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Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State

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A FRAMEWORK FOR EVALUATING EQUAL ACCESS CLAIMS BY STUDENT RELIGIOUS GROUPS: IS THERE A WINDOW FOR FREE SPEECH IN THE WALL SEPARATING CHURCH AND STATE?

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INTRODUCTION

During the 1985-86 Term, the Supreme Court will review *Bender v. Williamsport Area School District*.[1] In this case, the Court will confront for the first time the controversial "equal access" issue: When a public high school[2] allows voluntary, student-initiated non-religious student groups to meet on school premises, should it grant equal access to voluntary, student-initiated religious student groups?[3] This novel issue encompasses two difficult constitutional inquiries. Are schools compelled to grant equal access by the free speech clause,[4] the equal protection clause,[5] or the establishment

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1 741 F.2d 538 (3d Cir. 1984), *cert. granted*, 105 S. Ct. 1167 (1985).

2 The Article's analysis applies to schools containing lower grade levels as well as high schools. Because lower level schools are less likely to encounter student-initiated voluntary religious groups, the Article refers throughout to high schools.

3 The equal access controversy focuses exclusively on the free speech rights of organized student groups, rather than individual students or informal student groups. Religious expression by individual students or informal student groups raises fewer establishment clause concerns. *Cf.* Wallace v. Jaffree, 105 S. Ct. 2479, 2491 (1985) (suggesting there would be no constitutional problem with students' voluntary prayer during statutorily mandated moment of silence, so long as statutory purpose was not to promote prayer).

4 This clause provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . . " U.S. CONST. amend. I. It is binding on the states. Gitlow v. New York, 268 U.S. 652 (1925). The free speech clause protects not only the right of individual students to engage in religious expression, but also their right to associate for such purposes. NAACP v. Alabama, 357 U.S. 449, 460-61 (1958).

5 This clause provides: "No state . . . shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The analy-

clause?[6] Or are they prohibited from granting equal access by the establishment clause?

As the Third Circuit stated in *Bender*, this issue implicates "a constitutional conflict of the highest order."[7] Both the free speech and anti-establishment concerns, which weigh in favor of opposing conclusions, are unusually compelling. On the one hand, as a content-based prior restraint on free speech,[8] the denial of equal access suffers under a double presumption of unconstitutionality.[9] On the other hand, the courts have consistently enforced the establishment

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sis of content-based restrictions upon free speech or associational rights on public property is the same under the equal protection clause as under the free speech clause. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 461-63 (1980); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 98-99 (1972). For the sake of brevity, this Article refers only to the free speech clause.

6 This clause provides: "Congress shall make no law respecting an establishment of religion . . . " U.S. CONST. amend. I. It is binding on the states. Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

Although the establishment clause is usually invoked to challenge governmental favoritism toward religion, it also prohibits governmental hostility toward religion. *See, e.g.*, Lynch v. Donnelly, 104 S. Ct. 1355, 1359 (1984). Most equal access opinions have not discussed the establishment clause problems resulting from the denial—as opposed to the grant—of access. However, in Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub. nom.* Widmar v. Vincent, 454 U.S. 263 (1981), the Eighth Circuit held that the establishment clause required a public university to grant equal access to a student religious group. *See id.* at 1317-18 (denial of equal access has primary effect of inhibiting religion, and "hopelessly entangles" university in defining religion, determining whether proposed event involves religious worship, and monitoring events to ensure no prohibited activity occurs).

Student religious groups seeking access to school premises have also based their claims on the free exercise clause, which provides that "Congress shall make no law . . . prohibiting the free exercise" of religion, U.S. CONST. amend. I, and is binding on the states. Cantwell v. Connecticut, 310 U.S. 296 (1940). However, the courts have unanimously rejected the asserted free exercise rationale for equal access. *See infra* notes 52 & 53 and accompanying text.

7 741 F.2d at 557.

8 *See* Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) (university's refusal to permit student group to meet on campus constitutes prior restraint upon students' expressive rights); *Accord* Healy v. James, 408 U.S. 169, 184 (1972).

9 With respect to prior restraints on speech, see, e.g., New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam): "Any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." The government can overcome this heavy presumption only if it can "prove the unprotected character of the particular speech with certainty and show the irreparable nature of the harm that would occur if a [prior] restraint were not imposed . . . . " L. TRIBE, AMERICAN CONSTITUTIONAL LAW 731 (1978). The Supreme Court has almost never found a prior restraint justified. *Id.* at 729. With respect to content-based regulations of speech, see, e.g., Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972): "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Courts will sustain a content-based speech regulation only where the government can prove that it "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270. This stringent showing can rarely be made. *See, e.g., Carey*, 447 U.S. at 465.

clause most rigorously in the public school setting.[10]

Although the equal access issue has recently spawned much legislation,[11] litigation, and public debate, the Supreme Court has not yet provided any clear guidance for resolving the fundamental constitutional conflicts presented. In *Widmar v. Vincent*, the Court held that a public university had to grant equal access to a university student religious group, but it expressly distinguished, and reserved judgment on, the corresponding high school situation.[12]

The four circuit courts that have squarely faced the high school equal access question left unanswered by *Widmar* have all ruled that student religious groups should not be permitted to meet on school premises.[13] However, these decisions employed divergent analytical approaches. Two of them effectively espoused per se rules prohibiting any concerted student religious expression in public schools.[14] The other two—one of which is the Third Circuit's *Bender* ruling—employed ad hoc analyses, expressly recognizing that in certain circumstances, equal access would be constitutionally mandated.[15] Although the Supreme Court's ruling in *Bender* may fail to answer all questions raised by equal access controversies,[16] it will

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10 *See* L. TRIBE, *supra* note 9, at 841 n.9.

> [B]ecause of their central and delicate role in American life, public schools must be insulated from religious ceremony under the aegis of the establishment clause, even where no coercion can be shown, whereas in other public forums free exercise values permit some accommodation of [religion].

Id.

11 For example, the federal Equal Access Act, which became effective in August 1984, guarantees equal access to secondary school students who seek to hold religious meetings on school premises, under specified circumstances. Pub. L. No. 98-377, 98 Stat. 1302 (1984) (codified at 20 U.S.C. § 4071 (1984)).

12 454 U.S. 263, 274 n.14 (1981).

13 Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391 (10th Cir. 1985); *Bender*, 741 F.2d 538 (3d Cir. 1984); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981)..

Another recent Court of Appeals decision, Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984), also involved the propriety of a student religious group's meeting on school premises, but the limited record in that case does not reveal whether the school had an equal access policy. *Id.* at 649. The Eleventh Circuit affirmed the district court order that preliminarily enjoined the school district from permitting a junior high school student religious group to meet on school premises, after school hours, under faculty supervision. Given this procedural posture, the Eleventh Circuit's specific holding was quite narrow: the district court had not abused its discretion in concluding that the school's practice of permitting these meetings was likely to be found, after further judicial proceedings, to violate the establishment clause. *Id.*

14 *Lubbock*, 669 F.2d 1038; *Brandon*, 635 F.2d 971.

15 *Bell*, 766 F.2d 1391; *Bender*, 741 F.2d 538.

16 For example, the Court's *Bender* decision will probably leave unanswered many questions concerning the constitutionality and interpretation of the Equal Access Act, *see supra* note 11. The *Bender* case arose, and the lower court decisions were issued, before the Act's effective date.

probably settle the basic issue of whether such controversies should be resolved according to a per se rule or on a case-by-case basis.

This Article shows that only a non per se approach is faithful to both sets of constitutional values implicated in any equal access case: the free speech values prohibiting content-based discrimination against speech and protecting high school students' expressive conduct, as well as the anti-establishment values prohibiting the public schools from sponsoring any religious expression. Parts I and II sketch the doctrinal background against which the Supreme Court will evaluate *Bender*. Part III focuses upon the precise questions that *Bender* poses by analyzing the Third Circuit decision. Part IV discusses the constitutional necessity for case-by-case evaluations of equal access issues, and Part V proposes a framework for conducting such evaluations. Finally, Part VI evaluates *Bender* in accordance with the proposed analytical framework.

I
THE TWO CONFLICTING LINES OF SUPREME COURT PRECEDENTS

A. The Court's Treatment of Religious Expression In Public Schools

The Supreme Court has found an establishment clause violation in every case in which it has ruled upon state-sanctioned religious expression on public school premises, even if individual student participation was at least arguably voluntary. Specifically, the Court has struck down: a "released time" program whereby religious teachers provided religious instruction in public school classrooms during the school day to students electing to attend;[17] organized classroom Bible readings or prayer, with teachers leading or participating;[18] the prohibition of the teaching of Darwinian evolution theory;[19] the posting of copies of the Ten Commandments on classroom walls;[20] and a mandatory "moment of silence" for purposes of meditation or prayer.[21]

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17 Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948). *But see* Zorach v. Clauson, 343 U.S. 306 (1952) (upholding program whereby public school students whose parents make written requests may leave school during school day and go to religious centers for religious instruction).

18 School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

19 Epperson v. Arkansas, 393 U.S. 97 (1968). The Court concluded that this prohibition had no secular purpose but reflected the "fundamentalist sectarian conviction" that "the Book of Genesis must be the exclusive source of doctrine as to the origin of man." *Id.* at 107-108.

20 Stone v. Graham, 449 U.S. 39 (1980) (per curiam).

21 Wallace v. Jaffree, 105 S. Ct. 2479 (1985).

In his treatise on American constitutional law, Professor Laurence Tribe articulates the rationale underlying this line of cases:

> [Public schools are] the facilities through which basic norms are transmitted to our young. It is thus unsurprising that no major religious activity, however "voluntary," has been allowed to take place in the facilities through which we inculcate values for the future.[22]

As Professor Tribe indicates, in all of the Court's decisions concerning public school religious expression, the school was functioning in an inculcative capacity. The religious expression occurred in the classroom, during mandatory instructional periods, while the teacher was at least present and, in most cases, actually participating in or leading such expression. As the Supreme Court has repeatedly recognized, however, our nation's public school system aims to serve a dual role: not only to inculcate the majoritarian views and values deemed necessary for meaningful citizenship, but also to provide a "marketplace of ideas," stimulating free individual inquiry.[23] In implementing an equal access policy, a school would be functioning in its noninculcative, intellectual marketplace role. Therefore, the establishment clause concerns that prompted the Court's invalidation of public school religious expression when the school was acting as inculcator would not necessarily justify the invalidation of such expression when the school is serving as a marketplace of ideas.[24]

The Court's chief concern in these cases is the risk that students could perceive the school as endorsing or supporting religion.[25] The Court has repeatedly expressed a concern that, because of young people's particular impressionability, they might be more likely than adults to perceive any religious expression that occurs on school premises as manifesting the school's approval of religion.[26] The Court has also expressed the fear that, as a result of such perceived approval, students adhering to a minority religion or no religion might feel more alienated, or be more susceptible to indoctrination, than adults would be.[27]

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22 L. TRIBE, *supra* note 9, at 825.

23 *See, e.g.*, Board of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853, 864 (1982) (plurality opinion). *See infra* text accompanying notes 84-93.

24 *See infra* note 92 and text accompanying notes 92-93.

25 *Cf.* L. TRIBE, *supra* note 9, at 825 n.15.

26 *See, e.g.*, *McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring):

> That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school . . . . The law of imitation operates, and non-conformity is not an outstanding characteristic of children.

Id.

27 *See, e.g., id.*:

The Supreme Court's longstanding goal of insulating public school students from any apparent governmental endorsement of religion animated its most recent decision involving public school religious expression, *Wallace v. Jaffree*.[28] Adopting a standard that Justice O'Connor had formulated during the preceding Term,[29] the six Justices who joined in the *Wallace* judgment agreed that the key inquiry in evaluating public school student religious expression is whether the government either intends to endorse or is perceived as endorsing religion. The Court struck down the challenged mandatory moment of silence statute, because it was intended to convey a message of governmental approval of religion.[30]

The *Jaffree* decision has significant implications for the equal access controversy. Several of the opinions expressly recognize that the establishment clause might permit some mandatory moments of silence in public schools.[31] But the opinions expressing this view also state that grade and high school students are more subject to religious indoctrination and peer pressure than adults.[32] Consequently, the Justices who joined in these opinions evidently believe that, notwithstanding grade and high school students' relative impressionability or immaturity, they can nonetheless understand the

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> [There] is an obvious pressure upon children to attend. . . . The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents.

Id. *See also* Marsh v. Chambers, 463 U.S. 783, 792 (1983) (distinguishing between adults not susceptible to "religious indoctrination" and children subject to "peer pressure").

28 105 S.Ct. 2479 (1985).

