SMU | Dedman School of Law

SMU Law Review

Volume 44 | Issue 3 Article 7

January 1990

Board of Education v. Mergens: The Equal Access Act

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CASENOTES

BOARD OF EDUCATION V. MERGENS: THE EQUAL ACCESS ACT

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BRIDGET Mergens, a student at Westside High School in Omaha, Nebraska, went to the school principal, Dr. Findley, seeking permission to form a new club. She represented a group of students who wished to meet after school hours, on school premises, for the purpose of discussing the Bible and praying together. Dr. Findley denied the request.

A few weeks later the students again sought permission from Dr. Findley and Dr. Tangdell, associate superintendent of schools, to form a Christian club. Findley and Tangdell discussed the matter with Superintendent Hanson, and the three school officials agreed that the request should be denied on the grounds that a religious club at the school would violate the establishment clause of the first amendment.[1] Unpersuaded, the students petitioned the Board of Education of Westside Community Schools to approve the club's formation. The Board voted to uphold the denial, adding that the proposed club was inconsistent with Board policy requiring school buildings to be used only for curriculum-related, school-sponsored activities.

In April 1985, the students, by and through their parents as next friends, sought injunctive and declaratory relief from the United States District Court for the District of Nebraska. The students claimed that the School Board and school officials had deprived them of their first and fourteenth amendment rights to freedom of speech, association, and free exercise of religion. Additionally, the students asserted that the school officials, by preventing the Christian club's formation, violated the Equal Access Act[2] which prohibits public secondary schools from discriminating against student groups meeting in the school based on the content of speech at the meetings.[3] The school officials responded that Westside High School did not fall within the scope of the Equal Access Act ("the Act") and that any application of the Act to Westside violated the establishment clause of the

1. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ."). The establishment clause has been made applicable to the states through the fourteenth amendment. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

2. 20 U.S.C. § 4071 (1988).

3. *Id.* § 4071(a).

Constitution.[4]

Finding that Westside High School did not have a limited open forum[5] as defined by the Act and that the school officials had not deprived the students of their first and fourteenth amendment rights, the district court entered judgment for the school officials.[6] The United States Court of Appeals for the Eighth Circuit reversed.[7] The court of appeals held that the lower court erred in its determination that Westside did not have a limited open forum, and therefore, a proper application of the Equal Access Act forbade discrimination against the proposed club on the basis of its religious content.[8] The court of appeals then upheld the constitutionality of the Act, stating that it did not violate the establishment clause.[9] The appellate court reasoned that the Equal Access Act codified and extended the Supreme Court's decision in *Widmar v. Vincent*[10] to public secondary schools.[11] The United States Supreme Court granted certiorari to decide whether the Equal Access Act prohibited Westside High School from denying the proposed Christian club permission to meet on school premises and, if so, whether the Act violated the establishment clause. *Held, affirmed*: Since Westside High School maintains a limited open forum within the meaning of the Equal Access Act, the school is prohibited from denying the students' request to form a Christian club and the Act does not on its face violate the establishment clause. *Board of Education v. Mergens*, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990).

I. CONFLICT BETWEEN FREE SPEECH AND NONESTABLISHMENT

The United States Constitution protects, among other rights, the fundamental freedom for people to express their views.[12] The principles of free speech allow students to express views that are contrary to those held by school officials.[13] In fact, the Supreme Court encourages student exposure to an exchange of diverse ideas.[14]

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4. The United States intervened in the action pursuant to 28 U.S.C. § 2403 (1988) to defend the constitutionality of the Equal Access Act. Board of Educ. v. Mergens, 110 S. Ct. 2356, 2363, 110 L. Ed. 2d 191, 205 (1990).

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

6. Mergens v. Board of Educ., No. CV 85-0-426, slip op. at 13 (D. Neb. Feb. 2, 1988).

7. Mergens v. Board of Educ., 867 F.2d 1076, 1080 (8th Cir. 1989), *aff'd*, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990).

8. *Id.* at 1079.

9. *Id.*

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

11. *Mergens*, 867 F.2d at 1079. In *Widmar*, the Supreme Court nullified, on free speech grounds, a state university's regulation that prohibited students from meeting in the school's facilities for religious discussions. *Widmar*, 454 U.S. at 277.

