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RELIGIOUS CLUBS IN THE PUBLIC SCHOOLS: WHAT HAPPENED AFTER MERGENS?

Dena S. Davis*

I. INTRODUCTION

The Equal Access Act,¹ upheld by the Supreme Court in Board of Education v. Mergens,² requires public secondary schools to allow access to religiously based student groups on the same basis as other student clubs.³ Mergens presents many challenges to civil libertarians, who may find their traditional sympathies aligned on both sides of the issue.⁴ This article seeks to throw light on some of those issues by reporting on a research project that ascertained the actual effect of the Act on public high schools in Ohio.⁵

II. LEGAL BACKGROUND

In Widmar v. Vincent,⁶ the Supreme Court held that a public university in the State of Missouri was required to allow religiously based student groups the same access to school facilities as it afforded to other student groups.⁷ If a public university adopts a

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³ See 20 U.S.C. § 4071(a) (noting public secondary schools that receive federal funding and have what is known as a "limited open forum" cannot deny access to nor discriminate against students who wish to conduct meetings based on the religious content of the speech at such meetings).

⁴ See infra Part III (outlining the tension between the need for freedom of speech and the "coercive environment" of public secondary schools that could lead to undue pressure on students to accept religious doctrine).

⁵ See infra Part IV (discussing data from "The Mergens Project," a telephone survey of Ohio's public high school districts seeking information on religiously based student clubs and organizations).


⁷ See id. at 277. In Widmar, students from a registered religious group called Cornerstone sued the university after the group was told they could no longer use the university buildings to conduct meetings. Id. at 265. The university had adopted a policy that prohibited the use of any university buildings "for purposes of religious worship or religious teaching." Id. at 265.
policy of accommodating various student groups' meetings, as was the case in *Widmar*, the university has created what is known as an "open" or "public" forum. In other words, if the student democrats and the student chess club were allowed certain access and privileges, a student religious club could not be excluded. The decision was grounded primarily on the right of free speech, with the Court viewing the exclusion of religious clubs as "content-based discrimination."

The university argued that allowing religious groups to meet for worship in state university buildings was a violation of the Establishment Clause of the First Amendment. Using the three-pronged *Lemon* test, the Court found the university's "open-forum policy" did not discriminate against religious speech, as the policy had a secular purpose, avoided entanglement of government with religion, and did not have the "primary effect of advancing religion." In addressing the university's concerns on the issue of "advancement," the Court pointed to the rich diversity of clubs and interest groups already on campus, many of whose goals were not

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8 See id. (noting the university "officially recognize[d] over 100 student groups").
9 See id. at 287 (noting because the university created an open forum, the university "assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms").
10 See id. at 267-68. "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." Id.
11 Id. at 276. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards. Id. at 277.
12 Id. at 270-71.
13 See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Government policies and statutes do not offend the Establishment Clause if such policies and/or statutes meet the three prongs of the *Lemon* test. See id. at 612-13. The *Lemon* test's three prongs are: first, the policy must have a secular legislative purpose; second, the policy must have a principal or primary effect that neither inhibits nor advances religion; and, third, the policy may not "foster an excessive government entanglement with religion." Id. (citation omitted). Although having no direct effect on the legal discussion of this article, it should be noted, "[n] 1997, the Supreme Court appeared to consider the 'entanglement' prong as an effect, thus reducing the *Lemon* test to two central inquiries: secular purpose and secular effect." So Chun, Comment, *A Decade After Smith: An Examination of the New York Court of Appeals' Stance on the Free Exercise of Religion in Relation to Minnesota, Washington, and California*, 63 ALB. L. REV. 1305, 1322-23 n.149 (2000) (citing Agostini v. Felton, 521 U.S. 203, 223-24, 232-33 (1997)).
14 *Widmar*, 454 U.S. at 271-75.
endorsed by the university. The Court noted "[u]niversity students are . . . young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." Thus, there was little danger that students would perceive the university, or the State of Missouri, as giving religion special encouragement or endorsement that amounted to either an impermissible privilege or resulted in a significant advancement of religion's interests.

