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I. INTRODUCTION

Several years ago, a few students at a public high school organized a group called "Students for Voluntary Prayer."[1] The group sought permission from the school's principal to conduct communal prayer meetings in a classroom before the start of each school day.[2] The students made it clear that they were not seeking supervision or faculty involvement, and that their activities were completely voluntary and would not conflict with other school functions.[3] This request for student-initiated religious expression was disallowed by public school authorities, and the students filed suit seeking vindication for the denial of their free exercise, free speech, free association, and equal protection rights.[4] The students lost their case in both the district court[5] and the court of appeals on establishment clause grounds.[6] The court of appeals went so far as to suggest that even the *appearance* of government involvement with such a gathering of students "is too dangerous to permit."[7]

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1. Brandon v. Board of Educ. of the Guilderland Cent. School Dist., 635 F.2d 971, 973 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

2. *Id.*

3. *Id.*

4. *Id.* The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

5. 487 F. Supp. 1219 (N.D.N.Y.), *aff'd*, 635 F.2d 971 (1980), *cert. denied*, 454 U.S. 1123 (1981).

6. *Brandon*, 635 F.2d at 978-80.

7. *Id.* at 978.

The attitude of the courts, as well as of others,[8] seems to imply that somehow students who seek religious expression in the public schools are circumscribed and segregated and, thus, do not have equal treatment under the law. This approach is a form of religious apartheid which threatens the rights of an entire class of citizens. Certainly, there has been a plethora of debate concerning the constitutionality of religious activity on the public school campus.[9] Although state-sponsored and required religious activity on the public school campus indubitably falls within the strictures of the establishment clause,[10] student-initiated religious expression[11] on the public school campus[12] should be protected under the free speech clause.[13]

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8. *See, e.g.*, Ares, *Religious Meetings in the Public High School: Freedom of Speech or Establishment of Religion?*, 20 U.C.D. L. REV. 313 (1987); Teitel, *When Separate Is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U.L. REV. 174 (1987); Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis*, 12 HASTINGS CONST. L.Q. 529 (1985); Note, *The Right of Public High School Students to Conduct a Prayer Group on Public School Premises During Student Activity Period*, 10 T. MARSHALL L.J. 449 (1985).

9. *See, e.g.*, Piele & Pitt, *The Use of School Facilities by Student Groups for Religious Activities*, 13 J. LAW. & ED. 197 (1984); Stone, *The Equal Access Controversy: The Religion Clauses and the Meaning of "Neutrality"*, 81 NW. U.L. REV. 168 (1986); Strossen, *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?*, 71 CORNELL L. REV. 143 (1985); Note, *Religious Liberty in the Public High School: Bible Study Clubs*, 17 J. MARSHALL L. REV. 933 (1984); Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 YALE L.J. 499 (1983) [hereinafter *Student-Initiated Activity*]; Note, *The Constitutionality of Student-Initiated Religious Meetings on Public School Grounds*, 50 U. CIN. L. REV. 740 (1981).

10. *See, e.g.*, Edwards v. Aguillard, 107 S. Ct. 2573 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39, *reh'g denied*, 449 U.S. 1104 (1981); School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); McCollum v. Board of Educ., 333 U.S. 203 (1948); *see also infra* note 146 and accompanying text.

11. For the purposes of this article, student-initiated activity includes (but is not limited to) any traditional free speech activities, speeches, conversations, literature distribution, meetings, etc., that would not be questioned except for their purported religious content.

12. The public high school is not distinguished from junior high or elementary schools in terms of this article. Just as there is little to distinguish the high school student from the university student, there is little to distinguish the junior high school student from the high school student. As Professor Laycock notes:

> [W]hen a junior high or elementary school does create an open forum, there is no reason to distinguish it from a high school. Exclusion of religious speech is still discriminatory and hostile to religion. The argument for exclusion still depends on the premise that government approves of everything it does not censor. . . . Student maturity goes to whether the school should create an open forum in the first place. It cannot justify excluding religion from a forum that a school voluntarily creates . . . .

Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1, 51-52 (1986).

13. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981); Tinker v. Des Moines Indep.

This article will argue that student-initiated religious expression should be protected by both first and fourteenth amendment provisions. Moreover, such religious expression is a preferred first amendment right and cannot be contravened by any establishment clause concerns.[14] To the contrary, the religion clause mandates an accommodation of the free speech rights of students even in the context of religious expression.[15]

II. ACCOMMODATION

Accommodation of religion has both historical and constitutional roots.[16] Accommodation is the essence of government neutrality toward religion as required by the United States Supreme Court.[17] The Supreme Court has relied upon the intent of the framers of the Bill of Rights for understanding the meaning and reach of the establishment clause.[18] In fact, accommodation really makes little sense with-

School Dist., 393 U.S. 503 (1969) (affirming students' general right to free speech); Thompson v. Waynesboro Area School Dist., 673 F. Supp. 1379 (M.D. Pa. 1987); Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983), *rev'd*, 741 F.2d 538 (3d Cir. 1984), *vacated*, 475 U.S. 534 (1986); *see also* Strossen, *supra* note 9, at 149-57; Note, *Religion in Public Schoolrooms—Striking a Balance Between Freedom of Speech and Establishment of Religion: Bender v. Williamsport Area School District*, 1984 B.Y.U. L. REV. 671; Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 GEO. L.J. 135 (1983); *Student-Initiated Activity*, *supra* note 9, at 500-01, 504-07.

14. *See infra* notes 138-179 and accompanying text. *See generally* J. WHITEHEAD, THE FREEDOM OF RELIGIOUS EXPRESSION IN PUBLIC UNIVERSITIES AND HIGH SCHOOLS (2d ed. 1986).

15. *See infra* notes 16-61 and accompanying text.

16. *See infra* notes 20-61 and accompanying text.

17. *See, e.g.*, Bender v. Williamsport Area School Dist., 475 U.S. 534, 553-55 (1986) (Burger, C.J., dissenting); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 382 (1985); Lynch v. Donnelly, 465 U.S. 668, 714 (1983) (Brennan, J., dissenting); Marsh v. Chambers, 463 U.S. 783, 802-03 (1983) (Brennan, J., dissenting); Thomas v. Review Bd., 450 U.S. 707, 717 (1981); McDaniel v. Paty, 435 U.S. 618, 629, 636 (1978); Maher v. Roe, 432 U.S. 464, 475 n.8 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736, 747 (1976) (plurality opinion); Meek v. Pittenger, 421 U.S. 349, 372 (1975); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792-93 (1973); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); Gillette v. United States, 401 U.S. 437, 449, 469 (1971); Welsh v. United States, 398 U.S. 333, 372 (1970) (White, J., dissenting); Epperson v. Arkansas, 393 U.S. 97, 103-04, 109 (1968); Board of Educ. v. Allen, 392 U.S. 236, 242, 249 (1968); Sherbert v. Verner, 374 U.S. 398, 409, 422-23 (1963); School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203, 215-22, 226 (1963); Engel v. Vitale, 370 U.S. 421, 443 (1962) (Douglas, J., concurring); McGowan v. Maryland, 366 U.S. 420, 564 (1961) (Douglas, J., dissenting); Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

18. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting); Marsh v. Chambers, 463 U.S. 783, 786-92 (1983); Walz v. Tax Comm'n, 397 U.S. 664, 719-27 (1970) (Douglas, J., dissenting); McGowan v. Maryland, 366 U.S. 420, 434-36 (1961); *see also* McCollum v. Board of Educ., 333 U.S. 203, 213-16 (1948); Everson v.

out at least a brief look at its historical roots.

This historical record shows that the revolutionary and founding periods favored government accommodation of religious practice. Both Thomas Jefferson and James Madison, often cited for their disestablishmentarian views, in fact tolerated and approved numerous religious practices in the public schools and in public life.[19] Contemporary case law and theory support both this historical analysis as well as the need to accommodate religion in American public life.

A. The Historical Perspective

In religion clause adjudication, no less than in any other area of the law, Justice Holmes' statement is most fitting: "[A] page of history is worth a volume of logic."[20] The Supreme Court has determined that "the ultimate constitutional objective" as expressed by the framers and "as illuminated by history" is of particular relevance in religion clause adjudication.[21] Because of this basic constitutional presupposition, concrete, specific historical evidence of the framers' views on religion and religious practices in public education must be understood to determine the reach and meaning of the religion clause.

History provides varied and ample evidence that among the framers the universal sentiment toward religion was one of *accommodation* and, often, encouragement of a particular religion.[22] Public

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Board of Educ., 330 U.S. 1, 8-16 (1947); *cf.* Reynolds v. United States, 98 U.S. 145, 162-64 (1878) (analyzing historical meaning of free exercise clause). *See generally* D. DREISBACH, REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT (1987); J. WHITEHEAD, *supra* note 14.

19. In fact, Madison and Jefferson participated in some legislative activities on behalf of religion that no doubt horrify modern separationists. For example:

> On October 31, 1785, Madison introduced . . . [a] bill [in the Virginia legislature] which was appropriately called 'A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers.' There is strong evidence that this bill . . . was . . . penned by Jefferson. The bill in essential parts exempted clergymen from arrest while performing religious services and mandated severe punishment for disturbers of public worship or citizens laboring on Sunday.