29 From at least 1971 until 1984, the touchstone in establishment clause cases was the tripartite test first specifically enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971). Under *Lemon*, no government policy or practice can pass muster under the establishment clause unless: (1) it has a secular purpose; (2) its primary effect neither advances nor inhibits religion; and (3) it does not foster excessive entanglement between government and religion. *Id.* at 612-13. In Lynch v. Donnelly, 104 S. Ct. 1355 (1984), the Court stated that it would no longer necessarily employ the *Lemon* test in all establishment clause cases, *id.* at 1362, although it did not propose an alteruative test and has subsequently continued to rely on *Lemon*. *See, e.g.*, Grand Rapids School Dist. v. Ball, 105 S. Ct. 3248 (1985); Aguilar v. Fenton, 105 S. Ct. 3232 (1985); Estate of Thornton v. Caldor, 105 S. Ct. 2479 (1985); Tony and Susan Alamo Found. v. Secretary of Labor, 105 S. Ct. 1953 (1985). Justice O'Connor's concurring opinion in *Lynch* formulated a "refined *Lemon* test," under which the central issue is whether the challenged goverumental action is either intended to convey a message of governmental endorsement (or disapproval) of religion or is likely to be perceived as conveying such a message. 104 S. Ct. at 1368 (O'Connor, J., concurring). The Court has invoked this "refined *Lemon* test" in several post-*Lynch* establishment clause cases. *See, e.g., Grand Rapids*, 105 S. Ct. at 3226; Wallace v. Jaffree, 105 S. Ct. at 2493.

30 105 S. Ct. at 2492.

31 *Id.* at 2491 (majority opinion); *id.* at 2493 n.2 (Powell, J., concurring); *id.* at 2498-99 (O'Connor, J., concurring).

32 *Id.* at 2492, n.51 (majority opinion); *id.* at 2495 n.9 (Powell, J., concurring); *id.* at 2503 (O'Connor, J., concurring).

distinction between a school's endorsement of religious expression and its neutral provision of an opportunity during which students may choose to engage in such expression. These Justices evidently regard students as capable of distinguishing between the school's inculcative and noninculcative functions. Thus, although *Jaffree* makes clear that the Supreme Court will continue to examine public school religious expression with special vigilance, it also indicates that the Court will not necessarily invalidate all such expression. In particular, *Jaffree* indicates that the Court may well uphold concerted public school religious expression when, as under an equal access policy, the school neither acts nor is perceived as sponsor or inculcator.[33]

B. The Court's Treatment of All Expression in Public Forums and Public Schools

Although individuals have no general right of access to public property for purposes of exercising their free speech rights, they do have such a right of access to particular types of government property, which the courts have labelled "public forums."[34] Certain types of public property are traditionally deemed public forums. The quintessential examples of these "inherent" public forums are sidewalks, streets, and parks.[35] Additionally, whenever the government has actually opened some property for free speech purposes, that property is regarded as a "designated" public forum. In either an inherent or a designated public forum, the goverument cannot impose any content-based restriction upon speech, unless it can prove that the restriction is necessary to promote a compelling state interest.[36]

One final aspect of public forum law is particularly germane to

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33 Insofar as a moment of silence occurs during the regular school day, in a classroom, with a teacher presiding, it implicates greater establishment concerns than does a grant of equal access to a student religious group. However, a grant of equal access implicates greater establishment concerns insofar as students audibly engage in concerted religious expression.

34 *See, e.g.*, L. TRIBE, *supra* note 9, at § 12-21; Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

35 This notion is eloquently expressed in Justice Roberts's oft-quoted dictum in Hague v. CIO, 307 U.S. 496, 515 (1939).

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

36 For a recent summary of the principles governing inherent and designated public forums, see Cornelius v. NAACP Legal Defense & Educ. Fund, 105 S. Ct. 3439, 3448-51 (1985).

the equal access issue. Public property may be designated as a "limited public forum," available only for limited expressive purposes. For example, the government may designate public property as a forum for speech by certain categories of speakers. It may then exclude other categories of speakers, but it may not discriminate among members of the included categories on the basis of content.[37] Similarly, the government may designate property as a forum for speech about certain subjects. It may then prohibit speech about other subjects, but it may not discriminate against speech about the included subjects because of its content.[38] Any distinctions drawn between those speakers or subjects to which a limited public forum is available, and those to which it is not, must be "necessary to reserve the . . . forum to expressive activity compatible with the property," and must also be viewpoint neutral.[39]

The Supreme Court has not yet had occasion expressly to apply to public school students the free speech principles concerning public forums. However, the Court has made clear that students are generally entitled to the same free speech rights as adults. In its seminal decision recognizing such rights, *Tinker v. Des Moines Independent Community School District*, the Court declared, "It can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[40] The Court repeatedly emphasized that schools could restrict students'

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37 *See, e.g., Widmar*, 454 U.S. 263 (limited public forum for speech by university students).

38 *See, e.g.*, City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n., 429 U.S. 167 (1976) (limited public forum for speech about school board business).

39 Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 105 S. Ct., at 3458. Even if public property has been opened for some expressive purposes, it will be deemed a "nonpublic forum" if the government did not intend to create a public or limited public forum or if "the nature of the property is inconsistent with expressive activity." *Id.* at 3450. Access to a "nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.* at 3451. If a public school student forum were classified as a nonpublic forum, the exclusion of a student religious group, because of establishment concerus, would probably satisfy this reasonableness standard. Whether a particular high school student forum should be classified as a limited public forum or a nonpublic forum would depend upon how broadly the school defined the appropriate subject matter. A school could perhaps create a nonpublic forum by selectively granting access to a narrowly defined set of student groups. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-48 (1983) (public school's selective grants of access to internal mail system did not give rise to limited public forum). For example, a school might grant access to curriculum-related student clubs without thereby incurring the obligation to grant access to noncurriculum-related clubs. The Equal Access Act provides that a school creates a limited student forum only when it grants access to a noncurriculum-related student group. 20 U.S.C. § 4071(a)-(b) (1984). *See infra* note 128.

40 393 U.S. 503, 506 (1969).

expressive conduct only based upon specific evidence demonstrating that such conduct would "substantially interfere with the work of the school or impinge upon the rights of other students."[41]

II
CURRENT EQUAL ACCESS CASE LAW

A. *Widmar v. Vincent*

The only Supreme Court decision expressly addressing the tension between the anti-establishment and free speech concerns discussed in the preceding section is *Widmar v. Vincent*.[42] The public university involved in *Widmar* made its facilities generally accessible to voluntary, student-initiated nonreligious student groups. The Court ruled that the university violated the free speech clause by not making these facilities equally accessible to a voluntary, student-initiated religious student group, which sought to engage in prayer and worship.

The *Widmar* Court emphasized the numerous and diverse student groups meeting on campus[43] and held that the university had designated its campus as a limited public forum for students. This finding not only led to the Court's conclusion that the free speech clause barred content-based exclusions of student speakers,[44] but it also led to the Court's conclusion that a grant of equal access would not violate the establishment clause because no reasonable student should perceive the university as endorsing the group's religious message.

The Court in *Widmar* stressed that "an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices" because an equal access policy " 'would no more commit the University . . . to religious goals' than it is 'now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,' or any other group eligible to use its facilities."[45] In a footnote immediately following this statement, however, the Court suggested that the establishment clause analysis

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41 *Id.* at 509 (school violated students' free speech rights by suspending them for wearing black armbands to protest Vietnam War because no evidence of requisite adverse impact).

42 454 U.S. 263 (1981). While *Widmar* acknowledged the potential conflict between free speech clause and establishment clause values, it did not resolve this conflict. Because the Court concluded that granting access to the student religious group would not violate the establishment clause, it did not have to "reach the questions that would arise if state accommodation of . . . free speech rights should, in a particular case, conflict with the prohibitions of the Establishment Clause." *Id.* at 273 n.13.

43 *Id.* at 265, 274.

44 *Id.* at 277.

45 *Id.* at 274 (quoting Chess v. Widmar, 635 F.2d 1310, 1317 (8th Cir. 1980)).

might be different in the context of a public high school student forum:

> University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.[46]

In this important footnote, *Widmar* implicitly rejects any per se rule granting equal access for concerted religious speech in high school. However, it certainly does not endorse any converse per se rule because it does not find that all "younger students" are so "impressionable" that they would be inherently incapable of appreciating a school's neutral role under an equal access policy. Nor does *Widmar* provide any further specific guidance for resolving high school equal access issues.

Widmar marked a significant development in the legal status of concerted religious speech in public educational institutions. Several previous Supreme Court decisions had treated prayer and other devotional expression in traditional public forums as protected free speech.[47] However, the Court had not previously analyzed concerted religious expression in public educational institutions as free speech protected under the limited public forum doctrine. Instead, its prior decisions had treated such expression as a religious exercise, protected by the free exercise clause, and hence presenting potential conflicts between the establishment clause and the free exercise clause.[48] *Widmar* was therefore novel both in analyzing concerted student religious expression as protected by the free speech clause[49] and, correspondingly, in stating that such expression presented a potential conflict between the establishment clause and the free speech clause.[50]

The *Widmar* Court's holding turned on its treatment of concerted student religious expression as protected under the free

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46 *Id.* at n.14.

47 *See, e.g.*, Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 652-53 (1981); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948).

48 *See, e.g.*, School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222, 225-26 (1963); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 211-12 (1948).

49 The novelty of *Widmar*'s analysis is underscored by the fact that only one year earlier, the Second Circuit had ruled that concerted student prayer is not protected free speech. Brandon v. Board of Educ., 635 F.2d 971, 980 (1980), *cert. denied*, 454 U.S. 1123 (1981).

50 This constitutional conflict is clearly novel. Although Professor Tribe's comprehensive treatise on American constitutional law devotes several sections to the tension between the establishment clause and the free exercise clause, it contains no discussion of the tension between the establishment and the free speech clauses. *See* L. TRIBE, *supra* note 9, at §§ 14-3 to 14-7.

speech clause,[51] rather than simply under the free exercise clause. Courts have unanimously held that the exclusion of religious expression from public educational institutions does not violate the free exercise clause.[52] Although the *Widmar* majority did not reach the student religious group's free exercise claim, the sole Justice who did analyze that claim rejected it.[53] Thus, *Widmar*'s analysis of religious expression in public educational institutions under free speech clause theories creates, for the first time, a serious possibility that such expression will be constitutionally protected.

B. Courts of Appeals Decisions

Four courts of appeals have ruled on the merits of equal access claims.[54] The rationale of two decisions—the Second Circuit's *Bran-*

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51 Justice White criticized the majority's conclusion that the free speech clause protects prayer and other devotional religious expression as "plainly wrong," 454 U.S. at 284 (White, J., dissenting). In response, the majority noted that Justice White's position would require distinguishing "prayer" or "worship" from other types of religious speech that even Justice White would recoguize as protected, for example, descriptions of religious experiences and religious appeals to nonbelievers. *Id.* at 269 n.6. The majority then pointed out three problems with this distinction: it is difficult, if not impossible, to draw; it would lead to entanglement between government and religion; and the assertedly unprotected types of religious speech no more threaten establishment clause values than do the concededly protected types. *Id.* Some of the problems that would result from a rule purporting to distinguish prayer and other devotional religious expression from protected speech are illustrated by Reilly v. Noel, 384 F. Supp. 741 (D. R.I. 1974). Plaintiffs, a group of welfare recipients and their sympathizers, both clerical and lay, protested certain government welfare cutbacks on moral grounds. Plaintiffs determined that services in the state capitol building, consisting of religious songs, responsive readings from the Bible, and prayer, would effectively convey their opposition. Without even mentioning either first amendment religion clause, the court held that the government violated plaintiffs' free speech rights by seeking to stop their services. Although plaintiffs' speech was quintessentially religious and devotional in form, it was intended to convey a political message.

52 *See, e.g.*, Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391, 1400 n.6 (10th Cir. 1985); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1048 (5th Cir. 1982); *Brandon*, 635 F.2d at 976-78; Bender v. Williamsport Area School Dist., 563 F. Supp. 697, 703 (M.D. Pa. 1983), *rev'd*, 741 F.2d 538 (3d Cir. 1984), *cert. granted*, 105 S.Ct. 1167 (1985); Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965). For the rationale underlying these rulings, see, e.g., *Brandon*.

> We do not challenge the students' claim that group prayer is essential to their religious beliefs. . . .
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> . . . [However,] the school's rule [prohibiting group prayer on school property] does not place an absolute ban on communal prayer. . . . While school attendance is compelled for several hours per day, five days per week, the students . . . are free to worship together as they please before and after the school day and on weekends in a church or any other suitable place. . . . We do not have before us the case of a Moslem who must prostrate himself five times daily in the direction of Mecca. . . .

635 F.2d at 977.

53 454 U.S. at 289.