Subsequently, some federal courts failed to extend the reasoning of Widmar to public secondary schools. Some federal courts departed from Widmar in the "open forum" analysis, while others departed from the "advancement" analysis. For example, in Lubbock Civil Liberties Union v. Lubbock Independent School District, the Fifth Circuit held that a secondary school is not a "public forum," even if the school allows many student groups to meet before or after school. In Lubbock, the court stated: "[t]he District also argues that the school is a public forum, relying on Widmar, . . . maintaining that it created a public forum when it allowed many student groups to meet before or after school. This reliance is misplaced." The Lubbock court instead relied on the decision in Brandon v. Board of Education, decided by the Second Circuit a year before Widmar. In Brandon, the Second Circuit explicitly held 'a high school is not a 'public forum' where religious views can be freely aired.' Other federal courts departed from Widmar in the advancement analysis; for example, in Bender v. Williamsport Area School District, the Third Circuit noted high school students are less mature and more impressionable than

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15 See id. at 274 (stating the use of university facilities by the Students for a Democratic Society and the Young Socialist Alliance did not necessarily commit the university to the goals of these organizations).
16 Id. at 274 n.14.
17 Id. at 274-75. "If the Establishment Clause barred the extension of general benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" Id. (citations omitted).
18 See infra notes 20-25 and accompanying text (discussing, as an example, Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038 (5th Cir. 1982)).
19 See infra notes 26-28 and accompanying text (discussing, as an example, Bender v. Williamsport Area Sch. Dist., 635 F.2d 971 (2d Cir. 1980)).
20 669 F.2d 1038 (5th Cir. 1982).
21 Id. at 1048.
22 Id.
23 635 F.2d 971 (2d Cir. 1980).
25 Brandon, 635 F.2d at 980.
26 741 F.2d 538 (3d Cir. 1984), vacated, 475 U.S. 534 (1986) (vacating on jurisdictional grounds without deciding the merits of the case).
university students, and, thus, were "less able to appreciate the fact that permission for [the religious club] to meet would be granted out of a spirit of neutrality toward religion and not advancement." The court concluded: "the possible perception by adolescent students that government is communicating a message of endorsement of religion if it permitted a religious group to meet would be vastly different in a high school setting than the perception of such action by college students in a college setting." Congress reacted to the confusion created by the federal courts' failure to extend *Widmar* to secondary public schools by passing the Equal Access Act. The Act prohibits all secondary schools that receive federal funding, and that have a "limited open forum," from discriminating against student groups on the basis of their "religious, political, philosophical, or other content of the speech at such meetings." A "limited open forum" exists when the school provides opportunities for noncurriculum-related student groups to meet on school premises outside of class hours. Therefore, if a school allows a chess club, a science fiction club, or a Young Homemakers of America club, it must also allow a Christian club or a Jewish club (or, of course, a Hare Krishna club) as well.

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27 *Id.* at 552. The court also noted high school students are under the guise of compulsory attendance laws, while university students are not. *Id.* For another example of a federal court failing to extend the reasoning of *Widmar* to secondary schools, see *Nartowicz v. Clayton County School District*, 736 F.2d 646, 648-50 (11th Cir. 1984). In *Nartowicz*, the Eleventh Circuit affirmed the trial court's decision to grant a preliminary injunction that prohibited the school district from allowing student religious groups to meet on school property, since allowing a Youth for Christ group to meet on school grounds may not have furthered a secular purpose and may have presented entanglement problems, possibly violating the first and third prongs of the *Lemon* test. *Id.*

28 *Bender*, 741 F.2d at 552.

29 See S. REP. NO. 98-357, at 6-7 (1984), reprinted in 1984 U.S.C.C.A.N. 2348, 2352-53. Despite *Widmar*, many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an extracurricular activity. Like the judges of the district court in *Widmar*, they erroneously believe that the Establishment Clause prohibits students from engaging in such speech at all, even when other types of extracurricular student speech are permitted. ... A primary source of their confusion has been the lower Federal courts. *Id.* at 2352.