D. DREISBACH, *supra* note 18, at 120 (footnotes omitted). *See infra* notes 25-42 and accompanying text.

20. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

21. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 673-78 (1984); Marsh v. Chambers, 463 U.S. 783, 786-92 (1983); Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970); *see also supra* note 18 and accompanying text.

22. Story noted:

> Probably at the time of the adoption of the Constitution and of the amendment to it now under consideration, the general, if not the universal, sentiment in America was that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship.

2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 593-95 (2d ed. 1851); *see also* H. BLACK, CONSTITUTIONAL LAW 515 (4th ed. 1927); T. COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW 224 (1893).

education was no exception.[23] In contemporary society, accommodation of all religions, rather than encouragement of any, comports best with the American mind and better squares with constitutional guidelines.[24]

The views of Thomas Jefferson and James Madison have been previously recognized by the Supreme Court as most instructive in determining the meaning and reach of the religion clause.[25] Although Thomas Jefferson cannot in the true sense be regarded as a framer of the first amendment, the Court, in its early religion clause cases, adopted the view that "the framers spoke in a wholly Jeffersonian dialect and those who ratified it fully understood that style of speech."[26] At the time of the drafting and adoption of the first amendment, Jefferson was in France.[27] However, through his correspondence with James Madison, Jefferson's influence was at least partially felt.[28]

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23. For example, the Continental Congress enacted the Northwest Ordinance on July 13, 1987. That ordinance, in part, provided: "*Religion*, morality, and knowledge being essential to good government and the happiness of mankind, *schools and the means of education* shall forever be encouraged." Ordinance of 1787, art. 3 (1787), *reprinted* in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF AMERICAN STATES 52 (1927) (emphasis added). This early acknowledgment of the relationship between religion and education bespeaks a clear intent that religion, instead of being segregated from the educational process was, in fact, inseparable from the educational process. It is also significant that on August 7, 1789 (after the agreement to the final wording of the first amendment religion clause and the other provisions of the Bill of Rights), the Congress of the newly formed federal government reenacted the Northwest Ordinance. Northwest Ordinance, ch. 8, 1 Stat. 50-51 (1845).

24. *See, e.g.*, *infra* notes 44-61 and accompanying text.

25. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947).

26. M. HOWE, THE GARDEN AND THE WILDERNESS 10 (1965). Moreover, as early as Reynolds v. United States, 98 U.S. 145 (1878), the Supreme Court had canonized Jefferson's supposed version of the meaning of the first amendment religion clause by stating that "it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured." *Id.* at 164. This was in reference to Jefferson's statement that the religion clause built "a wall of separation between church and State." *Id.* However, it has been noted that:

> [T]he First Amendment was hardly the exclusive product of any one person. Subsequent interpretations of the Amendment should not be controlled by the singular statements of Madison [or] Jefferson. . . . An examination of the early activities of the Federal Government indicates that the people approved and welcomed its aid to church-related activities. . . . There was undoubtedly the faith that subsequent generations of Americans would be able to utilize the power of the Federal Government to promote the concurrent interests of government and religion under First Amendment norms that were reasonable, pragmatic, and just.

C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT 207-09 (1964).

27. *See Reynolds*, 98 U.S. at 163; *see also* D. DREISBACH, *supra* note 18, at 115.

28. D. DREISBACH, *supra* note 18, at 115-16, 119. In many ways, the views of

Although the adoption of the fourteenth amendment eventually resulted in the establishment clause being made applicable to the states,[29] the historically diverse record of state-church establishment nevertheless illustrates that the term "establishment" in the first amendment had an *institutional* meaning: "The real object of the [first] amendment was . . . to prevent any national ecclesiastical establishment which should give to [a] hierarchy the exclusive patronage of the national government."[30] As Jefferson's often quoted expression stated, the purpose for the religion clause was to build "a wall of separation between *church* and *State*."[31] No wall of separation was intended, however, even by Jefferson, to seal religion hermetically from governmental or public activities. Rather, the *institution* of the church was to be isolated from the *institution* of the state.[32] That the accommodation of religious expression was compatible with the "separationist" views of Thomas Jefferson was particularly evidenced in Jefferson's actions in the field of education.[33] Moreover, Jefferson as president repeatedly departed from the fastidious separationism which revisionist historians have attrib-

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Madison and Jefferson were *not* representative of those of the framers of the Constitution. Both Madison and Jefferson were from Virginia and were central figures in the fight in that state for the disestablishment of the Church of England. *See* Engel v. Vitale, 370 U.S. 421, 428-29 (1962); *Everson*, 330 U.S. at 11-13, 33-42. Moreover, both Madison's *Memorial and Remonstrance Against Religious Assessments*, written in 1785 in opposition to legislation which would use Virginia's public funds to pay teachers of the Christian religion, and Jefferson's *Bill for Establishing Religious Freedom* in Virginia, proposed in 1779 and enacted in 1786, were central documents to these disestablishmentarian forces. Madison, *Memorial and Remonstrance*, in VIII THE PAPERS OF THOMAS JEFFERSON (1950); *see also* BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA 1776-1787 (1977). Not all states, however, shared Madison's and Jefferson's fervor for disestablishment. As the Supreme Court has previously noted, at the outbreak of the Revolutionary War, "there were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five." *Engel*, 370 U.S. at 428 (footnote omitted).

29. Historical evidence of the framers' intent is made no less relevant by the adoption of the fourteenth amendment. In Marsh v. Chambers, 463 U.S. 783, 790-91 (1983), the Court said: "In applying the First Amendment to the states through the 14th Amendment, Cantwell v. Connecticut, 310 U.S. 296 (1940), it would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed upon the Federal Government."

30. Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (citing 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (1833)).

31. 8 WORKS OF THOMAS JEFFERSON 113 (Washington ed. 1861) (emphasis added).

32. In 1805 in his Second Inaugural Address, Jefferson said:

> In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the general [federal] Government. I have, therefore, undertaken on no occasion to prescribe the religious exercises suited to it, but have left them, as the constitution found them, under the direction and discipline of the State or Church authorities acknowledged by the several religious societies.

THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 341 (Koch & Peden ed. 1944).

33. *See infra* notes 35-42 and accompanying text.

uted to him.[34]

Jefferson was the founder of the University of Virginia. From its inception in 1819, the school was governed, managed, and controlled by the Commonwealth of Virginia. The question of the Christian religion at the University of Virginia was presented to him. Mr. Jefferson detailed his views in his annual report as Rector to the President and Directors of the Literary Fund of the University.[35] Simply put, Jefferson was not opposed to religious worship and study being conducted on the premises of a public educational institution.[36] To the contrary, in order to perpetuate and accommodate the religious beliefs and exercise of students at the public university, he recommended that students be allowed to meet on the campus to pray, worship, and be instructed together or, if need be, to meet and pray

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34. For example, on three separate occasions, Jefferson signed into law extensions of a land grant given by the federal government specifically to promote education and proselytizing amongst the Indians. *See* Act of March 3, 1803, ch. 30, 2 Stat. 155-56 (1845); Act of April 26, 1802, ch. 30, 2 Stat. 236-37 (1845); and Act of March 19, 1804, ch. 26, 2 Stat. 271-72 (1845). Further, in 1803, President Jefferson proposed to the United States Senate a treaty with the Kaskaskia Indians in which the federal government would agree to "give annually for seven years one hundred dollars towards the support of a priest" and "further give the sum of three dollars to assist the said tribe in the erection of a church." *A Treaty Between the United States of America and the Kaskaskia Tribe of Indians*, 7 Stat. 78-79 (1846). The treaty was ratified on December 23, 1803, and included a specific appropriation for a Catholic mission, at President Jefferson's request. *Id.*

35. Jefferson said:

> The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in general institution of the useful sciences. . . . *A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit the public provisions made for instruction in the other branches of science.* . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, *to establish their religious schools on the confines of the University*, so as to give to their students ready and convenient access and attendance on the scientific lectures of the University; and to maintain, by that means, those destined for religious professions on as high a standing of science, and of personal weight and respectability, as may be obtained by others from the benefits of the University. Such establishments would offer the further and great advantage of *enabling the students of the University to attend religious exercise with the professor of their particular sect, whether in rooms of the building still to be erected, and destined to that purpose under impartial regulations*, as proposed in the same report of the commissioners, *or in the lecturing room of such professor*. . . . Such an arrangement would *complete the circle* of the useful sciences embraced by this institution, and would fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion.

19 THE WRITINGS OF THOMAS JEFFERSON 414-17 (Memorial ed. 1904) (emphasis added).

36. *Id.*

with their professors.[37] He wanted only to "exclude the public authorities from the domain of religious freedom,"[38] i.e., from prescribing religious expression. Surely, Jefferson would not have objected to student-initiated free expression on the premises of a public school.[39]

It is also significant that when Congress initially authorized the public schools for the nation's capital, the first president of the school board was Jefferson himself.[40] In fact, Jefferson "was the chief author of the first plan of public education adopted for the City of Washington."[41] The first official report on file indicates that the Bible and Watts Hymnal were the principal, if not the only, books then in use for reading by the public school student.[42]

Accommodation, of course, does not stop with the historical process. It also finds strength in modern legal commentary and case law.[43]

B. Contemporary Accommodation

First amendment neutrality mandates that the public schools present no affront to the spiritual needs and concerns of their students.[44] Under contemporary religion clause adjudication, this means, as Professor Laycock has argued, "government conduct that insofar as possible neither encourages nor discourages religious belief or practice."[45] Insofar as free speech is concerned, "the government must be neutral both in its own speech and in its treatment of private speech. It may not take a position on questions of religion in its own speech, and it must treat *religious speech by private speakers* exactly like secular speech by private speakers."[46] The private, personal

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37. *Id.*

38. *Id.*

39. James Madison was a Member of the Board of Visitors which approved the report of Jefferson made as Rector, providing an indication of Madison's views on the constitutionality of voluntary religious worship and education in public schools. Regulations Adopted by the Board of Visitors of the University of Virginia, October 4, 1824, Jefferson, Madison, Breckenridge, Cocke, Loyally, and Cabell Being Present, *cited in* THE COMPLETE JEFFERSON 1110 (Padover ed. 1943).

