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Chess, Bible Clubs and the Public Schools: A Case Study of the Board of Education of Westside Community Schools v. Bridget Mergens.

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Chess, Bible Clubs and the Public Schools: A Case Study of the Board of Education of Westside Community Schools v. Bridget Mergens.

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Chess, Bible Clubs and the Public Schools: A Case Study of the Board of Education of Westside Community Schools v. Bridget Mergens.

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In January 1985 Bridget Mergens, a senior at Westside High School in Omaha, Nebraska, proposed to principal James Findley that a Bible club be allowed access to school property. This action precipitated a sequence of events that propelled both Mergens and Westside to the chambers of the United States Supreme Court in 1990. When the Supreme Court decided a Bible club could have access to the school under the Equal Access Act of 1984, *Mergens* became a landmark case in the debate over the Establishment Clause of the First Amendment.

My case study of *Board of Education of Westside Community Schools v. Bridget Mergens* focuses on the origins of the access legislation, the beginnings of the Bible club, and the path of the lawsuit to the Supreme Court. The battle for passage of the Equal Access Act began with the attempt by Congress to legislate *Widmar v. Vincent* to secondary schools. The *Widmar* decision declared that a public college or university could not prevent religious

meetings on campus if its policies allowed other groups to meet. Shortly after the Act's passage Mergens requested her Bible club. Once the district denied the request because it did not believe it was subject to the Act, Mergens filed suit against Westside, claiming that the group should be allowed according to the Act and that her freedom of speech had been violated.

The subsequent decisions of the federal district, appeals, and Supreme Court focused on the definitions of "open forums" and how student organizations may or may not be "curriculum-related." The Supreme Court decided that a school could not prohibit a religious student club access if it opened its campus to other organizations not connected to the curriculum. Furthermore the Court found that the Equal Access Act was constitutional.

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I

Context

When Chief Justice William Rehnquist called the Supreme Court to order for its 10 a.m. session on January 7, 1990 an anxious expectation filled the room. Much was expected of the Establishment Clause case before the high bench. The anticipation for the oral arguments and eventual decision in *Board of Education of Westside Community Schools v. Bridget Mergens*[1] rested not only in the minds of the participants of the day, but also in the countless followers of the Court. This group hoped to witness a landmark case, an argument and ruling that prescribed the Court's future course in regard to religious activities in the public schools. Some who waited anxiously had cause to believe that the direction of the Court was changing. Many believed the Court was due for a change, allowing religious expression in public schools, with an emphasis on returning to the moral traditions of the nation. Others feared that a judicial transformation, ending the prohibition of state-sponsored religious activities, meant a loss of individual liberties for religious minorities. Both looked to *Mergens* as a pivotal test with the winner claiming a significant victory in the debate over separation of church and state. An examination of the case is prudent, however, only after first placing *Westside v. Mergens* in the historical context of church and state conflicts.

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." For the first century and a half of the nation's history, the federal judiciary had little cause to

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[1] *Board of Education of Westside Community Schools v. Bridget Mergens*, 496 U.S. 226 (1990).

interpret, or even consider, that language. Except for various reviews of controversies surrounding Mormonism, the Supreme Court sat nearly silent on the role of the federal government regarding religious issues.[2] During that same span of time public schools reflected the majority culture and tradition, infusing school lessons with Protestant ideals and doctrine. In 1940 the Supreme Court took the momentous step of requiring the states to abide by the free exercise clause in *Cantwell v. Connecticut* and seven years later incorporated the Establishment Clause in the 1947 case *Everson v. Board of Education.*[3] In both cases the Court specified that the religious rights guaranteed in the First Amendment were among those fundamental liberties protected against state interference by the due process clause of the Fourteenth Amendment. The Court in effect announced its intention to scrutinize state actions that might threaten religious freedom. In subsequent cases, the justices began to construct the wall of separation Thomas Jefferson had theorized about in his famous letter to the Danbury Baptists.[4] The Supreme Court's responsibility now included the arduous task of defining the appropriate relationship between the government and religion. It was a task the Court and constitutional scholars would find to be treacherous.

The Supreme Court spent the next few decades trying to engineer the wall of separation and ascertain a formula for cases concerning religion and the schools. The

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[2] Frederick Mark Gedicks, "Religion," in *The Oxford Companion to the Supreme Court of the United States*, ed. Kermit L. Hall (New York: Oxford University Press, 1992), 717-718.

[3] *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Everson v. Board of Education*, 330 U.S. 1 (1947).

[4] Thomas Jefferson, Letter to the Danbury Baptists, In response to a letter from the Baptist group, Jefferson wrote that his understanding of the people's enactment of the First Amendment to be the "building a wall of separation between Church and State." (January 1, 1802), http://www.loc.gov./loc/lcib/9806/danpre.html.

justices began with an accommodationist stance before shifting towards protecting public school students from any type of establishment. The *Everson* decision in 1947 upheld the right of a public school district to fund transportation to parochial schools, and in 1952 the Court allowed release time for students to attend off campus religion classes. However, in 1962 the Court ordered an end to mandatory school prayer followed with a 1963 ruling that barred required Bible reading in public schools.[5] Under the watchful eyes of Chief Justice Earl Warren, Jefferson's wall was coming to fruition, "from sand to brick," in the words of First Amendment scholar Gregg Ivers.[6] This direction of the Court continued with rulings in 1973 that found public aid to parochial schools unconstitutional and in 1980 when the Court ruled against the posting of the Ten Commandments on public classroom walls.[7] The construction of the wall of separation, after so many years of blurred lines between church and state, inevitably led to conflicting viewpoints as to the proper manner in which to apply the First Amendment. The eagerness for direction from the Supreme Court in *Westside v. Mergens* stemmed from the scholarly and political debate surrounding this conflict.

Those who feared *Mergens* might set a new course of jurisprudence for the Court adhered to the belief that the Supreme Court was correct to step between the church and the state and paint a bright line of demarcation. Constitutional scholars such as Leo Pfeffer had rallied behind the concept of a true separation of religion and

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[5] *Zorach v. Clauson*, 343 U.S. 306 (1952); *Braunfeld v. Brown*, 366 U.S 599 (1961); *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963).

[6] Gregg Ivers, *Lowering the Wall: Religion and the Supreme Court in the 198's*, (New York: Anti-Defamation League, 1991), 2.

[7] *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Stone v. Graham*, 449 U.S. 39 (1980).

government as a "basic American democratic principle."[8] Those who joined this "strict separationist" school of thought pointed to the historical foundations of the nation to advance their ideals. While many flocked to America for religious freedom the separationists argued, it was not to create a theocratic society. Pfeffer railed against the idea that America was created solely on Christian principles. He believed the founding fathers to be "strongly anticlerical" and the fruits of their labors, the Declaration of Independence and the Bill of Rights, to be filled with "the spirit of deistic humanism."[9] Leonard Levy used Madison's Memorial and Remonstrance petition to show how the father of the Bill of Rights sought "perfect separation" in matters of church and state. The kingdom of heaven and the kingdom of government were defined as distinct.[10] Other separationists, such as Robert Alley and Ronald Flowers, argued that the government is restrained from aligning, promoting or preferring any religious activity by the First Amendment.[11] Reading the amendment in any other fashion endangered the liberties of those who did not belong to the majority religions of the culture. For those who subscribed to total government neutrality, the wall of separation in schools needed to be high and insurmountable.

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[8] Leo Pfeffer, *Church, State, and Freedom* (Boston: Beacon Press, 1953), 92.

[9] Leo Pfeffer, *God, Caesar, and the Constitution: The Court as Referee of Church-State Confrontation* (Boston: Beacon Press, 1975), 7-8.

[10] Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan, 1986), 99.

[11] Alley, Robert S., *School Prayer: The Court, the Congress, and the First Amendment* (Buffalo, New York: Prometheus Books, 1994); Ronald B. Flowers, *That Godless Court*, (Louisville: Westminster John Knox Press, 1994).

"Schools," Levy found, have "no religious purpose or function."[12] Others, however, saw the value of a wall only if it was low and pregnable.

Those who looked at *Mergens* as a signpost of a much-anticipated correction in the path of Supreme Court decisions wanted to see the Court return to government accommodation towards religion. They argued that the government cannot directly create or endorse one specific religion, but could tolerate, or accommodate religious activity. Hostility towards religion was not required by the First Amendment. Supporters of government accommodation often turned to a narrow reading of the Constitution to show that it called for the prohibition of a "law respecting an establishment of religion."[13] This interpretation, often referred to as "non-preferential," is described by law professor Michael McConnell as the belief that the government must show toleration of religion in that it "not favor one form of religious belief over another."[14] Non-preferentialists disagreed with the assertion that the Court's actions from 1940 forward were actions of governmental neutrality. Attorney and scholar John Whitehead referred to the Court's decisions between 1940 and the 1980s as "passive hostility." He argued that allowing indifference by the state, especially in the realm of public schools, actually violates neutrality.[15] Preventing religious activity allows a school to subject students to a secular point of view. In

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[12] Levy, 144; Madison's "Memorial and Remonstrance" was an open letter written in opposition to a proposed Virginia bill in 1785. The letter opposed the entanglement of the state in religion by collecting public funds to support teachers of religion.

[13] U.S. Constitution, amend. 1.

[14] Michael W. McConnell, "Accommodation of Religion," in *The Supreme Court Review: 1985*, ed. Philip B. Kurland, (Chicago: University of Chicago Press, 1986), 21, 39; McConnell, "Religious Freedom at a Crossroads," in *The Bill of Rights in the Modern State*, ed. Geoffrey Stone, (Chicago: University of Chicago Press, 1992), 194.

[15] John Whitehead, *The Rights of Religious Persons in Public Education* (Wheaton, IL: Crossway Books, 1994), 35.

effect, the public schools were instructed to teach an opinion about religion by ignoring it. Many who adhere to the concept of "non-preferential" do not hold that religious liberties should be interpreted as superior to the other rights enumerated. But as McConnell contended, nor should they be considered inferior.[16] These non-preferentialists hoped that *Mergens* would reflect a new direction of accommodation.

The academic debate over establishment notwithstanding, it is the beliefs and collective reasoning of the Supreme Court justices that in the end determines actual constitutional application. The Court's opinions can sometimes frustrate both schools of thought. The ever-changing definition of the establishment of religion, favorable in either party's direction, creates the climate where "a strict separationist and a zealous accommodationist are likely to agree." Levy asserts, "that the Supreme Court would not recognize an establishment of religion if it took life and bit the justices."[17] The Court has taken steps to avoid the appearance of being in a constant state of flux by trying to standardize its methods of examining establishment cases. In 1971 Chief Justice Warren Burger, in *Lemon v. Kurtzman*, combined three methods of determining whether or not government action crosses the line of establishment. In the renowned *Lemon* test Burger laid out three tests that any government action must pass:

> First, the statute must have a clear 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.[18]

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[16] McConnell, "Religious Freedom at a Crossroads," 186.

[17] Levy, 163.

[18] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The *Lemon* test became a method for the Court to provide consistency in its decisions on church and state.

While some scholars, such as Ronald Kalkyn, saw the test as adding "coherence and discipline" to rulings, many others found it flawed.[19] Separationist Levy argued that the term "entanglement" is too relative and easily modified. He dismissed the use of tests altogether as they are "only used to justify a decision" after an opinion has been formed. Accommodationist McConnell contended that while the *Lemon* test has resulted in some correct decisions, it is filled with inconsistencies and its three prongs often devalue religion with its allowance of government indifference towards religion.[20] While the *Lemon* test would be utilized, growing discontent with its use signaled a possible shift in the Court with *Mergens*. The potential change was the result of a conservative President and his appointments to the Court.

In 1980 Ronald Reagan was elected President of the United States. A Republican, the former California governor relied on several segments of the electorate to rise to national power. One of the groups that bolstered his chances to seize the executive title was the burgeoning evangelical Christian right. Long a group that had stayed away from direct politics, this ever-growing faction was now seeking a voice in federal legislation. Led by televangelists Jerry Falwell and Pat Robertson, the Christian right committed itself to increased political influence, largely as a reaction to the perceived forty year assault on religion in the courts.[21] The

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[19] Ronald Kalkyn, in *Oxford Companion to the Supreme Court of the United States*, ed. Kermit L. Hall (New York: Oxford University Press, 1992), 500.

[20] McConnell, "Religious Freedom at a Crossroads," 128-130.

[21] Jerry Falwell headed the Moral Majority and Pat Robertson was the founder of the 700 Club. While not in sync in theology, both men played prominent roles in endorsing and financially supporting various appointments and legislative actions that favored Christian ideals.

transformation of this religious section of the population coincided with the first Republican majority in the Senate in over twenty-five years and the election of a conservative President. The Christian right was now an active participant in major policies "fighting," contends historian Frank Ravitch, "for the soul of America."[22] Alley points out that this collection of evangelicals was "no longer a fringe group," as they found "a new sense of self esteem" that energized not only their core followers, but others across the nation who felt the courts had gone too far in erecting the high wall of separation. They hoped for a return to "traditional America" by way of Congress and the Supreme Court.[23] While foes Levy and McConnell both found fault with the premise of a purely Christian propelled jurisprudence, McConnell welcomed the influence as he argued the new political force "could correct the secular shift" in the judiciary.[24]

It was in the Supreme Court where real influence would be felt. The first political push came in support of varying constitutional amendments allowing public school prayer that could thwart judicial rulings of separation. While the battle over these amendments eventually ended in defeat for the accommodationist, a genuine change took place on the Supreme Court bench. Beginning with Sandra Day O'Connor in 1981, President Reagan appointed judges such as Antonin Scalia and Anthony Kennedy who questioned the application of the *Lemon* test and who openly opposed a strict separationist view. In 1986 Reagan promoted Rehnquist to Chief Justice, one year after Rehnquist wrote a dissent arguing that Jefferson's wall of

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[22] Frank S. Ravitch, *School Prayer and Discrimination: The Civil Rights of Religious Minorities and Dissenters* (Boston: Northeastern University Press, 1999), 35.

[23] Alley, *School Prayer*, 192.

[24] McConnell, 135.

separation was bad history.[25] Such movement in the Court signaled a profound potential for adjustment in the Court's thinking on religion cases. In lieu of the *Lemon* test, the new justices sought alternative means of arriving at opinions, more in step with non-preferentialists.

In 1984 Justice O'Connor used *Lynch v. Donnelly* to introduce the principle of an endorsement test.[26] While she did not desire to abandon *Lemon* altogether, she argued that this analysis better served the Court when evaluating expressive activity by the government. She simply contended that justices should determine if any governmental action created a perception of religious endorsement or disapproval.[27] Her endorsement test was often used as the first prong of Lemon. In *County of Allegheny v. ACLU*, Justice Kennedy put forth the coercion test wherein the Court had to determine a constitutional violation only if the government provided direct aid to a specific religion or coerced individuals to participate in specific religious activity.[28] It was an obvious nod to the accommodationist view that the Establishment Clause merely meant that the government could not prefer one particular organized religion over another.

Many supporters of non-preferential interpretation hailed the changes in the Court. Historian Rodney Smith called Rehnquist's abandonment of the wall "a breath of fresh air."[29] Conservative influence on the Court appeared to have taken hold. Strict separationists, however, feared the changes were going too far in the wrong

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[25] *Wallace v. Jaffree*, 472 U.S. 38 (1985).

[26] *Lynch v. Donnelly*, 465 US 668 (1984).

[27] *Lynch v Donnelly*, 465 U.S. 668 (1984).

[28] *Allegheny County v. American Civil Liberties Union*, 109 U.S. 3086 (1989).

[29] Smith, Rodney K., *Public Prayer and the Constitution*, (Wilmington, DE: Scholarly Resources Inc, 1987), 207.

direction. Believing that the Reagan era would lead to a complete reversal in constitutional values, Ivers predicted that "under Reagan, *Lemon* was set for the guillotine." He felt that politics and religion now bear more consideration than genuine constitutional jurisprudence.[30] Whether the change in course was complete or not largely depended on the outcome of *Mergens*. Separationists held out hope that the supporters of their view still on the Court could hold off the Reagan influence and wield enough authority to maintain the course set in 1940. Accommodationists wondered if the Reagan era had really resulted in their desired outcome, the dismantling of the theoretical wall of separation.

Westside v. Mergens was a case to determine the constitutionality of a congressional statute allowing student religious groups access to public high school campuses. When Chief Justice William Rehnquist dismissed the Court at 11:07 a.m. on January 7, 1990, Supreme Court observers were disappointed that little to nothing was argued or disputed in regard to the Establishment Clause considerations involved in government action. In the oral arguments the particulars of the case seemed to far outweigh the constitutional concerns. Yet when the decision came, the Supreme Court dissected the particulars in a way that eventually allowed both sides of the establishment issue to find positives in the Court's apparent stance. To understand such an aftermath, one must examine *Mergens* from its beginning.

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[30] Ivers, *Lowering the Wall*, 9.

II

The Equal Access Act

In January 1983 President Ronald Reagan declared that year to be the "Year of the Bible."[1] In doing so the President established one of the primary themes for next two legislative years. Not only would the Senate attempt to pass the President's constitutional amendment allowing prayer in public schools, but Congress would also seize the opportunity to provide religious groups access to public secondary school campuses equal to other allowed organizations and clubs.

Dealing with school prayer was not a new issue for Congress in 1983. Ever since the 1962 Supreme Court decision *Engel v. Vitale*, disallowing state-sanctioned prayer in the public school setting, conservative senators and representatives had tried varying methods to place prayer back in the school room.[2] Just prior to Reagan's election in 1980, Senator Jesse Helms of North Carolina introduced a measure to prevent the Supreme Court from hearing cases pertaining to public school prayer. While the bill failed in the full Senate, the election of Reagan provided school prayer supporters an opportunity not seen since the *Engel* ruling.[3] After the 1980 elections, the Republican-controlled Senate had an executive who supported school prayer initiatives as well as legislative action to curb the courts.

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[1] Reagan's action was authorized and requested by S.J. Res. 165, 97th Cong., 2d sess. (October 4, 1982), 1211.

[2] *Engel v. Vitale* was a New York case that served as the first in a series of Supreme Court rulings in which the Court deemed state sanctioned prayer in public schools unconstitutional. The New York Board of Regents had established a voluntary prayer for the beginning of each school day. Ten students brought action against the state for violation of the establishment clause of the First Amendment. While the New York Court of Appeals upheld the power of the board, the Warren Court reversed the decision, finding state sanctioned prayer unconstitutional. 370 U.S. 421 (1962).

[3] *Prayer in Public Schools and Buildings – Federal Court Jurisdiction*, Hearings before the House Subcommittee on Courts, 96th Cong., 2nd sess., 1980, 2-3.