The Senate, in committee hearings on the Equal Access Act, pointed to the *Lubbock* decision as a case that has brought confusion to the arena of religious free speech for public school students. *See id.* at 2353. "Students from California, Texas, Pennsylvania, Minnesota, Georgia, and Washington testified that a large number of school administrators are confused by the *Lubbock* and *Brandon* cases, which appear to be inconsistent with Supreme Court decisions recognizing that students have rights of free speech and association." *Id.* at 2357.


33 Equal access protects non-religious groups as well, including those whose activities might be squelched on the basis of their "political" or "philosophical" content. *See Bd. of Educ.*
In *Board of Education v. Mergens*, the Supreme Court ruled that the Equal Access Act was constitutional and did not violate the Establishment Clause. Although the bulk of the decision focused on the meaning of a "limited open forum," the Court did address the constitutional issues as well. The plurality stated that neither the difference in age and maturity of high school versus college age

v. Mergens, 496 U.S. 226, 249 (1990) (noting "the Act on its face grants equal access to both secular and religious speech"). Thus, a school district in Utah reacted to plans by gay and lesbian students to form a high school club and support group by closing down all its student clubs, an unpopular move among students. See James Brooke, *To Be Young, Gay and Going to High School in Utah*, N.Y. TIMES, Feb. 28, 1996, at B8. Ironically, the sponsor of the Equal Access Act, Senator Orrin G. Hatch of Utah, was among the most vociferous in arguing against the gay and lesbian club. "The act was never intended to promulgate immoral speech or activity," he said. *Id.*

Subsequently, the East High Gay/Straight Alliance, along with several students, brought an action against the Board of Education of the Salt Lake City School District, seeking preliminary injunctive relief to prevent the school board from denying them "access to the 'limited open forum' that the defendants allegedly [had] created for 'non-curricular' student clubs at East High School." E. High Gay/Straight Alliance v. Bd. of Educ., 30 F. Supp. 2d 1356, 1357 (D. Utah 1998). The court denied the injunction because, based on the evidence submitted, the court could not determine if a "limited open forum" existed. *Id.* at 1364. In a later proceeding, the court partially granted the Alliance's summary judgment motion by finding that during the 1997-1998 school year East High School had a "limited open forum," but, otherwise denied the motion. See *E. High Gay/Straight Alliance v. Bd. of Educ.*, 81 F. Supp. 2d 1166, 1184, 1195 (D. Utah 1999). Ruling in favor of the school board, the court noted "the District has adopted and maintained a closed forum under the Equal Access Act and that a 'limited open forum' as defined by the Act does not now exist at ... East High." *Id.* at 1197-98 (emphasis added). Subsequently, another group formed at East High, the PRISM Club, and applied for group status under the District's procedures for clubs in a "limited closed forum." See *E. High Sch. PRISM Club v. Seidel*, 95 F. Supp. 2d 1239, 1240, 1242 (D. Utah 2000). The District denied the Club's application, and the Club brought suit seeking a preliminary injunction in federal district court. *Id.* at 1240. The District's policy was to "provide[] for sponsorship of Student Clubs that are directly related to the curriculum offered in the school at which the Club is organized." *Id.* at 1242. The court ultimately granted the injunction because the proposed club related to classes offered within East High's curriculum, and the court found the District had inconsistently applied its own standards in evaluating the club's application. See *id.* at 1245, 1247, 1251. The school district argued that by allowing the club, the forum would now be considered "open." See *id.* at 1251. However, the court disagreed and noted "[t]he only potential damage to Defendant is that an injunction will require the District to consistently apply the standard it itself established to limit access to its forum." *Id.*


35 *Id.* at 253.

36 See *id.* at 247-53 (applying the same logic as in *Widmar*, the Court found the Act did not violate the Establishment Clause through the application of the *Lemon* test). The Court noted the "equal access" feature of the Act gave it the "purpose ... to [neither] 'endorse or disapprove of religion.'" *Id.* at 249 (citations omitted). Furthermore, the Court found the speech in question was not "government speech endorsing religion," but, rather, "private speech endorsing religion," which is protected by the Free Speech and Exercise Clauses. *Id.* at 250. The Court also found the Act limited school officials' participation so as to eliminate any worry of coercion by school officials, and noted "denial of equal access to religious speech might well create greater entanglement problems" than the simple assignment of a school employee for supervisory purposes as required in the Act. *Id.* at 251-53.
students, nor the state’s compulsory attendance laws, required a
different result in Mergens than in Widmar.\textsuperscript{37}

