

EXTRACURRICULAR RELIGIOUS ACTIVITIES IN THE PUBLIC SCHOOLS: CONSTITUTIONALLY PERMISSIBLE, REQUIRED OR PROSCRIBED?

R. COLLIN MANGRUM†

INTRODUCTION

Controversy concerning the appropriate role of religion in society has been a persistent theme throughout history. Control over the education and culturalization of society's youth has often been a center of controversy. In this country questions concerning the role of religion in the educational process have spawned a great deal of constitutional litigation. Does the state's interest in fostering a homogeneous group of people with common ideals override parental rights in having their children learn the Bible in their mother tongue at parochial schools?¹ Indeed, does the state's interest in standardizing the educational experience available to children generally justify compulsory public school?² If private school education as an alternative to public school education is constitutionally protected, can the state control curriculum,³ teacher certification, accreditation and textbook approval,⁴ or even attendance at any school?⁵

In the context of the public school, is released-time permissible

† Professor of Law, Creighton University School of Law; B.A., 1972, Harvard University; J.D., 1975, University of Utah School of Law; B.C.L., 1978, Oxford University; S.J.D., 1983, Harvard University.

1. See *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Court in *Meyer* invalidated on fourteenth amendment grounds a Nebraska statute which proscribed the teaching of foreign languages in the first eight grades.

2. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Pierce v. Hill Military Academy*, 268 U.S. 510 (1925) (invalidating Oregon's compulsory public school law on the basis of the parents' natural liberty protected by the fourteenth amendment).

3. See *State v. Whisner*, 47 Ohio St. 2d 181, —, 351 N.E.2d 750, 765 (1976), wherein the court invalidated curriculum requirements.

4. See *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987), wherein the Eighth Circuit upheld Iowa's regulatory scheme applicable to private schools. This case was discussed in Mangrum, *Family Rights and Compulsory School Laws*, 21 CREIGHTON L. REV. 1019 (1987-88).

5. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (where the Court granted an exemption to the Old Order Amish from requiring that their children attend school beyond the eighth grade); Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U.L. REV. 971 (1987); Comment, *The Constitutionality of Home Education Statutes*, 55 UMKC L. REV. 69 (1986).

for religious training in school⁶ or off school premises?⁷ Is it permissible for schools to hold state-written prayer in the classroom⁸ or even require a moment of silence?⁹ Can the Ten Commandments be displayed in the public school classroom?¹⁰ Is it permissible to proscribe the teaching of evolution¹¹ or require a balanced treatment of "creation science" as well as "evolution science?"¹² These questions, along with many other related questions concerning religious training in the educational setting, have perplexed the courts, the legislatures and the American public for many years.

The constitutional implications of religious activities conducted on public school premises during non-classroom hours present yet one more church and state problem that has been winding its way through the courts in search of a definitive answer. Recently the United States Court of Appeals for the Eighth Circuit in *Mergens v. Board of Education*¹³ and the United States Court of Appeals for the Ninth Circuit in *Garnett v. Renton School District No. 403*,¹⁴ addressed the constitutionality of permitting extracurricular student groups to meet for religious purposes on school premises before and after school on an equal basis with other groups and clubs. Since these courts concluded exactly the opposite on the same issues, the questions raised are likely ones that the United States Supreme Court will be called upon to resolve. This Article reviews these cases and the paradigmatic approaches that courts, commentators, and jurists have relied upon generally in settling church and state controversies and the approach that will likely be applied in this particular instance. The more persuasive arguments favor allowing student-initiated extracurricular groups to meet on school premises for religious purposes on an equal basis with other student groups.

MERGENS AND GARNETT

The facts of *Mergens* and *Garnett* are typical of the interchange between school boards and students throughout this country. The

6. See *McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (invalidating on establishment grounds an in-school released time program of religious training).

7. See *Zorach v. Clauson*, 343 U.S. 306 (1952) (permitting a released-time program for religious training away from the school premises).

8. See *Engel v. Vitale*, 370 U.S. 421 (1962) (invalidating public school prayer).

9. See *Wallace v. Jaffree*, 472 U.S. 38, 40, 61 (invalidating a moment of silence).

10. See *Stone v. Graham*, 449 U.S. 39, 39-40 (1980) (per curiam) (invalidating a statute which required that the Ten Commandments be displayed in the classroom).

11. See *Epperson v. Arkansas*, 393 U.S. 97 (1968) (invalidating a statute prohibiting the teaching of evolution).

12. See *Edwards v. Aguillard*, 107 S. Ct. 2573, 2575-76 (1987) (invalidating a balanced treatment statute).

13. No. 88-1227 (8th Cir. 1989).

14. No. 88-3552 (9th Cir. 1989).

facts of each case will be discussed first, followed by a review of the issues presented.

THE FACTUAL BACKGROUND OF *MERGENS* AND *GARNETT*

Mergens

Westside High School, as part of its overall educational program, allows students to participate in student clubs and groups on school premises before and after school. The clubs are student-initiated and strictly voluntary. No class credit or school curriculum time are implicated. Westside has a written school board policy concerning these groups and clubs.¹⁵ The policy statement, however, does not specify procedures for forming and obtaining approval for such clubs. In practice students wishing to form a club or group would submit a proposal to the school's principal, Dr. Findley, who would consider the request and decide whether to permit the formation of the club.

Students initiated and were permitted to form a variety of clubs. These clubs included Interact and Zonta, male and female service clubs loosely associated with Rotary International; a chess club; Subserfers, a scuba diving club; a photography club; Future Business Leaders of America; and Welcome to Westside, a big brother/sister program for matching beginning and more senior students. Prior to Bridget Mergens' application for a religious club, no club had ever been refused permission to meet.

In January of 1985 Mergens, a student at Westside, met with Westside's principal, Dr. Findley, and requested permission to form a Christian Club. Dr. Findley denied the request, apparently on separation of church and state reasoning. When Mergens persisted, Dr. Findley met with Dr. Kenneth Hansen, the Superintendent of Westside Community Schools, and Dr. James A. Tangdall, the Associate

15. Policy Number 5610 reads as follows:

STUDENT CLUBS AND ORGANIZATIONS

The Board of Education regards student clubs and organizations as a vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills.

School-sponsored clubs, and organizations are those directly under the control of the school administration, and shall have faculty sponsorship. The Superintendent shall establish operational guidelines for clubs and organizations which shall function for the welfare and the best interest of the students and the school.

Such clubs and organizations shall not be sponsored by any political or religious organization, or by any organization which denies membership on the basis of race, color, creed, sex or political belief.

Students participating in out of school clubs or organizations may not identify the clubs as school-affiliated organizations without prior administrative approval.

Appellant's Brief at App. 18, *Mergens v. Board of Educ.*, No. 88-1227 (8th Cir. 1989).

Superintendent of Westside Community Schools. They collectively agreed in February that Mergens' request should be denied. On March 4, 1985, Mergens petitioned the Board of Education, which upheld the earlier denials. The School Board justified the denial on grounds that the school buildings are to be used solely for school-sponsored, curriculum-related activities, which it decided did not fit the application for the Christian Club.¹⁶

On April 17, 1985, Mergens, together with four other students, through their parents as next friends, filed suit in the United States District Court for the District of Nebraska. They alleged that, under the first and fourteenth amendments of the United States Constitution, article I of the Nebraska Constitution and the Equal Access Act,¹⁷ their freedom of speech, freedom of assembly and association, freedom to exercise religion and their statutory civil rights had been violated by the School Board and its employees.¹⁸

On May 10, 1985, the United States Department of Justice intervened on behalf of the students in support of the constitutionality of the Equal Access Act. On the same day, the court heard plaintiffs' motion for preliminary injunction; on May 23, 1985, in a written opinion, the plaintiffs' motion was denied.

The trial commenced on February 2, 1988. The case presented three major issues: First, what type of forum has Westside created by opening their school up for student-initiated club meetings before and after regularly scheduled classes. Second, is the Equal Access Act¹⁹ both applicable and constitutional. Third, whether the free exercise clause requires or the establishment clause prohibits the school's recognition of a religiously-oriented club. On February 2, 1988 the court entered judgment for the school district, reasoning that Westside High School had a closed forum and thus the Equal Access Act did not apply. No other issues were determined.²⁰

The Eighth Circuit, in a three-judge panel including Chief Judge Lay, Senior Circuit Judge Gibson and Circuit Judge McMillian, reversed. McMillian, writing the opinion, held that: (1) Westside by its club policy had created a limited open forum, notwithstanding its characterization to the contrary; (2) the Equal Access Act applied and was constitutional; and (3) regardless of the applicability of the Equal Access Act, free exercise required and the establishment

16. Appellants' Brief at 5, *Mergens*.

17. 20 U.S.C. §§ 4071-74 (1984).

18. Appellants' Brief at 5, *Mergens*.

19. 20 U.S.C. §§ 4071-74 (1984).

20. Appellants' Brief at 6, *Mergens* (referencing the Court Record at 142-58).

clause did not proscribe the school's recognition of religiously-based clubs.

Garnett

The facts and issues discussed in *Garnett* are strikingly similar to those addressed in *Mergens*. However, the Ninth Circuit's panel of Circuit Judges Jerome Farris and Cecil F. Poole, and District Judge Robert J. Kelleher, sitting by designation, decided the case in favor of excluding the religious group.

In *Garnett*, Scott Germino, a sophomore at Lindbergh High School, a public high school in Renton, Washington, requested permission in the fall of 1984 from the school's principal, Brian Barker, to meet with other students before school in an empty classroom to discuss religious and moral issues, read the Bible and pray. When school officials refused permission the students filed suit.

The district court denied the students' motion for a preliminary injunction and entered judgment for the school district based on the following stipulated facts. The students' meetings would be entirely voluntary, student-initiated and student directed.²¹ The students have never sought school endorsement or sponsorship, nor do they ask the school to assign an employee to plan, lead, participate in, or even attend any of their strictly voluntary meetings. They simply seek an opportunity to use the school's facilities before and after school on an equal basis to other student-initiated groups.

In considering approval of clubs the school relied upon District Policy 6470, which sets forth nonexclusive criteria for approving co-curricular activities.²² Other student groups permitted to use the school's facilities under such criteria include the photo club, rocket club, skateboard club, chess club, arts and crafts clubs, Key Club, Special Kiwanis Youth Service club, ski club, and golf club.²³ Participants in most of these groups do not receive school credit and their

21. Appellant's Brief at 7, *Garnett v. Renton School Dist. No. 403*, No. 88-3552 (9th Cir. 1989).

22. District Policy 6470 provides the following criteria:

1. the purposes and/or objectives shall be an extension of a specific program or course offering,
2. the activity shall be acceptable to the community,
3. the activity should have carry-over values for lifetime activities,
4. the group shall be supervised by a qualified employee,
5. the cost of the activity must not be prohibitive to student or District,
6. the activity must comply with Title IX requirements,
7. the activity must take place on school premises unless approved in advance by the school principal, and
8. the activity must not be secretive in nature.

Garnett, No. 88-3552 at 379.

23. Appellant's Brief at 5, *Garnett*.

involvement in most of the clubs does not affect in any way the student's standing in the high school. For the most part student members, not faculty advisors, plan club activities and no faculty instruction takes place. The parties stipulated in this regard that the groups meet "during non-instructional time" and that "[o]ne or more of said student clubs are student-initiated, significantly student-directed, and student participation therein is voluntary."²⁴

The students appealed the denial of their motion on the authority of 42 U.S.C. § 1983 to enforce their constitutional rights to freedom of speech and association under the first amendment, as well as their statutory rights under the Equal Access Act, their free exercise rights, and their right under the fourteenth amendment to equal protection of the laws. The Ninth Circuit panel affirmed. The court held that: (1) the school has a closed forum;²⁵ (2) because the school had not created a "limited open forum" as defined in the Equal Access Act, the Act's requirements do not apply;²⁶ and (3) permitting the religious-based group to meet on school property is not required by the free exercise clause, but rather would violate the establishment clause.²⁷

Despite the similarity of facts and issues the two courts in *Mergens* and *Garnett* came to opposite conclusions. Their contrary conclusions reflect alternative characterization views and differences in the applicable tests used by the courts to resolve church and state issues. The *Mergens* court, characterizing the problem under free speech and free exercise perspectives, applied an accommodationist or neutralist paradigm in holding that both the Equal Access Act and the free speech and free exercise clauses required accommodation of the religious club.