On May 17, 1982, the Reagan administration's Resolution 199 was introduced in the Senate, calling for a "constitutional prayer amendment." The proposed amendment would be hotly debated in committee, tabled and reintroduced before being recommended to the full Senate. On the floor in March 1984, senators took turns rallying for the return of religious liberty or decrying the attempt to subvert the establishment clause of the Constitution. Ultimately the Senate would vote 56-44 in favor of the proposal, reaching a majority but failing to meet the required two-thirds standard.[4] While the 1983 prayer amendment resolution died on the Senate floor, just days later both congressional houses continued discussions of a byproduct of the prayer debate – the issue of equal access for religious groups on secondary school grounds

The equal access concept stemmed from the idea of extending the accepted public forum liberties of the United State to public schools. A public forum is a location or place where traditionally the government has allowed for the full and free exercise of the freedoms of speech and assembly. Once a public forum is established, the government cannot intrude on the civil liberties of citizens within that forum. Equal access legislation asserted that public schools, especially public secondary schools, constituted "limited open forums." Supporters of equal access legislation argued that within the school day students have significant amounts of time and choices, outside of the classroom, that establish limited forums. Once a school district created a forum wherein students could initiate, lead and join clubs and other organizations, then all groups within that forum must be treated equally. A school

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[4] *Voluntary School Prayer,* S.J. Res. 73, 98th Cong., 2nd sess, Congressional Record 130 (March 20, 1984), 5919.

could determine the definition of its forum by choosing to allow groups that were either curriculum or non-curriculum related. The authors of the proposed Equal Access Act had thought of the idea during the prayer debates. Senators Mark Hatfield of Oregon and Jeremiah Denton of Alabama sought to protect student groups within a non-curriculum setting from discrimination based primarily on religious views. They would do so not by way of a constitutional amendment as the prayer supporters had sought, but rather through the passage of a congressional act.

While the fervor of the amendment rhetoric was not repeated in the debates leading up to the access legislation, the environment had not completely simmered down. Reeling slightly from the prayer amendment failure, President Reagan seized this new proposal of equal access as a means of reversing what he saw as an erosion of moral values within the public school system. Addressing a friendly audience at the National Association of Evangelicals in 1983, Reagan stated his support for

> ...legislation on the whole question of prohibiting discrimination against religious forms of student speech. Such legislation could go far to restore freedom of religious speech for public school students. And I hope Congress considers these bills quickly.[5]

To Reagan, the United States was in the midst of a spiritual struggle wherein public schools were acting to prevent religious speech. While some, such as the *Washington Post*, saw Reagan turning to his "next best alternative," his supporters saw the action to require equal access as simply the next battle in a greater war.[6]

Senator Hatfield first introduced the concept of equal access during the Senate hearings on the prayer amendment. He proposed equal access language as a means of

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[5] Ronald Reagan, "Remarks at the Annual Convention of the National Association of Evangelicals" (Orlando, FL, March 8, 1983).

[6] *Washington Post,* editorial, July 25, 1984.

compromise, believing that the real issue was the ability of students to have access to facilities for religious purposes, rather than having the state sanction school prayer. The Senate discussions on prayer served as the precursor for the committee hearings on equal access. One of the witnesses to testify before the committee on prayer was Duke University Law Professor Walter Dellinger. Dellinger, a noted Constitutional scholar, felt that while the prayer amendment might not pass congressional or public muster, the Supreme Court would eventually support the issue of equal access:

> I am willing to bet the mortgage that in a case involving truly student initiated, voluntary prayer activities in a public setting, the Supreme Court will ...forbid discrimination against extracurricular activities involving religious speech.[7]

The definition of what is "extracurricular" or "non-curricular" would eventually become the basis by which the Supreme Court would rule on the constitutionality of equal access.

The Equal Access Act began its legislative journey on April 28, 1983 as the Senate Committee on the Judiciary convened to hear testimony, in favor and opposed, to two separate bills – S.815 and S. 1059. The sponsoring senators were very clear in their goals for the bills. Senator Denton desired legislation that "would require that student religious groups be afforded the same rights as other student groups,"[8] while Senator Hatfield viewed an access bill as a "straightforward measure to apply the Supreme Court's decision in *Widmar v. Vincent*..." to secondary schools in the

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[7] *Voluntary School Prayer Constitutional Amendment*, Hearing before the Senate Subcommittee on the Constitution, 98th Cong., 2nd sess., 1983, 64.

[8] *Equal Access: A First Amendment Question*, Hearing before the Senate Committee on the Judiciary, 98th Cong., 2nd sess. 1983, 2.

Conversely, several witnesses testified in opposition to the bills, mainly on the grounds that passage would violate the Establishment Clause of the First Amendment. Speaking on behalf of the American Civil Liberties Union (ACLU), Jack Novik argued that while the ACLU supported the *Widmar* decision, it felt that it was significant that the Supreme Court did not extend its decision to secondary schools.[12] Rev. W.W. Finlato, a Baptist pastor, defended the position of the ACLU, stating that allowing religious activity in the school "dilutes" the faith.[13] Representing the National Education Association (NEA), Janice Piccinni opposed the bills, as they would put teachers in the precarious position of having to sponsor, attend or supervise religious clubs. Both the Anti-Defamation League and the American Jewish Congress testified against the bills as blatant examples of the government encroaching on religion and subjecting students of minority religions to unnecessary peer pressure and discrimination.[14] These same arguments would be heard in the House's attempt to legislate access.

The House Committee on Education and Labor held four days of hearings in 1983, focused on H.R. 2732, the equal access bill sponsored by Representative Trent Lott of Mississippi. Like his Senate counterparts, the House bill's author sought to clarify any confusion as far as the extent to which a school district may allow access:

> the chief purpose of the measure is to protect the religious liberties of students in public schools...I believe that it is also important for us to give guidance to school administrators at all levels who are now in

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[12] Ibid., 87.

[13] Ibid., 86.

[14] Ibid., 201, 229-231, 255-257.

> substantial confusion over the scope of their duties under the Constitution.[15]

Commenting on *Widmar*, Lott declared that the Court had not defined whether or not its decision applied to other levels of education and that if the judicial branch would not comment on the subject, it was left to the legislators to do so. Thus Lott sought to apply the *Widmar* decision to public secondary schools, stating that "when a school does choose to permit extracurricular activities, it must give the Bible club the same rights as the chess club."[16]

In the House committee hearings, opponents and proponents once again dissected the bill. Marc Pearl of the American Jewish Congress feared that the legislation would create "beehives of proselytization" wherein the majority Christian religions would be allowed full access to pressure minority religion students into certain beliefs and actions.[17] He further argued, as would others, that a teacher as sponsor of a religious club would violate the Establishment Clause.[18] Francs Zweng of the People for the American Way found the proposed access bills more objectionable than the prayer amendment.[19] Keith Geiger, Vice President of the NEA, questioned why the "so called Equal Access Act" was even being considered when there were other, real education problems to be addressed.[20] Other opponents joining in testifying against the bill included representatives of the Anti-Defamation League

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[15] *Hearings on the Equal Access Act*, Hearing before the House Subcommittee on Elementary, Secondary and Vocational Education, 98th Cong., 2nd sess. 1983, 2-3.

[16] Ibid., 3-4.

[17] Ibid., 18.

[18] Ibid., 20-21.

[19] Ibid., 54.

[20] Ibid., 99.

of B'nai Brith, the ACLU, the Lutheran Council in the U.S.A, and the Americans United for Separation of Church and State.[21]

President Reagan's administration again testified in full support of the bill, submitting Secretary Bell's Senate testimony into the record. Senator Denton testified in favor of the House's legislation, informing the committee members that the Senate version of the Equal Access Act had been modified to apply only to students' right of access and allowed for greater school board discretion in dictating what type of forum would exist.[22] University of North Carolina Law Professor Arnold H. Loewy, who had earlier testified against the prayer amendment, spoke to the constitutionality of an equal access act dictated by the establishment of an open forum, stating that the "whole philosophy of an open forum is that the State does not care what is said, so long as it is not unlawful speech...it has got to be allowed. It's got to be all or nothing."[23] A school district could thus choose not to have an open forum by simply not allowing any non-curricular activities.

The hearings in both houses to clarify the equal access law were not without their own confusion. Committee members and witnesses alike used the stage to once again voice support or opposition to the prayer issue. While all three sponsors explicitly stated that the pending bills did not deal with school prayer, it did not prevent the confusion. Michigan Representative Dale Kildale began his comments by stating "What I am going to say is not directly related to this bill..." and then went into a defense of the prayer amendment. Witness Patrick Monighan of the Catholic

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[21] Ibid., 89-92, 160-164, 168-171, 50-53.

[22] Ibid., 137.

[23] Ibid., 201.

League had to correct members and witnesses in both hearings that their questions and responses were dealing with prayer and not the issue at hand.[24] While the House access bill would be defeated on the floor, the Senate version would find success, though not as a bill, but as an amendment to another act during the following legislative year.

On June 27, 1984, Senators Denton and Hatfield proposed the Equal Access Act (see appendix A) as an amendment to a senate education-spending bill known as the Math Science Bill. The Act consisted of five sections detailing the roles of the schools, the students and the government. The first section called for the prohibition of any discrimination based on religion against any students who wish to conduct a meeting within a school's limited open forum. This equal treatment clause applied to all public secondary schools that receive federal financial aid, which includes nearly all public schools. The second section defined a limited open forum to exist whenever a public school offers or allows for the meeting of any "non-curriculum" student organization during non-instructional time. This section allowed a school district to exempt itself from the Equal Access Act by choosing to allow only those student groups that were directly related to the school district's adopted or proposed curriculum. Thus if a school wanted to avoid having any student religious clubs meeting on its premises, it could simply stop all "non-curriculum" groups from meeting.

The third section of the Act expressed the parameters by which students could form groups and organizations. The criteria included a requirement that all groups

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[24] Ibid., 199.

should be student initiated, managed and attended. No outside influences, such as specific church leaders or parents could form or lead the clubs, nor could any school official be allowed to sponsor or attend the meetings except in a custodial manner. Section four established that the government could play no part in coercing attendance, shaping the content of the meetings or providing funds for any such groups. This clause was meant to separate the school district from even the appearance of abridging the establishment clause of the First Amendment. The fifth section declared that failure to heed the Equal Access Act could not be punished by the withholding of Federal funds. The government could not financially punish any schools not in compliance. Relief for students could thus only be found in the judiciary, wherein the courts would dictate adherence to the Act. The final section of the Equal Access Act addressed concerns that having a limited open forum would diminish the authority of the schools to maintain discipline and order. If a school determined that the inclusion of a specific student initiated club or organization would be a threat to the physical well being of students and faculty, it maintained the authority to prohibit access.

When the bill reached the floor, Senators rose to echo many of the same arguments given by those who testified in the hearings. In introducing the bill as an amendment, Senator Orin Hatch of Utah described the legislation as a remedy to the great confusion among public school districts as "...religious student clubs across the country are being told they cannot meet on the same basis as other students clubs...School authorities often feel they are compelled by judicial interpretation of

the first amendment to ban any religious activities on campus."[25] This Act would thus extend the *Widmar* decision to secondary schools and give direction to school administrators as to whether or not certain religious activities would be allowed. Senator Denton promised that its passage would "for the first time, make it clear that secondary school students engaging in religious speech have the same rights to associate together and to speak as do students who wish to meet to discuss chess, politics or philosophy."[26]

For both Senators Denton and Hatfield the Equal Access Act represented something larger than a religion bill. It stood not as an attempt to forward the government establishment of religion, but instead as a protection of the freedoms of speech and assembly. For Senator Hatfield the distinction was significant. An ardent opponent of President Reagan's prayer amendment, Hatfield felt that on the subject of equal access, religion was a secondary consideration, behind the constitutional rights of students.

> I feel very strongly that just because it is a religious subject, we should be no less vigilant about the freedoms and the rights in our Constitution than we are on any other subject...it is purely the right of the students to the access to school facilities, to have meetings, when one or more make this request of the administration and within the context of the rules and regulations governing all school activities.[27]

Hatfield stressed this position by sharing a letter on the floor from the ACLU stating its position was no longer in opposition to the equal access amendment, rather it stood

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[25] *Equal Access Act*, S. 1285, 98th Cong., 2d sess., *Congressional Record* 130 (June 27, 1984), 19211-19212.

[26] Ibid., 19216.

[27] Ibid., 19217-19218.

neutral, a shift from its stance during the hearings.[28] Other adversaries, however, did not waiver.

Senator Thomas Gorton of Washington agreed that the Act would be a remedy to potential actions of discrimination, but questioned if the cure might be more complicated than the disease.[29] The most vocal opponent on the floor was Senator Howard Metzenbaum of Ohio, who assailed the amendment on many fronts. Foremost in Metzenbaum's argument was the Act's possible erosive power on the theoretical wall between public schools and religious institutions. He feared that "an effort is being made to come in the back door" and erase the concept of a separation of church and state.[30] The Senator from Ohio further argued that if the Equal Access Act were passed, it would actually backfire, as unwanted groups such as cults and the Ku Klux Klan would be allowed on secondary campuses for the purposes of meeting and growing their numbers. This "parade of horribles" became a common theme among those in opposition to the Act.

In an attempt to compromise and show that his intent was not the advancement of religion into the schools, Hatfield proposed a perfecting amendment on the floor adding that no student-initiated clubs or groups should be prevented from meeting because of the "religious, political, philosophical or other content of [its] speech."[31] For Hatfield, religion was not the issue, the freedom of speech of all sorts was. He failed, however, to convince the Senator from Ohio. After additional debate regarding the autonomy of school boards within the scope of the Act, the Senate

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[28] Ibid., 19218.

[29] Ibid., 19224.

[30] Ibid., 19233.

[31] Ibid., 19220.

voted 88-11 in favor of the Math Science Bill, thus accepting the Equal Access Act and sending it to the House of Representatives for consideration.[32]

Debate on the House floor followed a similar theme. Many who had opposed the President's prayer amendment supported the concept of equal access legislation included in H.R. 1310, the Education for Economic Security Act. Representative Barney Frank of Massachusetts stated his intention "to vote in favor of the motion" as the Equal Access Act "does not discriminate among different types of groups." Furthermore he found that the Act empowered American teenagers to make freedom of speech choices without the assistance of school boards and authorities.[33] On the floor, Representative Lott declared his pleasure with the legislation, noting that the act would end the "misunderstanding and confusion rather than the malice on the part of school administrators."[34] Not everyone shared his joy.

Resistance in the House mirrored some of the Senate discussion and included new oppositions to the legislation. Arguments against passage included the possible threat to the Establishment Clause of the First Amendment, an influx of dangerous groups and the crafting of the bill. Representative Don Edwards of California declared that the act was obvious "government sponsorship of religion."[35] Charles Shumer, New York Congressman, attacked what he saw as a blatant attempt to bring religion into the schoolhouse, arguing that the bill would not only allow groups to meet, but promote religious services within public schools. Furthermore, at the other

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[32] Ibid., 19252.

[33] *Education for Economic Security Act,* H.R. 1310, 98th Cong, 2d sess., Congressional Record 130 (July 1984), 20933.

[34] Ibid., 20936.

[35] Ibid., 20937.

passage by the House, a *New York Times* editorial lambasted the Equal Access Act as "an atrocity, an unprecedented Federal intrusion into local school affairs."[40] Edd Doer of *The Humanist* warned parents that they may need to seek litigation to stop the invasion of the Christian "soul snatchers" that would now begin an assault on the schools.[41] Others, such as the *Progressive*, found the act to be a natural next step after *Tinker v. Des Moines*[42] in providing for civil liberties protection for public school students, arguing that "students do not need to be protected from ideas. For their intellectual and emotional well-being, they need to be exposed to all ideas, including those that speak of and for religion."[43] An *America* editorial reasoned that denying the purpose of the act would "seriously compromise the principles of freedom and freedom of speech."[44] Norman Redlich of *The Nation* defined the majority's collective thought, however, summarizing that the fate of the Equal Access Act was not yet fully realized as the discussion would now turn to the courts wherein the judiciary would need to rule on the constitutionality of the legislation.[45] Within six months that journey would begin, when an Omaha, Nebraska high school student entered her principal's office with the Equal Access Act in hand.

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[40] *New York Times,* editorial, August 1, 1984.

[41] Ed Doerr, "The Invasion of the Soul Snatchers," *The Humanist,* August 1984, 421.

[42] *Tinker v. Des Moines* was a 1969 Iowa case that involved secondary students arguing the right to wear armbands as a symbolic protest to U.S. involvement in Vietnam. While a divided appeals court upheld the right of the school to ban such protest, the Supreme Court reversed the decision, establishing the ability of students to exercise their right of free speech. 393 U.S. 503 (1969).

[43] Nat Hentoff, "The Fourth," *The Progressive*, December 1984, 37.

[44] "Equal Access for Religious Freedom," *America*, April 21, 1984, 290.

[45] Norman Redlich, Some Cracks in the Wall," *The Nation*, September 29, 1984, 279.

III

Bridget Mergens and a Bible Club

The purpose of the Equal Access Act was to further extend the principles of protected speech and assembly to public secondary students, specifically to religious groups or clubs. Its proponents intended to extend the application of the Supreme Court's *Widmar v. Vitale* decision for post-secondary campuses to the public high school environment. Would Congress's action withstand the scrutiny of the Supreme Court? A few months after its August 1984 signing, the first test of the Equal Access Act would begin. In January 1985 an Omaha public high school senior would request a school-sanctioned Bible club, the school district would refuse and the debate over limited open forums, free speech and assembly, and the constitutionality of the equal access legislation would begin.

In the fall of 1984 Bridget Mergens knew nothing of the Equal Access Act. Bridget was entering her senior year at Westside High School, the only high school in the Westside Community Schools district located in Omaha, Nebraska. She had attended Westside schools throughout her educational career. The youngest of five children, Mergens lived with her mother, an Omaha dental assistant. Her parents divorced when she was eight, but she maintained contact with her physician father who also lived in Omaha. Although raised Roman Catholic, religion did not play a prominent role in her family except for the obligatory holiday observances. In June of 1984, however, the role of religion in Mergens' life would drastically change.[1]

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[1] Bridget Mayhew (Mergens), interview by author, Omaha, NE, April 2005.

