

ARTICLES

Stretching the Equal Access Act Beyond Equal Access

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INTRODUCTION

The federal Equal Access Act¹ makes it unlawful for most public high schools to deny student groups the ability “to meet on school premises during noninstructional time”² on the basis of “the religious, political, philosophical, or other content of the speech at such meetings.”³ The First Amendment requires public schools to offer equal access when they make buildings available to community groups as a general-purpose meeting hall.⁴ Interpreting the Equal Access Act and the First Amendment together in *Prince v. Jacoby*,⁵ the Ninth Circuit held that a student religious group not sponsored by the school could claim equal access to more than just the school premises. Instead, the students were entitled to receive an equal measure of virtually all benefits a school might bestow on school-sponsored extracurricular clubs: affiliation with the student council, unrestricted grants from the school’s student activity fee account, appearance in the school yearbook, meetings during instructional time, and expenditure of tax money beyond the incidental cost of providing the space for meetings.⁶

This article explores the ramifications of stretching the Equal Access Act (“EAA” or “the Act”) beyond equal access to school premises for meetings during noninstructional time. I argue that *Prince* was wrongly decided: the school was obligated to allow unsponsored student groups to meet on campus, but had no corresponding obligation to provide them the other attributes of school sponsorship. This is because student groups have the right to promote ideas or behavior that public schools may be legally

* Staff Attorney, American Civil Liberties Union of Washington. My thinking has been influenced by my work on behalf of the ACLU in several cases cited in this article, including *Prince v. Jacoby*, *Davey v. Locke*, *Gallwey v. Grimm*, *Cogswell v. City of Seattle*, *Gonzaga University v. Doe*, and *City of Bellevue v. Lorang*. The views expressed here are my own. Readers interested in learning the ACLU’s stated positions should consult the briefs in those cases. Special thanks to my grammar squad of Daniel Caplan, Richard Caplan, Bob Cumbow, and Betty Rosse.

1. 20 U.S.C. § 4071–74 (1997).

2. *Id.* § 4071(b).

3. *Id.* § 4071(a).

4. See, e.g., *Good News Club v. Milford Central Sch. Dist.*, 533 U.S. 98, 104–105 (2001) (elementary school); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 385, 389–390 (1993) (high school).

5. 303 F.3d 1074 (9th Cir. 2002), *cert. denied*, No. 02-1610, 2003 WL 21134040 (U.S. October 6, 2003).

6. *Id.* at 1086.

prohibited from endorsing—as with clubs that advocate for religious beliefs or political candidates—or that schools prefer not to endorse—as with clubs that advocate racial superiority, legalization of recreational drugs, or other controversial ideologies. Schools need the ability to give meaningful support to the clubs they endorse, and to express in a meaningful way their lack of sponsorship of the clubs they do not endorse. By requiring schools to treat student groups identically with regard to all benefits, and not just building access, *Prince* reduces the ability of public schools to communicate their desired educational messages.

The source of the error is, in many ways, the Ninth Circuit's casual use of the term "forum" to describe virtually anything of value, whether or not it is a place or a medium for expression. Under existing interpretations of the First Amendment, a government entity must act differently when managing a public forum (like a park, sidewalk, or public access cable TV channel) than when performing other functions. *Prince* eliminates that difference: it holds that whenever a school provides anything to a user of a forum, it has added attributes to the forum itself. This greatly changes the legal standards governing school administrators. Before *Prince*, a school's decision to provide or withhold benefits other than meeting space to a student group would hinge on educators' judgments about the pedagogical value of the group's activities. After *Prince*, such value judgments are forbidden, since public forums are equally available to all. *Prince* is an extreme example of how an unthinking application of the public forum doctrine beyond its intended scope can have undesired consequences.

I often represent student groups seeking to enforce their rights under the EAA, so it may seem odd for me to advocate a narrower view of the law. I have written in favor of expansive free speech rights for public school students.⁷ I agree with the Supreme Court's ruling in *Westside Community Board of Education v. Mergens*⁸ that a school rule granting student groups equal access to the premises for meetings is constitutional on its face, even when the groups involved are religious. I even believe that such a rule will often be good public policy. Why then do I advocate less than full equality between sponsored and non-sponsored student groups when it comes to benefits unrelated to meeting space? My concerns arise primarily

7. See Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 139 (2003). *Public School Discipline* complements this article in that it explores a school's obligation to tolerate students' private speech; this article explores a school's obligation to facilitate or subsidize it.

8. 496 U.S. 226, 248–49 (1990).

from two sources: support for the mission of the secular public schools, and a desire for consistency and intelligibility in the law. *Prince* interferes with schools' ability to make legitimate educational choices and to maintain religious neutrality in the curriculum. This by itself would be enough to argue for a different result. In addition, both *Prince* and the EAA itself are maddening in their illogic and circular reasoning, making it nearly impossible for school officials of ordinary intelligence (and their attorneys) to understand them. This article tries to untangle the Act and the case law interpreting it, in hopes that the process will help even readers who disagree with my thesis to approach the Act with less confusion.

Part I provides background on the Equal Access Act, from its legislative origins through its interpretations by federal courts. This part includes a careful look at the statute's often confusing language. Part II describes and criticizes *Prince v. Jacoby*. I argue that the decision is plagued with legal errors large and small, but that the main error is its failure to consider a central question: equal access to what? Both the EAA and the First Amendment public forum doctrine indicate that student groups should have access to forums for assembly and expression, but *Prince* mandated access to much more. Part III explores a parallel development in which the First Amendment public forum doctrine has been stretched beyond forums for assembly and expression. This part first describes the doctrine in its standard form and then considers how well it translates to other settings. The process reveals some of the tensions within the public forum doctrine even when applied to its usual locations. Part IV concludes the article with practical suggestions for living with *Prince* if it is not overturned by later court decision. Some proposals are for schools (suggesting how to structure student groups' benefits to best comply with *Prince*), and some are for Congress (suggesting amendments that would make the Equal Access Act easier to understand and better suited to the needs of public school districts).

I. THE EQUAL ACCESS ACT

A. *Student Groups at Public Schools*

The prototypical EAA controversy involves a student-initiated club that seeks to meet on school grounds over the objections of a school that prefers to limit use of its premises to officially approved student groups. Although nothing prevents students from forming whatever groups they like outside of school, meetings at school have certain advantages from a student club's perspective. Potential club

members are already gathered on school property, so meeting on the premises is far more convenient than meeting in a private home or church. (Teachers' unions like to communicate with members at school for much the same reason.)⁹ Parents may see a safety advantage to student groups meeting at school, because it provides a known and trusted location for after-school activities and involves less transportation. For student groups that form to collectively advocate a message¹⁰—as would be the case for groups like Students Against Drunk Driving, a Gay/Straight Alliance, an animal rights group, or an evangelical religious club—the interest in meeting on school grounds goes beyond logistics. The club wants to meet and to be seen meeting. Visibility signals that the group belongs in the mainstream, a message that would not be expressed as effectively through an off-campus meeting. Compulsory attendance laws create an audience that would not exist in the absence of state action. Meetings held on school grounds may also cultivate the impression that the group has the school's seal of approval.

The mixture of student speech (through the group's activities) and school speech (through sponsorship or regulation of student groups) is the source of the social and legal contention that sometimes arises when student clubs express views that the school does not or cannot share. The emotions surrounding the topic arise in part from the role of the American public school. As Professor Akhil Reed Amar has written, "From one perspective, the twentieth-century state school is designed to serve a function very similar to that of the eighteenth-century state church: imparting community values and promoting moral conduct among ordinary citizens, upon whose virtue republican government ultimately rests."¹¹ Transmission of mores to future generations is at stake, so public interest in the socializing functions of public schools is keen. Those who believe that schools should condemn homosexuality may be displeased when a gay rights club meets on school grounds. Those who believe schools should not inculcate religious beliefs may worry when evangelical groups meet on school grounds. As noted in the graduation prayer context, "What to

9. See *Tex. State Teachers Ass'n v. Garland Indp. Sch. Dist.*, 777 F.2d 1046, 1048 (5th Cir. 1985), *summarily aff'd*, 479 U.S. 801 (1986); *Perry Educ. Assn. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 39 (1983); *L.A. Teachers Union v. L.A. City Bd. of Educ.*, 455 P.2d 827, 831 (1969).

10. For background on the First Amendment doctrine of expressive association, see *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 563 (1995); *Snedigar v. Hodderson*, 114 Wash.2d 153, 167, 786 P.2d 781, 788 (1990).

11. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1161 (1991).

most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."¹²

Given these pitfalls, most schools do not sponsor controversial student groups. Instead, they encourage meetings only of those specific groups believed to have educational value. A Washington attorney general opinion describes various types of school-sponsored clubs:

Some of these clubs may be closely related to a course or a series of courses offered in the school (such as a French club which is an outgrowth of a French class, or a future farmers organization which is directly related to classes on agriculture). Some organizations may be educational in nature, but not specifically related to courses offered in the school (such as clubs devoted to discussion of great literature or current events, or drama societies or musical ensembles which may supplement the school's educational offerings, but are not directly an outgrowth of them). Still other organizations are not specifically educational in nature, but are primarily social, recreational, or charitable in nature (booster clubs for the school's athletic teams, clubs whose primary function is to plan and organize dances and social events, or organizations that engage in community outreach projects ranging from care for the sick and homeless to conserving natural resources).¹³

The EAA does not reflect the historical reality described in this passage. The Act contemplates only two categories of student clubs: curriculum related and noncurriculum related.¹⁴ In practice, a school may find educational value in a student club regardless of how it relates to the curriculum. For example, most schools believe that a student orchestra has educational value. It introduces participants to historically important compositions, and group music-making teaches listening, teamwork, practice, leadership, and discipline. The educational benefits of an orchestra would exist regardless of the courses offered for credit elsewhere in the curriculum. One school might offer orchestra as a class during the school day and also sponsor an after-school orchestra club (perhaps a chamber orchestra that would be open to students enrolled in the curricular orchestra who

12. *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

13. 3 Wash. Op. Att'y Gen. 2 (1995).

14. This article uses the terms as they appear in the statute, notwithstanding their awkwardness and disdain for ordinary rules of hyphenation. Occasionally, I will use the more common term "extracurricular" as a synonym for noncurriculum related.

want a different musical experience and to musically inclined students who have not enrolled in the curricular orchestra). Another school might offer a choir class that does not cover instrumental music, but sponsor a similar after-school chamber orchestra. A third school without any music courses on its roster might nonetheless sponsor an extracurricular chamber orchestra. All three schools might support their chamber orchestras in the same ways, such as assigning a faculty or volunteer conductor, loaning musical instruments to students, buying sheet music and stands, and providing a rehearsal hall, a performance space, and transportation to concerts. At all three schools, the chamber orchestra is a school-sponsored activity operating under the school's auspices and subject to the school's control. Indeed, the Supreme Court has ruled that schools have so much control over their sponsored extracurricular clubs that they can force students to undergo drug tests as a condition to participating.¹⁵

In my orchestra examples, each school has made a decision to sponsor and subsidize a particular type of music-making. For whatever reasons, they have decided to affix their seal of approval and spend their money on extracurricular orchestras, but not extracurricular punk rock bands. The resource allocation decision does not represent hostility to punk music, just a preference for orchestral music. A school might decide to offer its punk musicians certain school resources (such as rehearsal and performance space), but not the full panoply of resources it devotes to the orchestra (such as instruments and transportation to off-campus gigs). No one would consider differential allocation of resources between the school-sponsored extracurricular orchestra and the unsponsored extracurricular punk band to be a free speech or free association problem. At least not before the EAA as interpreted in *Prince*.

The theory behind the EAA is to treat as an open forum any school that allows meetings of noncurriculum related student groups. There may be good reasons to operate a school building as a forum open to all student groups. Participation in group activities provides additional opportunities for socialization. Student groups can prepare youth for later civic involvement with adult organizations. Research suggests that participation in organized after-school activities helps prevent drug abuse.¹⁶ Whatever the advantages of operating a school as an open forum for student group meetings, it remains a legal fiction

15. Bd. of Educ. v. Earls, 536 U.S. 822, 830 (2002). Although some of the extracurricular activities in *Earls* would be considered noncurriculum related under the EAA, I know of no cases in which student-initiated clubs have demanded equal access to urinalysis.

16. Brief of Amici Curiae American Academy of Pediatrics, et al. at 10, Bd. of Educ. v. Earls, 536 U.S. 822 (2002) (No. 01-332).

that a school intends to create a forum whenever it sponsors a noncurriculum related group. A school that sponsors a chamber orchestra in all likelihood does so because it wants a chamber orchestra, not because it wants to create a forum for students to play punk, hip hop, bluegrass, or any other genre of music. Congress nonetheless embraced this factually unfounded legal fiction in 1984, in response to the school prayer movement.

B. Congressional Motivations¹⁷

Religious content in publicly-funded schools has been a topic of controversy in the United States ever since state-run education began to take hold in the early 19th century.¹⁸ Public interest in what was popularly called “the School Question” was especially heated in the 1870’s, with a majority of political leaders of the day favoring separation of church and state in education. President Ulysses S. Grant gave a highly publicized address where he inveighed against taxpayer funding of sectarian schools, urging states to fund only those schools “sufficient to afford to every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan, or atheistical dogmas. Leave the matter of religion to the family altar, the Church, and the private school, supported entirely by private contributions.”¹⁹ A proposed amendment to the Federal Constitution barring taxpayer funding of sectarian schools fell only four votes short of the two-thirds majority necessary to submit it

17. The legislative history of the EAA is explored in the Brief of the Anti-Defamation League of B'nai B'rith, et al. at 4, *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (No. 88-1597); Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 5, 22, 43 (1986); Ruti Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public Schools: A Proposal for a Unitary First Amendment Forum Analysis Test*, 12 HASTINGS CONST. L.Q. 529, 543 n.59 (1986); and Robert C. Boisvert, Jr., *Of Equal Access and Trojan Horses*, 3 LAW & INEQ. 373, 375-379 (1985).

18. For the history of 19th-century school prayer debates, see Brief Amicus Curiae of Historians and Law Scholars on Behalf of Petitioners Gary Locke, et al. at 23, *Locke v. Davey*, 123 S.Ct. 2075 (2003) (No. 02-1315); Brief of Amici Curiae the Becket Fund for Religious Liberty, et al. at 5, *Locke v. Davey*, 123 S.Ct. 2075 (2003) (No. 02-1315); Mark Edward DeForrest, *An Overview And Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 564 (2003); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 48 (1997); Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. OF LEGAL HISTORY 38, 61-69 (1992); and Robert F. Utter and Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L. Q. 451,456 (1988).

19. Speech of President Ulysses S. Grant at Des Moines, Iowa (September 30, 1875) (quoted in Green, *supra* note 18, at 47).

to the states for ratification.²⁰ Even so, many state constitutions already included similar language, and Congress required new states admitted to the Union (including Washington) to do likewise.²¹

A second wave of public interest began in the early 1960's after the Supreme Court ruled that the Establishment Clause forbade school-sponsored classroom prayer in public schools.²² Although a broad social consensus against state-conducted classroom prayer has solidified in most quarters in the intervening years, a minority of Americans continue to believe that government-run schools should include formal religious observance. This has generated backlashes of varying size when the Supreme Court has reiterated its school prayer holdings to forbid public schools from teaching religious creation dogmas,²³ encouraging in-class prayer through coercively framed moments of silence,²⁴ displaying the Ten Commandments as devotional objects,²⁵ or leading prayers at graduation²⁶ and football games.²⁷ The modern era finds many elected officials who consider it politically advantageous to profess fondness for school prayer, safe in the knowledge that the courts will rebuff any serious attempts to overrule the school prayer decisions, thus preserving the political vitality of the issue for years to come.²⁸

The Equal Access Act arose during one of the periodic upswings of political interest in school prayer. The 1980's version was spurred by the political successes of the organized Christian Right. A flurry of congressional bills supporting school prayer in one form or another were introduced and debated during the 98th Congress.²⁹ Efforts then

20. Green, *supra* note 18, at 67.

21. Utter & Larson, *supra* note 18, at 458-67.

22. Sch. Dist. of Abington Tp., PA v. Schempp, 374 U.S. 203, 223 (1963); *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

23. *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987).

24. *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985).

25. *Stone v. Graham*, 449 U.S. 39, 41-42 (1980).

26. *Lee v. Weisman*, 505 U.S. 577, 588 (1993).

27. *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 316 (2000).

28. On the political usefulness of judge-bashing, see Aaron H. Caplan, *Malthus & the Court of Appeals*, 73 WASH. L. REV. 957 (1998).

29. These efforts include "sense of the Congress" resolutions regarding periods of silence in public schools (H. Con. Res. 5, 98th Cong. (1983); H. Con. Res. 13, 98th Cong. (1983); H. Con. Res. 14, 98th Cong. (1983); H. Con. Res. 38, 98th Cong. (1983); H. Con. Res. 53, 98th Cong. (1983); H. Con. Res. 76, 98th Cong. (1983); H. Con. Res. 186, 98th Cong. (1983)); bills to remove federal court jurisdiction over any case involving school prayer (H.R. 183, 98th Cong. (1983); H.R. 253, 98th Cong. (1983); H.R. 525, 98th Cong. (1983); S. 784, 98th Cong. (1983), 98th Cong. (1983); S. 785, 98th Cong. (1983)); and bills to require high schools and colleges to provide access to their property for meetings of religious groups (H.R. 2732, 98th Cong. (1983); H.R. 4172, 98th Cong. (1983); H.R. 4996, 98th Cong. (1984); H.R. 5345, 98th Cong. (1984); S. 425, 98th Cong. (1983)).

coalesced around a proposed constitutional amendment to allow organized and individual prayer in the public schools.³⁰ A majority of senators supported the amendment, but it required a two-thirds supermajority and thus failed on a vote of 56 to 44.³¹

After the high-profile defeat of the school prayer amendment to the Constitution, school prayer advocates identified an approach that had sounder legal basis and better political resonance: guaranteeing that student groups could meet to pray on school grounds. The equal access concept for high schools drew on the Supreme Court's 1981 decision in *Widmar v. Vincent*,³² which held that when the University of Missouri at Kansas City (UMKC) made its facilities available to a wide array of voluntary private student organizations, it could not deny equivalent building access to student religious organizations:

Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.³³

Widmar concluded that by denying meeting space, the University had "discriminated against"³⁴ the religious student group.

As reflected in its lopsided 8-1 majority, the Supreme Court did not consider *Widmar* a particularly difficult case.³⁵ In reaching its decision, the Court noted that it was "the avowed purpose of UMKC to provide a forum in which students can exchange ideas,"³⁶ that over 100 different groups of varying philosophies used university buildings

30. See S.J. Res. 212 (introduced Jan. 24, 1984) (titled "School Prayer Constitutional Amendment"), in Senate Report 98-347. The proposed amendment had two sections. The first would repeal *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington School District v. Schempp*, 374 U.S. 203 (1963) by declaring that "[n]othing in this Constitution shall be construed to prohibit individual or group silent prayer or meditation in public schools." The second would repeal lower court decisions such as *Brandon v. Guilderland Bd. of Ed.*, 635 F.2d 971 (2d Cir. 1980) and *Lubbock Civil Liberties Union v. Lubbock Independent School Dist.*, 669 F.2d 1038 (5th Cir. 1982), by declaring that "[n]othing in this Constitution shall be construed to prohibit equal access to the use of public school facilities by all voluntary student groups."

31. 130 CONG. REC. 5919, 5895 (1984). The House did not consider the school prayer amendments. Boisvert, *supra* note 17, at n.16.

32. 454 U.S. 263, 277 (1981).

33. *Id.* at 267-68.

34. *Id.* at 269.

35. Laycock, *supra* note 18, at 63 ("*Widmar* was an easy case.").

36. *Widmar*, 454 U.S. at 271 n.10.

to hold their meetings,³⁷ and that students were adults free to make their own choices about which extracurricular activities to attend.³⁸ With an open door policy resembling the classic marketplace of ideas, the Court had little reason to question whether a public forum existed.³⁹ UMKC's only reason for its policy of excluding religious groups was its interpretation of the Establishment Clause, but the Court found no Establishment Clause violation. As public parks can be used for prayer meetings as well as political rallies or family picnics,⁴⁰ the same should hold true for university buildings. In retrospect, the trickiest question for the Court may have been how to justify limiting university property only to student groups. However, that question was not central to the case and it was finessed with a footnote⁴¹ and a passing reference to the university grounds as "the limited public forum."⁴²

With *Widmar* as their model, congressional proponents of school prayer coalesced around equal access as an achievable goal.⁴³ (*Widmar's* constitutional rule has since been applied beyond universities to primary and secondary schools, but the drafters of the EAA had no assurance this would occur, since lower court decisions on that question had been mixed.)⁴⁴ If the Supreme Court allows

37. *Id.* at 274.

38. *Id.* at 274 n.14.

39. *Id.* at 267 n.5.

40. *Niemotko v. Maryland*, 340 U.S. 268, 273-74 (1951).

41. *Widmar*, 454 U.S. at 267 n.5.

42. *Id.* at 272. The phrase had been used only once before by the Supreme Court. A few months earlier, it had casually described the Minnesota State Fairgrounds as "a limited public forum in that it exists to provide a means for a great number of exhibitors temporarily to present their products or views, be they commercial, religious, or political, to a large number of people in an efficient fashion." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981). Characterizing the forum as limited was not dispositive for either case, since *Heffron* hinged on the reasonableness of a time, place, or manner restriction as it interacted with the Free Exercise Clause, and *Widmar* hinged on the requirement of content neutrality as it interacted with the Establishment Clause.

43. *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 235 (1990) ("In 1984, Congress extended the reasoning of *Widmar* to public secondary schools."). Proponents of the Equal Access Act viewed it as "the next step" following the failed school prayer amendment. 130 CONG. REC. 19242 (1984) (Sen. Jepsen). *Accord, id.* at 19247 (Sen. Grassley). Some opponents felt the same way. *Id.* at 20934-35 (Rep. Schumer); *id.* at 20942 (Rep. Ackerman) ("This bill looks like school prayer, it tastes like school prayer, and it smells like school prayer.").

44. *Brandon v. Guilderland Bd. of Ed.*, 635 F.2d 971, 980 (2d Cir.1980), *cert. denied*, 454 U.S. 1123 (1981), a pre-*Widmar* case, concluded that unlike a university campus, a public school is not a public forum, so that prayer meetings before school would violate the Establishment Clause. Other pre-*Widmar* cases reached similar conclusions. *Trietley v. Bd. of Ed. of City of Buffalo*, 409 N.Y.S.2d 912, 917 (N.Y. App. Div. 1978); *Johnson v. Huntington Beach Union High Sch. Dist.*, 137 Cal.Rptr. 43, 52 (Cal. Ct. App. 1977); *Hunt v. Bd. of Educ.*, 321 F. Supp. 1263, 1267 (S.D.W.Va. 1971). A post-*Widmar* case, *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038, 1048 (5th Cir. 1982), distinguished *Widmar*, holding that

prayer groups in public forums, the reasoning went, then schools would become public forums. Proponents' concern for unregulated open forums was an obvious pretext in the early stages of the legislative process because the initial version of the bill protected student meetings only if they involved religious speech.⁴⁵ Passage of an equal access bill was finally secured when it was broadened to extend not only to student prayer groups, but to any student group regardless of the "religious, political, philosophical, or other content" of the group's meetings.⁴⁶ With this change, many opponents of the prior bill came to embrace it.⁴⁷ Nonetheless, the legislative process was not pretty, as Professor Douglas Laycock described:

The bill was completely rewritten in a series of multilateral negotiations after it was passed by the House and reported out of committee in the Senate. Thus, the committee reports cast no light on the language actually adopted. Senator Hatfield offered the negotiated compromise as a floor amendment in the midst of the Senate's rush to adjourn for the Fourth of July. He repeatedly emphasized that as many as 1,000 people had been

public schools were not public forums comparable to the University of Missouri. There was considerable evidence in *Lubbock* that the school's newly-minted equal access policy was adopted solely to evade an injunction against the district's pervasive school-sponsored prayers. See *id.* at 1039. On the other hand, *Reed v. Van Hoven*, 237 F. Supp. 48, 54 (W.D. Mich. 1965) approved voluntary student prayer on-campus before and after school. *Bender v. Williamsport Area Sch. Dist.*, 563 F. Supp. 697, 703-4 (M.D. Pa 1983), allowed a student religious club to meet during a midday activity hour, explicitly finding that "the high school's decision to create an activity hour to promote and stimulate student group participation is factually similar to the situation in *Widmar*." *Id.* at 706. Later stages in the *Bender* litigation occurred after enactment of the EAA, but curiously the new Act did not enter the arguments. The Third Circuit reversed, finding that even though the activity hour was a limited public forum, the Establishment Clause nonetheless required religious groups to be excluded. *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 561 (3d Cir. 1986). The Supreme Court was poised to rule on the question, but upon discovering an error that vitiated appellate jurisdiction, it dismissed the appeals and reinstated the trial court order. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 536 (1986). Four dissenters would have reached the merits to rule that an equal access policy for high schools was constitutionally mandated. *Id.* at 555 (Powell, J., dissenting).

45. S. 1059 would have required equal access for student groups "that seek to engage in voluntary extracurricular activities that include prayer or religious speech." S. REP. NO. 98-357 (February 22, 1984). The companion bill in the House, H.R. 5345, was similarly limited. H REP. NO. 98-710 (April 26, 1984). This allowed critics to charge that the Act was "nothing more than a school-prayer amendment in sheep's clothing." *Id.* at 13 (dissenting statement of Rep. Ackerman et al.).

46. Boisvert, *supra* note 17, at 373-77.

47. See, e.g., 130 CONG. REC. 19235-37 (1984) (Sen. Levin); *id.* at 20933 (Rep. Frank); *id.* at 20940 (Rep. Williams); *id.* at 20946-47 (Rep. Smith); *id.* at 20947 (Rep. Slattry); *id.* at 20948 (Rep. Synar); *id.* at 20949 (Rep. Schneider); *id.* at 20950 (Rep. Simon). The revisions prompted the ACLU and the National Education Association to drop their opposition to the bill. *Id.* at 19218, 19232, 20935.

involved in the negotiations that produced the compromise version, and that not all the senators sponsoring the compromise agreed with everything in it. Senator Gorton accurately observed that too many cooks had spoiled the broth. But Hatfield had a large majority committed to his compromise, and he resisted any change that might have caused the deal to fall apart. The Hatfield compromise later passed the House under a special rule that precluded amendments and limited debate to one hour.⁴⁸

In his statement upon signing the bill into law, President Reagan said: "These provisions honor, in a public school setting, this country's heritage of freedom of thought and speech, and I am delighted that they now become the law of the land."⁴⁹ Despite the many glowing statements about freedom of speech and association that accompanied the enactment of the EAA, Congress actually devoted a great deal of its attention ensuring that school buildings would not become forums for speech and association of groups it disfavored. Many members of Congress expressed concern that schools should not be required to provide access to "outside preachers, priests, cult leaders and gurus"⁵⁰ representing "self-styled religions."⁵¹ Others believed schools should not be obliged to host student chapters of the Nazi Party, Communist Party, or the Ku Klux Klan.⁵² These concerns were accommodated with provisions in the Act demanding that no "nonschool persons" could attend any student group meetings and preserving schools' ability to ensure that meetings were orderly and voluntary.⁵³

A New York Times editorial noted the irony of structuring a school prayer bill as a free speech bill. "Bending itself out of shape to accommodate the pressure for prayer in the schools, the Senate has now acted to admit a little prayer before or after classes, but in a perversely liberal way: it would also admit some atheism, politics and perhaps even homosexual agitation on an equal basis."⁵⁴

48. Laycock, *supra* note 17, at 37 (footnotes omitted). See also Boisvert, *supra* note 17, at 375-78.

49. President's Statement Upon Signing H.R. 1310 (Education for Economic Security Act), 20 Weekly Comp. Pres. Doc. 1120, 1121 (Aug. 11, 1984) (as cited in Boisvert, *supra* note 17, at 373 n.1).

50. 130 CONG. REC. 19245 (1984) (Sen. Thurmond).

51. 130 CONG. REC. 20942 (1984) (Rep. Oakar).

52. See, e.g., 130 CONG. REC. 19225 (1984) (Sen. Hatfield); *id.* at 19227 (Sen. Metzbaum); 19244 (Sen. Mitchell); *id.* at 20938 (Rep. Kastenmeier).

53. 20 U.S.C. § 4071(c)(5) (nonschool persons); *id.* at § 4071(f) (preservation of school authority). The latter section was added by Senator Danforth. 130 CONG. REC. 19229 (1984).

54. Schoolhouse Free-for-All, N.Y. TIMES, July 25, 1984, at A22, col. 1., reprinted in 130 CONG. REC. 20937-38 (1984). The article concluded, "They may think they're putting God in

C. Analysis of the Statute

For a statute so short, the EAA is notable for its confusing structure and clumsy draftsmanship. (The operative sections of the Act, 20 U.S.C. § 4071-72, are reproduced in Appendix A.) The text is replete with coined negative terms like “noncurriculum related,”⁵⁵ “noninstructional time,”⁵⁶ “nonparticipatory capacity,”⁵⁷ and “nonschool persons.”⁵⁸ As Justice Stevens joked:

The word “noncurriculum” is not in the dictionary. Neither Webster nor Congress has authorized us to assume that “noncurriculum” is a precise antonym of the word “curriculum.” “Nonplus,” for example, does not mean “minus” and it would be incorrect to assume that a “nonentity” is not an “entity” at all.⁵⁹

This section addresses some of the Act’s more important mysteries.

1. Access to What?

The centerpiece of the EAA is § 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.