54 *See supra* note 13. *But see* Clergy & Laity Concerned v. Chicago Bd. of Educ., 586 F. Supp. 1408 (N.D. Ill. 1984) (where school board granted military recruiter access to schools, its denial of access to antiwar activists constituted prohibited viewpoint discrim-

don v. Board Education[55] and the Fifth Circuit's *Lubbock Civil Liberties Union v. Lubbock Independent School District*[56]—are fully consistent with a per se rule precluding concerted student religious expression in public schools. Although neither expressly espoused such an absolute prohibition, both declared that "a high school is not a 'public forum' where religious views can be freely aired."[57] Thus, both courts apparently believed that no high school can create a forum for concerted student religious expression that will not give rise to perceptions that the school is endorsing religion. These rulings were largely based upon the courts' unsupported generalizations or presumptions that high school students are innately immature and impressionable and hence likely to perceive any religious expression on school premises as school-endorsed.[58]

In contrast with *Brandon* and *Lubbock*, the other two equal access decisions by Courts of Appeals—the Third Circuit's decision in *Bender* and the Tenth Circuit's recent decision in *Bell v. Little Axe Independent School District No. 70*—employed ad hoc analyses, focusing upon the particular facts presented. Although both decisions held that the equal access policies under review violated the establishment clause, each explicitly acknowledged that other equal access policies might pass muster under the establishment clause.[59] Indeed, in *Bell*, which involved a school containing grades 1-9, the Tenth Circuit expressly refused to generalize that even an elementary school is absolutely incapable of creating an open student forum sufficient to trigger a right of access for concerted student religious expression.[60]

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ination). The court rejected the school board's argument that granting access to one of the antiwar activists, a clergyman, would violate the establishment clause, in part by relying upon *Widmar* and stating: "even if . . . plaintiffs' messages were religious, a policy of equal access would not be violative of the establishment clause." *Id.* at 1412. The court did not even suggest, much less hold, that *Widmar* might not be fully applicable to the high school setting.

55 635 F.2d 971 (2d Cir. 1980).

56 669 F.2d 1038 (5th Cir. 1982).

57 *Lubbock*, 669 F.2d at 1048; *Brandon*, 635 F.2d at 980.

58 *Lubbock*, 669 F.2d at 1046-47; *Brandon*, 635 F.2d at 978.

59 *Bender*, 741 F.2d at 561; *Bell*, 766 F.2d at 1400.

60 766 F.2d at 1401-02. *Bell* recognized that, because of the particularly important establishment clause concerns implicated in public elementary schools, stricter religion-government separation should be required in an elementary school fornm than in a university or other public forum. Accordingly, rather than prohibiting elementary student religious groups, tbe court imposed certain limitations upon them—namely, that they could not meet during the official school day and that teachers should not be present during their meetings. *Id.* at 1406-07. Also in contrast with *Brandon* and *Lubbock*, *Bell* did not rely upon unsubstantiated generalizations or presumptions about students' relative immaturity or impressionability, even though it involved younger students. Instead, *Bell* relied upon specific, uncontradicted expert testimony concerning the coguitive development of students at the various grade levels involved in the case. *Id.* at 1404 n.11.

III.
THE *BENDER* CASE

Although the Third Circuit in *Bender* denied the student religious group's equal access claim, the court stressed that its legal rulings were dependent on the particular facts before it.[61] The high school had long allowed student groups to meet during a thirty-minute "student activity period," which was regularly scheduled after the beginning of the school day, two days per week.[62] Each student group was required to have a school-approved adult "advisor," who was usually a faculty member, but could also be another school employee or a parent. These advisors were required to attend the student group meetings. They were also authorized, although not required, to participate in the meetings.[63] While all students had to be on school premises during the activity period, they did not have to participate in any group meeting.[64]

The *Bender* case arose when a group of students formed an organization called "Petros," which they described as a "non-denominational prayer fellowship," and sought permission to meet during the activity period. The students stated that Petros's activities would include scripture reading, discussion, and prayer.[65] The principal had authority to withhold permission for any meetings that would not "contribute to the intellectual, physical or social development of the students," or were not "legal and constitutionally proper."[66] To the best of the current principal's recollection, no student club or activity had previously been disapproved.[67] However, acting on advice of counsel that Petros's meetings would violate the establishment clause, the principal denied permission for such meetings.[68] The students responded by commencing a lawsuit.

The District Court upheld the students' claim that the school's refusal to allow Petros to meet on the same terms as other student groups, solely because of its religious nature, violated their free speech rights.[69] A divided panel of the Third Circuit reversed. In

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61 741 F.2d at 560 n.30.

62 *Id.* at 543; *see also* 563 F. Supp. at 709.

63 741 F.2d at 544 & n.10.

64 *Id.* at 543.

65 *Id.* at 542.

66 *Id.* at 543-44.

67 *Id.* at 543. He had served as principal since 1974, and his testimony constituted the only evidence on this point.

68 *Id.*

69 563 F. Supp. at 700. However, the district court rejected the students' free exercise claim, explaining that their inability to meet at school during the student activity period did not "force them to forego their religious belief in group worship." *Id.* at 703. The court further noted that, even if the school should have accommodated the students' belief in group worship, it had attempted such an accommodation by offering to

contrast with the Second and Fifth Circuits, the Third Circuit concluded that "nothing precludes the existence of a forum in a high school setting."[70] In light of the evidence, the Third Circuit found that the school district had in fact created a limited public forum for high school students and that Petros's proposed activities fell within the parameters of this forum. Therefore, the Third Circuit ruled that the free speech clause protected the rights of Petros members to engage in concerted religious speech during the activity period.[71]

The Third Circuit also ruled, however, that allowing Petros to meet during the student activity period would violate the establishment clause.[72] This ruling rested primarily upon the court's determination that, because of high school students' relative immaturity, they would perceive a grant of equal access to Petros as reflecting the school's approval of religion.[73] The Court also relied on the following additional factors which, in the Court's view, distinguish colleges from high schools: the more obvious presence that a religious group would "unavoidably" have within a high school because of its more structured and controlled environment; compulsory student attendance; and, pursuant to state law, the constant supervision of high school students by adult school authorities.[74] The Court concluded that all of these factors increase the likelihood that high school students would perceive a grant of equal access as conveying the school's endorsement of religion.

The Third Circuit was thus faced with an unprecedented constitutional dilemma: a denial of equal access to the Petros students would violate their free speech rights, but a grant of equal access would violate the establishment clause.[75] The court devised a novel, open-ended balancing test to resolve this dilemma:

> [T]he appropriate analysis requires weighing the competing interests protected by each constitutional provision, *given the specific facts of the case*, in order to determine under what circumstances the net benefit which accrues to one of these interests outweighs the net harm done to the other. Recognizing that, under these cir-

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let them meet off school grounds during the activity period. *Id.* These free exercise rulings were not challenged on appeal. *See* 741 F.2d at 541 n.1.

70 741 F.2d at 548.

71 *Id.* at 550.

72 *Id.* at 555.

73 *Id.* at 552-55.

74 *Id.* at 552.

75 *Id.* at 557. *Widmar* did not confront this conflict because it held that granting equal access would not violate the establishment clause. *See supra* note 42. Conversely, *Brandon* and *Lubbock* did not face the conflict because they held that there was no free speech right of access. *See supra* text accompanying notes 55-58. Thus, the Third Circuit accurately characterized the question before it as one "of first impression." 741 F.2d at 558.

> cumstances, some constitutional protections must unavoidably be abridged, we believe that our role is to maximize, as best as possible, the overall measure of the fundamental rights created by the Framers, by deciding which course of action will lead to the lesser deprivation of those rights.[76]

Although the Third Circuit observed that the facts of the *Bender* case presented a close question under its balancing analysis, it concluded that establishment clause concerns outweighed free speech concerns.[77]

IV. The Constitutional Necessity for a Nonabsolutist Approach to Equal Access Issues

There are three basic alternative approaches for resolving any high school equal access controversy: an absolute rule granting equal access to any student religious group; an absolute rule denying equal access to any student religious group; and an approach that confers upon schools some discretion to grant or deny equal access based upon the facts and circumstances involved in any particular case. Only a case-by-case determination is consistent with applicable constitutional principles. Not only is there no constitutional justification for either absolutist approach;[78] more signifi-

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76 741 F.2d at 559 (emphasis in original). The balancing analysis that is typical of constitutional adjudication involves weighing various facts in light of a single legal standard. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 654 (1979) (fourth amendment balancing test). In contrast, the Third Circuit's approach in *Bender* requires weighing two different legal standards, in light of the facts involved, to decide which one to enforce and which to ignore.

77 741 F.2d at 560. The dissenting opinion contended that the Third Circuit majority had relied upon unsubstantiated generalizations, rather than specific evidence, in concluding that equal access would violate the establishment clause. The dissent was particularly critical of the majority's "forg[ing of a] constitutional principle . . . from vague impressions of the emotional sophistication of high school students." *Id.* at 563 (Adams, J., dissenting). The dissent contended that the majority's negative presumptions about the students' ability to benefit from an open forum were especially unjustified where before the advent of any student religious group, the school had independently determined that its students could benefit from such a forum and the students had, in fact, demonstrated the soundness of this determination by organizing and maintaining numerous, diverse groups. *Id.* at 563-65.

78 Either of the two possible per se rules would have the obvious advantage of simplicity. When establishment clause values are at stake, simplicity of application may be more than just a pragmatic advantage; it is potentially also of constitutional significance. A governmental act or policy violates the establishment clause if it leads to excessive entanglement between government and religion. *Lemon*, 403 U.S. at 612-13. One can argne that, because an absolute rule would be simpler to administer than an ad hoc approach, it would entail less religion-state entanglement. However, as equal access opinions have recognized, some entanglement would be inevitable under either per se approach. Under a per se prohibition, the school would have to monitor religious expression to separate permissible expression—for example, a discussion of theology—from impermissible—for example, a worship service. *See supra* notes 6 & 51. Some entanglement would also result from a rule granting per se permission because the schools

cantly, both would entail significant constitutional problems. A rule granting per se permission to student religious group meetings would create establishment clause problems, whereas a per se prohibition would be inconsistent with students' free speech rights.

A. Establishment Clause Problems With Per Se Permission

As all the decisions concerning the high school equal access issue have recognized, the establishment clause precludes any per se rule granting equal access to high school students' concerted religious speech.[79] This conclusion is consistent with the Supreme Court cases invalidating public school religious expression, which recognize the special establishment dangers posed by any expression that could reasonably be perceived as reflecting the school's endorsement of religion.[80] It is clearly possible that student religious expression under an equal access policy could reasonably be perceived as the school's sponsorship of religion. Consequently, no such expression should be automatically authorized. Only a close examination of the facts in any particular case can illuminate whether, as actually implemented, even a facially neutral equal access policy has the non-neutral effect of implying a school's support for religion.[81]

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would have to supervise student religious group meetings in accordance with applicable legal obligations. *See, e.g.*, *Bender*, 741 F.2d at 556-57; *Brandon*, 635 F.2d at 979. *See also Widmar*, 454 U.S. at 272 n.11 (concluding that more entanglement would result from per se denial of access than from either per se grant or ad hoc approach). *Accord, e.g.*, Country Hills Christian Church v. Unified School Dist. No. 512, 560 F. Supp. 1207, 1218 (D. Kan. 1983) (school board's policy denying use of building during nonschool hours for religious worship "risks much greater entanglement by attempting to determine what speech and actions constitute religious worship" than would result from granting equal access). Even assuming, however, that more entanglement would result from an ad hoc test than from a per se rule, the entanglement resulting from an ad hoc approach would clearly not exceed the permissible level. *See, e.g.*, *Lemon*, 403 U.S. at 615-22. In its most recent decision concerning this aspect of establishment clause doctrine, the Court stated that "[t]he critical elements of the entanglement proscribed in *Lemon*" and other prior cases are that "the aid is provided in a pervasively sectarian environment" and that "because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message." Aguilar v. Felton, 105 S. Ct. 3232, 3238 (1985). Neither element is present in the equal access context. The *Widmar* Court concluded that the ad hoc resolution of equal access issues in public universities did not involve excessive entanglement. 454 U.S. at 271-72. This conclusion fully applies to high schools as well.

79 *Bell*, 766 F.2d at 1402-07; *Bender*, 741 F.2d at 550-56; *Lubbock*, 669 F.2d at 1044-47; *Brandon*, 635 F.2d at 978-79. Similarly, in *Widmar* the Supreme Court emphasized that its rulings were based upon the particular factual record and should not be read as a per se authorization of all student religious expression under every university equal access policy. 454 U.S. at 273, 276-77.

80 *See supra* notes 17 to 21 and accompanying text.

81 *See, e.g.*, *Jaffree*, 105 S. Ct. at 2499 (O'Connor, J., concurring) (facially neutral moment of silence statute could "as actually implemented . . . effectively favor the child who prays").

B. Free Speech Clause Problems With Per Se Prohibition

Any content-based speech restriction in a public forum—including a limited public forum such as a high school student forum—must be based upon a compelling justification.[82] Several distinctions between colleges and high schools, and between college students and high school students, give rise to a greater danger that any concerted religious speech in high schools will be perceived as conveying the school's endorsement of religion. These differences warrant a closer scrutiny of student religious speech in high schools than in colleges. But, as explained in this section, the asserted justifications for denying equal access to student religious expression may not even afford a rational basis for such a content-based exclusion, let alone the requisite compelling basis. Consequently, they do not justify a per se prohibition of all such expression. More importantly, a per se prohibition would violate students' free speech rights.