12. U.S. CONST. amend. I.

13. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969).

14. *Id.* at 512. The Court quoted from its decision in Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967): "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' " (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)).

In *Tinker v. Des Moines Independent Community School District*,[15] the Supreme Court ruled that restrictions on students' freedom of expression were permissible only upon specific evidence demonstrating that such expression would materially and substantially interfere with school activities or impinge upon other students' rights.[16] The school in *Tinker* violated the students' constitutional rights when it suspended students for wearing armbands to protest the Vietnam War even though no disruption had occurred.[17] Clearly, any attempt to suppress religious discussions among high school students would be equally unconstitutional.[18] Schools are not, however, obligated to provide students with a forum for extracurricular expression unless failure to do so would violate a student's free exercise right.[19] School officials may assume that students have opportunities outside of school for religious worship.[20]

The Supreme Court established a different standard for review in the event that a school has voluntarily opened a forum for student extracurricular activity.[21] The *Widmar* Court ruled that once the University of Missouri permitted students to initiate extracurricular activities, the school could not discriminate against student groups merely because school officials disapproved of the speech content at the groups' meetings.[22] A school that recognizes a number of secularly oriented clubs bears a heavy burden in demonstrating a compelling state interest for regulating student religious groups.[23] Courts have primarily recognized avoidance of an establishment clause violation as a compelling reason for schools to deny student religious organizations equal access to their facilities.[24]

The Supreme Court adopted a three-part test in *Lemon v. Kurtzman*[25] for

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15. *Tinker*, 393 U.S. at 503.

16. *Id.* at 511. *See* Healy v. James, 408 U.S. 169, 180 (1972).

17. *Tinker*, 393 U.S. at 514.

18. *See* Gambino v. Fairfax County School Bd., 429 F. Supp. 731, 736-37 (E.D. Va. 1977), *aff'd per curiam*, 564 F.2d 157 (4th Cir. 1977); Bayer v. Kinzler, 383 F.Supp. 1164, 1165-66 (E.D.N.Y. 1974), *aff'd*, 515 F.2d 504 (2d Cir. 1975); Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 970-72 (5th Cir. 1972). In these cases, the courts allowed students to discuss a variety of controversial topics and even permitted students to publish school newspaper articles about the controversies.

19. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

20. Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1048 (5th Cir. 1982), *cert. denied*, 459 U.S. 115 (1983) ("A school is obligated to provide religious facilities only if its failure to do so would effectively foreclose a person's practice of religion."); *accord* Abington School Dist. v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring); Brandon v. Board of Educ., 635 F.2d 971, 977 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-8, at 835 (1978).

21. Widmar v. Vincent, 454 U.S. 263, 270 (1981).

22. *Id.* at 267.

23. *Id.* at 269-70. *See also* Carey v. Brown, 447 U.S. 455, 461, 464-65 (1980) (statute distinguishing between labor picketing and other picketing declared unconstitutional).

24. *See Lubbock*, 669 F.2d at 1048; *Brandon*, 635 F.2d at 973-74; Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 15-17, 137 Cal. Rptr. 43, 51-53 (1977), *cert. denied*, 434 U.S. 877 (1977); *but cf.* Reed v. Van Hoven, 237 F. Supp. 48, 54 (W.D. Mich. 1965) (student-initiated religious activity is constitutionally permissible).

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

determining when the establishment clause is violated.[26] First, a governmental policy must have a secular purpose to be within constitutional limits.[27] Second, the principal effect of the policy must be one that does not advance or inhibit religion.[28] Finally, the policy must not foster an excessive government entanglement with religion.[29]

The Supreme Court in *Widmar* determined that the University of Missouri could allow a religious group to meet in the school and still satisfy the *Lemon* test.[30] First, the school maintained a forum open to various student groups; therefore, the addition of a student-initiated religious club did not undermine the University's secular aim of merely providing a forum in which students could exchange ideas.[31] Second, the Court explained that the religious group's incidental benefits from using school facilities did not constitute primary advancement of religion since all of the student organizations enjoyed the same benefits.[32] Finally, the University would risk greater entanglement with religion in trying to keep religious speech out of the forum.[33]