The *Garnett* court, characterizing the problem under an establishment orientation, followed more of a strict separationist perspective in holding the Equal Access Act inapplicable and the religious activity proscribed by the establishment clause. An analysis of the persuasiveness of the differing approaches followed by the Eighth and Ninth Circuits in these cases ultimately depends on proper resolution of the characterization issue and the coherency of the competing paradigms used to resolve church and state issues generally. Accordingly, this Article will consider the issues discussed in these cases and then evaluate the competing paradigms either explicitly or implicitly guiding the variant approaches.

24. Noted in Appellant's Brief at 6, *Garnett*.

25. *Garnett*, No. 88-3552 at 385.

26. *Id.* at 389.

27. *Id.* at 381.

ISSUES PRESENTED IN *MERGENS* AND *GARNETT**Free Speech and Forum Characterization*

If one views the problem of extracurricular student religious groups as a free speech issue, then the forum characterization heavily influences the results.²⁸ The landmark case of *Cornelius v. NAACP Legal Defense & Education Fund*²⁹ discusses three categories of government controlled fora and corresponding free speech entitlements.

First, speech conducted in streets, parks and other "traditional public fora" receive the most extensive constitutional protection. Speech and assembly can be censored in such fora "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."³⁰

Second, "limited public fora" may be created by the state "for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."³¹ While the designation of a limited public forum is revocable, the state is subject to the same "compelling state interest" constraint if speakers falling within the group for whom the forum exists are to be excluded.

Third, the state can restrict speech and assembly in its "nonpublic forum"³² so long as the restrictions are "reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view."³³

Of course a governmental entity seeking maximum discretion in controlling public speech and assembly may seek to categorize its forum as "nonpublic." School officials in both *Mergens* and *Garnett* categorized their extracurricular programs as nonpublic so as to justify their exclusion of the religious groups. Religious groups could be excluded because the criteria for club approval was that the petitioning group must have a curriculum-related purpose and effect: because the Supreme Court has already held that religion cannot constitutionally be part of the curriculum,³⁴ a religious student group

28. Professor Johnson in *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817 (1984) perceptively notes that the first amendment religious doctrine is indeterminate in three ways: First, many religious issues can be characterized as either an establishment problem, a free exercise problem, or a free speech problem. He notes that the outcome depends largely on the characterization option selected. Second, the tests applied in each instance are subjective and indeterminate. Third, the definition of religion is indeterminate. *Id.* at 820-21.

29. 473 U.S. 788 (1985).

30. *Id.* at 800.

31. *Id.* at 802.

32. *Id.* at 800.

33. *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

34. *McCullum v. Board of Educ.*, 333 U.S. 203 (1948).

cannot pass the curriculum-related test.

Mergens

The Eighth Circuit in *Mergens* refused to accept the "closed forum" label that Westside officials applied to club activities. The court reasoned that the "closed forum" approach would subject the rights of students to the arbitrary categorization of school officials.³⁵

Garnett

The Ninth Circuit, in comparison, deferred to the school's discriminatory categorization aimed at excluding religious groups:

The Renton School District has not by either policy or practice opened its classrooms for indiscriminate use. District Policy 6470 explicitly states that "[t]he Renton School District does not offer a limited open forum." The district's policy is to allow use of its facilities by student groups only after those groups are approved according to narrowly circumscribed guidelines. The district's practice does not vary from its policy. Students are allowed to meet in high school classrooms only after express district approval. The school district has not intentionally opened its classrooms for public discourse by students and student groups.³⁶

The court reasoned that "[b]ecause the district has not created a public forum, it may limit student expression in any reasonable way."³⁷ Because the religious group, unlike every other group that had ever applied for consideration, has "nothing to do with the school district's educational mission" it could be reasonably denied approval.³⁸

Analysis

Certainly the clubs approved at both Westside and Lindbergh are indistinguishable. Consequently, either the Eighth or the Ninth Circuit's characterization of the free speech forum involved must be in error.

The two landmark cases dealing with free speech in the public school setting are *Tinker v. Des Moines Independent Community School District*³⁹ and *Hazelwood School Districts v. Kuhlmeier*.⁴⁰ *Tinker* involved the right of students to wear black armbands to protest the Vietnam War. In a sense the fora categories discussed later

35. *Mergens*, No. 88-1227 at 6.

36. *Garnett*, No. 88-3552 at 386.

37. *Id.* (citing *Perry*, 460 U.S. at 47).

38. *Id.*

39. 393 U.S. 503 (1969).

40. 108 S. Ct. 562 (1988).

in *Cornelius* are inapplicable to *Tinker*, because *Tinker* did not involve a question of access to public property.⁴¹ Rather, students were compelled under compulsory education laws to be in school. The United States Supreme Court, in recognizing the students' right to "speech," did not discuss whether school was a traditional forum for the narrow category of students and faculty; nor did the justices find that the school had created a limited public forum for students and faculty. Instead, they simply held that "students in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"⁴²

In *Hazelwood*, the Supreme Court, quoting *Cornelius*,⁴³ held that:

[S]chool facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," . . . or by some segment of the public, such as student organizations. . . . "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."⁴⁴

The student newspaper in *Hazelwood* was exclusively a product of the school's sponsored and financially supported journalism class: a closed forum. Consequently, the Court held that school officials could reasonably edit the paper so long as they did not suppress speech merely because they opposed the speaker's view. They were justified in this instance because the speech related to teen pregnancy and sexual matters, subjects properly within the school's regulatory discretion especially because the newspaper was published under school auspices.

Thus while *Tinker* requires secondary schools to accommodate the free speech rights of students, *Hazelwood* distinguishes personal from school-endorsed speech. If the students invoke the school's endorsement, then the school may exercise reasonable regulatory constraints.

Applied to the context of extracurricular student groups, the Supreme Court has not spoken definitively. In the only case to reach the Supreme Court, *Bender v. Williamsport Area School District*,⁴⁵

41. See Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1, 48-49 (1986).

42. *Hazelwood*, 108 S. Ct. at 567 (quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969)).

43. 473 U.S. 788, 802 (1985).

44. *Hazelwood*, 108 S. Ct. at 568 (quoting *Perry*, 460 U.S. at 47; *Cornelius*, 473 U.S. at 802).

45. 106 S. Ct. 1326 (1986).

the Court vacated, on standing grounds, a United States Court of Appeals for the Third Circuit decision that held "equal access" unconstitutional in the context of a during-school-hours extracurricular program.⁴⁶ The student-initiated group called "Petros" was formed for the purpose of promoting spiritual growth and positive attitudes in the lives of its members. They sought permission to meet on school premises during student activity periods scheduled during the regular schooldays on Tuesdays and Thursdays. The district court granted summary judgment in favor of the students on free speech grounds.⁴⁷

Even though the Supreme Court vacated the Third Circuit's reversal of the district court, and therefore did not reach the merits, four of the justices would have reversed the Third Circuit on the authority of *Widmar v. Vincent*⁴⁸ and free speech grounds. Chief Justice Burger, in a dissent joined by Justices Rehnquist and White, repudiated the school district's argument that the possibility of students being confused as to state sponsorship requires, on establishment grounds, the exclusion of religious groups. Burger distinguished between state directed and student initiated religious activities:

[T]he several commands of the [f]irst [a]mendment require vision capable of distinguishing between *state* establishment of religion, which is prohibited by the [e]stablishment [c]lause, and *individual* participation and advocacy of religion which, far from being prohibited by the [e]stablishment [c]lause, is affirmatively protected by the [f]ree [e]xercise and [f]ree [s]peech [c]lauses of the [f]irst [a]mendment. If the latter two commands are to retain any vitality, utterly unproven, subjective impressions of some hypothetical students should not be allowed to transform *individual* expression of religious belief into *state* advancement of religion.⁴⁹

Stating that the "[e]stablishment [c]lause mandates state neutrality, not hostility, toward religion," Chief Justice Burger concluded that "[b]y granting the student prayer group equal access to the student activity forum, the order of the [d]istrict [c]ourt 'follows the best of our traditions and is wholly consistent with the Constitution.'"⁵⁰

46. 741 F.2d 538 (3d Cir. 1984). The Court's decision thus reinstated the district court's decision which upheld on free speech grounds the students' petition to meet during the regular activity period on an equal basis with other student groups. *Bender v. Williamsport Area School Dist.*, 563 F. Supp. 697 (M.D. Pa. 1982).

47. *Bender*, 563 F. Supp. at 699-700.

48. 454 U.S. 263 (1981).

49. *Bender*, 106 S. Ct. at 1337 (Burger, C.J., dissenting).

50. *Id.* at 1338 (Burger, C.J., dissenting) (quoting *Zorach v. Clauson*, 330 U.S. 306, 314 (1952)).

Justice Powell, writing a separate opinion in dissent, opined that "this case is controlled by *Widmar v. Vincent*" notwithstanding the age and maturity differences between high school and college students.⁵¹

Other courts have, on occasion, characterized the problem from an establishment, rather than a free speech, perspective and invalidated an equal access resolution for religious student groups meeting on school premises. For example, the United States Court of Appeals for the Eleventh Circuit in *Nartowicz v. Clayton County School District*,⁵² while affirming on the facts in the case an injunction prohibiting a religious group from meeting, left open the possibility of a contrary result by stating that "[t]he ultimate question, of course, is whether the school district merely accommodates, as opposed to endorses," the religious group.⁵³ The United States Court of Appeals for the Fifth Circuit in *Lubbock Civil Liberties Union v. Lubbock Independent School District*,⁵⁴ and the United States Court of Appeals for the Second Circuit in *Brandon v. Board of Education*,⁵⁵ in comparison, each held that the establishment clause requires the exclusion of religious extracurricular groups.⁵⁶

The Equal Access Act was enacted, in large part, in response to the establishment reasoning, as compared with free speech reasoning, followed in the above cases. Congress hoped to extend the equal access policy constitutionally recognized in *Widmar* to the high school setting notwithstanding conflicting establishment cases to the contrary. The constitutionality of an equal access policy remains an issue in light of establishment concerns.

Applicability and Constitutionality of the Equal Access Act

Applicability of the Act to Extracurricular Activities

The Equal Access Act⁵⁷ (the "EAA") makes it unlawful for any public secondary school which receives federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or to 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

51. *Id.* at 1338-39 (Powell, J., dissenting).

52. 736 F.2d 646 (11th Cir. 1984).

53. *Id.* at 649.

54. 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).

55. 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

56. *See also* *Bell v. Little Axe Indep. School Dist. No. 70*, 766 F.2d 1391 (10th Cir. 1985) (holding that the establishment clause prohibits religious student groups at the junior high level).

57. 20 U.S.C. § 4071 (1984).

such meetings.⁵⁸

Subparagraph (b) of the EAA defines "limited open forum" as follows:

[A] public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.⁵⁹

While "limited open forum" is thus defined by the EAA, the EAA leaves undefined the term "noncurriculum related." The critical issue is whether school officials can avoid the strictures of the EAA, and the free speech characterization of the problem, by a broad definition of "curriculum-related" that includes nearly everything other than religion.

Mergens and Forum Characterization

In *Mergens*, Westside's principal, Dr. Findley, testified at trial that each of the approved clubs were curriculum-related. According to Dr. Findley's testimony, the Chess Club fosters critical thinking and logic, which are important analytical skills despite the fact that the school does not offer a course in logic; the Rotary International service clubs are related to the goals of sociology and psychology; Subserfers, the scuba club, relates to the goals of physical education; and so on. Of all the clubs proposed, Dr. Findley found that only the bible study group had no nexus to the curriculum, despite the obvious connection between the bible and literature, poetry, history and sociology. Based on Dr. Findley's testimony the district court held that Westside, in allowing only curriculum-related clubs, maintains a closed forum and that, therefore, the EAA does not apply.

On appeal the Eighth Circuit panel reversed, holding that allowing such a broad interpretation of "curriculum-related" would make the EAA meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the EAA. A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against particular student group on the basis of the content

58. 20 U.S.C. § 4071(a) (1984).