Prior to June 1984 Bridget Mergens was an independent, free-spirited teenager. Not yet mature and living in a single parent home, Mergens was an extrovert, prone to peer influences and crossing those lines her mother had drawn here and there to try such things as marijuana. Early that summer, however, one of her friends who had graduated and gone on to a Baptist college confronted her about her waywardness and the consequences of her decision-making. She listened to his depiction of the Christian Gospel and the need to give her life to Jesus Christ, that is, to be 'born-again.'[2] Later that summer, in the presence of another of her friends, she chose to make that conversion, surrendering her life to Christianity. For Bridget the decision came with many ramifications, not the least of which was the desire to surround herself with other teenagers who shared in her new found spirituality. She found this fellowship both in and out of school. At the beginning of her senior year, Mergens met fellow senior and choir classmate Andrea Simmonds. Simmonds, also a life-long district attendee, was a practicing Baptist and the two became instant friends, discussing their faith and the Bible during free times at school.[3] The two also began attending a weekly, citywide youth group called 'SPIRENO' at the Assembly of God church in Bellevue, Nebraska.[4] Here Mergens met students who shared her newfound beliefs. It was here also that she discovered that high school students from

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[2] The phrase "born-again,' is based on the Bible's John 3:3 used primarily by Fundamentalist Protestants to describe the process by which an individual repents of his or her sins and trusts in Jesus of Nazareth for the redemption and salvation of his or her soul. *The New American Desk Encyclopedia*, s.v. Born-Again Christians.

[3] Andrea Donahue (SImmonds), email message to author, May 2005.

[4] SPIRENO is an acronym for Spiritual Revolution Now. The city of Bellevue is a suburb located south of Omaha. The Bellevue Assembly of God was a large, thriving congregation now known as the Bellevue Christian Center.

across the city were meeting during non-instructional times in their respective schools to discuss the Bible.[5]

One evening in December of 1984 Mergens and Simmonds were driving home from a concert. They discussed their faith and their desire to have a type of forum at school where it would be convenient for other students to get together and have the same discussions they had been having about the Bible on Wednesday evenings. According to both Bridget and Andrea, it was in the car that night that the decision was made to form a Bible study group at Westside High School. It was also determined that Bridget should seek the permission of the principal to meet in the same manner as other groups and clubs at the school. For the girls the decision to have Bridget alone seek the permission stemmed from three obvious factors: first, Bridget was the more outgoing of the two; second, the principal was Bridget's homeroom supervisor; and third, there was no need for a unified front as both felt the request would not be a controversial issue. The purpose of the club was to provide a convenient forum for Christians and others to discuss the Bible and share their concerns about life, school and family. The objective was to meet before or after school in a classroom in the same manner as most clubs and groups at the school. With these goals in mind Bridget approached the principal of Westside High School, Dr. James Findley, in January 1985.[6]

Westside Community Schools was established in 1947, a result of the combination of two small school districts outside of the growing city of Omaha hoping to maintain a small community, educational environment. Now, nearly

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[5] Mayhew, interview, April 2005.

[6] Ibid.

surrounded by the Omaha Public Schools district, Westside is an independent public school system serving primarily middle and upper income families.[7] Dr. James Findley had spent nearly his entire career in the Westside district, serving wholly in administrative capacities. When Dr. James Tangdall was promoted from principal to associate superintendent in 1984, Findley assumed not only the role of principal of Westside High School, but also the position of Bridget Mergens' homeroom teacher. Homeroom was a shortened school period held each day wherein students received announcements and had the opportunity for advisement from at least one faculty member. Findley characterized his relationship with Mergens as typical for a high school principal and student. While he did notice a positive change in her behavior from previous years, Findley still found Bridget to be an immature, somewhat moody student. That played into his initial surprise when Bridget came to his office to request permission for the Bible club. For Findley, her demeanor seemed out of character and her request almost too formal, too rehearsed. Regardless, his answer was simple: the students may meet informally and discuss whatever they wish. The school, however, would not recognize the club nor allow access to the privileges given to school-sanctioned groups, such as the use of the bulletin boards or the intercom for announcements. Bridget Mergens remembers being shocked at his answer. Findley recalls being very clear in his response.[8]

Dr. Findley understood his role as principal to be not only an administrator, but also a protector of students. Parents of diverse faiths sent their children to him

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[7] Maria Laas, "The History Book of School District 66 – The Westside Community Schools 1947-1982: A Celebration," (Westside Community Schools, Omaha, NE), 1982, 3-6.

[8] Dr. James Findley, interview by author, Omaha, NE, May 2005; Mayhew, interview, April 2005.

with certain expectations including a freedom from being solicited or proselytized. His students were a captive audience, shielded from religious influence by the establishment clause of the First Amendment. Findley did not see his position as being hostile towards religion. He argued that his school did not prohibit discussions of faith or prayer, but instead supported each student's individual beliefs. To allow a religious club to formally meet by school endorsement would violate school board policy which prohibited the school's promotion of religion.[9] He saw himself not as preventing God from being in the school so much as preventing the school from endorsing any one particular view of God. As he understood the relevant court decisions, the separation of church and state, especially as it pertained to public schools, had to be complete.[10]

When Bridget reported the denial to Andrea, the girls shared their surprise and distress within their circle of friends. Dan Borman, the girls' Wednesday night driver and a student in a similar club at Burke High in the neighboring Omaha Public Schools district, brought the Equal Access Act to Mergens' attention. He told her how to get a copy of the Act from her congressman and gave her the name of someone at Glad Tidings Church in Omaha who could help her with her request. She ordered a copy of the act and called Douglas Veith, the man recommended by Borman.[11]

Veith was an Omaha attorney and a member of the Christian Legal Society who devoted some of his practice to assisting Christian fundamentalist causes.

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[9] Westside Community Schools Board Policy 5610, "Student Clubs."

[10] Findley, interview, May 2005.

[11] Mayhew, interview, April 2005.

Mergens was apparently unaware that Veith was an attorney during their first conversation, as it never occurred to her that she would be getting any type of professional advice. She simply wanted to know: "What are we doing wrong?" Veith advised Bridget to follow the chain of command within the school district, beginning with a new request to Dr. Findley. In February 1985 Mergens again approached Findley, this time handing him a copy of the Equal Access Act and asking him to have the school sanction a school Bible club. She argued that the group would be voluntary, that a faculty sponsor would not be necessary and that the legislation required that the school comply with her request. Having already consulted with Associate Superintendent Tangdall, Findley again denied the request to allow the group formal access to the school's facilities. It was the district's position that the Equal Access Act did not apply to Westside Community Schools as it viewed all of its clubs and organizations to be directly related to the school's curriculum and overall mission. Thus the Act's trigger of a limited open forum was not met. Findley offered to allow the students to meet at a church located adjacent to the school, but there would be no official acceptance of the club.

Once more in a bit of a shock, Bridget called Doug Veith for assistance, now aware of his profession. Veith advocated taking the next step of seeking the permission of the school board to have the school host the club. He offered to help her prepare and be with her at the meeting if necessary. Accepting the offer, Mergens requested to be put on the agenda for the March school board meeting: "I remember feeling frustrated that I had to wait so long to get on the agenda, but there was nothing else I could do but wait." After being put on the school board agenda, Bridget was

summoned to the high school office where she was greeted by both Findley and Tangdall. Tangdall, her homeroom advisor and principal from 1981 to 1984, asked her to drop the matter entirely as the board was most likely to support the separation of church and state. Frustrated, she accused her former principal of not knowing the law and left the meeting. She felt an immediate strain in her relationship with both administrators for the duration of the school year.[12]

On March 4, 1985 both Veith and Mergens addressed the Westside school board. Speaking first, Veith reviewed the Equal Access Act for the board. He argued that Westside was in fact a limited open forum as it sanctioned voluntary clubs and organizations that were not directly tied to the school's curriculum, specifically the chess and scuba clubs. Mergens explained that the Bible club would meet during non-instruction time and would be voluntary just like similar groups that were allowed to meet in other Omaha area public schools. Veith concluded the comments by threatening a federal lawsuit should the request be denied by the board. Testifying on behalf of the school, Superintendent Ken Hansen told the board that Westside was indeed a closed forum that allowed only curriculum-related clubs or groups. With little discussion the board voted 4-0, with one abstention, to uphold Findley's original denial of the club.[13]

"All I want is to have our Bible club," Bridget remarked after the hearing.[14] Following the board's vote, Mergens began to realize that the denial of her request

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[12] Mayhew, interview, April 2005. Findley testified in federal court that he did not participate in the meeting with Mergens and when interviewed, reaffirmed that position.

[13] Westside Community Schools minutes, copy provided by school district, in possession of author.

[14] "District 66 Won't Allow Bible Session," *Omaha World-Herald*, March 5, 1985, sunrise edition.

seemed to be something larger. To this point in the process, outside of the students who were interested in the club, few of her peers had paid much attention to her request. Both of her parents listened to her view of what was going on, but neither took more than a passing interest. However, the night of the board meeting, dozens of supporters were on hand. Ministers supportive of Bridget filled the room with backers. She spoke briefly with the press afterwards. She had assumed that the controversy would be over that night, but the vote and Veith's suggestion of court action took her aback. Looking at Veith afterwards, Mergens whispered, "Are you insane?" The decision now had to be made whether or not to continue with the request by legal means or simply accept defeat. Veith commented to a reporter, "...that will be up to Bridget."[15] Years later Bridget would claim: "I didn't know anything about the Constitution...I just thought my rights were being violated."[16] She decided the fight must continue.

Veith determined that their first step would be to request a preliminary injunction to stop the school district from preventing the club from meeting until the matter was resolved in court. Bridget was a senior and the school year was nearly over. He hoped to allow the group to meet, if only once, before any court proceedings. Mergens recollects not even knowing what an injunction was. "I kept thinking, this (the court case) is not really going to happen, we would climb this next tiny hill and then have our Bible study."[17] Veith knew otherwise. He asked Bridget to gather those students who were committed to having the Bible club. If there was

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[15] *Omaha World-Herald*, March 5, 1985.

[16] Mayhew, interview, April 2005.

[17] Ibid.

to be any further recourse, the parents would now have to be involved, and it was one of Bridget's parents that would confirm for her that the path she was about to take was the correct one.

Days later Veith met with those students and their parents in an Omaha hotel conference room. Bridget later described the environment as almost surreal. Here she was gathered with four other students and their parents. Each of the students was raised in various fundamental Christian homes.[18] Not only was Bridget new to the faith, but her own parents were still practicing Catholics. She convinced her father to come to the meeting to hear the attorney. Veith explained to the group that if they were to proceed, they would be filing suit for the preliminary injunction for the remainder of the school year and for a decision determining that Westside was in violation of the Equal Access Act. The parents discussed concerns and questioned Veith on the possible consequences any legal action would have on their children in regard to their school and permanent records. All of the parents then agreed to sign consent forms to allow the legal minors to pursue civil action. Before signing, Bridget's father pronounced, "What they [the board of education] are doing to my daughter is wrong." Bridget had her confirmation. Yet even that night Bridget and her friends "didn't see the full path of what was to come; we were like happy sheep."[19]

From the moment of the first request Findley suspected that Mergens' words were not hers alone. Her choice of vocabulary and her deliberate manner differed

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[18] Stephen Hollar, Brian Rensing, David Harris, Andrea Simmonds. Kendra Kellison, Michelle Harris and Kevin Brown were added to the plaintiffs at a later date.

[19] Mayhew, interview, April 2005.

from what he had heard and seen in homeroom. At the time he believed she was being used by someone at the Bellevue Assembly of God church where she was spending a great deal of time. Later he came to believe that she was a pawn, if unknowingly, of a larger, national organization - the 700 Club.[20] The 700 Club was the political and media outlet for Christian evangelist Pat Robertson. Robertson had been a vocal supporter of the Equal Access Act and would have, no doubt, liked to see the legislation tested in the courts. Mergens maintained, however, that no such relationship existed prior to the court preparations: "I was a new believer, in an unbelieving family, without a church – How would they have found me if they wanted to?"[21] When the civil action began, however, Findley continued to see what he felt were externally-influenced activities. Mergens kept asking if she could have her Bible club.

At the meeting with the parents, Doug Veith mentioned some tasks that would need to be accomplished before a lawsuit could be filed. First they would have to locate fellow classmates who would support the right of the club to be sanctioned regardless of whether they intended to join. Next they would need to find students who would be interested in attending the club's meetings if approved. Finally he would look for professional and financial assistance from outside his law firm. To this point Veith's efforts had been *pro bono*, an outreach of his own faith. The daunting task of a federal lawsuit and its numerous briefs and depositions would be

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[20] Findley, interview, May 2005.

[21] Ibid.

beyond his capacity. According to Bridget, this was the first time anyone mentioned any potential influence from someone outside the students or Veith.[22]

Turning to his Christian Legal Society, Veith sought the financial and legal assistance of the National Legal Foundation (NLF) in Washington D.C. The law firm, founded in 1985, is a public interest organization involved in the defense of religious liberty and the constitutional protection of the rights of Christians and other religious followers. An independent firm that actively responds to individuals' requests for help, the NLF received some funding from Pat Robertson's Christian Broadcasting Network prior to and during Mergens' proceedings. Founding members of the firm, Robert Skolrood and Doug Davis, flew to Omaha to help Veith plan legal strategy and compose Mergens' complaint.[23]

On April 17, 1985, with the help of the newly formed legal team, Mergens filed her complaint against the Westside Community Schools in Federal District Court in Omaha, Nebraska. The complaint asked for immediate injunctive relief, but also expanded the declaratory charges against the school district. While Mergens originally argued that the district violated the Equal Access Act, she now accused Westside of violating her First and Fourteenth Amendment rights as well:

> Plaintiffs, on behalf of themselves and others similarly situated, seek a declaration that the refusal of the Defendants to permit a wholly student initiated non-denominational fellowship group to meet before or after school at Westside High School, while permitting other groups comprised of students to use the facilities, violates the 1st Amendment and the equal protection clause of the 14th Amendment, including Plaintiffs right to free speech, freedom of assembly and association,

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[22] Ibid.

[23] Steven W. Fitschen, President, National Legal Foundation, email message to author, August 2005.

free exercise of religion and the establishment clause therein...[24]

The complaint argued that Westside was indeed a limited open forum as it allowed non-curriculum clubs to assemble and that the district's violation of Mergens' rights was based solely on her religious beliefs. Furthermore it contended that the denial violated Westside's own board policies that prohibited its schools from discriminating against students based on their religion.[25] The final paragraph of the complaint was a prayer for relief.

The complaint was filed with Judge C. Arlen Beam, a native of Nebraska, in his fourth year on the bench of the Federal District Court in Omaha. He scheduled May 10, 1985 for the injunction hearing wherein Mergens could explain why she merited immediate action from the judiciary. Westside, represented by its board attorney Allen Daubman, responded within days of the filing, petitioning for the complaint to be denied and the lawsuit to be dismissed.[26]

As the day of the injunction hearing drew nearer, the pressure on Mergens and the other students began to grow. Bridget started to receive some press requests and teachers began to comment to both Bridget and Andrea about the case. Except for the occasional "Bible thumper" comment from a few students, the student body was still mostly apathetic about the situation. The biggest critic, however, was Mergens'

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[24] "Plaintiff's Complaint, "April 17, 1985, Federal District Court for Nebraska, Omaha. The transcripts, evidence and briefs in the case are available at the National Archives at Kansas City, MO, filed as Case CV 85-0-426. Subsequent citations will be identified by the case number.

[25] Ibid.

[26] "Defense's Answer," April 19, 1985, Case CV 85-0-426, Federal District Court for Nebraska, Omaha.

it (the denial) was wrong, and should not be left undone."[31] She was not the only one who felt it was wrong. On May 10, 1985, to the surprise of both sides, a complaint in intervention was filed with the court. The United States government, by the decree of United States Attorney General Edwin Meese, sided with Mergens and the plaintiffs in asking for a judicial declaration against the Westside Community Schools. In its complaint written by Theodore Hirt, the government declared that the school district received federal financial assistance and therefore was subject to the Equal Access Act. The complaint defined a limited open forum per the act and argued for the act's constitutionality. While Hirt did not delve into whether or not Westside was a limited open forum, he did take issue with the district's request that the act be deemed unconstitutional.[32] "Once the U.S. entered on behalf of Mergens," Findley stated, "the case was no longer clear to us."[33] Clarity was years away.

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[31] Mayhew, interview.

[32] "Complaint in Intervention by United States of America," May 10, 1985, Case CV 85-0-426, Federal District Court for Nebraska, Omaha.

[33] "Findley, interview.

IV

Federal Court

Regardless of the potential for victory in federal court, Bridget Mergens would never attend a Westside High School-sanctioned Bible club. Now an alumnus, she focused on her freshman year of college while her legal team prepared for the hearing before United States Federal Judge Beam. In the interim between the injunction decision and the ensuing hearing, the attorneys prepared the final briefs for Judge Beam, disputing each other's statements of facts and setting the stage for the hearing's oral arguments and testimony.

Bridget Mergens' attorneys argued that the Westside Community Schools, through its board of education, district superintendent, and high school principal, violated her freedom of speech, right of assembly and the free exercise of her religious beliefs. They further alleged that the district disregarded her Fourteenth Amendment right of equal protection. Believing that the Equal Access Act was simply being ignored at Westside, her attorneys asked the Federal Court to order the school to allow a student-initiated, voluntary Bible club access to its facilities in the same manner that it allowed other non-curriculum groups to meet. Westside disagreed with each of Mergens' assertions as well as with her attorney's general statement of the facts. Judge Beam would hear the case and make the final determination.[1]

On June 3, 1985 the Westside school district filed with the court its response to Mergens' claims. Westside found no basis for the lawsuit whatsoever. The

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[1] "Plaintiff's Motion," July 10, 1986, Case CV 85-0-426, Federal District Court for Nebraska, Omaha.

defense argued that the Equal Access Act was unconstitutional as its requirement that a school open its facilities to religious organizations was a violation of the Establishment Clause of the First Amendment. Moreover the defense found the legislation's wording to be vague and impossible to apply, as it did not properly define what is and is not curriculum related. Finally, even if the act were to be deemed constitutional, Westside claimed that the Act did not apply to the school district as it regarded its high school environment to be a closed forum, not a limited open forum. All clubs and groups that had access to the high school's facilities were directly related to the school's curriculum. Thus Westside argued that the facts warranted a trial and asked that the suit be dismissed.[2]

For the plaintiffs, the issues in the case revolved around the fact that Westside was a public school district that received federal financial assistance. That being true, the district was required to adhere to the Equal Access Act even if only one of its thirty-one student clubs was found to be non-curriculum related. Westside responded in its brief that all of its clubs were indeed linked to its curriculum by falling under the general mission and goals of the school district. The district's attorneys argued that the court should determine: the classification of the forum that existed at the high school, the nature of the proposed Bible club, the constitutionality of the Act and finally, whether the *Widmar* decision could rightfully be extended to high school students. Nearly two years would pass as both sides haggled over facts and depositions. Mergens and some of her fellow plaintiffs had graduated from Westside and moved on with college and careers. Knowing this was a possibility at the outset,

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[2] "Answer of Defendants to Plaintiffs Complaint," June 3, 1985, Case CV 85-0-426, Federal District Court for Nebraska, Omaha.

