

Current Topics in Law and Policy

Using Federal Funds to Dictate Local Policies: Student Religious Meetings Under the Equal Access Act

The heated debate over issues of separation of church and state presents few more controversial questions than the one addressed in the recently passed Equal Access Act¹—that of the proper role of religion in the public schools. The Act addresses a narrow slice of this broad issue, the question whether student religious groups should be allowed to meet on public school premises. Into a deliberation already complicated by competing local interests and state and federal legal requirements, the Act injects yet another element—a federal directive to local school districts to allow such groups to meet.

In succumbing to political pressures to pass the Equal Access Act, Congress has failed adequately to consider important principles of federalism. It has used an attenuated connection to federal funding to induce states to accept the congressional vision of the appropriate student meetings policy for local school districts. The result is an act which is seriously flawed, and potentially unenforceable. Significant enforcement problems stem from the fact that the Act forecloses the most appropriate remedy for its violation, that of a denial of funds, while providing no alternative enforcement mechanisms. Even more seriously, the Act creates an unanticipated conflict with many state constitutional provisions requiring a stricter separation of church and state than is imposed by the federal establishment clause. This conflict will leave many school authorities with the limited choices of forgoing federal funds or barring all student meetings, a result that, ironically, would diminish rather than enhance the quality of state public education.

This is not merely a case of poor drafting. Congress is not well-

1. Pub. L. No. 98-377, Title VIII, 98 Stat. 1302 (1984) [hereinafter cited as Equal Access Act and by section number].

sited to address such inherently local concerns as the regulation of public schools. Federal legislation in this sensitive area, which is necessarily based on a tenuous connection to federal funding, cannot produce the uniform national practice sought. A close examination of the Act and its failings reveals why the question of student religious meetings in public high schools is best left to the care of the states and the judiciary. Such an examination also reveals two ways in which courts can treat the Act in order to ameliorate its harsh and unforeseen consequences: utilizing the Act's "safety valves" to accommodate state constitutional provisions or treating the Act as merely a statement of national policy.

I. *The Equal Access Act*

A. *The Political Background*

The Equal Access Act represents a marked departure from the general congressional policy of non-interference with local school administration.² Congress' role in this area, even in its most active posture, has been limited largely to providing financial assistance to states and localities in those areas in which Congress has identified particularly acute problems,³ such as the education of handicapped children and provision of vocational education.⁴ With the advent of the Reagan Administration's "New Federalism" even this limited role has been cut back. Drastic educational funding cuts have been proposed, and local discretion in administering existing funding programs has been emphasized.⁵ In sharp contrast, the Equal Access Act attempts to dictate to school authorities basic policy choices

2. See, e.g., 20 U.S.C. § 1232a (1982) (Federal Non-Interference With Curriculum Statute); 20 U.S.C. § 3403(b) (1982) (establishing the Department of Education subject to Federal Non-Interference With Curriculum Statute).

3. See, e.g., 130 CONG. REC. H3877 (daily ed. May 15, 1984) (remarks of Rep. Porter) ("The genius of our system of public education has been local control . . . Washington's only role has been . . . support for special categorical needs."); Griffith, *The U.S. Department of Education and the Issue of Control of Education*, 12 URB. LAW. 500, 501 (1980) (discussing limited federal role in education).

4. See Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1400 *et seq.* (1982); Vocational Education Amendments of 1968, 20 U.S.C. § 2301 *et seq.*; see also Elementary and Secondary Education Act of 1965, 20 U.S.C. § 241a *et seq.* (providing funds for teaching educationally deprived children); Education Amendments of 1978, 20 U.S.C. § 2701 *et seq.* (providing funds for textbooks and school supplies); Educational Agencies Affected by Federal Activities Act of 1950, 20 U.S.C. § 236 *et seq.* (providing federal assistance for school districts affected by federal activities and for the provision of education to native American children).

5. See Birman & Ginsburg, *The Federal Role in Elementary and Secondary Education: New Directions and Continuing Concerns*, 14 URB. LAW. 471 (1982) (analyzing education proposals of Reagan Administration).

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about a fundamentally local issue—access by student groups to school premises.

This surprising departure from both the pattern of most federal educational statutes and the general approach of Reagan Administration policies toward education is best explained by reference to the political controversy that prompted the Act's passage. Its enactment closely followed the defeat of a bill proposing a constitutional amendment that would have reinstated prayer in the public schools,⁶ thereby reversing the Supreme Court's decision in *Engel v. Vitale*.⁷ The connection between school prayer and the equal access questions addressed in the Act was denied by some of the bill's proponents.⁸ However, others labeled the Act a "backdoor" attempt to get prayer back in the schools;⁹ in their view, equal access represents only the first step toward a broad expansion of the religious activity permissible in public schools. There can be no doubt that many of the bill's supporters saw a close link between the two measures.¹⁰

That the Act reflects political pressures,¹¹ rather than a well

6. S.J. Res. 73, 98th Cong., 1st Sess. (1983) which would have provided for a constitutional amendment incorporating a right to prayer in public schools, was defeated on March 20, 1984, 11 votes short of the requisite two-thirds majority. See *The School Prayer Controversy*, 63 CONG. DIGEST 135, 137 (1984). Recently, Congress has also considered a series of bills to strip the federal courts of jurisdiction over school prayer cases and a proposed bill to permit silent prayer in the schools. See *id.* at 135-37.

7. 370 U.S. 421 (1962) (state laws requiring the recitation of a state-composed prayer in public classrooms violates establishment clause); see also *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (invalidating mandatory Bible reading and recitation of the Lord's Prayer); *Karen B. v. Treen*, 455 U.S. 913 (1982), *aff'g* 653 F.2d 897, 900-02 (5th Cir. 1981) (state-required school prayer at start of school day led by teacher or appointed student violates establishment clause). The Court had also previously held that school-sponsored religious classes taught on school premises during schooltime by private church groups violated the establishment clause. *McCollom v. Bd. of Educ.*, 333 U.S. 203 (1948). See generally S. REP. No. 357, 98th Cong., 2d Sess. 28 (1984).

8. See 130 CONG. REC. S8337 (daily ed. June 27, 1984) (remarks of Sen. Hatfield) (the bill has "nothing to do with school prayer"); *id.* at S8357 (remarks of Sen. Durenberger) (equal access is "clearly distinguishable from the issue we recently debated as voluntary prayer in the classroom").

9. *Id.* at S8352 (remarks of Sen. Metzenbaum); see also *id.* at H7733 (daily ed. July 25, 1984) (remarks of Rep. Ackerman) (referring to the equal access bill as "the son of school prayer").

10. See, e.g., *id.* at S8366 (daily ed. June 27, 1984) (remarks of Sen. Grassley); *id.* at H7725 (daily ed. July 25, 1984) (remarks of Rep. Schumer) (quoting the Rev. Jerry Falwell's comment that "[w]e knew we couldn't win on school prayer but equal access gets us what we wanted all along"). In general, there is little question that equal access is related to school prayer, since student-initiated prayer is among the activities which are permissible at the meetings sanctioned under the Act.

11. The hearings on equal access explicitly refer to the tension between public opinion and federal judicial decisions barring student religious meetings in public schools. See, e.g., *Equal Access: A First Amendment Question: Hearings on S. 815 and S. 1059 Before the*

thought-out legislative initiative, is also revealed by its hasty passage a scant three months before election day.¹² The final version of the Act was introduced late in the Senate floor debates as an amendment to the original bill.¹³ It was hurried through Congress without public hearings or a committee report,¹⁴ and with strikingly few hours of floor debate.¹⁵ It is hardly surprising, under these circumstances, that the Act's provisions remain ambiguous, even to its sponsors,¹⁶ and that it promises unintended consequences.

B. *The Act as an Extension of Supreme Court Doctrine*

The Act is an explicit attempt to extend to public secondary schools the Supreme Court's holding in *Widmar v. Vincent*.¹⁷ In *Widmar*, the Court held that when state colleges and universities offer a "public forum" generally open to student groups, they may not

Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 238 (1983) (testimony of Ted Pantaleo, The Freedom Council) ("The vast majority would welcome the return of voluntary, student-initiated prayer in our State and public schools again.").