40. Wilson, *Public Schools of Washington*, 1 RECORDS OF THE COLUMBIA HISTORICAL SOCIETY 4 (1897).

41. *Id.* at 5.

42. *Id.* at 9.

43. *See infra* notes 44-61 and accompanying text.

44. *See, e.g.*, Jones v. Opelika, 316 U.S. 584, 624 (1942) (Black, Douglas, Murphy, J. J., dissenting) (finding that "our democratic form of government . . . has a high responsibility to accommodate itself to the religious view of minorities, however unpopular and unorthodox those views may be"), *vacated*, 319 U.S. 103 (1943) (for reasons stated in original dissenting opinions).

45. Laycock, *supra* note 12, at 3.

46. *Id.* (footnotes omitted) (emphasis added).

view of the speaker or speakers is the quintessence of student-initiated religious speech.

Restraining, banning, or prohibiting student-initiated religious expression in public schools has significant "chilling effects" on first amendment rights of students.[47] First, it prefers those who believe in no religion over those who believe.[48] Second, it subjugates the free speech and exercise clauses to establishment clause interests,[49] thus creating an inherent inconsistency within the first amendment itself. Giving establishment interests precedence over free exercise interests creates a bludgeoning effect in that the establishment clause becomes a weapon to repress free speech and exercise rights.[50]

It should be obvious that governmental actions, which are "simply a tolerable acknowledgement of beliefs widely held among the people of this country," are not per se an establishment of religion.[51] It should be equally clear that the "limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the free exercise clause. To equate the two would be to deny a national heritage with roots in the Revolution itself."[52] Therefore, as the Supreme Court has held, "there is room for play in the joints productive of a benevolent neutrality" toward religion.[53]

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47. *Cf.* NAACP v. Button, 371 U.S. 415, 433 (1963). *See generally* Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U.L. REV. 685 (1978).

48. *See* School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203, 225 (1963) (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

49. As noted by Kauper:

> If the protection afforded in the name of religious freedom against a state-prescribed non-theistic orthodoxy is that a person cannot be compelled to participate, whereas the protection afforded in the name of the establishment clause is that a person may demand that any exercise promoting theistic belief be completely eliminated, the result is that the freedom protected by the establishment clause is regarded as having a higher value than the freedom protected by the free exercise clause.

Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031, 1063 (1963).

50. The Supreme Court has recognized the need for a balance of interests in the first amendment. For example, in Mueller v. Allen, 463 U.S. 388 (1983), the court noted: "As *Widmar* and our other decisions indicate, a program . . . that *neutrally provides state assistance to a broad spectrum of citizens* [i.e., religious and nonreligious] is not readily subject to challenge under the Establishment Clause." *Id.* at 398-99 (emphasis added); *see also* Widmar v. Vincent, 454 U.S. 263 (1981); *cf.* Bowen v. Kendrick, 108 S. Ct. 2562 (1988); Corporation of Presiding Bishop v. Amos, 107 S. Ct. 2862 (1987).

51. Marsh v. Chambers, 463 U.S. 783, 792 (1983).

52. Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970) (citing Sherbert v. Verner, 374 U.S. 398, 423 (1963)) (Harlan, J., dissenting); Braunfeld v. Brown, 366 U.S. 599, 608 (1961).

53. *Walz*, 397 U.S. at 669.

This "benevolence" is mandated when student-initiated religious expression is involved or when basic constitutional rights will be violated.[54]

Alfred North Whitehead once pointed out that education is an essentially religious inquiry.[55] Education, as contrasted with vocational training, requires an examination and discussion of fundamental values.[56] Public schools obviously intrude into the area of religion with courses in comparative religion, philosophy, ethics, sex education, and values clarification. As Professor Giannella notes: "Unlike . . . other areas, formal public education does not involve a pattern of regulation in which the place of religion can be derived from the secular categories. . . . [E]ducation directly touches upon religious concerns, such as the meaning of existence and the sources and nature of human values."[57]

Because of the state's ingress through the public schools into the precinct of religion, it is constitutionally impermissible for government to fanatically seal religious expression from its educational institutions.[58] Such a secularization would prefer nonbelief over belief.[59] Moreover, as the Supreme Court has recognized, the Constitution does not require "complete separation of church and state; it *affirmatively mandates accommodation*, not merely toleration, of all religions, and forbids hostility towards any."[60]

The requirement of affirmatively mandated accommodation is particularly relevant in education. Just as state-prescribed religious exercises could convey—indeed inculcate—doctrines contrary to the views of the student as well as the student's parents, the placing of the governmental hand upon the shoulder of a young religious adherent for freely holding and expressing religious views would be equally inappropriate. In the past, the Supreme Court has sought to "sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."[61] Nothing more than this would be undertaken in permitting student-initiated religious expression on an equal basis along with other student expression.

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54. *See infra* notes 64-140 and accompanying text.

55. A.N. WHITEHEAD, THE AIMS OF EDUCATION 26 (1952).

56. *Id.*; *see also supra* notes 22-42 and accompanying text.

57. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development—Part II*, 81 HARV. L. REV. 513, 561 (1968).

58. *See* Roemer v. Board of Pub. Works, 426 U.S. 736, 745-46 (1976).

59. Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).

60. Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (emphasis added).

61. *Zorach*, 343 U.S. at 313.

III. FREE SPEECH AND RELATED INTERESTS

A. The Tinker-Widmar Analysis

Any discussion concerning first amendment rights available to high school students must begin with the principles announced in *Widmar v. Vincent*[62] and *Tinker v. Des Moines Independent Community School District*.[63] The issue in *Tinker* was whether the wearing of armbands by public high school students during school hours in protest of the Vietnam War was constitutionally protected under the first and fourteenth amendments as a form of expression so closely akin to "pure speech" as to be "entitled to comprehensive protection under the First Amendment."[64] The Supreme Court upheld the right of the students, emphasizing that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[65]

In order to define what would constitute "constitutionally valid reasons," the *Tinker* Court formulated a two-pronged test:[66] a student's freedom of expression is guaranteed on a public high school campus if it does not materially and substantially interfere with the requirement of appropriate discipline in the operation of the school, and if it does not invade or collide with the rights of others.[67]

In applying the *Tinker* test to student-initiated religious expression, the Court's insistence that "[a] student's rights . . . do not embrace merely the classroom hours"[68] must be kept in mind.

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62. 454 U.S. 263 (1981).

63. 393 U.S. 503 (1969).

64. *Id.* at 505-06. Since *Tinker*, many lower courts have followed suit. *See, e.g.*, San Diego Comm'n Against Registration & the Draft v. Governing Bd., 790 F.2d 1471 (9th Cir. 1986) (antidraft advertisements); Gambino v. Fairfax County School Bd., 564 F.2d 157 (4th Cir. 1977) (birth control information); Jacobs v. Board of School Comm'rs, 490 F.2d 601 (7th Cir. 1973) (underground newspaper, profanity), *vacated*, 420 U.S. 128 (1975); Shanely v. Northeast Indep. School Dist., 462 F.2d 960 (5th Cir. 1972) (challenge to marijuana laws, birth control information); Thompson v. Waynesboro Area School Dist., 673 F. Supp. 1379 (M.D. Pa. 1987) (distribution of student newspaper with religious content); Wilson v. Chancellor, 418 F. Supp. 1358 (D. Or. 1976) (Communist speaker); Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974) (birth control and abortion information), *aff'd*, 515 F.2d 504 (2d Cir. 1975); *cf.* Note, *The Equal Access Act: A Haven for High School "Hate Groups"?*, 13 HOFSTRA L. REV. 589, 608-11 (1985); Note, *Administrative Regulation of the High School Press*, 83 MICH. L. REV. 625 (1984).

65. Tinker v. Des Moines Ind. Com. School Dist., 393 U.S. 503, 511.

66. *Id.* at 513.

67. *Id.*

68. *Id.* at 512.