To be sure, the possibility of student peer pressure remains,
but there is little if any risk of official state endorsement or
coercion where no formal classroom activities are involved
and no school officials actively participate... To the extent
a school makes clear that its recognition of respondents’
proposed club is not an endorsement of the views of the club’s
participants,... students will reasonably understand that
the school’s official recognition of the club evinces neutrality
toward, rather than endorsement of, religious speech.\textsuperscript{38}

The plurality also dismissed concerns about faculty sponsors and
other accoutrements of secondary school life,\textsuperscript{39} relying on the
language of the Act itself to curtail excessive “entanglement”
between government and religion.\textsuperscript{40}

III. DISCUSSION

The issue raised in Mergens is an extremely difficult one for civil
libertarians. On the one hand, it is patently wrong, not to mention
unconstitutional, to allow public schools to exclude certain groups
merely because of their beliefs.\textsuperscript{41} The message thus given to
students—whether it is one of hostility toward religion or contempt
for the requirements of free expression—is certainly not one we
wish to promote. Further, it is condescending and destructive to
assume that students cannot have sincere political or religious
views that command protection from school censorship. In 1969,
civil libertarians rejoiced when the Court decided that high school
students had the right to symbolic speech that expressed their

\begin{footnotes}
\item[37] See id. at 250-51 (giving deference to Congress’s opinion that high school students can
distinguish between school sponsored speech and student-initiated speech). The Court did not
“second-guess” Congress’s judgment, which was “based in part on empirical
determinations.” \textit{Id.}

\item[38] \textit{Id.} at 251 (citation omitted).

\item[39] See \textit{id.} at 252-53 (stating a faculty sponsor does not raise entanglement issues, as the
Act prohibits a sponsor’s direct participation in any religious meeting).

\item[40] For example, the Act limits the participation by school officials at meetings of religious
groups. 20 U.S.C. § 4071 (c)(3). The Act states: “employees or agents of the school or
government are [only allowed to be] present at religious meetings... in a nonparticipatory
capacity.” \textit{Id.}

\item[41] See, \textit{e.g.}, E. High Gay/Straight Alliance v. Bd. of Educ., 81 F. Supp. 2d 1166, 1170 (D.
Utah 1999) (noting although a board of education can set a “forum,” once set, “it may not pick
and choose among the ideas or viewpoints that find expression in that forum” because “[t]he
Constitution commands otherwise”).
\end{footnotes}
opposition to the Vietnam War. As Douglas Laycock asks, “[h]ow can it be that students are mature enough to deal with war protests and refusals to salute the flag—in the presence of an entire class—but are not mature enough to deal with a secluded prayer meeting attended only by those who wish to attend?”

On the other hand, it would be disingenuous to ignore the pervasively coercive environment of a public secondary school, which is strikingly unlike that of a public university. Extracurricular clubs are part of the school experience and students are encouraged to participate. Faculty “sponsors” or “monitors” are usually required in high school clubs. In some schools, extracurricular activities may substitute for curricular requirements. Club meetings may be announced over the Public Address system by school leaders. Laycock’s comments that separationists have been “led into error” about equal access because of their “hostility to the set of political and religious views that they associate with the supporters of school prayer” are naive in view of his own comment that the religious right generally “denies that the establishment clause requires neutrality.” The “give ‘em an inch and they’ll take a mile” attitude that separationists have toward the religious right is not without reason.

In fact, the concurrence by Justice Marshall (joined by Justice Brennan) in Mergens emphasizes the differences between Westside High and the University of Missouri, and delineates a number of steps that Westside must take in order to “avoid appearing to sponsor or endorse the [religious] club’s goals.” Marshall notes that the important difference is not that university and high school students have different levels of sophistication and varying abilities “to perceive the subtle differences between toleration and endorsement,” but that the institutions themselves differ in how

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43 Id.
45 Id. at 9.
46 Id. at 6-7.
48 Id. at 267 (Marshall, J., concurring).
they define their relationship to student groups. The university seems to take a neutral attitude toward these clubs, whereas Westside urges students to get involved in extracurricular activities, and “regards its student clubs as a mechanism for defining and transmitting fundamental values.” Thus, Marshall believes that “Westside must redefine its relationship to [the] club program.”