Doug Veith requested and received permission to add three additional plaintiffs in October 1985 who would be affected by the outcome of the case.[3]

In the spring of 1985 Michelle Harris was a ninth grader at Arbor Heights Junior High School in the Westside school district. Michelle's brother, David, was one of the original five students who had met with Veith and agreed to be a plaintiff. Michelle found the situation to be intriguing largely because it was "cool" for her brother to be suing the school. Yet she also desired to join the process because she believed that the school's denial was not right. Because she was not yet enrolled at Westside, Michelle could not join the lawsuit until her sophomore year began. As with the other plaintiffs, she did not feel that the school was correct in its decision and wanted to be part of the solution. With Judge Beam's approval, Michelle, Kevin Brown and Kendra Kellison became plaintiffs.[4]

On November 6, 1985 Judge Beam denied both sides' request for an immediate summary judgment. The long arduous process of discovery and depositions set in. In July 1986 Mergens' lawyers stated that there were ten clubs at Westside High School that it deemed to be non-curriculum organizations. After several tentative dates and continuances, Mergens' complaint was scheduled to be heard in the spring of 1987.[5]

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[3] "Plaintiff's Motion for Summary Judgment," October 4, 1985, Case CV 85-0-426, Federal District Court for Nebraska, Omaha.; "Plaintiff's Motion for Leave to Submit Amended Petition," Oct. 4, 1985, Case CV 85-0-426, Federal District Court for Nebraska, Omaha, .

[4] Michelle Harvey (Harris), interview by author, Omaha, NE , July 2005.

[5] The ten clubs stipulated for discussion were Interact, Chess, Subserfers, National Honor Society, Photography, Welcome to Westside, Future Business Leaders of America, Zonta, Student Advisory Board and Student Forum. By stipulating these ten organizations the plaintiffs stated that it did not assume the remaining twenty-one were curriculum related.

In the Omaha federal courthouse on April 8, 1987, Judge Beam called the trial to order, requesting opening statements from both sides. On behalf of the plaintiffs, Veith opened with a brief statement of facts, outlining once again the Equal Access Act, its origin and its purposes. He asked the court to rule that Westside Community Schools was in violation of the Act and had discriminated against Bridget Mergens on the grounds of her religious beliefs, violating her First and Fourteenth Amendment rights. Westside's attorney, Allan Daubman, refuted the claim of discrimination in the defense's opening. He stated that it was the district's policy to have a faculty member sponsor or monitor each school-sanctioned group. The defense argued that the decision to deny the Bible club was based on the fact that to allow the club would require a school employee to sponsor the meetings, which would cause the school to be in violation of the establishment clause of the Constitution. He further argued that Westside was not a traditional forum. Since all of the student activities that took place on the school campus fell under the supervision of the school district, it could not be deemed a type of open forum and thus would not trigger the vague Equal Access Act. With the lines now drawn on the record, the trial turned to the testimonies of both parties.[6]

At the time of the trial Bridget Mergens was finishing her sophomore year at Creighton University studying to be a teacher. In the interim much of the work on the case involved legal wrangling and little need for her input beyond depositions. Now over two years after her first request, she sat in the witness stand as Veith's first called witness. His opening set of questions sought to establish Mergens' motives in

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[6] Transcript, April 8, 1987, Case CV 85-0-426, Federal District Court for Nebraska, Omaha, 11-14.

making the request. With the National Legal Foundation as co-counsel and the perception that national evangelical leaders wanted the Act tested, Veith knew that her reason for proposing the club was going to be scrutinized. She testified that she had not received any outside influence before approaching Findley. She wanted to hold the meetings at school because it was the most convenient setting for fellow students and because she knew of other students in the city who were holding similar meetings at their public schools.[7] Mergens stated that she did not really consider all of the ramifications of being a school-sanctioned group, as she simply "wanted a place to meet." Asked by Daubman in cross-examination if her primary motive was to test the Equal Access Act, Mergens answered with a "No." On redirect Veith questioned why the students did not meet anyway, without school permission, even after the denials from the administration. Mergens responded that the students did not wish to meet as a rebellious group, defiant of the system, especially when they felt they were within their constitutional rights to be sanctioned.[8]

Following Mergens, Veith and the National Legal Foundation's Doug Davis called several of the other plaintiffs, each addressing questions of motive in starting or joining the club. Andrea Simmonds denied that any outside group, including her parents, had encouraged her to establish the Bible club. She also reiterated Bridget's claim that the decision was made to not assemble the club as long as there was an official denial so as "to be above board." Kendra Kellison stated that she chose to join the lawsuit because she "wanted to be treated the same as the other groups" in the

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[7] While Mergens maintained the argument that similar meetings were being held elsewhere in Omaha, no evidence was presented in court that showed such meetings were being held.

[8] Transcript, 50, 61, 65.

school. Michelle Harris denied that she was coerced to join the lawsuit by her parents and stated that she wanted the club to be recognized whether or not the school endorsed its existence. Kevin Brown, Bryan Rensing and Kevin Coates echoed similar sentiments to end the first day of the trial.[9]

The next day Veith and Douglas resumed their case by calling Westside students to the stand who were not plaintiffs and either would attend Bible club meetings or did not have an interest in joining the group, but nonetheless felt it should be allowed. Each of the students stated that they would not see the existence of the club as school sponsorship of religion. With the conclusion of the students' testimonies, Veith announced that the plaintiffs would now proceed to adverse witnesses, beginning with Westside principal James Findley, who Veith now called to the witness stand for what would become six and a half hours of testimony.[10]

After establishing Findley's administrative position in the district, Veith immediately went to the question of the thirty-one school sanctioned groups defined by Westside as curriculum-related. When asked how the chess club could be part of the curriculum when there was no chess class, the principal responded that:

> Curriculum to me includes all of our required courses, our elective courses, all the activities and clubs, activities that fall in the curriculum as part of the co-curricular part of it, and there would be a number of other things that probably could fall in there, as well, but definitely I have always thought of activities as part of our curriculum.[11]

He further replied that cheerleading and scuba clubs were related to physical education, while service clubs were related to sociology or psychology. Findley

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[9] Ibid., 74-78,111,133,148.

[10] Ibid., 210-244, 253.

[11] Ibid., 263.

explained that while there may not be a direct connection between the groups and the classes, the similarities between them were enough to meet the missions and goals of the school district. When Veith asked if a Bible club could meet these same missions and goals, Findley responded in the affirmative. His answer, however, introduced a different rationale for excluding the club. His stance was that his denial did not stem from the club's inability to fall under the district's umbrella of curriculum, but rather from the school's lack of control or supervision of the subject matter that would be discussed, which would be against the school district's policies. If the club had no sponsor, then the school had no ability to play an active role in the functioning of the group.[12]

Findley believed that one of his duties was to be a protector of the 'captive audience' that was his student body. In his testimony he shared his concerns that, without district leadership and guidance, the club could become an advocacy group that addressed religion purely from one side. Through his conversations with Bridget he further believed that one of the goals of the Bible club would be to seek out and proselytize the nonreligious students at Westside. Unsure of the club's outside sponsorship and unable to provide faculty sponsorship, he felt he had no choice but to deny Mergens' request. Before stepping down from the stand Findley defined under cross-examination the environment at Westside as a closed forum and denied ever having a meeting with Bridget Mergens and James Tangdall. As day two of the trial closed, Veith called associate superintendent James Tangdall to the witness stand.[13]

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[12] Ibid., 266-270, 277, 298.

[13] Ibid., 307-315, 317-318, 367.

The next morning Veith tried to ascertain from Tangdall how the ten stipulated organizations were in fact curriculum-related. Like Findley, Tangdall defined the groups to be co-curricular in nature in that each was consistent with Westside's overall mission and goals. When challenged to relate chess's objectives to the curriculum, Tangdall replied that "we do not have anything that gives a direct one to one relationship." As for its co-curricular role, he described that "we hope [the chess club] improves the problem solving ability of kids, the critical thinking ability of students and enhances their logical approach to solving problems." The questioning then turned to the act and school sponsorship.[14]

When the Equal Access Act was passed in 1984 the Westside Community Schools administrators met and determined that the new law did not necessitate any policy changes within the district as they defined Westside as a closed forum. Tangdall argued that he "felt that the Act did not apply to Westside." If the law did not apply then Tangdall held that school policy dictated an obvious denial to Mergens' request. He met with Bridget to indicate to her that the school's decision was not based on her religion, but rather on the lack of school sponsorship available because of the establishment clause boundaries. "All of our other clubs are clubs that we provide with school endorsement and faculty sponsorship," he claimed, "and that was certainly different than this particular request." Citing this sponsorship as crucial to the mission and goals of the district, Tangdall finished his testimony stating that both he and Findley had authored a memo to the superintendent arguing that it would

[14] Ibid., 410-411, 413, 415.

be better to disband all groups and clubs rather than allow one club to meet without school control.[15]

Day three would close with the testimony of Superintendent Ken Hansen and assistant principal Ron Huston. Huston explained that he played no role in Findley's decision to deny Mergens' request. When asked by Veith for his opinion on how chess related to the district's curriculum, Hansen responded that he did not know how it could relate to any one specific course. The plaintiffs now turned to dispelling the defendant's argument that the *Widmar* decision could not properly be applied to high school students due to their age.[16]

In its pretrial brief Westside argued that the application of *Widmar* to Westside was unfounded because of the distinctions in intellectual age and maturity between college and high school students. While a college student had the ability to recognize that the existence of a religious club on campus was not an institutional endorsement of Christianity, a high school student did not have the same capacity to distinguish the neutrality of the school. Thus if Westside allowed a Bible club on its campus, students would perceive the school as being supportive of that particular club's objectives.

On April 13 Douglas Davis called Dr. David Stewart Moshmar to the witness stand. Dr. Moshmar was a researcher, author and professor in educational psychology at the University of Nebraska at Lincoln. Moshmar indicated that his studies centered on his interest in First Amendment issues for school children. When Davis asked him to explain the high school student's capability to distinguish

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[15] Ibid., 425, 432, 435.

[16] Ibid., 498, 501-509.

accommodation by a school district, he replied that "the typical high school student is capable of a wide variety of abstract abilities, being able to look logically at arguments..." and that in fact there is "lots of overlap in abilities between high school and college" cognitive faculties. Asked if a high school student would perceive the sanctioning of a religious club as the endorsement of a specific religion, Moshmar responded that if that reasoning was correct, the denial of such an organization might equally be perceived as hostile towards a particular religion. It was his conclusion that there is no difference between a college and high school student in their ability to see action as strictly school or student directed.[17]

Davis next called Dr. Ward Sybouts, a professor of educational administration and curriculum and instruction at University of Nebraska at Lincoln. Deemed by the court to be an expert on school activities, Dr. Sybouts examined the ten stipulated groups for curriculum relationship. Applying his own definition of curriculum, as well as Congress's implied standard from the legislation, Sybouts found four of the ten groups to be clearly non-curriculum related, citing specifically that it would be difficult to argue that chess was curriculum-related unless there was an actual chess class. With the closing of Sybouts' testimony the plaintiffs rested and the trial turned to Westside's defense.[18]

Daubman called back Findley and Tangdall for statements regarding intellectual age differences, club specifics and administrative roles. Findley stated that "high school students...interpret things based upon what has happened in the past" and thus would perceive the school's sanctioning of a Bible club as government

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[17] Ibid., 543, 552-555, 558-560.

[18] Ibid., 563, 576, 583.

endorsement of one religious faith. He defended himself against the accusation that he denied the proposal based on its religious content, stating that he had no problem with Mergens meeting informally with students to discuss the Bible, it just could not be school sanctioned because of the issue of sponsorship. Both Findley and Tangdall spoke again to the importance of the administrators' role of meeting parents' expectations of protection from soliciting and proselytizing. Bridget was then called back to state that she was never prevented from meeting informally, but that the denial was based on the proposition of a formal, school-sanctioned meeting. With her testimony, the defense closed after less than a day's worth of testimony.[19]

When the trial resumed the following day Judge Beam asked that each of the sides address certain issues in their closing statements. He requested that the plaintiffs speak to the application of the *Lemon* test and the importance of meeting formally as a club. Of the defense he inquired for more distinction between *Widmar* and how the district would explain the free exercise clause of the First Amendment. With those instructions the court turned to the final statements, beginning with Mergens.[20]

Davis, on behalf of the plaintiffs, described Westside's concern over sponsorship as a red herring used to cover up the district's true concern that the club was Christian in nature. Using a requirement of faculty sponsorship simply acted as a means by which the school could evade the Equal Access Act and thus deny access to a group based solely on its religious content. He asserted the denial was based, in

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[19] Ibid., 590-635.

[20] "Closing Arguments," Transcript, April 16, 1987, Case CV 85-0-426, Federal District Court for Nebraska, Omaha, 1-4.

fact, upon the religious speech that would take place in the future and thus the school's action was one of prior restraint. There was no distinct difference between scuba, chess and the Bible club as "there is no bright line and the reason there is no bright line is because Westside has an open forum and it is impossible to draw that bright line."[21] Davis argued that Findley and subsequently the board of education created a line of distinction based on a fear of outsiders, specifically fundamentalist Christians. Thus Westside, not the enforcement of the Act, proved hostile towards religion. He concluded his statements by emphasizing that Bridget Mergens did not seek preferential treatment by the school district by asking for a formal meeting, but instead equal access to a forum that was open to other student groups: "She is requesting equality."[22]

Attorney Thomas Bovard next spoke briefly on behalf of the United States government. He reiterated the history of the Equal Access legislation and explained that its purpose was to protect the high school students' First Amendment rights of free exercise and speech. The government felt that such rights were being violated as secondary schools were confused as to whether or not the *Widmar* decision applied to them. It was the government's stance that *Widmar* should be extended to secondary schools and that the Equal Access Act accomplished this task and was in fact constitutional.[23]

Closing for the defense, Daubman likened Mergens' "political and philosophical" reasons for supporting a school-sanctioned club as nothing more than

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[21] Ibid., 19

[22] Ibid., 20-32.

[23] Ibid., 32.

window dressing that disregarded the Establishment Clause of the Constitution. He argued that "the curriculum at Westside High School consists of those activities that are under the control and supervision of the high school and that includes the student clubs because that is consistent with our board policy..." and thus theirs was a closed forum. While he admitted that that definition contrasted with the one outlined in the Equal Access Act, Daubman stated that it should stand as acceptable because the legislation was vague when defining "non-curriculum." He finished by arguing that the differences between college and high school students were not only in intellect, but also in environment.[24]

In rebuttal Davis once again refuted Westside's claim of a closed forum:

> The reason they are arguing that, is they had a religious club that wanted to meet. Whether they purposefully wanted to discriminate is not in dispute. The fact is that they did discriminate. They selectively excluded a religious club and in order to do so they had to come up with an argument and the argument is 'We have an open forum except when it comes to student clubs and then all of a sudden we close the door.[25]

Beam commented during the closing that he was concerned about the congressional characterization of "non-curriculum" because without a clear-cut definition it was difficult to identify what was related to curriculum. That was, however, what Beam had to work with.[26]

Mergens left the courtroom confident that she had been correct in taking the denial all the way to court. She and her fellow plaintiffs believed that their case was

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[24] Ibid., 45, 51-52, 62.

[25] Ibid., 71.

[26] Ibid., 54.

persuasive.[27] Nonetheless, Veith and Davis began preparations in case of a needed appeal. Findley was uneasy with the way the trial had progressed. He was uncomfortable that his own beliefs on God and the Bible were called into question. He never felt that God was not present in the schools; the schools just should not endorse it. Findley also knew that the curriculum question was crucial and felt that his school was on unstable ground. Groups like the scuba and chess clubs put the defense into "unnatural definitions" of curriculum. He had preferred the argument of the differences between high school and college students, but was surprised by the testimony of the plaintiff's expert witnesses. Finally he was troubled by what he saw in the courtroom each day watching his current and former students. As in the time period following his denial of the Bible club, he observed what he described as well-orchestrated actions by the students. Throughout the trial the students sat in and outside of the courtroom with their Bibles open in what Findley described as "premeditated" setups. Regardless of the actions of the students, Mergens' confidence or Findley's concerns, the decision now rested with Beam.[28]

Nearly ten months after the trial, on February 2, 1988, Judge Beam handed down his decision in a one page order supported by a sixteen page memorandum on the case. Beam found that Mergens and her fellow students had standing to raise the constitutional questions put forth in the trial and that the proposed Bible club merited examination as it was identical to other groups allowed at the school with the exception of the lack of a request for a faculty sponsor. What Beam needed to

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[27] Bridget Mayhew (Mergens), interview by author, Omaha, NE, April 2005.

[28] Dr. James Findley, interview by author, Omaha, NE, May 2005.

determine, however, was the relationship of those groups to the curriculum and whether or not their existence established a limited open forum.[29]

Judge Beam noted the growing difficulty involved in maintaining a balance between the rights of free speech and free exercise in conjunction with the establishment clause. While the judiciary had previously upheld the right of speech in public high schools through *Tinker*, it had not minimized that right if the speech was religious. "In fact," he observed, "the thrust of the free exercise and free speech clauses, when considered together, leads to the conclusion that heightened consideration should be accorded religious speech, wherever it is practiced." Beam wrote that while in previous cases justices had sought to create a preferential order of rights wherein the freedoms of press, speech, and religion were listed in a preferred order, he now found that any "bright lines circumscribing constitutional interests...have blurred." With the order of rights not clear, he would thus rely on the analysis of precedent to create the framework to apply to the *Mergens* case.[30]

Beam wrote that the *Mergens* case was appropriately set parallel to the Supreme Court's ruling in *Widmar*. Widmar applied the court's *Lemon* test determining if legislation served a secular purpose, was neutral on religion and did not entangle the government with religion. During the hearings Beam expressed concerns that he may have to utilize the test in order to establish the constitutionality of the Equal Access Act. His concerns stemmed from the varying methods by which it had been applied or not applied in previous cases. The test would be necessary if

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[29] *Bridget Mergens v. The Board of Education of the Westside Community Schools*, 867 F.2d 1076 (1988), 2.

[30] Ibid., 4, referring to *Murdock v. Pennsylvania,* 319 U.S. 105 (1943).