This sentence can be followed from beginning to end, but only with great effort. Its grammar offers many opportunities to go

the classroom, but atheists, too, would have their hour. So would socialists, homosexuals and vegetarians. Thus legislating for the schoolhouse from Washington is a clear case of a cure that is more dangerous than the disease.”

55. 20 U.S.C. § 4071(b).

56. *Id.* § 4071(b), *Id.* § 4072(4).

57. *Id.* § 4071(c)(3).

58. *Id.* § 4071(c)(5).

59. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 291 (1990) (Stevens, J., dissenting). Some members of Congress noted the awkwardness of the drafting even as the bill was being debated. Senator Evans said the bill was plagued by “ambiguous and ill-defined language.” 130 CONG. REC. 19249 (1984). Representative Pepper said, “I do not understand what this bill does.” Reading aloud the definition of limited open forum in 4071(b), he asked rhetorically, “What does that mean?” 130 CONG. REC. 20945 (1984). Representative Fish asked, “How many of us know what this language means? Even the House and Senate sponsors don’t.” 130 CONG. REC. 20945 (1984).

astray.⁶⁰ On first reading, one might stumble on what appears to be a clause modifying the verb “to conduct,” that is, “students who wish to conduct a meeting . . . on the basis of . . . speech.” In fact, the phrase “on the basis of . . . speech” does not describe the motivation of the students, but the motivation of the school (located 38 words away) that would “deny . . . or discriminate.” The phrase “deny equal access . . . to . . . students” prompts the question “deny WHOSE access to the students?” until one recognizes that the prepositional phrase “to . . . students” does not modify “access” but instead acts like an indirect object for the verb “deny” (as seen in the alternate phrasing “deny students equal access”). Another jolt comes from the word “students” serving simultaneously in nonparallel ways: as an indirect object of “deny” and as a direct object of the verb phrase “discriminate against.”⁶¹ Most of these traps can be puzzled through, but it would be better for Congress not to construct sentences that require such labor.

Even though it has pride of place in the title of the statute, the term “equal access” as used in § 4071(a) is surprisingly ambiguous. Much of the ambiguity hinges on the unexpected function of the word “to” in the phrase “deny equal access or a fair opportunity to.” Access is an abstract concept requiring further elaboration to be meaningful: Access to what? Most speakers would modify “access” with a prepositional phrase that functions like an adjective, as in, “The bridge gives access *to the island*.” By contrast, the word “to” in the phrase “opportunity to” would ordinarily be perceived as the

60. A helpful review of basic grammatical terms can be found in KAREN ELIZABETH GORDON, *THE TRANSITIVE VAMPIRE: A HANDBOOK OF GRAMMAR FOR THE INNOCENT, THE EAGER, AND THE DOOMED* 34 (1984):

Intransitive verbs are verbs capable of expressing themselves without requiring a complement to complete their meaning.

The god *thundered*.

Havelock *blushed*.

Sophie *sulked* by the spittoon. . . .

Transitive verbs are those that cannot complete their meaning without the help of a direct object. The verb is something that someone does to something or someone else.

We *bounced* the *idea* around the saloon. . . .

She *missed* the *midnight train*.

Transitive verbs sometimes take indirect as well as direct objects.

He *sent* his *fiancée* a *crystal ball*.

(The direct object is *crystal ball*; the indirect object is *fiancée*.)

61. If “discriminate against” is not viewed as a single, transitive verb phrase, then “discriminate” is an intransitive verb modified by the prepositional phrase “against students.” In either event, “deny” is a transitive verb whose direct objects are “access” and “opportunity” and is not parallel to the verbs “discriminate against” or “discriminate,” which take different direct objects or none at all.

beginning of an infinitive verb phrase, as in, “My vacation is an opportunity *to relax*” (which is shorthand for “an opportunity for me to relax”). In § 4071(a), however, the word “to” does neither of these expected and necessary things. Rather, it links a verb and its direct object (deny access) to an indirect object (students), as in “schools may not deny access to students,” or “schools may not deny students access.”⁶² But deny access to what? As a purely grammatical matter, the statute does not say. Only by borrowing from the clauses that modify “school” and “students” does congressional intent become clear: schools may not deny “equal access [to a limited open forum]” or “fair opportunity [to conduct a meeting within that limited open forum].”

2. When Does a School Have a Limited Open Forum?

After untying these grammatical knots, § 4071(a) may be reduced to a simpler form for purposes of discussion: “a school must give all student groups equal access to any limited public forum it may have.” By itself, this is close to a tautology, because ordinarily one only knows whether a school “has” an open forum by asking whether it grants equal access to potential users. For example, *Widmar* determined that a limited public forum existed only after examining university operations and noting that the university gave access to the premises for meetings of over 100 student groups organized for a wide variety of unrelated purposes. In § 4071(b), the EAA requires far less evidence for a limited open forum:

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.

In other settings, courts have held that government does not create a public forum by permitting “limited discourse,”⁶³ as would happen when it grants access to a single private user. Because the thresholds are so different, courts acknowledge that a “limited open forum” under the EAA is not the same thing as a “limited public forum” under the First Amendment.⁶⁴

The limited open forum arises when access is given to a “student group.” This term is not defined, but presumably, it could be as small

62. For review of *direct* and *indirect* objects, see LAUREL CURRIE OATES, ANNE ENQUIST, & KELLY KUNSCH, *THE LEGAL WRITING HANDBOOK* § 27.1, 739–43 (3d ed. Aspen L. & Bus. 2002) (1993).

63. *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 802 (1985).

64. *Mergens*, 496 U.S. at 242; *Prince v. Jacoby*, 303 F.3d 1074, 1091 (9th Cir. 2002).

as two people, as the Act elsewhere bars schools from limiting “the rights of groups of students which are not of a specified numerical size.”⁶⁵ On this reading, if two friends play chess in the library before or after classes—or for that matter talk to each other in the hallway at those times—the school has a limited open forum. Congress presumably meant for something more than these inevitable and casual encounters to trigger the formation of a limited open forum, but it is difficult to determine from the text what that something is. Some hints can be gleaned in various provisions. Since “groups” are entities that “conduct” meetings,⁶⁶ it follows that the student groups must be organized in some formal fashion. The groups should probably be standing entities with recurring meetings, such that ad hoc or one-time gatherings are not sufficient to create a limited open forum.⁶⁷ Perhaps most important is that some level of intentional conduct or permission on the part of the school must be required. If a group conducts meetings on the premises without the school’s knowledge or permission, the school cannot be said by its conduct to have “granted” any offerings or opportunities for meetings.⁶⁸

Little additional guidance can be found in the Act’s definition of a “meeting” in § 4072(3):

The term “meeting” includes those activities of student groups which [sic] are permitted under a school’s limited open forum and are not directly related to the school curriculum.

This definition is circular: under § 4071(b) a limited open forum is created when noncurriculum related groups are granted the opportunity to meet, and under § 4072(3), meetings not related to the curriculum occur to the extent the limited open forum permits it. The

65. 20 U.S.C. § 4071(d)(6).

66. *Id.* § 4071(a)–(c).

67. A sponsor of the Act stated that it would affect only student groups meeting “on a continuous basis.” 130 CONG. REC. 19231(1984) (Sen. Hatfield). However, the Act is not consistent in its suggestion that regular or recurring meetings are required. In many situations, the Act refers to a student group’s right to conduct “a meeting,” 20 U.S.C. § 4071(a) (emphasis added), or “the meeting,” *id.* at § 4071(c)(1) (emphasis added). In other places, the Act speaks in the plural. “Nonschool persons” are not to “regularly attend activities of student groups.” *Id.* at § 4071(c)(5) (emphasis added). The school is not required to expend funds beyond the incidental cost of providing the space for “student-initiated meetings,” *id.* at § 4071(d)(3) (emphasis added), or to sanction “meetings” that are otherwise unlawful, *id.* at § 4071(d)(5) (emphasis added). The school retains authority to assure that attendance at “meetings” is voluntary. *Id.* at § 4071(f) (emphasis added). Finally, a “meeting” includes “activities,” *id.* at § 4072(3) (emphasis added), a definition that directly mixes singular and plural.

68. *Id.* § 4071(b). The Act does not allow schools to “sanction” meetings that are otherwise unlawful, § 4071(d)(5), which raises a possibility that to create a limited open forum, schools may need to “sanction” at least one meeting. Also, “noninstructional time” means time “set aside by the school” for meetings, § 4072(4), a more intentional action than merely tolerating meetings.

reference to “permitted” activities in this section cannot be read to give schools authority to decide which meetings are permitted, because this would vitiate Congress’s purpose. Therefore, the best reading of this otherwise pointless definition is that Congress wanted the term “meeting” to include collective “activities” other than seated conversation. It could include a rehearsal, a game, a performance, or other such events. The school’s ability to decide what activities are “permitted” refers to the school’s authority to permit students to sing or dance on campus, but not to use power tools or explosives. This would be consistent with the express reservation in § 4071(f) of a school’s ability “to maintain order and discipline on school premises” and “to protect the well-being of students and faculty.”

The final puzzle piece for the creation of a limited open forum is the meaning of “noncurriculum related student groups,” because the forum exists only when a school grants meeting opportunities to these groups. The statute does not define the term, and the legislative history does not clarify matters.⁶⁹ Is a limited open forum created when a school supports and finances a club that has educational benefits but relates only indirectly to a course offered for credit (as with the extracurricular chamber orchestra in a school with a curricular choir)? This central question was left for later judicial clarification.

3. What Is a Limited Open Forum?

Though Congress described when a limited open forum exists, it failed to describe what a limited open forum is. Even though § 4071(b) is titled “‘Limited Open Forum’ Defined,” the definition is operational and not descriptive: when a school “grants” certain opportunities, it “has” a limited open forum (whatever that may be). As a whole, the statute implies that the otherwise undefined “forum” is a three-dimensional space. The student meetings that bring a forum into existence occur “on school premises,”⁷⁰ the school has no financial obligations beyond the cost of providing the “space” for meetings,⁷¹ and while it is unstated whether the forum must be a “classroom,” forum meetings need to occur before or after “actual classroom instruction.”⁷² The forum must allow student groups to “meet,”⁷³ “conduct meetings,”⁷⁴ or perform “activities.”⁷⁵ The groups

69. Laycock, *supra* note 17, at 36–42.

70. 20 U.S.C. § 4071(b).

71. *Id.* § 4071(d)(3).

72. *Id.* § 4072(4).

73. *Id.* § 4071(b).

74. *Id.* § 4071(a)–(b).

convene for these purposes during “noninstructional time.”⁷⁶ The meetings occur “within” the forum.⁷⁷ Together, these words indicate that Congress intended the limited open forum to consist of school buildings, grounds, or individual classrooms. The limited open forum does not include the school’s publications, curriculum, or budget, because these are not (1) *places* where (2) *meetings* (3) can be *conducted* (4) at particular *times*. Despite its ambiguities on other topics, the legislative history is wholly consistent in its treatment of limited open forums as physical spaces. No supporter or opponent of the Act ever mentioned the possibility that the statute would create a right of equal access to a school’s money, equipment, or approval. The Act’s sponsors sought to remedy the inability of religious clubs to gather on school property and in school buildings.⁷⁸ Opponents of the bill believed that religious groups should meet in churches or private homes, not on public school grounds.⁷⁹ The debates were littered with references to face-to-face meetings in buildings. For example, Representative Frenzel argued that since taxpayers paid to erect school buildings, their children “should have the right to use *these buildings*.”⁸⁰ Representative Vento said, “The argument that we now are coming to grips with is the utilization of locally controlled *public school physical facilities*.”⁸¹ For Sen. Baucus, the problem remedied by the bill was that of students “being denied the right to meet voluntarily *on school property*.”⁸² Other members of Congress understood the bill to involve school “buildings,”⁸³ “premises,”⁸⁴ “property,”⁸⁵ “grounds,”⁸⁶ or “classrooms and facilities.”⁸⁷ Both sides of the debate were reflected in a comment of Rep. Smith:

75. *Id.* § 4072(3).

76. *Id.* § 4071(b).

77. *Id.* § 4071(a)–(c). The Act contains one curious mention of activities occurring “under” a limited open forum, § 4072(3), which prompts macabre images of a chess club trapped in the rubble after an earthquake. Congress presumably meant “under” to mean “pursuant to,” rather than “beneath.” Still, this prepositional phrase would scan more readily if it spoke of those activities that occur “under a school’s limited open forum policy” rather than “under the limited open forum” itself.

78. *See, e.g.*, 130 CONG. REC. 19211–12 (1984) (Sen. Hatch); *id.* at 20939 (Rep. Nielson).

79. *Id.* at 19225 (Sen. Metzenbaum); *id.* at 20933 (Rep. Schumer); *id.* at 20939–40 (1984) (Rep. Schroeder); *id.* at 20940–41 (Rep. Boxer); *id.* at 20940 (Rep. Edgar); *id.* at 20940 (Rep. Burton); *id.* at 20950 (Rep. Shannon).

80. *Id.* at 20949 (emphasis added).

81. 130 CONG. REC. 20939 (1984) (emphasis added).

82. *Id.* at 19247 (emphasis added).

83. *Id.* at 20935 (Rep. Roukema); *id.* at 20943 (Rep. Penny).

84. *Id.* at 20943 (Rep. McEwen); *id.* at 19241 (Sen. Weicker).

85. *Id.* at 19248–49 (Sen. Grassley).

86. *Id.* at 20950 (Rep. Shannon).

87. *Id.* at 20948 (Rep. Hall).

I cannot understand how opponents of equal access can argue that it is permissible for a school to allow a chess club to *meet in a classroom* after the school day and deny that right to students wanting to study the Bible.⁸⁸

The EAA debated by Congress dealt with a discrete issue: access to school buildings at specific times for purposes of constitutionally protected expression. As Rep. Frank put it, “All groups, as long as they do not break either the laws or the furniture, should be allowed to *meet in the school buildings*.”⁸⁹ The tenor of congressional discussions was centered entirely around “meetings” in the ordinary sense: a group of people gathered in the same place to engage in collective activity. This vision of a meeting is vividly described in a passage of the Senate Report:

Such [religious] meetings would be voluntary in the truest sense of the word. In order for any student to attend, it first would be necessary for at least one student to take the initiative and arrange the meeting. Any other student desiring to participate would then have to reject the various other secular activities available to him and *go to the room where those few other students who have a common interest would be meeting* for religious activities.⁹⁰

Courts have interpreted this passage as evidence of congressional intent that “a place would be set aside where it would be necessary for the students to go.”⁹¹

Congress’s use of the word “forum” in its debates tracks the dictionary definition of a forum as a place where expression can occur.⁹² The archetypal image of a forum is a “public square or marketplace of an ancient Roman city that was the assembly place for judicial activity and public business.”⁹³ Its etymology is from the

88. *Id.* at 20943 (emphasis added).

89. *Id.* at 20933 (emphasis added).

90. S. Rep. No. 357, 98th Cong. 2d Sess., *reprinted in* Legislative History, Pub.L. No. 98-377, 1984 U.S.C.C.A.N. 2348, 2374 (emphasis added).

91. *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 588 (N.D. Miss. 1996); *Thompson v. Waynesboro Area Sch. Dist.*, 673 F. Supp. 1379, 1383 (M.D. Pa. 1987); *see also* *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 555 (1986) (Powell, J., dissenting) (approving a policy that would allow students “to meet in groups in separate school rooms for extracurricular activities, including discussion or debate on any subject of their choosing.”).

92. For example, a “forum” is defined as “a place, meeting, or medium where ideas and views on a particular issue can be exchanged.” THE NEW OXFORD AMERICAN DICTIONARY 668 (2001). “Forum” is also described as a “public meeting place for open discussion.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1460 (4th ed., 2000).

93. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1460 (4th ed., 2000). *See also* the definition of “forum” in THE NEW COLUMBIA ENCYCLOPEDIA 986 (4th ed. 1975): (“Market and meeting place in ancient Roman towns in Italy and later in the

Latin *fores* (outside door), and literally means “what is out of doors,” originally denoting an enclosure surrounding a house.⁹⁴ This reflects the lengthy conceptual linkage between responsible government and openness to public scrutiny. A tyrant need not conduct business in the open, but a government in service to the people must.⁹⁵ Although the term “public forum” in its First Amendment sense does not connote outdoor governmental activity, it was first applied in connection to speech on topics of public importance in outdoor spaces like sidewalks and city parks.⁹⁶ This was fitting, since one goal of the First Amendment is to give ordinary citizens the same privilege to speak on governmental affairs as do members of parliament.⁹⁷

The mental image of the archetypal Roman forum is applicable to the EAA’s linkage between forums and meetings. When our modern Senate meets indoors, there is a difference between the Senate (an elected body of legislators) and the floor of the senate (the place where the Senate meets to deliberate). The floor of the senate is a forum, but the Senate itself is not. A similar distinction can be made regarding schools as forums. The school building can be treated as a forum, but the school’s programs and budget should not. This is not a novel distinction. In 1889, as the Washington constitutional convention debated the provision that ultimately became Article IX, § 4 (barring public financing of sectarian schools), the delegates considered but rejected an amendment from ardent church-state separationist George Comegys that would have expressly prohibited

provinces, corresponding to the Greek agora. By extension, the word forum may indicate in modern usage the meeting itself.”). See also THE OXFORD ENGLISH DICTIONARY VI, 106 (2nd ed. Clarendon 1989).

94. THE NEW OXFORD AMERICAN DICTIONARY 668 (2001).

95. See also Amar, *supra* note 11, at 1177 (noting the framers’ implicit notion that outdoor matters were presumptively public, while indoor matters were presumptively private). In the same vein, one of the complaints voiced against King George III in the Declaration of Independence was his interference with what we now call transparency, freedom of information, or public disclosure. THE DECLARATION OF INDEPENDENCE para. 6 (U.S. 1776). “He has called together Legislative Bodies at Places unusual, uncomfortable, and distant from the Depository of their public Records, for the sole Purpose of fatiguing them into Compliance with his Measures.” *Id.*

96. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1718–19 (1987).

97. Akhil Reed Amar, *A Tale Of Three Wars: Tinker In Constitutional Context*, 48 DRAKE L. REV. 507, 509–511 (2000). See also Harry Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. L. REV. 1, 11–12 (“[I]n open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.”).

“religious exercise or instruction” in the public schools.⁹⁸ In colloquy, a delegate asked whether the amendment would prohibit religious meetings at schoolhouses outside of school hours. Comegys replied that such extracurricular meetings would be allowed under his proposal, because “‘public school’ did not mean ‘public school house’.”⁹⁹

4. When Is Access Equal?

The congressional debates did not distinguish between access and equal access. It is safe to say that the proponents of the Act were primarily concerned with securing an inviolable minimum level of access to school premises for student religious clubs. They gave as examples of discrimination and inequality stories of schools that denied religious clubs any access to the premises while granting access to other clubs. No member of Congress complained that it was unfair to give different levels of school support to different student clubs. For example, no one suggested that it would violate equal access for a school to buy chess sets for the chess club but not backgammon boards for the backgammon club. In a sense, the terms “equality” and “discrimination” were important mostly as rhetorical tools to generate political support for the Act and to shift the terms of debate away from school prayer. The concept of minimum access, rather than equal access, was expressly incorporated in § 4071(d)(3), which relieves schools of any statutory obligation to expend public funds for anything other than meeting space.

Reflecting the high marquee value but secondary practical importance Congress attached to equality of access, it used the terms “equal” and “discriminate” in § 4071(a) in an ambiguous way. The EAA does not define any baselines from which to measure whether access is “equal,” or whether students have been “discriminated against.” The Act could be read, for example, to require that noncurriculum related clubs receive the level of access provided to curriculum related clubs, and vice versa. Consider a school that has a curriculum related basketball team that practices in the gym in the afternoons and on weekends, and a noncurriculum related chess club that meets in the library in the afternoons. The existence of the chess

98. Utter & Larson, *supra* note 18, at 475–76. The amendment was defeated, in part because it was duplicative of language forbidding state funding of “religious worship, exercise, or instruction” in Art. I, § 11. *Id.* On the relationship between Art. I, § 11 and Art. IX, § 4, see *Gallwey v. Grimm*, 146 Wash.2d 445, 449, 48 P.3d 274, 276 (2002); see generally Katie Hosford, *The Search For A Distinct Religious-Liberty Jurisprudence Under The Washington State Constitution*, 75 WASH. L. REV. 643 (2000).

99. Utter & Larson, *supra* note 18, at 476.

club means the school “has” a limited open forum under § 4071(b), and must guarantee equal access and nondiscrimination to “student groups who wish to conduct a meeting” under § 4071(a). The chess club could demand that the school open the library on the weekends, arguing that the school would otherwise deny access equal to that enjoyed by the basketball team. Now imagine a computer science teacher from this school forming a computer club. Although curriculum related, it too is a student group wishing to conduct meetings. It could also demand the right to meet on campus on the weekends (like the basketball team) and in the library (like the chess club).

Counterintuitive claims like these can find support in the EAA’s ambiguous text, especially if courts read § 4071(a) as a free-floating guarantee of equal treatment instead of a narrower guarantee of equal access to school premises for meetings. Once focus is returned to the type of forum created in § 4071(b), it follows that Congress intended a noncurriculum related club’s equal access and nondiscrimination to be judged against other noncurriculum related clubs. Curriculum related clubs are unregulated. This results in a far more workable rule: if a school with a curriculum related orchestra allows a noncurriculum related punk band to rehearse on the premises, a noncurriculum related doo-wop quartet can demand only the level of access granted to the punk band, not to the orchestra.

But what type of equality is required among the noncurriculum related groups? Imagine a school with a noncurriculum related chess club that does not want to make space available for rehearsals of noncurriculum related punk bands (they are loud, use a lot of electricity, and express views the school does not share). The school might argue that equal access has been granted if it gives the punk band access equal to that of the chess club: namely, access to the premises to play board games. Access would be “equal” under § 4071(a), and the school would be exercising its ability to decide what “activities” are “permitted” in the limited open forum under § 4071(b). The school’s argument could not be defeated solely by reference to the ambiguous statutory language. A court would need to refer to the overall goal of the EAA to ensure an enforceable right to building access for as many student groups as possible. In light of this purpose, the Act does not allow further distinctions within the universe of noncurriculum related clubs. Once the school allows a chess club to meet, it must also allow meetings of all musical combos,

religious groups, and political advocacy groups. (Presumably all of them could be subject to a content-neutral noise limit.)¹⁰⁰

A variation of the problem is whether a school provides equal access if it requires student clubs to adhere to generally applicable nondiscrimination rules. A school could justifiably argue that access is granted equally to all groups if all are required to have an open membership policy. However, a club that is organized around a group identity—as would be the case for some religious or ethnic minority clubs—could justifiably argue that this rule interferes with their ability to control their message, drawing on cases recognizing a First Amendment right of expressive association. For example, the Christian club in *Hsu v. Roslyn Union Free School District*¹⁰¹ would allow only Christians to hold club offices. The school denied it the right to operate on campus because the exclusion violated the school's antidiscrimination rules.¹⁰² The Second Circuit held that the EAA's protection of speech at meetings included expressive association at meetings.¹⁰³ Hence, the club had a right to ensure that its meetings were led by officers who would further the group's religious purposes.¹⁰⁴ In a case currently pending in the Western District of Washington, a Christian student club claims a right to discriminate in its selection of all voting members, not just officers.¹⁰⁵ This claim goes beyond *Hsu*, which found that "a religious test for membership" in a public school club "is plainly insupportable."¹⁰⁶ The question promises to vex courts for some time to come.¹⁰⁷

5. Are There Limitations to the Equal Access Obligation?

To avoid violating the Establishment Clause, the EAA contains language limiting schools' involvement with the religious activities of

100. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989); *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949).

101. 85 F.3d 839, 848 (2d Cir. 1996).

102. *Id.*

103. *Id.*

104. The panel was divided regarding the remedy. The majority concluded that the club's associational interest extended only to officers with religious duties (president, vice-president, and music director), but a partial dissent argued it should extend to all officers. *Id.* at 872–74 (Van Graafeiland, J., concurring in part and dissenting in part).

105. *Truth v. Kent Sch. Dist.*, No. 03-785 (W.D. Wash. 2003). See generally, Nora Doyle, *Action Sought in Kentridge Bible Club Battle*, KING COUNTY JOURNAL, (Sept. 16, 2003), at <http://www.kingcountyjournal.com/sited/story/html/143448> (last visited Nov. 1, 2003).

106. *Hsu*, 85 F.3d at 858.

107. The argument in favor of permitting selective membership notwithstanding school antidiscrimination rules is described in Michael Stokes Paulsen, *A Funny Thing Happened On The Way To The Limited Public Forum: Unconstitutional Conditions On "Equal Access" For Religious Speakers And Groups*, 29 U.C. DAVIS L. REV. 653, 663–710 (1996).

student groups. Unfortunately, these subsections are combined with other provisions that apply equally well to nonreligious meetings, creating difficulties of interpretation.

One set of limitations appears in § 4071(c), which is structured as a safe-harbor provision. Under § 4071(a), schools cannot deny “a fair opportunity” to hold on-campus meetings, and § 4071(c) explains that a fair opportunity exists if a school “uniformly provides” for certain rules. Some of the fair opportunity criteria are designed for religious clubs (meetings must be voluntary and not sponsored by the school, and school staff must not participate in religious meetings), while others maintain the school’s general authority for discipline and safety (schools may prevent substantial interference with educational activities or regular attendance by “nonschool persons”). As Professor Laycock notes, it makes little sense to uniformly apply these “wildly nonparallel” criteria to both religious and non-religious clubs.¹⁰⁸ Read literally, the safe harbor provision would mean that schools could never sponsor noncurriculum related student groups (no matter how secular), because non-sponsorship must be “uniformly provided.” Prof. Laycock proposes a resolution for this “statutory glitch”:

Courts and conscientious school administrators should probably take a deep breath . . . and ignore the statutory text. Otherwise, the statute completely fails to serve its purpose. A broad spectrum of groups involved in debate over the Act has agreed that Congress did not intend to prohibit teacher participation in nonreligious student meetings.¹⁰⁹

The § 4071(c) criteria are structured as a safe harbor (itemizing non-exclusive means for schools to provide fair opportunity without fear of violating the statute), but they cannot be read that way. Avoiding school sponsorship or staff participation in religious meetings cannot be one acceptable option out of many; it is mandated by the Establishment Clause. Therefore courts have stated that

108. Laycock, *supra* note 17, at 43.

109. *Id.* at 45. A Washington attorney general opinion reached much the same conclusion. “If the group’s activities are not religious in nature, these heavier levels of involvement [with student groups] by faculty or staff advisers present no serious constitutional or other legal problems, so long as they are consistent with school policy and with the purposes for which the school was established.” 3 Wash. Op. Att’y Gen. 13 (1995). Some members of Congress noted this potential problem. Senator Denton noted that treating political and social groups identically to religious groups might mean that “A school-sponsored political debate, a teacher-led political discussion, or a school-financed noncurricular United Nations Day could run afoul of the restrictions found in the amendment.” 130 CONG. REC. 19230 (1984). Senator Gorton worried that the Act would cause schools not to hire coaches for noncurriculum related sports teams, *id.* at 19248–49. Senator Evans objected that as written, “a school cannot sponsor a non-curriculum activity whether that activity is debate, chess, or organized religious devotions.” *Id.* at 19249.

§ 4071(c) “circumscribes what the school may do”¹¹⁰ and that it creates “restrictions” that “clearly prohibit” staff participation in a student group’s religious functions.¹¹¹ Reading the fair opportunity criteria as part of a school’s obligation, rather than as one option among many, is also consistent with the structure of § 4071(a), since providing “fair opportunity” is itself an obligation upon the school.¹¹²

A second subsection is easier to comprehend as a set of prohibitions on religious activity of schools. Per § 4071(d), the Act does not “authorize” schools to control the content of religious activity, mandate participation in religious activity, expend funds beyond the incidental cost of providing meeting space, compel staff to attend meetings that are contrary to their beliefs, sanction otherwise unlawful meetings, or abridge constitutional rights. (This section also says that schools are not authorized to impose minimum size requirements on noncurriculum related student clubs.)¹¹³ Like § 4071(c), this subsection mixes and matches issues of general applicability with issues unique to religious clubs, pointlessly limiting a school’s freedom to support activities it believes are valuable. A school may want to support some noncurriculum related clubs through expenditure of funds beyond the cost of providing overhead, and Congress has no valid reason to declare that such expenditures are not authorized.¹¹⁴

A final limitation on the equal access obligation is found in § 4071(f), which says: “Nothing in this title shall be construed to limit the authority of the school. . .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.” The limited open forum exists within a school, where state agents have more authority to control student behavior than do state agents in

110. *Prince*, 303 F.3d 1074, 1081 (9th Cir. 2002).

111. *Sease v. Sch. Dist. of Philadelphia*, 811 F. Supp. 183, 189 (E.D. Pa. 1993) (public school teacher may not participate in student gospel choir).

112. Justice Kennedy argued that the criteria are non-exclusive, allowing other methods of providing “fair opportunity.” *Bd. of Educ. v. Mergens*, 496 U.S. 226, 260 (1990) (Kennedy, J., concurring).

113. The purpose of this provision was to ensure that minority religions had the same rights as more popular faiths. 130 CONG. REC. 20948 (1984) (Rep. Hall); *id.* at 20948 (Rep. Synar).