Three federal courts of appeal addressed the issue of religious meetings in public high schools, and all three ruled against such gatherings.[34] In *Brandon v. Board of Education*,[35] the Court of Appeals for the Second Circuit assumed that some impressionable students would perceive school endorsement of religion if the high school permitted prayer meetings in a classroom immediately before the school day commenced.[36] Additionally, the court noted that school officials would be required to monitor the religious club to maintain order and to ensure voluntary participation in the meetings.[37] The court decided that such surveillance would constitute prohibited government entanglement with religion.[38]

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26. *Id.* at 612.
27. *Id.*
28. *Id. See* Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).
29. *Lemon*, 403 U.S. at 613. *See* Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).
30. Widmar v. Vincent, 454 U.S. 263, 271 (1981).
31. *Id.* at 271-72.
32. *Id.* at 273-74. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973); *see also* Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 766-67 (1976) (annual grants to private colleges did not violate establishment clause); Hunt v. McNair, 413 U.S. 734, 741 (1973) (proposed financing of private college did not violate establishment clause); McGowan v. Maryland, 366 U.S. 420, 442 (1961) (laws restricting transactions on Sundays are not unconstitutional).
33. *Widmar*, 454 U.S. at 271-72.
34. Bender v. Williamsport Area School Dist., 741 F.2d 538, 560-61 (3d Cir. 1984), *vacated*, 475 U.S. 534 (1986); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1048 (5th Cir. 1982); Brandon v. Board of Educ., 635 F.2d 971, 980-81 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). Two courts considered the issue of religious meetings in public schools below the high school level. *See* Bell v. Little Axe Indep. School Dist. No. 70., 766 F.2d 1391, 1402-07 (10th Cir. 1985) (policy of elementary school violated establishment clause); Nartowicz v. Clayton County School Dist., 736 F.2d 646, 649 (11th Cir. 1984) (use of public address system by churches violated establishment clause).
35. *Brandon*, 635 F.2d 971 (2d Cir. 1980).
36. *Id.* at 978-79. The Second Circuit decided that schools violate the establishment clause if students perceive school endorsement of religion. *Id.*
37. *Id.* at 979.
38. *Id.*

The Court of Appeals for the Fifth Circuit, in *Lubbock Civil Liberties Union v. Lubbock Independent School District*,[39] used principally the same arguments adduced in *Brandon* to prevent religious meetings in Texas public schools.[40] In *Bender v. Williamsport Area School District*,[41] the Third Circuit stressed the importance of focusing on the particular facts of a first amendment case because there could be circumstances where the establishement clause would bend to accomodate free speech interests.[42] The court, nevertheless, found establishment clause concerns paramount.[43]

In 1984, Congress attempted to settle the debate surrounding student religious groups in high schools by passing the Equal Access Act.[44] The Act prohibits:

> . . . . any Federally Funded public secondary school[45] which has a limited open forum[46] from denying equal access or a fair opportunity to, or discriminating against, any students desiring to conduct a meeting[47] within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.[48]

II. *BOARD OF EDUCATION V. MERGENS*

In *Board of Education v. Mergens*, the Supreme Court applied and approved the Equal Access Act.[49] The *Mergens* Court addressed two issues: whether an application of the Act prohibited high school officials from excluding a student religious club from the school, and whether the Act complied with the establishment clause.[50] Justice O'Connor,[51] writing for the majority, determined that school officials violated the Equal Access Act by denying the Christian club permission to meet on school property.[52] A plurality of the Court then, combined the three-part *Lemon* test with the logic advanced in *Widmar* to hold that the Equal Access Act did not offend the establishment clause.[53]