Beam ruled Westside to be an open forum. While the forum and environment differed between college and high school campuses, the similarities to the schools' actions of barring a religious group while allowing others was significant. He found that the *Widmar* decision's shielding of religious speech mirrored the protection of political speech in the earlier *Tinker* decision. However, in both cases it was logical to allow the educational institutions to establish a set of regulations that maintained the goals of the school. In a footnote to the discussion on *Widmar*, Beam rejected Westside's argument of distinction between the impressionability of college and high school age students.[31]

Addressing the Equal Access Act, Beam reviewed the Supreme Court's acknowledged categories of speech forums: opened, limited and closed. As the access act depends on the classification of the forum at a particular school, Beam then sought to label the forum that existed at Westside. In *Widmar* the court found an open forum to exist. In Mergens the plaintiffs had argued that by sanctioning clubs such as chess and subserfers, Westside High School had also created an open forum. Westside had refuted this argument, however, believing that all of the organizations at its school were related to its curriculum, thus making it a closed forum. Beam agreed that Westside's policy of admitting clubs connected each of them to the overall curriculum. He believed the district's argument that each of its school-sanctioned organizations fell under the auspices of being part of the overall missions and goals of the school. Beam declared, "that Westside High School has not created a limited open forum as that term is used in the Equal Access Act or in...*Widmar*." He was

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[31] Ibid., at 5-6.

convinced that the clubs that were allowed access to Westside were linked to the educational purposes of the school and accordingly ruled in favor of the defendants.[32]

Furthermore, Beam addressed Mergens' accusation that the school district discriminated against her by violating her rights of speech and free exercise. In light of his ruling that the forum at Westside was closed, he found that the school's denial did not "offend the Constitution." Within a closed forum, the school maintained the right to restrict formal speech. The plaintiffs could engage in informal Bible discussions, but the school was within its right to restrict use of its facilities.[33]

By agreeing with the defendants that Westside was a closed forum, Beam avoided the application of the *Lemon* test in order to rule on the constitutionality of the Equal Access Act. As the Act was only triggered in the presence of a limited or open forum, it did not apply to the Westside High School, negating the need for the Act to be evaluated on its merits.

After the long wait the defendants were elated with the decision. "We thought all of our activities are curriculum-related, and that each one served a legitimate educational purpose," Superintendent Ken Hansen told a reporter.[34] The plaintiffs did not share in the joy. The National Legal Foundation's Robert Skolrood called the judgment a "terrible decision" and questioned the motives of Beam. He felt that Beam's decision was written in a limited scope so as to avoid scrutiny if Beam was ever asked to accept a higher judicial appointment.[35] Bridget Mergens was dismayed as she was "confident we were right." Attorney Doug Davis promised an appeal,

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[32] Ibid., at 8-13.

[33] Ibid., at 14-15.

[34] "Judge Says Westside Needn't Allow Bible Club," *Omaha World Herald*, Feb. 2, 1988

[35] "Foundation Says it Will Appeal Westside Case," *Omaha World Herald*, Feb. 3, 1988.

ultimately to the Supreme Court if necessary. True to his word, the request for appeal was filed the next day.[36]

[36] Mayhew, interview, April 2005.

V

Appeals

On February 3, 1988, Bridget Mergens' attorneys filed a one-paragraph notice of appeal, asking the United States Court of Appeals for the Eighth Circuit to reverse Judge Beam's decision in favor of Westside Community Schools. A three-judge appellate panel in St. Paul, Minnesota would consider the appeal later that year. The decision of that panel would propel the parties closer to the United States Supreme Court.

While the Eighth Circuit does not record transcripts of oral arguments before its panels, the evidence found in the briefs reveals that little new information was presented to the Judges Donald Lay, Theodore McMillian and Floyd Gibson. Mergens' brief asked for a reversal of the district court decision based on the facts presented at the trial and the perceived errors in the district court's rationale.[1] It argued that Westside High School was a public forum by virtue of the existence of non-curriculum clubs. In addition the brief stated that the school's structure for approving clubs within its system was vague, allowing for administrative denial based purely on the content of speech within a particular club. The Mergens brief disputed Beam's belief that the plaintiffs' rights to free speech, equal protection and free exercise of religion were not violated by Westside's action.

In its request to have the lower court decision affirmed, Westside High School reiterated its defense of its club system and procedures as a closed forum, as well as its stance that even if it were deemed to be an open forum, the Equal Access Act was

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[1] "Appellants' Brief and Addendum," April 25, 1988, Eighth Circuit Court of Appeals, St. Paul, MN, *Mergens v. Westside*, Case CV 85-0-426.

itself unconstitutional. As Westside maintained control over all clubs it sanctioned per the assignment of faculty sponsors, it believed its campus was a closed forum. The appellate brief focused more strongly on this issue of faculty sponsorship of clubs and activities. If the court found that the school's control did not by itself amount to a closed forum, then the access law should be found unconstitutional because it required schools to wrongfully entangle themselves in religious groups and clubs through the use of such sponsorship. If the Act was not ruled unconstitutional, the only remedy schools had to prevent an establishment violation was to eliminate all involvement or control over clubs.[2] Mergens' lawyers replied to the Westside position by again contending that the ten clubs stipulated at the district level demonstrated the presence of an open forum at Westside. They also disagreed with the school's fear of entanglement by drawing the court's attention to the fact that Dr. Findley had testified at trial that the Bible club would meet the general mission and goals of the school. Mergens' reply brief also argued that the school need not be entangled due to the club's willingness to forego a faculty sponsor, except for custodial supervision.[3]

The United States, once more acting as an intervenor, responded to Westside's claims that the Equal Access Act, if applicable in the case, should be found unconstitutional. It defended the drafters of the legislation as lawmakers who sought to extend the Supreme Court's *Widmar* decision to public high school students. The United States argued that the Act encompassed the rights of speech and exercise

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[2] "Brief of Appellees," June 17, 1988, Eighth Circuit Court of Appeals, St. Paul, MN, *Mergens v. Westside*, Case CV 85-0-426.

[3] "Appellants' Reply Brief," June 25, 1988, Eighth Circuit Court of Appeals, St. Paul, MN, *Mergens v. Westside*, Case CV 85-0-426

without over stepping the bounds of the Establishment Clause. Using the *Lemon* test as a framework, the government claimed that the act was secular in design as it covered more than religious activities. It contended that any advancement or inhibition of religion by a school operating under the Act would be incidental and could not be considered endorsement. The only danger of entanglement stemmed from a school's ability to censor speech, not from the granting of approval for a club to meet.[4]

On February 8, 1989, one year after the district court decision, the three-judge panel of the United States Court of Appeals for the Eighth Circuit issued its decision in a short written opinion by Judge McMillian. The appellants had asked for a reversal of the lower court based on the application of the Equal Access Act to what it deemed to be an open forum at Westside High School. The federal district court had identified the school as a closed forum. The appellate panel unanimously agreed with the appellants and reversed Judge Beam's order.[5]

The opinion restated the statute defining a limited open forum to be in existence whenever a school allows access to its facilities to at least one non-curriculum student group. Mergens' attorneys believed that at least ten of Westside's clubs were non-curriculum organizations. Westside argued that it was a closed forum because all of its clubs were curriculum related as each directly or indirectly fell under the school's umbrella of mission and goals. The appeals court disagreed with Westside: "Allowing such a broad interpretation of 'curriculum related' would make

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[4] "Brief for the United States as Intervenor," April 11, 1988, Eighth Circuit Court of Appeals, St. Paul, MN, *Mergens v. Westside*, Case CV 85-0-426.

[5] *Bridget Mergens v. The Board of Education of the Westside Community Schools*, 867 F.2d 1076 (8th Cir. 1989), 1.

the Equal Access Act meaningless." The panel felt that if schools were empowered with the discretion described by the district court, schools could indiscriminately choose favored clubs while arbitrarily denying access to undesired groups based on the content of speech: "This is exactly the result that Congress sought to prohibit by enacting the Equal Access Act." If a school has the ability to simply declare itself closed, it would then have the ability to choose to discriminate.[6]

In its decision, the appellate court examined the legislative history of the Equal Access Act. Specifically it pointed to the exchange on the Senate floor wherein one of the authors of the amendment, Senator Hatfield, answered in the affirmative when asked if the presence of a chess club created a limited open forum. McMillian stated that "Congress did not intend for the Equal Access Act to be easily circumvented by administrative decree. Many of the student clubs at Westside High School, including the chess club, are non-curriculum related." That being true, the Equal Access Act should be triggered.[7]

McMillian then turned to the issue of the constitutionality of the Equal Access Act. Westside had argued that regardless of the forum, the Act violated the Establishment Clause. The judges, once more, disagreed. The panel accepted at face value that the legislation was an extension of the *Widmar* decision. Like the district court, they found a similarity of the facts between the two cases and the application of the *Lemon* test. McMillian agreed that the legislation was less likely to entangle the government in religion than was the act of censorship itself. He found that "the only difference between the Equal Access Act and *Widmar* is the...extension of the equal

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[6] Ibid., 2.

[7] Ibid., 3.

access principle to public secondary school students." Thus the act could only be found to be unconstitutional if there is a difference between college and high school age students in the ability to recognize a school's neutrality – a predication rejected by the federal district court and now the court of appeals. So strong were the parallels between *Mergens* and *Widmar* that "even if Congress had never passed the Equal Access Act, our decision would be the same under *Widmar* alone. Accordingly, we reverse the decision of the district court."[8] The National Legal Foundation's Robert Skolrood reacted to the appeals decision with great happiness: "It is one of the most important decisions in decades...students will no longer be regarded as second class citizens." James Findley and the other Westside administrators were dismayed at the opinion. Bridget Mergens was relieved that they had finally won, but her relief was short lived as the school district quickly sought to have the Supreme Court consider the case.[9]

Westside was not the only party seeking relief from the high court. Three weeks earlier the United States Court of Appeals for the Ninth Circuit had issued an opinion in *Garnet vs. Renton School District.* In that case a high school student was denied his request to host a religious club on school grounds prior to the school day. The Renton School District club policy stated that all of its activities were extensions of its courses and that it considered itself to be a closed forum. The federal district court ruled in favor of the school's denial. On appeal, the Ninth Circuit affirmed the lower ruling, finding that granting access to a religious club would be in violation of

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[8] Ibid., 4-5.

[9] "Judge Says Westside Needn't Allow Bible Club," *Omaha World-Herald*, Feb. 2, 1988. Bridget Mayhew, interview by author, Omaha, NE, April 2005; "Foundation Says it Will Appeal Westside Case," *Omaha World-Herald*, Feb. 3, 1988.

the Establishment Clause. The court went on to state that there are distinct differences between the high school setting and *Widmar*. Furthermore, the court commented on the issue of local authority, stating that it respected "the district's determinations about which activities are curriculum related."[10] In similar cases, the Eighth and Ninth Circuits were now in disagreement, making it likely that the Supreme Court would be obliged to hear the *Mergens* appeal upon request.

Westside Community Schools, which began the case as the "defendants" and then became the "appellees," now acted as the "petitioners" requesting arguments before the Supreme Court by way of Writ of Certiorari.[11] Westside took six pages of its twenty-seven page brief to share with the high court its statement of the case, asserting that Westside was a closed forum wherein all clubs and organizations met the overall missions and goals of the school. It required that each student club be sponsored by a faculty member. The school had no issue with students meeting informally to discuss religious topics, but felt bound by the Constitution to deny any club that advocated a specific religion, in order to avoid the appearance of school endorsement. The ten clubs stipulated at the federal level were each related to the overall curriculum at Westside. It felt that the issues that the Supreme Court needed to address centered on whether or not the school district had violated the rights of the

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[10] *Richard Garnett v. Renton School District*, 865 F.2d 1121 (1989).

[11] Latin phrase meaning "to be informed." The phrase is applied to appellate proceedings for re-examination of actions of a trial court, or inferior appeals court. The United States Supreme Court uses writ of certiorari to reflect the decision by the court to hear an appeal. *Tech Law Journal*, s.v. "certiorari," http://www.techlaw journal.com/glossary/legal/certiorari.htm (accessed October 2, 2005).

students, whether the school's forum triggered the Equal Access Act, and whether the act was constitutional.[12]

As in the lower courts, Westside maintained that it was not an open forum. It argued that not all organized student activities are speech and thus the traditional definitions of forum cannot be utilized when discussing groups such as chess or scuba diving. Turning to the 1985 Supreme Court's ruling in *Cornelius v. NAACP Legal Defense Fund*, Westside contended that the district court's ruling of a closed forum was correct because it allowed school officials the authority to act as a "gatekeeper to determine which speakers will be given access..." thus keeping the forum closed. School officials had to deny the request for a Bible club to avoid even the appearance of advocating a position. By changing that policy, the school district believed its forum would drastically be altered, and they would be required to allow access to any controversial and potentially dangerous group – all without faculty sponsorship.[13]

The petitioners then asked the Supreme Court to either define non-curriculum or establish who has the authority to define the term. Westside argued that the authors of the access legislation did not want to limit local authority in defining curriculum and non-curriculum. If the Westside Community Schools wanted to define curriculum clubs as extensions of the district's missions and goals, then it was within their rights to do so. Westside wanted direction from the Court for other schools and other judges as to whether there should be one universal definition of

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[12] "Petitioners' Brief," Supreme Court of the United States, 1990, Case CV 85-0-426, *Board of Education of the Westside Community Schools v. Bridget Mergens*, 496 US 226.

[13] Ibid.

curriculum or whether local school districts should be allowed to define the term for themselves.[14]

Finally, Westside asked the Supreme Court to reverse the appellate court because requiring the school to permit the Bible club as a sanctioned part of its activities would entangle the school with religion because of the district's policy of having a faculty sponsor for all groups. From Findley's first denial through the district decision, Westside was motivated by the belief that even if were to be declared a limited open forum, it could not allow access to a Bible club. The role of the high school's faculty sponsor crossed the wall separating the school and religion. Westside reiterated that it believed that the students were asking for an endorsement of their religion by the school. This would require the school to violate the Establishment clause.[15]

Mergens and her fellow plaintiffs, now the "respondents," used five of their thirty-three pages to declare their statement of the case. They argued that the organizers of the Bible club desired the same treatment as other clubs and organizations that met at Westside High School. They suggested that the faculty sponsors were only custodial in nature and thus not necessary for every student club. The respondents contended that the administrative denial of the club was based entirely on the possible religious content of its speech and was a "hysterical response to the idea of a Bible club." Within this statement of the case, Mergens' lawyers addressed one of the Westside groups not stipulated at the federal level. Peer Advocates was a sanctioned Westside club that primarily focused on allowing the

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[14] Ibid.

[15] Ibid.

school's students to assist and tutor handicapped children. At the federal trial Dr. Findley had been asked if the Peer Advocates "relate[d] to any of the required curriculum or elective courses at Westside High School?" Findley responded in the negative. The respondents now sought to have the high court use this specific testimony to show that the Equal Access Act had been triggered.[16]

In their argument Mergens' attorneys described the school's denial as a breach of constitutional protection of speech. Since the administrators had admitted at trial that the club would satisfy Westside's missions and goals, the denial could only be from its supposed content. The fact that each of the petitioner's briefs spoke of faculty sponsorship was simply a means to cover up the school's discrimination. Furthermore, Mergens' lawyers stated that Westside was an open forum, protected in the same manner as the court's decision in *Widmar*, where it was deemed that the prohibition was a greater hostility than the accommodation tended to promote. If the school simply feared the appearance of endorsement, they could have taken less restrictive steps to make that known.[17] Next the Mergens brief raised questions of due process under Westside's vague club policy. Permitting administrative discretion for the acceptance or denial of groups allowed for the opportunity of abuse. Without formal written standards a group could be denied, as in this case, solely because of its potential viewpoint.[18]

Finally, Mergens' attorneys asked the Supreme Court to find that the Equal Access Act was constitutional. Much like the appellate brief for both Mergens and

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[16] "Respondents' Brief," Supreme Court of the United States, 1990, Case CV 85-0-426, *Board of Education of the Westside Community Schools v. Bridget Mergens*, 496 US 226.

[17] Ibid.

[18] Ibid.

the federal government, the argument followed the *Lemon* test, outlining the act's secular purpose, religious neutrality and lack of entanglement. If the court allowed the act to stand, then it must also find that Westside had a limited open forum, per the Peer Advocates testimony, and affirm the Eighth Circuit's decision.

Westside replied to Mergens, disputing the respondents' claims of the applicability of the Equal Access Act. The school district argued that it did not single out the Bible club for denial as the school "refuses recognition to any club whose purpose is one-sided advancement of ideological views, whether religious or political." The appearance of being singled out was based on the fact that it was the only advocacy club to ever seek sanction. Nor would the Peer Advocates group bring about the act's application, as it was a teacher run organization, not the student-initiated group that the Equal Access Act described.[19]

The petitioners further argued that the school's action was not a constitutional infringement as the school reserved the right to restrain speech or action that might be construed as school endorsement. The school reserved the right to restrict sanctioned speech if such speech gave the appearance of violating the establishment clause of the First Amendment. As for the lack of standards, Westside argued that the club policy was only vague depending on who was allowed to define what was meant by curriculum or non-curriculum. This stance allowed Westside to again ask the court to clarify who should have control over these types of educational matters – the local school board or federal government.[20]

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[19] Ibid.

[20] "Petitioners' Reply Brief," Supreme Court of the United States, 1990, Case CV 85-0-426, *Board of Education of the Westside Community Schools v. Bridget Mergens*, 496 US 226.

Along with the petitioners' and respondents' briefs, there were seventeen *amicus curiae* briefs, thirteen in support of Mergens and four in support of Westside.[21] The most significant was that of the United States, the intervenor in the lower courts. The Justice Department's lawyers summarized the legislative history of the Equal Access Act and analyzed the act in its recommendation to the high court to affirm the Eighth Circuit. They argued that the Act prohibited discrimination against groups based on the content of speech. The Act sought the same equal treatment of groups in the high school setting that was shown in *Widmar*. The government then asked the court to give a framework to the schools for the definition of curriculum so that it could not be arbitrarily defined or abused. Applying the *Lemon* test, the United States disputed Westside's stance that the Act violated the establishment clause, instead arguing that equal access was "the ideal envisioned by the Framers," and that Congress wanted to make a law that promoted the First Amendment. The United State also took the position that Westside had a limited open forum and the act should thus be applied.[22]

The American Jewish Committee, on behalf of Westside, argued for reversal based upon the fact that the access act breached the second and third steps of the Lemon test by asking a school to endorse a particular religion and by requiring a

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[21] Latin phrase meaning "friend of the court." The name for a brief filed with the court by someone who is not a party to the case. *Tech Law Journal*, s.v. "certiorari," http://www.techlaw journal.com/glossary/legal/amicus.htm (accessed October 2, 2005). Briefs on behalf of Mergens included the Baptist Joint Committee on Public Affairs, Catholic League for Religious and Civil Rights, Concerned Women for America, Christian Advocates Serving Evangelism, Knights of Columbus, Rutherford Institute, Southern Center for Law and Ethics, U.S. Catholic Conference, Tara Lynn Burr, Richard Colin Maryrum and Dr. David Moshman, Campus Crusade for Christ and Save America's Youth. Briefs on behalf of Westside included American Jewish Committee, People for the American Way, Anti-Defamation League of Bnai Brith and National School Boards Association.