Another issue raised in the concurrence is the lack at Westside of a “truly robust forum that includes the participation of more than one advocacy-oriented group.” Whereas the university’s clubs included a wide spectrum of political opinion, such that no student could seriously believe that the university was endorsing all the clubs, Westside’s clubs certainly merited Justice Stevens’s barb that they were as controversial as a “grilled cheese sandwich.” In a list of Westside’s clubs, which included four different cheerleading clubs, a panoply of athletic activities, three community service clubs, and various career oriented groups, the proposed Christian club stuck out like a sore thumb (or like a cross on a hilltop).

An appealing argument to civil libertarians is that equal access would allow a whole carnival of religious and political clubs from which students could freely choose. At least, where religion is concerned, this may prove to be a chimera. A more likely consequence is that Jews, who are traditionally separationists, would shun such activity, groups labeled as “cults” would stay away for fear of possible legal repercussions of adherents who are minors, Catholics would either be in parochial schools or focus

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48 See id. at 267-68 (Marshall, J., concurring) (postulating that high schools’ de-emphasis of student autonomy indicates that high school administrators perceive a lower level of maturity in high school students and structure extracurricular activities accordingly).

49 Id. (Marshall, J., concurring). As the majority took note, Westside’s school board policy concerning clubs describes them “as a ‘vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills.’” Id. at 231.

50 Id. at 269 (Marshall, J., concurring).

51 Id. at 268 (Marshall, J., concurring). It is clearly not inappropriate to describe Mergens’ club as “advocacy-oriented,” as more than one student stated that she joined the club at least in part to evangelize other students. See Petitioners’ Brief at 12 n.7, Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (No. 88-1597); J.A. at 185, Mergens 496 U.S. 226 (No. 88-1597) (quoting the student who initiated the lawsuit, as saying she wanted to be in the Club because some of the nonreligious students might “like to become Christians and follow God”).

52 Mergens, 496 U.S. at 276 (Stevens, J., dissenting).

53 See id. app. at 253-58 (giving a list of student activities, including Band, Chess Club, Choir, Speech and Debate, Future Medical Assistants, Latin Club, Math Club, Creative Writing Club, Swimming Timing Team, and the Wrestling Auxiliary).


55 For example, the International Society for Krishna Consciousness was nearly bankrupted by litigation that lasted approximately three years when the group was sued by
their after school activities on their churches, and the field would be left to Evangelical Protestants. Among the pallid fare that constitutes the usual extracurricular menu for high school students a single Christian prayer club becomes intensely problematic. Laycock identifies two kinds of “foreseeable” abuse of the Equal Access Act: school sponsorship of religious groups and school exclusion of unpopular groups; he explains why neither abuse is likely. But what is more likely is simply that, by the schools doing nothing, the sole existence of a single Christian group will act to engender the appearance of sponsorship. As Justice Marshall said in his concurrence, “in the absence of a truly robust forum that includes the participation of more than one advocacy-oriented group, the presence of a religious club could provide a fertile ground for peer pressure, especially if the club commanded support from a substantial portion of the student body.” Thus, the civil libertarian committed to the Establishment Clause fears that the secondary school environment will work to provide at least an appearance of endorsement, if not frank coercion, if religious groups are allowed “equal access.”

So, which is it? Is the Equal Access Act a clever “artifice” to “circumvent” the Supreme Court’s previous decisions striking down organized school prayer? Will students “be influenced to adopt the school endorsed prayer club’s beliefs to meet what they perceive to be the school’s expectations”? Will these clubs be “fronts” for evangelizing activity organized primarily by adults, or provide


56 See Laycock, supra note 43, at 53-55 (concluding the religious right will not want to jeopardize informal prayer groups by requesting a school’s official sponsorship, and schools cannot have an open policy only to exclude groups of which the school disapproves).