As the Third Circuit opinion in *Bender* demonstrates, courts and commentators have deemed the following alleged distinctions between colleges and high schools pertinent to the equal access issue: high schools serve more of an inculcative function; most high school students are in school because of compulsory education laws; state laws generally require high schools to exercise some supervision over students while on school property; and high school students are generally less mature and more impressionable than college students.[83]

The inculcative function of public high schools does not justify an absolute prohibition of equal access. A public school is intended to serve not only as the transmitter of majoritarian values, but also as the facilitator of students' independent thought, inquiry, and discussion.[84] Both the Supreme Court and lower courts have expressly recognized the importance of the public school's second role, as a "marketplace of ideas."[85] Although the noninculcative function may be more predominant in colleges than in high schools, the Supreme Court has referred to high schools and colleges interchangeably in discussing this essential function of all public educa-

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82 *See supra* text accompanying note 36.

83 *See, e.g., Bender*, 741 F.2d at 552-53; *Lubbock*, 669 F.2d at 1046; *Brandon*, 635 F.2d at 978-79.

84 *See supra* text accompanying note 23.

85 *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 512-13 (1969); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring); Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 968 (5th Cir. 1972); Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 807 (2d Cir. 1971).

tional institutions.[86] For example, the plurality opinion in *Board of Education, Island Trees Union Free School District v. Pico* suggested that public school students have a constitutional right of access to a diversity of ideas in the context of noncurricular activities or forums.[87] *Pico* thus supports the view that the free speech clause protects students' access to diverse ideas in the noncurricular setting of an open student forum.[88]

Even putting aside the *Pico* plurality view that public school students should be granted access to a range of ideas as a matter of constitutional right, students should be granted such access as a matter of sound public and educational policy.[89] As one court ob-

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86 *See, e.g.*, Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 877 (1982) (plurality opinion); *Tinker*, 393 U.S. at 512-14 & n.6; Shelton v. Tucker, 364 U.S. 479, 487 (1960). *See also* Cary v. Board of Educ., 427 F. Supp. 945, 952 (D. Colo. 1977), *aff'd*, 598 F.2d 535 (1979) (while some Supreme Court statements concerning importance of opportunity for independent inquiry in academic setting were made in higher education context, "that does not destroy their importance in providing a philosophical guidance" in secondary education context).

87 457 U.S. at 866-68, 871 (plurality opinion). *Pico* specifically held that public school officials could not remove books from the school library if the decisive factor motivating the removal was an intent to deny students access to ideas with which the officials disagreed. *Id.* at 871. The Supreme Court remanded the case to the district court for a determination of whether this standard was violated by the school board's removal of certain books that it characterized as "anti-American, anti-Christian, anti-Semitic, and just plain filthy." *Id.* at 857. Because school officials cannot deny students access to "anti-Christian" ideas in a noncurricular school setting, they might be equally precluded from denying students access to Christian ideas in such a setting. If a school permitted the meetings of an antireligious student group, then the school's denial of equal access to a student religious group could be considered unconstitutional viewpoint discrimination. *See supra* note 39. *See also Widmar*, 454 U.S. at 281 (Stevens, J., concurring) ("If school facilities may be used to discuss anticlerical doctrine . . . comparable use by a group desiring to express a belief in God must also be permitted.") A school's denial of access to a religious group while granting access to an anti-religious group could also create establishment clause problems, as manifesting the school's hostility toward religion. *See supra* note 6.

88 Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.

457 U.S. at 869 (emphasis in original). *See also* Fraser v. Bethel School Dist. No. 403, 755 F.2d 1356, 1364-65 (9th Cir. 1985); Nicholson v. Board of Educ., 682 F.2d 858, 863 (9th Cir. 1982); Seyfried v. Walton, 668 F.2d 214, 216 (3d Cir. 1981); Gambino v. Fairfax County School Bd., 429 F. Supp. 731, 736 (E.D. Va. 1977), *aff'd*, 564 F.2d 157 (4th Cir. 1977) (*per curiam*).

89 *See, e.g.*, *Pico*, 457 U.S. at 868 (plurality opinion) ("[A]ccess to ideas . . . prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."); Fraser v. Bethel School Dist. No. 403, 755 F.2d 1356, 1365 (9th Cir. 1985) (by creating open student forum, high school gave students "opportunity to gain practical experience in the democratic process"). *See generally* van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 203, 297 (1983) (argues that courts have inadequately protected stu-

served, "even those who go on to higher education will have acquired most of their working and thinking habits in grade and high school," and they need an early opportunity to "operate in an atmosphere of open inquiry. . . ."[90] Moreover, denying high school students an opportunity to develop habits of free inquiry would be both inequitable and unwise because many do not go on to college.[91]

Surely if a school was, or was perceived to be, serving as inculcator with respect to any student religious speech, it would transgress the establishment clause. However, a school's designation of an open student forum under an equal access policy epitomizes its noninculcative role. Reasonable students should appreciate that when a school functions as a marketplace of ideas, it generally does not endorse any ideas that students might exchange in such marketplace.[92] Any risk that students would misperceive the school's neutral, noninculcative, nonsponsoring role under an equal access policy should be countered through such measures as disclaimers. The wholesale exclusion of student religious speech is not necessary to avert this risk.[93]

Nor can a per se prohibition of equal access be justified on the basis of compulsory education and school supervision requirements. Even assuming that the majority of high school students actually attend school because of legal compulsion,[94] and even assuming that

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dents' interests in freedom of belief and assigned too much weight to government's claimed interest in inculcation, and cites empirical social science evidence assertedly showing that government has no compelling interest in value inculcation because it does not serve governmental goals of establishing stable democracy, reducing politically inspired violence, producing loyal citizenry, or preparing students for citizenship).

90 Albaum v. Carey, 283 F. Supp. 3, 10-11 (E.D.N.Y. 1968). *Accord, e.g., Shanley*, 462 F.2d at 972, 977-78 (5th Cir. 1972); James v. Board of Educ., 461 F.2d 566 (2d Cir.), *cert. denied*, 469 U.S. 1042 (1972); *Cary*, 427 F. Supp. at 952-53.

91 *See, e.g., Cary*, 427 F. Supp. at 953:

> To restrict the opportunity for involvement in an open fornm for the free exchange of ideas to higher education would not only foster an unacceptable elitism, it would also fail to complete the development of those not going on to college, contrary to our constitutional commitment to equal opportunity. Effective citizenship in a participatory democracy must not be dependent upon advancement toward college degrees. Consequently, it would be inappropriate to conclude that academic freedom is required only in the colleges and universities.

Id.

92 *Id.* (in assessing academic freedom issue, court should consider whether it arises in context where school acts in inculcative role or in context where student is part of "open, participatory community").

93 *See infra* text accompanying note 140.

94 In most states, school attendance ceases to be compulsory once a student has attained the age of 16, which generally occurs in grade 10 or 11. Therefore, in a high school with grade levels 9-12 or 10-12, many, if not most, students are no longer subject to compulsory education requirements. *See* M. GUGGENHEIM & A. SUSSMAN, THE RIGHTS OF YOUNG PEOPLE 306 (1985). Moreover, even students below the cut-off age level for

all schools have some legal responsibility for students whenever they are on school premises,[95] it still does not follow that students would regard their schools as endorsing the religious content of any concerted religious speech that occurs on school premises. The risk that compulsory attendance and supervision requirements might lead reasonable students to infer school support for religion could—and should—be readily countered through reasonable precautionary measures.[96] Total exclusion of student religious speech is not necessary for this purpose.

The distinguishing feature between high school and college students that is most stressed by equal access decisions is high school students' relative immaturity and impressionability.[97] But this alleged difference would warrant a blanket prohibition upon high school equal access only if high school students were inherently too immature and impressionable to be able to differentiate between a school's neutral provision of an open forum and its partisan endorsement of religious expression within that forum. Although *Brandon* and *Lubbock* both asserted such a conclusion, neither cited any supporting evidence. Such an unsubstantiated conclusion cannot be justified as a proper exercise of judicial notice.[98] Indeed, some adolescent psychology experts believe that many high school students are better able to distinguish tolerance from approval, and less susceptible to indoctrination, than many college students.[99] Moreover, even assuming arguendo that high school students are inherently immature and impressionable, it still

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compulsory attendance probably attend school for reasons other than their legal obligation to do so. *Cf.* Note, *Students' Constitutional Rights on Public Campuses*, 58 VA. L. REV. 552, 554 (1972) (even university education has come to be widely viewed as practical necessity).

95 *See infra* notes 137-38.

96 For specific recommendations of such measures, *see infra* text accompanying notes 136-39.

97 *See supra* text accompanying notes 58 & 73.

98 FED. R. EVID. 201(b) authorizes a court to take judicial notice of a "fact . . . not subject to reasonable dispute." High school students' alleged inability to appreciate a school's neutral role under an equal access policy would not meet this standard. Indeed, some courts have taken judicial notice of contrary "facts." *See, e.g.*, *Fraser*, 755 F.2d 1363 ("high school students are beyond the point of being sheltered from the potpourri of sights and sounds we encounter at every turn in our daily lives"); *Seyfried*, 668 F.2d 214, 219-20 (Rosenn, J., concurring) (students attain progressively higher levels of intellectual and emotional development in later secondary school grades); Russo v. Central School Dist. No. 1, 469 F.2d 623, 633 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (tenth graders "are approaching an age when they form their own judgments"); Wilson v. Chancellor, 418 F. Supp. 1358, 1368 (D. Or. 1976) ("[T]oday's high school students are surprisingly sophisticated, intelligent, and discerning. They are far from easy prey for even the most forcefully expressed, cogent, and persuasive words."); *Albaum*, 283 F. Supp. at 10 (E.D.N.Y. 1968) ("much of what was formerly taught in many colleges . . . is now covered in the upper grades of good high schools").

99 *See* Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public*

would not follow that no student religious group should be permitted to meet under an equal access policy. The risk that students could mistake the school's neutral role for sponsorship could be checked through such measures as disclaimers.[100]

High Schools, 92 YALE L. J. 499, 507-509 (1983). Based upon research in adolescent psychology, this Note argues:

> [H]igh school may in fact be a time when the distinction between tolerance based on mutual respect and explicit approval of student expression is particularly clear — even more clear, perhaps, than in later stages of life. Thus, not only is the high school student able to make such a distinction, he is also likely to do so.

Id. at 509. Experts in adolescent psychology have also opined that college students, at least in the early years of college, are in a "late adolescent" stage when they are very impressionable and hence vulnerable to indirect coercion concerning religious beliefs. *See, e.g.*, White, *Problems and Characteristics of College Students*, 57 ADOLESCENCE 23, 28 (1980). This analysis is supported by evidence that the typical convert to a nontraditional religion, or "cult," is in the age range of 18-25 and is a college student. C. STONER & J. PARKE, ALL GOD'S CHILDREN 68, 76 (1977); Schwarz & Kenslow, *Religious Cults, the Individual and the Family*, L.J. OF MARITAL AND FAM. THERAPY, at 15, 16.

100 *See infra* note 140. Ironically, the assertion that high school students are inherently incapable of understanding the school's neutral role in a student forum is logically inconsistent with the conclusion that equal access must be denied to avoid an establishment clause violation. If students are inherently bound to perceive a school's equal treatment of student religious groups as conveying its approval of religion, then they would be equally bound to perceive the school's unequal treatment of student religious groups as conveying its disapproval of religion. The establishment clause is violated fully as much by a governmental act or policy that appears to disapprove religion as it is by one that appears to approve religion. *See supra* note 6. Therefore, even assuming arguendo that students are inherently immature and impressionable, it would follow that the denial of equal access would simply substitute one type of establishment clause violation for another. Judicial opinions have made this point. *See, e.g.*, *Bender*, 741 F.2d at 565 (Adams, J., dissenting); *Lubbock*, 680 F.2d at 426 (Reavley, J., dissenting from denial of petition for rehearing en banc). This point should not be confused with the argument made by proponents of state-mandated, teacher-led prayer in public school classrooms when they contend that the Court's invalidation of such activities manifests hostility toward religion. *See, e.g.*, *Engel*, 370 U.S. at 433-34. As the Court has repeatedly noted, students should be able to understand that certain constitutional guarantees prohibit the government from sponsoring any religious activity in the public school classroom during the school day. Therefore, reasonable students should not view the absence of such school-sponsored classroom activities as reflecting governmental hostility toward religion. It does not follow, however, that students should understand that constitutional guarantees prohibit them from voluntarily meeting with other students outside the classroom, outside regular school hours, to engage in religious expression, particularly when other students are permitted to meet at such times and places to engage in nonreligious expression. A reasonable student might well regard such a distinction as manifesting governmental hostility toward religion. In any event, if students can in fact understand that the exclusion of voluntary, student-initiated religious groups from a student forum does not manifest the school's hostility toward religion, then they can also understand that the inclusion of religious groups does not manifest the school's endorsement of religion. A school official or court could potentially determine that a particular case did in fact present a dilemma between these two basic types of potential establishment clause violations. However, this Article contends that both potential violations could still be avoided by invoking alternative measures less drastic than either an outright grant of access on the same terms applicable to all other student groups or an outright denial of access. *See infra* text accompanying notes 130 and 149-52.