[22] "United States Amicus Brief," Supreme Court of the United States, 1990, Case CV 85-0-426, *Board of Education of the Westside Community Schools v. Bridget Mergens*, 496 US 226.

school to entangle itself in the administration of a religion. It asked the court to recognize the unique environment of secondary schools as a non-public forum. Even if it the setting could be a limited public forum, then the establishment clause still reigned supreme because of the entanglement of school sponsorship, financing and involvement.[23] The National School Board Association, in its argument for reversal, contended that the Act violated the first part of the Lemon test in that Congress first desired a religious only protection and then included the word religious in the legislation. The association contended that the original intent of the Act was to promote or advance religion, with its authors simply adding "political and philosophical" clubs to make it appear somewhat neutral. Moreover, the association felt that the Eighth Circuit had stumbled in not leaving the definition of "non-curriculum" to local school districts.[24]

The Rutherford Institute, a conservative legal association, argued on behalf of Mergens for affirmation by also looking at the Lemon test. In its analysis it explained that the Act passed the test, while Westside's action did not. The act of censorship or denial was seen as paramount to entanglement as it placed the school in the position of violating free speech and exercise of religion.[25] In a more extreme argument for the court's ruling in favor of Mergens, the national Christian youth organization Save America's Youth called for the Supreme Court to stop the "sterilization of public

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[23] "Brief of American Jewish Committee," Supreme Court of the United States, 1990, Case CV 85-0-426, *Board of Education of the Westside Community Schools v. Bridget Mergens*, 496 US 226.

[24] "Brief of National School Board Association," Supreme Court of the United States, 1990, Case CV 85-0-426, *Board of Education of the Westside Community Schools v. Bridget Mergens*, 496 US 226.

[25] "Brief of Rutherford Institute," Supreme Court of the United States, 1990, Case CV 85-0-426, *Board of Education of the Westside Community Schools v. Bridget Mergens*, 496 US 226.

education" from Judeo-Christian values. It reminded the court of the role religion had played in the history of the United States and of the recent restraint placed on religion by the judiciary. By not allowing the Equal Access Act to stand, the government would be in the position of endorsing non-religion and make students "creatures of the state."[26]

The Supreme Court obviously needed to determine a standard or definition of the term "non-curriculum." It was also possible that the Court would need to rule on the constitutionality of the Equal Access Act, turning again to the Lemon test. However, that decision would not come before each side had the chance to give oral arguments before the high court in January 1990. Westside would stick with its principal attorney to make the case in person. Mergens would turn to a new player on its legal team, choosing to go with experience in front of the bench.

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[26] "Brief of Save America's Youth," Supreme Court of the United States, 1990, Case CV 85-0-426, *Board of Education of the Westside Community Schools v. Bridget Mergens*, 496 US 226.

VI

Oral Arguments

Five years had passed since Bridget Mergens, now Bridget Mayhew, made her first request to Dr. Findley seeking permission to hold a Bible club at Westside High School. She had played a very minor role in the preparations that took place following the district court ruling against her. Mergens once again became the center of attention as her legal team prepared to argue her case before the Supreme Court. Now married and a mother, the decision of the high court would have little bearing on Bridget herself. Nonetheless, both her legal team and Westside felt that a great deal was at stake.

The large number of *amicus* briefs spoke to the significance of the case. Those who sided with the school district saw an opportunity for the court to further solidify the theoretic wall between pubic schools and the establishment of religion. Supporters of Mergens saw a potential Supreme Court decision that would breach this artificial wall. Many felt it was the first real opportunity since *Engel* to open the school doors to religion. The two parties who would argue the case before the Court, however, seemed to be crafting strategies that went in other directions. According to its briefs and pretrial interviews, Westside was going to focus its argument on the fact that its school was a closed forum. Rather than challenging the constitutionality of the Equal Access Act, the school district's attorneys chose this much narrower ground for reversal. And while religious access was a motivator for Mergens, her attorney's argument was set to center on the issue of free speech and the declaration of Westside as a limited open forum. Each of the sides felt that a favorable decision was more

possible if the arguments focused on the specifics of the case versus the overarching ideals. With so many issues in the balance, the oral arguments and the decision would prove pivotal for public schools around the nation. It was a point not lost on legal commentators waiting for the oral arguments. In an *Omaha World-Herald* interview days before the arguments, Pepperdine constitutional law professor Bernard James stated, "Usually these cases promise a lot more than they deliver. This case, I think, will deliver."[1]

What would be delivered, however, would not be determined by the petitioners or respondents or either's numerous friends in briefs. The final decision would come from the nine members of the Supreme Court. While many felt the Court in 1990 would extend the *Widmar* decision, speculation on the decision was futile as there had been a turnover of three judges since the precedent in 1984. There were also enough moderate-to-liberal justices on the bench to cast the possibility that the decision could come down to one swing vote. This bloc of justices that it was believed may desire to rule against the Act included John Paul Stevens, Harry Blackmun, Thurgood Marshall and William Brennan. Chief Justice William Rehnquist joined by Justices Anthony Kennedy and Antonin Scalia headed the more conservative bloc, having supported the idea of a lower wall of separation. Two moderate justices that most felt could swing the decision in either direction were Byron White and Sandra Day O'Connor.

On Tuesday morning January 7, 1990 Chief Justice Rehnquist called the daily session of the Supreme Court to order and asked the petitioners to argue their case. For its allotted thirty minutes Westside chose its own attorney, Allen Daubman, to

[1] Paul Goodsell, "Court Will Hear Westside Story," *Omaha World-Herald*, 6 January 1990.

make its case to the justices. It was his first time before the Supreme Court. Daubman quickly reviewed the nature of the Equal Access Act and its definition of a limited open forum. He then outlined Westside's belief that the act balanced three areas of concern: free speech, non-establishment of religion, and the ability of school administrators to define curriculum. Concentrating on the latter, Daubman began to describe the relationship of faculty sponsors at Westside before being interrupted by Justice O'Connor. The justice asked several questions in regard to the role of a sponsor as defined in the legislation. Daubman responded that the Act's determination of the role of a sponsor was moot if the school had a closed forum. With the question of forum at issue, O'Connor asked a pointed question that led into the respondent's expected argument, "Does the school have classes in the regularly-offered courses for credit in scuba and in chess?" Forced into the question by focusing on the issue of a forum, Daubman replied, "No, it does not." Justice Stevens seemed to attempt to salvage the issue of forum by promptly asking Daubman if the lack of a class necessarily created a situation where a club could not be considered curriculum-related. Daubman did not appear to recognize Stevens' assistance, however, and replied that that was "not entirely correct" as there must be something that connects the club or group to the curriculum. Westside had argued that all of its student clubs fell under its missions and goals. It appeared that while Stevens tried to give Daubman the opportunity to argue his case for curriculum-related under this broader concept of mission and goals, the Westside attorney continued his fixation on the role of a faculty sponsor. As Stevens pushed Daubman on to whether or not the

relationship could simply be the presence of a faculty sponsor, another justice interrupted with questions regarding one of the Westside clubs.[2]

Entrenched on the topic of the relationship between clubs and curriculum, Daubman turned to the questioning of Justice Scalia. Scalia asked if Westside justified a curriculum relationship based on a club's goal of teaching community responsibility. He centered the question on Peer Advocates, the organization that the respondents had challenged in their brief before the Supreme Court on the basis that it was a community service club that was not directly or indirectly connected to any class. It was not one of the ten organizations originally stipulated in the pretrial briefs at the district level. Daubman argued that Peer Advocates was a teacher-initiated group and thus was outside the scope of the Equal Access Act. Scalia challenged that defense as he read the act to cover student groups, "It does not say student initiated." Unsettled by the confrontation, Daubman resorted to arguing that the petitioners had not had the opportunity to dispute any factual determination of Peer Advocates as it had only been discussed in the Supreme Court briefs. Having made his point, Justice Scalia abandoned the questioning on Peer Advocates and revisited O'Connor's question on the chess club. He took it to its next logical step inquiring, "How is that curriculum related?" Daubman attempted to make a connection between chess and the logical and analytical lessons in math before being interrupted by Justice Kennedy. The justice wanted clarification of what to do if one school district might believe that such a connection between chess and math existed, but another

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[2] *Board of Education of Westside Community Schools v. Mergen*, 496 US 226 (1990), transcript, 1-3. Unofficial transcript of oral arguments provided to the author by the National Legal Foundation. Transcript verified by audio of proceedings at www.oyez.org. Transcript in author's possession.

school district did not: "Could teachers at different schools take different positions about whether or not the chess club is curriculum-related?" As far as who would make the determination of what is the definition of curriculum-related, Daubman responded that considering the case before the bench "it is what this court thinks."[3] His hastened response was a missed opportunity to try and sway the conservative justices to his argument on the basis that The Equal Access Act was a broad, sweeping power of the federal government that negated local control. It seems possible that Daubman could have found his swing vote if he could have convinced one justice that the citizens of the Westside school district had lost input into the education of their children because of the long arm of the federal policy.

After some questioning about the district court's decision, Chief Justice Rehnquist asked if all the petitioners wanted was to have the court interpret the Equal Access Act in a manner that deemed Westside to be a closed forum. Daubman tried to use his affirmative answer to make a distinction of the case from *Widmar* based on Westside's use of faculty sponsors as a control over the campus. Scalia questioned the attorney on a school's ability to use sponsors in such a manner, as it would obviously allow administrative discrimination by simply placing a restrictive limitation on all clubs. A school could create a rule with the sole purpose of using it to exclude a particular type of club. Daubman responded that Westside's use of the faculty sponsor justification was not a limiting factor, but instead showed "active sponsorship and involvement by the school district," thus making the connection between the clubs and the missions and goals of the district. If that logic held, Rehnquist questioned whether any school district could simply assign sponsors as a

[3] Ibid., 4-6.

way of avoiding the Act altogether? If a school had that type of power, what could Congress have desired in passing the legislation? Daubman replied,

> I know Congress intended that what ought to be done in terms of the school district's response to the Equal Access Act is to allow school districts in their discretion to make educational decisions as to what academic and co-curricular programs they're going to sponsor. If a school district were to blatantly say no, everything we do here is curriculum related, therefore the act doesn't apply, I think our trial courts are well able to see a sham when one exists.[4]

After this brief exchange on the ability of each district to identify its forum, the justices' questioning turned to what other groups and organizations could have access to a public secondary school that was deemed a limited open forum.

One of the arguments made by proponents of Westside was that a limited open forum on a secondary campus opened the school doors to not only clubs of a religious nature, but also to the "parade of horribles" mentioned in the *Tinker* case. Justice Stevens asked Daubman if "one of the costs of having a non-curriculum related club is that you must allow not merely religious groups, but political groups? The Ku Klux Klan, perhaps, and advocacy of free use of drugs...?" Unfortunately for Daubman, as he tried to answer a question that seemed to be in his favor, Stevens added the observation that such was the consequence "if you have a chess club." Instead of being able to argue to the fears of undesirable groups, the attorney quickly reverted to Westside's contention that a chess club was in fact curriculum related and would not trigger access to other groups. Stevens then sought further clarification as to just what was Westside's argument, when Daubman asked the court to reserve the

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[4] Ibid., 7-9.

remainder of his time for rebuttal. Rehnquist granted his request and it was time for the respondents.[5]

For Mergens' oral response, the National Legal Foundation turned to Washington D. C. attorney Jay Sekulow. Sekulow had successfully argued before the high court in the 1987 *Board of Airport Commissioners v. Jews for Jesus* which granted permission for an organization to hand out religious pamphlets at the airport. He was the executive director of the Christian Advocates Serving Evangelism and, according to the foundation, only offered his services once the Supreme Court granted permission for the arguments. He was a known counsel for Pat Robertson and had appeared on his television show the 700 Club. After the federal district court's ruling in favor of Westside, the 700 Club began a public fundraising campaign to help finance the National Legal Foundation's participation in the suit. Not long after the oral arguments, Robertson asked Sekulow to head his American Center for Law and Justice, an organization founded to protect religious and constitutional freedoms, as a counter to the ACLU. When Rehnquist asked for the respondents to speak, it was Sekulow who stepped to the dais.[6]

Following the petitioners' lead, Sekulow opened with a specific inquiry into the matters of the particular case instead of an overarching argument in the defense of students' rights to speech and religion. He framed his opening around the premise that the primary question for the Court to decide was whether or not Westside High School was a limited open forum. As that was the issue the Court appeared to be fixed upon, Sekulow argued that Dr. Findley's admission at the district level that Peer

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[5] Ibid., 10-13.

[6] Email from NLF on Sekulow, "About Chief Counsel," www.aclj.org.

Advocates was not related to the curriculum triggered the Equal Access Act. If there was a question regarding what clubs would be considered curriculum related, then the "test for whether the act would be triggered would be whether there is a direct relationship between the club and a core curriculum course or a curriculum course." He stressed the phrase "direct relationship." When he attempted to show that Westside had itself made such connections known in its club catalog, by listing that some clubs were related to specific classes, he was interrupted for the first of what would be many questions from Justice Stevens.[7]

Stevens' first question dealt with how the Act would handle extracurricular activities such as athletics. Sekulow responded that groups like the football team are "a little different than the clubs" in that the relationship includes a guiding coach compared to a custodial sponsor. Furthermore, athletics did not usually fall under a school's definition of student groups. Stevens then stated that Congress intended to allow schools to make choices for certain groups to avoid "sponsoring drugs and Ku Klux Klan and political advocacy...because that's the price, is it not, if you become a public forum?" Sekulow quickly countered that Congress' intention was to "eliminate invidious discrimination against religious and political speech." Stevens, however, stuck to the point, asking again if once an open forum was declared, how could a district prevent any group from entering? Sekulow answered that Congress understood the possibility of other groups wanting access, but "that is the price of freedom." He argued "Congress did not ask schools to surrender control to the facilities," and did not require access to all groups as it "adopted the test that this

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[7] *Board v. Mergens*, transcript, 13.

court enunciated in *Tinker* in saying that any type of group or organization that would be materially disruptive or interfere with other students right to learn..." could be denied access by the school. However, Sekulow added, the Bible Club in Mergens had been the only group denied access at Westside High School.[8] The school did so without knowledge that any of the group's speech would be disruptive.

After a short give and take about whether or not a school could avoid the Act all together by simply canceling all clubs, the questions again moved in the direction of defining "non-curriculum." Sekulow restated that it was the respondent's position that a curriculum-related club or group must be "directly related to the class" or it did not meet the parameters set forth by the Act. Stevens seemed frustrated with the definition as not "very illuminating" because now they would have to debate how to define "direct." Sekulow attempted to show that Westside had already done so by labeling in its catalog certain clubs as extensions of courses while simply listing others, such as the chess club, for interested students. In the ensuing dialog as to whether that simple formality satisfied defining "direct relationship," Sekulow deferred to the Congressional history on labeling the relationship established by the chess club. He argued that Congress used the chess club as "one of the main bases upon which" to clarify how a "non-curriculum" activity or group would trigger the Act. Justice White inquired if Sekulow felt the Court should be bound by legislative history if the chess club was not mentioned in the final legislation. While Sekulow argued that the Court should not rely solely on legislative history, he did contend that

[8] Ibid., 14-16.

examining what Congress meant helped clarify the distinction intended between what is curriculum related and what is not.[9]

When Justice O'Connor asked if Sekulow defined direct as "has to be taught in class," Stevens interjected that if the court reached such a definition, would it not be better to remand the case back to the appellate level for application. Sekulow responded, however, that he believed that the three-judge panel had utilized the direct relationship test so a remand would not be necessary. He finished his response by focusing again on the specifics of the Westside case arguing, "if in fact they are going to allow student initiated clubs, which this school does, that they, then, if an 'non-curriculum' related club does exist, they in fact have to open the forum up under the act."[10]

His time expired, Sekulow was faced with one last question from Justice Stevens regarding his standard or definition: "You would consider it to be part of the curriculum if the students, if the school, is devoting a substantial amount of its resources specifically to running or directing the club?" Sekulow was allowed to finish with a final statement in response, emphasizing the triggering of the act:

> I think it would have to go beyond just expending resources. There would have to be something more where there was instruction going on, or else in fact it would just not be more than, if you will, another club. That there would have to be something during the curriculum where academic credit was given, supervision of a teacher and these types of things.[11]

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[9] Ibid., 19-21.

[10] Ibid., 21-23.

[11] Ibid., 23.

With that statement, Sekulow concluded the respondent's argument, having bypassed the expected Establishment Clause questions involved. He yielded the remaining time to the United States Government.

Solicitor General Kenneth Starr opened his comments on behalf of the Justice Department by expressing the view that there were two thematic values at the heart of Congressional intent in passing the Equal Access Act: fairness and liberty. As he began to advocate the equality available through the Act, Justice Stevens inquired if this same fairness was offered then to "these other groups we have talked about...like the Ku Klux Klan...?" When Starr tried to answer that groups could not be discriminated against, Stevens seized upon the subject of equality and congressional intent, asking if Starr found in "the legislative history, a predominant interest in protecting the religious groups" and that the addition of the other groups was only to avoid an accommodation of religion? Starr conceded that the Act was "originally drafted as to provide protection only to religious groups" but it was necessary for the legislation to "speak neutrality." He noted, however, that Congress was aware of the possibility of dangerous or disruptive groups, which is why the Act included safeguards in order to maintain the authority of the schools over discipline.[12]

Justice Stevens, after some discussion regarding athletic teams under the Act, asked Starr what would trigger the Act. "It is certainly clear that Congress was focusing on what the course work was," responded Starr. And "in light of Congress' use of the term curriculum and its discussion of any number of groups, the Chess club, which does exist at Westside was considered the quintessential 'non-

[12] Ibid., 23-24.

curriculum' related club...." Thus the United States rested, having argued that the Act sought to end discrimination against student groups and that the Act was indeed triggered at Westside High School.[13]

Daubman had four minutes reserved to rebut both respondents. He argued that the test that the respondents endorsed for triggering the law itself violated the Equal Access Act and would not work in most educational settings. Westside did not allow any advocacy groups within its curriculum and thus the Bible club must be denied. He concluded by making an attempt to argue that the definition of "non-curriculum" put forth by the respondents "stifles the efforts of educators" to recognize and identify curriculum appropriate for each school district. The Chief Justice thanked the attorney and submitted the case.[14]

In Daubman's first time before the Supreme Court, he failed to argue three of the petitioners' apparent strengths. First, given the plurality of conservative justices on the bench before him, Daubman did not emphasize Westside's position on the importance of local control. He might have scored better arguing for allowing local control in determining coursework and forums rather than acquiescing to Congress's desire to create a broad, federal interpretation of curriculum or non-curriculum. When asked by Kennedy who should decide the standard of curriculum, he ignored local and state direction and instead surrendered the authority to the decision-making powers of the Supreme Court. Second, Daubman appeared disconcerted with some of the questioning and failed to recognize the helping hand of Justice Stevens. Whenever Stevens would ponder the role of legislative power in education, the

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[13] Ibid., 27.