Therefore, under *Tinker*, "it is apparent that religious students not only *may* be, but *must* be granted such a right, unless it could be shown that discussions among students would materially and substantially interfere with appropriate school discipline or that . . . [they] would collide with or invade the rights of others."[69]

The *Tinker* Court also held that prior restraints on student expression would be permissible only in the presence of "*facts* which might reasonably have led school authorities to *forecast substantial disruption of or material interference with* school activities."[70] The core word "fact" is essential to an understanding of the Court's reasoning,[71] since the Court has previously refused to sanction prior restraints merely on the basis of past experience.[72] A prior restraint on student-initiated religious expression would be justified only if the "facts" supported a reasonable belief on the part of school officials that such expression would cause substantial and material disruption or interference with school discipline.[73] The *Tinker* Court distinguished such a reasonable belief from an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression" in public high schools.[74] *Tinker*, "despite permitting some restraints, grants extensive first amendment rights to high school students, rights not subject to limitations merely to prevent embarrassment or discomfiture to school authorities."[75]

In *Widmar v. Vincent*,[76] a public university denied a student religious club access to university meeting facilities that were otherwise generally available for use by student organizations.[77] Finding that the university had created a public forum by its general accommodation of student meetings, the Court held that the school's exclusion of religious speech from that forum violated the first amendment's free speech clause.[78] Of importance was the fact that the Court reaffirmed the principle that religious speech is entitled to all the protections of the free speech clause.[79] The *Widmar* Court also rejected the school's contention that the establishment clause compelled ex-

69. Toms & Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 EMORY L.J. 3, 32 (1978) (emphasis in original).

70. *Tinker*, 393 U.S. at 514 (emphasis added).

71. *See* Comment, *Prior Restraints in Public High Schools*, 82 YALE L.J. 1325, 1326, 1334 (1973).

72. *See, e.g.*, Kunz v. New York, 340 U.S. 290, 294-95 (1951).

73. *Tinker*, 393 U.S. at 513.

74. *Id.* at 508.

75. Note, *Prior Restraint—Nitzberg v. Parks*, 35 MD. L. REV. 512, 522 (1976); *see also* Comment, *supra* note 71.

76. 454 U.S. 263 (1981).

77. *Id.* at 264-65.

78. *Id.* at 270-76.

79. *Id.*

clusion.[80] Consequently, the Court held the school's discriminatory action unconstitutional.[81] In sum, the *Widmar* Court established two propositions: first, the creation of an open forum in no way commits the educational institution to the goals of the various students who make use of that forum; second, the fact that the forum was of benefit to a broad spectrum of both religious and nonreligious persons negated any inference of state approval.[82]

Justice White's dissent in *Widmar* argued that religious speech is constitutionally different from all other speech because the first amendment itself "distinguishes religious speech" from other speech.[83] The *Widmar* majority, by the import of its decision, rejected such reasoning as well as Justice White's attempted distinction between worship and religious speech.[84] *Widmar*, along with a case decided the year before, effectively equated secular and religious speech on public property.[85]

Since the *Widmar* Court dealt only with university policies based on the facts in that case, it left open the question of the rights of religious expression on public high school campuses.[86] Although some lower courts have restricted the access of religious groups to meet,[87] a federal district court in *Bender v. Williamsport Area School Dis-*

80. *Id.* at 270.

81. *Id.* at 277.

82. *Id.* at 267-76.

83. *Id.* at 284-85 (White, J., dissenting). Justice White cited the school prayer and Bible reading as support for his argument. *Id.* at 285.

84. *Id.* at 269 n.6. The *Widmar* majority also stated that if a distinction between worship and other religious speech could be drawn and administered, the government is constitutionally incompetent to draw it. *Id.* The Court went on to note that even if some establishment clause interest might be involved, the majority could see no reason to distinguish religious worship from other religious speech since worship should be no less protected than the proselytizing found in Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981). In *Heffron*, the Supreme Court rejected the claim that religious speech is more protected than other noncommercial speech. *Id.* at 652-53. *Heffron* is "[t]he Supreme Court's most explicit equation of secular and religious speech on public property . . . ." Laycock, *supra* note 12, at 12.

85. *See Heffron*, 452 U.S. at 640; *see also supra* note 84 and accompanying text.

86. Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 GEO. L.J. 135, 136 (1983).

87. *See, e.g.*, Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th 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. of Guilderland Cent. School Dist., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); Mergens v. Board of Educ. of Westside Community Schools, No. CV-85-0-426 (D. Neb. Feb. 2, 1988); Clark v. Dallas Indep. School Dist., 671 F. Supp. 1119 (N.D. Tex. 1987); Garnett v. Renton School Dist., 675 F. Supp. 1268 (W.D. Wash. 1987); Ford v. Manuel, 629 F. Supp. 771 (N.D. Ohio 1985); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977), *cert. denied*, 434 U.S. 877 (1977).

trict[88] held that the *Tinker-Widmar* analysis applies in public secondary schools in much the same manner as it applies to public universities. Specifically, the court held that a public high school had created a limited public forum for student-initiated speech by providing for an activity period scheduled during the school day.[89] Thus, the court required the school to justify its exclusion of student-initiated religious speech by showing a compelling state interest.[90] Applying this test, the court found that allowing religious meetings during the activity period would not violate the establishment clause, compliance with which the school had asserted to be a compelling interest.[91] The court said:

> This is not a case where school administrators have adopted a rule or policy requiring, or even allowing, students to meet for religious purposes. This is not a case where a school teacher or other school official has adopted a practice of requiring or encouraging school prayer or other religious discussion in his classroom. It is not a case where a teacher or other school official encouraged or counselled the students to request the opportunity to meet during the activity period. It is not a case where the students represent a particular religious denomination. Rather, in this case, a number of students, acting voluntarily and free of outside influences, have requested permission to form a club and meet during the school's activity period on the same basis as other student organizations. The request was denied on the sole ground that the students wished to engage in religious speech. This decision was not based on a judgment regarding curricular choices or concerns of discipline and order. It was based solely upon the belief that the school board cannot exercise power to grant the request without contravening the United States Constitution.[92]

The Supreme Court adopted a somewhat different standard for certain types of student speech in *Hazelwood School District v. Kuhlmeier*.[93] Nevertheless, the *Kuhlmeier* Court was careful to emphasize the continuing validity of the *Tinker* standard in the appropriate context:

> Students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." [citation omitted] They cannot be punished merely for expressing their *personal views* on the school premises—whether "in the cafeteria, or on the playing field, or on the campus during the authorized hours," . . . unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students."[94]

The student speech in *Kuhlmeier* involved more than the simple message of armbands, or personal communication between students on school property (that was at issue in *Tinker*).[95] Rather, the question posed in *Kuhlmeier* was whether the school could censor student

88. 563 F. Supp. 697 (M.D. Pa. 1983), *rev'd*, 741 F.2d 538 (3d Cir. 1984), *vacated*, 475 U.S. 534 (1986).
89. *Id.* at 705-07.
90. *Id.* at 707.
91. *Id.* at 716.
92. *Id.* at 698-99.
93. 108 S. Ct. 562 (1988).
94. *Id.* at 567 (emphasis added).
95. *See supra* notes 64-65 and accompanying text.

speech in an *official* school newspaper that obviously bore the imprimatur of the school.[96] In the words of the *Kuhlmeier* Court:

> The question whether the First Amendment requires a school to *tolerate* particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school *affirmatively to promote* particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over *school-sponsored* publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. *These activities may fairly be characterized as part of the school curriculum*, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.[97]

The Court found that when student speech is promoted or sponsored by the school, educators are entitled to exercise more control over the content of the speech, both for pedagogical purposes and to ensure that the speaker's views are not erroneously attributed to the school.[98] However, the Court carefully summarized its analysis of the distinction between personal and school-sponsored student expression:

> Accordingly, we conclude that the standard articulated in *Tinker for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.* Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in *school-sponsored expressive activities* so long as their actions are reasonably related to legitimate pedagogical concerns.[99]

The clear import of *Kuhlmeier* is that schools can exercise reasonable control over both the style and content of student speech that is *officially sponsored by the school.*[100] When, however, student speech

96. *Kuhlmeier*, 108 S. Ct. at 568-69.

97. *Id.* at 569-70 (emphasis added).

98. *Id.* at 570.

99. *Id.* at 570-71 (emphasis added and footnotes omitted).

100. Even when school-sponsored speech is involved, however, school officials may not exercise editorial control over the content of student speech *if* the school facility or medium (such as a school newspaper or teacher mailbox) has been opened by policy or practice to indiscriminate use by the general public or to students or student organizations. *Id.* at 568-69; *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). The Court expressly found in *Kuhlmeier* that the school newspaper had *not* been opened to students for indiscriminate use, and that the school had exercised control over the publication and intentionally made it a part of regular classroom activity. The paper was not, therefore, an open forum and the school could exercise reasonable editorial control over the content of student speech in the *school-sponsored newspaper*. *Kuhlmeier*, 108 S. Ct. at 569.

is *not* school-sponsored but is solely the expression of the *personal views* (i.e., private speech) of the student, protected speech can be prohibited only, in terms of the *Tinker-Widmar* analysis, if the school authorities have reason to believe that substantial disruption of school work will occur.[101]

Moreover, the *Kuhlmeier* Court expressly considered distribution of non-school material *not* to be school-sponsored student speech subject to the editorial control of school authorities.[102] *Kuhlmeier*, rather than detracting from the reasoned precepts of either *Tinker* or *Widmar*, re-emphasizes the general principles inherent in the Court's thinking on freedom of expression. As such, student-initiated religious expression would fall clearly within the *Tinker-Widmar* analysis and not within the school-sponsored parameter of *Kuhlmeier*.[103]

B. Content-Related Censorship and the Public Forum Question

The core principle of the first amendment is that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[104] The Supreme Court has reiterated this principle on so many occasions, often in lengthy and eloquent statements, that it requires no extended analysis.[105]

The first amendment not only prohibits the government from favoring one viewpoint over another, but also prohibits the government from seeking to avoid public controversy by banning speech on an entire subject.[106] If a public school's response is to ban not only student-initiated religious speech but all student-initiated speech, religious and secular, the result is contrary to first amendment principles.[107]

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101. *See supra* notes 66-85 and accompanying text.