Certain age-based distinctions in legal rights are of course permissible.[101] But the Supreme Court has closely scrutinized age-based restrictions on fundamental rights.[102] In *Tinker* and its progeny, the Supreme Court and lower federal courts have been particularly protective of high school students' free speech rights. Professor Tribe's constitutional law treatise suggests a general standard for determining when individuals may be deprived of rights on the basis of their youth. This standard, as well as the *Tinker* standard, militates against the per se prohibition of high school students' concerted religious speech:

> Whenever . . . government must provide a convincing justification for depriving a person of certain kinds of liberty, . . . highly generalized appeals to the characteristics of "the young" will not do. Insofar as the deprivation is to be justified by reference to immaturity and its supposed consequences, nothing less than demonstrable incapacity to make acceptable use of the opportunity . . . should suffice.[103]

Free speech rights are clearly among those liberties which government cannot deny an individual in the absence of a "convincing justification."[104] Therefore, pursuant to Professor Tribe's suggested approach, the government should not be empowered to deprive students of free speech rights merely by asserting unsubstantiated generalizations about their alleged immaturity and its supposed consequences—namely, preventing them from understanding the school's neutral role in an open student forum. Instead, any such deprivation could be justified only by specific evidence actually demonstrating students' incapacity to make acceptable use of their free speech rights in an open forum—i.e., specific evidence actually demonstrating that students would perceive the school to be endorsing religion.

In cases concerning the free speech rights of high school students on nonreligious subjects, the courts have consistently followed the approach outlined in both the *Tinker* decision and the Tribe treatise. These cases have consistently rejected the presump-

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101 *See generally* L. TRIBE, *supra* note 9, at § 16-29; Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 938-39 (1963).

102 *See, e.g., Pico*, 457 U.S. 853; *Tinker*, 393 U.S. 503. Because youth has not been deemed a "suspect classification," youth-based classifications are not subject to "strict scrutiny" under the equal protection clause. Professor Tribe argues that youth should be a "semi-suspect" classification, in that there must ordinarily be an opportunity for a young person to rebut any assumed youth-based incapacity. *See* Tribe, *Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles*, 39 LAW & CONTEMP. PROBS. 8 (1975).

103 L. TRIBE, *supra* note 9, at 1079.

104 *See generally id.* at § 12-1; T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

tion that high school students are inherently too immature to be entitled to the full panoply of free speech rights.[105] Following *Tinker*, the lower courts have prohibited school authorities from limiting students' exposure to various ideas or opinions that such authorities do not support.[106] Moreover, the lower courts have imposed such prohibitions even when the school authorities have a legitimate interest in avoiding the impression that they endorse the ideas or opinions at issue.[107] In contrast to the operative presumptions in *Brandon* and *Lubbock*, these cases presume that high school students *are* capable of distinguishing a school's neutral provision of access to a spectrum of ideas and opinions from its partisan endorsement of any particular idea or opinion.[108]

In cases concerning nonreligious speech, the students' free speech rights are not generally counterbalanced by the school's constitutional duty to avoid actually or apparently endorsing the substance of the students' speech.[109] It would be appropriate to ascribe less weight to the school's nonconstitutionally-based interests in

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105 *See, e.g., Fraser*, 755 F.2d 1356; *Russo*, 469 F.2d 623; Garvin v. Rosenau, 455 F.2d 233 (6th Cir. 1972); Riseman v. School Comm., 439 F.2d 148 (1st Cir. 1971); Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. 1970), *cert. denied*, 400 U.S. 826 (1970); Stanton v. Brunswick School Dist., 577 F. Supp 1560 (D. Me. 1984); Fricke v. Lynch, 491 F. Supp. 381 (D. R.I. 1980); Wilson v. Chancellor, 418 F. Supp. 1358 (D. Or. 1976); Dixon v. Beresh, 361 F. Supp. 253 (E.D. Mich. 1973).

106 . *See Tinker*, 393 U.S. at 511 (students "may not be confined to the expression of those sentiments that are officially approved.") *Accord, e.g., Shanley*, 462 F.2d at 970-72; *Gambino*, 429 F. Supp. at 736-37; Bayer v. Kinzler, 383 F. Supp. 1164, 1165-66 (E.D.N.Y. 1974), *aff'd*, 515 F.2d 504 (2d Cir. 1975).

107 *See, e.g., Seyfried*, 668 F.2d at 216.

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

109 It could be argued that a school has a constitutional duty to avoid the apparent endorsement of students' nonreligious ideas because such apparent endorsement would deter other students from expressing disagreement with those ideas, thus infringing their free speech rights. School officials may have a constitutional right to avoid the reasonable inference that they endorse ideas with which they do not actually agree. *See* Wooley v. Maynard, 430 U.S. 705 (1977) (striking down New Hampshire's requirement that state motto, "Live Free or Die," be displayed on car license plates, as violating first amendment right to "refrain from speaking"). However, courts have held that when there is a constitutional obligation to facilitate the expression of ideas, regardless of their content, as in a public forum, then no imputation of endorsement could arise that would be deemed sufficiently reasonable to violate this right. *See, e.g.*, Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980); Gay Student Servs. v. Texas A&M Univ., 737 F.2d 1317, 1330 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 1860 (1985). Accordingly, if a school has created an open student forum, a school official's free speech right to refrain from apparent endorsement of certain ideas would not justify exclusion of student groups. However, the standard for determining whether there is a sufficiently reasonable inference of endorsement to implicate the right to refrain from speaking may differ from the standard for determining whether there is a sufficiently reasonable inference of endorsement to implicate establishment clause concerns. *Cf.* Norwood v. Harrison, 413 U.S. 455, 469-70 (1973) (establishment clause violated by lower level of state support than that required to violate equal protection clause).

avoiding perceived endorsement of nonreligious speech than to the school's constitutional obligation to avoid perceived endorsement of religious speech. For this reason, it would be appropriate to impose limitations upon students' religious speech based on less evidence of perceived school endorsement than would be required to impose limitations upon students' nonreligious speech.[110] To go further, however, by allowing high schools to exclude student religious speech based upon naked generalizations, would contravene general principles concerning students' and young people's rights.[111]

V
PROPOSED ANALYTICAL FRAMEWORK

The preceding Part of this Article suggests two basic considerations that must be taken into account in resolving any equal access issue consistently with both free speech and anti-establishment concerns. First, a public high school can, in theory, create a neutral student forum in which content-based restrictions on speech would be strictly limited. Second, there is a risk that any concerted religious speech in a high school, even where the school has created a neutral student forum, could cause a reasonable student perception that the school sponsors religion.[112]

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110 The proposed analytical framework for evaluating equal access issues accounts for this distinction by requiring student religious groups to make a greater showing, as a prerequisite for being granted equal access, than nonreligious groups would be required to make under traditional public forum principles. *See infra* text accompanying notes 129-40.

111 *See, e.g., Tinker*, 393 U.S. at 509. Such a sweeping general prohibition would be tantamount to a legislative finding that all high school students lack the intellectual and emotional maturity necessary for participation in the marketplace of ideas. In addition to depriving high school students of their fundamental free speech rights in the equal access context, this finding could jeopardize students' free speech and other fundamental rights in other contexts. If a court finds that all high school students are inherently too immature to understand the neutrality of the public forum and equal access concepts, could it not also find such students too immature to be exposed to speech about politics, sex, or other controversial subjects? *See, e.g.*, Trachtman v. Anker, 563 F.2d 512, 518-20 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978) (high school students too immature to be exposed to anonymous, voluntary, student-designed questionnaire about their sexual experience and attitudes). And could it not further find that, because of their immaturity, the female students should not make their own decisions, in consultation with their doctors, about whether to have an abortion? That the Supreme Court has expressly prohibited states from presuming all minor females to be too immature to make such decisions underscores the flaws in the presumptive approach to the equal access issue. *See, e.g.*, City of Akron v. Akron Center For Reproductive Health, 462 U.S. 416, 439-40 (1983); Bellotti v. Baird, 443 U.S. 622, 647-48 (1979); Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 74 (1975).

112 Both of these generalizations apply to colleges and universities as well as high schools. Therefore, the basic elements of the suggested analytical framework for evaluating particular equal access claims could be applied in the college and university con-

It follows from these basic considerations that concerted student religious speech should be allowed on high school premises if and only if two general criteria are met: the school must have created a neutral, open student forum; and reasonable students must not infer that the school endorses religion.[113] The proposed analytical framework for determining whether these two general prerequisites have been met in any particular case charts a middle course between the two inconsistent evidentiary approaches underlying the two pertinent lines of Supreme Court precedents. The proposed framework neither elevates one set of constitutional values over the other nor leaves schools and courts with unconstrained discretion for resolving conflicts between those values.

A. Inconsistent Evidentiary Approaches Underlying Two Lines of Supreme Court Precedents

Once a prima facie showing has been made that the government has restricted a free speech right, the burden of proof shifts to the government (or other proponent of the restriction) to demonstrate that it is justified.[114] The specific justification that must be shown depends upon the nature of the restriction. In the case of a content-based restriction of speech in a public forum, the requisite showing would be the very difficult one that the restriction was necessary to promote a compelling state interest and that less drastic alternative measures would not serve that purpose.[115] One type of alternative measure that courts have considered is a content-neutral

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text as well. In *Widmar*, the Supreme Court indicated that equal access cases in the higher education setting should be decided on the basis of their particular facts and suggested some pertinent inquiries. However, the Court did not elaborate a generally applicable analytical approach. *See supra* text accompanying notes 42-47.

113 The school should make efforts to ensure that every student understands the neutrality of its open student forum, *see infra* note 140 and accompanying text. However, student religious groups should not be restricted or excluded merely because some students unreasonably misperceive equal access as reflecting school endorsement of religion. *See* Citizens Concerned For Separation of Church and State v. City & County of Denver, 526 F. Supp. 1310, 1315 (D. Colo. 1981) (court sustains nativity scene display on public property despite evidence that "most sensitive or fastidious citizens" perceive display as conveying governmental endorsement of religion). *Cf.* Roth v. United States, 354 U.S. 476, 489 (1957) (test that "judg[es] obscenity by the effect of isolated passages upon the most susceptible persons . . . must be rejected as unconstitutionally restrictive of the freedoms of speech and press").

114 *See, e.g.*, Clark v. Community for Creative Nonviolence, 104 S. Ct. 3065, 3069 n.5 (1984). Appellate courts have reversed decisions upholding speech regulations specifically because the lower courts did not impose upon the government the burden of proving such regulations to be justified. *See, e.g.*, Healy v. James, 408 U.S. 169, 184-85 (1972); Ysleta Fed'n of Teachers v. Ysleta Indep. School Dist., 720 F.2d. 1429, 1435 (5th Cir. 1983); U.S. S.W. Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 771 (D.C. Cir. 1983); Wright v. Chief of Transit Police, 558 F.2d 67, 68 n.1, 70 (2d Cir. 1977).

115 *See, e.g.*, *Widmar*, 454 U.S. at 270; *Wright*, 558 F.2d at 68 n.1, 70.

regulation upon the time, place and manner of speech.[116]

Cases arising under the free speech clause have also repeatedly held that any restriction upon free speech must be justified by specific evidence.[117] For example, directly addressing the public school context, the Supreme Court declared in *Tinker* that "undifferentiated fear or apprehension" of disturbance is not enough to overcome students' freedom of expression. Instead, the Court demanded specific "evidence that the school authorities had reason to anticipate" that the students' expressive conduct would cause adverse consequences.[118]

Under the foregoing evidentiary principles, the denial of equal access to student religious groups in an open student forum could not be justified by a general apprehension of establishment clause problems. Instead, as courts have held in the context of other public forums, the apprehension of an establishment clause violation would not justify excluding religious groups unless such apprehension was based upon specific evidence. Accordingly, courts have rejected generalized arguments that members of the viewing public would perceive religious expression on public property as manifesting governmental endorsement of religion. Even when there is evidence that some members of the viewing public will perceive such endorsement—including instances when the viewing public includes children—the courts have been reluctant to find that these perceptions are sufficiently reasonable or widespread to justify special re-

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116 *See, e.g., U.S. S.W. Africa/Namibia Trade & Cultural Council*, 708 F.2d at 771. These general standards have been applied in the specific setting of the public schools. *See, e.g., Garvin*, 455 F.2d at 240 (where high school principal refused to recognize student antiwar group, alleging school policy against recognizing "partisan" groups, school had burden of establishing compelling reason for this classification); *Russo*, 469 F.2d at 632-33 (school board regulations governing expressive conduct lacked requisite "precision and less restrictive effect"); *Riseman*, 439 F.2d at 150 (school should devise rules governing time, place, and manner of student literature distribution as less drastic alternative to prohibition of such distribution); Butts v. Dallas Indep. School Dist., 436 F.2d 728, 732 (5th Cir. 1971) (school officials should not prohibit student expressive conduct "unless . . . the circumstances allow them no practical alternative" to avert anticipated adverse consequences); *Fricke*, 491 F. Supp. at 386 (recommends specific less restrictive alternatives that school should invoke, rather than prohibiting student's expressive conduct); Cintron v. State Bd. of Educ., 384 F. Supp. 674, 679 (D. P.R. 1974) (school regulations that prohibited circulation of "material . . . aimed at promoting movements of a political-partisan or religious-sectarian character . . . on school premises" held unconstitutional as prior restraint on expression, especially where government "has made no attempt to find a 'less drastic means' to accomplish its permissible purposes"); *Dixon*, 361 F. Supp. at 254 (school's asserted reason for denying recognition to certain student groups "is entirely speculative and hence must be discounted").