12. The bill was passed by the Senate on June 27, 1984, *see* 130 CONG. REC. S8370 (daily ed. June 27, 1984), and by the House on July 25, 1984, *see id.* at H7740-41 (daily ed. July 25, 1984), and was signed into law by the President on August 11, 1984.

13. *See id.* at S8338 (daily ed. June 27, 1984). The version of the Act originally introduced on the Senate floor, S. 1059, had been considered in both hearings, *see supra* note 11, and a committee report, *see* S. REP. NO. 357, *supra* note 7. However, S. 1059 was significantly different from Senator Hatfield's version, which eventually passed. Other earlier versions had also received more extensive consideration. *See* H.R. REP. NO. 710, 98th Cong., 2d Sess. (1984) (report on H.R. 5345); *Hearings on the Equal Access Act: Hearings on H.R. 2732 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. (1983); *Religious Speech Protection Act: Hearing on H.R. 4996 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 2d Sess. (1984).

14. *See* 130 CONG. REC. H7727-28 (daily ed. July 25, 1984) (remarks of Rep. Edwards) ("The Senate had no hearings, none whatsoever on the equal access amendment [N]o committee has had any opportunity to have hearings or any kind of study on this bill written on the floor of [the Senate], and yet there are important constitutional questions involved."); *id.* at H7736 (remarks of Rep. Fish) ("Have the various House committees with jurisdiction over this bill held hearings on this language? No.").

15. The Senate's consideration of the final version of the Act was limited to forty-odd pages in the Congressional Record, while it was considered in the House under a suspension of the rules, whereby debate was limited to an hour and no amendments were allowed. There was significant objection to this procedure. *See, e.g., id.* at H7728 (daily ed. July 25, 1984) (remarks of Rep. Edward) ("We need until [August 6th] to study the Senate bill, to hold public hearings, to learn more about the grave constitutional implications of this bill [T]his is not a responsible course of action by this body . . ."); *id.* at H7733 (remarks of Rep. Oakar) ("I take great offense at the consideration of this legislation under suspension thereby denying the Members of this body the opportunity of amending the language of the bill."); *id.* at H7736 (remarks of Rep. Schumer) ("Are we abdicating our responsibilities as legislators by rushing through such an important piece of legislation without thought to its consequences? Yes.").

16. *See id.* at S8354-55 (daily ed. June 27, 1984) (exchange between Sen. Chiles and Sen. Hatfield); *see also id.* at H7736 (daily ed. July 25, 1984) (remarks of Rep. Fish).

17. 454 U.S. 263 (1981).

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discriminate against certain groups based on the religious content of their speech.¹⁸ Treating the issue as one of free speech, the Court applied traditional first amendment analysis, requiring that such content-based exclusion of religious speech be justified by a “compelling state interest.” The state’s interest in complying with the establishment clause provisions of federal and state constitutions, the Court held, was not such a “compelling interest” for two reasons: First, the Court held that allowing such meetings on a state university campus would not violate the federal establishment clause; second, the Court held that the state’s interest in maintaining a stricter separation of church and state than federally required, based on the state constitution, could not constitute such a “compelling state interest” in the context presented.¹⁹

However, the Court was careful to confine its “narrow”²⁰ holding to the level of public higher education, stating that “[u]niversity students are, of course, young adults . . . less impressionable than younger students.”²¹ This distinction is an important one, since constitutional analysis in this area often turns on whether the challenged activity gives the appearance of government approval of religion. Thus, *Widmar* left open the question of whether allowing student religious groups to meet in public high schools would violate the federal establishment clause.²² At the time the Act was passed, the Court had refused to hear several cases that presented this specific issue, despite disagreements among the lower federal courts.²³ The Equal Access Act thus reflects an explicit attempt by Congress to resolve this conflict in favor of allowing religious stu-

18. *Id.* at 277.

19. *Id.* at 274-77.

20. *Id.* at 276.

21. *Id.* at 277.

22. *Id.* at 274 n.14. The Court also declined to reach the question of whether students have a right to hold religious meetings in the free exercise of their religion. *Id.* at 273 n.14.

23. See *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); *Brandon v. Bd. of Educ. of the Guilderland Cent. School Dist.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). In the *Brandon* case, decided before *Widmar*, the Court had held that school districts must prohibit extracurricular student-initiated religious discussions. A number of courts, including the *Lubbock* court, had followed *Brandon* in cases involving public secondary schools, some even after *Widmar* was decided. See *Nartowicz v. Clayton County School Dist.*, 83 Civ. 1A, Slip Op. (M.D. Ga. 1983), *aff'd*, 736 F.2d 646 (11th Cir. 1984); *Hunt v. Bd. of Educ. of County of Kanawha*, 321 F. Supp. 1263 (S.D. W. Va. 1971); *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977); *Trietly v. Bd. of Educ. of the City of Buffalo*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (4th Dept. 1978). Other courts, however, had held such meetings to be permissible. See, e.g., *Country Hills Christian Church v. Unified School Dist.*, No. 82-2345, Slip Op. (D. Kan. March 29, 1983).

dent meetings in secondary schools,²⁴ perhaps nudging the Supreme Court toward a faster, if not also a similar, decision on the issue. In fact, the Court has since granted certiorari in a case applying *Widmar* to a public high school.²⁵

C. *The Act's Provisions*

It is important to note that for authority to legislate the Act Congress did not rely upon the first amendment, but rather upon the congressional spending power.²⁶ In its preamble, the Act declares that "[i]t shall be unlawful for any public secondary school which receives Federal financial assistance" to engage in the proscribed practices.²⁷ Thus, the Act applies to public schools only indirectly through the lever provided by the receipt of federal funds.²⁸ At the same time, however, it specifies that funds are not to be denied as a sanction for violation of the Act's terms.²⁹

In other respects, the Act is very closely modeled on the *Widmar* decision's language. It is triggered only where a federally assisted public secondary school offers a "limited open forum."³⁰ The term "limited open forum," however, is broadly defined as allowing "one or more noncurriculum related student groups to meet on school premises during noninstructional time."³¹ While the term "noncur-

24. The legislative history contains repeated references to the congressional intention to clear up the "confusion" created for school administrators by the disagreements among the lower federal courts. See, e.g., H.R. REP. NO. 710, *supra* note 13, at 3; S. REP. NO. 357, *supra* note 7, at 6.

25. *Bender v. Williamsport Area School Dist.*, 563 F. Supp 697 (M.D. Pa. 1983), *rev'd*, 741 F.2d 538 (3d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3586-87 (U.S. Feb. 19, 1985) (No. 84-773).

26. See U.S. CONST. art. I, § 8, cl. 1 ("Congress shall have the Power To lay and collect Taxes . . . to . . . provide for the . . . General Welfare of the United States.").

27. Equal Access Act § 802(a).

28. This is a substantial lever. It is estimated that "[o]nly a handful of the approximately 16,000 public school districts in the United States do not receive federal financial assistance of some kind," Stern, *Public Education*, 10 URB. LAW. 497, 497 (1978), and it was clearly suggested in the legislative history that Congress assumed that tying the bill to federal funds would allow it to reach most public secondary schools. See 130 CONG. REC. H3857 (daily ed. May 15, 1984) (remarks of Rep. Edwards) (noting that the similar predecessor bill would have injected "the imperial power of the Federal Government . . . into every one of the 15,517 school districts in the United States").

29. The Act provides that "nothing in this title shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school." Equal Access Act § 802(e), see also *infra* text accompanying notes 77-78 (discussing consequences of refusal to allow withholding of federal funding).

30. Equal Access Act § 802(a). This term is modeled on the "limited public forum" which triggers constitutional scrutiny under free speech doctrine. See *Widmar*, 454 U.S. at 273.