59. 20 U.S.C. § 4071(b) (1984).

of the speech of that group.⁶⁰

In support of its holding the court cited the EAA's legislative history. Specifically, the court quoted the following discussion between Senators Gorton and Hatfield of the definition of "noncurriculum-related" student groups:

Mr. Gorton: I gather from the previous remarks of the Senator from Oregon and the Senator from Alabama that the definition of these non-related student groups is fairly broad. The chess club would be such a group. If the school permits a chess club, it has thereby created the limited open forum which brings into effect the proscriptions of the act.

Mr. Hatfield: That is correct.⁶¹

Based on the legislative history of the EAA, the Eighth Circuit concluded that:

Congress did not intend for the EAA [Equal Access Act] to be easily circumvented by administrative decree. Many of the student clubs at WHS [Westside High School], including the chess club, are noncurriculum-related. Therefore, WHS maintains a limited open forum, and the EAA forbids discrimination against appellants' proposed club on the basis of its religious content.⁶²

Garnett and Forum Characterization

The Ninth Circuit panel in *Garnett* also relied on legislative history but this time in support of the notion that school districts have almost unfettered discretion in defining activities that are curriculum-related. Not surprisingly, therefore, the court concluded that the school district's intent to avoid "limited open forum" status was dispositive of the issue:

The legislative history of the [EAA], however, reveals [c]ongressional intent that local school districts have discretion in determining what is and what is not curriculum related. During debate, Senator Hatfield, a sponsor of the legislation, stated that the [EAA] in no way seeks to limit a school district's authority to determine where the line is to be drawn between curriculum-related activities and noncur-

60. *Mergens*, No. 88-1227 at 6.

61. *Id.* at 6 (quoting 130 CONG. REC. S8342 (daily ed. June 27, 1984) (statements of Senators Gorton and Hatfield)). On the other hand, Senator Gorton queried Senator Hatfield regarding the effect of a school district deciding that chess was a curriculum-related activity. Hatfield responded: "I would not say that no district could, but I cannot readily conceive of a criterion that could be used at this time to establish that as a curriculum-related activity. I am not saying it could not be, because as long as you have lawyers, they can find ways of doing things one way or another." 130 CONG. REC. S8342 (daily ed. June 27, 1984).

62. *Mergens*, No. 88-1227 at 6.

riculum related activities. . . . District Policy 6470 prevents Lindbergh from having a "limited public forum" under the [EAA]. The policy provides that student activities must be an "extension of a specific program or course offering." This allows only activities which are curriculum related.⁶³

Thus the court concluded that because every other club ever proposed had some nexus, however tenuous, with the high school curriculum defined by the school district, the school district had not created a limited open forum and, therefore, the EAA simply did not apply.⁶⁴

Legislative Intent

Although the text and legislative history of the EAA is not a model of clarity,⁶⁵ Senator Leahy expressed an intent that if the EAA were to provide any protection,⁶⁶ the school's actual practices, not its stated policy should be determinative. In this regard any school's actual recognition of a single club that is not curriculum-related creates a statutory open forum within the meaning of the EAA, regardless of the school district's characterization to the contrary.

While specific references to legislative history may be available on both sides of the issue of administrative discretion, the general intent cannot seriously be disputed. The bill's primary intent was the elimination of pervasive discrimination against religious student speech. The sponsors were aware of *Widmar v. Vincent*,⁶⁷ providing equal access for religious speech at the university level, and judicial opinions⁶⁸ that distinguished *Widmar* as applied to secondary schools. They essentially wanted to "clear up the mistakes of the two circuits and school districts [*Brandon* and *Lubbock*] which have followed *Widmar*."⁶⁹ Moreover, the EAA's sponsors believed that they

63. *Garnett*, No. 88-3552 at 388.

64. *Id.*

65. Senator Hatfield, the sponsor of the bill, acknowledged that as many as 1,000 people had been involved in negotiating a compromise on the bill and no consensus existed as to the meaning of each of its provisions. 130 CONG. REC. S8345 (daily ed. June 27, 1984) (statement of Sen. Hatfield). Senator Gorton observed that too many cooks had spoiled the broth. *Id.* (statement of Sen. Gorton). House opponent Representative Fish suggested that not even the sponsors knew what the bill meant. *Id.* at H7736 (daily ed. July 25, 1984) (statement of Rep. Fish).

66. 130 CONG. REC. S8341 (daily ed. June 27, 1984) (statement of Sen. Leahy). See also Laycock, 81 NW. U.L. REV. at 36; Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 758-61 (1986).

67. 454 U.S. 263, 265-66 (1981) (providing equal access at the university level).

68. See *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist. No. 70*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

69. Memorandum to Senate Staff from March Bell and Karl Moor, Sub-committee on Security and Terrorism at 1 (Jan. 14, 1983), *quoted in* Teitel, *The Unconstitu-*

had defined "limited open forum" in a manner that covered most schools with extracurricular programs.⁷⁰ Given the overwhelming support of the EAA by both houses of Congress,⁷¹ issues of legislative intent ought to be resolved in favor of a narrow view of curriculum-related and correspondingly an expansive view of limited open forum, lest religion be regularly excluded from the scope of the EAA's protection and the EAA's purposes frustrated by characterization discretion.

Even if "curriculum-related" is given an expansive view, certainly bible study would have a closer nexus to a school's curriculum than many clubs. Thus an understanding of the bible would be compatible with the study of literature, poetry, sociology, history, philosophy, government, applied ethics and comparative studies of cultures and belief systems.

The obvious point is that religious clubs are not uniquely excluded because of all the extracurricular activities that students are interested in, religion is the only subject that has no connection with school curriculum. Despite the attempt to rationalize the exclusion, religious clubs are simply excluded because of their speech content: schools discriminate against religion *because it is religion* not because a nexus cannot be found between religious studies and curriculum. It is well established, however, that the establishment clause does not require the state to suppress a person's speech merely because the content of the speech is religious. As Justice Brennan stated in his concurring opinion in *McDaniel v. Paty*, "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."⁷²

Thus whether such discrimination on speech content is constitutionally required or prohibited ultimately is less a statutory issue than a constitutional one. That is, the "limited open forum" classification discussed in the EAA fairly interpreted does not expand the

tionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis, 12 HASTINGS CONST. L. Q. 529 (1985). Teitel argues that the EAA is unconstitutional partially on the basis of the legislative history indicating that the Equal Access Act was passed for the purpose of protecting religious speech.

70. See 130 CONG. REC. S8362 (statement of Sen. Dole that open forum included all groups not "directly" related to the school's curriculum); *Id.* S8365-66 (daily ed. June 27, 1984) (statements by Senators Grassley and Baucus that recognition of a French club would implicate the Act).

71. The House vote was 337-77. 130 CONG. REC. H7740-41 (daily ed. July 25, 1984) (Roll Call No. 313). The Senate passed the bill by a 88-11 vote. *Id.* at S8370 (daily ed. June 27, 1984) (vote on Amendment No. 315).

72. 435 U.S. 618, 641 (1978).

rights of students to participate in religious activities within the confines of the school premises. Rather, the EAA seeks to emphasize that invidious discrimination against religion is unconstitutional under free speech reasoning. The significant issue, then, in the area of equal access to school premises is whether discrimination against religion is constitutionally required or proscribed.

Review in *Mergens* and *Garnett* of the Constitutionality of the Equal Access Act

Mergens

The Eighth Circuit held that the "EAA codifies the Supreme Court's decision in *Widmar v. Vincent*, . . . extending that holding to secondary public schools."⁷³ The court in this regard reviewed *Widmar's* reasoning. To determine the constitutionality of an "equal access" policy, the Court in *Widmar* applied the three-part test from *Lemon v. Kurtzman*: A policy or statute implicating religion is constitutionally sound if: (1) it has a secular purpose; (2) its primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive governmental entanglement with religion.⁷⁴

The Eighth Circuit in *Mergens* noted that the Supreme Court in *Widmar* recognized first, a secular purpose in the university's providing a forum for the exchange of ideas between students.⁷⁵ Second, a primary secular effect because: (1) "the policy did not 'confer any imprimatur of state approval on religious sects or practices.' . . . because young adults are able to understand that such a policy is neutral toward religion;"⁷⁶ and (2) "the fact that the benefits would devolve upon such a wide variety of nonreligious as well as religious groups would indicate a 'secular effect.'"⁷⁷ Finally, "an equal access policy was less likely to entangle the university with religion than a policy of religious censorship which would require the university not only to define 'religious speech' but also to constantly monitor the meetings of registered student groups."⁷⁸

73. The court quoted Senator Levin's explanation given during the Senatorial debate:

[T]he pending amendment is constitutional in light of the Supreme Court's decision in *Widmar* against *Vincent*. This amendment merely extends a similar constitutional rule as enunciated by the Court in *Widmar* to secondary schools.

Mergens, No. 88-1227 at 7 n.1 (quoting 130 CONG. REC. S8355 (daily ed. June 27, 1984) (statement of Sen. Levin)).

74. *Id.* at 7 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

75. *Id.* at 8 (citing *Widmar v. Vincent*, 454 U.S. 263, 271 n.10 (1981)).

76. *Id.* (citing *Widmar*, 454 U.S. at 274 n.14).

77. *Id.* (citing *Widmar*, 454 U.S. at 274).

78. *Id.* (citing *Widmar*, 454 U.S. at 272 n.11).

The court in *Mergens* observed that the EAA "closely tracks the holding of the Court in *Widmar*."⁷⁹ Consequently, any constitutional challenge would have to be predicated on the difference between secondary school students and university students. At trial the plaintiffs offered expert testimony which the court accepted to the effect that "students over the age of 12 years can make sponsorship distinctions and that there is no significant differences [sic] between high school and college students in their abilities to understand endorsement or nonendorsement by the school."⁸⁰

The court, on appeal, did not refer to this testimony, but did rely on the fact that "Congress considered the difference in the maturity level of secondary students and university students before passing the EAA. We accept Congress' fact-finding."⁸¹ This judicial notice of legislative facts is well within the common-law authority of the courts.⁸² Indeed, Justice Harlan in his dissenting opinion in *Katzenbach v. Morgan*, stated that "[t]o the extent 'legislative fact' are [sic] relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to respect."⁸³

Chief Justice Burger, in his dissenting opinion in *Bender v. Williamsport Area School District*,⁸⁴ impliedly came to the same conclusion when he asserted that the "[u]tterly unproven, subjective impressions of some hypothetical students should not be allowed to transform *individual* expression of religious belief into *state* advancement of religion."⁸⁵ In *Mergens*, the Supreme Court's reasoning in *Widmar*, together with the Eighth Circuit's notice of legislative facts relating to impressionability, sufficiently established the constitutionality of the EAA to the Eighth Circuit panel.

Garnett

The Ninth Circuit panel, in comparison, because of their accept-

79. *Id.*

80. *Id.* at 6 n.1.

81. *Id.* at 9 n.2. The court quoted the opinion of the Senatorial Committee that high school students are not likely to confuse an equal access policy with state sponsorship of religion:

Authors writing in leading legal periodicals have considered the issue and agree that students below the college age can understand that an equal access policy is one of State neutrality toward religion; not one of State favoritism.

Id. (quoting S. REP. NO. 357, 98th Cong., 2d Sess. 8 (1984)).

82. See Mangrum, *Judicial Notice in Nebraska*, 22 CREIGHTON L. REV. 379, 388-92 (1989). See also Davis, "There is a book out" *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987).

83. 384 U.S. 641, 668 (1966).

84. 106 S. Ct. 1326 (1986).

85. *Id.* at 1337 (Burger, C.J., dissenting).

ance of the school officials' "closed forum" characterization did not reach the issue of the constitutionality of the EAA.⁸⁶ Nonetheless, the court, in distinguishing *Widmar* for constitutional purposes, observed that "[h]igh school students are less mature and more impressionable than university students."⁸⁷

Review in Mergens and Garnett of the Establishment and Free Exercise Issues

Mergens

The Eighth Circuit panel in *Mergens*, in reversing the district court, found *Widmar* controlling on the issues of establishment and free exercise: "Indeed the facts in the case before us today are the same as the facts in *Widmar* except for the setting. Therefore, even if Congress had never passed the EAA, our decision would be the same under *Widmar* alone."⁸⁸ Rather than getting involved with an extended discussion of establishment issues, the court relied on the Supreme Court's analysis in *Widmar* of the *Lemon* tripart test applied to an equal access policy. Open access to all groups fostered a secular purpose of an open exchange of ideas; did not have the primary effect of advancing religion because no imprimatur of state approval was involved and students are capable of understanding a neutral policy toward religion; and involved less entanglement than a rule which required the school to monitor meetings lest "religious speech" occur.⁸⁹

Garnett

Contrary to *Mergens*, the Ninth Circuit panel in *Garnett* held that permitting religious groups to meet on school premises as an extracurricular club would violate the establishment clause. The court did so by suggesting that notwithstanding *Widmar* extracurricular religious groups in a high school setting would flunk the tripart *Lemon* test.⁹⁰

The court allowed that permitting religious groups to meet on the school premises under conditions similarly imposed on other student groups "might arguably have the secular purpose of allowing

86. *Garnett*, No. 88-3552 at 388.