57 Mergens, 496 U.S. at 268 (Marshall, J., concurring).

58 See Brief of Amici Curiae Anti-Defamation League of B'Nai B'rith et al. at 6, 8, Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (No. 88-1597) (citing Senator Hatfield, a leading proponent of the Act, who “essentially conceded” that “equal access” was a device used to circumvent establishment clause impediments to promoting religion in public schools).

59 Id. at 15.
Will the club’s faculty supervisor tend to be the popular basketball coach, and will there be a nexus between sports, Christianity, and popularity that appears to have school endorsement? Will “the preferences of individuals in a religious minority . . . be inundated by a torrent of allegedly voluntary observances,” as a New York Times editorial predicted? Ought civil libertarians seek to curtail the implications of Mergens, or ought we to go the next step and endorse the equal access concept even in elementary schools, as one set of proposed guidelines suggests?

Will “a thousand flowers bloom,” and school clubs grow to include a variety of religions and political perspectives, so that the “grilled cheese sandwich” at least acquires a touch of mustard and a side of salsa? Will religious clubs, with the Equal Access Act protecting “voluntary forms of religious speech in the face of potentially hostile school officials,” be one more “take it or leave it” offering? Or, will the religious club stand alone as the sole advocacy organization, but without engendering significant peer pressure or other Establishment Clause concerns?

How will Mergens affect the community in which the school is embedded? Are school officials who believe “that allowing religious speech . . . is more trouble than it is worth,” correct? After Mergens, a number of school districts went to considerable trouble attempting to avoid complying with the Equal Access Act. For example, one school district redefined “noncurriculum related” to

64 See B. of Educ. v. Mergens, 496 U.S. 226, 276 (1990) (Stevens, J., dissenting) (explaining that a school’s recognition of non-controversial clubs does not demonstrate that the school believes its students are better off if permitted or encouraged to “compete along ideological lines”).
66 Sekulow et al., supra note 62, at 1018.
refer only to student-initiated groups.\textsuperscript{67} The court struck down this attempt.\textsuperscript{68}

After \textit{Mergens}, religious groups have shown a continued interest in expanding their access to public school environments. In \textit{Rosenberger v. Rectors and Visitors of University of Virginia},\textsuperscript{69} the Court ruled that a public university must pay for the printing of a religiously based publication put out by a school group, on the same basis as it funds other publications.\textsuperscript{70} Justice Souter dissented, labeling the publication as "frankly evangelistic."\textsuperscript{71} The Supreme Court recently held that student-led organized prayer prior to high school football games is public, not private speech, and, thus, violates the Establishment Clause.\textsuperscript{72} Similarly, invocations and benedictions at graduation ceremonies may also violate the Establishment Clause.\textsuperscript{73} Pressure for a so-called "religious liberty amendment" to the Constitution continues.\textsuperscript{74} Thus, the questions

\begin{itemize}
  \item See Pope v. E. Brunswick Bd. of Educ., 12 F.3d 1244, 1248-49 (3d Cir. 1993) (noting the school attempted to circumvent the Act by adopting a policy requiring all student based groups be sponsored by the school board rather than initiated by the students).
  \item See \textit{id}. at 1248-51 (enjoining the school from "interfering with the rights granted [to students] by the Equal Access Act to form a voluntary student Bible Club"). The court concluded "student initiation of clubs and other groups is not a requirement for triggering the Equal Access Act." \textit{id}. at 1251.
  \item 515 U.S. 819 (1995).
  \item See \textit{id}. at 845-46 (holding that the neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action and those actions risked "fostering a pervasive bias or hostility to religion").
  \item See \textit{id}. at 877 (Souter, J., dissenting) (chastising the majority for not seeing the true nature of the student publication). Souter also stated, "[t]he resulting decision is in unmistakable tension with the accepted law that the Court continues to avow." \textit{id}. at 865.
  \item See \textit{Santa Fe Indep. Sch. Dist. v. Doe}, 120 S. Ct. 2266, 2275 (2000) (holding that "student-led, student-initiated prayer at football games violates the Establishment Clause"). The Court distinguished the holding in \textit{Santa Fe} with that of \textit{Mergens}. \textit{Id}. In \textit{Mergens}, the Court held the speech to be private, and, thus, protected under the Free Speech and Free Exercise Clause. See \textit{Bd. of Educ. v. Mergens}, 496 U.S. 226, 250 (1990). In \textit{Santa Fe}, the Court was "not persuaded that the pregame invocations should be regarded as 'private speech.'" \textit{Santa Fe}, 120 S. Ct. at 2275. Therefore, because the Court found the speech in \textit{Santa Fe} to be public, the government's endorsement of the speech violated the Establishment Clause of the First Amendment to the Constitution. \textit{See id}.
  \item \textit{See generally} John DiConsiglio, \textit{Constitutional Crisis?}, 130 SCHOLASTIC UPDATE, Sept. 8, 1997, \textit{available at} 1997 WL 9585628 (noting although supporters may push for the amendment, getting any amendment passed, especially a controversial one, is nearly impossible).
\end{itemize}
that animated *Mergens* remain important. If we are to have a reasoned perspective on those issues, we need to know answers to some empirical questions, among them: how many religious clubs were formed in public schools in response to *Mergens*? Did those clubs exhibit a wide variety of religious faiths? Did any schools close down their "limited public fora"\(^7\) rather than allow religious clubs?