117 *See, e.g., U.S. S.W. Africa/Namibia Trade & Cultural Council*, 708 F.2d at 771, 774.

118 393 U.S. at 508, 509. Following *Tinker*, the lower courts have rigorously enforced this requirement. *See, e.g.*, Quarterman v. Byrd, 453 F.2d 54, 59 (4th Cir. 1974); Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 810 (2d Cir. 1971); *Butts*, 436 F.2d at 731-32; *Scoville*, 425 F.2d at 13-14.

strictions on religious speech.[119] Moreover, in the context of nonschool public forums, courts have consistently suggested that the government could eliminate any danger of perceived endorsement through the use of disclaimers. Disclaimers constitute a less drastic alternative to the total exclusion of religious speech.[120]

The stringent standards for determining whether there is an establishment clause violation sufficient to limit free speech in public forums differ significantly from the standards for determining whether there is any establishment clause violation in a public school. The Supreme Court's decisions concerning public school religious expression have not required specific evidence that the feared violations would result from the challenged expressions. Instead, the Court has made assumptions about the inherent likelihood of establishment clause violations arising from certain characteristics of public schools and their students.[121] Moreover, the Court has not discussed less drastic alternatives to the complete prohibition of such expression. Rather than requiring that the prohibition be necessary to avert an actual establishment clause violation, the Court has expressly approved measures that are sufficiently broad to counter even potential violations.[122]

Under the free speech clause precedents, a presumptive right of

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119 *See, e.g.*, McCreary v. Stone, 739 F.2d 716, 727 (2d Cir. 1984), *aff'd mem. by an equally divided Court sub nom.* Board of Trustees v. McCreary, 105 S. Ct. 1859 (1985) (per curiam) (rejected contention that children who see nativity scene in public park might not understand government's neutrality toward religion, because there was little direct testimony, and no other evidence, to support this conclusion); Jaffe v. Alexis, 659 F.2d 1018 (9th Cir. 1981) (enjoined state agency from prohibiting speech by religious groups on its property, because of lack of specific evidence substantiating agency's asserted establishment clause justification); *Country Hills Christian Church*, 560 F. Supp. at 1216, 1219 (dismissed as "speculative" school district psychologist's opinion that elementary students would perceive school as endorsing church that used school building for Sunday morning worship services, because psychologist did not cite empirical evidence or studies to support opinion); Citizens Concerned for Separation of Church and State v. City & County of Denver, 526 F. Supp. 1310, 1312-15 (D. Colo. 1981) (upholding nativity scene on public property despite evidence that some community members, including Jewish children, perceived it as conveying governmental approval of Christianity).

120 *See infra* note 140.

121 *See* cases cited *supra* notes 17-21.

122 The Supreme Court's two recent "parochiaid" decisions illustrate the Court's relatively lenient evidentiary standards governing the finding of an establishment clause violation in cases "involving the sensitive relationship between government and religion in the education of our children." Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3222 (1985); *see also* Aguilar v. Felton, 105 S. Ct. 3232 (1985). The Court invalidated certain governmental assistance programs, under which public school employees taught secular subjects in parochial schools, because of its general apprehension that these teachers "may well subtly (or overtly) conform their instruction to the environment in which they teach," causing a prohibited "indoctrinating effect." *Grand Rapids*, 105 S. Ct. at 3225. This potential establishment clause violation persuaded the Court to strike down the programs, even though they had existed for almost twenty years, and even though there was no evidence of even one incident of the feared indoctrination through-

access for student religious speech would arise upon the showing of a student forum that is open as a matter of policy to a sufficiently broad range of subjects. Following such a showing, the equal access opponent would bear the heavy—if not impossible—burden of demonstrating that equal access would violate the establishment clause and that no less drastic alternative than denial of access could avert the violation. In contrast, under the establishment clause precedents, the equal access proponent would bear the heavy—if not impossible—burden of disproving the presumptive establishment clause dangers deemed inherent in any public school religious expression.

Under the proposed analytical framework, as distinguished from both the free speech and establishment clause precedents, there would be no conclusive presumptions weighing either for or against equal access. Instead, the school authorities' exercise of discretion in each case would be evaluated in light of specific standards designed to ensure the openness of the forum and to minimize the dangers of actual or apparent school sponsorship of religion. A school would not be permitted to grant equal access to a student religious group unless it complied with these standards. If it complied with these standards, a presumption would arise that the grant of equal access was proper. This presumption would, however, be subject to rebuttal based upon specific evidence that the students would perceive the equal access grant as the school's sponsorship of religion.

B. Showing Required To Establish Equal Access Right

1. *Neutral Open Student Forum*

Because a public school is not an inherent public forum, a student religious group would have no right of access to school property unless it could demonstrate that the school had created a limited public forum for student speech.[123] To demonstrate the existence of such a forum, the equal access proponent would have to make two essential showings: that the forum was not created to promote religion, and that any subject matter limitation upon the forum is sufficiently broad to include, but not to single out, religion.

The first required showing—that the forum was not created to promote religion—mirrors the fundamental tenet that, to survive scrutiny under the establishment clause, a government policy must have a secular purpose.[124] In evaluating the purpose underlying

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out this period. *Id.* The Court dismissed this lack of evidence, which it expressly acknowledged as "of little significance." *Id.*

123 *See, e.g., Widmar*, 454 U.S. at 273; *supra* text accompanying notes 34-39.

124 *See supra* note 29. *See also Jaffree*, 105 S. Ct. 2479 (struck down Alabama's statute

any student forum or equal access policy, it is important to consider such factors as whether the school had previously adopted any other policies or engaged in any other acts concerning religion, whether the policy was adopted before or after any student religious group sought to meet on school property, and whether the policy was adopted as part of any broader set of guidelines.[125]

The second required showing—that the student forum is open to a sufficiently broad spectrum of subjects—derives from both free speech clause and establishment clause doctrines. Under the free speech clause, no speaker could claim an equal access right to public property unless the property had been designated as a public forum or limited public forum. In the case of a limited public forum, a speaker would not have a free speech right of access unless the property was available to a sufficiently broad, justifiably defined category of subjects or speakers, and the speaker fit within any such category.[126] Under the establishment clause, religion may be included within a broad class of beneficiaries of a public service, but it may not be singled out as such a beneficiary.[127] If some secular groups were excluded from the forum, the inclusion of religious groups might constitute a special benefit to religion in contravention of the establishment clause. Therefore, a school that barred the meetings of a controversial student political group, for example, could have difficulty contending that it had created a sufficiently open forum to permit the meetings of a religious group.[128]

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mandating moment of silence in public schools ostensibly for purposes of meditation, prayer, or any other quiet activity chosen by each individual student, because Court concluded statute's actual purpose was to promote prayer). Some observers believe that the equal access issue is being exploited by evangelical religious groups as "the key to open the schoolhouse door" to organized religious activity. Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey*, 60 NOTRE DAME L. REV. 901, 923 (1985). Evidence that a school's adoption of an equal access policy was due to any such pressure would negate the required secular purpose.

125 In *Lubbock*, for example, these factors indicated that the challenged equal access policy was a ruse for perpetuating the school's longstanding practice of actively promoting religion. 669 F.2d at 1044-45.

126 *See supra* text accompanying notes 37-39.

127 *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983); *Widmar*, 454 U.S. at 274 (stressing university's "provision of benefits [access] to so broad a spectrum of groups" in upholding equal access for religious group); Walz v. Tax Comm'n, 397 U.S. 664 (1970).

128 *See supra* note 39. In designating its property as a limited public forum, the goverument may impose speaker or subject matter limitations that are "necessary to reserve" the forum "to expressive activity compatible with the property," so long as these limitations are viewpoint neutral. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 105 S. Ct. at 3458. Similarly, *Tinker* held that a public school may restrict student expressive conduct if such conduct would "substantially interfere with the work of the school or impinge upon the rights of other students." 393 U.S. at 509. In accordance with these governing principles, a school could impose general subject matter constraints upon a student forum to ensure that the forum is compatible with the school's educational mission. The school could also restrict the expressive conduct of particular

2. *Content-Neutral Restrictions on Student Group Meetings*

Because of the establishment dangers inherent in concerted religious expression in the public schools, and because of the difficulty of ascertaining whether such expression in fact violates the establishment clause—in particular, whether reasonable students actually perceive a school to be endorsing religion—a school's duty under the establishment clause should be construed to go beyond merely avoiding clear violations. Instead, as courts have recognized, the school's duty should be viewed as the broader one of taking reasonably available, constitutionally permissible steps to minimize the risk of an establishment clause violation.[129] Accordingly, in addition to demonstrating the existence of a neutral, open forum, the equal access proponent should also be required to show that the school has taken such steps. In particular, the equal access proponent should show that the school has imposed certain content-neutral time, place, and manner regulations upon student group meetings: the meetings should take place outside the compulsory attendance period; the role of any adult supervisor should be as limited as permissible under applicable law and should under no circumstances include participation in student group meetings; and the school should issue disclaimers and take other steps to ensure that students understand its neutral role under an equal access policy.

Before addressing the specific rationale for each proposed measure, it is important to explain the underlying rationales common to this whole set of requirements. The recommended regulations constitute less drastic alternatives to either an unqualified grant of access to a student religious group, with its attendant establishment dangers, or an outright denial of access, with its attendant free speech dangers.[130] A school's grant of equal access in the absence

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students or student groups in accordance with *Tinker*'s substantial disruption or impingement standard. However, because of the fundamental content neutrality requirement, schools would not be permitted to exclude student groups merely because of the controversial nature of the subjects they address. *See, e.g.*, Gay Alliance of Students v. Matthews, 544 F.2d 162, 167 (4th Cir. 1976) (Markey, J., concurring).

129 *See, e.g.*, *Grand Rapids*, 105 S. Ct. at 3226-27; *see also Bell*, 766 F.2d at 1407 ("[W]e believe that religious activity in the public schools . . . requires stricter separation than does a university campus or a public square."). Some courts have suggested that schools' interests in minimizing risks of establishment clause violations could even justify the infringement of free speech rights. For example, in *Bender*, the Third Circuit squarely held that the school's denial of equal access to Petros would violate the students' free speech rights, 741 F.2d at 550, but it nonetheless ordered the school to deny equal access to avoid an establishment clause violation. *Id.* at 560-61. In contrast, the recommended measures are fully consistent with free speech principles. *See infra* note 131 and text accompanying notes 132-35.

130 Less drastic alteruatives to either an outright denial or an unconditional grant of access will not only maximize students' free speech rights, but will also minimize the

of such regulations would not necessarily violate the establishment clause. Nevertheless, because these content-neutral regulations would significantly reduce the risk of an establishment clause violation without abridging students' free speech rights,[131] school officials and courts should require their imposition before granting equal access to student religious groups.

One could argue that treating the proposed regulations as essential prerequisites for a grant of equal access to student religious groups limits students' free speech rights insofar as it recognizes the school authorities' discretion not to create the type of forum to which these groups would be granted access. There are several responses to this argument. First, a school's discretion to choose whether or not to create the prescribed type of student forum is simply one manifestation of government officials' general discretion to choose whether or not to create limited public forums on government property and to impose upon any such forum justifiable, viewpoint neutral speaker or subject matter limitations. To this extent, outside of inherent, traditional public forums, any first amendment right of access to government property is always dependent upon the discretion of government officials.[132]

Second, by preserving some degree of school discretion, the

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likelihood of both basic types of potential establishment clause violations in this setting. Alternatives to outright denial may enable a school to avoid violating the establishment clause by conveying its disapproval of religion. Likewise, alternatives to an unqualified grant may enable a school to avoid violating the establishment clause by conveying its approval of religion.

131 *See, e.g.*, Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984).

> Expression . . . is subject to reasonable time, place, and manner restrictions . . . provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a siguificant governmental interest, and that they leave open ample alternative channels for communication of the information.