114. Conceivably 20 U.S.C § 4071(d) could be interpreted to mean that the EAA does not authorize expenditures for student groups but also does not prevent expenditures authorized through other sources, such as the school district’s spending powers under state law. This reading is probably necessary, but it highlights the structural problems of this subsection. The other actions listed in § 4071(d) (influencing the content of prayers or compelling teachers to attend meetings over their objections) seem to be practices that Congress wanted to prohibit, not just refrain from authorizing.

other settings. However, a school may not claim that the content of a student group's speech is itself a threat to order and discipline, or else the exception would swallow the rule. In § 4071(c), Congress adopted language from *Tinker v. Des Moines School District*¹¹⁵ giving schools authority to restrict student club activity that would "materially and substantially interfere with the orderly conduct of educational activities within the school."¹¹⁶ The Act as a whole should also be understood to incorporate *Tinker's* caution that student expression on school grounds cannot be limited on the basis of an "undifferentiated fear of disruption," and that students "may not be confined to the expression of those sentiments that are officially approved."¹¹⁷

Some writers have postulated that the "disruption" proviso in the EAA would allow a school to exclude hate groups, such as a student auxiliary of the Ku Klux Klan.¹¹⁸ Under *Tinker*, more would be required than a mere prediction that the on-campus presence of a hate group would result in controversy and distraction. To prevent § 4071(f) from becoming a loophole for schools to evade their equal access obligations, it cannot be invoked solely on the basis of the speech of the group that is proposing to meet. Consistent with *Tinker*, there must be concrete evidence that allowing the group to meet on campus during noninstructional time would endanger the school's ability to pursue its lawful functions. Even in a school setting, "the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it."¹¹⁹

6. How Is the Act Enforced?

The Act does not specify a remedy, but it does rule one out:

115. 393 U.S. 503, 513 (1969). For more background on *Tinker*, see Caplan, *supra* note 7, at 120-40.

116. 20 U.S.C. § 4071(c).

117. 393 U.S. at 511.

118. At least some of the Act's Congressional sponsors thought this. See 130 CONG. REC. 19224, 19232 (1984) (Sen. Hatfield); *id.* at 19244 (Sen. Mitchell); *id.* at 20941 (Rep. Goodling). See also Hsu v. Roslyn Union Free School District, 85 F.3d 839, 854-55 (2d Cir. 1996); Doni Gewirtzman, 'Make Your Own Kind of Music': *Queer Student Groups and the First Amendment*, 86 CAL. L. REV. 1131, 1165-67 (1998); Laycock, *supra* note 17, at 50-55; Michael Aaron, *The Equal Access Act: A Haven For High School 'Hate Groups'?*, 13 HOFSTRA L. REV. 589, 592 (1985); Boisvert, *supra* note 17, at 393-96 n.152,.

119. *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001). Cases involving school district restrictions on confederate flag attire do not allow a per se ban on the symbol, but instead require a showing that it has contributed to racial unrest on campus. See Caplan, *supra* note 7, at 148-163; James M. Dedman IV, *At Daggers Drawn: The Confederate Flag And The School Classroom - A Case Study Of A Broken First Amendment Formula*, 53 BAYLOR L. REV. 877, 927 (2001).

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.¹²⁰

The EAA has always been enforced through private causes of action deemed to arise directly under the statute or through 42 U.S.C. § 1983.¹²¹ The Supreme Court's recent decision in *Gonzaga University v. Doe*¹²² limits the number of federal statutes creating "federal rights" protected by § 1983, but it should not affect the private cause of action to enforce the EAA. *Gonzaga* involved the Federal Educational Rights and Privacy Act (FERPA),¹²³ a law that made withdrawal of federal funds available as a sanction to deter violations. This remedy is not available under the EAA, so the *Gonzaga* reasoning regarding alternative enforcement measures does not apply.¹²⁴ Congress appears to have contemplated enforcement of the EAA through § 1983 in its acknowledgement in § 4071(e) of "the availability of any other remedy under the Constitution or the laws of the United States." Also, Congress declared in § 4071(a) that "it shall be unlawful" for a school to deny equal access to student clubs on the basis of their speech,¹²⁵ signaling that violations were a serious matter justifying some type of enforcement. FERPA has no similar language making invasions of privacy "unlawful."

D. Court Interpretations of the Equal Access Act

Courts were quick to note Congress's intent to open school premises to student meetings.¹²⁶ But as the congressional debates suggested, a major interpretive question remained unresolved: which

120. 20 U.S.C. § 4071(e).

121. Boisvert, *supra* note 17, at 397-403.

122. 536 U.S. 273, 274 (2002).

123. 20 U.S.C. § 1232g (1997).

124. This was the view taken in a Washington Attorney General opinion: "Congress's apparent intent was merely to create a new statutory right on the part of students at such a school, to be enforced through civil litigation, rather than to use the administrative machinery of withholding federal benefits to districts which were out of compliance with the act." 3 Wash. Op. Att'y Gen. 4 n. 3 (1995).

125. 20 U.S.C. § 4071(a).

126. The first appellate decision interpreting the statute involved a political group. Student Coalition for Peace v. Lower Merion Sch. Dist., 776 F.2d 431, 434 (3d Cir. 1985). Congress enacted the EAA while the lawsuit was on appeal, and the Third Circuit recognized the need to remand for reconsideration in light of the Act. On remand, the district court found that the school had created a limited open forum. Student Coalition for Peace v. Lower Merion Sch. Dist. Bd. of Sch. Dir's, 633 F. Supp. 1040, 1041 (E.D. Pa. 1986).

student groups were sufficiently “noncurriculum related” to create “limited open forums.” That question was answered in *Mergens*.¹²⁷

1. Westside Community Board of Education v. Mergens

The suburban Omaha school in *Mergens* had approximately 1500 students and 30 student clubs.¹²⁸ The clubs were the usual assortment of high school fare. Some (like the Latin club) were directly linked to courses offered at the school; some (like Speech and Debate) had educational benefits but were only loosely related to course work; some (like the Scuba Diving club) were not related to any course offered for credit.¹²⁹ The school considered its club offerings to be a “vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills.”¹³⁰ Clubs met on campus only with the approval of the school principal, who reviewed each club’s objectives to ensure that they were “consistent with school board policies and with the school district’s ‘Mission and Goals’ - a broadly worded ‘blueprint’ that expresses the district’s commitment to teaching academic, physical, civic, and personal skills and values.”¹³¹ All in all, the clubs at Westside were “no more controversial than a grilled cheese sandwich.”¹³² Undoubtedly, the school was happy to endorse them.

The lawsuit arose after a group of students sought recognition of a Christian religious club that existed “to permit the students to read and discuss the Bible, to have fellowship, and to pray together.”¹³³ The school argued that it had no open forum, since all existing clubs had educational value and were therefore related to the school’s curricular goals.¹³⁴ The Supreme Court rejected the notion that curriculum related “means anything remotely related to abstract educational goals.”¹³⁵ This approach would “result[] in almost no schools having limited open fora” and “permit schools to evade the Act by strategically describing existing student groups.”¹³⁶ Since the Act’s intended beneficiaries were religious and political student groups, any curriculum related group “must at least have a more

127. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 227 (1990).

128. *Id.* at 231.

129. *Id.* at 253–58.

130. *Id.* at 231.

131. *Id.* at 232.

132. *Id.* at 276 (Stevens, J., dissenting).

133. *Id.* at 233.

134. *Id.* at 244.

135. *Id.*

136. *Id.*

direct relationship to the curriculum than a religious or political club would have."¹³⁷

In light of this legislative purpose, we think that the term "noncurriculum 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 our 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.¹³⁸

The relationship between club and curriculum was what mattered, not a school's desire to sponsor or endorse clubs. Only Justice Stevens dissented, arguing that a "limited open forum" would exist only when a school hosted an array of organizations resembling the one in *Widmar*.¹³⁹

The Court next held that the Equal Access Act did not violate the Establishment Clause on its face, or as applied at *Westside*.¹⁴⁰ The eight justices in the majority could not agree on a rationale for this holding. Four justices (O'Connor, joined by Rehnquist, White, and Blackmun) extended the *Widmar* reasoning to the high school setting.¹⁴¹ Governmental endorsement of religious activity was unconstitutional, but no reasonable student would believe that the existence of an open forum signaled endorsement of religious activities that took place there.¹⁴² Two justices (Kennedy, joined by Scalia) disagreed with this assessment. "I should think it inevitable that a public high school 'endorses' a religious club, in a commonsense use of the term, if the club happens to be one of many activities that the school permits students to choose in order to further the development of their intellect and character in an extracurricular setting."¹⁴³ These justices concurred in the result because they believed that the Establishment Clause did not prevent a school from endorsing religious pursuits, so long as it did not distinguish among religions.¹⁴⁴ The other two concurring justices (Marshall, joined by Brennan)

137. *Id.* at 238.

138. *Id.* at 239-40.

139. *Id.* at 271-73 (Stevens, J., dissenting).

140. *Id.* at 248.

141. *Id.* at 250.

142. *Id.* at 252.

143. *Id.* at 261 (Kennedy, J., concurring).

144. *Id.* at 248.

agreed with the plurality that a message of endorsement was unconstitutional, but they were not prepared to adopt a categorical ruling about presence or absence of endorsement, preferring to determine the question on a case-by-case, as-applied basis.¹⁴⁵

All of the justices in the majority considered it vital that the Act contained express limitations on school involvement with religious clubs in § 4071(c) and (d).¹⁴⁶ Justice Kennedy's concurrence noted that the open forum metaphor could break down if empirical evidence indicates that religious groups will dominate a publicly-funded forum.¹⁴⁷ A court's inquiry in any as-applied EAA case "must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw."¹⁴⁸ The Establishment Clause would be violated if a school adopts the trappings of a limited open forum as a scheme to advance its own religious views through the mouths of students whose prayers are not truly independent.¹⁴⁹

Justice Marshall noted that unlike the large state university in *Widmar*, a high school will have relatively few student clubs, and fewer or none that the school would not gladly support.¹⁵⁰ In the absence of affirmative steps, the relationship of a school to student clubs that meet on the premises will more closely resemble blanket endorsement rather than blanket neutrality.¹⁵¹ Unless schools "change their relationship to their fora so as to disassociate themselves effectively from religious clubs' speech,"¹⁵² the school's imprimatur will intentionally or unintentionally be conferred on it. The fear that high school clubs could make religious minorities feel like unwanted outsiders¹⁵³ is not fantasy. An empirical study of school districts in Ohio discovered that none of the schools surveyed had a roster of

145. *Id.* at 266 (Marshall, J., concurring in the judgment).

146. *Id.* at 251 (O'Connor), 253, 261 (Kennedy, J., concurring), 269-70 (Marshall, J., concurring).

147. *Id.* at 260 (quoting *Widmar*, 454 U.S. at 275).

148. *Id.* at 260-61 (Kennedy, J., concurring).

149. For examples of forums that were rigged to advance a state-sponsored religious agenda, see *Doe v. Santa Fe Indep. Sch. Dist.*, 530 U.S. 290, (2000); *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038, 1048 (5th Cir. 1982); *Collins v Chandler*, 644 F.2d 759, 761-62 (9th Cir. 1981); and *Bell v Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1404 (10th Cir. 1985).

150. *Mergens*, 496 U.S. at 267.

151. *Id.* at 268 (Marshall, J., concurring) (citation omitted).

152. *Id.* at 263 (Marshall, J., concurring).

153. State endorsement of religion "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

clubs that resembled a marketplace of religious ideas.¹⁵⁴ At the schools with religious clubs, all were Christian.¹⁵⁵ In one school, the head coach initiated and supported a Fellowship of Christian Athletes club.¹⁵⁶ Students and parents outside the club perceived that “you had to be involved in the club to play football.”¹⁵⁷ Nonmembers experienced student-on-student harassment.¹⁵⁸ While this is an extreme example, it is a foreseeable result, capable of repetition in other districts, if school administrators are not attuned to their schools’ culture.

Compared to the Court’s lengthy discourse on the statutory and constitutional questions in *Mergens*, the discussion of a remedy was practically an afterthought. According to the plurality, the question presented by the case was whether the school was barred “from denying a student religious group permission to meet on school premises during noninstructional time.”¹⁵⁹ However, buried deep in the opinion was a remarkable fact: Westside had not denied the religious group permission to meet on school premises during noninstructional time!

Although the school apparently permits respondents to meet informally after school, respondents seek equal access in the form of official recognition by the school. Official recognition allows student clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair.¹⁶⁰

It is difficult to tell from the opinion what, if any, importance the Court attached to the amorphous concepts of “official recognition” and being “a part of the student activities program.” They are

154. Dena S. Davis, *Religious Clubs in the Public Schools: What Happened After Mergens?*, 64 ALB. L. REV. 225, 236 (2000).

155. *Id.* at 236–37.

156. *Id.* at 238.

157. *Id.*

158. *Id.* The school district responded by closing the school’s limited open forum. Rather than close the school to all noncurriculum related groups, the school could have pursued other remedies. These include strict enforcement of the rule against school employees participating in religious meetings, § 4071(c)(3), and the rule that attendance at meetings must be voluntary and student-initiated, § 4071(c)(1) and (f). Steps to ensure voluntariness could include assigning the religious group a custodian other than the coach, and strictly enforcing the school’s anti-harassment or anti-bullying policies.

159. *Mergens*, 496 U.S. at 231. See also *id.* at 233 (plaintiffs allege school’s “refusal to permit the proposed club to meet at Westside”).

160. *Id.* at 247.

mentioned only in passing in a plurality opinion.¹⁶¹ The Court's focus was not on recognition for its own sake but on concrete benefits that recognition would provide. Each of the listed benefits is a medium of expression that the student group would use to inform interested students of the time, place, and purpose of on-campus meetings. Such announcements are concomitant with the right to hold meetings in the first place, since a right of access to the building for meetings is of little value if the meetings are a secret. To the extent school rules require some ministerial action like "recognition" or "registration" before groups can meet and speak on campus, the Court directs schools to perform that action. Interpreting this portion of *Mergens*, a Washington attorney general opinion says:

School districts may extend "recognition" to student groups organized to engage in religious activity if the "recognition" merely opens access to a limited public forum on the same basis that other groups organized for other purposes have access. However, forms of "recognition" which amount to official school district endorsement or support of a religiously-oriented organization would violate the state constitution (and perhaps the federal constitution as well).¹⁶²

Although *Mergens* found a right to announce meetings, schools may lawfully require that school media be used only for simple announcements of the time and place of club meetings, and not for active proselytization.¹⁶³

2. Post-Mergens Decisions

After *Mergens* defined non-curriculum related clubs broadly, virtually all secondary schools across the country became subject to the EAA. This broad coverage has generated two waves of litigation to date, the first involving religious clubs and the second involving gay rights clubs.

161. Issues that merely lurk in the record and are not ruled upon by the Court are not a holding. See *Berschauer/Phillips v. Seattle Sch. Dist.*, 124 Wash.2d 816, 824, 881 P.2d 986, 991 (1994).

162. 3 Wash. Op. Att'y Gen. 1 (1995). See also *Westfield High Sch. LIFE Club v. City of Westfield*, 249 F. Supp.2d 98, 118 n.17 (D. Mass. 2003) ("[D]enying the LIFE Club official school recognition would violate the Equal Access Act, if such a designation would allow the Club to be "part of the student activities program" and to have access to the school bulletin, school bulletin boards, and the public address system.").

163. *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1051 (9th Cir. 2003); *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 586 (N.D. Miss. 1996).

a. *Religious Groups*

As the intended beneficiaries of the Act, religious student groups made up the first wave of post-*Mergens* plaintiffs. Their demands for access to school premises were uniformly upheld over any state constitutional objections. *Garnett v. Renton School District No. 403*¹⁶⁴ relied on federal supremacy to reject a school's argument that the EAA must accommodate the Washington constitution's stricter limitations on use of public schools by religious groups.¹⁶⁵ Judge Farris concurred, but decried the result.¹⁶⁶ He noted that schools wishing to adhere to state law retained some ability to control student club activity, but the EAA made that control far more difficult to exercise than before.¹⁶⁷ "The state may restructure its curriculum to avoid the obligations of the Act," he wrote.¹⁶⁸ "But there was a time when it would not have been required to do so as the price for enforcing its state constitution and obtaining critical federal funds."¹⁶⁹ A similar result was reached in *Hoppock v. Twin Falls School District No. 411*,¹⁷⁰ which held that Idaho's constitutional church/state provisions were overridden by the EAA.¹⁷¹

Like the constitutional questions, matters of statutory interpretation have consistently been decided in favor of student religious groups. For example, *Ceniceros v. Board of Trustees of San Diego Unified School District*¹⁷² held that "noninstructional time" included the lunch hour, even though this fell after the first class of the morning and before the last class of the afternoon.¹⁷³ *Donovan v. Punxsutawney Area School Board*.¹⁷⁴ also interpreted "noninstructional time" to mean any time period lacking actual classroom instruction,

164. *Garnett v. Renton Sch. Dist. No. 403*, 987 F.2d 641, 646 (9th Cir. 1993).

165. *Id.* at 646.

166. *Id.* at 647 (Farris, J., concurring).

167. *Id.*

168. *Id.*

169. *Id.* at 647 (Farris, J., concurring). At least with regard to the Washington constitution, the conflict in *Garnett* may have been more apparent than real. A post-*Garnett* attorney general opinion predicted that a properly structured equal access policy that extended to religious groups would not violate the Washington constitution, thus avoiding any conflict between state law and the EAA. See 3 Wash. Op. Att'y Gen. 5-9 (1995).

170. 772 F. Supp. 1160, 1164 (D. Idaho 1991).

171. On the preemption question, see Deborah M. Brown, *The States, The Schools And The Bible: The Equal Access Act And The State Constitutional Law*, 43 CASE W. RES. L. REV. 1021, 1055-64 (1993).

172. 106 F.3d 878, 880 (9th Cir. 1997).

173. A different conclusion was reached under the constitution in a pre-EAA case from California, where even the plaintiffs agreed that the lunch hour was "an inseparable part of the school day" that could not be used for religious activity. *Johnson v. Huntington Beach Union High Sch. Dist.*, 137 Cal.Rptr. 43, 50 n.12 (1977).

174. 336 F.3d 211 (3d Cir. 2003).

which meant that a religious club could meet during an early-morning activity period held between homeroom and other classes.¹⁷⁵ *Pope v. East Brunswick Board of Education*¹⁷⁶ held that the presence of non-curriculum related student groups would trigger the creation of a limited open forum for student-initiated religious clubs, even if the initial clubs were school-sponsored and not student-initiated.¹⁷⁷ This is consistent with the Act's overall structure, which places no importance on school sponsorship.

Few cases have explored the scope of a school's authority to regulate group meetings in the interest of "protecting the well-being of students and faculty"¹⁷⁸ or avoiding material and substantial interference with educational activities.¹⁷⁹ In dicta, *Hsu* proposed that discrimination in selection of officers by a religious club must be tolerated under the EAA, but that racial discrimination on the part of a supremacist group could be forbidden as "invidious."¹⁸⁰ But since the religious club in *Hsu* prevailed on a free speech theory, rather than a free exercise theory, the supremacist group would have similar First Amendment rights. It is unlikely that a school could succeed in denying access to such groups on the basis that their very presence is disruptive or threatens well-being. In *Lamb's Chapel*, the Supreme Court signaled its unwillingness to allow a school to exclude "radical" churches whose presence might generate "public unrest and even violence."¹⁸¹

Not all litigation involving religious entities' access to public school buildings is resolved under the EAA, since it does not apply to elementary schools or to meetings of adults. In the years since *Mergens*, the courts have interpreted the First Amendment to provide access similar to *Widmar* in these situations not covered by the Act.¹⁸² It should be noted that these decisions grant building access to persons planning religious activities, but they do not alter a school's obligation

175. *Id.* at 222.

176. 12 F.3d 1244 (3d Cir. 1993).

177. *Id.* at 1249.

178. 20 U.S.C. § 4071(f).

179. *Id.* § 4071(c)(4).

180. *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 868 (2d Cir. 1996).

181. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 396 (1993).

182. Constitutional cases involving access to elementary schools include *Good News Club v. Milford Central Sch. Dist.*, 533 U.S. 98, 113 (2001) and *Culbertson v. Oakridge Sch. Dist.*, 258 F.3d 1061, 1063 (9th Cir. 2001). Constitutional cases involving access to school buildings by adult groups include *Lamb's Chapel*, 508 U.S. at 395; *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1051 (9th Cir. 2003); *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 284 (4th Cir. 1998); *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 331 F.3d 342, 343 (2d Cir. 2003); *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703, 703 (4th Cir. 1994).

to maintain a religiously neutral environment. Graduation ceremonies must still be free of prayer or proselytization.¹⁸³ Teachers may not use their position in the classroom to encourage students to attend religious activities outside school.¹⁸⁴ A school district “cannot refuse to distribute literature advertising a program with underlying religious content where it distributes quite similar literature for secular summer camps, but it can refuse to distribute literature that *itself* contains proselytizing language.”¹⁸⁵

b. *Gay Rights Groups*

A second wave of EAA litigation has begun in the last few years, focusing on access to schools for student gay rights groups. Courts have had little difficulty applying the guidelines developed for religious clubs to these secular organizations, uniformly holding that these clubs must be allowed to meet on school property.¹⁸⁶ This result is surprising only in light of the legislative history: Congressional floor debates showed no enthusiasm for gay rights clubs meeting in high schools.¹⁸⁷ The statutory language chosen, however, assured the

183. See, e.g., *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 980 (9th Cir. 2003); *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1100 (9th Cir. 2000).

184. *Culbertson*, 258 F.3d at 1065.

185. *Hills*, 329 F.3d at 1053 (original emphasis).

186. *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F. Supp.2d 667, 683 (E.D. Ky. 2003); *Franklin Cent. Gay/Straight Alliance v. Franklin Township Comm. Sch. Corp.*, No. IP01-1518 C-M/S, 2002 WL 31921332, at *1 (S.D. Ind. 2002); *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135 (C.D. Cal. 2000); *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp.2d 1166, 1198 (D. Utah 1999). See generally, *Gewirtzman*, *supra* note 118, at 1163–64; *Regina M. Grattan, It's Not Just for Religion Anymore: Expanding the Protections of the Equal Access Act to Gay, Lesbian, and Bisexual High School Students*, 67 GEO. WASH. L. REV. 577,592–94 (1999); *Ralph D. Mawdsley, The Equal Access Act and Public Schools: What Are the Legal Issues Related to Recognizing Gay Student Groups?* 2001 B.Y.U. EDUC. & L. J. 1, 6 (2001). Similar cases have been decided with regard to college-level clubs. *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1549 (11th Cir. 1997); *Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1, 17–18 (D.C. 1987); *Gay Lib v. Univ. of Mo.*, 558 F.2d 848, 857 (8th Cir. 1977); *Gay Students Organization of N.H. v. Bonner*, 509 F.2d 652, 662 (1st Cir. 1974).

187. Senator Denton asserted his view that homosexuality is an “unfortunate anomaly” that might be alleviated if more religious groups met at school. 130 CONG. REC. 19230 (1984). Senator Metzbaum opposed the Act and warned colleagues that it would benefit gay rights groups and religious cults. *Id.* at 19226–27. Senator Hatfield thought the proviso for schools not sanctioning unlawful activity would allow schools to deny access to gay rights clubs, at least in states where homosexuality was unlawful. *Id.* at 19224. Most often, though, members of Congress expressed their belief that under existing First Amendment law, gay rights clubs and other undesirable organizations already had an enforceable right to meet in high school buildings, so at the very least religious groups should have the same opportunities. 130 CONG. REC. 19230 (1984) (Sen. Denton); *id.* at 19241 (Sen. Nickels); *id.* at 20948 (Rep. Perkins). Despite this contemporary understanding, when courts in the late 1990’s first began to recognize the rights of gay student groups under the EAA, Senator Hatch asserted that the EAA was never

outcome. As Justice Kennedy noted, "one of the consequences of the statute, as we now interpret it, is that clubs of a most controversial character might have access to the student life of high schools that in the past have given official recognition only to clubs of a more conventional kind."¹⁸⁸

The highest profile controversy involving a club for sexual minorities occurred in Salt Lake City, where the school board considered the Rainbow Club so alarming that it enacted a policy barring all non-curriculum related clubs from campus rather than allow a limited open forum that would allow the gay rights club to meet.¹⁸⁹ The Utah legislature passed a law directing schools to deny access to any student organization whose programs would "involve human sexuality."¹⁹⁰ To justify its defiance of the EAA, the legislature included a finding that clubs involving sexuality were, by definition, "detrimental to the physical, emotional, psychological, and moral well being of students and faculty, the maintenance of order and discipline on school premises, and the prevention of any material and substantial interference with the orderly conduct of a school's educational activities."¹⁹¹ Although this statute has yet to be challenged in court, it is plainly inconsistent with the EAA and should be considered preempted. As discussed above, the incorporation of the *Tinker* standard means that the likelihood of danger or disruption caused by students' on-campus speech cannot be judged solely by adults' disapproval of the speech.¹⁹² Instead, factual indicators of disruption are necessary on a case-by-case basis.

The cases involving religious and gay rights clubs form a history of post-*Mergens* EAA litigation that can be summarized as "the student group wins." It nonetheless bears noting what they won. All of the cases discussed above were brought by students who were not allowed to hold meetings on school premises during non-instructional

intended to benefit gay student clubs. Dan Harrie, *Gay Club Ban: Will It Cost Taxpayers?* SALT LAKE TRIBUNE (April 20, 1996); James Brooke, *To be Young, Gay, and Going to High School in Utah*, NEW YORK TIMES (Feb. 28, 1996).

188. Bd. of Educ. v. *Mergens*, 496 U.S. 226, 259 (1990) (Kennedy, J., concurring).

189. See *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp.2d 1166, 1177 (D.Utah 1999).

190. *Id.* at 1196.

191. UTAH CODE ANN. § 53A-3-419(2)(a)(iii) (1997). For legislative history of this law, see Grattan, *supra* note 186, at 590.

192. *Tinker v. Des Moines Indep. Comm'y Sch. Dist.*, 393 U.S. 509 (1969) (school censorship must be justified by "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"); *Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 171 (D.Mass. 1994) (a school cannot prohibit expression that merely "arouses the hostility of a person with an opposite opinion").

time, or were denied equal access to school media for announcing and publicizing their club activities. This is precisely the problem Congress sought to remedy.¹⁹³ As I will now discuss, *Prince* addressed a different problem.

II. PRINCE V. JACOBY

A. Description of the Ninth Circuit Decision

The student plaintiffs in *Prince* did not have the problem faced by the plaintiffs in earlier EAA cases. The school allowed their religious club to meet on school premises during non-instructional time and to announce the time and place of club activities.¹⁹⁴ Their complaint involved benefits that were different in kind, such as affiliation with the student council, money from the student council or the school itself, and appearance in the yearbook alongside school-sponsored groups.¹⁹⁵ They considered it discriminatory for the school to have a two-tier system where only school-sponsored clubs received benefits above and beyond the right to hold and announce meetings.¹⁹⁶ My description of the case begins with a review of state law governing student activities, because the tier of clubs the *Prince* plaintiffs sought to join was marked by affiliation with the school's student council, known in Washington as an associated student body or ASB.

1. The ASB Under Washington Law¹⁹⁷

State statute defines a high school's associated student body as "the formal organization of the students of a school formed with the approval of and regulation by the board of directors of the school district."¹⁹⁸ Depending on the activities an ASB chooses to undertake, it may also include "subcomponents or affiliated student groups such as student clubs."¹⁹⁹ An ASB must be established at a school whenever students engage in money-raising activities under the approval, direction, or supervision of the school district.²⁰⁰ Each

193. See *supra* text accompanying notes 70–98.

194. *Prince*, 303 F.3d 1074, 1077–78 (9th Cir. 2002).

195. *Id.* at 1078.

196. *Id.* at 1079.

197. The ASB statute and regulations were amended in 2000 and 2001 after the briefing in *Prince* was already completed. WASH. REV. CODE § 28A.325 (*Associated Student Bodies*) (2002); WASH. ADMIN. CODE § 392-138 (2003) (same). Citations in this article are to the current versions; however, they are not materially different from their predecessors.

198. WASH. REV. CODE § 28A.325.020 (2002). In an elementary school, the functions of the ASB may be delegated to a district employee. *Id.*

199. WASH. ADMIN. CODE § 392-138-010(1) (2003).

200. *Id.* § 392-138-011.

school's ASB has a "governing body" comprised of students whose role is to budget for and oversee school-sponsored student activities.²⁰¹ The governing body is usually the student council, but may take other forms such as a student activities board.²⁰² A student council with voting delegates elected from homerooms is the most common approach, but not all ASB governing bodies are structured along the one-person, one-vote model. At many schools in Washington, governing bodies will also include voting representatives from ASB-affiliated student clubs in addition to the members selected through homerooms, student body elections, appointments, or other selection methods. In practice, most faculty and students use the phrase "the ASB" to refer to the governing body of the ASB, and this article will occasionally employ this common usage.

All programs of an ASB are "conducted with the approval, and at the direction or under the supervision, of the school district."²⁰³ A long line of court decisions and attorney general opinions have viewed the ASB as "an arm and agency of the school district."²⁰⁴ The district retains all power with respect to the "regulation of actions and activities of the associated student bodies of the district."²⁰⁵ In particular, these include final control over ASB constitutions and bylaws and over the policies determining which activities will be part of the ASB program.²⁰⁶ The school district has final approval over the ASB budget, although it is required to consult with the ASB governing body in exercising that authority.²⁰⁷

There are several different sources of money for an ASB. The primary method is admission fees for optional noncredit extracurricular events like football games, band concerts, or school dances.²⁰⁸ Another method is for a school to charge students a one-time comprehensive activity fee, often collected through the purchase of an activity card.²⁰⁹ ASBs also conduct their own fundraising events.²¹⁰ State law also allows a school to pay for ASB activities from

201. WASH. REV. CODE § 28A.325.030(1)(a)-(c).

202. WASH. ADMIN. CODE § 392-138-010(6).

203. *Id.* § 392-138-010(2)(b).