102. *Kuhlmeier*, 108 S. Ct. at 570 n.3 (emphasis added).

103. There has been a move in some states by way of legislation to remove any perceived restrictions of *Kuhlmeier*. *See, e.g.*, Hentoff, *The Duke Goes Up Against the Supreme Court*, Washington Post, Aug. 27, 1988, at A27.

104. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

105. *See, e.g.*, Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 535-37 (1980); Hudgens v. NLRB, 424 U.S. 507, 520 (1976); NAACP v. Button, 371 U.S. 415, 444-45 (1963); Thomas v. Collins, 323 U.S. 516, 537 (1945); Thornhill v. Alabama, 310 U.S. 88, 104 (1940).

106. *Consolidated Edison*, 447 U.S. at 537. "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibitions of public discussion of an entire topic." *Id.*

107. *See generally* Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981). *See also* Laycock, *supra* note 12, at 13. "[S]uppression of speech is not desirable or constitutional merely because it can be characterized as evenhanded. Nor is it evenhanded to suppress all speech on a particular subject matter. A subject-matter ban, though less egregious than a ban against particular viewpoints, is still a content-based restriction on speech." *Id.* (footnotes omitted).

The first amendment obviously protects political speech.[108] Indeed, *Tinker* itself involved political speech[109] as have many other cases.[110] Any doubt that the first amendment accords full and equal protection to student-initiated religious speech was settled in *Widmar*.[111] To argue otherwise in a democratic society is ludicrous. As Professor Laycock has noted: "To say that religious or political speech can be suppressed in a forum where secular and apolitical speech is protected is to turn the first amendment on its head."[112] Also, to distinguish "protected" secular speech from a "less" or "unprotected" religious speech is a base form of censorship and lends itself to religious apartheid.

Some public school authorities may suggest that while a complete ban on distribution of political and religious speech (imposed without regard to the *Tinker* standard of imminent threat of material disruption of school operations)[113] might well be unconstitutional, a school policy that merely bans "proselytizing" religious or political beliefs is well within constitutional parameters. Apart from the fact that the term "proselytizing" is unconstitutionally vague, there is no authority for the proposition that the first amendment protects the right to speak but not to persuade (or proselytize).[114] Speech calculated to persuade, advocate, or proselytize implicates the very reasons the first amendment was adopted.[115]

A great deal of first amendment jurisprudence was formed through

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108. *See, e.g.*, Smith v. Goguen, 415 U.S. 566 (1974); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); Bond v. Floyd, 385 U.S. 116 (1966).

109. *See supra* notes 64-65 and accompanying text.

110. *See supra* note 108 and accompanying text.

111. 454 U.S. 263, 269 (1981) (citing Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981)); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948); *see also* Poulous v. New Hampshire, 345 U.S. 395 (1953); Kunz v. New York, 340 U.S. 290 (1951); Marsh v. Alabama, 326 U.S. 501 (1946); Jamison v. Texas, 318 U.S. 413 (1943); Largent v. Texas, 318 U.S. 418 (1943); Martin v. City of Struthers, 319 U.S. 141 (1943); Edwards v. California, 314 U.S. 160 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. City of Griffin, 303 U.S. 444 (1938).

112. Laycock, *supra* note 12, at 14; *cf.* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

113. *See supra* notes 66-67 and accompanying text.

114. The Supreme Court has held:

> [T]he protection they [the framers] sought was not solely for persons in intellectual pursuits. It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. "Free trade in ideas" means free trade and the *opportunity to persuade* to action, not merely to describe facts.

Thomas v. Collins, 323 U.S. 516, 537 (1945) (emphasis added).

115. *Id.*

individual attempts, notwithstanding governmental restrictions, to persuade, recruit, or proselytize others to a particular political, social, or religious view. As the Supreme Court said in a decision protecting the right of the Jehovah's Witnesses to recruit adherents to their view (*i.e.*, to proselytize): "The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance."[116]

A public school is not a "traditional" public forum, but it can become a "limited" public forum for first amendment purposes by designation as a place of expressive activity.[117] The designation need not permit *all* persons to exercise their first amendment rights in any manner they choose in order to create a "limited" public forum.[118]

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116. Martin v. City of Struthers, 319 U.S. 141, 143 (1943); *see also* Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948). The Supreme Court, speaking through William O. Douglas, explains:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Terminello v. City of Chicago, 337 U.S. 1, 4 (1949).

117. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, 569 (1988); Perry Education Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45-47 (1983); *see also*, Piele & Pitt, *supra* note 9, at 205-06; Strossen, *supra* note 9, at 170-71; Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 GEO. L.J. 135, 139-49 (1983). Limited public fora are also implicated in the federal Equal Access Act, 20 U.S.C. §§ 4071-4074 (Supp. 1985). For cases discussing the Equal Access Act, see generally Mergens v. Board of Educ. of Westside Community Schools, No. CV-85-0-426 (D. Neb. Feb. 2, 1988); Clark v. Dallas Indep. School Dist., 671 F. Supp. 1119, 1124-25 (N.D. Tex. 1987); Garnett v. Renton School Dist., 675 F. Supp. 1268 (W.D. Wash. 1987). The student-initiated expression discussed in this article does not necessarily involve any claims under the Equal Access Act, but in particular fact situations provisions of the Act might be invoked. The Equal Access Act has also been addressed in the literature. *E.g.*, Cetron, *The Equal Access Act of 1984: Congressional and the Free Speech Limits of the Establishment Clause in Public High Schools*, 16 J. LAW & ED. 167 (1987).

118. In Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985), *vacated*, 795 F.2d 215 (1986), the Supreme Court reviewed three categories of fora. "Traditional public fora" are places devoted to speech and assembly "by long tradition or by government fiat." *Id.* at 802. Speakers can be excluded from traditional public fora (e.g., streets and parks) "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id.* at 800. "Limited public fora" are fora designated by government "for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Id.* at 802.

> The existence of a limited public forum is said to depend on the government's intention to create it, and the designation of a limited public forum is revocable. But while the limited forum exists, only a compelling state interest can

Thus, in *Widmar*,[119] a state university which had an express policy of making its meeting facilities available to all registered student groups thereby created a public forum from which it could not exclude student groups meeting for a religious purpose.[120] Even though the designation did not cover all citizens or even all the students (only registered student clubs were included), the *Widmar* Court held that the university had created an open forum.[121] Practically all public schools permit at least some student-initiated expression to occur. This general permission creates the limited open forum (one for students only), and any exception must meet the test of being narrowly drawn to effectuate a compelling state interest.[122] However, as previously demonstrated, no compelling state interest exists for a blanket prohibition of speech that proselytizes religious or political beliefs.[123]

However, discussion of public fora and access thereto as defined by the Supreme Court[124] is irrelevant in situations concerning *student-*

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justify the exclusion of speakers who fall within the group for whom the forum exists and who wish to address a topic for which the forum exists.

Laycock, *supra* note 12, at 46. Any other government property or channel of communication is a "nonpublic forum." *Cornelius*, 473 U.S. at 802. The government can exclude speakers from nonpublic fora so long as the restrictions are "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983). There are problems with the Court's formulation of the three categories of fora:

> The most troubling thing about this three-category formulation is that censorship can become self-justifying in the second and third categories. The implication is that the government can convert a limited public forum to a nonpublic forum without any reason whatever, or even because of hostility to speech. The government's intention to close or limit the forum may be shown by evidence that it has excluded speakers in the past. A choice to close the limited public forum is not constrained by a requirement that all speech be treated equally; the government can allow some speakers into a non-public forum while excluding others. Thus, outside the traditional public forum, the only real protection is that exclusion of speech must be reasonable and not motivated by hostility to the views expressed. And the Court's application of that test has been deferential. It makes little sense to apply the compelling interest test to a category of cases and then let the government opt out of the category at will. The limited public forum category needs to be remodeled in a way that provides more protection for speech.

Laycock, *supra* note 12, at 46-47 (footnotes omitted).

119. 454 U.S. 263 (1981).

120. *See supra* notes 76-82 and accompanying text; *see also* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985), *vacated*, 795 F.2d 215 (1986); Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 n.7 (1983).

121. *Widmar*, 454 U.S. at 267.

122. *Id.* at 269-70.

123. *See supra* notes 108-116 and accompanying text.

124. *See supra* notes 117-120 and accompanying text.

initiated activity on the public school campus. It is certainly irrelevant when discussing *Tinker*[125] (which controls in student-initiated expression) since the case did not involve a question of access to public property.[126] The issue in *Tinker* was whether high school and junior high school students had a right to wear black armbands on the campus to protest American participation in the Vietnam War,[127] a right which the Supreme Court upheld.[128]

When a citizen claims a right to enter government property for the particular purpose of speaking, it is relevant to ask whether other speakers have been allowed the same privilege, or whether the property is especially appropriate for speech.[129] The various versions of the public forum doctrine address these questions.[130] However, as Professor Laycock aptly notes, "public forum analysis is irrelevant when access is not at issue. When citizens are going about their business in a place they are entitled to be, they are presumptively entitled to speak."[131] Since a student is generally entitled to be on public school grounds during school hours, access is not an issue, and public forum analysis is not implicated.