[14] Ibid., 28-29.

parade of horribles or the need for a broad definition, Daubman would inevitably refocus the question back to Westside's forum and its particular definition of non-curriculum related. Finally, as was the petitioner's strategy, Daubman focused simply on the specifics of the Westside case rather than appealing to the Court on the basis that the Act was unconstitutional as it allowed for an establishment of religion. It was a calculated risk that allowed the justices to hammer the attorney on statutory definitions of forum and curriculum designations instead of the more expansive constitutional questions regarding the First Amendment. He did not appear to sway the Court. As one courtroom journalist noted, "The Court seemed fairly dissatisfied," with Daubman's approach.[15]

Sekulow's experience in front of the Supreme Court and the ability to argue as the respondent played heavily in his favor. Having witnessed Daubman stick to the particulars of the case and having heard the pointed questions of the justices, Sekulow formulated a consistent message centered around challenging the designation of Westside as a limited open forum and a narrowly read definition of "non-curriculum" related. The sections of the Act that gave each school district controlling discipline authority allowed him to dismiss Steven's concerns over undesirable groups. Scalia's and O'Connor's inquiries into the relationship between actual classes taught and clubs opened the door for Sekulow to discuss the potential legislative trigger of Peer Advocates, admitted to in testimony by Dr. Findley. Whether or not it was his original strategy, Sekulow was able to capitalize on the environment provided by the petitioner's arguments. For his part, Starr was able to avoid the constitutional questions finally put forth by Stevens.

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[15] Tony Mauro, "Dungeons and Dragons," *Legal Times*, 22 January 1990, 13.

Dr. Findley and the Westside High School administrators had feared the unnatural stance of defending the chess club as curriculum. While it did fit into their school's standard of mission and goals, they knew it would create an awkward and somewhat limited debate. The focus at the Supreme Court on what one reporter called the "pedestrian discussion" of such definitions surprised and in many cases disappointed those who were seeking a showdown on Establishment Clause grounds. Another observer noted the oral arguments as a squandered opportunity, as the particulars of Westside and Mergens took precedence over the First Amendment.[16] Prior to the appearance before the high court, it was reasonable to predict that Chief Justice Rehnquist, and Justices Kennedy and Scalia would find in favor of the respondents. However, the silence of Brennan, Marshall and Blackmun gave the appearance that only Stevens and possibly White would vote on behalf of Westside. If the predicted extension of *Widmar* came to fruition, the question was on what basis would the Supreme Court uphold the Equal Access Act, as well as which justices would agree. Six months passed before the answer came.

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[16] Mauro, 13, and Lyle Denniston, "The Constitution Gets Lost in the Curriculum," *The American Lawyer*, April 1990, 88.

VII

Decision

On Monday, June 4, 1990, five years after Bridget Mergens' decision to file suit against her high school, the United States Supreme Court issued its decision regarding the Equal Access Act and its applicability at Westside High School. In an eight to one ruling, the Court voted to affirm the decision of the appellate court, holding that Westside High School was a limited open forum and a Bible club must be allowed access equal to other student groups and organizations. While the ruling was a result of a clear majority, the justices of the court differed in the means by which they arrived at their decision. A plurality of four justices agreed fully with the majority opinion, while another four justices split in a pair of special concurrences. Justice John Paul Stevens was the lone dissenter.

Justice Sandra Day O'Connor wrote for the plurality of the Court, including Justices White, Blackmun and Chief Justice Rehnquist, in a three-part, twenty-three page opinion. In part one of the decision she established the pertinent facts and history of the case. Part two outlined the logic by which the Court determined Westside had in fact triggered the Equal Access Act. In part three of her opinion, O'Connor addressed the constitutionality of the Act. Her use of the Lemon test in this final part of the opinion led to the two special concurrences by the remainder of the justices who ruled in favor of Mergens.

O'Connor stated that there were two questions that the Supreme Court was compelled to answer. The first centered on whether or not Westside High School could deny permission to a student religious club in light of the Equal Access Act.

school."[3] That standard created the challenge of then determining to what extent a group is "related" to the body of courses. She noted, however, that Congress used the phrase "directly related" in its description of meetings in the Act. That relationship could then also be applied to identifying or characterizing student groups. That being true, "a curriculum related student group is one that has more than just a tangential or attenuated relationship to courses offered by the school." Furthermore, Justice O'Connor argued that:

> the act is premised on the notion that a religious or political club is itself likely to be a non-curriculum related student group. It follows, then, that a student group that is "curriculum related" must at least have a more direct relationship to the curriculum than a religious or political club would have.[4]

She noted that she would prefer to use the legislative history to strengthen the point of a direct relationship, but found it was of almost no assistance in clarifying the relationship between student clubs and curriculum.

The equal access legislation was severely modified after leaving its respective committees in both houses of Congress. Thus any discussion of a direct relationship occurred only on the legislatures' floors. Both Westside and Mergens could find statements supporting their characterization of the relationship within the congressional debate. Conflicting definitions aside, the Court did find "significant" O'Connor wrote, "that the Act...reflects at least some consensus on a broad legislative purpose."[5] It was obvious that the Act's original purpose was to curtail discrimination against students based on religious speech. Using this intent, in

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[3] Ibid., 8.

[4] Ibid., 8.

[5] Ibid., 9.

conjunction with the implied "direct relationship," Justice O'Connor concluded that, "...the term 'non-curriculum related student group' is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school." In the Court's view:

> a student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.[6]

A curriculum related club had to be organized around a subject that was part of the coursework offered by the school. She argued that this finding was the most "commonsense interpretation of the Act" in order to determine when a school has triggered its application. The presence of any student group or organization that did not exhibit this direct relationship produced a limited open forum at the school. The Equal Access Act would then be applicable to that school. Contrary to the petitioner's stance, she argued that lower courts would not have difficulty applying this standard to decide cases that came before them.[7]

The Justice then addressed Westside's concern, in its brief, that such a broad reading and application would offend the principle of local control. She stated first, that school districts retained the ability to determine what subjects were taught as coursework. Second, the Act allowed schools to protect the educational environment by reserving to the school the authority to prohibit student clubs and groups that would interfere with the discourse of education. Finally, although probably not

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[6] Ibid., 10.

[7] Ibid., 11.

desirable, a school could choose to refuse any federal funding and thus withdraw from any application of the Equal Access Act. She found these powers to be sufficiently left to the local school boards while operating under the protection of the Equal Access Act.[8] Local control was thus not undermined in the passage or enforcement of the Act.

Addressing the Westside issue specifically, O'Connor rejected the school's argument that the term "curriculum-related" encompassed all student groups that were remotely related to the mission and goals of a school. She argued that applying such a standard created no type of forum and in fact allowed a district to escape the legislation entirely.[9] As for a trigger, the Court found "it clear that Westside's existing student groups include one or more 'non-curriculum related student groups.'" Specifically, subserfers did not directly relate to physical education and chess had no clear relationship to mathematics. Furthermore, the existence of Peer Advocates, while a worthy organization, was acknowledged by the principal to not directly relate to the coursework at the school. Each of the three listed student groups led the Court to determine that "Westside has maintained a limited open forum," as described within the Equal Access Act.[10]

The conclusion that Westside was a limited open forum meant that it could not prohibit student clubs equal access based on student speech. Furthermore, the Court found that Westside's action against the Bible club did not allow equal access and such action was thus prohibited. Since the Court decided the case on the

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[8] Ibid., 11-12.

[9] Ibid., 15.

[10] Ibid., 15-16.

statutory definitions, O'Connor concluded the second part of the opinion by finding that the Court need not address the concerns regarding possible violations of Mergens' rights of speech and the free exercise of religion per the First Amendment.[11] The question of Constitutionality still remained.

Westside had argued that even if its school was determined by the Court to be a limited open forum, it still had standing to deny access to the Bible club in order to avoid violating the Establishment Clause of the Constitution. It disputed the sanctioning of the Bible club on the grounds that permitting any club advocating a particular religious point of view would be viewed by students as school endorsement of the club and its speech. O'Connor responded to that contention with a simple, "We disagree."[12] The Act was constitutional and she turned to *Widmar* for the Court's foundation by which to disagree.

The *Widmar* decision was based on the application of the Lemon test and its three-point evaluation. Outlining again the *Widmar* decision, O'Connor wrote that, "the logic of Widmar applies with equal force to the Equal Access Act." Lemon's first test required that legislation must have a secular purpose. While O'Connor admitted that the Act's authors were motivated by religion, the final version of the Act put forth the purpose of protecting religious, political, philosophical, or other speech. As such the religious motives of the authors "would not invalidate the Act," because what was relevant was the legislative purpose of the statute, not the possible

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[11] Ibid., 17.

[12] Ibid., 18.

religious motives of those who brought the law to fruition. As the Act was written to protect all types of student speech, the Court read it as serving a secular purpose.[13]

Westside had further contended that the Act forced the school to advance a particular religion in a climate wherein students did not possess the ability to discern school neutrality. This meant that the Act failed the second part of the Lemon test. Again, O'Connor disagreed, this time on three principles. First, she stated that there is a considerable difference between the advancement of government, or school speech and the advancement of private, or student speech. The speech involved was that of the students, not the school. She found that high school "students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[14] Just because a school allowed certain student speech, it did not result in the endorsement of that speech.

Second, Justice O'Connor noted that the role of school officials was expressly restrained by the Act. While there may be the potential for student influence in advancing a club, the school's influence is limited. In fact, she contended, Westside's "fear of a mistaken inference of endorsement is largely self imposed, because the school itself has control over any impressions it gives the students." A school could reasonably choose to disclaim its association with a student club in order to prove neutrality to its student body.[15] Finally, the diverse nature of the club system at Westside would allow a student initiated club of any type to be accepted without a fear of endorsement, "to the extent that a religious club is merely one of many

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[13] Ibid., 19.

[14] Ibid., 20.

[15] Ibid., 21-22.

different student initiated voluntary clubs..." found at the school.[16] The Court concluded that the Act was valid under the second test of Lemon and did not advance religion.

The final part of the Lemon test prohibited the entanglement of the school with religion. Westside argued that its use of faculty sponsors created such entanglement. O'Connor responded by focusing on the Act's stipulation to faculty monitors. The Act permitted the assignment of a faculty member solely for custodial purposes. The Court found that as long as a school adhered to oversight and not management of the group, the school would not violate the entanglement test. Reaching again to *Widmar*, O'Connor stressed that the denial of a religious club may in fact be entanglement "in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur."[17] The action of prohibiting a religious club was a greater degree of entanglement as it had a greater affect on the speech involved than simply granting access to the club.

Surviving the Lemon test, the Equal Access Act mustered the constitutional support of Justice O'Connor. Justices Scalia and Kennedy agreed with the decision of the Court, but found fault with the reasoning in part three of O'Connor's opinion. Justices Marshall and Brennan also agreed with the result, but sought to clarify the means by which a school would avoid the appearance of endorsement.

Justice Kennedy wrote, with Scalia concurring, that O'Connor was correct in her statutory definition of "non-curriculum" related as the best conclusion from an ambiguous statute. The Court was also correct in determining that the Act did not

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[16] Ibid., 22.

[17] Ibid., 23.

violate the Establishment Clause. However, Kennedy contended this could be discovered by applying a test separate from Lemon. He found that the legislation needed to be evaluated under two principles: did the government give direct assistance to religion to a degree that it established a religion and did the government coerce any student to partake in religious activity. Kennedy stated that under this simpler standard, the Equal Access Act was constitutional.[18]

Kennedy did not concur with O'Connor's use of the Lemon test. He contended that the endorsement prong of the test "has insufficient content to be dispositive." In some cases, the government may appear neutral by this test, when in fact it is hostile toward religious expression. He felt that the proper analysis should be the test of coercion. Finding that Westside had not coerced students to participate in the Bible club, he concurred with the judgment of the Court.[19]

Justice Marshall, with Justice Brennan concurring, agreed that the term "non-curriculum" related should be defined broadly so as to prevent schools from discriminating against students on the basis of a student initiated club's speech. However, he feared that the opinion of the Court did not reach far enough to establish the differences between *Widmar* and *Mergens*. Emphasizing those differences, Marshall attempted to provide the means by which a school could avoid endorsement and maintain its club system. Because Westside, as a part of its school policy, encouraged students to take part in its club activities, it would now be paramount that the school make an attempt to disassociate itself from these activities. He found that just because the Act is triggered by both religious and political groups, "does not

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[18] Special Concurrence, found in Westlaw, 17-18.

[19] Ibid.,18.

ameliorate the potential threat of endorsement." A public high school must actively attempt to distance itself from advocacy groups allowed access to the campus.[20]

Marshall argued that it was not the age difference between high school and college students that was important, but that the schools themselves are different environments. He stated that "in the absence of a truly robust forum that includes the participation of more than one advocacy oriented group," such as was the case at most colleges, "the presences of a religious club could provide fertile ground for peer pressure" of high school students. While he concurred with the decision of the Court, he contended that schools such as Westside "must redefine its relationship to its club program," beyond prohibiting faculty management. He concluded that schools need to respond to the parameters of the Act, but also to the call to disassociate themselves from student groups that promote religious speech.[21]

The lone dissenter in *Mergens* had been the most outspoken justice during the oral arguments. Justice John Paul Stevens tried determinedly to pinpoint both parties' definition of "non-curriculum" related. He appeared dismayed at the potential threat to existing extracurricular activities as well as the potential for access to undesirable groups such as the Ku Klux Klan, quite simply because a school allowed a chess club. His three part, twenty-two page dissent encompassed scrutinizing the majority's standard for curriculum related, the extension of *Widmar*, the potential violation of the Establishment Clause, and an examination of congressional intent.

Stevens centered his argument on the precept that Congress did not intend the broad reading of the Act prescribed by the Court's majority. While he agreed with

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[20] Ibid., 20.
[21] Ibid., 22.

O'Connor that it was necessary to view the statute through its own language and legislative history, he argued that if this resulted in the opinion that *Widmar* should be applied, then the definition would only be applicable if Westside were itself a college.[22] Because Westside was a high school, he believed there were additional factors to be considered. If *Widmar* were to be extended, then the Court should ask two questions: could a high school create a forum similar to the one determined in *Widmar,* and if so, does the Establishment Clause result in different consequences when viewed through the high school environment. He concluded that "in this case the first question must instead be answered in the negative, and that this answer ultimately proves dispositive under the Act just as it would were only constitutional considerations in play."[23]

Westside and the forum at *Widmar* were far too different for Stevens' liking. He argued that Widmar should only be applied to schools with similar forums. While he agreed that the Equal Access Act was intended to extend the *Widmar* decision to the high school setting, he found it unwise to disregard the distinctions between the situations. Recognizing student and environment differences, he sided with Westside's contention in its brief that "an extracurricular student organization is 'non-curriculum related' if it has as its purpose the advocacy of partisan theological, political, or ethical views." Only those types of clubs could possibly trigger the Act as "it seems absurd to presume that Westside" allowed subserfers and chess even though such "course offerings are no more controversial than a grilled cheese

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[22] "Dissent," *Board of Education of Westside Community Schools v. Bridget Mergens*, 496 U.S. 226, 2.

[23] Ibid., 3.

sandwich." That being said Stevens stated that he would find groups to be curriculum related by their nature of "being fully consistent with the school's curricular mission." This would allow Westside's argument of a closed forum as each of its clubs met the school's mission and goals.[24]

Justice Stevens agreed that Congress desired to prevent discrimination against religious speech and that the legislation could not be read so as to allow school districts to evade this purpose. He found, however, the Court's interpretation of "non-curriculum" related as "irrelevant" in the aim to end discrimination. Furthermore, by the majority's own test, to prevent avoidance a school could simply have a one day lesson on scuba or chess and thus avoid triggering the Act. Thus while Court-applied tests usually produce hard cases, the majority's opinion in *Mergens* "seems to produce nothing but hard cases."[25]

In part two of his dissent, Stevens addressed the question of analyzing the Act in view of the Establishment Clause. While he argued that it was not necessary under his reading of the statute, it was more suitable in light of what the Court determined in its opinion. He found that "the Act...comes perilously close to an outright command to allow organized prayer" on school premises. Allowing religious activity on campus would be an outright violation of the "special sensitivity" required by the Establishment Clause. Such activity is not protected as private speech, because it is a collective speech with powers of influence and persuasion and "certainly we should

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[24] Ibid., 6-7.

[25] Ibid., 9-11.

not rush to embrace the conclusion that Congress swept aside these concerns by the hurried passage of clumsily drafted legislation."[26]

Furthermore, Stevens questioned the modification in the balance of state and federal control over education:

> The Court's construction of this Act, however, leads to a sweeping intrusion by the federal government into the operation of our public schools, and does so despite the absence of any indication that Congress intended to divest local school districts of their power to shape the educational environment.[27]

He questioned if a local school district must exclude any student club that is not directly related to the courses taught at the school because it thinks it prudent to prohibit access to undesirable groups. Stevens contended that the vagueness of the Act spoke to Congressional deference to local school boards.

Finally, Justice Stevens wrote of his bafflement on how the majority could rule against such arguments based on a dictionary definition of curriculum, especially since "non-curriculum" cannot be found in the dictionary. He questioned how it could be assumed that one is the antonym of the other. The definition of the phrase, combined with the purpose of the Act, and the distinction from Widmar gave Stevens enough concerns to respectfully dissent.[28]

The eight to one decision was well received by the respondents. Bridget Mayhew interpreted the overwhelming victory as clarifying for public school administrators: "they can't discriminate against religion anymore." Her attorney from

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[26] Ibid., 16-19.

[27] Ibid., 20.

[28] Ibid., 21-22.

the outset, Douglas Veith, described himself as elated. Not surprisingly, those closest to the facts of the specific case responded with far-reaching predictions for the precedent of the decision. Veith referred to the ruling as a constitutional milestone, while the National Legal Foundation's Robert Skolrood likened its importance to the *Tinker* decision for student speech.[29] Constitutional scholar Bernard James agreed, finding the *Mergens* decision to be of landmark status because of its extension of an open forum to the public high schools. As for Bridget, weeks later she reflected on her role in bringing about the decision stating that she "was in the right place, at the right time, it just happened because it was supposed to happen."[30] What happened was not cause for celebration for everyone.

James Tangdall, now superintendent of Westside Community Schools, shared his administration's disappointment, but vowed that his district would follow the Court's decision. Those who had sided with Westside, however, reacted with blame and predictions of their own. Attorney Marc Stern warned school administrators that efforts would most likely be mounted by extremist groups to gain access to the schools. The spokesperson for the National School Board Association feared that the schools were now open to organizations that advocated violence. Those who feared the influence of the Christian right also lamented over the decision. Anne Gaylor of the Freedom From Religion Foundation saw the Mergens victory as an open door for evangelists "to establish beachheads in our public schools." Renowned atheist

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[29] "Backer Says Clubs Will Blossom," *Omaha World-Herald*, June 4, 1990; "Supreme Court Backs Bible Club," *Omaha World-Herald*, June 4, 1990; Ibid.; "Backer Says Clubs Will Blossom," June 4, 1990.