204. 21 Wash. Op. Att'y Gen. 3 (1974); 44 Wash. Op. Att'y Gen 2 (1975); 62 Wash. Op. Att'y Gen 2 (1973); *Carraba v. Anacortes Sch. Dist.*, 72 Wash.2d 939, 957 n.8, 435 P.2d 936 (1968) (school district liable for negligence of referee hired by ASB).

205. WASH. ADMIN. CODE § 392-138-013(1)(a).

206. *Id.* § 392-138-013(1)(b)(i).

207. WASH. REV. CODE § 28A.325.030(b); WASH. ADMIN. CODE § 392-138-030(4); *Id.* § 392-138-110.

208. WASH. REV. CODE § 28A.325.010; WASH. ADMIN. CODE § 32-138-105.

209. WASH. REV. CODE § 28A.325.010; WASH. ADMIN. CODE § 32-138-105.

210. WASH. ADMIN. CODE § 392-138-013(1)(b)(iii), (2).

its general operating fund without reimbursement.²¹¹ In those cases, the ASB is operating directly from tax revenues.

The foregoing funds are considered public ASB moneys, managed by the county treasurer on behalf of the school district and subject to state open records and competitive bidding laws.²¹² Property purchased with this money is owned by the school district.²¹³ In contrast to these public ASB moneys, state law also allows school districts to create policies that will permit students “in their private capacities” to raise money for “scholarship, student exchange, and/or charitable purposes.”²¹⁴ There had been doubt about the legality of allowing an ASB to raise money to be distributed to private charities, since it implicated the constitutional bans on gifting of public funds.²¹⁵ Therefore, the legislature revised the ASB statute in 2000 to clarify that an ASB could also raise “nonassociated student body fund moneys” or “associated student body private moneys” that could be earmarked by the ASB governing board for charitable purposes approved by the school board.²¹⁶ Schools must maintain segregated funds for ASB private moneys and distinguish them from the ASB public moneys raised through other means.²¹⁷

2. The Dispute at Spanaway Lake High School

The Bethel School District was trying its best to obey the law. Realizing that it had a limited open forum as defined in *Mergens*, and taking seriously Justice Marshall’s caution that schools needed to “change their relationship to their fora,”²¹⁸ it redrafted its student club policies in 1994.²¹⁹ No longer would the school limit its premises to groups it wished to sponsor.²²⁰ Instead, it would allow non-sponsored student groups to meet on campus, subject to the precise terms of the EAA.²²¹ School District Policy 5525 combined the various exceptions and limitations found in §§ 4071(c) and (d) into a single document that

211. WASH. REV. CODE § 28A.325.030(1)(c).

212. See *id.* § 28A.325.030; WASH. ADMIN. CODE § 392-138-014; *id.* § 392-138-017; *Id.* § 392-138-019; *Id.* § 392-138-110, 115, 120, 125, 130.

213. WASH. ADMIN. CODE § 392-138-021.

214. See WASH. REV. CODE § 28A.325.030(2); see WASH. ADMIN. CODE § 392-138-010(2).

215. 2000 Wash. Laws 157 § 1 (findings).

216. *Id.* See also WASH. ADMIN. CODE § 392-138-010(5).

217. WASH. ADMIN. CODE § 392-138-017; *id.* § 392-138-200; *id.* § 392-138-205; *id.* § 392-138-210.

218. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 263 (1990) (Marshall, J., concurring).

219. *Prince v. Jacoby*, 303 F.3d 1074, 1077 (9th Cir. 2002).

220. Brief of Plaintiffs-Appellants at 23, *Prince v. Jacoby*, 303 F.3d 1074 (1999) (No. 99-35490).

221. *Prince*, 303 F.3d at 1077.

would apply to student-initiated groups that the school would not or could not sponsor.²²² The existing method of handling sponsored student groups—affiliation with the ASB—remained in place.²²³ This would entail finding a faculty advisor, preparing a constitution and bylaws, and receiving approval from the student council and principal.²²⁴

Led by Tausha Prince, students at Spanaway Lake High School (SLHS) decided to form a club they called “World Changers.”²²⁵ It resembled the Christian club involved in *Mergens*, but with a more aggressively articulated proselytizing slant. According to the club’s constitution, its stated purposes include “spreading the Gospel to the students of Spanaway Lake High School,”²²⁶ “encourag[ing] Christian leadership in students at SLHS” and “evangeliz[ing] our campus for Jesus Christ.”²²⁷ School administrators had no objection to granting the World Changers access to the school building for their meetings.²²⁸ After all, Policy 5525 was designed with this goal in mind.²²⁹ As it happened, the World Changers were the first group to organize under Policy 5525.²³⁰ The World Changers therefore considered Policy 5525 status to be a religious ghetto; they wanted their club to be part of the ASB like all the other clubs.²³¹ (Shortly after the formation of the World Changers, a secular club of Japanese anime enthusiasts was also formed as a 5525 club, so the notion that the school’s two-tier system was based solely on religion was unfounded.)²³²

222. As summarized by the Ninth Circuit, Policy 5525 would allow student groups to meet on the premises:

so long as the groups 1) remain voluntary and student initiated; 2) are not sponsored by the school or its staff; 3) hold meetings that do not materially and substantially interfere with the orderly operation of the school; 4) require that students, rather than outsiders, are responsible for the direction, control, and conduct of the meetings; 5) do not require students to participate in any religious activity; 6) do not use school funds for other than incidental and/or monitoring costs; 7) do not compel any staff member to attend; and 8) respect the constitutional rights of all persons.

Id.

223. *Id.* at 1078.

224. *Id.*

225. *Id.* at 1077.

226. Brief of Defendants-Appellees at 5, *Prince v. Jacoby*, 303 F.3d 1074 (1999) (No. 99-35490).

227. *Prince*, 303 F.3d. at 1097 (Berzon, J. concurring in part and dissenting in part).

228. *Id.* at 1077.

229. *Id.*

230. Brief of Plaintiffs-Appellants at 8–11, *Prince v. Jacoby*, 303 F.3d 1074 (1999) (No. 99-35490).

231. *Prince*, 303 F.3d. at 1077.

232. See *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 286 (4th Cir. 1998) (recognizing that one group will always have to be the first to utilize any access policy).

After discovery, the World Changers alleged that Spanaway Lake offered different and less attractive benefits to 5525 clubs than it offered to ASB clubs.²³³

- Only ASB clubs had the school's official recognition and enjoyed "ASB status."
- Only ASB clubs could receive money under the budget created by the ASB governing body (which at Spanaway Lake was the student council).
- Only ASB clubs could participate free of charge in ASB fundraisers, which included an annual craft fair and school auction. 5525 clubs could participate if they paid a \$60 fee.
- Only ASB clubs would appear free of charge in the school yearbook, which was a project of the ASB. Non-ASB entities, including 5525 clubs, could purchase advertising space in the yearbook if desired.
- ASB clubs could post flyers publicizing their meetings on several bulletin boards around the school, and could announce events in various school media including the printed daily bulletin, on the Channel One internal broadcast, and over the intercom during the morning announcements. 5525 clubs had a single bulletin board for their announcements and could not use the intercom. They could announce meetings in the daily bulletin and on Channel One.
- Only ASB clubs could obtain permission to hold club meetings during student/staff time, a scheduled class period from 10:10 am to 10:40 am two days a week. During this period, a student may work on homework, receive one-on-one tutoring with a teacher, attend school assemblies, or, with prior arrangement and approval of the principal, participate in a student club meeting. Attendance is taken during student/staff time and students are not allowed to leave the campus.

233. The School District argued that this list of different benefits did not reflect reality, but were straw man arguments based on off-the-cuff answers to hypothetical deposition questions. School District Brief of Defendants-Appellees at 12-13., *Prince v. Jacoby*, 303 F.3d 1074 (1999) (No. 99-35490). The Ninth Circuit treated the differences as official school policy.

- ASB clubs could use school supplies, have priority access to school audio/visual equipment, and use school vehicles for field trips. The school would limit expenditures for 5525 clubs to the incidental cost of providing space for the meetings.²³⁴

3. Trial Court Decision

The trial court found no statutory violation in this two-tiered system of student clubs, since “it is plain that the defendants crafted Policy No. 5525 with the EAA in mind, in fact borrowing some of the phraseology of § 4071(c).”²³⁵ The school could lawfully distinguish between ASB clubs and 5525 clubs in practice, and not simply on paper:

The plaintiff argues that she is not demanding that “World Changers” be given ASB status, but rather that her group be granted the same advantages (described above) that ASB groups have. However, the EAA itself makes clear that schools and school districts must remain uninvolved *and uninvested* in student-initiated religious groups. The various advantages that the plaintiff argues for here require significant expenditure of school district resources. The EAA and the Establishment Clause forbid that.²³⁶

The district court then found that Spanaway Lake’s system of benefits for ASB-affiliated student clubs was not a limited public forum in the constitutional sense even if there was a limited open forum under the EAA.²³⁷ As a result, there was no separate First Amendment obligation to provide benefits beyond those required by the Act.²³⁸

4. Court of Appeals Decision

The Ninth Circuit reversed.²³⁹ All three judges found that the World Changers were entitled to most of the requested benefits under the EAA, and two of the three found entitlement to the remaining benefits under the First Amendment.²⁴⁰

234. Brief of Defendants-Appellees at 25, *Prince v. Jacoby*, 303 F.3d 1074 (1999) (No. 99-35490).

235. *Prince v. Bethel Sch. Dist.*, No. C98-5099FDB, 5-6 (W.D. Wash. Ap. 2, 1999) (order granting defendants’ motion for summary judgment).

236. *Id.* at 6 (emphasis in original).

237. *Id.* at 6-8.

238. *Id.* at 9.

239. *Prince v. Jacoby*, 303 F.3d 1074, 1077 (9th Cir. 2002).

240. *Id.*

a. Equal Access Act Issues

The court's statutory discussion was organized in three sections.

1. Equal Access, Fair Opportunity, and Discrimination

The centerpiece of the Ninth Circuit decision was its analysis of § 4071(a), which makes it unlawful for schools governed by the Act "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 their speech. Bethel clearly had not denied World Changers a "fair opportunity" as that term is defined in § 4071(c), because Policy 5525 incorporated that section's criteria almost verbatim. Yet the court said that providing a fair opportunity was only the beginning of the school's obligations:

The disjunctive prohibition renders the denial of equal access or fair opportunity or discrimination unlawful. The use of the disjunctive "or" suggests that "equal access" and "discriminate against" have meaning independent of "fair opportunity."²⁴¹

The court argued at length that the School District's position would contravene the canon of construction requiring courts to interpret statutes to avoid surplusage where possible.

The School District and the district court's restrictive reading of the Act to require only "fair opportunity" renders superfluous the words "equal access" and "discrimination" in Section 4071(a). They would read "equal access" and "discrimination" right out of the Act, making what "Congress has plainly done . . . devoid of reason and effect."²⁴²

Although nothing in the remainder of the opinion turned on the distinction, the court proposed that discrimination would mean actions prompted by discriminatory motives, while denial of equal access was a strict liability offense that did not turn on the school's intent.²⁴³

2. Sponsorship

The court next considered the School District's contention that treating the World Changers identically to school-sponsored ASB clubs would be an unlawful governmental sponsorship of a religious

241. *Prince v. Jacoby*, 303 F.3d 1074, 1080 (9th Cir. 2002).

242. *Id.* at 1081 (quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217 (2002)).

243. *Id.*

club.²⁴⁴ The court found no sponsorship. It began by noting that § 4072(2) defines sponsorship to include “the act of promoting, leading or participating in a meeting.”²⁴⁵ Since affiliating a student group with the ASB did not specifically involve school board participation in the meetings of the student clubs, there was no sponsorship in the statutory sense.²⁴⁶ The court then noted that the direct supervision of the World Changers would come through the student council, not the school board itself, and that this distancing was sufficient to prevent sponsorship.²⁴⁷ The court concluded with a warning: “If state regulations did require the School District to ‘sponsor’ the club as prohibited by the Act, then it is the regulations that must give way, not the District’s obligation to provide equal access.”²⁴⁸

3. Specific Benefits

The court then considered specific benefits that would flow from ASB status.²⁴⁹ It concluded that the World Changers must receive (almost) every benefit that the school bestowed on clubs that were part of what the court termed “the ASB forum.”²⁵⁰ Specifically, the Court held that the EAA guaranteed the World Changers the opportunity to seek ASB funding; the right to conduct private fundraising on campus, including in the annual ASB craft fair and school auction; the right to have the club’s picture and description appear in the school yearbook without purchasing advertising space; and equal use of the intercom and school bulletin boards to announce meetings.

The court concluded that two of the benefits sought by the World Changers (meetings during student/staff time and use of school supplies and equipment) were not guaranteed by the EAA.²⁵¹ Student/staff time was a period of mandatory attendance in which students often interacted with faculty in classrooms.²⁵² It was “actual classroom instruction” and therefore “instructional time” beyond the scope of the EAA.²⁵³ Next, the EAA does not authorize schools to expend public funds for equal access clubs beyond the incidental cost

244. *Id.* at 1083.

245. *See id.*

246. *See id.*

247. *See id.*

248. *Id.* at 1083–84.

249. *Id.* at 1084–90.

250. *Prince* uses the term “the ASB forum” with respect to the Equal Access Act claims at 303 F. 3d. at 1078, 1089.

251. *Id.* at 1089.

252. *Id.* at 1087.

253. *Id.* at 1089.

of providing the space.²⁵⁴ Therefore, the World Changers had no statutory right to use school supplies and equipment in ways that would impose marginal costs beyond the overhead of providing meeting space.

b. First Amendment Issues

Since the EAA had not provided all of the relief sought by Prince, the court next considered whether access to these latter benefits was required by the First Amendment.²⁵⁵ The court repeatedly referred to the ASB as a limited public forum in the constitutional sense.

As in *Widmar*, Spanaway Lake High School has created a limited public forum in which student groups are free to meet during student/staff time, as well as to use school vehicles for field trips, to have priority for use of the AV equipment, and to use school supplies such as markers, posterboard, and paper. While certainly not required to grant student clubs access to these benefits, the school has chosen to do so. Having done so, it cannot deny access to some student groups because of their desire to exercise their First Amendment rights without a compelling government interest that is narrowly drawn to achieve that end.²⁵⁶

The majority's First Amendment analysis relied on *Rosenberger v. University of Virginia*,²⁵⁷ in which the Supreme Court held that a university could not prevent student activity funds from being spent on the costs of student religious publications if those funds were also used to print student secular publications.²⁵⁸ The *Prince* majority interpreted *Rosenberger* to mean that a limited public forum in the First Amendment sense need not have any necessary relationship to locations or media for communication, but that any expenditure of public funds could constitute a "fiscal forum" that must comply with public forum neutrality principles.²⁵⁹ Since access to this constitutional "ASB forum"²⁶⁰ conferred the ability to meet during

254. 20 U.S.C. § 4071(d)(3).

255. *Prince*, 303 F.3d at 1091. On the relationship between the EAA and First Amendment, see Ralph D. Mawdsley, *Leveling The Field For Religious Clubs: The Interface Of The Equal Access Act, Free Speech, And The Establishment Clause*, 174 ED. LAW REP. 809, 816–24 (2003).

256. *Prince*, 303 F.3d at 1091.

257. 515 U.S. 819 (1995) (cited in *Prince*, 303 F.3d at 1085).

258. *Id.* at 840.

259. *Prince*, 303 F.3d at 1091 (quoting *Davey v. Locke*, 299 F.3d 748, 756 (9th Cir. 2002)).

260. *Prince* used the term "ASB forum" as a constitutional concept at 303 F.3d at 1091, 1092, 1094, 1096, and 1098.

student/staff time and to use certain school supplies and equipment, the school could not deny those benefits to the World Changers in the absence of a compelling interest, and the school's asserted interest in upholding the state and federal Establishment Clauses was found inadequate in light of *Widmar* and its progeny.²⁶¹

Judge Berzon's partial dissent did not question the majority's holding that Spanaway Lake had a limited public forum for First Amendment purposes, and that access to this forum included a right to meet during student/staff time and to use school supplies and equipment. Instead, she argued that granting those benefits to a religious club would violate the Establishment Clause. The School District asked the Supreme Court to review the constitutional decision, but the petition was denied.²⁶²

B. Critique of the Ninth Circuit Decision

This summary shows that *Prince* deviated greatly from the interpretation of the statute offered in Part I of this Article, which emphasized the Act's guarantee of a minimum level of access to school premises to conduct meetings during non-instructional time. By contrast, *Prince* viewed the EAA as an all-purpose guarantee of equal entitlement to all school benefits, not restricted to the provision of meeting space. This gives student groups control over aspects of educational policy that have traditionally been controlled by educators. The court compounded the problem by making a series of serious legal errors that may have consequences beyond student activity cases.

1. Equal Access to What?

The best reading of the EAA acknowledges that the rights it creates for student groups are limited in scope. Schools cannot deny equal access to the premises, deny fair opportunity to conduct meetings on the premises, or discriminate with regard to access to the premises. *Prince* unmoored the EAA from the school building, and thus treated it as a free-floating nondiscrimination mandate. In some ways, this was a result of the poor drafting of § 4071(a), which, as explained above, hides the objects of the Act's central verbs in unexpected locations. With so many missing objects in § 4071(a), it is not surprising that the court lost sight of the object of the equal access

261. *Prince*, 303 F.3d at 1092, 1094.

262. *Jacoby v. Prince ex rel. Prince*, No. 02-1610, 2003 WL 21134040 (9th Cir. May 2, 2003), *cert. denied* (9th Cir. October 6, 2003).

right, i.e., access to the premises for meetings during non-instructional time.

Instead of considering the central question posed by the case—equal access to what?—*Prince* devoted its energy to divining separate meanings for “deny equal access,” “deny fair opportunity,” and “discriminate.” As justification for this task, *Prince* cited the canon of construction that courts should read statutes in a way that avoids rendering any words as surplusage.²⁶³ However, it could have relied on other canons of construction that were equally well suited to resolving the case. One familiar canon requires statutes to be read as a whole.²⁶⁴ This approach would have led the court to consider the many passages in the statute indicating that equal access, fair opportunity, and discrimination all relate to meetings on school premises during non-instructional time, and not to other benefits like appearance in the yearbook or grants from the student activity fund. The canon of *ejusdem generis* advises that when general terms are used as part of a list, they should be understood to refer to the same concepts defined by the more specific terms in the list.²⁶⁵ *Ejusdem generis* would lead the court to conclude that the broad term “discriminate against” should be understood to have the same general purpose as the adjacent and more specific terms “deny equal access to [the limited open forum]” and “deny a fair opportunity to [conduct meetings within the limited open forum].” *Prince* did not consider either of these fully applicable rules of interpretation.

The court’s eagerness to avoid surplusage within the four corners of § 4071(a) is particularly unwarranted given the redundancy of the Act as a whole. It would be difficult to find any statute that contains more surplusage per column-inch. A limited open forum exists under § 4071(b) when a school grants either “an offering to” or “an opportunity for” student groups to meet, giving no indication what possible difference might exist between those terms. In several places the Act restricts “agents” or “employees” of a school, even though employees are by definition agents. To constitute a meeting under § 4072(3), the student group’s activities must be permitted in the forum and be “not directly related to the school curriculum,” but no forum exists at all unless the groups were “noncurriculum related”

263. *Prince*, 303 F.3d at 1079–80.

264. See, e.g., *U.S. Nat’l Bank of Oregon v. Indp. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (“In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”). *Prince* quoted this statement, 303 F.3d at 1082, but never did examine “the provisions of the whole law” or consider whether meetings on school premises were its “object.”

265. *Cleveland v. United States*, 329 U.S. 14, 18 (1946).

under § 4071(b) in the first place. There should be no “sponsorship” of meetings under § 4071(c)(2)—which in light of the definition of sponsorship under § 4072(2) includes “participating in a meeting”—but § 4071(c)(3) repeats that school employees can be present at religious meetings only in a “nonparticipatory capacity.” Schools must ensure under § 4071(c)(4) that a student meeting “does not materially and substantially interfere with the orderly conduct of educational activities within the school,” but § 4071(f) reiterates that the school is in no way limited from its authority “to maintain order and discipline on school premises.” Most of the definitions in § 4072 are unhelpful tautologies. Do we need to be told in § 4072(1) that a “secondary school” is “a public school which provides secondary education” and in § 4072(4) that “noninstructional time” occurs “before actual classroom instruction begins or after actual classroom instruction ends”?²⁶⁶ And then there are the provisions that spell out matters that go without saying, such as the admonition in § 4071(d)(5) for schools not to sanction meetings that are otherwise illegal, and the reminder in § 4071(d)(7) that the statute should not be construed to authorize abridgements of constitutional rights. This is hardly a statute whose drafters were offended by a little surplusage.

Prince should have concluded that the three verbs in § 4071(a) serve the same function. The panel chided the school district for an interpretation that would “read ‘equal access’ and ‘discrimination’ right out of the Act,”²⁶⁷ but seemed untroubled that its interpretation read “fair opportunity” out of the Act instead. If all student clubs must be given identical treatment whether or not that treatment resembles the fair opportunity criteria of § 4071(c), there will never be any reason for a school to consider those criteria. One might conceivably argue that the fair opportunity criteria constitute a floor, whereby all student groups must be given at least those benefits that constitute a fair opportunity, and that if schools offer better than a fair opportunity, it must do so in a way that ensures equal access and nondiscrimination. But that reading makes no sense in light of the actual fair opportunity criteria Congress included in § 4071(c). Instead of listing benefits a school must give to a student group, this section is structured as a safe harbor that lists benefits a school need not (or, as it has been interpreted, cannot) give to a student group. A section that provides no benefits cannot be treated as a minimum

266. Admittedly, some courts have grappled with the meaning of “noninstructional time.” *Prince*, 303 F.3d at 1087; *Ceniceros*, 106 F.3d at 880–81; and *Donovan*, 336 F.3d at 215–16. I doubt that the results or reasoning in these cases would have been any different if the statute had simply omitted the Delphic definition in its entirety.

267. *Prince*, 303 F.3d at 1081.

benefit. To the extent that § 4071(c) is a safe harbor, the court's approach eliminates its function altogether, finding liability when a school district incorporated § 4071(c) verbatim into its internal policies. Overall, *Prince's* zeal to ensure that a handful of words in § 4071(a) had separate meaning drained § 4071(c) of its meaning entirely.

This harm was not offset by any interpretive gains within §4071(a), because the difference the court purported to find between "deny equal access" and "discriminate" was illusory. To most readers, "discrimination" would be the broader term encompassing any type of disadvantage, whether or not that disadvantage involved denial of equal access to facilities. Under this intuitive reading, "equal access" is redundant. The court never proposed any similarly concrete alternative. It explained that proof of discrimination requires evidence of intent, while proof of denied equal access does not²⁶⁸—but it never explained what else would be part of the proof. It might make sense to argue that denial of equal access *to the premises for meetings* is a strict liability offense, while discrimination *with regard to other benefits* requires proof of discriminatory intent. *Prince* did not do so. It simply defined every allegation of denied benefits as a denial of equal access, obviating any need to show discrimination.²⁶⁹ The court's expansive definition of equal access (equal access to everything) means that there will never be a case where proof of discrimination is required. So instead of "deny equal access" being surplusage, the court turned "discriminate" into the surplus term.

Other statutory terms that *Prince* renders irrelevant are "premises," "meetings," and, oddly enough, "forum." The court used the term "forum" with great frequency, but never with any attention to its statutory meaning. The pattern began the very first time the opinion used the word: "Prince claims that by denying the World Changers access to the same benefits as ASB groups, the School District denies her equal access to this forum in violation of the Act."²⁷⁰ The antecedent to the term "this forum" is unclear. The best interpretation is that the court considered a "forum" to be those "benefits" used by one or more noncurriculum related groups, because the sentence pairs "access to the same benefits" with "access to this forum." This approach ignores the plain meaning and legislative history of the term "forum," which imply a physical place where meetings can occur. An empty classroom can be a forum for

268. *Id.* at 1081.

269. *Id.* at 1086–87, 1092.

270. *Id.* at 1078.

meetings, but a school yearbook cannot. The student council meets in a forum, but is not itself a forum. By confusing the ASB with the forum in which the ASB meets, *Prince* committed precisely the error that the Supreme Court sought to correct in *Hurley*.²⁷¹

Not every court ignores the statutory terms that *Prince* devalued. In *Gernetzke v. Kenosha Unified School District No. 1*,²⁷² a religious student group wished to paint a mural containing religious symbols on the school walls. The Seventh Circuit recognized that access to the building for meetings, which is guaranteed under the EAA, is not the same as control over the physical appearance of the building.²⁷³ In *Thompson v. Waynesboro Area School District*,²⁷⁴ distributing student newspapers in the hallway was not a “meeting” for purposes of the EAA, since it was not a voluntary gathering of like-minded students in the same location at the same time. (*Thompson* correctly found a right to distribute the newspaper under the First Amendment.) *Herdahl v. Pontotoc County School District* found that the daily broadcast of a Bible club’s prayers and devotional messages over the school intercom was not a meeting.²⁷⁵ In a few other factually analogous cases, the absence of an EAA claim tells the same story. *Fleming v. Jefferson County School District R-1*²⁷⁶ decided under the First Amendment whether students could include religious symbols in a school-sponsored art tile project, and *Westfield High School L.I.F.E. Club v. City of Westfield*²⁷⁷ relied on First Amendment principles to determine the rights of a student club to distribute candy canes with religious messages in school hallways. In both cases, no claim was made under the Equal Access Act, and none could be, because affixing permanent artwork to the walls of the school building, or distributing candy canes, are not meetings on school premises during noninstructional time.

2. The Meaning of Sponsorship

In its consideration of school sponsorship, *Prince* relied on a line of US Supreme Court cases—which I will call the Good News Cases for ease of reference—for the proposition that when a public educational entity operates a public forum in the constitutional sense,

271. 515 U.S. 557, 566, 570–71 (1995) (street is public forum, but parade is private expression within the forum).

272. 274 F.3d 464, 467 (7th Cir. 2001).

273. *See id.* at 467.

274. 673 F. Supp. 1379, 1394 (M.D. Pa 1987).

275. *See* 887 F. Supp. 902, 913 (N.D. Miss. 1995).

276. 298 F.3d 918, 920 (10th Cir. 2002).

277. 249 F. Supp.2d 98, 117–18 (D.Mass. 2003).

it must allow equal access to religious groups, because access is required by the Free Speech Clause and not barred by the Establishment Clause.²⁷⁸ These cases conclude that when a meeting room is made available to all, courts will not find an unconstitutional message of endorsement or sponsorship of religion if the room is used by private parties for religious purposes.²⁷⁹ *Prince* did not carefully consider whether this logic applies equally well to the non-forum benefits it had reflexively treated as “limited open forum” under the EAA or “limited public forum” under the First Amendment. To the administration of Spanaway Lake High School—and I would argue, to most reasonable observers—many of the benefits demanded by the World Changers are more closely linked to sponsorship than is simple access to an empty classroom for after-school meetings.

While the rule of the Good News Cases has been stated with increasingly strong language by the Supreme Court, the conclusion they reached was not inevitable. Interestingly enough, two of the strongest proponents of the rule of the Good News Cases—Justices Kennedy and Scalia—said in *Mergens* that it was “inevitable that a public high school ‘endorses’ a religious club, in a commonsense use of the term, if the club happens to be one of many activities that the school permits students to choose in order to further the development of their intellect and character in an extracurricular setting.”²⁸⁰ By the time *Good News Club* was decided, both justices joined an opinion seeming to say that the position they had taken in *Mergens* “defies logic.”²⁸¹

[E]ven if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.²⁸²

As a rhetorical device, labeling the concern over implied or inferred endorsement as one of “misperception” helps minimize the problem. Only unreasonable people misperceive things, the argument implies, and why should the law stretch to accommodate the unreasonable? However, many areas of the law take steps to counter

278. *Good News Club v. Milford Central Sch. Dist.*, 533 U.S. 98, 120 (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394–97 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 253 (1990); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981).

279. *Good News Club*, 533 U.S. at 108–109.

280. *Mergens*, 496 U.S. at 261 (Kennedy, J., concurring).

281. *Good News Club*, 533 U.S. at 114.

282. *Id.* at 118.

misperceptions that are considered reasonable and foreseeable. Trademark law is premised around avoiding any likelihood of consumer confusion as to the source or sponsorship of goods and services.²⁸³ Potential confusion is legally relevant, not only actual confusion.²⁸⁴ In the immigration realm, the law grants asylum to refugees who have a reasonable fear of persecution on the basis of imputed political opinion, which involves situations where the potential persecutors reasonably or unreasonably misperceive the refugees' political opinions.²⁸⁵ Danger of misperception often has constitutional significance. Due process requires that trials be held before judges who are impartial and also appear to be impartial.²⁸⁶ The First Amendment permits restrictions on political activity in order to avoid the appearance of corruption.²⁸⁷ In constitutional campaign finance cases, the government does not need much evidence regarding the appearance of corruption; any evidence that is beyond "mere conjecture" and is not "illusory" will suffice.²⁸⁸ Although the rule of the Good News Cases is sometimes expressed as a bright-line principle that will apply to any type of government benefit, in situations other than providing meeting rooms the situation is far from settled. Even in some types of public forums, the government must take affirmative steps to avoid the perception of religious partiality.²⁸⁹

Both of the misperceptions mentioned in *Good News Club*—faulty impressions of governmental endorsement of or hostility to religion—are possible, but are they equally likely as an empirical matter? The Good News Cases do not attempt to determine whether, in our actual culture in our actual time, people are more likely to view after-school activities on school grounds to be school sponsored or more likely to view the absence of such activities as school hostility.²⁹⁰ The increasing tone of exasperation in the language of the Good News

283. *Academy of Motion Picture Arts & Sciences v. Creative House Promotions*, 944 F.2d 1446, 1456 (9th Cir. 1991).