Tinker, which is pivotal to student-initiated speech (whether secular or religious), did not hold that the school had created a public forum. Nor did the decision in *Tinker* depend on the school's intention. Instead,

> *Tinker* held that the Constitution protected the student's right to speak, a right that was not contingent on whether the school had allowed others to speak. . . . *Tinker* thus protects the right to speak in the halls and on the school grounds—in all the student's free time when the school is not presenting its own messages. It protects the right to nondisruptive expression such as buttons and armbands, even in class. *Religious speech is included in these rights, and these rights have nothing to do with the school's status as a public forum.*[132]

In situations involving high school students, the question of capacity often surfaces.[133] Since *Widmar*, it has been argued that even if there is no actual government endorsement, there will be an improper appearance of endorsement if religious speech is allowed in public high schools.[134] The reasoning is that university students may

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125. 393 U.S. 503 (1969).

126. *See supra* notes 64-65 and accompanying text.

127. *See supra* note 64 and accompanying text.

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

129. *See supra* notes 117-123 and accompanying text.

130. *See supra* notes 117-118 and accompanying text.

131. Laycock, *supra* note 12, at 48; *see also* Jamison v. Texas, 318 U.S. 413, 416 (1943); Texas State Teachers Ass'n v. Garland Indep. School Dist., 777 F.2d 1046, 1053-55 (5th Cir. 1985), *aff'd mem.*, 107 S. Ct. 41 (1986); Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1343-44 (1979); Comment, *The Public School as Public Forum*, 54 TEX. L. REV. 90, 105-07, 111 (1975).

132. Laycock, *supra* note 12, at 48.

133. *See supra* note 12 and accompanying text.

134. *See, e.g.*, Bender v. Williamsport Area School Dist., 741 F.2d 538, 552 (3d Cir.

understand the neutrality of an open forum but high school students are too young and impressionable.[135] However, this argument is flawed, both factually and legally. Professor Laycock's assessment is once more quite accurate:

> The proposition that government cannot censor speech, and therefore that it does not endorse everything it fails to censor, is not complicated. High school students can understand the proposition if it is explained to them. That is all they need to understand to avoid a mistaken inference of endorsement. . . . The proposition that government does not endorse everything it fails to censor is fundamental to our system of government.[136]

The constitutional commitment to free speech and equal treatment of its citizens should not be undermined because of fears that the audience will misunderstand.[137] "At the very least, a heavy burden of persuasion rests on those who would exclude some views for fear that they will mistakenly be attributed to the state."[138]

Moreover, *Tinker* rests on precisely the opposite assumption in holding that high school students are not too young or impressionable to be allowed free speech rights.[139] If students are capable of dealing with an issue as emotionally charged and politically sensitive as a war protest, surely they have the capacity to handle a secluded, voluntary prayer meeting. Insofar as free speech rights are concerned, there is no reasoned distinction between the two.[140]

IV. NONESTABLISHMENT

A recurring argument, which arose in *Widmar*,[141] is that the establishment clause prohibits any form of religious expression in the

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1984), *vacated on other grounds*, 475 U.S. 534 (1986); *see also* Bell v. Little Axe Indep. School Dist., 766 F.2d 1391 (10th Cir. 1985); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); Thompson v. Waynesboro Area School Dist., 673 F. Supp. 1379 (M.D. Pa. 1987); Perumal v. Saddleback Valley Unified School Dist., 198 Cal. App. 3d 64, 243 Cal. Rptr. 545, *cert. denied*, 109 S. Ct. 327 (1988).

135. *See supra* note 12 and accompanying text.

136. Laycock, *supra* note 12, at 15 (footnotes omitted); *see also* Bethel School Dist. v. Fraser, 106 S. Ct. 3159, 3164 (1986); Carey v. Board of Educ., 427 F. Supp. 945, 953 (D. Colo. 1977), *aff'd on other grounds*, 598 F.2d 535 (10th Cir. 1979); Albaum v. Carey, 283 F. Supp. 3, 10-11 (E.D.N.Y. 1968); Strossen, *supra* note 9, at 160-61.

137. *See Bigelow v. Virginia*, 421 U.S. 809, 827-28 (1975) (The state's interest in "shielding its citizens from information" is entitled to little weight, even in the context of commercial advertising.).

138. Laycock, *supra* note 12, at 16. A collection of psychological studies suggests that adolescents resist authority and are capable of independent critical thought. *See Student-Initiated Religious Activity*, *supra* note 9, at 507-09.

139. *See supra* notes 64-75 and accompanying text.

140. *See* Laycock, *supra* note 12, at 17.

141. 454 U.S. 263 (1981).

context of the public school.[142] This result is supposedly reflected in the tripartite test formulated in *Lemon v. Kurtzman*.[143] The *Lemon* critera are: "First, the statute must have a secular legislative purpose; second, its *principal* or *primary* effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an *excessive* government entanglement with religion.' "[144]

Recalling the Supreme Court's position on accommodation, "it is little wonder that the key phrases in the tripartite test are 'principal or primary effect' and 'excessive entanglement.' Therefore, in applying the test to a particular religious practice, if the practice no more than 'incidentally' benefits religion, it passes the Supreme Court's muster."[145]

To be specific, the Supreme Court has designated only six particular practices as unconstitutional establishments of religion in public schools.[146] In each of these six situations, the government sponsored

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142. *Id.* at 270-73.

143. Lemon v. Kurtzman, 403 U.S. 602, *reh'g denied*, 404 U.S. 876 (1971).

144. *Id.* at 612-13 (citations omitted) (emphasis added) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). The test no doubt had its origin in School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203 (1963), wherein Justice Clark explained:

> The test may be stated as follows: What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Id. at 222. The tripartite test, however, has been brought into question in some recent cases. *See generally* Lynch v. Donnelly, 465 U.S. 668 (1984); Marsh v. Chambers, 463 U.S. 783 (1983). See also the discussion of the *Lemon* test in Mueller v. Allen, 463 U.S. 388 (1983).

145. J. WHITEHEAD, *supra* note 14, at 20.

> *Everson* and *Allen* put to rest any argument that the State may never act in such a way that has the *incidental effect of facilitating religious activity*. . . . If this were permissible . . . a church could not be protected by the police and fire department, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.

Roemer v. Board of Pub. Works, 426 U.S. 736, 747 (1976) (emphasis added).

146. *See* Edwards v. Aguillard, 107 S. Ct. 2573 (1986) (state-directed and required teaching of scientific creationism); Wallace v. Jaffree, 472 U.S. 38 (1985) (state-directed and authorized "period of silence" for meditation and voluntary prayer); Stone v. Graham, 449 U.S. 39, *reh'g denied*, 449 U.S. 1104 (1981) (state-directed and required posting of the Ten Commandments); School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203 (1963) (state-directed and required Bible reading); Engel v. Vitale, 370 U.S. 421 (1962) (state-directed and required prayer); McCollum v. Board of Educ., 333 U.S. 203 (1948) (state-directed and required on-premises religious training). The lower federal courts have followed suit. *See, e.g.*, Stein v. Plainwell Community Schools, 822 F.2d 1406 (6th Cir. 1987) (benediction at high school graduation employing Christian theology and prayer unconstitutional); May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105 (7th Cir. 1986) (religious meetings held by teachers on public school property unconstitutional); Bell v. Little Axe Indep. School Dist., 766 F.2d 1391 (10th Cir. 1985) (group meetings at elementary school unconstitutional); May v. Cooperman, 780 F.2d 240 (3d Cir. 1985) (state statute providing for one minute of silence at beginning of