87. *Id.* at 384.

88. *Mergens*, No. 88-1227 at 8.

89. *Id.* at 8 (citing *Widmar*, 454 U.S. at 271-77). *Widmar* could be viewed as a free exercise case, but in reality it involved the application of the free speech clause to religious speech.

90. *Garnett*, No. 88-3552 at 381-83 (citing *Lemon v. Kurtzman*, 402 U.S. 602, 612-13 (1971)).

equal access to school facilities.”⁹¹ The court, however, held that “[p]ermitting this student religious group to meet in a public high school just before the start of classes would impermissibly advance rather than neutrally accommodate religion.”⁹²

In so holding the court distinguished between instances of permissible accommodation and impermissible support. First, the court accepted that on occasion “[g]overnment may accommodate religious practices to avoid impinging on the right to freely exercise religious beliefs”⁹³ and that “government need not withhold generally available benefits from a religious organization simply because the organization is religious.”⁹⁴

Second, the court recognized, on the other hand, that the “[g]overnment may not, however, take actions which even appear to sponsor religion.”⁹⁵ In support of the view that permitting religious groups to meet at the high school would impermissibly give the appearance of support, the court quoted the pre-*Widmar*, *Brandon* case:

Our nation’s elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular creed. This symbolic inference is too dangerous to permit.⁹⁶

Third, the court distinguished *Widmar* and disregarded Congress’ specific fact finding to the contrary contained in the legislative record of the EAA, on the grounds that the high school setting is substantially different than the university setting, and that these differences are constitutionally cognizable:

Unlike university students, high school students are required to attend school. The instructional format at a high

91. *Id.* at 381 (citing *Brandon v. Board of Educ.*, 635 F.2d 971, 978-79 (2d Cir. 1980)).

92. *Id.* at 382 (citing *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948)).

93. *Id.* at 381 (citing *Brandon*, 635 F.2d at 975 (2d Cir. 1980)).

94. *Id.* (citing *Roemer v. Board of Public Works*, 426 U.S. 736, 746-47 (1976)).

95. *Id.* at 382.

96. *Id.* at 383 (quoting *Brandon*, 635 F.2d at 978). The court also cited the following cases for the proposition that “allowing student religious meetings during non-instructional time in a public secondary or elementary school would constitute an impermissible advancement of religion:” *Bell v. Little Axe Indep. School Dist.*, 766 F.2d 1391 (10th Cir. 1985); *Nartowicz v. Clayton County School Dist.*, 736 F.2d 646 (11th Cir. 1984); *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 106 S. Ct. 1326 (1986); *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).

school is far more structured than at a university. High school students are less mature and more impressionable than university students. Teachers at high schools, unlike college professors, are both educators and authority figures. The same considerations that mandate special vigilance in preventing religious establishments in public schools—the impressionability of young students, compulsory attendance laws that make students a captive audience, and the role of public schools in inculcating democratic ideals—distinguish public secondary schools from public universities. The religious activity proposed in this case, which would take place at a time closely associated with a highly structured school day, would be far more likely to appear to enjoy school sponsorship than a group on a college campus. In addition, all student activities in the Renton School District, unlike those in *Widmar*, are district approved and supervised by district employees.⁹⁷

The court in *Garnett* also distinguished *Widmar* on the ground that high school activities in the Renton School District, unlike university activities at the University of Missouri at Kansas City, required, by school district rules, supervision or monitoring. The court opined that “[t]his necessary supervision could lead to teacher interference with or advocacy of religious activities.”⁹⁸ The court deemed this possible interference as sufficient to find improper entanglement.

Consequently, because the court found that permitting the religious group to meet before school would impermissibly advance religion and entail governmental entanglement, the court, under the three-part *Lemon* test, held that permitting extracurricular religious groups to meet before school on school premises would constitute an establishment of religion.

Obviously the results in *Mergens* and *Garnett* are not reconcilable. Either extracurricular religious groups at the high school level are constitutionally permissible for public policy reasons, constitutionally required by the free speech and free exercise clauses, or they are proscribed by the establishment clause. The resolution of this issue, as many church and state issues, depends largely on the cogency of the paradigm⁹⁹ adopted. Paradigms relied upon in the church-

97. *Garnett*, No. 88-3552 at 384.

98. *Id.* at 385.

99. The search for an explanatory paradigm as a methodology was made famous by Thomas Kuhn's publication *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS*, 6, 7, 27, 29, 52-65 & *passim* (2d ed. 1970). Kuhn explains that paradigms are models or principles that explain most phenomena within their scope. Their value lies in accounting for phenomena that otherwise would appear random or inexplicable. If unaccounted

and-state area include: (1) neutral principlism; (2) historical accommodationism; (3) strict separationism; and (4) free exercise reconciliationism. Consideration of each of these models applied to the issue of extracurricular religious groups in public high school settings may facilitate a rational analysis of the problem.

INTERPRETIVIST PARADIGMS

NEUTRAL PRINCIPLISM

Writers and jurists, who can loosely be characterized as neutral principlists, contend that constitutionally and morally government should be neutral toward religion. Professor Kurland even prior to *Lemon* advocated a neutral principle approach to free exercise and establishment cases alike.¹⁰⁰ Simply stated, if the statute is facially neutral it is constitutional even though the effect is to either burden or benefit religion. Professor Beschle offers an alternative version of the neutrality perspective. He would go beyond the text of the statute in examining whether a message of approval or disapproval is being conveyed.¹⁰¹ Beschle recommends the neutrality approach as an alternative to the concept of separation:

The concept of liberal neutrality expressed in the requirement that government withhold endorsement of religion or any specific religion provides an attractive alternative to the concept of separation as the basis of religion clause analysis. When neutrality among and legal equality of value systems becomes the goal of the inquiry, we can abandon the foundation of separationism, that all contact between church and state is suspect and to be only reluctantly tolerated when absolutely unavoidable.¹⁰²

Applied to the issue of extracurricular religious groups meeting on school premises, Beschle argues that the neutrality principle requires nondiscrimination:

[I]t is difficult to see how access to classrooms or other facilities after the regular school day, available to all on a content-neutral basis, would constitute endorsement of any belief system espoused by one who took advantage of that availability. While it is clear that under current law this reasoning applies to public colleges, and may apply also to high

phenomena predominate then there exists good reason to abandon the model for a more comprehensive alternative.

100. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 2 (1961).

101. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 174 (1987).

102. *Id.* at 175-76.

schools, there is no reason not to also extend this principle to public elementary schools.¹⁰³

As a matter of stare decisis, the neutrality principle finds some support in *Lemon v. Kurtzman's*¹⁰⁴ requirement that the "principal or primary effect [of government involvement with religion] must be one that neither advances nor inhibits religion."¹⁰⁵ Beschle argues that Justice O'Connor's concurring opinion in *Wallace v. Jaffree*¹⁰⁶ reflects an emerging neutral principlist perspective.¹⁰⁷

The varied meaning of neutrality makes this paradigm problematic,¹⁰⁸ nonetheless the thesis carries a great deal of explanatory force, is consistent with "neutral principled" analysis in other constitutional contexts,¹⁰⁹ and often captures juridical perspectives.

Professor Laycock offers an articulate formulation of the neutrality premise applied to the equal access issue.¹¹⁰ Laycock relies on the neutrality principle in arguing that the constitution "requires a right of equal access for religious speech."¹¹¹ Laycock argues first, that the basic argument set out in *Widmar v. Vincent*.¹¹²

[S]eems so self-evident that it is hard to elaborate on the Court's arguments. Whether one starts with the principle that the free speech clause requires content-neutral regulation of speech, or with the principle that the religion clauses require strict neutrality toward religion, one arrives immedi-

103. *Id.* at 183-84 (footnotes omitted).

104. 403 U.S. 602 (1971).

105. *Id.* at 612. The tripartite *Lemon* test also requires (1) a secular purpose and (2) non-entanglement.

106. 105 S. Ct. 2479, 2497 (O'Connor, J., concurring).

107. Beschle, 62 NOTRE DAME L. REV. at 174. He ascribes this position to Justice O'Connor's query as to whether the government was, by the practice in question, "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Id.* (quoting *Wallace*, 105 S. Ct. at 2497 (O'Connor, J., concurring)).

108. Dean Stone, commenting on Professor Laycock's formulation of the neutrality principle, suggests that evenhanded suppression of all speech concerning religious and antireligious subject matter is a more acceptable form of neutrality. Stone, *The Equal Access Controversy: The Religion Clauses and the Meaning of "Neutrality,"* 81 NW. U.L. REV. 168 (1986). See also Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis,* 12 HASTINGS CONST. L.Q. 529, 586 (1985). Laycock responds to these "special" views of neutrality as follows: "To say that religious or political speech can be suppressed in a forum where secular and apolitical speech is protected is to turn the first amendment on its head." Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers,* 81 NW. U.L. REV. 1, 14 (1986).

109. Professor Wechsler launched the neutral-principle debate with his article entitled "Toward Neutral Principles in Constitutional Law," 73 HARV. L. REV. 1 (1959), a critique of *Brown v. Board of Education*.

110. Laycock, 81 NW. U. L. REV. at 1.

111. *Id.* at 3.

112. 454 U.S. 263, 265-66 (1981).

ately at the result in *Widmar*.¹¹³

Second, Laycock denies the enhanced likelihood of equal access implying the state's actual or apparent endorsement of religion at the secondary school level in comparison with the impression left when equal access is permitted at the university level. He states that "[t]he claim of actual endorsement is absurd."¹¹⁴ He adds that an improper appearance of endorsement also "is wrong both factually and legally."¹¹⁵ Factually, the available studies suggest that adolescents resist authority and are capable of independent critical thought.¹¹⁶ In any event, Laycock argues that "[a]t the very least, a heavy burden of persuasion rests on those who would exclude some views for fear that they mistakenly will be attributed to the state."¹¹⁷ Laycock urges application of the cliché: "[T]he remedy for bad speech is more speech."¹¹⁸ Laycock insists that "[t]he inference that the school supports everything it does not censor is just as fallacious" to the equal access controversy "as it would have been in *Tinker* or *Barnette*."¹¹⁹

The Supreme Court in *Tinker*¹²⁰ and *Barnette*¹²¹ established the free speech rights of public school students even with respect to controversial subjects such as war protests and refusals to salute the flag even during a time of war. Applied to the equal access issue, the students retain their free speech rights on religious subjects notwithstanding the fear of some that school sponsorship will be mistakenly inferred.

Laycock argues that the apparent endorsement argument "is untenable [even if true] because it leads to an insoluble contradic-

113. Laycock, 81 NW. U.L. REV. at 11 (footnotes omitted).

114. *Id.* at 14.

115. *Id.* at 15 (locating the argument in Judge Garth's opinion in *Bender v. Williamsport Area School Dist.*, 741 F.2d 538, 552 (3rd Cir. 1984), *vacated on other grounds*, 106 S. Ct. 1326 (1986)). See also *Bell v. Little Axe Indep. School Dist. No. 70*, 766 F.2d 1391, 1404-05 (10th Cir. 1985); *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038, 1045-46 (5th Cir. 1982), *cert. denied*, 459 U.S. 115 (1983); *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); Teitel, 12 HASTINGS CONST. L.Q. at 566-74.

116. Laycock, 81 NW. U.L. REV. at 16 (citing Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 YALE L.J. 499, 507-09 (1983); Strossen, *A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?*, 71 CORNELL L. REV. 143, 162 (1985)).

117. *Id.* For an extensive overview of the problems of burdens of proof in the free exercise context, see Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

118. Laycock, 81 NW. U.L. REV. at 18 (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

119. *Id.*

120. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).

121. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

tion."¹²² He reasons that "if students cannot understand toleration of religion in the schools, they are just as incapable of understanding exclusion of religion from the schools."¹²³ He argues that each the secular left and the religious right mistakenly "seeks to allocate all risk of uncertainty to the other. Neutrality is seen as support for the other side because it might be misunderstood as support for the other side."¹²⁴

Laycock concludes that the neutrality principle best comports with the demands of free exercise and free speech:

[A] solution in which one side bears all of the risk of student misunderstanding while the other side bears none is not a neutral solution. The risk of misunderstanding must be shared. It is best shared by facially neutral rules in which the government takes no position on religion in its own speech and treats private religious speech exactly like private secular speech. Whatever the risk that some students will perceive an open forum as an endorsement of all groups that participate, that risk is far outweighed by the actual and apparent hostility in a rule that allows students to talk about anything except religion.¹²⁵

Neutral principlism, therefore, offers a controlling paradigm with much explanatory power; the approach is especially compelling with respect to the equal access issue if the problem is characterized from a free speech perspective. Why should the religious content of a student's speech be entitled to less respect than a discussion of Marxism or moral philosophy? Of course the justification for any restrictions would have to be tied to establishment reasoning. The question is whether Chief Justice Burger spoke accurately in his dissent in *Bender* when he observed that "it is common ground that nothing in the [e]stablishment [c]lause requires the [s]tate to suppress a person's

122. Laycock, 81 NW. U.L. REV. at 19.

123. *Id.* at 19 n.97. In support of the argument that refusing equal access may appear to be hostile to religion, the court cited *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 680 F.2d 424, 426 (5th Cir. 1982) (Reavley, J., dissenting from denial of rehearing en banc), cert. denied, 459 U.S. 1155 (1983); Drakeman & Seawright, *God and Kids at School: Voluntary Religious Activities in the Public Schools*, 14 SETON HALL L. REV. 252, 276 (1984); Strossen, *A Framework For Evaluating Equal Access Claims By Student Religious Groups: Is There A Window For Free Speech In The Wall Separating Church And State?*, 71 CORNELL L. REV. 143, 163 n.100 (1985); Toms and Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 EMORY L.J. 3, 9-10 (1978); Note, *The Constitutionality of Student-Initiated Religious Meetings on Public School Grounds*, 50 U. CIN. L. REV. 740, 785 (1981)).

124. Laycock, 81 NW. U.L. REV. at 20. Laycock observes that Ruti Teitel erroneously focuses on the risks of equal access. *Id.* (citing Teitel, *When Separate is Equal—Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U.L. REV. 174 (1986)).

125. Laycock, 81 NW. U.L. REV. at 20.

speech merely because the *content* of the speech is religious in character."¹²⁶ Ultimately the equal access question turns on the resolution of this issue. Other paradigms focus more directly on the establishment characterization of the equal access problem.

ACCOMODATIONISM

Justice Douglas, in his concurring opinion in *Engel v. Vitale* (the original school prayer case), observed that "[o]ur system at the federal and state levels is presently honeycombed" with governmental support of religion.¹²⁷ The policy of equal access could be viewed as another instance of support. Assuming the truth of the support allegation, what are we to make of it from an establishment perspective? Neutral principlists would simply ask whether the support reflects equal or preferred treatment. Strict separationists, on the other hand, on establishment reasoning make any evidence of support into an agenda for reform: the courts on establishment grounds should eradicate every last vestige of governmental support of religion from "In God We Trust" on coinage to the words of our Pledge of Allegiance, to the discriminatory protection of freedom of religion in the first amendment itself.

Accommodationists, in comparison, see the pervasive vestiges of religion in the public realm as justification for their continuance. The justifying rationale may be Burkean in orientation, preferring continuity with the past; it may depend on an "intent-of-the-Framers" argument, with the historical commingling of church and the state by the Framers as interpretivist ammunition to shoot down the rising star of strict separationism; or it may simply reflect public interest reasoning that accommodation "'constitutes a reasonable and balanced attempt to guard against' the 'latent dangers' of government hostility towards religion."¹²⁸ In any event, accommodationists favorably review the long-standing and multifaceted support given religion by the state.

Pre-*Everson* Accommodationism

Robert Cord's *Separation of Church and State* published in 1982 exemplifies the use of history in defense of the accommodationist position.¹²⁹ Cord writes in response to Justice Black's invocation of his-

126. *Bender v. Williamsport Area School Dist.*, 106 S. Ct. 1326, 1337 (Burger, C.J., dissenting). Justices Rehnquist and White joined in the dissent.

127. 370 U.S. 421, 437 (1962).

128. *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989) (Scalia, J., joined by Justices Rehnquist and Kennedy, dissenting) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970)).

129. In a review of Cord's book, Tushnet predicted that Cord would be ignored.

tory in *Everson v. Board of Education*¹³⁰ in support of the thesis that the establishment clause "was intended to erect 'a wall of separation between church and [s]tate.'"¹³¹ Cord chronicles substantial instances of government support in refutation of the historical argument concerning the intent of the Framers.

For example, the tradition of federal chaplaincies weighs against the aptness of the wall metaphor. Cord observes that in one of the earliest acts of Congress, the Congressional Committee, of which Madison was a member,¹³² recommended and the House approved of the election of a congressional chaplain on May 1, 1789. The Supreme Court in *Marsh v. Chambers*,¹³³ relied heavily on the historical continuity of legislative chaplaincies to permit, against establishment challenges, chaplaincy-directed prayer in the Nebraska unicameral. Similarly, the First Congress provided for a chaplain system for the military which practice has continued to the present.¹³⁴

The First Congress also requested and President Washington on October 3, 1789 proclaimed "Thursday, the 26th day of November next, to be devoted by people of these [s]tates to the service of that great and glorious Being who is the beneficent author of all that good that was, that is, or that will be; that we may all unite in rendering unto Him our sincere and humble thanks"¹³⁵ Subsequent Thanksgiving Day proclamations were the norm. Cord observes that Washington issued a second proclamation on January 1, 1795; Adams issued similar proclamations on March 23, 1798 and March 6, 1799; and Madison issued Thanksgiving Day proclamations on July 9, 1812, July 23, 1813, November 16, 1814, and March 4, 1815.¹³⁶ Jefferson, on the other hand refused to issue such proclamations on establishment grounds and Madison later questioned the propriety of such

Tushnet, Book Review, 45 LA. L. REV. 175, 175, 178 (1984). Tushnet's prediction, however, has not proven true. Justice O'Connor cites Cord in her concurrence in *Wallace v. Jaffree*, 472 U.S. 38, 79 (1985). Rehnquist's accommodationist position in the same case also relies on historical evidence presented by Justice Black in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), which challenges the strict separationist view. *Wallace*, 472 U.S. at 92-106 (Rehnquist, J., dissenting).

130. 330 U.S. 1 (1947) (the first case that significantly developed a broad interpretation of the establishment clause).

131. *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

132. Professor Levy, in his response to Cord's historical record, quotes a July 10, 1822 letter from James Madison to Edward Livingston where Madison indicates that he never approved of the chaplain decision in the First Congress. L. LEVY, *THE ESTABLISHMENT CLAUSE* 97 (1986).

133. 463 U.S. 783 (1983).

134. R. CORD, *SEPARATION OF CHURCH AND STATE*, 54-55, 55 n.25 (reviewing a comprehensive history of the growth of the United States Army Chaplaincy program).

135. *Id.* at 52.

136. *Id.* at 52-53.

proclamations.¹³⁷

Also, Congress allowed the support of religion through the grant of public lands in the territories. The Northwest Ordinance of 1787, based on the opinion that "religion, morality, and knowledge" were necessary to good government, set aside public lands in the territories for schools, which at the time were church-run sectarian schools. While the First Congress amended the Northwest Ordinance for other technical reasons associated with the configuration of the new republic, Congress did not amend the Ordinance to preclude the grant of public lands to church-run schools.¹³⁸

Even more problematic for the historicism of the strict separationist position, Congress for more than a century paid for sectarian missionary work among the Indians.¹³⁹ Cord, in reviewing the history, observes that even Jefferson by treaty provision permitted the construction of a Catholic church and the payment of a Catholic priest for the Kaskaskias.¹⁴⁰ The practice of direct aid to sectarian education of the Indians continued until 1897.¹⁴¹ Even then Congress enacted the restrictions primarily as a Protestant reaction to the extensive inroads Catholics had made among the Indians during the interim. Nonetheless, the practice in many instances continued thereafter indirectly through public administration of tribal trust funds.

The Supreme Court considered whether this indirect subsidy violated the statute in *Quick Bear v. Leupp*.¹⁴² In permitting the trust funds to be used for sectarian purposes, the Court made two points. First, the Court observed that "[i]t is not contended that it is unconstitutional, and it could not be."¹⁴³ That is, the petitioners did not even raise the argument that public subsidies of sectarian education of the Indians constituted an establishment of religion within the meaning of the first amendment. The Court made it clear that any such argument would not have been successful. Second, the Court

137. *Id.* at 53 & n. 13.

138. See discussion in M. MALBIN, RELIGION AND POLITICS, THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 14-15 (1978). Section 1 of the Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52-53, replaced references to "the United States in Congress assembled" with "the President of the United States" and Section 2 of the Act permitted the secretary of the territory to perform the duties of the governor in the event of vacancy.

139. R. CORD *supra* note 132, at 57-80.

140. *Id.* at 261-63.

141. Act of June 7, 1897, ch. 3, 30 Stat. 62, 79 (ending direct support of sectarian education of the Indians).

142. 210 U.S. 50 (1908).

143. *Id.* at 81 (citing *Bradfield v. Roberts*, 175 U.S. 291 (1899), wherein the Court permitted congressional appropriation to a Catholic hospital in the District of Columbia despite the first challenge of federal aid to religion on establishment grounds).

suggested that any attempt by Congress to preclude use of tribal funds for sectarian education would have violated the free exercise clause.¹⁴⁴

Governmental support of religion also is reflected in statutory and common-law exemptions from state obligations granted on religious grounds. Justice Brewer, speaking for a unanimous Court in *Church of the Holy Trinity v. United States*,¹⁴⁵ perhaps provides the most blatant justification of these exemptions as rooted in our religious history. *Holy Trinity* involved the interpretation of a federal statute which proscribed labor contracts with immigrants prior to their migration to the United States. The statute made no exemption for contracts for religious services. When the federal government assessed a penalty against the Holy Trinity Church for recruiting an English pastor, the Church appealed. The circuit court, interpreting the statute literally, held that the contract was within the prohibition of the statute. The Supreme Court, interpreting the statute with our religious traditions in mind, reversed. The Court reasoned that "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation."¹⁴⁶ After demonstrating that the colonial charters typically espoused a cause of establishing the true Christian faith in the New World, the Court recounted the continued governmental support of religion on a day-to-day basis:

If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen;" the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; . . . These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.¹⁴⁷

The Court addressed the issue of the constitutionality of religious exemptions from governmental obligations in *Arver v. United*

144. *Id.* at 82.

145. 143 U.S. 457 (1892).

146. *Id.* at 465.

147. *Id.* at 471.

States.¹⁴⁸ In *Arver*, the petitioners claimed that Congress had violated the establishment clause by granting draft exemptions with conscientious objector theological tenets. The Court responded tersely that the "unsoundness [of the establishment claim] is too apparent to require us to do more."¹⁴⁹

Post-*Everson* Accommodationism

Prior to *Everson*,¹⁵⁰ tradition favored the integration of public life with religious affairs. *Everson*, however, redirected the judicial paradigm towards separatism. The separatist paradigm, however, has remained more rhetorical flourish than a realistic description of the state of affairs. Even in *Everson* the Supreme Court allowed public financing of bus transportation for children attending parochial schools.