31. Equal Access Act § 802(b). The Act's application to all cases where a school allows a single group to meet seems significantly broader than the definition of an "open forum" embraced by the Supreme Court. See *Widmar*, 454 U.S. at 274 (noting that the

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riculum related” is not defined in the legislation, the legislative history suggests that Congress contemplated that it would encompass a broad range of activities, including chess clubs, student debate societies, and political organizations.³²

Wherever such student activities are permitted—which surely includes most school districts in the country—the Act’s main provision applies. This provision specifies that such a school may not 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.³³

Such a “fair opportunity” is deemed to have been offered by the school where it “uniformly provides”³⁴ that such a meeting is “voluntary and student-initiated,”³⁵ involves no sponsorship by the school or participation by school employees,³⁶ and is not controlled or regularly attended by “nonschool persons.”³⁷

The Act also contains certain “safety valves” that limit possible

forum in that case was available to a “broad class . . . [of] over 100 recognized student groups”). The term “noninstructional time” is defined under the Act to mean “time set aside by the school before . . . instruction begins or after . . . instruction ends.” Equal Access Act § 803(4).

32. The closest the Act comes to defining “noncurriculum related student groups” is in its definition of “meeting,” which includes activities which conform to the school’s access policies and are “not directly related to the school curriculum.” Equal Access Act § 803(3). The Act’s sponsor, Senator Hatfield, anticipated that noncurriculum related groups would include “the chess club, the Young Democrats, [and] the Young Republicans.” 130 CONG. REC. S8342 (daily ed. June 27, 1984); *see also id.* at S8362 (remarks of Sen. Dole) (the term “noncurriculum related” removes certain ambiguities about whether field trips trigger the Act’s coverage). An alternative definition of “noncurriculum related” offered in the House would have encompassed “those student activities which are either of a type which schools usually do not sponsor or those activities which the school might sponsor but has not.” *Id.* at H7732 (daily ed. July 25, 1984) (remarks of Rep. Goodling).

33. Equal Access Act § 802(a). The proscription of discrimination based on political and philosophical, as well as religious, content was a response to opponents of the Act who objected to the singling out of student religious speech for special protection. *See, e.g.*, 130 CONG. REC. H3857 (daily ed. May 15, 1984) (remarks of Rep. Edwards).

34. Equal Access Act § 802(c).

35. *Id.* at § 802(c)(1). This requirement that the meetings be “voluntary and student-initiated” was advisable to help the Act withstand constitutional scrutiny: Were such meetings school-initiated, the resulting state support of religion would violate the establishment clause; were the meetings nonvoluntary, students’ free exercise rights would be implicated.

36. *Id.* at §§ 802(c)(2),(3). The requirements that neither the school nor its employees sponsor the meetings, defined as “promoting, leading, or participating in a meeting,” *id.* at § 803(2), and that employees be present only in a “nonparticipatory” capacity, *id.* at § 802(3), may have been designed to insulate the legislation from establishment clause challenge. *See Note, The Constitutional Dimensions of Student-Initiated Activities In Public High Schools*, 92 YALE L.J. 499, 514 (1983) (for school board to avoid advancing religion, student religious meetings must be entirely student-initiated).

37. Equal Access Act § 802(c)(5). A final provision requires that such meetings addi-

constructions of the statute. These provisions preserve the state's leeway to ban student meetings which, although religious in nature, would conflict with fundamental public policies. Of these provisions, two are particularly significant: The first provides that nothing in the Act is to be construed to authorize any government to "sanction meetings that are otherwise unlawful;"³⁸ the other bars interpreting the Act to allow governments to "abridge the constitutional rights of any person."³⁹

II. *Enforcement Problems*

Aside from the inherent ambiguity of the Act's provisions, the prospect of its enforcement presents several fundamental problems. The combination of reliance on the spending power for authority, explicit denial of any fund cut-off as a remedy, and omission of any other express remedy results in a statute that appears to confer substantive rights without providing for a remedy in the event of their violation. These enforcement problems can be viewed from two perspectives: that of parties seeking to enforce the Act in court and that of school officials seeking to implement it.

A. *Problems in Seeking Judicial Enforcement*

On its face, the Act has no enforcement mechanism. The remedy of a cut-off of federal funding, a key provision in earlier versions,⁴⁰ is specifically forbidden.⁴¹ Similarly, provisions present in earlier

tionally not "materially and substantially interfere with the orderly conduct of educational activities within the school." *Id.* at § 802(c)(4).

38. *Id.* at § 802(d)(5).

39. *Id.* at § 802(d)(7). The Act is also not to be read to authorize any government "to influence the form or content of any prayer," *id.* at § 802(d)(1), "to require any person to participate in . . . religious activity," *id.* at § 802(d)(2), to expend public funds beyond the cost of providing space, *id.* at § 802(d)(3), to compel any teacher to attend a student meeting if the content of the meeting is against his or her beliefs, *id.* at § 802(d)(4), or "to limit the rights of groups of students which are not of a specified numerical size," *id.* at § 802(d)(6). Again, most of these are designed to protect the Act from an establishment clause challenge, while the last two address the possible free exercise issues raised for teachers and members of minority religions.

40. For example, H.R. 4996 was subtitled an Act "[t]o provide that no federal educational funds may be obligated or expended to any state or local educational agency which discriminates against [voluntary student religious meetings]," and a provision for the cut-off of funds was its central enforcement mechanism. H.R. 4996, 98th Cong., 2d Sess. (1984); see also H.R. 5345, 98th Cong., 2d Sess. (1984) (same).

41. Equal Access Act § 802(e) (quoted in full *supra* note 29). The addition of this proviso that federal funds may not be withheld or denied for violations of the Act was crucial to its passage. Much of the opposition to earlier bills cited the "Draconian sanction" of a fund cut-off as a primary objection, 130 CONG. REC. H3857 (daily ed. May 15, 1984) (remarks of Rep. Edwards), finding it unfair that "[i]f one school in a school district was in violation of the bill, all Federal funding for all schools in that district would

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bills for enforcement by the Attorney General⁴² and by private citizens⁴³ were deleted from the final version, as was an extensive section providing for federal jurisdiction over Equal Access Act cases.⁴⁴ As it now stands, the only mention of enforcement mechanisms is a few brief passages in the Act's legislative history.⁴⁵ Therefore, any party seeking to enforce the Act in court will, as a threshold matter, carry the heavy burden of establishing a right even to seek enforcement.

1. *Judicial Enforcement By Private Parties*

For private parties, this means establishing either that a private cause of action should be implied from the Act,⁴⁶ or that a civil

be cut off," *id.* at H3876 (remarks of Rep. Kostmayer). Many who had voted against the original bill cited the cut-off proviso as one reason for changing their vote. *See, e.g., id.* at H7737 (daily ed. July 25, 1984) (remarks of Rep. Smith); *id.* at H7738 (remarks of Rep. Slattery).

42. *See* S. 1059, 98th Cong., 2d Sess. § 4(a) (1984) (authorizing the Attorney General to receive and investigate complaints and to institute suits, based on those complaints, to enforce the Act).

43. *See id.* at § 3 (authorizing individual actions to enforce the Act); S. 815, 98th Cong., 1st Sess. § 2 (1983) (same).

44. *See* S. 1059, 98th Cong., 2d Sess. § 5 (1984) (granting federal district court jurisdiction regardless of amount in controversy); S. 815, 98th Cong., 1st Sess. (1983) (same).

45. There is apparently only one off-hand reference to the problem of enforcement of the Act, in which Senator Hatfield noted that rather than providing for the cut-off of funds, the bill provides "due process and an implied judicial remedy." 130 CONG. REC. S8355 (daily ed. June 27, 1984). However, this was the only mention of contemplated enforcement mechanisms, and there was no discussion at all of government suits.