and was actively involved in the particular religious activity.[147] The

school day unconstitutional); Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984) (school's practice of permitting student religious groups to meet on school property and churches to announce events over school public address system unconstitutional); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982) (school board policy permitting students to use school facilities either before or after the regular school hours for religious purposes unconstitutional), *cert. denied*, 459 U.S. 1155 (1983); Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982) (statute authorizing voluntary students or teachers to initiate prayer at the beginning of the school day unconstitutional); Hall v. Board of School Comm'rs of Conecuh County, 656 F.2d 999 (5th Cir. 1981) (conducting morning devotional reading over school's public address system and conducting a course of Bible literature in a manner which advanced religion unconstitutional), *modified*, 707 F.2d 464 (1983); Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir.) (student council members reciting prayers and Bible verses at school assemblies unconstitutional), *cert. denied*, 454 U.S. 863 (1981); Brandon v. Board of Educ. of Guilderland Cent. School Dist., 635 F.2d 971 (2d Cir. 1980) (school's refusal to allow students to meet on school facilities for prayer meetings before or after school unconstitutional), *cert. denied*, 454 U.S. 1123 (1981), *reh'g denied*, 455 U.S. 983 (1982); Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (teaching course called Science of Creative Intelligence-Transcendental Meditation unconstitutional); Meltzer v. Board of Pub. Instruction, 548 F.2d 559 (5th Cir. 1977) (distribution of Gideon Bibles, Bible readings on school facilities, and a state statute requiring teachers to "inculcate by precept and example . . . every Christian virtue" unconstitutional), *cert. denied*, 439 U.S. 1089, *modified*, 577 F.2d 311 (1978); Despain v. DeKalb County Community School Dist., 384 F.2d 836 (7th Cir. 1967) (prayer recited by class prior to morning snack unconstitutional), *cert. denied*, 390 U.S. 906 (1968); Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965) (school officials could constitutionally prevent students from having an opportunity in the classroom for praying), *cert. denied*, 382 U.S. 957 (1965); Mergens v. Board of Educ. of Westside Community Schools, No. CV-85-0-426 (D. Neb. Feb. 2, 1988) (denying student's right to operate Christian club); Clark v. Dallas Indep. School Dist., 671 F. Supp. 1119 (N.D. Tex. 1987) (school district policy prohibiting student religious meetings on school property constitutional); Ford v. Manuel, 629 F. Supp. 771 (N.D. Ohio 1985) (renting school facilities for after hours religious instruction unconstitutional); Graham v. Central Community Dist., 608 F. Supp. 531 (D. Iowa 1985) (religious invocations and benedictions at high school graduation unconstitutional); Walter v. West Virginia Bd. of Educ., 610 F. Supp. 1169 (S.D. W. Va. 1985) (prayer amendment to state constitution for brief time of personal and private contemplation, meditation, or prayer in public schools unconstitutional); Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983) (public school's Bible program unconstitutional); Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 (D.N.M. 1983) (statute allowing moment of silence in public schools unconstitutional); Goodwin v. Cross Country School Dist., 394 F. Supp. 417 (E.D. Ark. 1973) (student council members reading Bible verses and the Lord's Prayer over school intercom and distribution of Gideon Bibles unconstitutional). *But see* Florey v. Sioux Falls School Dist., 619 F.2d 1311 (8th Cir. 1980) (rules permitting public school Christmas observances with religious elements constitutional), *cert. denied*, 449 U.S. 987 (1980); Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965) (student-initiated voluntary prayer before commencement of school day constitutional).

147. For example, in Engel v. Vitale, 370 U.S. 421 (1962), the public school district, under a directive from the governing school board, had the following prayer said aloud by each class in the presence of a teacher at the beginning of each school day: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

standard is whether there has been "sponsorship, financial support, and active involvement of" the government "in religious activity."[148] These factors are absent with student-initiated religious expression as with any student expression generally. Therefore, there should be no serious doubt about the constitutional validity of a student group, initiated by and limited to students, which does not in any way involve the faculty or administration of a school.[149]

A. Secular Purpose

Student-initiated religious expression does not contravene the secular purpose aspect of the *Lemon* test.[150] Allowing students to engage in all forms of generally protected first amendment speech implements the fundamental secular purpose of respecting and fostering the constitutional rights of all students.[151] The issue is not whether student-initiated expression is in part religious, but whether there is a secular purpose in allowing students to exercise first amendment free speech rights as defined using the *Tinker-Widmar* analysis.[152] A secular purpose for allowing student-initiated religious expression is, in the spirit of accommodation,[153] to avoid discriminating against religion and to comply with both the free speech and free exercise clauses.[154] This means that "[s]tate efforts to alleviate discriminatory or state-imposed burdens on religious exercise [expression] are consistent with neutrality, even though any such effort, considered in isolation, will appear to aid religion."[155]

The Supreme Court has noted that "*Lemon*'s 'purpose' requirement aims at preventing the relevant governmental decision maker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters."[156] Public school officials, for example, who merely acquiesce in the student-initiated religious expression along with other types of speech clearly would *not* evince any intent by the school system to promote religion any more than they would show an intent to promote the viewpoint of any other expression they permit.

Respecting students' free speech rights not only has a secular pur-

148. Corporation of Presiding Bishop v. Amos, 107 S. Ct. 2862, 2868-69 (1987) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

149. *See* Laycock, *supra* note 12, at 4. This would not, of course, preclude school authorities from monitoring such meetings for reasons of safety and discipline. See *infra* notes 179-183 and accompanying text.

150. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

151. *See* Toms & Whitehead, *supra* note 69, at 20.

152. *See supra* notes 62-92 and accompanying text.

153. *See supra* notes 16-61 and accompanying text.

154. *See* Toms & Whitehead, *supra* note 69, at 20.

155. Laycock, *supra* note 12, at 21.

156. Corporation of Presiding Bishop v. Amos, 107 S. Ct. 2862, 2868 (1987).

pose, but is basic to the very mission of the public schools themselves. As one district court has recognized, allowing religious speech by students "would not change the secular nature of the *school's* objective, despite the fact that [the students themselves] have a nonsecular purpose."[157] Further, the *Widmar* Court explained that a university's secular aim of allowing numerous and diverse student clubs to meet would not be undermined by allowing the meetings of a religious club because "the university does not thereby endorse or promote any of the particular ideas aired" in the clubs' meetings.[158] Similarly, allowing student-initiated religious expression in a public high school no more reflects a nonsecular or religious purpose than does allowing the wearing of armbands by students to protest the Vietnam War as in *Tinker*.[159]

B. Primary Effect

Under the *Lemon* test, an inquiry must also be made as to whether or not the student-initiated religious expression would have the "primary effect" of advancing or inhibiting religion.[160] The *Widmar* Court held that permitting religious clubs to meet would *accommodate* rather than advance religion.[161] Noting that religious groups probably would benefit from the policy, the Court indicated the benefit was merely "incidental," not primary.[162]

One may argue that a constitutional difference exists between the *Widmar*[163] decision, which required accommodation of religion in college,[164] and a high school setting where students arguably might

157. Thompson v. Waynesboro Area School Dist., 673 F. Supp. 1379, 1389-90 (M.D. Pa. 1987) (emphasis in original).

158. *Widmar*, 454 U.S. at 272 n.10.

159. *See supra* notes 64-65 and accompanying text.

160. *Lemon*, 403 U.S. at 612-13.

161. *Widmar*, 454 U.S. at 273-75.

162. *Id.* On its face, then, the effects test is simply a statement of neutrality. The phrase is derived from School District of Abington Township, Pa. v. Schempp, 374 U.S. 203, 222 (1963), which held that state-required and directed Bible reading in public schools is unconstitutional. The effects test first appeared in *Schempp* in a paragraph reiterating the "wholesome 'neutrality' of which this Court's cases speak." *Id.*

It has been suggested that the Court's continued use of the term "principal or primary effect" is misleading. Instead, "[a] more accurate statement of the Court's test would be that the legislation for government actions may have no 'substantial' effect that advances or inhibits religion." Laycock, *supra* note 12, at 24. See also Allen v. Hickel, 424 F.2d 944 (1970), wherein the court of appeals recognized: "The question is not whether there is any religious effect at all but rather *whether that effect, if present, is substantial.*" *Id.* at 949 (emphasis added).

163. 454 U.S. 263 (1981).

164. *See supra* notes 76-92 and accompanying text.

perceive an accommodation policy as placing a government endorsement on a particular religion. Although the Supreme Court has not yet dealt with the applicability of *Widmar*'s reasoning to high schools, a federal district court in *Thompson v. Waynesboro Area School District*[165] held that a policy of permitting religious speech in high schools was not, and would not be perceived as, one which had the primary effect of advancing religion.[166] Moreover, it would be stretching one's imagination to believe that high school students would believe a school to be endorsing religion by merely allowing free speech without discrimination.[167]

A claim of endorsement where a public school allows student-initiated religious expression on an equal basis with other expression is irrational.[168] Fear of endorsement is not enough to stifle free expression. Student discussion of religious concepts in no way implies that the public school endorses their ideas.

The Supreme Court has made it clear that *active participation* by the government is necessary in order for an impermissible "primary effect" of advancing religion to be found:

> [t]o have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion *through its own activities and influence.* As the Court observed in *Walz*, "[F]or the men who wrote the Religion Clauses of the First Amendment, the 'establishment' of a religion connoted sponsorship, financial support, and *active involvement* of the sovereign in religious activity."[169]

There is simply no active involvement or official sponsorship of religion by merely allowing students their right of free speech. Moreover, a school policy allowing student speech for *all* students (whether or not it involves religious expression) is exactly the type of neutrality required by establishment clause analysis. The Supreme Court held in *Mueller v. Allen*:[170] "As *Widmar* and our other decisions indicate, a program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."[171] If the government can spend

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165. 673 F. Supp. 1379 (M.D. Pa. 1987).

166. *Id.* at 1390.

167. *See supra* note 12 and accompanying text.

168. As Professor Laycock notes:

> The claim of actual endorsement is absurd. Perhaps in a totalitarian state the government implicitly endorses all that it does not censor. But no such inference can be drawn in a nation with a constitutional guarantee of free speech. . . . Before *Widmar*, my own university censored rallies by the Longhorn Christian Fellowship but allowed Students for Freedom from Religion to hold a "Phooey on Falwell" rally.

Laycock, *supra* note 12, at 14.

169. Corporation of Presiding Bishop v. Amos, 107 S. Ct. 2862, 2868-69 (1987) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)) (latter emphasis added).

170. 463 U.S. 388 (1983).

171. *Id.* at 398-99. "[T]he 'effects' test was intended to implement the neutrality requirement." Laycock, *supra* note 12, at 25. See Bowen v. Kendrick, 108 S. Ct. 2562

money neutrally, surely it can establish policies conducive to free speech neutrally applicable to all.