Nonetheless, the separatist language of *Everson* has presented a target for accommodationists ever since. An early opponent, Edwin Corwin, responded to the intent of the Framers argument relied upon by Justice Black in *Everson* as the basis of separatism by remarking, "[u]ndoubtedly the Court has the right to make history, . . . but it has no right to *remake* it."¹⁵¹ Justice Reed, in dissent in *McCullum v. Board of Education* the year following *Everson* critically remarked that "[a] rule of law should not be drawn from a figure of speech."¹⁵²

Accommodationist cases and arguments have continued since *Everson*, as a counterbalance to *Everson*'s separatist rhetoric. In *Zorach v. Clauson*,¹⁵³ for example, the Court upheld a released-time program for religious training away from school premises, even though it had four years earlier invalidated an in-school released-time program.¹⁵⁴ The Court explained in *Zorach* that the establishment clause "does not say that in every and all respects there shall be a separation of [c]hurch and [s]tate."¹⁵⁵ Justice Douglas, writing for the Court, observed that "[w]e are a religious people whose institutions presuppose

148. 245 U.S. 366 (1918).

149. *Id.* at 390. The Supreme Court more recently in *Welsh v. United States*, 398 U.S. 333 (1970) and *United States v. Seeger*, 380 U.S. 163 (1965), conditioned the constitutionality of conscientious objector exemptions upon their extension to philosophical as well as theological grounds for conscientious objections.

150. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

151. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 3, 20 (1949) (emphasis in original).

152. 333 U.S. 203, 247 (1948) (Reed, J., dissenting).

153. 343 U.S. 306 (1952).

154. *Illinois ex. rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948). *McCullum* was the first case to invalidate state aid to religion on establishment reasoning.

155. *Zorach*, 343 U.S. at 312.

a Supreme Being."¹⁵⁶ Justice Douglas accommodated the released-time program because it neutrally and noncoercively facilitated free exercise of religion.

The Court again "accommodated" religion in *Walz v. Tax Commission of New York City*,¹⁵⁷ when it validated tax exemptions for religious property on par with exemptions granted other charitable corporations. The Court distinguished between an unlawful intent to favor religion and a lawful intent to "'accommodate the public service to [the people's] spiritual needs.'"¹⁵⁸ Permitting tax exemptions, the Court reasoned, "constitutes a reasonable and balanced attempt to guard against" the latent "dangers" of government hostility toward religion.¹⁵⁹ In the tradition of *Holy Trinity*, the Court explained that "few concepts:"

[A]re more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.¹⁶⁰

Justice White, in dissent in *Lemon v. Kurtzman*, similarly advocated an accommodationist alternative to the three-part test adopted by the majority:

[T]he [f]ree [e]xercise [c]lause of the [f]irst [a]mendment at least permits government in some respects to modify and mold its secular programs out of express concern for free-exercise values. . . . "[W]hen the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."¹⁶¹

Although the *Lemon* modified separatist perspective has since been the standard, accommodationist cases continue to challenge the dominance of separatism as the *controlling* paradigm.

Chief Justice Burger in *Marsh v. Chambers*¹⁶² justified allowing legislative prayer in the Nebraska Unicameral against an establishment challenge on the strength of a "part of the fabric of our society" rationale.¹⁶³ Chief Justice Burger continued to develop the accom-

156. *Id.* at 313.

157. 397 U.S. 664 (1970).

158. *Id.* at 672 (quoting *Zorach*, 343 U.S. at 314).

159. *Id.* at 673.

160. *Id.* at 676-77.

161. 403 U.S. 602, 664-65 (White, J., dissenting) (quoting *Zorach*, 343 U.S. 306, 313-14 (1952)).

162. 463 U.S. 783 (1983).

163. *Id.* at 792.

modationist perspective in *Lynch v. Donnelly*.¹⁶⁴ In permitting the display of a nativity scene in a public park as part of a Christmas display, Chief Justice Burger explained: "Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."¹⁶⁵

Other justices have also adopted some form of an accommodationist perspective in recent cases. In *Hobbie v. Unemployment Appeals Commission*,¹⁶⁶ Justice Scalia, in dissent, observed that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the [e]stablishment [c]lause."¹⁶⁷ In *Corporation of Presiding Bishop v. Amos*,¹⁶⁸ Justice White writing for the Court, in upholding a section of the Civil Rights Act of 1964 exempting religious groups from Title VII's antidiscrimination provisions, found that it is a permissible legislative purpose to alleviate "significant governmental interference with the ability of religious organizations to define and carry out their religious missions."¹⁶⁹

To the same effect, Justice Scalia, in dissent in *Texas Monthly, Inc. v. Bullock*,¹⁷⁰ explained that one might "simply describe the protection of free exercise concerns, and the maintenance of the necessary neutrality, as 'secular purpose and effect,' since they are a purpose and effect approved, and indeed to some degree mandated, by the Constitution."¹⁷¹ Applied to the facts, Justice Scalia concluded that "[i]t is not always easy to determine when accommodation slides over into promotion, and neutrality into favoritism, but the withholding of a tax upon the dissemination of religious materials is not even a close case."¹⁷²

The "honeycombed support" of religion by the federal government has changed significantly since Justice Brewer spoke for a unanimous Court in *Holy Trinity*, but support nonetheless continues to exist. Historical accommodationists rely on history and "fabric of our society" arguments as providing justifactory basis for the continued support of religion against strict separatist challenges. Others have offered normative defenses of the accommodationist perspective.

164. 465 U.S. 668 (1984).

165. *Id.* at 673.

166. 480 U.S. 136 (1987).

167. *Id.* at 144-45.

168. 107 S. Ct. 2862 (1987).

169. *Id.* at 2870.

170. 109 S. Ct. 890 (1989).

171. *Id.* at 913.

172. *Id.*

Accommodationist Political Theory

Michael McConnell reinforces historical accommodationism by arguing that the historical political theory that underlies the Constitution is more consistent with an accommodationist than a separatist position.¹⁷³ The argument essentially has three parts. First, because the liberal state cannot be the source of the people's values, but instead is a regime of fair procedures for mediating self-interest, the citizen's commitment to order and morality is precarious. In brief, there is a social need for public virtue but no legitimate way for the state to shape public morality. Second, the genius of pluralism is that private associations outside of government provide the principal means by which civic responsibility is developed. These associations, including families, churches, and other organic groups, "bear the brunt of the responsibility for articulating and inculcating values of morality and justice in the liberal republic."¹⁷⁴ Thus private associations promote the good for the citizens of the liberal community, while the state mediates conflicts. McConnell relies on this contention to explain why Tocqueville described religion as "the first of [America's] political institutions."¹⁷⁵ Third, McConnell relies on Madison's theory of factionalism as an explanation of how the liberal state realizes the civic virtue arising out of private organizations, such as churches, without suffering the dangers of religious tyranny.¹⁷⁶

McConnell explains that:

Liberal political theory thus favored religion, but it did not favor any one religion. It guaranteed religious freedom in the hope and expectation that religious observance would flourish, and with it morality and self-restraint among the people. But it feared monopoly in religion, especially at the national level.¹⁷⁷

Mark Tushnet, in reviewing McConnell's accommodationist account of republican political theory, raises some skeptical questions about its cogency under modern circumstances. First, he insists that the "republican theory [which] regarded religious belief as an empirically necessary predicate to civic virtue," is no longer empirically sound because "secularism has produced some secularists who are

173. McConnell, *Accommodation of Religion*, 1985 Supreme Ct. Rev. 1, 14-23.

174. *Id.* at 17.

175. *Id.* at 18 n.65 (quoting A. TOCQUEVILLE, *DEMOCRACY IN AMERICA* 292 (Anchor Books ed. 1969)).

176. *Id.* at 19. Madison, in Federalist No. 51, expressly relied on the favorable circumstances for religious freedom that the multiplicity of religious sects had presented in colonial America as the exemplar for his recommending analogous factionalism in politics.

177. *Id.* at 19-20.

virtuous in a republican sense."¹⁷⁸ Thus, while religion may foster civic virtue, other methods are available. This realization, Tushnet insists, calls for nondiscrimination rather than accommodation as the controlling principle. Second, Tushnet argues that over-all civil strife may increase, rather than diminish, if sectarian factionism is allowed under an accommodationist principle. Thus Tushnet concludes that McConnell's accommodationist political theory ultimately rests on an unproven, if not dubious, empirical assumption that weakens its persuasiveness.

STRICT SEPARATIONISM

Advocates of separatism offer both historical and normative justifications for their position. Justice Black, writing for the Court in *Everson v. Board of Education*,¹⁷⁹ outlined the intent of the Framers argument. Justice Black relied extensively on Jefferson's "Bill for Establishing Religious Freedom in America," and Madison's support contained in his 1785 "Memorial and Remonstrance Against Religious Assessments," both of which Justice Black republished as appendices to the opinion.¹⁸⁰ According to Justice Black, Jefferson most aptly explained the intent of the Framers as expressed in these documents, in a letter to the Danbury Baptists wherein he adopted Roger Williams' wall of separation metaphor as describing the constitutionally mandated barrier between church and state.¹⁸¹

Based on the wall metaphor, Justice Black, writing for the Court despite allowing, against establishment challenge, tax money to be used to reimburse parents for the cost of transporting their children to parochial schools, announced a no-nonsense standard of review for testing the constitutionality of any government aid to religion:

The "establishment of religion" clause of the [f]irst [a]mendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions,

178. Tushnet, *Accommodation of Religion (Dubitante)*, 76 GEORGETOWN L.J. 1691, 1696 (1988).

179. 330 U.S. 1 (1947).

180. *Id.* at 63-74.

181. *Id.* at 16.

whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and [s]tate."¹⁸²

Everson can be viewed as a paradigm-shifting case. After *Everson*, the unquestioned historical accommodationist approach has had to deal with the powerful influence that the wall of separation metaphor has had on establishment vocabulary. Obviously the wall cannot be impermeable if the case announcing it permitted aid, albeit indirect, through subsidies paid directly to the parents of parochial students. In working out the wall in light of accommodationist incursions, the Court has announced certain bright-line tests justified normatively for their assistance in maintaining the wall of separation. The Court in *Abington Township School District v. Schempp*,¹⁸³ in invalidating Bible reading as a devotional exercise in public schools, announced a two-part establishment test:

[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the [e]stablishment [c]lause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.¹⁸⁴

The Court institutionalized an additional hurdle in *Walz v. Tax Commission of New York*.¹⁸⁵ In *Walz*, the Court upheld tax exemptions for religious property along with other charitable property on the reasoning that to do otherwise would entangle the government with religion in determining what amounted to "religious purpose" property, as well as problems associated with property assessments, collections and the rest of the involvement entailed in maintenance and enforcement of the taxing power. The Court combined *Abington*'s two-part test with *Walz*'s "non-entanglement" requirement to fashion a three-part test in *Lemon v. Kurtzman*.¹⁸⁶ In *Lemon* the Court struck down Rhode Island and Pennsylvania programs providing public assistance to parochial schools. Even though each program had the primary purpose of enhancing the quality of secular educa-

182. *Id.* at 15-16.

183. 374 U.S. 203 (1963).

184. *Id.* at 222.

185. 397 U.S. 664 (1970).

186. 403 U.S. 602 (1971).

tion,¹⁸⁷ they had the primary effect of aiding religion and entailed excessive entanglement.¹⁸⁸

Although the *Lemon* three-part test has stuck for stare decisis purposes, the application has been confusing and often unpersuasive. For example, loaning textbooks to parochial school students has passed the test,¹⁸⁹ but providing instructional materials such as maps, projectors, and laboratory equipment, has failed as having the primary effect of advancing religion.¹⁹⁰ Similarly, public school employees may perform counseling and remedial services for private school students if the services are performed in an adjacent trailer,¹⁹¹ but not if provided at the church-school itself.¹⁹² Of course, dissenters in each case have pointed to the incongruous results and the deficiencies of the *Lemon* test generally. Predicting what the majority will view as the primary purpose or effect of government aid, or the consequential entanglement, has not proven to be an exact science.

Nor has even the majority tied itself to *Lemon*. The Court in *Marsh v. Chambers*¹⁹³ upheld on grounds of historical continuity the practice of the Nebraska Unicameral of opening each session with a prayer delivered by a permanent chaplain. Justices Brennan and Marshall, dissenting, were quick to point out that the questioned practice could not stand the "settled doctrine" of *Lemon*.¹⁹⁴ Also, the Court in *Mueller v. Allen*,¹⁹⁵ in allowing a limited state tax deduction for certain expenses incurred in providing dependents with "tuition, textbooks and transportation" for elementary and secondary school, observed that "our cases have also emphasized that [*Lemon*] provides 'no more than [a] helpful signpos[t]' in dealing with [e]stablishment [c]lause challenges."¹⁹⁶ The four dissenters found that the Minnesota program failed the primary effect test.¹⁹⁷

The Court further signalled the weakening of *Lemon* in *Lynch v.*

187. *Id.* at 613.