46. In order to establish a right to sue to enforce a statute where no cause of action is expressly provided, a private party must establish that Congress intended to create an implied cause of action. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979) ("The central inquiry [is] whether Congress intended to create, either expressly or by implication, a private cause of action."). The "preferred approach" for determining whether such an intent exists is the test articulated in *Cort v. Ash*, 422 U.S. 66 (1975), which measures four indications of intent. The four relevant factors, in summary, are: (1) whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted," that is, whether the "statute create[s] a federal right in favor of the plaintiff;" (2) whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one;" (3) whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff;" and (4) whether the area is "one traditionally relegated to state law . . . so that it would be inappropriate to infer a cause of action based solely on federal law." *Cort v. Ash*, 422 U.S. at 78 (citations omitted) (emphasis in original). If the first two factors indicate that Congress did not intend a private cause of action, however, it is dispositive, and there is no need to consider all four. *California v. Sierra Club*, 451 U.S. 287, 298 (1981). In fact, in the case of funding statutes, it is often the first question that determines the outcome, since it is usually most difficult to decide whether or not a funding statute was intended to create an enforceable federal right. The central inquiry is whether the statute is written with an "unmistakable focus on the benefited class," or is written "simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to . . . institutions engaged in [such] discriminatory practices." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 691-93 (1979). This de-

rights action under 42 U.S.C. § 1983 should be available.⁴⁷ If, however, the Act is viewed as funding legislation, recent Supreme Court doctrine suggests that these causes of action may be unavailable, since both causes depend on whether the Act was intended to create enforceable "rights" in private parties, a problematic inquiry where funding statutes are involved.⁴⁸ Moreover, even if a private party is

depends primarily on the language of the statute. *Id.* at 690-93 & n.13 ("[T]he right-or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action."); *see also* *Univ. Research Ass'n v. Coutu*, 450 U.S. 754, 771-72 (1981) (quoting *Cannon* test). In this case, it would be very difficult to decide whether the Act's wording supports an implied private cause of action. It is literally worded as a "ban on discriminatory conduct by recipients of federal funds"—here public secondary schools—which suggests that a cause of action should not be implied. However, it is at the same time not dissimilar to statutes which have been found to support such a cause of action. *See Cannon*, 441 U.S. 677 (finding an implied cause of action under Title IX of the Education Amendments of 1972). The question, in essence, is whether a statute which does not specify that "no person" be denied rights may nonetheless create enforceable federal rights. *See id.* at 690 n.13 (citing examples of statutes). The Supreme Court has recently stressed that the question is "not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries," *California v. Sierra Club*, 451 U.S. at 294, and that "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person," *Cannon*, 441 U.S. at 688, which suggests a restrictive approach to implying federal rights. *See also* *United States v. Philadelphia*, 644 F.2d 187, 192 (3d Cir. 1980) ("In recent years the Court has been far more reluctant to infer rights of action for silent statutes."). On the other hand, this Act seems to convey few benefits on any party other than any federal right which might be created, since it authorizes no additional funds to be expended. Looking to the second factor of the *Cort* test, the answer is similarly not clear-cut. On balance, however, it weighs slightly against implying such a remedy, since the defeat of amendments which would have provided for a private cause of action is considered a significant indication of an intent to deny such a remedy. *See Coutu*, 450 U.S. at 778. In sum, whether an implied private right of action should be available to enforce the Act is at least a close question.

47. While the Supreme Court in *Maine v. Thiboutot*, 448 U.S. 1 (1980), affirmed that actions under 42 U.S.C. § 1983 are available to enforce federal statutes as well as federal constitutional rights, it added several important qualifications to this rule shortly thereafter. In particular, a § 1983 action is not available if either the federal statute in question creates no enforceable rights, or Congress has created exclusive remedies for the enforcement of the statute which preclude any other form of action. *See Middlesex County Sewage Auth. v. Nat. Sea Clammers*, 453 U.S. 1, 20-21 (1981). Given the first limitation, which focuses on the question of whether Congress intended to create enforceable rights, the inquiry is clearly closely linked to the question of whether a private cause of action should be available. However, whereas a court determining the latter question must presume that congressional silence means no cause of action was intended, the § 1983 inquiry assumes that a cause of action is available unless Congress intended to foreclose such a remedy. *See, e.g.,* *Rousseau v. City of Philadelphia*, 589 F. Supp. 961, 972 (E.D. Pa. 1984); *Ryans v. New Jersey Comm'n for the Blind*, 542 F. Supp. 841, 846 (D.N.J. 1982). The key question is whether allowing a § 1983 action is consistent with congressional intent. *See Ruth Anne M. v. Alvin Indep. School Dist.*, 532 F. Supp. 460, 476 (S.D. Tex. 1982) (finding § 1983 action precluded because the expansive relief such an action would allow would be inconsistent with statutory scheme). Again, the answer is not clear-cut in this case.

48. In *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981), which essentially defined the current contours of federal funding law, the Court held that the "bill of rights" provision contained in the Developmentally Disabled Assistance and Bill

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permitted to sue, the scope of relief available under a funding statute has been curtailed sharply by recent Supreme Court decisions, which may effectively nullify the benefit of establishing a cause of action in the first place.⁴⁹

2. Public Enforcement

Similarly, if the federal government seeks to enforce the Act, it must prove that the statute contemplates public enforcement.⁵⁰

of Rights Act did not create any substantive rights for residents in state hospitals in states receiving funds under the Act. Answering the question whether a private cause of action existed under the funding statute involved in *Pennhurst*, the Court noted that in "legislation enacted pursuant to the spending power, the typical remedy for state non-compliance with federally imposed conditions is not a private cause of action . . . but rather action by the Federal Government to terminate funds to the State." *Id.* at 28. The Court also addressed the question of whether a § 1983 action would be available to enforce the funding statute, noting that this would depend in part on whether an individual's interest in having a state submit assurances of compliance with funding conditions is a "right secured" by the laws of the United States, an issue which it considered "at least an open question." *Id.*; see also *Middlesex County Sewage Auth. v. Nat. Sea Clammers*, 453 U.S. at 20-21 (§ 1983 actions are generally available unless the federal statute forecloses such relief or makes clear that no federal "right" is created).

49. In *Guardians Ass'n v. Civil Service Comm'n of the City of New York*, 103 S. Ct. 3221 (1983) the Supreme Court held that while a private action was available to enforce the anti-discrimination provision of Title VI, the private party was not entitled to a "make whole" remedy where the alleged violation was for unintentional, rather than intentional, discrimination. *Id.* at 3228. It noted that "'make whole' remedies are not ordinarily appropriate in private actions seeking relief for violations of statutes passed by Congress pursuant to its 'power under the Spending Clause to place conditions on the grant of federal funds.'" *Id.* at 3229 (quoting *Pennhurst*). In such cases, only "limited injunctive relief" is available, and "relief based on past violations of the conditions attached to the use of federal funds . . . is not available." *Id.* at 3232. Rather, the court must simply "identify the violation and enjoin its continuance or order recipients of federal funds prospectively to perform their duties incident to the receipt of federal money," giving the recipient the "option of withdrawing and hence terminating the prospective force of the injunction." *Id.* at 3229. This holding relied on the fact that in that case, as in the present one, the condition of funding—there liability for unintentional discrimination—was not present at the time funds were initially accepted. Thus the same rationale should apply here. Moreover, in this case, where Congress specifically intended that funds not be cut off or denied as a sanction for the Act's violation, it is also arguable that it did not intend for schools to be forced, through self-denial, to forgo funds at all. This would mean that not even the limited relief available in *Guardians Association* would be available in this case.

50. For the government to establish a right to enforce a statute where no express authorization is present, it must prove that it has an "interest" that will support such a suit. *Wyandotte Co. v. United States*, 389 U.S. 191, 201 (1967). While *In re Debs*, 158 U.S. 564 (1895), suggested that such a suit would be possible whenever alleged statutory violations "affect the public at large," *id.* at 586, only one court has come even close to such an expansive reading. See *United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970). Rather, courts have held that in order to support a suit by the government, there must be "a property interest, interference with national security or a burden on interstate commerce." *United States v. Mattson*, 600 F.2d 1295, 1298-99 (9th Cir. 1979); see also *United States v. Solomon*, 563 F.2d 1121, 1127 (4th Cir. 1977) (in all of the cases allowing a government suit, "the United States had a property interest to be protected or there was a well-defined statutory interest of the public at large to be protected"). Where a funding statute is involved, it has been held that while such legisla-

Under the law governing federal enforcement of funding statutes, however, the government's power to seek judicial relief is strictly limited, and would be difficult to establish in this case.⁵¹ Such a suit is based on the existence of a "contract" between the state and federal governments, in which public enforcement is premised on the government's rights as a party to that contract. However, it is not at all clear that the Act unambiguously creates conditions, judicially enforceable, on which such a government contract suit against the school district could be based.