The *Lemon* "effects" test, it must be emphasized, has two sides. It is unconstitutional as a primary effect for a public school to advance religion, but it is just as unconstitutional for a public school to "inhibit" religion.[172] A public school system would inhibit religion by discriminately prohibiting student-initiated religious expression. This is a blatant form of hostility toward religion prohibited by the first amendment.[173]

Finally, if school officials harbor any concerns over endorsement, they can explicitly state their position. "The school can explain its open forum policy, and there is no reason to believe that high school students are incapable of understanding that explanation."[174]

C. *Entanglement*

The final prong of the *Lemon* test forbids the fostering of excessive entanglement between government and religion.[175] This requirement should be easily satisfied in situations involving student-initi-

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(1988), wherein the Court upheld, against an establishment clause challenge, a federal statute that provided funds for nonprofit organizations, including religious organizations, for services and research concerning prevention of premarital teenage pregnancy. The Court stated:

> [This law] is similar to other statutes that this court has upheld against Establishment Clause challenges in the past. In *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976), for example, we upheld a Maryland statute that provided annual subsidies directly to qualifying colleges and universities in the State, including religiously affiliated institutions. As the plurality stated, "religious institutions need not be quarantined from public benefits *that are neutrally available to all.*" . . . In other cases involving indirect grants of state aid to religious institutions, we have found it important that *the aid is made available regardless of whether it will ultimately flow to a secular or sectarian institution.*

Id. at 2573 (citations omitted) (emphasis added). But see *Garnett v. Renton School Dist.*, 675 F. Supp. 1268, 1276 (W.D. Wash. 1987), in which a "slight" benefit to religion was held suspect.

172. *Lemon*, 403 U.S. at 612-13.

173. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 673 (1984); Zorach v. Clauson, 343 U.S. 306, 314 (1952); Illinois *ex. rel.* McCollum v. Board of Educ., 333 U.S. 203, 211-23 (1948).

174. Laycock, *supra* note 12, at 18.

175. *Lemon*, 403 U.S. at 612-13. Analysis of the entanglement requirement may be unnecessary. As Justice White asserted in his concurring opinion in Roemer v. Board of Public Works, 426 U.S. 736, 767 (1976): "As long as there is a secular legislative purpose, and as long as the primary effect of the legislation is neither to advance nor inhibit religion, I see no reason—particularly in light of the 'sparse language of the Establishment Clause,'—to take the constitutional inquiry farther." *Id.* at 768 (White, J., concurring).

ated religious speech where only the private, personal views of the students are aired. In fact, a public school that allows equal treatment of all speech helps to avoid entanglement with religious matters. As the *Widmar* Court noted, a school system actually risks greater entanglement by attempting to enforce an exclusion of religious speech than by simply allowing all otherwise protected first amendment speech.[176] Moreover, at least one court has held:

> If defendant imposes the same reasonable time, place, and manner regulations on plaintiffs' [religious] activities that it imposes on other student activities, the foreseeable entanglement need not be excessive but could be limited. . . . Neutral supervision without active involvement by a teacher or school official in plaintiffs' activities would not be violative of the establishment clause.[177]

However, it seems that no incidental effect is too trivial to be constitutionally damning.[178] It is not the mere appearance of sponsorship but rather the heat, light, and supervision normally incident to classroom use that are supposedly impermissible effects and entanglements.[179]

Any alleged "entanglement" arising from the presence of a monitor would be wholly speculative and, in any event, as one district court pointed out, very limited.[180] Certainly, "[t]here is nothing . . . like the 'comprehensive, discriminating, and continuing state surveillance' or 'enduring entanglement' present in *Lemon*."[181] Arguments that monitors (designed to keep order)[182] of student-initiated religious groups are government endorsements and result in entanglements are stretched, to say the least. In fact:

> it is a long leap from endorsing the monitor to endorsing religion. When the police are sent to preserve order at a demonstration, no one infers that the city endorses the goals of the demonstrators. It is no more reasonable to infer that a monitor sent to protect furnishings and to suppress spitballs endorses the goals of the groups he supervises.[183]

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176. *Widmar*, 454 U.S. at 272 n.11.

177. Thompson v. Waynesboro Area School Dist., 673 F. Supp. 1379, 1392 (M.D. Pa. 1987).

178. For example, merely allowing a student-initiated religious organization use of an otherwise empty schoolroom to meet on a public high school was held to be enough of a benefit for it to be constitutionally suspect. Garnett v. Renton School Dist., 675 F. Supp. 1268, 1275-76 (W.D. Wash. 1987). This was true even though the court deemed it a "slight" benefit to religion. *Id.* at 1276.

179. Laycock, *supra* note 12, at 25; *see also* Corporation of Presiding Bishop v. Amos, 107 S. Ct. 2862 (1987); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 12, 137 Cal. Rptr. 43, 49, *cert. denied*, 434 U.S. 877 (1977); Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis*, 12 HASTINGS CONST. L.Q. 529, 562-65 (1985).

180. Bender v. Williamsport Area School Dist., 563 F. Supp. 697, 715 (M.D. Pa. 1983), *rev'd*, 741 F.2d 538 (3d Cir. 1984), *vacated*, 475 U.S. 534 (1986).

181. Lynch v. Donnelly, 465 U.S. 668, 684 (1984) (citations omitted).

182. "Given the disruption and violence in some of our public schools, the Court is unlikely to hold that high school students have a constitutional right to meet on school property without a monitor." Laycock, *supra* note 12, at 50.

183. *Id.* at 29.

Clearly, providing a monitor is providing equal treatment to both religious and secular groups.

The fact that student-initiated religious speech occurs on public property and is thus, in an abstract sense, supported by public tax funds is not suggestive of any entanglement. What matters is not the location of speech but the identity of the speaker.[184] This is central to student-initiated religious expression because students are compelled to and have a right to be on public premises.[185]

On the other hand, a school policy banning student-initiated religious speech violates the establishment clause by inhibiting religion and by causing excessive entanglement with religion. One district court stated: "[B]y prohibiting the distribution of *Issues and Answers* inside the school building because of the paper's religious content, the school may actually be engaging in hostility to religion. 'The establishment clause acts as a proscription against hostility to, as well as advancement of, religion.' "[186] A restriction on religious speech, while other speech is permitted, sends a clear message to all students that religious beliefs are disfavored by the school. Such open hostility toward religion is clearly impermissible under the first amendment.[187]

School policies which restrict religious speech violate the excessive entanglement prong of *Lemon* because they require school officials, as agents of the state, to determine what constitutes impermissible speech. *Widmar* held that it might even be "impossible" to ascertain in a principled manner what is and is not religious speech.[188] In *Corporation of Presiding Bishop v. Amos*,[189] Justice White noted that a complete religious discrimination exemption from Title VII of the

184. See Toms & Whitehead, *supra* note 69, at 15-19 for a detailed discussion on the location issue.

185. *See supra* notes 123-133 and accompanying text. Moreover, "time, place, and manner of 'involvement' is not an establishment clause 'concern.' " Laycock, *supra* note 12, at 18-19. Simply put:

> Whether the speech is on public or private property is wholly irrelevant if the state lacks power to censor. It is almost a given that a public forum will be on public property; very few exist on private property. Because the state lacks power to exclude views from a public forum on public property, there can be no reasonable inference that it endorses speech in such a forum.

Id. at 15.

186. Thompson v. Waynesboro Area School Dist., 673 F. Supp. 1379, 1390 n.7 (W.D. Pa. 1987) (quoting Bender v. Williamsport Area School Dist., 563 F. Supp. 697, 714 (M.D. Pa. 1983)) (citations omitted).

187. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

188. *Widmar*, 454 U.S. at 272 n.11.

189. 107 S. Ct. 2862 (1987).

Civil Rights Act was not only constitutional but was preferable to a statute that purported to cover "religious" jobs in churches while exempting "nonreligious" jobs.[190] Justice Brennan underscored the same theme in his concurrence: "[D]etermining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs."[191]

A neutral school policy merely acquiescing in student-initiated religious expression, along with other free expression, fully comports with the requirements of the establishment clause. Such a policy would have a secular purpose in allowing students to exercise their free speech rights on an equal footing, would confer, if any, only an indirect or incidental benefit on religion, and would not cause excessive entanglement with religion. The establishment clause does not, therefore, compel nor justify prohibitions of such expression.

V. CONCLUSION

In situations involving student-initiated religious expression in public school limited forums, one does not find state sponsorship of religious activity, nor state-mandated or endorsed religious exercise. Student-initiated expressive activities involve private speech and personal viewpoints and are wholly voluntary, without violation of conscience. Under these circumstances, a school system cannot be said to lend its prestige, power, and influence to religious thought or expression. To the contrary, such a school system is merely allowing free speech to flourish by avoiding discriminatory attitudes and actions against those students who express themselves religiously. By banning such free expression, the public education system runs the risk of practicing a form of religious apartheid that is hostile, not neutral, toward religion. Simply put: "To tell students that they cannot assemble to express their religious views and feelings amongst themselves while other students are permitted to meet is not a neutral position. It is a hostile one. Schools need not and should not persist in such a policy."[192]

190. *Id.* at 2870.

191. *Id.* at 2872 (Brennan, J., concurring).

192. Note, *The Constitutionality of Student-Initiated Religious Meetings on Public School Grounds*, 50 U. CIN. L. REV. 740, 785 (1981).