188. *Id.* at 613-14.

189. See *Wolman v. Walter*, 433 U.S. 229 (1977). Under *Abington's* two-part test the Court had previously validated the lending of secular texts to private school students in *Board of Educ. v. Allen*, 392 U.S. 236 (1968). Even earlier the Court in *Cochran v. Louisiana State Board of Educ.*, 281 U.S. 370 (1930), permitted the free distribution of secular textbooks to public and religious students alike. However, since the first amendment was not applied to the states until *Cantwell v. Connecticut*, 310 U.S. 296 (1940) the *Cochran* case has little precedential effect.

190. *Meek v. Pittenger*, 421 U.S. 349 (1975).

191. *Wolman*, 433 U.S. at 229.

192. *Meek*, 421 U.S. 349 (1975).

193. 463 U.S. 783 (1983).

194. Brennan argued that the practice failed all three tests. *Id.* at 797-99 (Brennan, J., dissenting).

195. 463 U.S. 388 (1983).

196. *Id.* at 394.

197. *Id.* at 408-11 (Marshall, J., dissenting).

Donnelly.¹⁹⁸ The majority introduced the *Lemon* analysis by explaining that "we have often found [*Lemon*] useful" but "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."¹⁹⁹ Thus, while the five-member majority paid lip service to *Lemon*, the weight of the argument permitting a nativity scene in a city-sponsored Christmas display fell to historical analysis and accommodationist reasoning. Of course Justice Brennan in dissent recalled that "ever since its initial formulation, the *Lemon* test has been consistently looked upon as the fundamental tool of [e]stablishment [c]lause analysis."²⁰⁰

Any doubt as to the continued viability of *Lemon* following *Marsh* and *Lynch* however, was attenuated by the Court's reaffirmation of *Lemon* in *Wallace v. Jaffree*.²⁰¹ Alabama's moment-of-silence "for meditation or prayer" in public schools, being religiously motivated, failed *Lemon*'s secular purpose test.²⁰² Chief Justice Burger, on the other hand, characterized the Court's reliance on *Lemon* as "a naive preoccupation with an easy, bright-line approach for addressing constitutional issues."²⁰³ Justice Rehnquist advocated the replacement of *Lemon* with an "original intent accommodationist" analysis.²⁰⁴

Most recently, the Court, in a plurality opinion, applied *Lemon* in *Texas Monthly, Inc. v. Bullock*,²⁰⁵ invalidating a Texas statute exempting from sales and use taxes sales of religious periodicals. Justice Brennan, joined by Justices Marshall and Stevens, found tax exemptions limited to religious periodicals as failing all three *Lemon* tests. Justice Scalia in dissent noted that "*Lemon* is not, after all, a statutory enactment"²⁰⁶ and suggested that the "accommodation" of free exercise concerns may qualify as "'secular purpose and effect.'"²⁰⁷

FREE EXERCISE RECONCILIATIONISM

The final model or paradigm having explanatory force in the church and state arena might be described as free exercise reconcilia-

198. 465 U.S. 668 (1984).

199. *Id.* at 679.

200. *Id.* at 696 n.2 (Brennan, J., dissenting).

201. 472 U.S. 38 (1985).

202. *Id.* at 56-60.

203. *Id.* at 89 (Burger, C.J., dissenting). Chief Justice Burger also expressed concern for "the Court's obsession with [*Lemon*'s] criteria" in *Aguilar v. Felton*, 53 U.S.L.W. at 5018 (Burger, C.J., dissenting).

204. *Id.* at 113 (Rehnquist, J., dissenting).

205. 109 S. Ct. 890 (1989).

206. *Id.* at 913.

207. *Id.*

tionism: for the sake of brevity, reconciliationism. Reconciliationism offers the most coherent approach to the free exercise establishment conundrum. The paradigm can be immediately compared with the other models under discussion. First, it acknowledges the impossibility of a strict separatist position and attempts a principled resolution of the inevitable conflict. Second, it rejects the ad-hoc aspects and subjectivity of historical accommodationism. That is, history seems extremely malleable without a normative perspective to give it meaning and significance. Both separatists and neutralists claim to be the true heirs of the Framers. Without a broader normative perspective there seems to be no way of vindicating the historical authenticity of the conflicting claims. Third, reconciliationism challenges, from both descriptive and normative perspectives, liberalism's faith in strict neutrality as the only coherent mediating principle. Under reconciliationism, religion is entitled to more than neutrality; the free exercise of religion sometimes mandates and in other instances permits granting religious beliefs and practices a preferred status in instances of conflict with state objectives.

Granting religion a preferred status is controversial because separatists and neutralists hold that any preference is inconsistent with establishment clause principles. Professor Choper opines that the free exercise and establishment clauses are logically irreconcilable for this very reason.²⁰⁸ The challenge for constitutionalists, however, should be explaining how to reconcile these interdependent terms, rather than interpreting either term in ways that make it logically contradictory with the other.

The claim that the free exercise clause justifies granting religion a preferred status, notwithstanding the establishment clause, has received some receptivity from Justice Scalia. In his dissents in *Edwards v. Aguillard*²⁰⁹ and *Texas Monthly, Inc. v. Bullock*,²¹⁰ Justice Scalia argues that the state in certain instances must and in other circumstances may prefer religion to facilitate free exercise.

Applied to the subject of extracurricular religious activities in the public schools, the question arises as to whether establishment concerns against granting either equality or preferences predominate over free exercise claims weighing in favor of the contrary. One of the determinative arguments relied upon in justification of discriminating against religion for extracurricular activities is that it might jeopardize the schools' special role in inculcating common values to

208. See Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 947-48 (1985-86).

209. 107 S. Ct. 2573, 2595 (1987) (Scalia, J., dissenting).

210. 109 S. Ct. 890 (1989).

our children. The argument is essentially one favoring a form of civil religion. The constitutionality of establishing a civil religion presents difficult normative issues.

The United States Court of Appeals for the Second Circuit, for example, in *Brandon v. Board of Education*, in holding the use of school facilities for religious meetings during the regular school hours unconstitutional, expressed concern over the effect on the value-transmitting role of the schools:

Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit.²¹¹

The Ninth Circuit in *Garnett* not only quoted the above passage from *Brandon* but supplemented it with a parallel quote from *Edwards v. Aguillard*:

The [s]tate exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. . . . "[T]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the [s]tate is it more vital to keep out divisive forces than in its schools."²¹²

These comments prompt several questions. First, from whence cometh the special role of the public schools in value inculcation? Second, what are these values? Third, if these values are given special preference, does not that raise issues of establishment itself? That is, if the state, through its schools, decides to promote a belief system that is the functional equivalent to religion, has it established its own form of religion? Moreover, if this belief system incorporates all the basic rights recognized under the constitution except for tolerance for competing belief systems, has it not established a preferred religion? Of course some writers advocate the open adoption of a civil religion which will serve the functional role of traditional religion but will not invoke a problematic aura of sacredness. Others urge civil religion to be imbued with the same sacred implications as traditional religion. Either adoption may already be largely in place in the way the schools and other public fora inculcate values deemed

211. 635 F.2d 971, 978 (2d Cir. 1980).

212. *Edwards*, 107 S. Ct. at 2577-78 (citations omitted), quoted in *Garnett*, No. 88-3552 at 382.

to be part of our common destiny; the question of whether this constitutes constitutionally cognizable religion remains.

The definition of religion is important because the free exercise and establishment clauses mandate that "religion" be treated differently than other social phenomena. Free exercise protection may provide special benefits; establishment considerations may entail special restrictions. An activity, therefore, may gain or lose privileges depending upon its religious classification.

The Supreme Court's concept of religion has evolved from a very narrow definitional approach to a broad functional view.²¹³ The Supreme Court in the landmark Mormon polygamy cases of the nineteenth century defined religion in narrow theistic terms. In *Reynolds v. United States*,²¹⁴ Chief Justice Waite, quoting Jefferson, defined religion to be "a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions"²¹⁵ The Court restated this view in *Davis v. Beason*: "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."²¹⁶

More recently the Court has abandoned a definitional approach in favor of sweeping statements concerning the concept of religion. In *Torcaso v. Watkins*, the Court repudiated theistic limitations in stating that "among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."²¹⁷ While *Torcaso* broadly construed religion for free exercise purposes, the Court provided little guidance in determining the

213. The problem of naming religion has been addressed by many writers. Dean Choper offers a definitional approach requiring "extratemporal consequences." Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 598. Freeman criticizes a narrow definitional approach. Freeman, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519, 1565 (1983). Kent Greenawalt also observes that "any dictionary approach oversimplifies the concept of religion;" as an alternative he offers an analogical approach. Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 763 (1984). Phillip Johnson, in turn, critically observes that "everything depends upon what we choose as the point of comparison from which to analogize." Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 837 (1984). For a discussion of the naming problem in general, see Mangrum, *Naming Religion (and Eligible Cognates) in Tax Exemption Cases*, 19 CREIGHTON L. REV. 821 (1985-86).

214. 98 U.S. 145 (1878).

215. *Id.* at 164 (quoting Thomas Jefferson in a reply to a committee of the Danbury Baptist Association).

216. 133 U.S. 333, 342 (1890).

217. 367 U.S. 488, 495 n.11 (1961) (invalidating a Maryland oath of office requirement of a profession of belief in God).

circumstances under which the privileges of the free exercise clause should be extended or the prohibitions of the establishment clause enforced. In two conscientious objector cases arising in the context of the Vietnam War, the Court adopted what can be described as a functional approach to the concept of religion. In *United States v. Seeger*, the Court, relying on the writing of Paul Tillich,²¹⁸ characterized the test for religious belief to be "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."²¹⁹ In *Welsh v. United States*,²²⁰ the Court, on free exercise reasoning, extended the privilege of exemption from the draft laws to Elliot Welsh despite Welsh's own characterization of his belief system as nonreligious. Only if his beliefs were insincere or did not "rest at all upon moral, ethical, or religious principle but instead rest[ed] solely upon considerations of policy, pragmatism, or expediency," could the exemption be denied.²²¹

The Court's extension of free exercise protection to parallel belief systems premised alternatively on "moral, ethical, or religious principles" poses special problems when the courts have recognized the unique role of the public schools "in transmitting basic and fundamental values to our youth."²²² What is the source of these values or common destiny that the schools have special responsibility to promote exclusively? Is it our cultural heritage, which surely encompasses the sectarian notion of providential history manifest in Pilgrim lore as well as our national motto "In God We Trust?"²²³ If not, why not? If the source of these values is moral theory, rather than history, how are they justified?

John Stuart Mill, more than a century ago, warned of the dangers of state-run education over the minds of man. In his famous essay *On Liberty*, he offers the following insight:

All that has been said of the importance of individuality of character, and diversity in opinions and modes of conduct, involves, as of the same unspeakable importance, diversity of education. A general [s]tate education is a mere contrivance for molding people to be exactly like one another; and as the mold in which it casts them is that which pleases the predominant power in the government . . . it establishes despotism over the mind

218. 380 U.S. 163, 180 (1965) (quoting P. TILlich, II SYSTEMATIC THEOLOGY 12 (1957)).

219. *Id.* at 165-66.

220. 398 U.S. 333 (1970).

221. *Id.* at 342-43.

222. *Garnett*, No. 88-3552 at 383 (quoting *Brandon*, 635 F.2d at 971).

223. 36 U.S.C. § 186 (1985).

. . . .
 . . . There would be nothing to hinder them from being taught religion, if their parents chose, at the same schools where they were taught other things. All attempts by the [s]tate to bias the conclusions of its citizens on disputed subjects are evil²²⁴

Perhaps Mill's warning is inapplicable to the case at hand. Perhaps all that is meant to be transmitted are the noncontroversial fundamental values that have been judicially recognized as part of our constitutional philosophy. But many of our extant values that have been judicially recognized are of relatively recent vintage, remain controversial and their permanence is always in doubt. Thus, racial equality, the right of privacy, and due process considerations surely would be on almost any list of the fundamental values that are part of our recognized constitutional philosophy, but their constitutive paradigms are relatively contemporary and continue in dispute.