B. *The Dilemma of State Officials Seeking to Implement the Act*

Many state authorities seeking to implement the Act face a dilemma never even considered by Congress in passing the Act: Often, state constitutions directly address the question of religious activities in public schools. Many state constitutions provide de-

tion "does indicate a keen interest on the part of the federal government . . . that interest [does] not extend [] beyond providing funds," and does not support a governmental suit for equitable relief. *Mattson*, 600 F.2d at 1299. On the other hand, the government's right under funding statutes to sue to enforce conditions of a grant is well recognized, *see, e.g., Solomon*, 563 F.2d at 1129 (the United States has "implied authority to sue for vindication of its proprietary and contractual interests in grants that it has made"); *United States v. Marion City School Dist.*, 625 F.2d 607, 609 (5th Cir. 1980) (United States has "an inherent right to sue for enforcement of the [grant] recipient's obligation in court"); *United States v. Frazer*, 317 F. Supp. 1079, 1084 (M.D. Ala. 1970) (government has a "right to bring suit to require the recipient of federal grants to comply with the terms and conditions of the grant"); as is its right to sue to recoup funds spent in violation of the grant conditions, *see Bell v. New Jersey and Pennsylvania*, 103 S. Ct. 2187 (1983) (government may recover funds misspent by the state under Title I of the Elementary and Secondary Education Act); *Woods v. United States*, 724 F.2d 1444, 1449 (9th Cir. 1984) (government has "implied power to recover funds spent in violation of the express terms and conditions of the grant"). These suits are premised on the government's right, as a party to a contract, to invoke standard principles of contract law. *See id.* (government has a right to make contracts and to "resort to the same remedies as a private person" to protect that right); *see also Frazer*, 317 F. Supp. at 1084 ("[T]he interest of the United States is to enforce the terms and conditions of grants of federal funds.").

51. Such suits are usually based on an actual written assurance that the government has received from the state, *see, e.g., Marion City School Dist.*, 625 F.2d at 609 (case compelling specific performance of assurances); *United States v. County School Bd. of Prince Georges County*, 221 F. Supp. 93, 100 (E.D. Va. 1963) (the assurance forms a term of the contract); and requires at the very least evidence that the conditions were indeed voluntarily and unambiguously accepted, and a binding contract formed. *See United States v. Onslow County Bd. of Educ.*, 728 F.2d 628, 634 (4th Cir. 1984) (the assurance shows that "Congress unambiguously imposed, and the [recipient] explicitly accepted, the condition"). In this case, assurances are not required, and it is in fact unlikely that they would even be permissible, since the congressional intent not to have funds denied for failure to comply with the Act would logically seem to preclude such a requirement. There is no reason why the provision that "nothing in this Title" be construed to authorize a denial of funds should be limited to *past* violations of the Act, rather than continuing refusal to comply. Thus it is unclear how—and whether—a state could ever signal the knowing and voluntary acceptance required to form such a contract. *See also infra* text accompanying notes 77-78.

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tailed, and extensive, consideration of questions of religious rights.⁵² Even more importantly, the precise issue of allowing religious meetings on public school premises has often already been considered under state constitutional provisions. The typical interpretation is that religious meetings may be held on public school property only if a fair rental fee is paid,⁵³ and even then, many states place restrictions on the times⁵⁴ and places⁵⁵ such meetings may be

52. State constitutions typically have a number of provisions dealing with issues of religious rights, including free exercise clauses, establishment provisions, provisions regarding oaths of office, grants of exemption from state taxes for religious organizations, bans on religious instruction in state schools, and provisions regarding the use of public funds and lands for religious purposes. Wyoming, for example, has 11 separate provisions governing questions of religion. *See* WYO. CONST. art. 1, §§ 18, 19; art. 7, §§ 4,5,6,7,8, 12; art. 10, § 12; art. 21, § 28; *see also, e.g.*, IND. CONST. (six constitutional provisions regarding religion); KY. CONST. (five provisions); MO. CONST. (same); ORE. CONST. (six provisions); PA. CONST. (five provisions); S. C. CONST. (same); TEX. CONST. (six provisions); UTAH CONST. (seven provisions). Both on their face and as applied, many state constitutions call for a stricter separation of church and state than is federally required. *See, e.g.*, *American United v. Rogers*, 538 S.W.2d 711, 720 (Mo.) (en banc), *cert. denied*, 429 U.S. 1029 (1976) (holding that the Missouri Constitution requires stricter separation of church and state than that required by the federal Constitution), *cited in Widmar*, 454 U.S. at 275 n.16; 1960-61 OP. GA. ATT'Y GEN. 349 (finding that Georgia Constitution's requirement of separation of church and state was intended to have a stronger application than the first amendment to the federal Constitution); *compare* *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (busing does not violate the federal Constitution), *with* *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961) (holding that the transportation of students to nonpublic schools would violate the Alaska Constitution), *cert. denied*, 368 U.S. 517 (1962); *Bd. of Educ. For Indep. School Dist. No. 52 v. Antone*, 384 P.2d 911 (Okla. 1963) (holding that transporting parochial school students at public expense violates the Oklahoma Constitution); *Mitchell v. Consol. School Dist. No. 201*, 17 Wash. 2d 61, 135 P.2d 79 (1943) (holding that provision of transportation to students attending private schools violates the Washington Constitution); *compare also* *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968) (finding free textbook loan programs permissible under the federal Constitution), *with* *California Teachers Ass'n v. Riles*, 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981) (holding program for free textbook loans to nonpublic schools to violate the California Constitution); *People ex rel. Klinger v. Howlett*, 56 Ill. 2d 1, 305 N.E.2d 129 (1973) (same); *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983) (same); *Bloom v. School Committee of Springfield*, 376 Mass. 35, 379 N.E.2d 578 (1978) (same); *McDonald v. School Bd. of Yankton Indep. School Dist. No. 1*, 246 N.W.2d 93 (S. Dak. 1976) (same).

53. In Wisconsin, for example, the state constitution was specifically amended to allow the use of school buildings by religious organizations only "upon payment . . . of reasonable compensation for such use." WIS. CONST. art. 1, § 24 (added 1972). In other states, the same result has been reached by judicial decision or executive interpretation. *See* *Pratt v. Arizona Bd. of Regents*, 110 Ariz. 466, 469, 520 P.2d 514, 517 (1974) (the lease of school facilities to religious groups without payment of fair market value would violate the state constitution); 1966 OP. ALAS. ATT'Y GEN. No. 3 (no establishment of religion under state constitution so long as religious organizations using school buildings are required to pay same rental fee as other groups); 59 OP. CAL. ATT'Y GEN. 214 (1976) (student religious groups may not hold devotional meetings on high school premises during nonschool hours where no payment is contemplated in exchange for the use); 1969 OP. N.M. ATT'Y GEN. 22 (in the absence of payment for such use, public school buildings may not be used for religious instruction).

54. *See, e.g.*, *Pratt v. Arizona Bd. of Regents*, 110 Ariz. 466, 469, 520 P.2d 514, 517 (1974) (the two keys to constitutional use of school property for religious purposes are

held. In some states, such meetings are simply not permissible under any conditions.⁵⁶

The important point is that in many states there is at least a serious question as to whether the state constitution will permit what the Equal Access Act requires—allowing student groups to hold religious meetings on school premises. In such states, school authorities may not be able to implement the Act's central provision while also satisfying the state constitution. In these cases, they will be left with two equally unpalatable choices—eliminating a “limited open forum” by not allowing *any* student groups to meet, the option Congress intended to present, or turning down federal funds, an

“fair rental value and the occasional nature of the use”); *Southside Estates Baptist Church v. Bd. of Trustees, School Tax Dist. No. 1*, 115 So. 2d 697 (Fla. 1959) (school board may allow churches to use school facilities temporarily on Sundays pending completion of church construction, but permanent promotion of a particular religious denomination would violate the state constitution); *Resnick v. East Brunswick Township Bd. of Educ.*, 77 N.J. 88, 389 A.2d 944 (1978) (prolonged use of school facilities by religious group without evidence of immediate intent to secure own building violates state constitution); *OP. MINN. ATT'Y GEN. No. 170-F-4* (1943) (school boards may rent unused space to religious groups only during summer vacation); *OP. MO. ATT'Y GEN. No. 82* (1970) (school district may rent premises to religious organization only during times when use for school purposes is not required); 1937-38 *OP. N.M. ATT'Y GEN. 36* (school board may allow parochial school students to use gymnasium only when such use does not interfere with regular school activities); 1973 *OP. N. DAK. ATT'Y GEN. No. 2* (rental of state college facilities permissible only at reasonable times which do not interfere with the regular activities of the college); 5 *OP. TEX. ATT'Y GEN. 102* (1943) (school board may lease school property for sectarian purposes only if the lease in no way interferes with the use of such property for school purposes).