The majority initially interpreted "noncurriculum related" in order to de-

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39. *Lubbock*, 669 F.2d 1038 (5th Cir. 1982).
40. *Id.* at 1042-48.
41. *Bender*, 741 F.2d 538 (3d Cir. 1984).
42. *Id.* at 559.
43. *Id.* at 561. ". . . the constitutional balance of interests tilts against permitting the [religious] activity to be conducted within the school as a general activity program." *Id.*
44. 20 U.S.C. § 4071 (1988). For a summary of the Act's procedural history, see Crewdson, *The Equal Access Act of 1984: Congressional and the Free Speech Limits of the Establishment Clause in Public High School*, 16 J. LAW & EDUC. 167, 170-76 (1987).
45. A secondary school is "a public school which provides secondary education as determined by State law." 20 U.S.C. § 4072(1) (1988).
46. *See supra* note 5.
47. Meeting is defined as "those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum." 20 U.S.C. § 4072(3) (1988).
48. *Id.* § 4071(a).
49. Board of Educ. v. Mergens, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990).
50. *Id.* at 2362, 110 L. Ed. 2d at 203.
51. Justices White, Blackmun, Scalia, Marshall, Brennan, Kennedy, and Chief Justice Rehnquist joined the judgment of the Court.
52. *Mergens*, 110 S.Ct. at 2370, 110 L. Ed. 2d at 213-14.
53. *Id.* at 2370-73, 110 L. Ed. 2d at 214-18.

termine whether Westside High School permitted any such student groups and thereby maintained a limited open forum, triggering the Equal Access Act's applicability.[54] Using the antonym of curriculum as defined in Webster's Dictionary,[55] the majority determined that noncurriculum related student groups are those groups that are to some degree unrelated to the course selection offered by the school.[56] The dissent, however, criticized the majority's assumption that noncurriculum is the antonym of curriculum since "[n]either Webster nor Congress has authorized" this definition.[57]

Upon reviewing the legislative history,[58] which the Court found contradictory and inconclusive, the Court determined that Congress intended a broad interpretation of the phrase since Congress designed the Equal Access Act "to address perceived widespread discrimination against religious speech in public schools."[59] Therefore, the majority held that any student group is noncurriculum related if the school does not teach, and will not soon teach, the subject matter of the group; if the subject matter of the group does not concern the body of courses as a whole; if the school does not require participation in the group for a particular course; and if the school does not give academic credit for participation in the group.[60]

Once the Court defined the phrase noncurriculum related, it easily determined that Westside maintained a limited open forum.[61] A school may not avoid creating an open forum by simply stating that all of its existing clubs further the school's goals in some way.[62] If a club's activity is, on its face, noncurriculum related, the school has an open forum.[63] Since the school denied the Christian club equal access to school facilities used by other noncurriculum related groups, Westside's school officials violated the Equal Access Act.[64]

The plurality proceeded to examine the Equal Access Act's effect on the establishment clause and held that it passed the three-prong *Lemon* test.[65] First, Congress enacted the Act to prevent discrimination against both secu-

54. *Id.* 110 S. Ct. at 2365, 110 L. Ed. 2d at 207.

55. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 557 (1976). Curriculum is defined as "the whole body of courses offered by an educational institution or one of its branches." *Id.*

56. *Mergens*, 110 S. Ct. at 2365, 110 L. Ed. 2d at 207.

57. *Id.* at 2393, 110 L. Ed. 2d at 242 (Stevens, J., dissenting). Justice Stevens argued that " '[n]onplus,' for example, does not mean 'minus' and it would be incorrect to assume that a 'nonentity' is not an 'entity' at all." *Id.*

58. *Id.* at 2366, 110 L. Ed. 2d at 208. *See* 130 CONG. REC. 19, 223 (1984) (statement of Sen. Hatfield). For an analysis of the congressional debate about the Equal Access Act, see Laycock, *Equal Access and Moments of Silence*, 81 NW. U.L. REV. 1, 37-39 (1986).

59. *Mergens*, 110 S. Ct. at 2366, 110 L. Ed. 2d at 208.

60. *Id.* at 2366, 110 L. Ed. 2d at 209.

61. *Id.* at 2369, 110 L. Ed. 2d at 212-13. The Court determined that the chess club, scuba diving club, and peer advocacy program constituted noncurriculum related student groups. *Id.*

62. *Id.* 110 S. Ct. at 2369, 110 L. Ed. 2d at 212. The Court rejected petitioners' argument that " 'curriculum related' means anything remotely related to abstract educational goals" since such a broad interpretation would make the Act meaningless. *Id.*

63. *Id.*

64. *Id.* at 2370, 110 L. Ed. 2d at 213-14.