**IV. THE MERGENS PROJECT**

In an attempt to answer as many of these questions as possible, in 1995, I undertook a survey of all public high school districts in Ohio.\(^6\) Unfortunately, a limited budget precluded a survey of the entire nation. However, Ohio, because it ranges geographically and culturally from Cleveland to Appalachia, is a good choice if one is forced to limit oneself to a single state.

With the help of Robert Sheehan of the Center for Applied Research in Education at Cleveland State University, I determined that a random telephone sampling of 241 school districts would constitute a statistically sound result. Dr. Sheehan and I created a telephone interview instrument consisting of twenty-one questions to be asked of high school principals (or other administrators if the principals were not available). I report the significant findings below.

Of the institutions surveyed, at that time ninety-three had religious based clubs or organizations for high school students that met on the school premises; 148 did not. The 148 districts reported having taken no steps to either encourage or discourage such clubs. Only one of the districts removed itself from the reach of the Equal Access Act by limiting existing clubs only to those that were curriculum-related.

Of the districts that had religious clubs, all were Christian; some were described as "non-denominational," some as "Protestant," and some as "mixed." The number of students participating ranged from under five at two schools to nearly a hundred at three schools.

Although only about half the districts required faculty advisors, all but fifteen of the districts that had clubs had advisors.\(^7\) Only

\(^{15}\) *Mergens*, 496 U.S. at 291 (Stevens, J., dissenting).

\(^{16}\) Original research data on file with the author at Cleveland-Marshall College of Law.

\(^{17}\) In my opinion, the school advisor issue has been inadequately addressed in the Act, in *Mergens*, and in most of the articles on this topic. The Act says that "employees or agents of the school or government [may be] present at religious meetings only in a nonparticipatory capacity." 20 U.S.C. § 4071(c)(3) (1994). This distinguishes the role of adult "onlookers," (for
Religious Clubs in Public Schools

three districts allowed club activity to be used for independent-study credit.

Club activities were announced to students in a variety of ways, including bulletin boards, over the Public Address system (the most popular), flyers, and word of mouth. In some schools, the clubs had generated other school-based activities, including a glee club, speakers and assemblies, dances, trips, and a blood drive. Most respondents did not report any source of funding, but those who did included membership dues (nine schools), district funds (two schools), and contributions from the community, various churches, and fundraisers (six in all).

I was especially interested in how these groups got started. People who applaud the Equal Access Act tend to characterize the clubs as the spontaneous result of student interest. Those who oppose it often see it as a plot by outside evangelical ministries to establish beachheads in public schools.\(^7\) Of the schools that had religious clubs, thirty-two did not know how their groups formed, and thirty reported that students initiated the group. Sixteen schools reported clubs started by faculty members, seven by ministers, four by athletic coaches, and one by the Parent Teachers Organization.\(^8\) One respondent reported that students "were disgusted with the situation in the world and approached the principal." One principal reported that "two coaches thought the clubs would be a positive thing for students . . . but the main reason the clubs were started was to keep the kids away from drugs."