Id. at 3069 (citations omitted). The proposed measures easily satisfy this standard. They are content neutral because they apply to all student groups. They are narrowly tailored to serve the compelling governmental interest in complying with both the establishment clause and the free speech clause. Finally, they leave open ample alternative channels for student group communication. All three measures should, in fact, enhance students' expressive rights by de-emphasizing the school's traditional inculcative role

132 *See supra* text accompanying notes 34-39. Under the Equal Access Act, as well as under the proposed analytical framework, a student forum will not be characterized as a limited public forum sufficient to trigger the school's obligation to grant equal access to student group meetings, regardless of "the religious, political, philosophical, or other content of the speech at such meetings," unless the forum is subject to certain constraints. Specifically, under the Act, a school will not be deemed to have created a "limited open forum" sufficient to give rise to equal access rights unless it has granted an "opportunity for one or more noncurriculum-related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(a)-(b) (1984). Thus, a school that created a forum for meetings of curriculum-related student groups, or for meetings of any student groups during instructional time, would have no obligation under the Act to grant equal access to student religious groups.

proposed test is faithful to fundamental principles that protect the autonomy of local school officials. Under these principles, courts defer to school officials' decisions and "do not . . . intervene in the resolution of conflicts which arise in the daily operation of school systems" unless such conflicts "directly and sharply implicate basic constitutional values."[133] The proposed standards limit the situations in which a court could overrule a school's resolution of an equal access claim to those that present such a sharp conflict: where a school has denied equal access, notwithstanding the existence of an open, neutral forum subject to the prescribed regulations; or where the school has granted equal access, notwithstanding the absence of such a forum or notwithstanding other specific evidence that the students perceive the school as endorsing religion.

There is an additional rationale for treating the proposed neutral restrictions as fixed requirements, in and of themselves, rather than as factors relevant to the ultimate issue of whether a school sponsors, or appears to sponsor, religion. This ultimate issue is inherently elusive, calling for a conclusion that will inevitably reflect the factfinder's value judgments.[134] By substituting for this subjective inquiry an objective inquiry concerning the school's adoption of specific measures, the proposed test imposes meaningful constraints upon lower courts' discretion. It thereby affords more guidance to school officials, students, and others interested in equal access controversies and promotes consistency among schools and courts in their resolutions of these controversies.[135]

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133 Epperson v. Arkansas, 393 U.S. 97, 104 (1968). *See also* Sexton, *Minority-Admissions Programs after Bakke*, 49 HARV. EDUC. REV. 313, 320-22 (1979) (discussing judicial recognition that educational institutions should be allowed "considerable discretion" in conducting educational affairs, reflecting both respect for academic freedom and courts' lack of expertise).

134 *See generally* Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 936 (1980) (when court's inquiry depends upon "judgmental," "predictive," or "evaluative" facts, it may appropriately rely more on devices such as judicial notice or presumptions and less on particular evidentiary facts). Under the proposed framework, courts would in effect defer, to some extent, to the judgment of local school authorities concerning whether their students would perceive a grant of equal access as conveying the school's endorsement of religion. Presumably, such a judgment would be at least one significant factor in a school's decision whether or not to create an open student forum subject to the prescribed content-neutral regulations. Under Professor Davis's analysis, it is particularly appropriate for a court to defer to such a determination of "judgmental or predictive" facts by a local school official. *See id.* (agency expertise "may in a sense serve as a substitute for future facts").

135 *Cf.* Columbus Board of Educ. v. Penick, 443 U.S. 449, 491-92 (1979) (Rehnquist, J., dissenting) (criticizing majority's vague standards for determining whether school system's pupil assignment plan violates equal protection clause, as relegating determination to district court discretion).

> [This approach] holds out the disturbing prospect of very different remedies being imposed on similar school systems because of the predilections of individual judges and their good-faith but incongruent efforts to

The first proposed neutral regulation—requiring student groups to meet at times that are clearly separated from any period when students are required to be at school—is designed to counter reasonable inferences of school support for religion that might arise from compulsory education laws. Anti-establishment values would be best served by a requirement that the students meet after the time when they are legally compelled to be at school.[136]

The second proposed neutral regulation—requiring the school to comply with its supervisory obligations in the least obtrusive manner that is legally permissible—is designed to curb reasonable inferences of school sponsorship of religion that might arise from school supervision rules. For example, a school may have a lower degree of supervisory responsibility during hours not covered by compulsory attendance laws.[137] If so, that would afford an additional reason for requiring student groups to meet outside compulsory attendance hours. As another example, the school might be able to fulfill its supervisory responsibility without requiring the physical presence of an adult during student group meetings.[138]

> make sense of this Court's confused pronouncements today. Concepts such as "discriminatory purpose" and "systemwide violation" present highly mixed questions of law and fact. If district court discretion is not channelized by a clearly articulated methodology, the entire federal court system will experience the disaffection which accompanies violation of Cicero's maxim not to "lay down one rule in Athens and another rule in Rome."

Id. As Justice Rehnquist noted, additional advantages that would result from a standard "channelizing" district court discretion in cases involving educational policy and students' constitutional rights would be the promotion of both local autonomy and students' rights. *Id.*

136 Even with an interval between the conclusion of a student religious group's preschool meeting and the beginning of the school day, the religious students could remain on school property and be seen by other students arriving for the beginning of classes. This scenario could create reasonable perceptions that the religious group had the school's support. *See, e.g.*, *Bell*, 766 F.2d at 1405 n.14.

137 Many state statutes impose on schools a duty to supervise students' conduct on school property only during the school day. *See, e.g.*, Lauricella v. Board of Educ., 52 A.D.2d 710, 381 N.Y.S.2d 566 (1976); Carabba v. Anacortes School Dist. No. 103, 72 Wash. 2d 939, 435 P.2d 936 (1967). Schools generally have no duty to supervise students who participate in voluntary extracurricular activities on school grounds after regular school hours, unless the activity is inherently dangerous. *See, e.g.*, Bush v. Smith, 154 Ind. App. 382, 289 N.E.2d 800 (1972); Kantor v. Board of Educ., 251 A.D. 454, 296 N.Y.S. 516 (1937); Annot., 38 A.L.R. 3d 830, 852-53 (1971).

138 A random survey of the education statutes of several states reveals no express requirement that the staff supervise student activities. At least one court has construed a state statute to require such supervision, even without an express mandate. See Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977) (construing CAL. EDUC. CODE § 44807 (West 1978), as requiring a "faculty sponsor" to attend all student activities). Most states surveyed grant broad discretion to local authorities to establish all operating regulations for the schools. *See, e.g.*, PA. STAT. ANN., tit. 24, § 7-775 (Purdon 1962 and Supp. 1985) ("The board of school directors of any district may permit the use of its school grounds and

Even if applicable legal standards did require an adult to be present during a student meeting, that adult should under no circumstances participate in the meeting. The school should minimize the risk that reasonable students would perceive it, through its authorized adult monitors, as endorsing the content of a student group's expressive conduct. Therefore, any such monitor should be confined to a strictly custodial role.[139]

The final proposed content-neutral regulation is designed to counter perceptions of school support for religion that could arise from the public schools' inculcative function, as well as from the students' relative immaturity or impressionability. Rather than imposing a per se prohibition upon student religious meetings because of students' presumed inability to comprehend the school's neutral role under an equal access policy, courts should instead require schools to make reasonable efforts to explain the equal access and public forum concepts to their students.[140]

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buildings for social, recreation, and other proper purposes, under such rules and regulations as the board may adopt.") At least in the absence of a more specific statute or regulation, a school's supervisory duty is generally measured by a negligence standard—i.e., it must exercise the degree of care that an ordinarily prudent person would exercise under similar circumstances. *See, e.g.*, Woodsmall v. Mount Diablo Unified School Dist., 188 Cal. App. 2d 262, 10 Cal. Rptr. 447 (1961); Miller v. Griesel, 261 Ind. 604, 308 N.E.2d 701 (1974); Titus v. Lindberg, 49 N.J. 66, 228 A.2d 65 (1967); Morris v. Douglas County School Dist. No. 9, 241 Or. 23, 403 P.2d 775 (1965); Cirillo v. Milwaukee, 34 Wis. 2d 705, 150 N.W.2d 460 (1967). "Absent special dangerous circumstances," a school is not required to provide "constant supervision of all movements of all pupils at all times." Connett v. Fremont County School Dist. No. 6, 581 P.2d 1097, 1103 (Wyo. 1978). *Accord* Schuyler v. Board of Educ., 18 A.D.2d 406, 408, 239 N.Y.S.2d 769, 771 (1963), *aff'd mem.*, 15 N.Y.2d 746, 205 N.E.2d 311, 257 N.Y.S.2d 174 (1965).

139 The role of an adult monitor who is authorized only to maintain order and discipline could be analogized to that of a policeman at a religious rally in a public park, which has been held consistent with the establishment clause. *See* O'Hair v. Andrus, 613 F.2d 931, 935 (D.C. Cir. 1979).

140 In upholding the access claims of religious expression to nonschool public forums, courts have relied upon disclaimers to minimize establishment clause problems. *See, e.g., McCreary*, 739 F.2d at 728 (establishment clause does not bar temporary location of privately-owned nativity scene in public park if accompanied by appropriate disclaimers); Jaffe v. Alexis, 659 F.2d 1018, 1022 (9th Cir. 1981) (state agency's fears that public might perceive it as endorsing views of religious speakers granted access to its property "can easily be allayed by posting sigus"); Allen v. Morton, 495 F.2d 65, 67 (D.C. Cir. 1973) (per curiam) (temporary display of crèche in public park would not violate establishment clause if accompanied by plaques indicating government did not sponsor it). *See also Widmar*, 454 U.S. at 274 n.14 (noting that university handbook contained statement disclaiming university endorsement of student organizations). Of course, disclaimers will not always eliminate establishment clause violations. *See, e.g.*, Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (notwithstanding disclaimer on copy of Ten Commandments required to be posted in public school classroom, which stated that Commandments constitute basis of secular legal system, establishment clause was violated because statute had no clear secular purpose).

C. Showing Required To Overcome Equal Access Right

In accordance with the basic tenets of public forum doctrine, if a student religious group can make the specific showings to establish an access right to a public high school forum, no special restriction may be imposed upon the group unless it is necessary to promote a compelling goverumental interest—namely, the interest in avoiding an establishment clause violation.[141] No limitations should be imposed upon any student group meetings unless they are the least restrictive necessary to avert an establishment clause problem. Accordingly, the student religious group should not be denied access altogether unless the equal access opponent can satisfy the heavy burden of proving that less drastic alternative measures will not be sufficient to prevent an establishment clause violation. In accordance with general public forum doctrine, the equal access opponent should be required to adduce specific evidence to demonstrate both an establishment clause violation and the absence of less restrictive alternatives.

The equal access opponent can attempt to demonstrate, for example, that reasonable students would perceive the school's grant of equal access to a student religious group as conveying its support for religion because the forum is not actually utilized by numerous, diverse student groups, or because one or more religious groups predominate in actually using the forum. Evidence concerning both the forum's actual utilization and the relative predominance of religious groups was central to the Supreme Court's analysis in *Widmar*.[142]

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141 *See supra* text accompanying notes 34-36. In *Widmar* the Supreme Court recognized that the university's "interest . . . in complying with its constitutional obligations [under the establishment clause and the state constitutional counterpart] may be characterized as compelling." 454 U.S. at 271. In McCreary v. Stone, 575 F. Supp. 1112, 1133 (S.D.N.Y. 1983), 739 F.2d 716 (2d Cir. 1984), *aff'd mem. by an equally divided Court sub. nom.* Board of Trustees v. McCreary, 105 S. Ct. 1859 (1985), the court held that the avoidance of an establishment clause violation was a sufficiently compelling state interest to justify content-based exclusion of speech from a public forum.

142 The absence of the suggested actual utilization and nonpredominance factors would neither disprove the existence of a limited public forum nor prove the existence of an establishment clause violation. So long as the school property was in fact open and available as a matter of policy, a limited public forum should be found to exist, even if numerous, diverse student groups did not actually utilize it. *See McCreary*, 739 F.2d at 722 (in concluding that park constituted public forum, court stressed its *availability* for free speech purposes; that park had not actually been utilized by numerous, diverse speakers was irrelevant). Likewise, so long as the school is neither supporting any student religious group nor perceived by the students to do so, the student religious group meetings would not violate the establishment clause, even if such meetings did predominate. It could be argued that courts should deem these two material but nonessential factors concerning the existence of an open student forum to be independently necessary prerequisites for a grant of equal access, rather than simply probative of the ultimate prerequisites for such grant (the presence of an open student forum and the

In *Widmar*, the Court deemed the evidence concerning the sizeable and broad array of student groups actually meeting on campus to be relevant to the free speech analysis because it indicated that the campus was available to a sufficiently broad range of student speech to constitute a limited public forum.[143] This evidence was also relevant to the Court's establishment clause analysis because it indicated that no reasonable student should infer the school to be sponsoring the religious content of student speech.[144] Similarly, in support of its conclusion that reasonable students should not construe a grant of equal access as conveying the university's endorsement of religion, *Widmar* relied upon the fact that religious student groups did not predominate in using the forum. However, the Court indicated that if, at some future point, one or more religious groups did come to dominate the forum, then it might be appropriate to exclude them.[145]

An equal access opponent could potentially meet its burden of proof necessary to overcome a right of access by adducing the following types of evidence: testimony of individual students that they perceive the school as sponsoring religion; opinion testimony by experts in adolescent psychology or education that, under the circumstances, a reasonable student would infer school support for religion;[146] evidence concerning objective factors that would support a conclusion that a hypothetical "reasonable student" would infer school endorsement of religion;[147] and a survey of students demonstrating that some statistically significant portion of them

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absence of actual or perceived school sponsorship of religion). However, to elevate these evidentiary facts into constitutionally ultimate facts would not entail the major advantages that would result from attributing independent constitutional significance to the proposed content-neutral regnlations: the confinement of lower courts' discretion, and the concomitant promotion of the autonomy of local school officials, within constitutional parameters. *See supra* text accompanying notes 134-35. Because these intermediate issues would themselves call for relatively open-ended, subjective determinations, they would likely fail to circumscribe the discretion that lower courts could exercise in evaluating the ultimate issues.