65. *Id.* at 2370-73, 110 L. Ed. 2d at 214-18 (plurality). For an extensive history of estab-

lar and religious speech.[66] The plurality considered Congress's purpose undeniably secular.[67] Second, a high school that permits a religious club to meet in its buildings, along with other noncurriculum related groups, does not necessarily imply approval of the club's subject matter.[68] Specifically, the Court rejected the argument that high school students would confuse an equal access policy with school endorsement of religion.[69] Third, the Act prohibits school officials from participating in the religious discussions and permits the meetings only during noninstructional time.[70] These provisions, in addition to ensuring that students will not perceive school endorsement of religion, prevent school administration of religious activities.[71] A faculty member monitoring the meetings for custodial purposes does not constitute government entanglement with religion.[72]

In his concurring opinion, Justice Kennedy[73] disagreed with the plurality's determination that high schools with equal access policies do not endorse noncurriculum related clubs.[74] He stated that schools endorse clubs, in the common-sense use of the term, simply by allowing such organizations to use school facilities.[75] A school violates the establishment clause, however, only if it imposes pressure on students to engage in religious activities.[76] Thus, according to Justice Kennedy, coercion, not endorsement, should constitute the test for such a constitutional violation.[77]

Justice Marshall's[78] concurring opinion approached the endorsement issue differently. Consistent with the plurality, he warned that high schools must avoid the appearance of endorsing religious clubs.[79] Justice Marshall indicated, however, that the plurality did not adequately stress the duty placed on high schools to ensure religious neutrality.[80] In essence, a school with few advocacy-oriented groups must disassociate itself from its extracur-

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lishment clause doctrine, see Note, *The Constitutionality of Student-Initiated Religious Meetings on Public School Grounds*, 50 U. CIN. L. REV. 740, 741-59 (1981).

66. *Mergens*, 110 S. Ct. at 2371, 110 L. Ed. 2d at 215 (plurality).

67. *Id.*

68. *Id.*

69. *Id.* at 2372, 110 L. Ed. 2d at 216. The Court noted that Congress determined high school students capable of understanding the difference between student-initiated and state-initiated religious speech. Therefore, the Court will "not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations." *Id. See generally* Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 YALE L. J. 499, 507-09 (1983) (high school students can make their own determination).

70. 20 U.S.C. §§ 4071(c)(3),(5) (1988).

71. *Mergens*, 110 S. Ct. at 2373, 110 L. Ed. 2d at 217 (plurality).

72. *Id.*

73. Justice Scalia joined the concurring opinion.

74. *Mergens*, 110 S. Ct. at 2377-78, 110 L. Ed. 2d at 223 (Kennedy, J., concurring).

75. *Id.* at 2378, 110 L. Ed. 2d at 223. Endorse means "to approve, support or sustain." RANDOM HOUSE COLLEGE DICTIONARY 437 (1st ed. 1982).

76. *Mergens*, 110 S. Ct. at 2378, 110 L. Ed. 2d at 223 (Kennedy, J., concurring). A school may endorse religious clubs without coercing students to join them. *Id.*

77. *Id.*

78. Justice Brennan joined the concurring opinion.

79. *Mergens*, 110 S. Ct. at 2379, 110 L. Ed. 2d at 224 (Marshall, J., concurring).

80. *Id.* at 2380-83, 110 L. Ed. 2d at 225-29. Justice Marshall explained:

ricular program once a religious club is added.[81]

Justice Stevens wrote a lengthy dissent attacking the majority's interpretation of noncurriculum related student groups and its failure to distinguish the university forum in *Widmar* from the high school forum at Westside.[82] He argued that since Congress intended to extend the *Widmar* decision to high schools when it enacted the Equal Access Act, the limited public forum in *Widmar* is comparable to the limited open forum described in the Act.[83] Therefore, noncurriculum related student groups should be those that advocate "partisan theological, political, or ethical views" similar to the clubs in *Widmar*.[84]