When asked whether the school had taken steps to encourage or discourage such clubs, fifteen respondents answered that the clubs were encouraged; the others appeared to be neutral.

lack of a better word) from the role they play in such clubs as French, Boy and Girl Scouts, Pep Squad, etc. If we assume that teachers, who volunteer to be present at these clubs, are somewhat sympathetic to their aims, and knowing that the natural and common role of teachers in clubs involves some sort of support and leadership, it is difficult to imagine that the onlookers confine their roles to making sure that students don't break the furniture.\(^7\)

See James J. Knicely, Free Speech and Nonestablishment in the Public Schools, 22 J.L. & EDUC. 73, 74 (1993). But, [t]he origins of the Equal Access Act were not in a 'conservative' master agenda or some conspiracy hatched in the Reagan-Bush White House, but in the spontaneously simple, yet persuasive, complaints of individual students who were prohibited by school administrators from praying or discussing religious subjects on school property, while their counterparts were permitted to meet and use school property for a variety of self-directed speech purposes.\(^7\)

This finding is problematic, as the Act says the meeting must be "student-initiated," and school employees must be present "only in a nonparticipatory capacity." 20 U.S.C. § 4071(c)(1), (3) (1994). The Act also says "nonschool persons may not direct, conduct, control, or regularly attend activities of student groups." § 4071(c)(5).
Only a minority of schools (eleven in all) reported controversy. In one school, a "strong" faculty member, who was also a head coach, had initiated and supported the club (Fellowship of Christian Athletes). As a result, some parents and students believed that "you had to be involved in the club to play football." Students who didn't join reported harassment and eventually complained to the school board. As a result, the school became a "closed forum." Five schools reported controversy from the staff, three from parents, and one each from students, the school board, and the community.

V. CONCLUSION

At least in Ohio, the news on *Mergens* is mixed. On the one hand, the Court's decision that the Equal Access Act is constitutional did not trigger a tidal wave of religious evangelizing in public schools. Nor did it result in an upsurge of sectarian controversy or public conflict. (Since the ACLU is active and visible in Ohio, I am reasonably certain that the lack of controversy does not simply mean that people, who feel their rights have been trampled by religiously based school clubs, are suffering in silence.) As expected, Christian clubs, usually of a Protestant nature, are the sole advocacy offerings in virtually all the schools in which they are present. Thus, Justice Stevens's comment about the "grilled cheese sandwich" continues to be apropos. 80

More troubling are the schools in which clubs are initiated by teachers, coaches, or outside ministers, which seems directly contrary to the provisions of the Act. 81 On the other hand, the Act's provisions, with regard to adult participation, are both disingenuous and probably not constitutional. 82 It is disingenuous to think that, in an environment as controlled and authoritarian as a public high school, 83 officially sanctioned student activities will involve teachers in only neutral, nonparticipatory, custodial fashions. And it is probably not constitutional to expect them to do so. After all, if a teacher can initiate and support a scuba club or a cheerleading squad, why not the bible study group? And if a Scout troop can

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80 See *supra* notes 51-53 and accompanying text (questioning whether high schools have student groups that offer "a wide spectrum of political opinion").
81 See 20 U.S.C. § 4071(c)(1) (requiring "the meeting [to be] voluntary and student-initiated").
82 See Morgenstein, *supra* note 60, at 261 (recommending the Equal Access Act be declared unconstitutional since it is ambiguous, conflicts with precedent, and lacks a secular purpose).
83 See Laycock, *supra* note 43, at 50 (reciting the argument that "a high school never can be an open forum, because the educational function requires the school to control so much of the speech that goes on there").
meet in the school, with all the infrastructure, leadership and official organization of the national scouting organizations, under what theory can a school deny to the student bible group the presence and leadership of a local minister?

This study was limited to one state, and to a quantitative methodology. It would be very worthwhile to do a similar study nationwide, and also to investigate further a representative number of public schools to pursue questions only a qualitative study can answer, for example, about the influence of these clubs in the school, the actual role of advisors, and so on. It would also be interesting to interview other students in the school, such as Jewish or Muslim students, to find out why they have not initiated parallel organizations.