143 454 U.S. at 277.

144 *Id.* at 274.

145 *See id.* at 275 ("*At least* in the absence of empirical evidence that religious groups will dominate [the university's] open forum . . . the advancement of religion would not be the forum's 'primary effect.' ") (emphasis added).

146 This type of evidence was considered in *Bell*, *see supra* note 60. For other examples of establishment clause cases that have considered such evidence, see, e.g., Country Hills Christian Church v. Unified School Dist. No. 512, 560 F. Supp., 1207, 1216 (D. Kan. 1983); Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 1013, 1016-17 (D. N.M. 1983); Citizens Concerned for Separation of Church and State v. City & County of Denver, 526 F. Supp. 1310, 1314-15 (D. Colo. 1981).

147 This could include evidence concerning such institutional factors as any steps the school may take to promote its noninculcative role, and the particular options available to the school in fulfilling its supervisory obligations. Evidence concerning the general intellectual and emotional levels of a particular school's student body could also be rele-

perceived the school to be endorsing religion.[148]

A central issue under the proposed analysis is whether any establishment clause problems that might result from student religious group meetings could be averted through alternative measures, that are less drastic than outright denial of access. Two such alternative measures for curbing any reasonable perception of school endorsement are suggested by *Bender*. First, the student members of the religious group, Petros, volunteered not to use any school media to announce their meetings or to publicize their activities.[149] Second, the principal offered Petros members the alternative of being "released" from school during the student activity period so they could meet in another nearby location.[150] Other less drastic alternatives to outright denial of access that would minimize the establishment clause risks resulting from student religious group meetings include limitations upon the length or frequency of student group meetings, requirements that such meetings occur in areas of the school that are not normally used for regular classroom instruction,[151] and requirements that such meetings take place during evenings or weekends.[152]

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vant. *See, e.g.*, Trachtman v. Anker, 426 F. Supp. 198, 202 & n.3 (S.D.N.Y. 1976), *rev'd*, 563 F.2d 512 (2d Cir. 1977).

148 *See generally Citizens Concerned for Separation of Church and State*, 526 F. Supp. at 1312-15 (in evaluating whether governmentally displayed nativity scene conveyed message of government approval, court considered expert testimony about scene's historic and folkloric significance, expressions of reactions by individuals who viewed it, and psychological study of perceptions of certain Jewish children). The suggestion that such evidence might overcome a constitutionally-based equal access right implicates the broader question of the extent to which constitutional issues should turn on adjudicative, as opposed to legislative, facts. *See generally* Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931 (1980).

149 741 F.2d at 542.

150 *Id.* at 553 (citing Zorach v. Clauson, 343 U.S. 306, 315 (1952)).

151 *Cf. Grand Rapids*, 105 S. Ct. at 3227 (establishment clause problems increased when secular subjects taught in same classrooms as religious).

152 Many state statutes expressly provide that school buildings may be opened to religious meetings during nonschool hours. *E.g.*, ILL. ANN. STAT. ch. 122, § 10-22.10 (Smith-Hurd Supp. 1981-82); KY. REV. STAT. § 162.050 (1980); OHIO REV. CODE ANN. §§ 3313.76-.77 (1980). Courts have held that the use of school buildings for religious purposes during nonschool hours does not violate the establishment clause or its state counterparts. *See, e.g.*, Southside Estates Baptist Church v. Board of Trustees, 115 So. 2d 697 (Fla. 1959); Nichols v. School Directors, 93 Ill. 61 (1879); Davis v. Boget, 50 Iowa 11 (1878); State *ex rel.* Gilbert v. Dilley, 95 Neb. 527, 145 N.W. 999 (1914); Resnick v. East Brunswick Township Bd. of Educ., 77 N.J. 88, 389 A.2d 944 (1978). Courts have also held that the free speech clause requires that religious groups be allowed to meet in school buildings during nonschool hours if other groups are allowed to do so. *See, e.g.*, *Country Hills Christian Church*, 560 F. Supp. 1207.

VI

EVALUATION OF *BENDER* UNDER THE PROPOSED ANALYTICAL FRAMEWORK

The analytical approach that the Third Circuit employed in *Bender* differs from the analytical framework recommended in this Article in several significant respects. First, in concluding that Petros's meetings would violate the establishment clause, the *Bender* majority relied too heavily upon generalizations and presumptions about high school students' alleged immaturity and high schools' allegedly inculcative atmosphere. In contrast, under the proposed framework, if Petros could make the requisite showings for an equal access right, then an equal access opponent could overcome this showing only if it substantiated an establishment clause violation by specific evidence. Furthermore, if Petros made the specified showings, it could not be denied access altogether unless specific evidence demonstrated that no alternative measures, less burdensome upon the students' free speech rights, would avoid the establishment clause violation. This insistence upon specific evidence promotes the students' free speech rights.

Another significant distinction between the Third Circuit's approach and the one proposed in this Article is that the latter provides more guidance for parties involved in equal access disputes, without arbitrarily elevating one set of competing constitutional values over the other. Having concluded that a constitutional violation would result from either a grant or a denial of access, the Third Circuit in effect made a value judgment as to which violation would be the lesser of two evils. In contrast, under the proposed analysis, a finding that a grant of access to a student religious group would violate the establishment clause would be dispositive. To be sure, alternative restrictions, less drastic than outright denial of access, would be considered. However, the student religious group would under no circumstances be granted access on the same terms as other student groups because the avoidance of an establishment clause violation constitutes a compelling state interest sufficient to justify limitations upon free speech rights.[153] The open-ended balancing of alternative constitutional violations in which the Third Circuit engaged would be neither necessary nor appropriate under the proposed framework.

Notwithstanding the differences between the proposed analytical framework and the Third Circuit's approach, both lead to the same ultimate conclusion: that Petros should not have been permit-

153 *See supra* note 141.

ted to meet in school during the student activity period.[154] The Petros students might be able to make the first showing necessary to establish an equal access right—that the school had created a neutral, open student forum. They could not, however, make the second requisite showing—that the school had adopted the recommended content-neutral regulations for minimizing establishment dangers.

Although the *Bender* record is relatively limited because the case was decided on summary judgment motions, it does contain some evidence supporting both prescribed indicia of an open student forum. First, the conclusion that the student activity period was not created for the impermissible purpose of advancing religion is supported by the fact that the first religious group's request to meet during that period, Petros's request, occurred "long" after the period was created.[155] The school's secular purpose in creating the forum is further supported by its refusal to authorize meetings of the only religious group to seek such authorization—namely, Petros. Second, the stated subject matter limitations upon student groups—those that would contribute to the students' "intellectual, physical or social development" and were "legal and constitutionally proper"—satisfy the recommended standard of encompassing religion without singling it out. Facially, these limitations appear to comply with the criteria for constitutionally permissible constraints upon the availability of a limited public forum: they would probably be deemed "necessary to reserve the [school] to expressive activity compatible with" it, and they are also viewpoint neutral. Moreover, the absence of evidence that a student group had ever been denied

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154 It likewise appears that no student religious group that has been involved in a reported equal access case has made the showings necessary to be entitled to access on the terms it sought. Because the students in *Brandon* asked to meet during the compulsory attendance period, they could not satisfy one of the proposed prerequisites for a prima facie equal access right. 635 F.2d at 979. In both *Lubbock* and *Bell*, the nonsecular purpose underlying the student forums should also preclude any prima facie free speech right of access for a student religious group. *See Bell*, 766 F.2d at 1402-03; *Lubbock*, 669 F.2d at 1044-45. It may well be that few high schools would be able or willing to comply with the prescribed standards for permitting student religious groups to meet at school. With respect to the open student forum requirement, school officials may decide that the concomitant obligation to grant access to controversial secular groups is too high a price to pay for the right to grant equal access to religious groups. *See supra* note 128 and accompanying text. The nondispositive actual utilization and nonpredominance factors, *see supra* text accompanying notes 142-45, may be difficult to satisfy in many high schools due to demographic factors. As compared to a typical college student body, the typical high school student body is smaller and drawn from a more limited geographic area, thus tending to be more homogeneous. The present Article does not purport to resolve these factual questions. Rather, it delineates the legally-mandated conditions with which any school must comply if it should in fact choose to permit student religious meetings.

155 563 F. Supp. at 709.

permission to meet is consistent with the lack of additional, *de facto* subject matter limitations.[156]

The two suggested material but nondispositive factors for assessing whether there is a neutral, open student forum also support the conclusion that the requisite forum probably existed in *Bender*.[157] First, the student forum was actually utilized by numerous, diverse student groups, relative to the student body's size. Indeed, the ratio between the number of student groups and the total student population in *Bender* was almost identical to the ratio between the corresponding numbers in *Widmar*.[158] Second, when Petros sought to meet, religious groups did not dominate the forum since none of the other student groups then meeting engaged in religious expression. Nor did it appear that Petros itself would dominate the forum, in light of the small number of students who expressed an interest in it.[159]

Notwithstanding that the student activity period in *Bender* might have satisfied the prescribed characteristics of a bona fide open student forum, Petros was correctly denied permission to meet during that period. Under the proposed analytical framework, Petros did not establish an equal access right because the school had not implemented the recommended content-neutral measures for minimizing establishment dangers. Of greatest concern, the student meetings took place during the compulsory attendance period, and teachers or other school-approved adults were authorized to participate in the meetings.[160]

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156 *See supra* text accompanying notes 39 & 128. Whether the student activity period was truly open to diverse student groups cannot be definitively answered on the basis of the relatively sparse record. For example, there was only limited evidence as to whether a principal had ever previously denied a student group permission to meet during the activity period. In view of the homogeneous nature of the extant clubs and the breadth of the principal's authority to disapprove proposed clubs on the ground that they did not contribute to the students' "development," or were not "proper," it is unclear whether controversial secular groups would have been allowed to meet. If not, Petros might have difficulty satisfying the open student forum standard. If the student activity period were classified as a nonpublic forum, the exclusion of Petros because of establishment clause concerns would probably satisfy the "reasonableness" standard that would then govern. *See supra* note 39.

157 *See supra* text accompanying notes 142-45.

158 In *Bender*, there were 25 student groups and a student body of 2,500. 741 F.2d at 567 (Adams, J., dissenting). In *Widmar*, there were 100 student groups and a student body of 11,000. 454 U.S. at 450.

159 Before receiving the opinion of counsel that Petros's meetings would violate the establishment clause, the principal allowed Petros to hold an organizational meeting. Approximately 45 students, comprising about 2% of the student body, attended. 741 F.2d at 543, 547.

160 *See supra* text accompanying notes 62-63. The student members of Petros offered to withdraw their request for an adult advisor. 563 F. Supp. at 715-16. This offer suggests that the physical presence of an adult may not have been legally required. The record does not reveal whether the school implemented the third recommended coun-

CONCLUSION

It seems unlikely that the Supreme Court will absolutely prohibit equal access under all circumstances, even if it concludes that the student religious group in *Bender* should not have been allowed to meet under the circumstances of that case. Instead, in line with its public forum and students' rights decisions, the Court will probably endorse some type of ad hoc analysis for resolving particular equal access controversies. A nonabsolutist approach would also be consistent with the Court's latest decision concerning public school religious expression.

This Article has demonstrated that only an approach that accords some discretion to school officials can be faithful to the two competing sets of constitutional principles implicated in any equal access controversy. It has also delineated a specific analytical framework that should facilitate the resolution of equal access issues consistently with both sets of constitutional values. While this analytical framework is sufficiently flexible to take into account the specific facts and circumstances involved in any particular controversy, it is also sufficiently precise to provide advance guidance and predictability.

As compellingly stated in the *Bender* dissent, a non per se test, such as the one proposed here, best promotes the fundamental first amendment values at stake in any equal access case.

> [T]he purposes of the First Amendment are better served by rejecting a *per se* rule, even in cases involving religion and the school. One of the great triumphs of America's constitutional experiment has been the avoidance of religious factionalism in the political sphere. Our country's continued progress in this endeavor ultimately depends on the individual citizen's tolerance and respect for religious diversity. When the schools can teach such tolerance to our young citizens without impermissibly sponsoring religion, I believe the Constitution and the Nation are the better for it.[161]

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termeasure—the issuance of disclaimers and follow-up efforts to ensure the students' understanding of its neutral role.

161 741 F.2d at 569-70 (Adams, J., dissenting).