284. *Id.*

285. *Canas-Segovia v. INS*, 970 F.2d 599, 601–2 (9th Cir. 1992).

286. "Justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14, (1954)). See also *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) ("[T]he appearance of even-handed justice . . . is at the core of due process.").

287. *Nixon v. Shrink Mo. Government PAC*, 528 U.S. 377, 389 (2000); *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976).

288. *Montana Right to Life Assn. v. Eddleman*, 343 F.3d 1085, 1092 (9th Cir. 2003) (quoting *Nixon*, 528 U.S. at 392, and *Buckley*, 424 U.S. at 27)).

289. See discussion of *Capitol Square Review and Advisory Board v. Pinette* *infra* text accompanying notes 454–466.

290. Laycock, *supra* note 17, at 16–20 (discussing the lack of empirical data regarding perceptions of endorsement, and concluding it is of no constitutional importance).

Cases may reflect the Court's unhappiness that their earlier pronouncements have not shifted public perception more than they have. Of course, court opinions and acts of Congress can influence public perceptions. One court said that the enactment of the EAA itself would mandate a change in what people think on the subject:

In this age of Congressional mandates requiring schools to either provide equal access to diverse student groups or risk losing federal funding, a member of the public cannot perceive the actions of every single student group that uses school facilities to bear the "imprimatur of the school" and expect those perceptions to be reasonable.²⁹¹

Nonetheless, the extent to which court decisions or legislation shape subsequent public opinion is a complex one. Some rulings are embraced by the public at large (as with the *Miranda* warnings)²⁹² while others remain contested for years (as with cases involving sexual behavior).²⁹³ It is impossible to know in advance which rulings will gain social acceptance; public expectations and practices do not change with a wave of the wand. As if lecturing a slow learner, *Mergens* said that "the proposition that schools do not endorse everything they fail to censor is not complicated."²⁹⁴ It may not be complicated, but it is not always consistent with lived experience. In other contexts, the Court has readily conceded that silence may reasonably be viewed as assent.²⁹⁵ Therefore, even if the Supreme Court remains steadfast in its position that operating a forum is never sponsorship of expression occurring there, it should not presume that the result was obvious or inevitable.²⁹⁶

Indeed, the Court's own approach to school sponsorship of student activity was markedly different in *Hazelwood School District v. Kuhlmeier*.²⁹⁷ In that case, the Court was asked whether the principal

291. *Westfield High Sch. LIFE Club v. City of Westfield*, 249 F. Supp.2d 98, 118 (D. Mass. 2003).

292. *Dickerson v. United States*, 530 U.S. 428, 464 (2000).

293. *Compare* *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (*affirming* *Roe v. Wade*, 410 U.S. 113 (1973)) *with* *Lawrence v. Texas*, 123 S.Ct. 2472, 2484 (2003) (*overruling* *Bowers v. Hardwick*, 478 U.S. 186, 198 (1986)).

294. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250–51 (1990).

295. *PG&E v. California Utilities Comm'n*, 475 U.S. 1, 15 (1986) (utility that is forced by law to include newsletter of public interest group in its billing envelopes "may be forced either to appear to agree with [the newsletter] or to respond").

296. This species of arrogance can be found in Paulsen, *supra* note 107, at 653 ("[I]t's taken some time to get the idea through their heads—and of course some of them still just don't get it—but maybe now, finally, recalcitrant lower court judges and civil libertarians will now come to accept a proposition that some of us thought obvious all along.").

297. 484 U.S. 260 (1988). For more background on *Hazelwood*, see Caplan, *supra* note 7, at 131–51.

or the students had final editorial control over a high school newspaper.²⁹⁸ Notwithstanding a school board policy that “school sponsored student publications’ will not restrict free expression or diverse viewpoints within the rules of responsible journalism,”²⁹⁹ the Supreme Court held that school principals retain the power to censor school newspaper articles “so long as their actions are reasonably related to legitimate pedagogical concerns.”³⁰⁰ The Court considered this editorial power to be a necessary adjunct to

educators’ authority over school-sponsored publications, theatrical productions, and *other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school*. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.³⁰¹

Hazelwood differs from the Good News Cases and the EAA on two important issues: the scope of the curriculum and perceptions of sponsorship. Under the EAA as interpreted in *Mergens*, “curriculum” is basically synonymous with “actual classroom instruction.”³⁰² As used in *Hazelwood*, “curriculum” extends to educational opportunities “whether or not they occur in a traditional classroom.”³⁰³ As for sponsorship of non-religious clubs, the EAA is oblivious to the question; all that matters is whether a student club is curriculum-related.³⁰⁴ *Mergens* concluded that anyone who worries that out-of-classroom activities at a school building will be viewed as school-sponsored is deluded by a “largely self-imposed” fear of a “mistaken inference.”³⁰⁵ Yet under *Hazelwood*, “[s]tudents, parents, and members of the public might reasonably perceive” that student’s expressive activities on school grounds but outside the classroom “bear the imprimatur of the school.”³⁰⁶ In order to dissociate itself from that reasonable inference of school sponsorship, “a school may refuse to lend its name and resources to the dissemination of student

298. *Hazelwood*, 484 U.S. at 262.

299. *Id.* at 277 (Brennan, J., dissenting) (quoting school board policy Board Policy 348.51).

300. *Id.* at 273.

301. *Id.* at 271 (emphasis added).

302. Bd. of Educ. v. *Mergens*, 496 U.S. 226, 235–240 (1990).

303. *Hazelwood*, 484 U.S. at 271.

304. *Mergens*, 496 U.S. at 240.

305. *Id.* at 251.

306. *Hazelwood*, 484 U.S. at 271.

expression”³⁰⁷—even through such ordinarily forbidden means as prior restraint of the press.

The competing visions of sponsorship found in *Hazelwood* and the Good News Cases might be reconciled if the equal access principle was applied only to the school building and not to the school program. Most applications of the equal access principle involve access to otherwise empty educational buildings for meetings.³⁰⁸ When other benefits are involved that implicate the school’s educational mission, there is more weight to a school’s desire to maintain control over the substance and appearance of its program. By ignoring this distinction, *Prince* endangers the one line that could unify the Supreme Court’s conflicting reasoning.

Prince offered three reasons for finding that bestowing ASB status and all accompanying benefits would not constitute sponsorship of the World Changers. None survive scrutiny. The court first looked to the definition of “sponsorship” in § 4072(3).³⁰⁹ Noting that the term sponsorship “includes” various actions that relate to meetings, the court concluded that granting ASB status to a club did not mandate school participation in the meetings themselves.³¹⁰ But the court ignored the reigning principle that when used in a statute, the term “includes” is nonexclusive: it means “includes, but is not limited to.” If, as *Prince* proposes, forbidden sponsorship under the EAA can occur only in direct connection to a meeting, a school would not violate the Act if it were to hang a banner over the front door that read, “Spanaway Lake High School Proudly Sponsors the World Changers” or “Spanaway Lake—Home of the Gay/Straight Alliance.” Of course, these banners would constitute sponsorship under the EAA even if they did not relate directly to the groups’ meetings. They would also be sponsorship under the First Amendment.

Prince next argued that it was the student council’s decision to associate student groups with the ASB, not the school board’s, and that this intermediary layer would mean that no action regarding student groups could be fairly attributed to the board.³¹¹ This simply ignores the facts and law of the ASB. The ASB is an agent acting at the behest of the school board. Specifically, the school board sets the policies regarding “identification of those activities which shall

307. *Id.* at 272–73.

308. *Rosenberger v. Rector and Visitors of University of Virginia* is the one exception. See discussions of *Rosenberger supra* text to accompany notes 347–52, 503–44.

309. *Prince v. Jacoby*, 303 F.3d 1074, 1083 (9th Cir. 2002).

310. *Id.* at 1083.

311. *Prince*, 303 F.3d at 1083–84.

constitute the associated student body program.”³¹² Furthermore, if the student council was truly independent, the court was dealing with the wrong defendant. Only the school district and its employees were named defendants, and the court could not issue any injunction ordering a truly independent third party not before the court to affiliate with the World Changers or to give it any money. *Prince’s* treatment of the student council as a third party tries to have it both ways.

The court’s last response to the question of sponsorship is the most far-reaching: if a school requires sponsorship before any particular noncurriculum related student club can receive the benefits given to sponsored groups, then it must stop sponsoring noncurriculum related clubs. In other words, if a school is not willing to buy electric guitars for noncurriculum related punk bands, it cannot sponsor a noncurriculum related chamber orchestra. Sadly, this result locks into law Professor Laycock’s “statutory glitch” in § 4071(c) whereby schools must uniformly avoid sponsorship of all groups.³¹³

Prince confuses sponsorship—in the sense of promoting and supporting an activity—with the ministerial action *Mergens* described as “recognition.”³¹⁴ To be sure, *Mergens* held that a school could not withhold recognition from a nonsponsored group if recognition was necessary to have equal access to school communications media.³¹⁵ Six justices in *Mergens* agreed that official endorsement of religious activity would violate the Establishment Clause, so these justices must have believed that recognition, as it functioned at Westside, was not sponsorship. *Prince* made an unjustified leap from this holding. Just because recognition of the sort encountered in *Mergens* was not sponsorship, it does not follow that nothing can ever be sponsorship, or that sponsorship must, as a matter of law, be extended to either everyone or no one.

In cases involving college-level student clubs, courts generally look past the formalities of academic recognition to consider what substantive benefits accrue from the recognition. If the student group is entitled to the benefits, then they must be provided. Recognition is beside the point. For example, *Healy v. James*³¹⁶ involved a state college’s decision to deny recognition to a local chapter of Students for a Democratic Society (SDS), an organization widely believed to advocate violence. The Supreme Court remanded the case for

312. WASH. ADMIN. CODE § 392-138-013(1)(b)(i).

313. Laycock, *supra* note 17, at 42–45.

314. See *Prince*, 303 F.3d at 1084.

315. Bd. of Educ. v. *Mergens*, 496 U.S. 226, 247 (1990).

316. 408 U.S. 169, 171 (1972).

findings on why recognition was denied, but it plainly considered the import of recognition to lie in its substance and not its symbolism.

The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes. The practical effect of nonrecognition was demonstrated in this case when, several days after the President's decision was announced, petitioners were not allowed to hold a meeting in the campus coffee shop because they were not an approved group.³¹⁷

Because denying meeting space is a form of prior restraint,³¹⁸ something much different was at stake than an "administrative seal of official college respectability" or the "college's stamp of approval."³¹⁹ Although *Healy* guaranteed the SDS a right to meet on campus, it nowhere implied that the group was entitled to the college's stamp of approval. *Widmar* had nothing to say on that question, since the religious club in that case was already a "registered student group."³²⁰

The most detailed discussion of the difference between recognition and access to facilities is found in *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*.³²¹ The District of Columbia's public accommodations ordinance required Georgetown, a Catholic university, to provide its "facilities and services" without discrimination on the basis of sexual orientation.³²² The University withheld official recognition from two gay rights clubs, citing its sincere religious objections.³²³ In a heavily fractured opinion, the court decided that use of "facilities and services" should be separated from "recognition," and that the student groups were entitled to the former but not the latter.³²⁴ "We must sever the artificial connection between them in order to analyze the true issues."³²⁵ The "true issue," therefore, was whether the precise "tangible benefits" sought by the student clubs would amount to endorsement.³²⁶ A majority found that these tangible benefits did not equate with endorsement, while other judges believed they did.³²⁷

317. *Id.* at 181.

318. *Id.* at 184.

319. *Id.* at 182.

320. *Widmar v. Vincent*, 454 U.S. 263, 264–65 (1981).

321. 536 A.2d 1, 17 (D.C. Cir. 1987).

322. *Id.*

323. *Id.* at 14.

324. *Id.* at 39.

325. *Id.* at 20.

326. *Id.* at 20.

327. *Id.* at 39 (majority); *id.* at 62 (dissent).

In light of these cases, *Prince's* troubling declaration that Washington schools must stop sponsoring noncurriculum related clubs is an unjustified overstatement. Some benefits really do connote sponsorship, even if equal access to school premises for meetings does not. Take, for example, the benefit of allowing a club to use the school's name or mascot on its letterhead, or the benefit of a banner over the front door celebrating a club's achievement. Benefits like these cannot be treated identically to the sort of ministerial recognition involved in *Mergens* and *Healy*. Courts may wave aside a school's recognition rules if they block access to the premises for meetings.³²⁸ But in *Prince*, Policy 5525 already granted access to the premises for meetings. The court did not wave aside a recognition rule that interfered with a statutory right, but instead intruded on the school's ability to allocate its own resources and endorsement.³²⁹

One might argue that *Prince* still allows schools to express verbally their lack of endorsement, perhaps by some form of disclaimer. For example, the school could prepare a list of clubs with asterisks next to the sponsored ones. When times and places for club meetings are announced, the school could remind students which clubs are school sponsored. But governmental disclaimers of sponsorship must be effective.³³⁰ As one judge noted in connection with a school policy permitting on-campus distribution of Bibles, the efficacy of disclaimers in a school setting is doubtful:

In some situations a disclaimer can help to prevent a perception of government endorsement, but an observer must be able to read and understand a disclaimer if it is to have any effect. It remains unclear whether the young children here could read or understand the Board's disclaimer, even if read to them. Furthermore, no disclaimer can save government action from an Establishment Clause challenge when, as here, "other indicia of endorsement . . . outweigh the mitigating effect of the disclaimer." Just as the nearly unanimous *Stone [v. Graham]* Court concluded that a disclaimer was "not sufficient to avoid conflict with the First Amendment," the disclaimer in this case simply cannot eliminate the many indications of government endorsement.³³¹

328. *Id.* at 26.

329. *Prince*, 303 F.3d at 1077.

330. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 776 (1995); *Paulson v. City of San Diego*, 294 F.3d 1124, 1142 (9th Cir. 2002) (en banc).

331. *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 301 (4th Cir. 1998) (Diana Gribbon Motz, J., concurring in part and dissenting in part).

Disclaimers are no different than anything else: actions speak louder than words. If a school gives an unsponsored group every benefit that it gives to sponsored groups—whether it is affiliation with the ASB, appearance in the yearbook, or access to unrestricted cash grants—observers would be justified in thinking that any distinction between sponsored and nonsponsored groups is illusory. When it comes to religion in public schools, “law reaches past formalism.”³³²

3. Specific Benefits Under the EAA

The following sections examine each form of relief ordered by *Prince* in light of the foregoing principles.

a. ASB Affiliation

Prince is unclear about whether the World Changers must become affiliated with the Spanaway Lake ASB. Most of the time, the court says that noncurriculum related student clubs must receive benefits equal to those granted ASB clubs (suggesting that there is still a difference between the two types of clubs), but elsewhere it says that the result of its decision will be “inclusion in the ASB forum.”³³³ Because the court used the shorthand term “the ASB forum”³³⁴ as a collective label for a group of disparate benefits, it did not seriously consider the ASB’s status as the student government and as an “arm and agent” of the school board. Affiliating a religious club with the ASB would have obvious Establishment Clause ramifications because, as an agent, its actions during the course of ASB activities are those of the school district. Also, in many Washington schools, affiliated clubs have voting representation on the ASB. This would mean that an ASB-affiliated Bible club would have a vote on the student council purely by virtue of its existence as a religious entity. While religiously observant persons and clergy must have equal suffrage and equal rights to seek and hold public office,³³⁵ giving political authority to a church in its role as a church unquestionably violates the Establishment Clause. “A state may not delegate its civic authority to a group chosen according to a religious criterion.”³³⁶

332. *Lee v. Weisman*, 505 U.S. 577, 595 (1992) (rejecting formalistic argument that attendance at high school graduation is optional).

333. *Prince v. Jacoby*, 303 F.3d 1074, 1083, 1094 (9th Cir. 2002).

334. *Id.* at 1078, 1079, 1089, 1091, 1092, 1094, 1096 (Hall, J. concurring), 1098 (Hall, J. concurring).

335. *McDaniel v. Paty*, 435 U.S. 618, 628–29 (1978).

336. *Bd. of Educ. v. Grumet*, 512 U.S. 687, 698 (1994). See also *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 127 (1982) (church may not exercise governmental power to veto liquor licenses).

In addition, *Mergens* held that “a school’s student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school.”³³⁷ A student council would be curriculum-related in those schools where representatives are elected from home rooms, much as an honor society whose membership is based on grades would be curriculum-related.³³⁸ When a Bible Club, Gay/Straight Alliance, or Ku Klux Klan group demands entree to the student government, it demands control over an aspect of the curriculum.

b. ASB Funding

Prince held that the school must give the World Changers equal access to ASB funds,³³⁹ but was vague about what this would mean in practice. At a minimum, it would mean abandoning the school’s categorical rule excluding non-ASB clubs from inclusion in the ASB budget prepared by the student council. The court dodged the next logical question, which will arise when the student council convenes to prepare its budget. Is it obligated to allocate funds for the World Changers to purchase Bibles if it also allocates funds to the chess club for chess sets? Student councils typically use a legislative process to decide which activities are worthy of funding. Some projects are deemed worthy, and others unworthy, because of their content. Defining the ASB budget as a forum means that the ASB governing body cannot rely on the majority’s judgment of worth, as elected legislatures ordinarily do. A later case will no doubt be faced with this dilemma.³⁴⁰

In the portion of the question that it did decide, *Prince* held that ASB moneys were not “public funds” within the meaning of § 4071(d)(3) (barring expenditure of “public funds” for religious student groups), because they were not commingled with the school’s operating budget.³⁴¹ This is unsatisfactory on many levels. First, the existence of separate accounts does not affect ownership of the accounts. A person with more than one bank account owns the money in all of them. The funds the government raises through Social Security taxes are held in a separate account, but no one would argue

337. Bd. of Educ. v. *Mergens*, 496 U.S. 226, 240 (1990).

338. *Id.*

339. *Prince v. Jacoby*, 303 F.3d 1074, 1086 (9th Cir. 2002).

340. See discussion of Board of Regents v. Southworth *infra* text accompanying notes 503–44.

341. *Prince*, 303 F.3d at 1085.

that Congress could buy rosary beads or prayer wheels with them. Second, the court was wrong on the facts. Property ownership is ordinarily a matter governed by state law,³⁴² and *Prince* ignored unambiguous state law indicating that ownership of the ASB account rests with the school district.³⁴³ The relevant regulations explicitly refer to the bulk of the ASB fund as “ASB public moneys,” contrasting this with the “non- ASB private moneys” that may be donated to charity.³⁴⁴ The school district may also directly spend its own tax dollars for ASB purposes without reimbursement from the ASB public money account.³⁴⁵ Third, *Prince* assumed that the definition of “public funds” under the EAA should not be determined by state law, but by application of *Rosenberger*.³⁴⁶ This approach cannot be justified as a matter of congressional intent, since Congress in 1984 could have had no inkling of what the Supreme Court would say in *Rosenberger* in 1995. Moreover, the court’s reading of *Rosenberger* is wrong.

In *Rosenberger*, the University of Virginia collected mandatory student activity fees and allowed a student council to budget the proceeds to reimburse activities of various student groups.³⁴⁷ In a controversial 5-4 decision, the Supreme Court held that the portion of the fund dedicated to publishing student-authored magazines and newspapers could not exclude religious publications.³⁴⁸ The Court offered two reasons for why Virginia’s student activity fund did not contain tax funds that would otherwise be governed by the Establishment Clause, but instead was “a forum more in a metaphysical than in a spatial or geographic sense.”³⁴⁹ First, the relevant portion of the fund was used only for printing and publishing, which are constitutionally protected activities.³⁵⁰ Second, the money was disbursed not to the student group that writes the religious material, but to the printer who would use it only to facilitate speech.³⁵¹ These conditions did not exist for the ASB at Spanaway Lake High School. The governing body of the ASB can budget for any form of “optional noncredit extracurricular events of . . . a

342. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

343. See generally WASH. ADMIN. CODE § 392-138-010(2); WASH. REV. CODE § 28A.325.030(2).

344. WASH. ADMIN. CODE § 392-138-010(2); see WASH. REV. CODE § 28A.325.030(2).

345. 21 Wash. Op. Att’y Gen. 4, 7–9 (1974).

346. *Prince*, 303 F.3d at 1085.

347. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 824–25 (1995).

348. *Id.* at 845–46.

349. *Id.* at 830.

350. *Id.* at 841.

351. *Id.* at 842.

cultural, social, recreational, or athletic nature, or to otherwise support the public activities and programs of associated student bodies.”³⁵² There is no restriction of the funds to publishing or any other form of expression. If desired, the ASB governing body could lawfully devote a portion of its money to a pizza party for itself or an affiliated club—and no doubt this often occurs. Unlike the publishing funds in *Rosenberger*, the funds that the World Changers sought eligibility for were entirely unrestricted. It matters little that the school disburses funds only to reimburse vendors and not as cash to student groups, because the student group is still free to direct ASB funds to vendors of its choice in exchange for goods and services of its choice.

c. *Fundraising on Campus*

Prince lumped private fundraising together with grants from the ASB account,³⁵³ but the two are unrelated. Unlike ASB funds, private fundraising by a student group may indeed be properly viewed as not involving “public moneys” under § 4071(d)(3). For example, one of my Gay/Straight Alliance clients wished to hold a bake sale in the school commons to raise money to buy a subscription to *The Advocate* for the school library. The school’s concern was to ensure a responsible accounting of the cash, which is a concern whenever teenagers handle other people’s money. If desired, a school could organize separate accounting for such funds in a manner comparable to the treatment of non-ASB private moneys. Of course, whether a school wants to allow any private fundraising on campus that is unrelated to school-sponsored activities is a policy decision not dictated by the EAA or the Constitution.

d. *Appearance in the Yearbook*

The school yearbook is perhaps the clearest example of *Prince*’s disregard for the repeated references in the EAA to meetings occurring on school premises during noninstructional time.³⁵⁴ Having a group’s picture in the yearbook is not a meeting, does not occur on school premises, and is not fixed in time. The EAA simply has nothing to say about which groups get their pictures in the yearbook, and the court erred in finding that it did.

352. WASH. REV. CODE § 28A.325.010.

353. *Prince*, 303 F.3d at 1086. *Prince* may have assumed that money raised by a group at the craft fair or auction was the property of the group, rather than of the ASB as a whole, but the record is unclear on that point. I assume in this paragraph that a group’s on-campus fundraising is done for the benefit of that group alone.

354. *Id.* at 1086.

Prince's discussion of the yearbook rested entirely on the source of the funds used to produce it. Reasoning that the yearbook was produced from ASB funds, and that there was no statutory bar to expending ASB funds on religious clubs, the court concluded that the World Changers must be allowed to appear in the book on the same basis as school-sponsored clubs.³⁵⁵ This focus on the money used to pay for the yearbook is inapposite, since what really matters regarding the yearbook is its symbolism. A school yearbook is one of the "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" under *Hazelwood*.³⁵⁶ Yearbooks are usually produced with the involvement of a faculty advisor, and represent the school to the community at large and for posterity. Yearbooks are ordinarily distributed at school and become a huge topic of conversation both in and outside of class when they arrive. Historians and social scientists consult high school yearbooks for the insights they can provide.³⁵⁷ If any publication bears the school's imprimatur, the yearbook does. Returning to George Comegys's distinction, the yearbook is the record of the public school, not of the public school house.³⁵⁸ The school building in *Lamb's Chapel* was used by the Manorville Humane Society for a Chinese Auction and the Chamber of Commerce for Town Fair Day,³⁵⁹ but there is no reason to believe these events were recorded in the school yearbook.

Prince's approach to the yearbook also ignores social expectations about publishing. Readers of newspapers and magazines understand that the publishers are responsible for the editorial content and expect that no one paid to be included there. The publisher's discretion to make editorial judgments is constitutionally protected against government interference.³⁶⁰ By contrast, advertising does not represent the speech of the publisher, and advertisers do pay for their appearance. To most readers, it is the advertising space in a

355. *Id.*

356. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

357. *E.g.*, Richard E. Jones, *Brown v. Board of Education: Concluding Unfinished Business*, 39 WASHBURN L.J. 184, 190 (2000) (analyzing racial segregation in Topeka high schools by reference to yearbooks). Any number of unexpected sources can provide useful material for the historian, including the lowly law school casebook. See Linda K. Kerber, *Writing Our Own Rare Books*, 14 YALE J.L. & FEMINISM 429 (2002) (surveying successive editions of casebooks on sex equality).

358. Utter & Larson, *supra* note 18, at 476.

359. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 391 n.5 (1993).

360. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 252 (1974); *Nelson v. McClatchy Newspapers, Inc.*, 131 Wash.2d 523, 541, 936 P.2d 1123, 1132 (1997).

newspaper that is expected to function somewhat like a public forum. Rejected advertisers often become upset and claim censorship has occurred when their ads are not accepted for publication.³⁶¹ Under the system found illegal in *Prince*, Spanaway Lake followed this longstanding and widely understood tradition when it offered the World Changers the opportunity to purchase advertising space in the yearbook.³⁶² School sponsored groups could have their pictures in the editorial content of the yearbook at no charge, on pages that a reader would understand to bear the imprimatur of the school.³⁶³ Noncurriculum related clubs who did not enjoy school sponsorship could purchase advertising space.³⁶⁴

As it happens, the Ninth Circuit had previously ruled that the advertising space in school newspapers, yearbooks, and athletic programs is not a public forum, allowing a school to reject advertising for explicitly content-based reasons.³⁶⁵ By declaring for the first time that the editorial space of a school yearbook—unlike the advertising space—is a limited open forum under the EAA, *Prince* deviated from circuit precedent. Student press advocates who oppose *Hazelwood* might not be pleased, however. Even though *Prince* takes a portion of editorial control over the yearbook away from school administrators, it does not vest that control with student editors. Instead, it vests editorial control with any noncurriculum related student group that seeks to be included in the publication.

e. *Publicity for Meetings*

Prince ruled that the World Changers should be allowed to announce the place and times of their meetings over the school public address system and school bulletin boards on the same basis as other groups.³⁶⁶ This ruling was correct because announcements are necessary adjuncts to the holding of meetings under *Mergens*.³⁶⁷ However, *Prince* did not specify whether the existence of separate bulletin boards for ASB and non-ASB clubs was a violation of the

361. A recent example occurred when many campus newspapers refused to print advertisements criticizing the movement for slavery reparations. See Duncan Campbell, *Right Turn*, Guardian Unlimited: EducationGuardian.co.uk. (May 30, 2001), at <http://education.guardian.co.uk/higher/worldwide/story/0,9959,498531,00.html> (last visited Nov. 1, 2003).

362. *Prince*, 303 F.3d at 1086.

363. *Id.* at 1078.

364. *Id.* at 1086.

365. *Clark County Sch. Dist. v. Planned Parenthood*, 941 F.2d 817, 824 (9th Cir. 1991) (en banc).

366. *Prince*, 303 F.3d at 1086–87.

367. *Id.* at 1086–87.

First Amendment. Assuming they are roughly equivalent in number and location, separate bulletin boards would not violate the First Amendment. Indeed, *Prince* contemplated that Spanaway Lake must have some mechanism to indicate that it does not sponsor the World Changers,³⁶⁸ even if it did not specify what those mechanisms might be. Twin bulletin boards would be one simple way for the school to explain which activities it sponsored and which it did not.

f. Meetings During Student/Staff Time

Prince correctly concluded that “student/staff time” at Spanaway Lake High School was not “noninstructional time” during which equal access must be given to noncurriculum related student groups.³⁶⁹ Attendance is taken during these periods, so skipping school will affect students’ credits toward graduation. Student/staff time falls in the midst of actual classroom instruction (between 10:10 am and 10:40 am), and is not a time “set aside” for empty classrooms to be used for meetings by any and all student groups before and after school.³⁷⁰ The activities to be performed during student/staff time are academic in nature, including sessions with teachers or tutors.³⁷¹ Not all noncurriculum related student groups are allowed to meet during student/staff time, only those who receive permission, presumably based on pedagogical concerns.³⁷² Student/staff time is characterized by the sort of control a school ordinarily exercises over its curriculum. Educators who choose to structure a portion of the school day in a nontraditional manner should not find their options subsequently restricted by the EAA.³⁷³

The *Prince* majority could not leave a correct statutory ruling well enough alone. It found that even though student/staff time was beyond the reach of the EAA, that time nonetheless was a public forum for constitutional purposes.³⁷⁴ Its constitutional analysis, like its EAA analysis, equated access to a forum with entitlement to benefits:

As in *Widmar*, Spanaway Lake High School has created a limited public forum in which student groups are free to meet

368. *Id.* at 1094.

369. *Id.* at 1089.

370. *Id.* at 1087–88.

371. *Id.* at 1077, 1087.

372. *Id.* at 1087.

373. *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211 (3d Cir. 2003) criticized *Prince* on this point, arguing that mandatory attendance is irrelevant to the determination of “noninstructional time.” *Id.* at 223.

374. *Prince*, 303 F.3d at 1089, 1091.

during student/staff time, as well as to use school vehicles for field trips, to have priority for use of the AV equipment, and to use school supplies such as markers, posterboard, and paper. While certainly not required to grant student clubs access to these benefits, the school has chosen to do so. Having done so, it cannot deny access to some student groups because of their desire to exercise their First Amendment rights[.]³⁷⁵

This passage mischaracterizes *Widmar*, which did not involve anything akin to student/staff time. The university clubs in *Widmar* sought to use otherwise empty university buildings at night, not to force the University into providing attendance credit for nonsponsored meetings held during a time of day when the buildings were to be used for the curriculum.³⁷⁶ High school teachers in Washington have no constitutional right to make curricular decisions over the objections of the school board,³⁷⁷ so it is remarkable to learn that students do have such a right. After *Prince*, “the notion that a limited public forum can creep into the instructional part of the school day now will be of concern to school districts in the Ninth Circuit.”³⁷⁸ The ruling regarding student/staff time directly restricts a school’s control over a core educational function. Despite the Supreme Court’s repeated warnings to avoid this result, *Prince* held in effect that “the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.”³⁷⁹

In the passage quoted above, the *Prince* majority asserted that a *Widmar*-like forum existed but did not marshal any evidence in support of that conclusion.³⁸⁰ Instead, the majority appears to have simply incorporated its finding of a limited open forum under the EAA to a finding of a limited public forum under the Constitution, even though *Mergens* explained that the two were not identical.³⁸¹ The *Prince* majority did not compare the size of Spanaway Lake’s forum to that of the University of Missouri in *Widmar*, where over 100 groups

375. *Prince*, 303 F.3d at 1091. This was incorrect in its statement that all ASB clubs are allowed to meet during student/staff Time.