55. *See, e.g.*, 1978 *OP. WASH. ATT'Y GEN. No. 10* at 13 (school property being rented to religious group must be “sufficiently remote from other property being retained for school purposes”).

56. The meetings allowed under the Equal Access Act would encompass prayer, religious instruction, and other devotional activities, and would thus violate many state constitutions under any arrangement. *See, e.g.*, *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977) (state constitution bars voluntary student Bible study group from meeting on public high school campus), *cert. denied*, 434 U.S. 877 (1977); *Hysong v. Gallitzin Borough School Dist.*, 164 Pa. 629, 30 A. 482 (1894) (school directors may not permit public school buildings to be used for sectarian religious meetings); 1976-77 *OP. LA. ATT'Y GEN. 153* (use of public school classroom for religious instruction, even after school hours, violates state constitution); 1969 *OP. VT. ATT'Y GEN. 95, 98* (state constitution prohibits use of public school plant for any form of religious worship). Moreover, such meetings may be completely banned even in states where rental of facilities to religious organizations is generally permitted. *See, e.g.*, *OP. IOWA ATT'Y GEN. (Apr. 30, 1965)* (a school district is constitutionally prohibited from permitting the use of public classrooms for religious instruction); *OP. MO. ATT'Y GEN. No. 337* (1969) (use of state college classrooms for course in religious instruction prohibited under state constitution); 1952-54 *OP. NEV. ATT'Y GEN. 232* (school officials may not allow use of public school buildings by religious groups for sectarian purposes), *revised*, 1954-56 *OP. NEV. ATT'Y GEN. 76*; *Matter of Appeal of Irving Kleinman*, 7 N.Y. EDUC. DEPT. REP. 118 (1967) (use of public school gymnasium by parochial school team barred under state constitution); 5 *OP. N.Y. STATE COMPT. 137* (1949) (a town may not permit its property to be used by religious organizations for purpose of giving religious instruction to school children).

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option which always remains available, despite the express congressional desire not to affect the receipt of federal funds.⁵⁷ Ironically, this conflict is likely to diminish rather than to enhance the diversity of school environments, quite contrary to the congressional desire in passing the Act to enrich public education.⁵⁸

C. Preemption Arguments

The characterization of the Act as a funding statute further compounds implementation problems for such states by rendering inapplicable any preemption arguments the state might otherwise be able to use to avoid these limited choices. In general, the congressional failure to consider a conflict with state law could be cured by reliance on preemption doctrine, which requires clear congressional intent to displace state law before the state provision is rendered ineffective.⁵⁹ The Supreme Court has repeatedly held that federalism considerations require a presumption that state law is preserved,⁶⁰ particularly where the congressional action is in a field that "has been traditionally occupied by the States."⁶¹ If only congressional intent were examined, the absence of any congressional consideration of the issue of state constitutional provisions, combined with the general congressional concern with maintaining the discretion of local school authorities⁶² and the traditional role of the states

57. See *supra* note 41.

58. If the implementation problems faced by state officials are reconsidered in light of the enforcement problems created by the congressional failure to specify the intended remedies, it is true that there exists an additional alternative to those so far considered—that of ignoring the Act altogether. However, school authorities cannot afford simply to disregard federal law, and the uncertainty created by even a potentially unenforceable statute remains substantial.

59. See *Maryland v. Louisiana*, 451 U.S. 725, 746 ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.") (citations omitted); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("We start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."), *quoted in Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). Such an intent may, however, be either "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 520, 525 (1977) (citations omitted); see also *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("[A] purpose [to displace state law] may be evidenced in several ways.") (citations omitted).

60. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (the assumption that state law is not superseded absent clear intent to do so "provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts").

61. *Id.*

62. Congress's desire to retain local discretion was reflected both in the inclusion of a special proviso reaffirming the authority of the school to "maintain order and discipline," Equal Access Act § 802(f), which was described as affirming that "school authorities are in command . . . and they remain in command," 130 CONG. REC. S8352 (daily

in the educational field,⁶³ might well lead to the conclusion that Congress intended to preserve the role of the states.⁶⁴

However, a fundamental prerequisite to any preemption argument is missing here: In order to hold that the state should be allowed to implement its constitution, the court would first have to ascertain that the two laws are in conflict.⁶⁵ Such conflict does not exist here, however; both state and federal law can be implemented, since the state is left with other options, albeit undesirable ones, to violating one law or the other. Ultimately fatal to a preemption argument, therefore, is the fact that the Act does not actually displace state law. No matter how unpalatable the choices created, the fact that options exist effectively eliminates any preemption argument that might otherwise be relevant.⁶⁶

ed. June 27, 1984) (remarks of Sen. Hatfield), and in the congressional concern for leaving decisions as to how to implement the Act in the hands of local authorities, *see, e.g., id.* at S8357 (remarks of Sen. Durenberger) (the Act "retains local school board control over its schools" since the board decides whether to create a limited open forum and can set time and place regulations); *id.* at S8362 (remarks of Sen. Mattingly) (the Act leaves decisions on "local school scheduling [and] the structure of student activities" in the hands of local school authorities).

63. *See infra* notes 80-81.

64. In *Wheeler v. Barrera*, 417 U.S. 402 (1974), for example, the Supreme Court read into another educational funding statute, Title I of the Elementary and Secondary Education Act of 1965, a congressional intent to preserve the role of state constitutions, based on only a few sparse comments in the legislative history and the general federal policy of noninterference. *Id.* at 417 n. 13. Such a holding could also be made here, based on the inclusion of provisions for preservation of state law, *see supra* text accompanying notes 38-39, and the discussions of local autonomy, *see supra* note 61. It is true that a preemption argument would run into difficulty should the two laws be found to be so inconsistent that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), *quoted in Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978), or if compliance with both is a "physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), *quoted in Fidelity Federal Savings and Loan Ass'n v. Cuesta*, 102 S. Ct. 3014, 3022 (1982). However, the lack of technical conflict between the two leads to a far more serious problem: Preemption arguments cannot be made at all.

65. *See Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (deciding whether state law is preempted is a "two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict") (*quoting Perez v. Campbell*, 402 U.S. 637, 644 (1971)).

66. In fact, this failure of preemption arguments is true to some extent of any funding legislation, even legislation which seeks to accommodate state law, since declining funding always remains in the background as a means of implementation. In *Wheeler*, for example, even though the Court held that the statute was intended to preserve the role of state law, it noted that should the state be unable to come up with a program that satisfied both the requirements of Title I and the state constitution, declining funds under the Act always remains an option. *See* 417 U.S. at 425. In that case, unlike the present one, it was at least theoretically possible to implement both state and federal law, since there were a number of different ways the state could structure the provision of funds to provide "comparable" services for public and private schools; it was a matter

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III. *The Problems Created By Reliance on Federal Funding*

The Act's many enforcement problems do not stem from a single cause, nor are they susceptible to a single solution. The congressional failure to provide specific enforcement mechanisms, for example, which creates serious problems in the Act as it presently stands, is primarily attributable to poor draftsmanship, and could be cured by simple amendment of the Act's language. The implementation dilemmas created for state officials, however, reveal a much more fundamental problem with the Act's basic structure: These stem from the congressional reliance on funding legislation to dictate a uniform school meetings policy to the states. It is this reliance which creates the draconian choices offered many school boards, and which displaces standard preemption arguments. Moreover, tying the Act to federal funds further exacerbates the enforcement problems created by poor drafting, rendering uncertain the availability of traditional enforcement mechanisms. These unanticipated flaws in the Act suggest that Congress has legislated here under the spending power without carefully considering the unique qualities of funding statutes.