[30] "Professor: Ruling Won't Foster State Religion," *Omaha World-Herald*, June 5, 1990; Bill Hewitt, "Winners," *People*, July 1990.

Madalyn Murray O'Hair denounced the decision as "an intrusion" that declares "Christianity has a new field for mission work" in the public schools.[31]

The national and local press appeared to share some of the same sentiments. An editorial in the *Washington Post* criticized the Court's "dreary argument over 'non-curriculum'" in its about-face on the previous forty years of jurisprudence. Ted Gesi of *U.S. News and World Report* found that the wall of separation was not being lowered, but blasted away by Reagan appointees. Some, however, viewed the decision as not as momentous as originally thought. A *New York Times* editorial speculated that the decision could in time actually bring calm to the debate over church and state. It found that the ruling, as construed, "can't do much harm." Nonetheless, the *Omaha World-Herald* questioned Mayhew's motives and commended the board of education for its willingness to fight for local control in light of the politics involved.[32]

Regardless of those who opposed to the decision, the ruling of the Supreme Court was the final stand for the immediate future. Any public high school was now a limited open forum once it opened its doors to student clubs that were not directly related to the school's curriculum. The Equal Access Act withstood the scrutiny of the Court and was validated under the Court's varying tests of constitutionality. The question that now remained for those who had hoped for this outcome, as well as for those who sought strict separation, was whether or not the ruling could be a blessing.

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[31] "Supreme Court Backs Bible Club," June 4, 1990; "Ruling Adds Zeal to Bible Students' Crusade," *New York Times*, June 11, 1990; "School Official Says Hate groups Could Take Advantage of Ruling," *Omaha World-Herald*, June 5, 1990.

[32] *Washington Post*, June 6, 1990; Ted Gasi, "The Court's New Catechism," *U.S. News and World Report*, June 18, 1990, 22; *New York Times*, editorial, June 6, 1990; *Omaha World-Herald*, editorial, June 6, 1990.

VIII

Conclusion

Bridget Mergens and the Equal Access Act were clearly victorious in the eight to one decision. However, the three opinions for the majority and the dissent showed that the Supreme Court was still divided in an internal struggle on how to rule in cases of church and state, especially those concerning public schools. In *Mergens,* a simple plurality agreed to apply the nearly twenty-year old Lemon test. Two justices who voted for Bridgett Mergens argued that the Court's decision was based on a standard that was too restrictive in its reading. Another two who ruled for Mergens challenged the plurality for not requiring public schools to sufficiently disentangle themselves from religion. The Court's path from 1940 certainly had changed and according to those in the accomodationist camp, it was in the right direction. However, the question remained whether *Mergens'* place in the battle over the Establishment Clause would signify a complete change of course or a simple bend in the road.

Strict separationists knew that *Mergens* held the potential of altering the terrain of establishment jurisprudence. Many found the ruling validating the access legislation to be a departure from previous norms. They viewed *Widmar* as only applicable to the unique college environment. The captive audience of the high school campus varied greatly from an open collegiate setting. Frank Ravitch lamented O'Connor's abandoning that concept to extend the idea of a limited open forum. Gregg Ivers argued that the Court "ignored dubious legislative history," while law professor Richard Shugrue contended the Court "snubbed history" altogether in

permitting such an encroachment of federal legislation.[1] The weakening of the wall of separation that seemed apparent was laid squarely at the feet of the Reagan influence.

For over ten years those who adhered to the ideal of a high wall feared that a target had been painted on public schools by the Christian right. They worried about the influence that group had on President Reagan. His appointments and promotions on the Court appeared to solidify the accommodation viewpoint in the *Mergens* decision. Historian and *Mergens* critic James Jurinski stated it plainly: "...if the case had been brought two decades earlier, the Court would have found the entire Act unconstitutional."[2] The Lemon test survived, but some found it now diluted. Ivers stated that O'Connor had turned the third prong of entanglement "on its head." If a school-sanctioned Bible club with an assigned faculty member present was not entanglement, critics questioned what entanglement would be? For the strict separationist, the Rehnquist Court did not respect the Establishment Clause or the previous precedents of the Court. They feared such an attitude would continue to mark later decisions.[3]

Legal and constitutional scholars who held to an accommodation view of the First Amendment read *Mergens* as a victory. It emphasized the principle that it was safer and more constitutionally sound to accommodate or tolerate religious activity

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[1] Ravitch, 145; Gregg Ivers, *Redefining the First Freedom: the Supreme Court and the Consolidation of State Power*, (New York: Transaction Publishers, 1992), 19; Richard E. Shurgrue, "Faithful to the Constitution: The Roadblock for Nebraska's Schools," *Nebraska Law Review* 79 (2000): 889.

[2] James Jurnski, *Religion in the Schools: A Reference Handbook*, (Santa Barbara: ABC-CLIO, 1998), 16.

[3] Greg Ivers, *Lowering the Wall*, 35, 39.

than to censor it.[4] In the view of the Christian right, the path set by *Mergens* was the traditional and intended course. Law professor Richard Duncan hailed the ruling as a true civil liberties case that legitimized religion's place in pubic schools. The editors of *America* described those involved in helping right the ship as "persistent and brilliant" dreamers. *Charisma* magazine deemed the ruling one of the most significant of the decade for Christians.[5] *Mergens* was a sign to accommodationists that the wall was becoming more and more transparent. It was not immediately apparent if the decision's role as precedent signaled a total crumbling or a mere lowering of the wall of separation.

Professor McConnell recognized the break in jurisprudence exhibited by *Mergens*, but cautioned that the case might not have the lasting non-preferential application expected by many. He argued that outside the context of groups wanting activities access, it may not affect other outcomes.[6] To be sure, the use of *Mergens* as citation in other cases has predominantly involved other religious groups wanting similar access. In 1993, *Garnett v. Renton* was reexamined and this time the Ninth Circuit Court of Appeals applied *Mergens* to compel the Renton school district to allow a Bible club in its limited open forum. In a similar case that same year, the Third Circuit ruled that the East Brunswick School District had to allow access to a student religious organization. A broad reading of *Mergens* in *Ceniceros v. Board of Trustees* ruled that a Bible club should be allowed access during the school day since

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[4] McConnell, "Religious Freedom at a Crossroads," 141.

[5]Richard Duncan, "Back to School and Back to Religion," *Texas Lawyer*, Oct 8, 1990, 31; "God and Cheerleaders: Equal Access," editorial, *America*, June 23, 1990, 595; Paul Thigpen, "Christians in Court," Charisma and Christian Life, December 1990, 69.

[6]McConnell, "Religious Freedom at a Crossroads," 141.

that was when all other clubs were allowed to meet.[7] Such an expansive application of *Mergens* favored the influence of accommodation thinking. For the Christian right, however, the broad reading became a mixed blessing.

There is no doubt *Westside v. Mergens* was a victory for the non-preferential view of the Establishment Clause as well as for the Christian right. The broad readings of the decision solidified a tolerant point of view in dealing with schools and religion cases. However, the neutral language in the Act created far-reaching results not anticipated by either side in the conflict. Because the Act permitted access to student groups of any "religious, political, philosophical and other speech," non-religious groups have also gained entry into limited open forums through litigation based on Mergens. It was not the parade of horribles forecast by Justice Stevens, but it was student groups focused on social issues, not always aligned with the Christian right. Gay Straight Alliance clubs have widely used the Equal Access Act and the *Mergens* decision to make their way into public high schools where previously prohibited. Letters to club members outlined *Mergens* and encouraged the students to identify "non-curriculum" clubs on campus before approaching administrators for access. In *East High Gay Straight Alliance v. Board of Education of Salt Lake City* the plaintiffs argued for access based solely on the Equal Access Act. The school responded by allowing the group to meet.[8] Scholar David Gregory, not long after *Mergens*, questioned how the proponents of the Act would react to this inevitable extension. While those who influenced the legislation may not have foreseen such a

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[7]Garnett v. Renton, 987 F.2d 641 (9th Cir. 1993); Pope v. East Brunswick Board of Education, 12 F.3d 1244 (3d Cir. 1993); Ceniceros v. Board of Trustees of San Diego Unified School District, 106 F.3d 878 (9th Cir. 1997).

[8] *East High Gay/Straight Alliance v. Salt Lake Board of Education*, 1999 WL 1390255.

result, it is apparent that some would support such an extension as true 'equal' access. Consider Bridget Mayhew's words of reflection in the aftermath of the decision. She hoped the Act would withstand all scrutiny because "our First Amendment rights are very, very valuable."[9]

Following the 1990 decision, the Equal Access Act has been applied in a number of cases, primarily at the district and appellate level. That the Court has since changed personnel and not seen fit to revisit *Mergens* speaks to its judicial value. Was *Mergens* the course correction so hoped for by the accommodationists? If the measure is the elimination of the wall of separation the answer is no. In subsequent Court cases the justices have validated the prohibition of prayer before athletic events and invocations at public high school graduation ceremonies. If instead the gauge is a lowering of the wall in order to tolerate religious activity without state endorsement, the answer must be yes. This measure asks for fair and equal treatment, not endorsement or passive hostility. In a recent interview, Bridget Mayhew expressed that that was all she wanted from the beginning.[10]

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[9] "Backer Says Clubs Will Blossom," *Omaha World-Herald*, June 4, 1990.

[10] Bridget Mayhew, interview by author, Omaha, NE, April 2005.

The Equal Access Act

(20 U.S.C. §§ 4071-74)

DENIAL OF EQUAL ACCESS PROHIBITED

Sec. 4071. (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

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

(c) School shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that-

1. the meeting is voluntary and student-initiated;
2. there is no sponsorship of the meeting by the school, the government, or its agents or employees;
3. employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
4. the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
5. nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this subchapter shall be construed to authorize the United States or any state or political subdivision thereof-

1. to influence the form or content of any prayer or other religious activity;
2. to require any person to participate in prayer or other religious activity;
3. to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
4. to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
5. to sanction meetings that are otherwise unlawful;
6. to limit the rights of groups of students which are not of a specified numerical size; or
7. to abridge the constitutional rights of any person.

(e) Not withstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

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

SELECTED BIBLIOGRAPHY

Books

Alley, Robert S. *School Prayer: The Court, the Congress, and the First Amendment.* New York: MacMillian, 1986.

_____. *Without a Prayer: Religious Expression in Public Schools.* New York: Prometheus Books, 1996.

_____. *The Supreme Court on Church and State.* New York: Oxford University Press, 1988.

Andryszewski, Tricia. *School Prayer: A History of the Debate.* New Jersey: Enslow Publishers, 1997.

Cushman, Clare, ed. *The Supreme Court Justices: Illustrated Biographies 1789-1995.* Washington D.C.: CQ Press, 1995.

Dugger, Ronni. *On Reagan: The Man and His Presidency.* New York: McGraw-Hill, 1983.

Flowers, Ronald B. *That Godless Court.* Louisville, KY: Westminster John Knox Press, 1994.

Fraser, James W. *Between Church and State: Religion and Public Education in a Multicultural America.* New York: St. Martin's Press, 1999.

Guiman, David E. *Faith on Trial.* Oxford: Lexington Books, 2002.

Hamburger, Philip. *Separation of Church and State.* Cambridge, MA: Harvard University Press, 2002.

Hall, Kermit L., ed. *Oxford Companion to the Supreme Court of the United States.* New York: Oxford University Press, 1992.

Hartman, Gary, Roy Mersky and Cindy Tate. *Landmark Supreme Court Cases: The Most Influential Decisions of the Supreme Court of the United States.* New York: Facts on File, 2004.

Hutcheson, Richard G. *God in the White House.* New York: Macmillan, 1988.

Ivers, Gregg. *Lowering the Wall: Religion and the Supreme Court in the 1980s.* New York: Anti-Defamation League, 1991.

_____. *Redefining the First Freedom: the Supreme Court and the Consolidation of Power.* New York: Transaction Publishers, 1997.

Johnson, John W. *The Struggle for Student Rights: Tinker v. Des Moines and the 1960s.* Lawrence, KS: University Press of Kansas, 1997.

Jurinski, James. *Religion in the Schools: A Reference Handbook.* Santa Barbara, CA: ABC-CLIO, 1998.

Kelly, Dean, ed. *Equal Separation: Understanding the Religion Clauses of the First Amendment.* New York: Greenwood Press, 1990.

Laas, Maria. *The History Book of School District 66 – The Westside Community Schools 1947-1982: A Celebration.* Omaha: Westside Community Schools, 1982.

Levy, Leonard. *The Establishment Clause*: *Religion and the First Amendment.* New York: Macmillan, 1986.

Monsma, Stephen V. and Super, J. Christopher, eds. *Equal Treatment of Religion in a Pluralistic Society.* Grand Rapids: W.B. Eerdmans, 1998.

Panoch, James V. and David L. Barr. *Religion Goes to School: A Practical Handbook for Teachers.* New York: Harper and Row, 1968.

Pfeffer, Leo. *Church, State, and Freedom.* Boston: Bean Press, 1953.

_____. *God, Caser, and the Constitution: The Courts as Referee of Church-State.* Confrontation. Boston: Beacon Press, 1975.

_____. *Religious Freedom.* Skokie, IL: National Textbook Company, 1977.

Ravitch, Frank S. *School Prayer and Discrimination: The Civil Rights of Religious Minorities and Dissenters.* Boston: Northeastern University Press, 1999.

Shelfer, Martin S. *God versus Caesar.* Albany: State University of New York Press, 1999.

Smith, Rodney K. *Public Prayer and the Constitution.* Wilmington, DE: Scholarly Resources Inc, 1987.

Stone, Geoffrey R., Richard A. Epstein and Cass R. Sunstein, eds. *The Bill of Rights in the Modern State.* Chicago: University of Chicago Press, 1992.

Whitehead, John. *The Rights of Religious Persons in Public Education.* Wheaton, IL: Crossway Books, 1994.

Periodicals

America. Editorial. "Equal Access For Religious Freedom." 21 April 1984, 290.

America. Editorial. "God and Cheerleaders: Equal Access." 23 June 1990, 595.

Baron, Mark A. and Harold L. Bishop. "Come One, Come All." *The American School Board Journal*. March 1991, 29-30.

Buckley, William F. "Reagan at Orlando." *National Review*. 15 April 1983, 22.

Cain, Michael Scott. "Crazies at the Gate: The Religious Right and the Schools." *Humanist*. July/August 1983, 16-21.

Christianity Today. Editorial. 7 September 1984, 12.

Coyle, Marcia and Fred Strassar. "Religious Clubs." *The National Law Journal*. 18 June 1990, 15.

Denniston, Lyle. "The Constitution Gets Lost in the Curriculum." *The American Lawyer*. April 1990, 88.

Doerr, Edd. "Invasion of the Soul Snatchers." *Humanist*. July/August 1984, 44.

Drinan, Robert. "The Supreme Court to Review Student Prayer Groups in High School." *America*. 28 April 1990, 429-430.

Duncan, Richard. "Back to School and Back to Religion." *Texas Lawyer*. 8 October 1990, 31.

Gest, Ted. "The Court's New Catechism." *U.S. News and World Report*. 18 June 1990, 22.

Goldberg, Chuck. "One Girl's Fight for Freedom." *Pentecostal Evangel*. 21 April 1991, 10-11.

Goldsmith, Kory. "The Equal Access Act: The Supreme Court Upholds its Constitutionality." *School Law Bulletin*. Fall 1990. v21, 9-15.

Hentloff, Nat. "The Fourth." *The Progressive*. December 1984, 35-37.

Lewis, Anne C. Editorial. *Phi Delta Kappa*. November 1984, 163.

Mahon, J. Patrick. "Mergens: Is the Equal Access Issue Settled?" *Journal of Law and Education*, 19 (Fall 1990): 543-47.

Mauro, Tony. "Dungeons and Dragons." *Legal Times*. 22 January 1990, 13.

McConnell, Michael W. "Accommodation of Religion." *The Supreme Court Review*: 1985. 1986.

Morris, Arval. "The Equal Access Act After Mergens." *West's Education Law Reporter*. 11 October 1990. v61, n4 1139-65.

New Republic, Editorial. "Reverend Reagan." 4 April 1983, 7-8.

People Weekly. 25 June 1990, 67.

Redlich, Norman. "Some Cracks in the Wall." *The Nation*. 29 September 1984, 277-280.

Sanders, Alain L. "Prayers in the Schoolhouse?" *Time*. 15 January 1990, 51.

_____. "Let Us Pray." *Time*. 18 June 1990, 19.

Sidey, Hugh. "The Right Rev. Ronald Reagan." *Time*. 21 March 1983, 18.

Thigpen, Paul. "Christians In Court." *Charisma and Christian Life*. December 1990, 66-76.

Time. "Equal Access: Congress and Student Piety." 6 August 1984, 59.

Time. "Readin, Ritin and Religion." 13 August 1984, 15.

Wall, James. Editorial. "Mr. Reagan Speaks Only to Believers," *Christian Century*. 23 March 1983, 259.

Winton, Ben. "Experts: Gate Open to Occult." *Phoenix Gazette*. 9 June 1990.

Newspapers

New York Times. 1983-84.
New York Times. 1988-1990.
Omaha World-Herald. 1985
Omaha World-Herald. 1988-1990.
Washington Post. 1984.
Washington Post. 1990.

Public Documents

U.S. Congress. House of Representatives. *Hearings on the Equal Access Act*. 1982.

U.S. Congress. Senate. Judicial Committee. *Equal Access: A First Amendment Question*. 1982.

The Board of Education of the Westside Community Schools v. Bridgett Mergens., 496 U.S. 226 (1990).

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

Mergens v. Westside., 867 F.2d 1076. (8th Cir. 1985).

_____. Case CV 85-0-426, All related documents, briefs, motions and transcripts filed under this case number at the National Archives at Kansas, City, MO.

U.S. Congress. *Congressional Record*. 1984. Vol. 14. 19211-52.

_____. *Congressional Record*. 1984. Vol. 16. 20932-51.

Interviews and Email Communications

Harris, David. Interview by author. May 2005, Omaha.

Harris, Michelle. Interview by author. July 2005, Omaha.

Hirt, Theodore. Email communication with author. January-July 2005.

Mayhew, Bridgett (Mergens). Interview by author. April 2005, Omaha.

Simmonds, Andrea. Email communication with author. January-May 2005.

Findley, James. Interview by author. June 2005, Omaha.

Fitscher, Steven W., National Legal Foundation. Email communication with author. August 2005.

Internet and Websites

www.aclj.org
www.nlf.net
www.oyez.org
www.supremecourtus.gov