376. See *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

377. *Millikan v. Bd. of Dir’s.*, 93 Wash.2d 522, 611 P.2d 414 (1980). See generally Karen C. Daly, *Balancing Act: Teachers’ Classroom Speech And The First Amendment*, 30 J. L. & Educ. 1 (2001).

378. Mawdsley, *supra* note 255, at 823–24.

379. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 686 (1986) (quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 526 (1969) (Black, J., dissenting)). On the history of this quotation, see Caplan, *supra* note 7, at 131.

380. *Prince*, 303 F.3d at 1091.

381. *Id.*

on campus on a variety of topics. Justice Stevens' lonely dissent in *Mergens* argued that the EAA should apply only to secondary schools whose forum for student group meetings resembled that in *Widmar*, and he thought that the 30 groups meeting at Westside were significantly different.³⁸² The *Mergens* majority thought the EAA was constitutional as applied to Westside and its 30 wide-ranging student clubs.³⁸³ *Prince* did not consider whether the roster of clubs at Spanaway Lake High School was comparable to the one in *Mergens*. This disregards the strong cautions contained in the plurality, both concurrences, and the dissent in *Mergens*.³⁸⁴ Ironically, the majority cites *Mergens* for the proposition that a limited open forum under the EAA is different than a limited public forum under the Constitution,³⁸⁵ but fails to apply the distinction. The better approach for courts facing constitutional questions regarding schools as forums is to compare the facts in the given case to the school in *Mergens*.

g. Spending Beyond the Cost of Meeting Space

The final type of relief the World Changers sought was the ability to compel the school to spend public money beyond the cost of building overhead, particularly on such things as school supplies, audio/visual equipment, and school buses. For the one and only time in the opinion, the majority considered whether the requested relief was of a type called for in the EAA.³⁸⁶ The court reasoned that since these expenditures were "beyond the incidental cost of providing the space for student-initiated meetings" under § 4071(d)(3), the statute did not demand them.³⁸⁷

As with student/staff time, the majority relied on *Rosenberger* to give back to the World Changers under the First Amendment anything it denied under the EAA.³⁸⁸ In doing so, it did not consider whether the money spent at Spanaway Lake was comparable to the dedicated printing fund in *Rosenberger*. If the school supplies were to be used uniformly by all groups for expressive purposes, *Rosenberger* might apply. If instead the supplies or equipment were to be used for pure consumption without contributing to a forum for communication like the one created by Virginia's publishing fund, *Rosenberger* would have little to say about the proper result. The record does not reveal

382. Bd. of Educ. v. *Mergens*, 496 U.S. 226, 279 (1990).

383. *Id.* at 253.

384. *Id.* at 259, 271.

385. *Prince v. Jacoby*, 303 F.3d 1074, 1091 (9th Cir. 2002).

386. *Id.* at 1084.

387. *Id.* at 1085.

388. *Id.*

the answer, since this entire point of disagreement between the parties was based on an off-the-cuff response to a hypothetical deposition question.³⁸⁹ The facts on this point were far too scanty to be the basis for what will prove to be *Prince's* most significant constitutional ruling.

If followed, *Prince's* constitutional ruling about non-overhead expenses will impose considerable financial burdens on schools. Consider the example of the school that provides a conductor, instruments, supplies, uniforms, rehearsal space, and transportation to a school sponsored but noncurriculum related chamber orchestra. Under *Prince*, a student-initiated noncurriculum related punk band can demand that the school provide it with the same benefits (a manager, electric guitars, torn t-shirts, and so on). Perhaps a later court would avoid imposing these additional expenses by reading *Prince* to require equal distribution of supplies and services that the school has already purchased. This would limit some variations of the problem, but not all of them. Imagine that the school orchestra plays Bach, but a student-initiated orchestra club prefers to play Bartok. Under *Prince*, the school's existing violins and cellos must be made available for the nonsponsored orchestra on an equal basis, which would necessitate some form of rationing. If the school-sponsored orchestra club originally met every afternoon, it might need to meet less often so the nonsponsored orchestra could use the equipment instead. To ensure that the nonsponsored group has equal access to the instruments, the school may need to stop allowing students in the sponsored orchestra to take instruments home overnight or on weekends for practicing or lessons. Treating school supplies as if they were a forum either impairs the school's ability to sponsor its own orchestra as it sees fit, or in the alternative, imposes an obligation to purchase additional supplies that would strain the school budget as a whole.

C. *Prince's* Significance

The federal reporters are no doubt riddled with cases that have reasoning that is as bad as or worse than *Prince*. What makes it worthy of the attention I have given it?

First, by getting the law wrong, the ruling will force Washington State and its hundreds of school districts to revise existing statutes, regulations, and school policies. Some suggestions for compliance are contained in Part IV of this article. Because Washington's ASB

389. Brief of Defendants-Appellees at 12, *Prince v. Jacoby*, 303 F.3d 1074 (1999) (No. 99-35490).

structure has analogues in other states, the effort will likely need to be duplicated in other jurisdictions.

Second, *Prince* restricts schools' ability to control their own speech and determine their own educational messages. As it relates to student groups, this will likely affect schools' ability to bestow meaningful sponsorship and endorsement upon extracurricular activities that meet with school approval. A school ought to be able to sponsor a Students Against Drunk Driving group and to give it benefits not offered to Students For Drunk Driving. The Junior Ku Klux Klan may hold its meetings on campus, but a school should not have to invite it into the student council or show its picture in the yearbook. The result of my vision will be that some student groups that may have great merit—such as Gay/Straight Alliances or Dungeons & Dragons clubs—will receive fewer benefits than other student groups. They will be tolerated but not subsidized. This is a reasonable outcome, because the right of a group to assemble for expressive purposes has never included a right to have the government agree with or subsidize the group's message.

Third, *Prince* damages Washington's ability to ensure that its schools adhere to the vision of separation of church and state set forth in the state constitution, which is acknowledged to be stricter than the federal Establishment Clause.³⁹⁰ Washington schools should have the ability to decide that their state-mandated student activity fees will be spent solely on secular projects. They should be able to decide that, just as creationism is not taught in its science classes, religious groups advocating creationism will not be listed in the editorial portions of its yearbooks alongside the science club. This is particularly important in the not uncommon situation where student religious groups are formed and supported at the instigation of adults in the community as a method of proselytizing to a public school audience.³⁹¹ Such organizations have the right under the EAA and the Constitution to hold and publicize meetings on school grounds in a manner similar to secular groups, but *Prince* erred in granting them an enforceable right to demand all the accoutrements of school sponsorship.

Fourth, *Prince* pronounced a new principle of constitutional interpretation, which is always a matter of importance. The majority's rule—not seriously challenged by the dissent—is that any type of government benefit must be distributed according to the same

390. See Brief Amicus Curiae of the Am. Civil Liberties Union, et al. at 14, *Locke v. Davey*, 123 S.Ct. 2075 (2003) (No. 02-1315).

391. For example, the Good News Clubs are sponsored by the Child Evangelism Fellowship, Inc. See <http://www.gospelcom.net/cef/ministry/gnc.php> (last visited Nov. 11, 2003).

principles that govern access to public forums. Taken seriously, this approach would revolutionize governmental practices. Medicare and Medicaid payments are benefits, but the Medicare and Medicaid funds are not public forums. The right to speak, picket, or leaflet in a traditional public forum cannot be restricted on the basis of age or income, but entitlement to the Medicare and Medicaid programs can be, and are, restricted along those lines. At its lower levels of scrutiny, equal protection law allows the government to make many distinctions that would never be allowed in a public forum. For example, the government may decide that those who are fired from their jobs are more deserving of unemployment compensation than those who quit voluntarily. To be sure, unemployment compensation cannot be based on the recipient's ideology (including religious beliefs).³⁹² But the point remains that there is something about a public forum that makes it uniquely inhospitable to distinctions that would be allowed in other settings. Nothing in prior law required *Prince* to apply the public forum metaphor to the non-forum benefits at issue, but the decision to do so drove the outcome.

The next part of this article considers the situations where it does, or does not, make sense to demand the type of equality that the First Amendment provides in public forums.

III. STRETCHING THE PUBLIC FORUM DOCTRINE

Prince was not the first case to stretch constitutional public forum doctrine beyond the context of government-owned property made available to the population at large for assembly and expression. Some of these extensions operate in an intuitively appealing manner (the internet as a public forum), while other extensions are more problematic (subsidy programs as public forums). I consider the unthinking extension of public forum doctrine a dangerous trend, in part because the doctrine is a less than helpful model even for its intended purposes. This part of the article has two sections. The first reviews the public forum doctrine as it exists generally. The second looks at how the doctrine operates when it is stretched to cover disembodied communications media, private property, government programs, government money, and government speech.

392. *Thomas v. Review Bd.*, 450 U.S. 707, 720 (1981); *Sherbert v. Verner*, 374 U.S. 398, 410 (1963); *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

A. Overview of the Public Forum Doctrine³⁹³

The public forum doctrine as we know it derives from cases in the early 1970s involving the right to picket on public sidewalks.³⁹⁴ The first public forum cases drew on language from early prior restraint cases like *Hague v. CIO*,³⁹⁵ which mentioned that “wherever the title of streets and parks may rest,” such “public places” have “from ancient times” been used “for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” These were special places, the doctrine suggested, entitled to extra constitutional consideration whenever the government acts to regulate expression on them. Of course, positing that some places have more protection for free speech suggests that others have less. Accordingly, the Court’s attention predictably shifted to creating the rules for places like military bases that were not considered public forums.³⁹⁶ I use the term “public forum doctrine” to mean the notion that in assessing a First Amendment claim for speech on government property, courts “must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic.”³⁹⁷

1. Public and Nonpublic Forums

The principal division in public forum doctrine is between the public forum and the nonpublic forum.³⁹⁸ Property is treated as a public forum if it has historically been used for assembly and discussion (the traditional public forum),³⁹⁹ or if the government has chosen to dedicate the property for similar purposes (the designated

393. This section owes a great deal to Robert C. Post’s article, *supra* note 96. Additional insights on these questions may be found in David A. Stoll, *Public Forum Doctrine Crashes At Kennedy Airport, Injuring Nine*, 59 BROOK. L. REV. 1271, 1275 (1993); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U.CHI L. REV. 46, 86–94 (1987); and Daniel A. Farber & John A. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1220 (1984).

394. *Police Dept. of City of Chicago v. Mosely*, 408 U.S. 92, 93, 102 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 105–6, 115 (1972).

395. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939).

396. *Greer v. Spock*, 424 U.S. 828, 837 (1976); *Perry Educ. Assn. v. Perry Local Educators’ Ass’n.*, 460 U.S. 37, 40, 47–8, 55 (1983); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 797 (1985).

397. *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 797 (1985)). Readers should beware that public forum cases do not always use terms in the same way, especially when speaking of “designated public forums” and “limited public forums.”

398. *Id.*

399. *Id.*

public forum).⁴⁰⁰ While their origins differ in theory, traditional public forums and designated public forums both operate under the same rules: the government cannot ban speech in a public forum, and at most, it can only impose content-neutral time, place, or manner restrictions.⁴⁰¹ On occasion, speakers may be excluded from a public forum if such exclusion survives strict scrutiny, i.e., “the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.”⁴⁰² In a nonpublic forum, the government has far greater latitude to restrict expression. Rules affecting speech in a nonpublic forum will be upheld if they are viewpoint neutral and reasonable.⁴⁰³ “Thus, two main categories of fora are public (where strict scrutiny applies) and non-public (where a more lenient ‘reasonableness’ standard governs).”⁴⁰⁴

Sidewalks and or city parks are traditional public forums whether the government likes it or not.⁴⁰⁵ Moreover, it is irrelevant whether the primary use of certain property is not as a park or public thoroughfare; what matters is whether there is concrete evidence that use for expressive activity would significantly disrupt the principal uses.⁴⁰⁶ Property that is not a traditional public forum will be governed by public forum rules if the government designates it for

400. *Id.*

401. *See generally*, *Hopper v. Pasco*, 241 F.3d 1067 (9th Cir. 2001). A reasonable time, place, or manner restriction for a traditional public forum is one that is content neutral, motivated by significant government interest, narrowly tailored to that interest, and leaves ample alternative opportunities for expression. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Under Article I, section 5 of the Washington Constitution, content-neutral time, place, and manner regulations in traditional public forums must be justified by a “compelling” governmental interest, rather than a “significant” interest. *Collier v. City of Tacoma*, 121 Wash.2d 737, 747–48, 854 P.2d 1046, 1051 (1993).

402. *Hopper*, 241 F.3d at 1074 (quoting *Cornelius*, 473 U.S. at 800). While this strict scrutiny standard is often cited in public forum opinions, few cases turn on it. One of the rare examples of an interest sufficiently compelling to justify restrictions in a traditional public forum is *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding law against political campaigning within 100 feet of a polling place).

403.

The Government’s decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated. . . . Nor is there a requirement that the restriction be narrowly tailored or that the Government’s interest be compelling. The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker’s message.

Cornelius, 473 U.S. at 808–9 (emphasis in original).

404. *Hopper*, 241 F.3d at 1074.

405. *Id.*

406. *See ACLU of Nev. v. Las Vegas*, 333 F.3d 1092 (9th Cir. 2003).

expressive purposes.⁴⁰⁷ For example, the space on the side of a bus is not inherently available for expression, but it can become a designated public forum if the government rents billboard space there.⁴⁰⁸ While it is not always clear when the government has designated a public forum, in theory the designation hinges on governmental intent: “[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”⁴⁰⁹ But giving too much weight to governmental intent will inevitably validate intent to censor (where it exists). For this reason, the intent to designate property as public forum can be proven, despite the government’s protestations in litigation, by pointing to the history of speech on the property and the compatibility (or lack thereof) between the proposed expression and the primary use of the property.⁴¹⁰

What, then, is a nonpublic forum? Most courts use the term to mean “all government-owned property not traditionally or explicitly designated as a public forum.”⁴¹¹ This approach leads many courts to state that “under the forum-based approach, government property is divided into three categories: public fora, designated public fora, and nonpublic fora.”⁴¹² Unfortunately, use of the term “nonpublic forum” to mean “not a public forum” is ambiguous, since it could mean forums that are not public or properties that are not forums at all (like the space shuttle, a general’s office in the Pentagon, or the documents stored in the National Archives). It would advance clarity to use “nonforum” when speaking of things that are not forums,⁴¹³ and

407. See *Hopper*, 241 F.3d at 1078.

408. See *Cornelius*, 473 U.S. at 801 (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300 (1974)).

409. *Id.* at 802.

410. *Planned Parenthood Ass’n/Chi. Area v. Chi. Transit Authority*, 767 F.2d 1225, 1232 (7th Cir. 1985).

411. *Atlanta Journal and Constitution v. City of Atlanta Dept. of Aviation*, 322 F.3d 1298, 1306 n.9 (11th Cir. 2003).

412. *PMG Intern. Div. L.L.C. v. Rumsfeld*, 303 F.3d 1163, 1169 (9th Cir. 2002). Many cases contain similar language suggesting that all government property must be one of three kinds of forum. See, e.g., *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 929 (10th Cir. 2002) (citing *Hawkins v. City of Denver*, 170 F.3d 1281, 1286 (10th Cir. 1999)); *Atlanta Journal and Constitution v. City of Atlanta Dept. of Aviation*, 322 F.3d at 1298, 1306 n.9 (11th Cir. 2003); *Lederman v. U.S.*, 291 F.3d 36, 41 (D.D.C. 2002). A related formulation is to say that three types of forum exist, without implying that these categories cover all government property. See, e.g., *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 351 (2d Cir. 2003); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1124 (10th Cir. 2002).

413. Some, but not enough, examples exist where courts acknowledge the existence of government property that is “nonforum.” *Knolls Action Project v. Knolls Atomic Power Laboratory*, 771 F.2d 46, 49–50 (2d Cir. 1985); *Tele-Communications of Key West, Inc. v. U.S.*, 757 F.2d 1330, 1337 (D.D.C. 1985); *Gannett Satellite Information Network, Inc. v.*

“nonpublic forum” for those situations—like city council meetings—where expression occurs in a highly regulated format.⁴¹⁴ Using the term “nonpublic forum” for nonforums facilitates *Prince’s* error of treating every conceivable type of property as if it were one type of forum or another.

2. Limited Public Forums

Whether it is envisioned as a two-part or three-part division, the public/nonpublic distinction is incomplete, because it omits the limited public forum. Courts use the term limited public forum to describe a forum dedicated only for use by certain persons—like a televised campaign debate available only to certain candidates⁴¹⁵—or for the discussion of certain topics—like a publication devoted to describing only certain types of charities.⁴¹⁶ Lower courts have found the limited public forum category to be “a source of much confusion.”⁴¹⁷ Some courts say that the limited public forum is a species of designated public forum⁴¹⁸—which suggests that it should be subject to traditional public forum rules—while other courts consider it a nonpublic forum.⁴¹⁹ The Supreme Court’s latest description of the limited public forum applied a standard very similar to that used for nonpublic forums, holding that the government may reserve the limited public forum for desired speakers or topics so long as the restriction does not “discriminate against speech on the basis of viewpoint, and . . . is reasonable in light of the purpose served by the forum.”⁴²⁰ As noted by many commentators, the dramatically relaxed scrutiny given to restrictions in a limited public forum is frequently inhospitable to freedom of speech.⁴²¹ With the validity of censorship

Metropolitan Transp. Auth., 745 F.2d 767, 773 (2d Cir. 1984); United States Southwest Africa/Namibia Trade & Cultural Council, 708 F.2d 760, 764 (D.C. Cir. 1983).

414. *White v. City of Norwalk*, 900 F.2d 1421, 1423 (9th Cir. 1990); *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 267–69 (9th Cir. 1995). *But see* *Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm’n*, 429 U.S. 167, 174 n.6 (1976) (statute providing for open school board meetings creates a public forum).

415. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 669–72 (1998).

416. *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 806 (1985).

417. *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001).

418. *Id.* at 1074 (“a limited public forum is a sub-category of a designated public forum”); and *Bronx Household, of Faith v. Bd. of Educ. of City of New York*, 331 F.3d at 342, 351 (2d Cir. 2003) (equating limited public forum and designated public forum).

419. *Summum v. Ogden*, 297 F.3d 995, 1002 n.4 (10th Cir. 2002) (“A ‘limited public forum’ is a subset of the nonpublic forum classification.”).

420. *Good News Club v. Milford Central Sch. Dist.*, 533 U.S. 98, 106–7 (2001) (citations and internal punctuation omitted; brackets added).

421. *See, e.g.*, *Post*, *supra* note 96, at 1745–58; *Gewirtzman*, *supra* note 118, at 1147–58. *Ronnie J. Fischer, What’s In A Name?: An Attempt to Resolve the “Analytic Ambiguity” of the*

judged only in relationship to the boundaries of the forum, and with few restrictions on where those boundaries may be set, censorship in a limited public forum can justify itself.

Consider *Cogswell v. City of Seattle*, a case from Washington recently decided by the Ninth Circuit.⁴²² Shortly before each election, the City of Seattle prepares and mails a voters' pamphlet to all registered voters describing the candidates and ballot issues.⁴²³ The City gives candidates space in the pamphlet to present themselves to the voters.⁴²⁴ Because access to the pamphlet is limited to candidates and not available to the public at large, it is by definition a limited public forum.⁴²⁵ But because the pamphlet is a limited public forum, the City can claim greater power to control the content appearing there.⁴²⁶ Using this power, the City enacted a rule prohibiting candidates from making statements that mention their opponents.⁴²⁷ Therefore, candidate Smith could talk about Candidate Smith's merits, but not about candidate Johnson's flaws. This restriction on content caused a problem for Cogswell, who was running on a throw-the-bum-out platform.⁴²⁸ The City's content restriction barred him from explaining why a change was necessary, but left the incumbent free to brag about his record.⁴²⁹

The limited public forum doctrine allowed the City to avoid offering any justification for its regulation of candidates' speech. The syllogism works like this: (a) speech restrictions are allowed in a limited public forum if they are reasonable in light of the forum's purpose; (b) we declare that the purpose of the forum is to provide an opportunity for candidates to talk about themselves; therefore (c) a rule barring candidates from talking about others is constitutional because it is reasonably related to the purpose of the forum. Notably absent from this framework is any requirement that the City offer a compelling, or even significant, reason for defining the forum in the way it did. Therefore, the inquiry will always favor the government.

To avoid this dilemma, courts impose a requirement that restrictions in a limited public forum, as in any nonpublic forum,

Designated and Limited Public Fora, 107 DICK. L. REV. 639, 657 (2003); Matthew D. McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929, 932 (2000).

422. *Cogswell v. City of Seattle*, 347 F.3d 809 (9th Cir. 2003).

423. *Id.* at 811-12.

424. *Id.* at 812.

425. *Id.* at 814.

426. *Id.* at 814-15.

427. *Id.* at 812.

428. *Id.* at 812-13.

429. *Id.* at 813.

must be viewpoint neutral even if there are limitations on the forum's subject matter. Unfortunately, it is often difficult to distinguish between viewpoint distinctions and subject matter distinctions. For example, in a televised candidate debate, a rule against discussing the merits of Democratic candidates would be the epitome of viewpoint discrimination before a general election, but a legitimate subject matter restriction during the Republican primary. Because of this problem, courts have had to admit that "the Supreme Court's concept of viewpoint neutrality in First Amendment jurisprudence has not been easy to understand," and that principles to distinguish subject matter from viewpoint are "elusive."⁴³⁰ On the *Cogswell* facts, for example, one could debate endlessly whether the rule against mentioning one's opponent is a restriction on subject matter or viewpoint. The trial court considered it "a close question" and changed its opinion between the motion for preliminary injunction and the motion for summary judgment.⁴³¹ The Ninth Circuit reversed, finding no viewpoint bias even though *Cogswell's* viewpoint on his opponent was excluded.⁴³²

This indeterminacy between subject matter and viewpoint can be avoided in appropriate cases by looking at the context instead of the doctrine. The labels "subject matter" and "viewpoint" can be traded for a host of more relevant questions. What functions does the forum serve within a larger context? What are the needs of participants in the forum? What social expectations does the audience attach to the forum? What governmental interests are being served by the restrictions? How important are those interests? How necessary are the chosen restrictions to accomplishing the government's ends? In short, is the expression that is suppressed incompatible with the central purpose of the forum? These kinds of questions, which are the same as those that arise in the context of traditional and designated public forums, are more susceptible to principled decision-making than the amorphous standards offered by the limited public forum doctrine.

Cogswell becomes an easy case if one considers the context and the purported justifications for the speech restriction and not the

430. *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 970 (9th Cir. 2002). See also *Tucker*, 97 F.3d at 1216 (distinction is "a difficult one to draw"). The malleability of these categories caused *Sammartano* to warn that "courts must be wary of attempts to manipulate the line between subject and viewpoint by claiming that a regulation operates at a higher (and more appropriate) level of generality than it actually does." 303 F.3d at 971.

431. *Cogswell v. City of Seattle*, No. C01-1209L, at 2 (W.D. Wash. Sept. 19, 2001) (order granting Plaintiffs' motion for summary judgment), *rev'd* No. 01-36162, 347 F.3d 809 (9th Cir. 2003).

432. *Cogswell v. City of Seattle*, 347 F.3d 809, 816-18 (9th Cir.2003).

semantic categories of the limited public forum doctrine. The context of the candidate statement was an election for public office. “[I]t can hardly be doubted that [the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office.”⁴³³ “[D]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges.”⁴³⁴ The voters pamphlet is important to candidates, because it is the one piece of campaign literature certain to be received by every voter. The voters expect the candidate, and not the government, to choose the ideas in the candidate statement. Allowing the candidates to create their own unregulated statements is fully consistent with the purposes and management of the forum. The City’s justifications for limiting speech are paternalistic judgments about which electioneering speech is most fair or civil and which information is most important for voters to read. Once the justifications for restricting speech are identified, it is evident that they violate the basic First Amendment principle that “speakers, not the government, know best both what they want to say and how to say it.”⁴³⁵ Substituting basic First Amendment principles for the hairsplitting that often arises in limited public forum cases can turn hard cases into easy ones.

3. Is Public Forum Doctrine Necessary?

Professor Robert Post has written convincingly that the public forum concept as a whole is unhelpful.⁴³⁶ First Amendment values should prompt courts to ask whether the government has a sufficiently good reason to enact laws that restrict expression. By focusing on locations of property instead of justifications for regulating speech, the public forum doctrine allows the government to answer the question “Why is this restriction necessary?” with a non-sequitur: “Because it’s our property.” Mere government ownership of sidewalks was no excuse for prior restraint in *Hague*, so it is peculiar to treat it as an excuse in other settings. Unless the government can explain what important purposes it wishes to accomplish with the property and how the proposed speech would endanger those purposes, speech restrictions should not be allowed. By the same token, if the government can offer such an explanation—as it sometimes can in the

433. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

434. *Republican Party of Minnesota v. White*, 536 U.S. 765, 781 (2002) (internal quotation marks and citations omitted).

435. *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 791 (1988).

436. Post, *supra* note 96, at 1775.

context of operating a school—labeling property as public forum should not prevent government from imposing necessary restrictions. Only occasionally does the existing public forum doctrine guide courts toward these more relevant questions.

Public forum doctrine is also somewhat illusory in its appearance of providing special protection for speech on certain kinds of government property. In fact, the speech protection in a public forum is not meaningfully different from the general First Amendment rules that apply with regard to regulation of speech on private property.⁴³⁷ The government may not engage in viewpoint restrictions when regulating private speech, regardless of whose property hosts the speech.⁴³⁸ It also may place reasonable time, place, or manner restrictions on private expression on private property.⁴³⁹ By purporting to bestow special speech protection on certain property but not actually offering any, the main function of the public forum doctrine is to devalue speech in the newly created category of nonpublic forum.

Another major problem with the public forum doctrine is that it treats a label as a basis for decision. Categorizing a forum can be the end of the analysis as easily as the beginning: is property a nonpublic forum because speech restrictions are justified there, or are speech restrictions justified because it is a nonpublic forum? In many Supreme Court cases, justices who agree on the result differ on whether the property is a public forum, suggesting that the labeling effort is not worthwhile.⁴⁴⁰ Judge Williams of the D.C. Circuit argues that “while forum analysis adds the allure of seemingly discrete analytic steps . . . it adds little in real predictability.”⁴⁴¹ For Judge Williams, the main impact of forum analysis is longer briefs

437. Post, *supra* note 96, at 1797–98.

438. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Leathers v. Medlock*, 499 U.S. 439, 448–49 (1991).

439. See generally *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996) (time, place, and manner test applied to ban on automatic dialing and announcing devices).

440. In *Lee v. Int'l Soc. For Krishna Consciousness, Inc.*, 505 U.S. 830, 831 (1992), a ban on airport leafleting was found unconstitutional by four justices who believed the airport was a public forum, plus one who believed that a leafleting ban was unreasonable even in a nonpublic forum. In *United States v. Kokinda*, 497 U.S. 720, 730, 736 (1990) a ban on solicitations outside post offices was upheld by four justices who thought post office walkways were not a public forum, joined by one who found the ban acceptable regardless of forum status. With an air of relief, other cases have stated that there is no need to decide whether the property in question is a public forum. E.g., *Cuffley v. Mickes*, 208 F.3d 702, 706 n.3 (8th Cir. 2000).

441. *Henderson v. Lujan*, 964 F.2d 1179, 1186 (D.C. Cir. 1992) (Williams, J., concurring) (also citing *Comty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1398 (D.C. Cir. 1990) (Williams, J., concurring)).

submitted by lawyers who are forced to debate what the outcome would be under each of the possible labels.⁴⁴²

None of this should be read to suggest that the constitutional rule against viewpoint discrimination lacks validity. Viewpoint neutrality is obviously important.⁴⁴³ But First Amendment protections like the viewpoint neutrality rule “are not confined to the ‘public forum’ first noted in *Hague*.”⁴⁴⁴ The government must act neutrally when regulating speech on private property, just as it does when managing public property.⁴⁴⁵ For example, the government cannot make it a crime to desecrate a flag, whether the desecration occurs on public or private property.⁴⁴⁶ In some instances, courts claim to be invoking the public forum doctrine when in fact they are invoking a more general concept of viewpoint neutrality that has no necessary connection to the forum concept.⁴⁴⁷ In these instances, little is gained by reflexively reciting public forum language.

B. Five Ways to Stretch the Public Forum Doctrine

The difficulties of public forum doctrine made it an inauspicious model for the EAA. Fortunately, Congress included words in the Act that, if interpreted properly, would limit its scope to school “premises” that can host assembly and expression. *Prince* failed to limit the Act to school premises, and its First Amendment analysis likewise rejected any connection between the public forum doctrine and actual forums. This section examines *Prince*’s constitutional ruling in light of cases where courts have applied constitutional public forum concepts outside the setting of a three-dimensional space owned by government where people assemble for face-to-face dialogue. It considers how public forum doctrine functions when applied to (a) governmental communications media, (b) private property, (c) government programs with incidental communicative elements, (d) government money, and (e) government speech. This survey suggests that the public forum metaphor works best when the

442. *Henderson*, 964 F.2d at 1186 (Williams, J., concurring).