There is a basic difference recognized between funding statutes and all other legislation. Such statutes are considered to have the status of contracts between the state and federal governments, in which the state agrees to abide by certain conditions in exchange for receiving federal funds.⁶⁷ Most funding legislation is in fact consciously administered as a contract: The legislation embodies the federal offer, the state knowingly and voluntarily accepts the terms⁶⁸ (usually by providing a written assurance of compliance),⁶⁹ and the agreement is legally enforceable against either.⁷⁰ This fiction allows the federal government far broader power than it would otherwise enjoy;⁷¹ it is free to attach a wide variety of conditions to the receipt

of designing a plan meeting both the federal and state restrictions. There is no similar flexibility under the Equal Access Act, since the Act requires what the state constitution prohibits.

67. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. at 17.

68. *See id.* ("[T]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'.") (citations omitted).

69. Every school district that receives federal assistance must sign assurances of compliance with a number of federal laws, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1982), Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (1982), and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1970). *See generally* Stern, *Public Education*, 10 *URB. LAW.* 497 (1978).

70. *See* Stern, *supra* note 69.

71. *See Oklahoma v. Schweiker*, 655 F.2d 401, 405-06 (D.C. Cir. 1981) ("[T]he gen-

of federal funds⁷²—premised on the fact that the state is equally free to reject the conditions by turning down the funds.⁷³ Thus, the central element which justifies the expansive congressional power under the spending clause is the idea that the state always has a choice whether or not to accept funds. This remains true regardless of whether Congress includes a cut-off proviso in the legislation.

In this case, however, the existence of this “choice” to turn down federal funds operates to limit the state’s options rather than expand them, since the option of implementing the Act may be foreclosed by the state constitution.⁷⁴ At the same time, interpreting the Act under contract principles also affects judicial decisions as to what parties are entitled to enforce that contract because contracts are generally enforceable only by the parties themselves or by third party beneficiaries; this makes the omission of statutory causes of action a far more serious matter than it would be under mandatory legislation.⁷⁵

The Equal Access Act, moreover, operates only imperfectly, even

eral welfare clause is . . . an independent—and expansive—source of Congress’ spending authority;” “[t]he conditions that Congress may set in disbursing federal funds are not restricted to those areas over which Congress has direct regulatory authority”).

72. See *Pennhurst*, 451 U.S. at 17 (“[O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States.”); *Oklahoma v. United States Civil Service Comm’n*, 330 U.S. 127, 144 (“The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual.”).

73. See, e.g., *Oklahoma v. Schweiker*, 655 F.2d 401, 412 (D.C. Cir. 1981) (any state may “choose to conform to federal requirements or to forego federal funds”); *Florida Dept. of Health v. Califano*, 449 F. Supp. 274, 284 (N.D. Fla. 1978) (“[A]ny state which objects to the ‘strings’ attached to receipt of the federal funds has the option to refuse both the grants-in-aid and the objectionable conditions.”). The key distinction is that such terms, which apply to the states through the indirect mechanism of funding, are considered “voluntary” requirements, as opposed to the “mandatory” requirements of legislation which applies directly. See, e.g., *Pennhurst*, 451 U.S. at 27 (noting the “well-settled distinction between congressional ‘encouragement’ of state programs and the imposition of binding obligations on the States”). The doctrinal implications of this distinction are far-reaching. Challenges to congressional exercises of the spending power succeed only when “by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress,” *United States v. Butler*, 297 U.S. 1, 67 (1936); see also *Buckley v. Valeo*, 424 U.S. 1, 90 (1976) (the spending clause is not “a limitation upon congressional power” but rather “a grant of power, the scope of which is quite expansive”); *Walker Field Public Airport Auth. v. Adams*, 606 F.2d 290, 297 (10th Cir. 1979) (“Unless barred by some controlling constitutional prohibition, the Federal Government may impose the terms and conditions upon which its money allotments to the States shall be disbursed. . . .”).

74. It is true that Congress intended to present at least one choice under the Act—the choice of whether to let all student groups, including religious ones, meet, or to choose not to give access to any student groups. However, Congress never anticipated that for some states, the choice would become one between banning all student groups and forgoing federal funds.

75. See *supra* text accompanying notes 40-51.

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as a funding statute. Unlike other funding legislation, the Act does not seek to regulate the use of funds provided to the states. Nor does it authorize any program of additional appropriations.⁷⁶ Instead, it merely uses the existence of funding as a trigger for the application of new substantive requirements. In contract terms, this represents an attempt by the federal government to unilaterally change the terms of existing contracts providing for federal funding of public education. Such changes have previously been accomplished by requiring the state to show its assent to the new conditions before receiving any additional funds under existing programs.⁷⁷ However, the Equal Access Act does not provide any mechanism by which states can signal their assent to the modified terms. Written assurances of agreement to comply with the law are not required by the legislation itself, and the statute makes no provision for administrative coordination with existing funding programs. In fact, the cut-off proviso may make it impossible for the government to obtain such assurances: If funds cannot be denied for failure to comply with the Act, it is hard to see how an agreement to comply can be required as a condition of disbursing such funds.⁷⁸ Thus, under the structure of the Act, it is unclear how the state can ever signal its acceptance of the changed terms in a manner unambiguous enough to form a binding contract, as is necessary to make funding laws effective.

The key question is: Why is the Act so structured? Why did Congress forgo direct regulation of educational policy, adopting indirect regulation through the spending power instead? The answer is

76. For example, it is striking to contrast the Equal Access Act with the Education for Economic Security Act, to which it was appended; the specific purpose of this latter Act is to "make financial assistance available to State and local educational agencies" to help them improve the quality of their math and science instruction. See H.R. 1310, 98th Cong., 2d Sess. § 261 (1984).

77. This is done, for example, under the provision of the Education Amendments of 1972 that prohibits discrimination on account of sex in any program receiving federal funds, a provision that uses language very similar to that used in the Act. However, that statute contains two important differences: first, Title IX specifically provides for administrative enforcement, *id.* at § 1682, which the Agency has interpreted to require written assurances of compliance from the state before receipt of funds under any federal program, *see supra* notes 69-70; second, Title IX could have been enacted under § 5 of the fourteenth amendment rather than the spending power, so Congress's power to require these conditions is in any case clear, *see Fullilove v. Klutznick*, 448 U.S. 448, 478 (1979) (where Congress could have achieved its objectives by use of its § 5 power, the objectives are also within the scope of the spending power).

78. It is true that the continued receipt by the state of federal funds after the Act's effective date might be considered to complete the contract. However, it is not at all clear whether this would constitute the type of knowing and voluntary acceptance of the Act's terms required to make them binding.

that, in our federal system, it is highly questionable whether such legislation could be structured in any other way. While Congress could theoretically have allowed funds to be denied under the Act, the inclusion of a cut-off proviso reflected objections to what was perceived as an overbearing federal intrusion into local school administration.⁷⁹ More importantly, even if the Act had been drafted differently, Congress could not have avoided tying the Act to federal funds in the first place. In the area of public education, the use of funding statutes has been characteristic, because of the tremendous controversy that would arise from any congressional attempt to dictate directly to the states how to provide educational services. Education has long been recognized as being one of the most important functions of state governments,⁸⁰ and it is the states which bear by far the greatest burden of providing educational services in this country.⁸¹ For Congress to directly intrude upon an area which has for so long been viewed fundamentally as a state responsibility would be politically difficult and unwise. By tying the same duties to federal funds, however, Congress is seen as playing a legitimate, if coercive, role. Thus, many of the problems which plague the Act are inevitable if Congress is to attempt to legislate educational policies which are also regulated by state constitutions—such as those concerning the role of religion in the public schools. This strongly suggests that such policy issues are better fit for judicial resolution, which does not depend on a problematic relation to federal funding.⁸²

79. See *supra* note 41.

80. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) ("Education is perhaps the most important function of state and local governments."). Public education is constitutionally mandated in all but two states. See Griffith, *The U.S. Department of Education and the Issue of Control of Education*, 12 URB. LAW. 500, 501 (1980).