Justice Stevens explained that the purpose of *Widmar* was to prevent discrimination against advocacy or controversial groups once a school permitted other such organizations to use its facilities.[85] The purpose was not, however, to force schools to open their facilities to advocacy groups in the first place.[86] Justice Stevens suggested that the majority forces any school with common clubs, such as chess or scuba diving clubs, to allow religious and political organizations.[87]

Justice Stevens demonstrated the difficulties that may arise when applying the Court's definition of "noncurriculum related."[88] For example, the presence of a football team may bring a school within the Equal Access Act,

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> Given the nature and function of student clubs at Westside, the school makes no effort to disassociate itself from the activities and goals of its student clubs.
>
> The entry of religious clubs into such a realm poses a real danger that those clubs will be viewed as part of the school's effort to inculcate fundamental values. The school's message with respect to its existing clubs is not one of toleration but one of endorsement. As the majority concedes, the program is part of the "district's commitment to teaching academic, physical, civic, and personal skills and values." [citation omitted]. But although a school may permissibly encourage its students to become well-rounded as student-athletes, student-musicians, and student-tutors, the Constitution forbids schools to encourage students to become well-rounded as student-worshippers. Neutrality toward religion, as required by the Constitution, is not advanced by requiring a school that endorses the goals of some noncontroversial secular organizations to endorse the goals of religious organizations as well.

Id. at 2380, 110 L. Ed. 2d at 225-26 (footnotes omitted).

81. *Id.* at 2382-83, 110 L. Ed. 2d at 229.

82. *Mergens*, 110 S. Ct. at 2383-93, 110 L. Ed. 2d at 229-42 (Stevens, J., dissenting).

83. *Id.* at 2384-85, 110 L. Ed. 2d at 231-32. Justice Stevens noted:

> As the Court of Appeals correctly recognized, the Act codified the decision in *Widmar*, "extending its holding to secondary public schools." [citation omitted]. What the Court of Appeals failed to recognize, however, is the critical difference between the university forum in *Widmar* and the high school forum involved in this case. None of the clubs at the high school is even arguably controversial or partisan.

Id. (footnotes omitted).

84. *Id.* at 2385, 110 L. Ed. 2d at 232.

85. *Id.* at 2386-87, 110 L. Ed. 2d at 233-34.

86. *Mergens*, 110 S. Ct. at 2386, 110 L. Ed. 2d at 233. Justice Stevens argued that "[n]othing in *Widmar* implies that the existence of a French club, for example, would create a constitutional obligation to allow student members of the Ku Klux Klan or the Communist Party to have access to school facilities." *Id.* (footnote omitted).

87. 110 S. Ct. at 2391, 110 L. Ed. 2d at 239.

88. *Id.* at 2387-88, 110 L. Ed. 2d at 235.

depending on whether flag football is also taught in a physical education class.[89] Additionally, schools may be able to constantly manipulate the Act's applicability by altering the subjects taught in classes.[90] In concluding his dissent, Justice Stevens stated that the Court should have defined noncurriculum as the subjects that "cannot properly be included in a public school curriculum."[91]

III. CONCLUSION

In *Board of Education v. Mergens*, the Supreme Court held that the Equal Access Act prohibits public high schools from discriminating against noncurriculum related student groups based on the content of speech at their meetings. The Court ruled that Westside High School, which maintained a limited open forum for noncurriculum related groups, violated the Act when it denied equal access to a Christian club. Additionally, the Court stressed that Congress intended the Equal Access Act to apply to most high schools. Few schools, therefore, will be able to use the establishment clause as a basis for excluding religious groups.

89. *Id.* at 2388, 110 L. Ed. 2d at 235. Justice Stevens explained:

> The Court's analysis makes every high school football program a borderline case, for while many schools teach football in physical education classes, they usually teach touch football or flag football, and the varsity team usually plays tackle football. Tackle football involves more equipment and greater risk, and so arguably stands in the same relation to touch football as scuba diving does to swimming.

Id.

90. 110 S. Ct. at 2387, 110 L. Ed. 2d at 234-35.

91. *Id.* at 2393, 110 L. Ed. 2d at 242.