443. Geoffrey R. Stone, *Content Regulation And the First Amendment*, 25 WM. & MARY L. REV. 189, 223–27 (1983).

444. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 130 n.7 (1981).

445. *Johnson*, 491 U.S. at 411–13; *U.S. v. Eichman*, 496 U.S. 310, 317–18 (1990).

446. *Id.*

447. See discussions of *Rosenberger v. Rector and Visitors of University of Virginia* and *Board of Regents v. Southworth* *infra* text accompanying notes 503–44.

potential for property or media to host future expression is not noticeably diminished by the hosting of present expression.⁴⁴⁸

1. Communications Media as Public Forum

The forerunners of the public forum cases involved government property that could facilitate both assembly and speech. On a street, sidewalk, or city park, people could gather for rallies or parades, or a lone picketer or leafleter could interact face to face with her audience.⁴⁴⁹ But the public forum doctrine has also been routinely applied to settings where communication occurs without assembly. When communications media share the same salient features as the sidewalk or park, courts have instinctively considered them to be forums, applying public forum doctrine to such media as an inter-office mail system⁴⁵⁰ a bulletin board,⁴⁵¹ print space within a publication,⁴⁵² and the internet.⁴⁵³ In short, "the particular channel of communication constitutes the forum for First Amendment purposes."⁴⁵⁴ The capacity of the property to convey expression, rather than the capacity of the property to host assembly, is the key.

Disembodied communications media may be readily treated as forums because the rules developed for forums may be applied without significant alterations. The concept of nondiscriminatory access translates fairly well: instead of demanding access for a physical speaker, a court can demand access for the speaker's written or recorded message. Time, place, and manner regulations can be applied to the distribution of the message, just as they would have been applied to the speaker in a traditional public forum. Just as speakers on a sidewalk do not fundamentally alter the ability of the sidewalk to host other speakers at another time, each message may be transmitted through these media without necessarily exhausting or altering the media. This does not require that a communications medium must have infinite capacity to be a forum, any more than a

448. This is related to the compatibility concept most often cited in traditional or designated public forum cases. See *ACLU of Nev. v. Las Vegas*, 333 F.3d 1092 (9th Cir. 2003). A use might be incompatible with the purpose of the forum if it will inevitably alter or diminish the forum for future uses. *Prince*, 303 F.3d. at 1074.

449. See, e.g., *Schneider v. New Jersey*, 308 U.S. 147, 149 (1939) (leafleting); *Staub v. City of Baxley*, 355 U.S. 313, 315 (1958) (union organizing); *Niemotko v. Maryland*, 340 U.S. 268, 279 (assembly in park); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 518 (1939) (picketing).

450. *Perry Educ. Assn. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 40 (1983).

451. *Giebel v. Sylvester*, 244 F.3d 1182, 1185 (9th Cir. 2001).

452. *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 801 (1985); *Cogswell*, 347 F.3d 809, 816-18 (9th Cir. 2003).

453. *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

454. *Cornelius*, 473 U.S. at 801.

park or a sidewalk must have infinite capacity to be a forum. The metaphor appears to work where: (1) the medium's capacity for messages is greater than the demand (as with the internet); (2) where the medium can expand to accommodate the demand (as in a publication that can be made a few pages longer); or where (3) the medium can be made to accommodate the demand through simple time, place, and manner restrictions (as with a bulletin board that removes messages after they have been posted a certain number of days).

A major theme of the Good News Cases is that the government's operation of a forum does not constitute endorsement of the speech occurring within the forum. This conclusion succeeds or fails to the extent it is possible to distinguish between the forum and the user of the forum. In a traditional public forum, it is easy to tell the difference. The government provides the sidewalk and does not express much of anything; the expression comes from the mouth or hand of a private individual. If the government does speak on the sidewalk—in the form of street signs, traffic signals, or uniformed police officers—the speech is plainly labeled as governmental.⁴⁵⁵ An inter-office mailbox is much the same. The government provides the box, but each piece of writing placed there has an author's identification attached (and anonymous leaflets are not presumed to come from the government). E-mail messages and web pages have identifiable authors who are distinct from the entities that operate the internet itself.

However, some communications media do not immediately convey the difference between the forum and the speaker. This problem often arises in connection with permanent or semi-permanent physical displays on government land. Most people seeing a statue in a public park, or writing on the side of a public building, assume that the statue or the writing has been placed there by the government, or by a third party with the government's permission. Indeed, writing on the side of a public building without permission is ordinarily termed graffiti or malicious mischief. Erecting a statue in a public park is different than a person giving a speech in a public park. I perceive two main differences in these situations. First, social expectations, based on lengthy historical practice, lead most people to expect that permanent displays on government property are government-

455. Most jurisdictions pass laws to ensure a governmental monopoly over the markers for these forms of governmental speech. *State v. McLamb*, 932 P.2d 266, 275 (Ariz. App. 1996) (unauthorized use of police uniform illegal); *Sanctity of Human Life Network v. California Highway Patrol*, 129 Cal.Rptr.2d 708, 710 (Cal. App. 3 Dist. 2003) (unauthorized traffic sign illegal).

sponsored. Second, a permanent structure necessarily alters the forum's availability for future expression. When a Democratic candidate for office gives a speech in a park in the morning, the park is available in more or less the same condition for the Republican candidate's speech in the afternoon. Once a statue is erected, the land it occupies is no longer available for other uses; the size and scope of the forum is necessarily altered.

These differences make it risky to assume that standard public forum doctrine should apply without any alterations to cases involving public displays. The problems are visible in the leading case of *Ohio Capitol Square v. Pinette*,⁴⁵⁶ which involved the Ku Klux Klan's demand to erect a cross on the grounds of the state capitol in Columbus. By state law, the grounds were a public forum for "free discussion of public questions, or for activities of a broad public purpose."⁴⁵⁷ This statute seems to grant nondiscriminatory access to the grounds for assembly and speech, not to provide a right of the public to erect forum-changing structures. However, the record showed that the state had tolerated objects such as "a privately-sponsored menorah during Chanukah, a display showing the progress of a United Way fundraising campaign, and booths and exhibits during an arts festival."⁴⁵⁸ Even though earlier cases held that government does not designate a public forum by allowing this sort of "limited discourse" on government property,⁴⁵⁹ *Pinette* concluded that the Ohio capitol grounds were "a full-fledged public forum" for unattended signs or sculptures.⁴⁶⁰ The court made this leap without much cognitive dissonance, but other decisions have been less adept at the transition. The mismatch between standard public forum doctrine and unattended displays on government property was inadvertently revealed in a recent Ten Commandments decision that could find no good way to describe the alleged forum. It ultimately could do no better than the ungainly phrase, "the 'permanent monuments on the lawn of the Ogden city municipal building' forum."⁴⁶¹

In a flurry of concurring and dissenting opinions, a majority of the justices in *Pinette* concluded that a forum for unattended displays would require the government to disseminate an effective disclaimer

456. 515 U.S. 753, 758 (1995).

457. OHIO ADMIN.CODE § 128-4-02(A) (1994) (cited in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 757-58 (1995)).

458. *Pinette*, 515 U.S. at 758.

459. *Cornelius*, 473 U.S. at 802.

460. *Pinette*, 515 U.S. at 762.

461. *Sumnum v. City of Ogden*, 297 F.3d 995, 1002 (10th Cir. 2002).

of any private religious displays erected there.⁴⁶² In short, the state had an obligation under the Establishment Clause to clarify the blurred boundary between forum and speaker. Another approach to the question (which may have been foreclosed by the litigation positions taken by the parties) would be to hold that a public forum for assembly is not necessarily a public forum for unattended displays. Recent cases involving permanent decorations at schools have followed this approach by upholding the schools' authority to determine the content of tiles or murals to be affixed to the school building, even if they are designed by students.⁴⁶³

Governments who choose to characterize their properties as public forums for permanent unattended displays should be careful what they wish for. Some cities or counties attempt to justify the display of religious statues on public property by claiming that the land is a public forum.⁴⁶⁴ When Casper, Wyoming relied on public forum logic to keep a Ten Commandments statue in a City Park, the city faced a dilemma when anti-gay activists announced plans to add their own statue.⁴⁶⁵ The monument, as proposed, would be made of marble or granite, stand 5 to 6 feet in height, with a heavy bronze plaque bearing the face of slain University of Wyoming student Matthew Shepard and an inscription reading "Matthew Shepard, Entered Hell October 12, 1998, in Defiance of God's Warning: 'Thou shalt not lie with mankind as with womankind; it is abomination.' Leviticus 18:22."⁴⁶⁶ Appalled at the prospect of the city park hosting a permanent monument celebrating a notorious hate crime, the City may remove the Ten Commandments display and end the fiction that the park is a public forum for purposes of unattended displays.⁴⁶⁷

In a related pattern that is likely to generate litigation elsewhere, the King County Public Library in Redmond, Washington dedicated the tiles in its front plaza as a public forum. For a price, donors could specify a message of their choice to be engraved on the tile. Most of

462. Pinette, 515 U.S. at 776 (O'Connor, J.); *id.* at 793 (Souter, J.); *id.* at 818 (Ginsburg, J.).

463. Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 934 (10th Cir. 2002); Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464, 467 (8th Cir. 2001).

464. Brendan Burke, *Phelps seeks anti-gay marker*, CASPER STAR-TRIBUNE (Oct. 3, 2003), <http://www.casperstartribune.net/articles/2003/10/03/news/casper/f060e8d5f0ddf401c07f72e2617c79c6.txt> (last visited Nov. 1, 2003) (reporting that the anti-gay activists planned to take advantage of the Tenth Circuit rule that "any city that displays a Ten Commandments monument on public property must also allow monuments espousing the views of other religions or political groups on that same property").

465. *Id.*

466. *Id.*

467. *Id.*

the messages were of the type anticipated by the library: “The Smith Family,” “Reading is Fun!” or the like. Some donors chose explicitly religious messages, such as “God Can Change Life.” Following *Pinette*, the library posted a disclaimer notifying patrons that the statements on the tiles were private speech in a designated public forum. Opponents of the religious tiles began purchasing tiles of their own, such as “First Amendment: Keep Church & State Separate,” and “Jehovah, Allah, Zeus, Thor & Brahma. They’re All Myths.” The library ultimately discontinued the project because of the swelling controversy after a donor purchased a forceful tile that read: “God Kills Babies. Read 1 Samuel 15:3. And God Is Love?” The library closed the designated public forum, having learned that in this situation the evanescence of a traditional public forum is preferable to a format that fixes private expression in stone.⁴⁶⁸

2. Private Property as Public Forum

Although public forum doctrine arose from cases involving private expression on government-owned property, the doctrine has been applied with varying levels of success to private property. The results tend to support Professor Post’s thesis that court decisions involving free speech should not turn on the categorization of the property where the speech occurs.

Traditional public forum rules generate satisfactory results when applied to private property resembling sidewalks or parks. This arises most often when public streets or sidewalks are converted to private ownership, while retaining the look and feel of public ownership.⁴⁶⁹ It also occurs when state law requires owners of private shopping malls

468. *Clash over religious expression derails tile sales*, KING COUNTY JOURNAL—EASTSIDE (Oct 19, 2002) at <http://www.kingcountyjournal.com/sited/story/html/107801> (last visited Nov. 1, 2003). No litigation accompanied the Redmond Library episode. As this article goes to press, a lawsuit was filed over a similar inscribed brick program at a state park in the nearby suburb of Kenmore. The plaintiffs allege that the state selectively refuses messages based on their religious content. See Verified Complaint for Declaratory and Injunctive Relief, *Buchanan v. Locke*, No. 03-02899 at 5, In. 34 (W.D. Wash. 2003). See also Jon Savelle, “Park Playground’s brick pavers lead to suit against state,” *Seattle Times* (Sept. 25, 2003), at <http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug> (last visited December 29, 2003). A similar dispute has led to litigation currently pending in federal court in Arizona. See Complaint, *Seidman v. Paradise Valley Unified Sch. Dist.*, No. 03-CV-472 (D. Ariz. 2003). See also Kirsten Sorenson, “Parents Sue the PV District: Rejecting ‘God’ on School Tiles Sparks Furor,” *Arizona Republic* (March 13, 2003), at <http://www.azcentral.com/arizonarepublic/local/articles/0313nepvlawsuit13/html> (last visited December 29, 2003).

469. *ACLU of Nev. v Las Vegas*, 333 F.3d 1092 (9th Cir. 2003); *Venetian Casino Resort v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937, 941–42 (9th Cir. 2001); *First Unitarian Church v. Salt Lake City*, 308 F.3d 1114, 1131 (10th Cir. 2002).

to allow unregulated speech on those portions of the property that function as a modern town square.⁴⁷⁰ State action is found in situations where a private entity exercises government-like authority over speech occurring on property held open to the general public.⁴⁷¹ With the growth of nongovernmental entities that assert control over publicly visible speech (like homeowners associations and gated communities), there will be more instances where the free speech imperative trumps private property ownership.⁴⁷² Cases like these are correctly premised on function rather than form, and ask the correct questions that should be asked when any authority figure attempts to suppress speech. That is, does the need for the suppression of expression outweigh whatever social costs are imposed by the suppression?⁴⁷³

Other cases show that attaching a forum label to private property can be just as irrelevant as attaching the label to public property. For example, *U.S. Postal Service v. Council of Greenburgh Civic Associations*⁴⁷⁴ considered the constitutionality of the federal statute making it illegal for anyone other than the post office to deposit anything in privately owned mailboxes attached to people's homes. The statute was upheld in a matrix of opinions that reached every possible combination of legal doctrines. The majority and a concurrence both found the regulation to be a constitutional exercise of the postal power, but differed over whether the mailboxes were a public forum.⁴⁷⁵ Two dissents found that the law infringed freedom of speech, but also differed over whether the mailboxes were a public forum.⁴⁷⁶ Ultimately, all the opinions had less to do with whether a

470. See generally *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (California constitution gives right of access to shopping malls for speech). But see generally *Walmart, Inc. v. Progressive Campaigns, Inc.*, 139 Wash.2d 623, 989 P.2d 524 (1999) (Washington constitution gives right of access to shopping malls for petitioning but not speech).

471. *Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002); *Marsh v. Alabama*, 326 U.S. 501, 506-508 (1946)

472. See Frank Askin, *Free Speech, Private Space, and the Constitution*, 29 RUTGERS L.J. 947, 961 (1998) (noting that "if grass roots organizers cannot go to the new town squares or go door to door in gated communities to disseminate their messages, their opportunity to be heard is greatly reduced in the modern age"); James E. Lobsenz & Timothy M. Swanson, *The Residential Tenant's Right to Freedom of Political Expression*, 10 U. PUGET SOUND L. REV. 1, 26 (1986) (arguing that the "requirement of advance landlord consent to tenant political speech activities constitutes an invalid prior restraint upon the exercise of constitutionally protected speech").

473. The same questions informed the decision in *Pacific Gas & Electric Co.*, 475 U.S. 1, 18-19 (1986), which invalidated a state law requiring a private property owner to include in its envelopes speech with which it did not agree.

474. 453 U.S. 114 (1981).

475. *Id.* at 134 (not public forum); *id.* at 134 (Brennan, J., concurring) (public forum).

476. *Id.* at 148-52 (Marshall, J., dissenting) (public forum); *id.* at 152 (Stevens, J., dissenting) (not public forum).

mailbox was a public forum than with the functional question of whether the challenged regulation was an acceptable method of serving a governmental interest of sufficient magnitude. Labeling the mailbox as a public or nonpublic forum was irrelevant, as was the difference of opinion over whether private property could ever be a public forum.

The cases discussed above attempt to apply the speech-protective aspects of the public forum doctrine to private property. The speech-restrictive aspects of the nonpublic forum theory should have no application at all to private property, because the rationale for declaring certain areas as nonpublic forums is that the property is owned and managed by the government. On private property the government always acts as a sovereign engaged in governance, not as a proprietor engaged in management of its own resources.⁴⁷⁷ Yet public forum discourse has achieved such a high profile in free speech jurisprudence that courts have sometimes used the nonpublic forum label to devalue private speech.

An egregious example occurred in *Seattle v. Huff*.⁴⁷⁸ The defendant appealed a conviction under a Seattle telephone harassment ordinance that made it unlawful to make phone calls "threatening to inflict injury on the person or property of the person called or any member of his family." The case could have been resolved on the simple and directly applicable ground that government may criminalize true threats.⁴⁷⁹ But *Huff* took misleading detours to reach the same result and created much confusion in the process. The first error was to ignore the threat doctrine in favor of the fighting words doctrine, despite the important differences between the two doctrines.⁴⁸⁰ The government may punish fighting words that are likely to provoke an immediate breach of the peace on the part of the listener.⁴⁸¹ Therefore, this doctrine cannot apply unless the speakers are face to face.⁴⁸² The threat doctrine has no similar geographical limitation, because it is designed to avoid the mental anguish that comes from being threatened. It applies regardless of whether or not

477. Post, *supra* note 96, at 1788.

478. 111 Wash.2d 923, 924, 767 P.2d 572, 573 (1989).

479. *Virginia v. Black*, 123 S.Ct. 1536 (2003); *State v. J.M.*, 144 Wash.2d 472, 488, 28 P.3d 720, 728 (2001); *NAACP v. Claiborne Hardware*, 458 U.S. 886, 896-97 (1982); *Watts v. United States*, 394 U.S. 705, 707 (1969).

480. 111 Wash.2d 923, 925-26, 767 P.2d 572, 573-74 (1989).

481. *Seattle v. Camby*, 104 Wash.2d 49, 52-53, 701 P.2d 499, 501 (1985).

482. *Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997) (no fighting words when speaker shouts at pedestrians from moving truck).

the threat is accompanied by a breach of the peace.⁴⁸³ Unfortunately, *Huff* confused the standards, saying that threats were protected by the First Amendment unless they would cause an immediate breach of the peace.⁴⁸⁴ Since threats over the telephone could not be fighting words, the court considered them constitutionally protected in the absence of some other limiting principle.⁴⁸⁵

This led to the second and more serious constitutional mistake: applying the nonpublic forum doctrine to devalue speech occurring on private property. To extricate itself from its first mistake, the court asserted that telephone communications were a nonpublic forum where the city could regulate speech so long as the “distinctions drawn [were] reasonable in light of the purpose served by the forum and [were] viewpoint neutral.”⁴⁸⁶ Applying this standard to telephone communications would mean that government could impose the same types of detailed speech restrictions in private conversations as it could in a city council meeting. Of course, private telephone communications are entitled to the highest constitutional protection against government regulation.⁴⁸⁷ An otherwise unconstitutional restriction placed on telephone communication cannot be saved by treating it as a reasonable time, place, and manner regulation in a nonpublic forum.

In *Huff*, the court had no one to blame but itself. Introducing its public forum discussion, the court noted that “[t]he parties did not address the public/nonpublic forum distinction.”⁴⁸⁸ They did not address it because it was irrelevant. Nonetheless, the court engrafted the speech-restrictive nonpublic forum doctrine onto private channels of communication. Fortunately, the Washington Supreme Court appears to have recognized the problems with *Huff* and now examines telephone harassment cases without regard to the public forum doctrine. *Bellevue v. Lorang*⁴⁸⁹ invalidated a telephone ordinance that prohibited telephonic speech that was “without purpose of legitimate

483. See *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1088 (9th Cir. 2002) (en banc) (threats made over the internet). See generally, Leigh Noffsinger, *Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats From Coercive Political Advocacy*, 74 WASH. L. REV. 1209, 1229 (1999).

484. 111 Wash.2d 923, 925–26, 767 P.2d 572, 573–74 (1989).

485. 111 Wash.2d at 926, 767 P.2d at 574.

486. 111 Wash.2d at 927, 767 P.2d at 574–75 (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 806 (1985)).

487. *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 131 (1989) (constitutional protection for indecent telephone calls).

488. *Huff*, 111 Wash.2d at 926–27, 767 P.2d at 574.

489. 140 Wash.2d 19, 31, 992 P.2d 496, 502–03 (2000).

communication.” Nowhere did the court apply nonpublic forum doctrine to telephonic speech.⁴⁹⁰ The *Huff* experience should be a cautionary tale for other courts: do not apply nonpublic forum principles to private property.

3. Government Programs as Public Forum

Some government programs primarily designed for noncommunicative purposes may include an incidental element of communication. It is tempting, but often wrong, to view the communicative aspects of these programs as a type of forum that can be categorized as public, nonpublic, or limited. For example, when a state department of transportation hires employees to clear litter from the sides of highways, no one considers the trash picking crew to be a public forum. Some states have commenced Adopt-a-Highway programs where private entities pick up the trash (or donate money to the state for that purpose). The state posts a sign on the highway identifying the donor. Picking up trash is still a government service and not a public forum. However, signs containing words could conceivably be treated as a forum because they are a medium of communication. Disputes have arisen where controversial groups have sought to adopt highways and display their names on official highway signs. Unlike the state, which is primarily interested in litter reduction, the primary purpose of the groups is often publicity, with only a secondary concern about clean highways. For example, the Ku Klux Klan sought to adopt a portion of a highway near a public housing project in Vidor, Texas that was being desegregated over the Klan's opposition.⁴⁹¹ The Klan's goal was to intimidate black residents with a vivid reminder of its influence in the community and to intimate an association with the powers that be through its participation in a government program and its presence on a governmental sign.⁴⁹² The court correctly chose not to view “This Mile Adopted By. . .” signs as forums in and of themselves. Rather, it focused on the Adopt-a-Highway program as a whole. Because “the Program does not have as its purpose the provision of a forum for expressive activity,” the court deemed it a nonpublic forum where racially intimidating speech would be inconsistent with the underlying purpose of the forum.⁴⁹³ The conclusion would have been even clearer had the court used the term “nonforum” rather than the confusing

490. *Id.* at 22–29, 498–502.

491. *Texas v. Knights of Ku Klux Klan*, 58 F.3d 1075, 1077–78 (5th Cir. 1995).

492. *See id.* at 1080.

493. *Id.* at 1078.

term “nonpublic forum.” In another case involving a state rejecting Klan participation in an Adopt-a-Highway program, the court decided the case without any categorization of the program as a forum.⁴⁹⁴

Unlike the plaintiffs in the Adopt-a-Highway Cases, the plaintiffs in *Cornelius v. NAACP Legal Defense Fund*⁴⁹⁵ were more interested in access to the program itself than to its incidental speech components. The Combined Federal Campaign allowed federal employees to direct a portion of their paychecks to charitable organizations.⁴⁹⁶ Only tax-deductible charities that provided “direct health and welfare services to individuals”⁴⁹⁷ were eligible; other tax-deductible non-profit groups, such as those that undertake impact litigation, were not eligible.⁴⁹⁸ A program for automatic payroll deduction was of considerable value to the groups, whether they got to speak in the process or not. Nonetheless, the Supreme Court viewed the case as one involving access to a forum for speech.⁴⁹⁹ Searching to find a forum somewhere in the facts, the parties and the Court latched onto a pamphlet (similar to the voters pamphlet in *Cogswell*) where eligible charities each had 30 words to describe their mission.⁵⁰⁰ Speech seeking charitable donations enjoys constitutional protection, and the pamphlet could—if you squinted—be analogized to other media for constitutionally protected speech, like an inter-office mailbox.⁵⁰¹ Therefore, both the majority and dissent in *Cornelius* acted as if the case was about access to a forum. The entire forum discussion was rather artificial, because the plaintiff charities would have wanted to be included in the program even if there was no pamphlet at all (as would occur if federal employees received a simple checklist identifying charities without text). *Cornelius* has been frequently criticized for its role in advancing the messy and speech-

494. *Cuffley v. Mickes*, 208 F.3d 702, 706 n.3 (8th Cir. 2000) (“we need not discuss . . . whether the Adopt-A-Highway program is a public forum.”). Unlike *Texas v. KKK*, *Cuffley* found viewpoint discrimination and ruled in favor of the Klan. To the extent the cases can be reconciled—and they probably cannot—the effort may hinge on the factual setting. *Texas v. KKK* arose in a particular location with a volatile atmosphere and history of racially motivated violence, allowing the court to find what amounted to a compelling state interest in denying the Klan’s application. There were no comparable facts in the *Cuffley* record. This suggests *Texas v. KKK* might have been resolved by allowing the Klan to adopt a different stretch of highway.

495. 473 U.S. 788, 793 (1985).

496. *Id.* at 788.

497. *Id.* at 795.

498. *Id.*

499. *Id.* at 800.

500. *Id.* at 801.

501. *Id.*

restrictive limited public forum doctrine.⁵⁰² The court may have reached the same result in *Cornelius* if it had not adopted this metaphor, but its opinion would have been less sweeping and generated less confusion if it had not struggled to stretch the public forum doctrine into a case with no forum.

4. Government Money as Public Forum

The slippery slope towards treating government money as if it were a public forum began with *Cornelius*, but found its fullest expression to date in *Rosenberger v. University of Virginia*.⁵⁰³ Much like the high school in *Prince*, the public university in *Rosenberger* charged students a mandatory fee to endow a student activity fund that could be allocated by a student council to reimburse the expenses of eligible student groups. The student activity fund was often used to pay vendors to print student publications, but university rules prohibited such payments for a proselytizing Christian magazine called *Wide Awake*. The question presented to the Supreme Court was whether a rule against reimbursing for religious publications was acceptable.

For its answer, the Court leaped with little explanation into the forum metaphor. The majority opinion began its legal discussion by citing cases that involved regulation of private speech on private property. The Court then stated: “[t]hese principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation.”⁵⁰⁴ The introduction of “the limited public forum” at this point is unexplained and unsupported, since almost none of the cases cited involved limited public forums. After explaining that viewpoint discrimination is not allowed in a limited public forum, the majority said without further explanation: “The [Student Activity Fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.”⁵⁰⁵ Other than viewpoint neutrality, the remainder of the opinion did not discuss any of the principles (plural) that arise in public forum cases. There was no discussion of reasonableness in relation to the purposes of the forum, which would arise in limited public forum cases. Except in the sense of utterly mundane regulations about who signs the checks, there can be no meaningful time, place, or manner restrictions in the context of

502. Post, *supra* note 96, at 1756–58.

503. 515 U.S. 819 (1995).

504. *Id.* at 829 (emphasis added).

505. *Id.* at 830.

spending money, although such restrictions are germane in a traditional public forum. The mismatch between public forum doctrine and money became slightly more explicit in *University of Wisconsin v. Southworth*, a student activity fee case where Justice Kennedy, again writing for the majority, said that public forum principles were “instructive here by close analogy” but then revealed that he meant only “[t]he standard of viewpoint neutrality found in the public forum cases”⁵⁰⁶

Justice Souter’s dissent in *Rosenberger* objected to stretching the public forum doctrine to reach governmental disbursement of money:

The Court’s claim of support from these forum-access cases is ruled out by the very scope of their holdings. . . . [T]hey rest on the recognition that all speakers are entitled to use the street corner (even though the State paves the roads and provides police protection to everyone on the street) and on the analogy between the public street corner and open classroom space. Thus, the Court found it significant that the classroom speakers would engage in traditional speech activities in these forums, too, even though the rooms (like street corners) require some incidental state spending to maintain them. The analogy breaks down entirely, however, if the cases are read more broadly than the Court wrote them, to cover more than forums for literal speaking.⁵⁰⁷

The majority rejected this concept, portraying it as an argument based on scarcity of resources.⁵⁰⁸ As suggested above, however, the question is not whether forum resources are infinite—they never are—but whether the proposed use will of necessity alter the forum. Once a tile in the library plaza is engraved with the words “Religion is the Opiate of the Masses,” the opportunity for future expression in the same medium is both smaller and different. One less tile is available for expression, and future speakers must compete against or accommodate themselves to the existing message when formulating

506. 529 U.S. 217, 229–30 (2000) (“Our public forum cases are instructive here by close analogy. This is true even though the student activities fund is not a public forum in the traditional sense of the term The standard of viewpoint neutrality found in the public forum cases provides the standard we find controlling.”). See also *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544 (2001) (“As this suit involves a subsidy, limited forum cases such as *Perry*, *Lamb’s Chapel* and *Rosenberger* may not be controlling in a strict sense, yet they do provide some instruction.”).

507. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 888–89 (1995) (Souter, J., dissenting).

508. “The University urges that, from a constitutional standpoint, funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not. . . . The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity.” *Rosenberger*, 515 U.S. at 835.

their own. By contrast, the uses proposed in the standard access cases do not alter or deplete the forum. After a union organizer hands out leaflets on the sidewalk, the sidewalk is still there for the next leafleter. After a writer posts a web page or sends an e-mail over the internet, the internet itself is not necessarily depleted. There will of course be marginal impacts on the forum from these activities, but in most cases the burden of maintenance is not materially different than if the expression had not occurred in the first place. If demand reaches an intolerable point, the government can impose some sort of rationing system under the time, place, or manner rubric,⁵⁰⁹ but such restrictions as a means of preserving the forum itself are rarely needed.

Spending money is different. By definition, expending a dollar from a fund for one kind of speech leaves one less dollar available for other speech. Access to a public forum does not diminish the forum, but access to a bank account (if the word "access" has any meaning in that setting) necessarily diminishes the account. For this reason, the student activity fund in *Rosenberger* was not a forum in a "metaphysical" sense any more than it was a forum in a "spatial" or "geographic" sense.⁵¹⁰ The Supreme Court has since recognized, in *Legal Services Corp. v. Velazquez*,⁵¹¹ that the government may not enforce speech-restrictive rules in a forum if doing so would "distort [the forum's] usual functioning."⁵¹² In *Velazquez*, the government attempted to require federally funded attorneys to refrain from certain kinds of legal arguments on behalf of their clients.⁵¹³ The Supreme Court concluded that this rule would distort the usual functioning of the attorney/client relationship and the litigation process.⁵¹⁴ In a similar way, spending money from a government fund both distorts the fund (by making it smaller) and distorts the speech that might otherwise have been subsidized from the fund (by subjecting it to a greater degree of rationing). Money, therefore, should not be viewed as a forum.