81. Federal funds provide an average of only 8.7 percent of the total funds spent for elementary and secondary education in the United States. See Birman & Ginsburg, *supra* note 5, at 473 (1982) (citing W. GRANT & L. EIDEN, DIGEST OF EDUCATION STATISTICS 22 (1981)).

82. None of the limitations discussed above would apply were the Supreme Court to adopt a ruling almost identical to the Act's central provision. Under the supremacy clause, U.S. CONST. art. V., the holding would apply directly to every school district, without the need to rely on federal funds. Moreover, the problem of state constitutional provisions could be dealt with directly, just as the court did in *Widmar*, see *supra* text accompanying note 19. Thus legislation in this area raises serious questions of institutional competence as well as federalism, a problem Congress may have recognized in its attempt to borrow *Widmar's* language and to base the Act on judicial precedent. See S. REP. NO. 357, *supra* note 7 (50-page report consisting mainly of an extensive analysis of first amendment case law). Because of the delicate balance between free exercise and free speech rights on one hand, and the establishment clause on the other, decisions on religious issues often turn on the unique facts of the case. See *Wheeler v. Barrera*, 417 U.S. 402, 426 (1974) ("The task of deciding when the Establishment Clause is impli-

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IV. Conclusion—*Salvaging the Act through Judicial Interpretation*

However undesirable and inappropriate this legislation, the fact remains that it is law. What are courts then to do when faced with enforcement of this Act? A number of options are available.

First, it is possible for courts to find that the Act is unconstitutional. The statute raises serious questions under the federal establishment clause, since the Supreme Court refused to reach the issue in *Widmar*.⁸³ In addition, the Act may be susceptible to constitutional challenge as extending beyond the admittedly broad limit of the congressional spending power. The Court has repeatedly stressed that there are outer limits to this power.⁸⁴

Second, courts could solve the problem of accommodating state constitutional provisions by a broad interpretation of the Act's "safety valves." The provision that the Act does not sanction meetings that are "otherwise unlawful"⁸⁵ could be found to apply where state constitutions prohibit activities mandated by the Act.⁸⁶ Alternatively, the provision that the Act not operate to "abridge . . . constitutional rights"⁸⁷ could be interpreted to extend to state constitutional provisions.⁸⁸ The legislative history does not ade-

cated in the context of parochial school aid has proved to be a delicate one [which usually] requires a careful evaluation of the facts of the particular case." (citation omitted). Thus, the Act may be seen as encroaching not only upon the states' right to establish educational policy, but also upon the judiciary's proper role in interpreting the constitutional religion clauses.

83. See *supra* text accompanying notes 21-23.

84. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 475 (1980) (since the funding statute at issue could have been enacted under the commerce clause or § 5 of the fourteenth amendment, the Court "need not explore the outermost limitations on the objectives attainable through . . . application of the spending power"); *Lau v. Nichols*, 414 U.S. 563, 569 (1973) (the limits of the spending power have not been reached in the congressional enactment of Title VI of the Civil Rights Act of 1964). In general, the Court has found it unnecessary to determine the limits of the spending power because there have been alternative congressional powers under which the legislation could have been enacted. In this case, however, it is hard to see what source of congressional power other than the spending power could have been relied upon. While the commerce clause has been interpreted extremely broadly, it is nevertheless questionable whether public school education affects the stream of commerce in any significant way. Similarly, while the first amendment has been applied to the states through the fourteenth amendment, it would be hard to justify legislating about free speech rights based on § 5 without allowing § 5 to become a basis for any legislation affecting incorporated constitutional rights. Thus, the question of the limits of the spending power may be squarely presented here.

85. Equal Access Act § 802(d)(5).

86. Such an interpretation might also apply in cases where a state statute prohibited this activity. This would be a desirable interpretation because a state statute would pose the same dilemma to school officials as would a state constitutional provision.

87. *Id.* at § 802(d)(7).

88. This route would not cover the (still hypothetical) problem of a state statute. See *supra* note 86.

quately explain what these safety valves are intended to encompass,⁸⁹ but such interpretations would fall well within the bounds of acceptable statutory construction.⁹⁰ However, such a reading may not go far enough toward remedying the serious problems which beset the Act, leaving unresolved the problems of public and private enforcement.

This objection suggests a third, and final, means of avoiding the problems associated with the Act: Courts could find that the Act is simply a declaration of national policy, and thus not specifically enforceable. While this may seem a radical solution, there is a sound basis for such an interpretation both in the text of the Act and in the case law. Since the Act itself provides no enforcement mechanisms, and expressly denies the mechanism of a fund cut-off, a court must in fact go out of its way to find an affirmative basis for suit. In particular, as has been shown above, it is not at all clear that any party, either public or private, has standing to sue for enforcement of the Act.⁹¹ By denying standing to *all* relevant parties, courts could avoid the unforeseen remedial problems which beset the Act.

Even if the courts conclude that there exists a party with standing to enforce the Act, they should not read the Act as imposing substantive obligations on state officials. A suit to enforce the conditions of the grant, or to recover funds misspent in violation of those terms, both depend upon a court first finding that the recipient of federal funds voluntarily and knowingly accepted such conditions. Here, written assurances, which would prove such consent, are neither required nor possible, and the continued receipt of federal funds after the Act's passage cannot necessarily be considered to constitute knowing acceptance, given the ambiguity created by the

89. The "otherwise unlawful" provision was discussed briefly in the floor debates, with the implication that it would apply to some state laws forbidding homosexual conduct. See 130 CONG. REC. S8343 (daily ed. June 27, 1984) (remarks of Sen. Hatfield). However, the question of state laws that run counter to the Act's substantive provisions did not arise. The "constitutional rights" provision was barely mentioned at all.

90. It is true that either of these readings leads to the conclusion that any state could amend its constitution to prevent application of the Act. But allowing each state to formulate, on a statewide and considered basis, the appropriate religious access policy would be well in keeping with long-established federal policy, and would also reflect the avowed congressional concern with federalism. Cf. *North Carolina ex rel. Morrow v. Califano*, 445 F. Supp. 532, 535 (E.D.N.C. 1978) (noting that were one state, "by some oddity of its Constitution," allowed to invalidate a funding condition, then any state "dissatisfied by some valid federal condition on a federal grant could thwart the congressional purpose by the expedient of amending its constitution. . . ."; however, the "validity of the power of the federal government . . . to impose a condition on federal grants . . . does not exist at the mercy of the State Constitutions. . . .").

91. See *supra* text accompanying notes 40-51.

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cut-off proviso.⁹²

It is true that Congress meant the Act to have some effect. Moreover, it could be argued that the role for judicial enforcement should be greater here than under most funding statutes because of the absence of any other enforcement mechanisms, such as administrative implementation. However, that same failure to provide enforcement means could also be interpreted as evincing a congressional concern not with applying the Act coercively, but with articulating a clear national policy to provide guidance to school districts. This interpretation finds some support in the legislative history of the Act.⁹³ Thus, a court could hold that the Act, like the “bill of rights” in *Pennhurst*, is neither a condition of funding nor a substantive requirement, but rather a hortatory declaration of national policy.⁹⁴

Reading the Act as a statement of national policy would resolve all of the problems that beset it. Admittedly a bold step, this interpretation of the Act is most consistent with the whole bundle of congressional concerns motivating its passage, which included federalism and the quality of education as well as religious freedoms. Beyond this, however, the enforcement problems under the Act should counsel this further conclusion: Where Congress structures legislation that would more appropriately be enacted as a direct mandate in a form which simply creates unenforceable “conditions” of funding, the spending power has been misused. When this occurs, the effectiveness of congressional action is undermined whether or not a constitutional violation exists.

—*Niki Kuckes*

92. See *supra* text accompanying notes 76-77.

93. See, e.g., S. REP. NO. 357, *supra* note 7, at 12 (“[T]he Committee recommends that Congress adopt legislation to *guide* school administrators, students, and parents. . . .”) (emphasis supplied).

94. See *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. at 31 (the Developmentally Disabled Assistance and Bill of Rights Act “establishes a national policy . . . and creates funding incentives. . . . [b]ut . . . does no more than that”).