Treating the government's money like a forum can have serious repercussions for ordinary democratic principles. Governments develop their budgets through the political process, but *Southworth*, analogizing a budget to a forum, held that it would be unconstitutional for a student council to allocate a portion of its budget according to a vote of the students who paid the fees.

509. *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 326 (2002).

510. *Rosenberger*, 515 U.S. at 830.

511. *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001)

512. *Id.* at 543.

513. *Id.* at 536-37.

514. *Id.* at 537.

To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent.⁵¹⁵

The Court's remarkable conclusion is that a student council formulating a budget should not be compared to a legislature writing a budget. Instead, a student council should be treated like a police chief rousting speakers from a sidewalk or city park. Presumably, high schools create student councils to give students some experience with representative government. Under the expansion of the public forum doctrine in *Rosenberger* and *Southworth*, schools shouldn't bother. It is now unconstitutional for a student council to act like a legislature.

I agree with the Supreme Court when it said "the First Amendment certainly has application in the subsidy context."⁵¹⁶ If a state chose to subsidize political campaigns for Democrats but not for Republicans, the viewpoint bias would not vanish simply because it was expressed as the absence of a subsidy. However, I disagree that equal access principles must be applied to subsidies the way they are applied to public forums. Unfortunately, I have little to offer as a substitute except the ill-defined concept of unconstitutional conditions. The unconstitutional conditions doctrine is the subject of much theorizing and little consensus—unless one counts the consensus that the doctrine is inconsistent.⁵¹⁷ In its strongest form, the unconstitutional conditions doctrine says that government cannot condition the grant of a benefit on the recipient's relinquishment of a constitutional right.⁵¹⁸ Thus, a state cannot offer tax exemptions on the condition that the recipient forfeits the constitutional right to belong to subversive organizations.⁵¹⁹ Notwithstanding the doctrine, the government routinely offers conditional benefits that are entirely lawful. Prosecutors offer plea bargains in which the state dismisses some criminal charges if the defendant forfeits the right to a trial on

515. *Bd. of Regents v. Southworth* 529 U.S. 217, 235 (2000).

516. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998).

517. See, e.g., Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions In Three Dimensions*, 90 *GEO. L.J.* 1, 3 n.13 (2001) (citing Louis Michael Seidman, *Reflections on Context and the Constitution*, 73 *MINN. L. REV.* 73, 75 (1988), who also observes that unconstitutional conditions cases "display wildly inconsistent results"); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 *HARV. L. REV.* 1413, 1416 (1989) (stating that "the doctrine of unconstitutional conditions is riven with inconsistencies").

518. Berman, *supra* note 517, at 8.

519. *Speiser v. Randall*, 357 U.S. 513, 529 (1958).

other charges. The government offers tax exemptions to nonprofit organizations if they forfeit the constitutional right to lobby Congress or make campaign endorsements.⁵²⁰ “Despite early judicial assertions that such offers are, on the one hand, always permissible or, on the other, always unconstitutional, it is now universally recognized that such conditional offers are sometimes constitutionally permissible and sometimes not.”⁵²¹ This contrasts with the public forum doctrine, which unyieldingly requires access to government property with no strings attached. Resolving the unconstitutional conditions doctrine is beyond the scope of this article. I raise it here because the unconstitutional conditions doctrine—and not the public forum doctrine—seems to be where the right questions lie, even if we do not yet know the right answers.⁵²²

5. Government Speech as Public Forum

The Supreme Court has proposed one boundary to the *Rosenberger/Southworth* analogy between money and public forums: the government does not create a public forum when it spends money for its own speech.

It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.⁵²³

The government’s defense of its own policies will not be viewpoint neutral. Government is free to say things that directly contradict the

520. *Regan v. Taxation with Representation*, 461 U.S. 540, 550 (1983); *Cammarano v. U.S.*, 358 U.S. 498, 513 (1959).

521. *Berman*, *supra* note 517, at 3.

522. The Supreme Court will soon grapple with an unconstitutional conditions question in *Locke v. Davey*, 123 S.Ct. 2075 (2003), which asks whether a state may condition the grant of a tax-funded scholarship on an agreement not to use the money for a theology degree. Predictably, the case has been litigated to date under the public forum doctrine rather than the unconstitutional conditions doctrine. See generally *Davey*, 299 F.3d at 756 (calling the scholarship program a fiscal forum).

523. *Bd. of Regents v. Southworth* 529 U.S. 217, 229 (2000).

views of some citizens, even when they are deeply held or religiously inspired.⁵²⁴

This is not an inevitable conclusion: Some commentators have suggested that when the government speaks, it has a constitutional obligation to provide a forum-like right of reply.⁵²⁵ Treating government speech as if it were part of a forum could address the concerns that government speech may devolve into totalitarian propaganda or through its sheer magnitude drown out private voices. As the reader will have surmised, I agree that government speech should not be viewed as the creation of a public forum. "Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist."⁵²⁶ Of course, my agreement on this point should not suggest that I agree with the converse proposition that a public forum is created whenever the government spends money to facilitate the speech of others.

It also bears noting that the line between government speech and government subsidizing of third party speech is not crystal clear. In *Rust v. Sullivan*,⁵²⁷ the government paid non-governmental doctors to provide family planning services, but imposed a condition that the doctors refrain from discussing abortion.⁵²⁸ This restriction could have been stricken down as viewpoint discrimination in a program to subsidize non-governmental speech, as in *Rosenberger*,⁵²⁹ or as a distortion of the usual functioning of the doctor-patient relationship, similar to the attorney-client relationship in *Velazquez*.⁵³⁰ *Rust* did not

524. *Id.* at 229; *American Family Ass'n, Inc. v. City & County of San Francisco*, 277 F.3d 1114, 1125 (9th Cir. 2002) (city may purchase billboards criticizing public statements made by religious groups).

525. John E. Nowak, *Using the Press Clause to Limit Government Speech*, 30 ARIZ. L. REV. 1, 5 (1988); Linda L. Berger, *Government-Owned Media: The Government as Speaker and Censor*, 35 CASE W. RES. L. REV. 707, 737 (1985); *FCC v. League of Women Voters of California*, 468 U.S. 364, 408-19 (1984) (Stevens, J., concurring); S. Shiffrin, *Government Speech*, 27 U.C.L.A. L.REV. 565, 590-601 (1980). Not everyone agrees that copious government speech presents a serious constitutional problem. See *Block v. Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986) (Scalia, J.); Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373, 377 (1983).

526. *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (2000). *Downs* involved a school teacher who wished to add his own anti-homosexual material to the school's official bulletin boards encouraging tolerance and diversity. "When the school district speaks through bulletin boards that are not 'free speech zones,' but instead are vehicles for conveying a message from the school district, the school district may formulate that message without the constraint of viewpoint neutrality." *Id.*

527. 500 U.S. 173, 181 (1991)

528. *Rust v. Sullivan*, 500 U.S. 173, 178-80 (1991).

529. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 820 (1995).

530. *Velazquez*, 531 U.S. at 540

take either approach,⁵³¹ and it has since been interpreted as an instance of government control over government speech.⁵³² This is acceptable as a way to limit *Rust* to its facts, but it does not help distinguish government speech uttered through third parties from third-party speech subsidized by the government. To take another example, it would take only a few strokes of the pen for Congress to define grants to artists through the National Endowment for the Arts as instances of government speech instead of instances of government-subsidized speech.⁵³³

Even those who advocate for restrictions on government as speaker recognize that such limitations would be difficult or impossible to implement in an educational setting. "The creation of public school systems meant that some government officials or employees would be influencing our children's opinions regarding a wide variety of matters. Obviously, we have survived this history of government speech with no evidence of significant damage to our democratic system."⁵³⁴ There can be little educating without propagating at least some ideas and values held by the teachers. "If the Court were truly serious about imposing an absolute ban on viewpoint discrimination [in public schools], educational pedagogy as we know it would cease to exist."⁵³⁵ In particular, relatively unhampered government speech is important when it comes to establishing academic and curriculum standards. At a university,

students are inevitably required to support the expression of personally offensive viewpoints in ways that cannot be thought constitutionally objectionable unless one is prepared to deny the University its choice over what to teach. No one disputes that some fraction of students' tuition payments may be used for course offerings that are ideologically offensive to some students, and for paying professors who say things in the university forum that are radically at odds with the politics of particular students.⁵³⁶

A school's ability to control its own speech was an important element in *Fleming*.⁵³⁷ When Columbine High School reopened after

531. *Rust*, 500 U.S. at 192–94, 202.

532. See, e.g., *Rosenberger*, 515 U.S. at 820; *Southworth*, 529 U.S. at 229; *Velazquez*, 531 U.S. at 540.

533. See generally *NEA v. Finley*, 524 U.S. 569, 583 (1998).

534. Nowak, *supra* note 525, at 5.

535. Gewirtzman, *supra* note 118, at 1148.

536. Bd. of Regents v. *Southworth* 529 U.S. 217, 242–43 (2000) (Souter, J., concurring); see also *Rosenberger*, 515 U.S. at 833–34 (Universities have discretion to structure curriculum); *Widmar v. Vincent*, 454 U.S. 263, 276–277 (1981) (same).

537. *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 933 (10th Cir. 2002).

the 1999 shootings, the school began a project to decorate the hallways with student-painted tiles.⁵³⁸ The school imposed some guidelines on the content of the tiles: they should be abstract, avoid references to the shootings, and include no religious symbols.⁵³⁹ Surveying the major Supreme Court cases in the area of student speech, the Tenth Circuit observed a continuum that ranged from the independent speech of students to school-sponsored speech of students to the school's own speech.⁵⁴⁰ Student speech was protected from school regulation under *Tinker*.⁵⁴¹ School-sponsored speech was governed by the "legitimate pedagogical interest" standard from *Hazelwood*.⁵⁴² The school's own speech is subject to its plenary control, as in *Downs*. The art tile project represented school-sponsored speech because permanent physical attachments to the building are reasonably perceived as bearing the imprimatur of the school.⁵⁴³ There were legitimate pedagogical purposes behind the guidelines: avoiding constant reminders of the tragedy and avoiding contentious religious disagreements of the sort that have since plagued the city park in Casper and the tiled plaza at the Redmond library.⁵⁴⁴ A similar continuum exists from school speech to student speech with respect to extracurricular clubs. Some clubs represent the school's speech (National Honor Society), others are school-sponsored (chamber orchestra), and still others are the independent creations of the students (Bible Club). The Equal Access Act does not contemplate this simple continuum, but it should.

C. Public Forum Doctrine as Applied in *Prince*

These excursions through the stretched public forum doctrine further reveal the errors of the majority in *Prince*. Like the EAA, the public forum doctrine is supposed to apply to things that at least resemble forums. Which of the benefits the Court awarded to the World Changers match that description?

Access to school premises for meetings during noninstructional time obviously qualifies as access to a forum. There is a clear demarcation between a classroom and the speakers who assemble there. The room is not depleted or distorted by the presence of an

538. *Id.* at 921.

539. *Id.* at 922.

540. *Id.* at 923.

541. *Id.*

542. *Id.* at 926 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

543. *Id.* at 923.

544. See discussion of the Casper and Redmond cases *supra* text accompanying notes 462–

extracurricular meeting within it. The same goes for announcements about the time and place of meetings over the public address system, Channel One, and bulletin boards. The benefits that entail expenditure of money—whether ASB funds or school district funds—should not have been viewed as a forum. Finally, some of the demanded benefits encroach upon the school's own speech: meetings and credit for meetings during student/staff time, appearance in the editorial portion of the yearbook, and affiliation with the ASB.⁵⁴⁵ The latter categories should not be governed by the all-or-nothing standards of the public forum, but by the legitimate pedagogical interest standard that *Hazelwood* applies to school-sponsored speech.⁵⁴⁶

IV. PRACTICAL SUGGESTIONS FOR APPLYING OR REVISING THE EQUAL ACCESS ACT AFTER PRINCE

A. *Suggestions for Schools: Restructuring the Forum*

Now that the Ninth Circuit has decided that every ASB in Washington is a limited open forum subject to the EAA, schools will need to operate their ASBs differently. This is in keeping with Justice Marshall's call for schools to "change their relationship to their fora so as to disassociate themselves effectively from religious clubs' speech."⁵⁴⁷ The following concepts should guide Washington school districts in making the necessary changes to the structure of ASBs.

Equal Access Should Not Depend on ASB Affiliation. This is the primary result of *Prince*. A school's rules regarding access to premises for student clubs may not differ based on ASB affiliation. To accomplish this goal of equal treatment, a school could require all student groups to become affiliated with the ASB. It could also leave ASB affiliation rules as they are, but ensure that non-ASB clubs enjoy benefits identical to the ASB clubs.

All Clubs Could Become Non-ASB Clubs. Another alternative would be to structure a school's ASB so that it did not have any affiliated clubs. The ASB would conduct its own operations, such as budgeting for and planning social events or school betterment activities. Clubs devoted to other subjects would be non-ASB, performing their own

545. "'University Recognition' is speech." Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ., 536 A.2d 1, 25 (D.C. 1987).

546. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

547. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 263 (1990) (Marshall, J., concurring).

fundraising. Of course, under the EAA, all of the non-ASB clubs would need to be treated equally.

Equal Access Should Not Be Subject to Student Vote. The rights Congress created though the EAA cannot be denied by a local school or its agents—which would include the governing body of the school’s ASB. Currently, many Washington schools allow ASB members to vote on whether to affiliate independent student clubs with the ASB. Sometimes a two-thirds vote is required. After *Prince* and *Southworth*, a school cannot base equal access decisions on the results of a student vote, even if the ASB governing body continues to vote on which student groups are ASB-affiliated. One method to avoid putting the rights of student clubs to a popular vote is to establish neutral criteria for ASB membership. A club that met those criteria could become affiliated with the ASB, with no voting required. Another method is for schools to make benefits equally available without regard to ASB affiliation.

ASB-Affiliated Clubs Should Not Have ASB Voting Privileges. A school that allows ASB-affiliated clubs to have voting representatives on the ASB governing body does not follow the one-person, one-vote model of representative democracy. Nothing in the constitution or laws requires ASB governing bodies to be truly representative, but schools may find that it would be a worthwhile educational experience. If schools structure their ASB governing bodies as student congresses, without voting privileges for affiliated clubs, schools would also avoid the potential Establishment Clause problems that arise when religious clubs in their organizational capacity have voting power over public moneys. If schools desire, they can create a system where ASB-affiliated clubs could send non-voting delegates to the student council meetings, much as the District of Columbia sends non-voting delegates to the U.S. Congress.

Schools May Still Create Curriculum Related Clubs. Although *Prince* forbids differential benefits among noncurriculum related clubs, it does not affect a school’s ability to provide different benefits to curriculum-related clubs. A school retains the ability to sponsor student clubs and provide them with benefits not offered equally to other groups, but only if the sponsored club relates to the curriculum as defined in *Mergens*. This may require the school to tweak its classroom instruction. For example, a foreign language class could offer extra credit for participation in a related language studies club.

A math class could add a section on the rules, geometry, and probabilities of chess, so that the chess club would relate to the curriculum.

Schools Should Abandon the Word "Recognition." In ordinary usage, "recognition" often connotes endorsement or approval.⁵⁴⁸ As used in equal access cases, it is a term of art for a ministerial process (akin to registration) through which groups are given access to limited open forums.⁵⁴⁹ The difference in meaning can become a needless point of contention, causing schools to resist granting that type of recognition necessary for access because they wish to avoid the connotation of endorsement. Abandoning the term "recognition" will help. Schools could instead use the word "registered" to signify the student groups that are eligible to use the school's facilities. Although less elegant, a more precise option would be to use the terms found in the EAA. For example, neither the chamber orchestra nor the World Changers are "recognized" student groups; the chamber orchestra is a curriculum related student group and the World Changers are a noncurriculum related student group.

B. Suggestions for Congress: Restructuring the Act

The suggestions listed above should help schools avoid litigation under the existing statute as interpreted by *Prince*. They do not alter the reality that the EAA contemplates only two types of student groups, curriculum related and noncurriculum related. Congress would be well advised to replace this binary approach with one that recognizes a school's legitimate interest in sponsoring and supporting clubs regardless of their relationship to the curriculum.

1. A Modest Proposal: the Intelligible Access Act

In Appendix B, I propose revisions to the EAA to accomplish this goal. Since my revisions also aim to make the act more comprehensible, I call it the "Intelligible Access Act." This section explains the choices behind my amendments.

The main change is a statutory reversal of *Prince*, clarifying that the Act guarantees only that form of access debated by Congress in 1984: ability for noncurriculum related groups to hold meetings on school premises during noninstructional time. I considered

548. The *American Heritage Dictionary* defines "recognition" in the following manner: "3. [a]n acceptance as true or valid, as of a claim . . . 4. [a]ttention or favorable notice." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1460 (4th ed., 2000).

549. See *supra* text accompanying notes 314–32.

eliminating the term “equal,” to make more explicit that the Act’s purpose is to ensure a minimum level of access to the building, rather than a free-floating demand of equal benefits. The proposed Act retains the phrase “equal access” in deference to the emotional attachment that has formed around the term, but a definition is provided to explain its scope. That definition codifies the decisions recognizing a right to publicize on-campus meetings through school-controlled media.

Other changes are aimed at enhancing clarity and eliminating redundancy. Concepts that have caused unnecessary confusion have been removed, including “limited open forum,” “student-initiated,” “fair opportunity,” and “discriminate.” The fair opportunity criteria of § 4071(c) and exemption criteria of § 4071(d) are revamped, so that like concepts are grouped with like. Restrictions that apply solely to religious groups for Establishment Clause purposes are plainly labeled as such. The circular definitions have been eliminated, including the definition of “noninstructional time” that prompted difficulties in *Ceniceros*, *Prince*, and *Donovan*.⁵⁵⁰

I debated removing the ban on “nonschool persons” from the proposed draft because it limits a club’s ability to choose volunteer adult mentors. It has also been largely ignored in practice. Clubs affiliated with national youth organizations like the Scouts or 4-H typically do have nonschool persons in regular attendance, notwithstanding the statute. Schools can easily evade the ban on nonschool persons by designating volunteers as school agents for purposes of club supervision. To be sure, schools do not need to open their doors to any stranger who desires to enter after hours. There are legitimate safety and voluntariness concerns that could lead a school to place limits on the involvement of nonschool persons. Because Congress need not mandate those decisions, a ban on nonschool persons is offered as an option in the revised Act, not a requirement.

To ensure that the Act will be enforceable as a “federal right” through 42 U.S.C. § 1983, the revision makes clear that the Act creates a “right” of equal access. If desired, Congress could include an explicit private right of action.

The EAA in its present form contains a conscience clause allowing teachers to refuse to attend any student meeting that offends them, even if the attendance is in a purely custodial capacity.⁵⁵¹

550. Leaving “noninstructional time” undefined will likely be viewed as a Congressional ratification of the existing case law. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 695–98 (1979). If Congress wishes to reverse these cases, it could clarify that the equal access obligation applies only before the first class of the morning and after the last class of the afternoon.

551. 20 U.S.C. § 4071(d)(4).

Because this clause was most likely intended to apply only to meetings of religious groups, my revision makes this explicit. *Mergens* noted the Catch-22 that arises when school rules simultaneously require a student club to have a faculty sponsor as a condition to access and prevent any religious club from having a faculty sponsor.⁵⁵² Conceivably, a highly controversial student group might have views that offend every member of a school's faculty, allowing all of them to opt out of attendance. In a school that requires faculty sponsors, the conscience clause acts as a faculty-controlled heckler's veto. Although not spelled out in so many words, *Mergens* resolved this tension by holding that a school cannot withhold equal access based on the lack of a faculty sponsor.⁵⁵³ If the conscience clause is retained in a revised Act, it will mean that student groups unpopular with the faculty must be allowed to meet unsupervised. A better option may be to delete the conscience clause entirely, since it creates a statutory right for teachers not found in the Constitution.⁵⁵⁴

A major question for any revisions to the EAA would be whether to maintain the concept of "noncurriculum related" student clubs. My main goal is to provide schools with meaningful tools to sponsor and support groups they endorse and to disclaim involvement with groups they do not endorse. This concept would be better expressed through an Act that divided groups along lines of sponsorship rather than relationship to the curriculum. If Congress had not invented the term, schools and students would have no interest in classifying clubs the way the Act does. The result is litigation that requires judges to sift evidence and pronounce a legal conclusion that no one cares about (which clubs are curriculum related) as a precursor to the ultimate decision. Placing sponsorship at the center of the legal inquiry would better comport with the parties' real interests. However, an Act that hinged on the inherently discretionary sponsorship decision would frustrate Congress's purpose by allowing schools to deny sponsorship, and hence access, to groups it does not favor.⁵⁵⁵ The right of unpopular or controversial groups to meet on school premises cannot rest solely on sponsorship—but sponsorship should nonetheless be allowed.

552. *Mergens*, 496 U.S. at 253.

553. *Id.*

554. Teachers have no constitutional right to refrain from teaching the district's curriculum and would have no constitutional right to refuse assignment as a nonparticipating monitor at a student club meeting. See generally *Millikan v. Bd. of Dir's.*, 93 Wash.2d 522, 611 P.2d 414 (1980) (teachers cannot require school to allow them to set curriculum); *Pelosa v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) (teacher has no constitutional right to challenge school's evolution curriculum in the classroom).

555. *Mergens*, 496 U.S. at 236.

The simplest solution is for Congress to dispense with the fiction that the presence of noncurriculum related clubs creates a limited open forum. A revised EAA could simply declare that any secondary school receiving federal funding must give all student groups access to the premises for meetings, whether or not other clubs also meet there. For two reasons, I chose to maintain the concept of noncurriculum related clubs as a trigger for application of the Act. First, the term has been given a strict but workable definition in *Mergens*. Schools and courts for the most part understand how to apply it, even though it often feels silly to do so. Second, it guarantees that at least one noncurriculum related club will exist on a campus before other groups can demand a statutory right to meet. This guarantees that a school with a religious club will host at least one other club as an alternative, lessening the appearance of selective endorsement.⁵⁵⁶ Another possible reason exists to retain the noncurriculum related club as a trigger, but I do not give it much weight. The trigger offers the theoretical possibility that a school could close its premises to all noncurriculum related clubs, thus avoiding the obligation to provide access to unapproved groups. In practice, no court has ever found that a school lacked noncurriculum related groups, so the forum closure option may rightly be viewed as a false promise. In all likelihood, the schools most able to close the premises to noncurriculum related groups would be wealthier schools that can afford to link the desired number of student clubs to offerings in the curriculum. Impoverished schools would be in the worst position to escape the Act, because they have greater need to supplement their educational program with noncurriculum related clubs, and because they are more likely to be situated in areas where the local school is used as a community center.

The proposed Act is silent regarding school sponsorship of clubs. However, unlike the current act as interpreted by *Prince*, the revision allows room for meaningful sponsorship and non-sponsorship. The revision contemplates four different categories of student clubs:

Sponsored and Curriculum Related. Depending on the curricular offerings at a school, this category would likely encompass language clubs, drama, band, and sports teams. The school would not be restricted in its allocation of benefits among these clubs.

556. Admittedly, the alternative to a Protestant club might be another religious club rather than a secular club. See *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 284–86 (4th Cir. 1998) (first club to take advantage of a forum might be religious). In practice, most communities would not have alternative Jewish, Muslim, or Buddhist student groups, but instead would have competing Christian clubs. Cf. *Davis*, *supra* note 154, at 233–39.

Nonsponsored and Curriculum Related. Most schools would willingly sponsor clubs that are curriculum-related. However, they might not sponsor them where the school lacks resources to support the club, or where the club's viewpoint is not shared by the school. For example, some Gay/Straight clubs have attempted to convince the school that they should be sponsored because they relate to material covered in health, sex education, or social studies classes. However, the school's control over its own speech should allow the sponsorship decision to be made by the school and not dictated by a student group. Otherwise, a student Ku Klux Klan group could demand school sponsorship whenever an American history class addresses the nation's racial history and the Klan's ugly role in it. These nonsponsored but curriculum related groups would be guaranteed access to the premises for meetings during noninstructional time and the right to publicize the time and place of the meetings.

Sponsored and Noncurriculum Related. Depending on the school's curriculum, this category might include Students Against Drunk Driving, the chess club, the debate team, or others. The school would be required by the amended statute to allow these groups to hold and publicize meetings on school premises, although in practice this would take care of itself because a school sponsoring the group would not want to deny such benefits. In addition, the school would be free to provide whatever additional benefits it felt were appropriate in light of the educational value of the club.

Nonsponsored and Noncurriculum Related. This category would include the clubs that have been forced in the past to resort to litigation: religious clubs and controversial clubs like Gay/Straight Alliances. They would be entitled to hold and publicize their meetings on the premises during noninstructional time to the same extent as the sponsored and noncurriculum related clubs.

2. A Less Modest Proposal: Repeal

In light of developments in First Amendment interpretation, another option would accomplish nearly all of the goals of my proposed amendments: abolishing the Act altogether. The Supreme Court's jurisprudence has interpreted the First Amendment as a guarantee of access to public school buildings for after-hours meetings, at least in those circumstances where the building is opened to a variety of unrelated groups. The fear of Congress in 1984 that *Widmar* would not be extended to younger students has since been

proven wrong. In light of these changes, the only difference between the EAA and the Constitution is the EAA's lower threshold for invoking the equal access obligation (one group as opposed to many). If *Prince* remains the law, there is no perceivable difference between the EAA and the Constitution, since *Prince* finds a constitutional forum whenever there is a statutory forum. Congress cannot override a court's constitutional interpretations, so if *Prince* is not overturned, Congress loses nothing by repealing the Act.

Repeal addresses what Senator Metzenbaum considered to be the "fundamental flaw" of the Act: "it seeks to provide a sweeping legislative solution to a problem which has been successfully handled by the courts on a case-by-case basis."⁵⁵⁷ As the courts move toward a consensus, the Act increasingly becomes a solution in search of a problem. As seen in *Prince*, the Act's current function is to facilitate litigation by groups that already enjoy access to the premises for meetings, to blur valid distinctions between sponsored and nonsponsored groups, and to limit schools' fiscal and educational options. None of these are worthy goals.

When all is said and done, I favor amendment more than repeal, assuming the constitutional errors of *Prince* are eventually rectified. When that happens, the EAA will once again do something different than the First Amendment, namely impose an obligation to provide minimum access in a significant number of schools that would not have such an obligation under the Constitution. The need for legislatively imposed minimum access may be fading, but it has not vanished. Schools continue to exclude controversial groups, although the gay rights groups are now a more common source of controversy than religious groups. Other student group controversies may arise, as with schools that forbid meetings of ethnic minority groups on the grounds that they are gang-related. In a revised form, an equal access act can serve a valuable function, so long as it provides minimum access to school premises for meetings and avoids intrusion on schools' educational choices.

557. S. REP. NO. 98-377 at 46 (1984).

APPENDIX A: THE EQUAL ACCESS ACT

20 U.S.C. § 4071. - Denial of Equal Access Prohibited**(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited**

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) "Limited open forum" defined

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) Fair opportunity criteria

Schools 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) Construction of subchapter with respect to certain rights

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) Federal financial assistance to schools unaffected

Notwithstanding 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) Authority of schools with respect to order, discipline, well-being, and attendance concerns

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.

20 U.S.C. § 4072. - Definitions

As used in this subchapter -

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

APPENDIX B: THE INTELLIGIBLE ACCESS ACT (PROPOSED)

20 U.S.C. § 4071. - Denial of Equal Access Prohibited**(a) Denial of access on basis of religious, political, philosophical, or other speech content prohibited**

It shall be unlawful for any public secondary school which receives Federal financial assistance and which permits one or more noncurriculum related student groups to hold recurring meetings on school premises during noninstructional time to deny equal access to any other noncurriculum related student group on the basis of (1) the religious, political, philosophical, or other content of the speech at the group's meetings, or (2) the numerical size of the group.

(b) Equal access defined

"Equal access" means the right of a noncurriculum related student group to hold recurring meetings on school premises during noninstructional time and to publicize the time and place of those meetings through school-sponsored media, each to the same extent as the school grants to any other noncurriculum related student group.

(c) Religious neutrality mandated

When student groups meet on school premises to engage in prayer or religious activities, a school subject to this section must ensure that:

(1) the school and its agents do not initiate, sponsor, promote, lead, or participate in the meeting;

(2) any agent of the school present at such meeting acts solely in a custodial capacity;

(3) no school agent is compelled to attend a school meeting if the content of the speech at the meeting is contrary to his or her beliefs;

(4) student attendance at the meeting is voluntary;

(5) the school does not influence the form or content of any prayer or other religious activity; and

(6) the school does not expend public funds beyond the incidental cost of providing the space for student-initiated meetings.

(d) Authority of schools with respect to order, well-being, and safety

Nothing in this section shall be construed to limit the authority of the school:

(1) to maintain order and discipline on school premises;

(2) to protect the well-being of students and faculty;

(3) to assure that attendance of students at meetings is voluntary;

(4) to ensure that student meetings do not materially and substantially interfere with the orderly conduct of educational activities within the school or violate the rights of others; and

(5) to prevent nonschool persons from controlling or regularly attending meetings of student groups.

(e) Federal financial assistance to schools unaffected

Notwithstanding 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.