For example, the paradigm that in racial matters separate is inherently unequal dates from *Brown v. Board of Education*.²²⁵ Prior to *Brown*, was it the responsibility of the public schools to inculcate the notion that separate but equal is grounded on the fundamental values of society? Subsequent to *Brown*, should the schools have promoted the notion that affirmative action programs contradict our country's fundamental values? The same point can be made for the controversial right of privacy and the reasonableness of its extension to the case of abortion,²²⁶ or any of our other rights now part of our "concept of ordered liberty."²²⁷ Indeed our very concept of "ordered liberty" entails normative implications that are forever changing and always controversial. What exactly are the values with which schools are peculiarly vested with promoting? More importantly, why should the schools promote such values exclusively?

Moreover, if the schools are charged with promoting fundamental constitutional values, what about free exercise as a central value in any liberal democratic scheme? John Rawls, in his full account of philosophical liberalism explains that liberty of conscience provides the core idea around which self-respect and individual integrity are built: "The question of equal liberty of conscience is settled. It is one of the fixed points of our considered judgments of justice."²²⁸ Indeed, Rawls asserts that a rational person would not allow religious liberty

224. J. MILL, ON LIBERTY 129-31 (Library of Liberal Arts ed. 1956).

225. 347 U.S. 486 (1954).

226. *Roe v. Wade*, 410 U.S. 113 (1973).

227. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds*, *Duncan v. Louisiana*, 391 U.S. 145 (1968).

228. J. RAWLS, A THEORY OF JUSTICE § 33, at 206 (1971).

to be "subject to the calculus of social interests."²²⁹ If free conscience is a core liberal value, why should the state through its public schools be allowed to inculcate any exclusive value system?

The proponents of civil religion argue on grounds of expediency in favor of granting it a preferred status as the belief system of the public order. Harold Berman has argued that the legitimacy of the state is enhanced if afforded divine approbation. Accordingly he favors a form of civil religion.²³⁰ Yehudah Mirsky similarly argues that "a self-conscious and critically reflective civil religion can play a positive role in cementing the communal symbolic life of American society."²³¹ He suggests that civil religion is a societal response to the advent of modernity and the loss of the social glue previously supplied by traditional religion:

By developing and nurturing civil religions the members of modern societies attempt to recapture some of the lost, organic solidarity of pre-modern societies by linking political ideas and institutions, naturally shared by all, with a network of hallowed meanings. By so doing, a society can link its political ideas and institutions to its basic, heartfelt sentiments and aspirations.²³²

He suggests, contrary to the Berman approach, that civil religion has to be stripped of sacred content and transformed into purely secular significance lest the establishment clause be implicated. Thus, for Mirsky but not for Berman, civil religion rests on sentimental and non-rational bases, but of the non-sacred variety. This line of distinction between sentimental-but-not-sacred and sentimental-and-sacred is particularly thin considering the Court's previous rulings extending the concept of religion to parallel belief systems with even fewer points of comparison than anticipated between civil and traditional religion.

It is not obvious, therefore, that the gambit of removing the sacred content from civil religion can rescue it from establishment implications. By justificatory explanation, civil religion provides the type of social solidarity previously associated with sharing a common religion. It provides the social glue otherwise lacking in modernity. This expedient justification for civil religion parallels the expedient justification of sectarian accommodation recommended by McConnell as expressing the spirit of republican virtue in the pluralistic state.²³³

229. *Id.* § 33, at 207.

230. See H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974).

231. Mirsky, *Civil Religion and the Establishment Clause*, 95 *YALE L.J.* 1237, 1255 (1986).

232. *Id.* at 1250.

233. McConnell, 1985 *SUPREME CT. REV.* at 18-21.

But whereas McConnell finesses the establishment implications of relying on religion for the social glue of republican morality by relegating the responsibility for moral development to private associations and relying on Madison's notion of factionalism as a practical limit to authoritarianism, civil religion advocates simply avoid seriously discussing the establishment entailments of their proposals. Civil religion ostensibly is not subject to the same rules either as a matter of expediency or because *it is true* under the precepts of constitutional morality. However, if religion for constitutional purposes encompasses parallel belief systems serving the functional role of traditional religion, then civil religion indeed qualifies as religion and expediency arguments for treating it differently are not persuasive. Just as critiques of McConnell's republican pedigree of the accommodation principle point out that the claim that religious belief is empirically necessary as a predicate of civic virtue²³⁴ is no longer tenable because "secularism has produced some secularists who are virtuous in a republican sense,"²³⁵ civil religion's claim to be the sole parent of civic virtue similarly lacks credibility.

Moreover, two correlated points remain. First, it is not clear that the object of organic solidarity at the state level is part of the political philosophy of liberal democracy. Second, it is equally disputable that organic solidarity is a pre-modern social phenomenon. The communal experience of many religious groups, trade associations, political parties, and sports affiliations all bespeak of pluralistic communalism more fitting with the underlying tenets of liberalism.

This variance between arguing in favor of individual autonomy and absolute freedom of conscience, on the one hand, while insisting on filtering all belief systems through Kantian rationality, on the other, has created blind spots for many liberal theorists. Professor Richards, for example, has argued that toleration, not organic solidarity, is the defining characteristic of the liberal state.²³⁶ Toleration fits liberalism's avowed commitment to neutrality towards "judgments of true beliefs."²³⁷ But Richards' concept of toleration, which is incisive regarding the implications of liberalism, is lacking when applied to the context of religious belief systems. Richards, embracing at times Jefferson's "wall of separation," as paradigmatic of liberalism's appropriate stance toward religion, argues that the inalienable right to conscience requires that "religious teaching must be completely disas-

234. Tushnet, *Accommodation of Religion (Dubitante)* 76 GEO. L.J. 1691, 1696 (1988).

235. *Id.*

236. D. RICHARDS, *TOLERATION AND THE CONSTITUTION* 128-62 (1986).

237. *Id.* at 138.

sociated from state power."²³⁸

The specific concern of the antiestablishment clause is that, in contexts of belief formation and revision, the state not illegitimately (nonneutrally) endorse any one conception (whether religious or secular) from among the range of conceptions of a life well and humanely lived that express our twin moral powers of rationality and reasonableness.²³⁹

For Richards, however, liberalism's neutrality does not extend to consciences informed by processes other than epistemic rationality. Belief systems based on faith, spiritual insight, non-rational intuition, sentiment, group consciousness or any other non-rational source are delegitimized in an intolerant fashion even as the concept of tolerance is invoked as the paradigmatic solution to constitutional conundrums.

Applied to the context of public schools, Richards elevates scientific reasoning and methodology over conscience as the ultimate arbiter of questions involving the so-called neutral education of children:

One of the minimum epistemic responsibilities of good education is the cultivation of the epistemic rationality of students; and the teaching of good scientific method is one crucial organon for imparting and cultivating principles of epistemic rationality. Scientific method is precisely that: a neutral method that, like any good critical technique, deepens our critical rationality, our capacity to follow out reason even against our preconceptions.²⁴⁰

Thus the tolerant commitment to "moral independence of any kind (secular and religious) in the direction of one's spiritual life,"²⁴¹ turns out to be translated to tolerance subject to the conditions of epistemic rationality. Richards is unable to see that for the religious adherent of sacred writings and spiritual insight, science and epistemic rationality as the sole source of understanding is anything but neutral.

Professor Carter, considering this very problem of insensitivity on the part of liberalism asks:

[W]hy is it that contemporary liberalism, which proclaims the freedom of individual conscience, values conscience less when an individual chooses to discover the world through faith rather than through reason? What is it about religious belief that liberalism so fears?²⁴²

238. *Id.* at 147.

239. *Id.* at 149.

240. *Id.* at 152-53.

241. *Id.* at 155.

242. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 984-85.

Carter explains that liberalism is tied to the preeminence of reason because without it:

[L]iberalism becomes an impoverished philosophy: either a simple-minded majoritarianism, . . . or a variant of Leninism, because it has nothing behind it but an insistence on one set of values as the correct one, and a willingness to back that conviction with all the power of the state. In short, without a faith in the faculty of reason, liberalism has nothing whatever to recommend it.²⁴³

Carter recommends that lest liberalism simply pay the cause of religious freedom lip service alone it will have to "find[] ways to take seriously the deep religious feelings that motivate so many Americans in their daily lives."²⁴⁴ Although he admits that he has not worked out the details of a softened liberal position, he insists that liberalism at a minimum must "not insist on reason as the only legitimate path to knowledge about the world."²⁴⁵

Professor Fish, agreeing with Carter's observations regarding the inability of liberals to see the "angled, partisan, biased" assumptions of liberalism's exclusive preoccupation with reason and empirical science, doubts the likelihood of liberalism's ability to soften to the views of other belief systems: "persons embedded within *different* discursive systems will not be able to hear the other's reasons as reasons, but only as errors or even delusions."²⁴⁶ Thus, Fish concludes:

"Tolerance" may be what liberalism claims for itself in contradistinction to other, supposedly more authoritarian, views; but liberalism is tolerant only *within* the space demarcated by the operations of reason; any one who steps outside that space will not be tolerated, will not be regarded as a fully enfranchised participant in the marketplace (of ideas) over which reason presides. In this liberalism does not differ from fundamentalism or from any other system of thought; for any ideology—and an ideology is what liberalism is—must be founded on some basic conception of what the world is like . . . and while the conception may admit of differences within its boundaries (and thus be, relatively, tolerant) it cannot legitimize differences that would blur its boundaries, for that would be to delegitimize itself.²⁴⁷

These perceptive observations explain why so many liberals conjoin an expression of the cherished place of freedom of conscience in the liberal value system with an urgent call for the exclusion of reli-

243. *Id.* at 988.

244. *Id.* at 995.

245. *Id.*

246. Fish, *Liberalism Doesn't Exist*, 1987 DUKE L.J. 997, 999 (emphasis in original).

247. *Id.* at 1000.

gious beliefs from the public forum. Louis Henkin, for example, in objecting to prohibitions against obscenity as illegitimately grounded on religious beliefs, argued that social problems at the state level should be "resolved by rational social processes, in which men reason together, [and] examine problems and propose solutions capable of objective proof or persuasion, subject to objective scrutiny by courts and electors."²⁴⁸ Bruce Ackerman, more recently, argues that rational discourse provides the justificatory basis of authority within the liberal state. Accordingly religious ideas are illegitimate as a basis of public policy because they are not rationally accessible to others.²⁴⁹ Similarly David Lyons insists that "governmental policy must be subjected to appraisal in open discussion on the basis of criteria that can be understood by all. Those in power have no special claim to moral insight from which others generally are barred."²⁵⁰

Kent Greenawalt, generally sympathetic with the liberal argument requiring the exclusion of religious ideas as a basis for public policy, qualifies the exclusionary rule in a very significant way. Greenawalt observes that many policy questions within the liberal state cannot be resolved in a noncontroversial way on rational grounds. If so "[o]nly a society that was actually hostile to religion or riven by religious strife could think it preferable for people to rely on nonreligious, nonrational judgments rather than upon religious convictions."²⁵¹

Greenawalt offers three categories of questions that cannot be resolved on rational grounds: (1) questions of status such as who is a person (abortion issues) and what do we owe nonpersons (environmental and animal rights issues); (2) complex factual questions such as welfare entitlements and obligations; and (3) ultimate questions of moral rights when liberal values conflict. In other areas amenable to rational resolution, the good liberal citizen, and by extension the dutiful public servant, will not rely on religious beliefs in making policy decisions.

Greenawalt's qualification of the only-publicly-accessible-reasons theory has prompted various responses. John Garvey, noting the non-neutral preference of liberals for their theory of the good, would expand the categories within which religious beliefs could legitimately

248. Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 411 (1963).

249. B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 10-11, 40-41, 280-82 (1980).

250. D. LYONS, *ETHICS AND THE RULE OF LAW* 193 (1984).

251. Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352, 379 (1985). See generally, K. GREENAWALT, *LIBERAL DEMOCRACY AND PUBLICLY ACCESSIBLE REASONS* (1988).

hold sway.²⁵² Michael Smith observes as an historical matter that religious beliefs have been at the root of many of the reformists efforts in this country to eradicate slavery, poverty, racism and other social ills.²⁵³ He recommends reliance on religious considerations as long as they are embedded in our cultural past.²⁵⁴ Diane Zimmerman, more sympathetic to the liberal hostility to religious bases for policy decisions, would limit the acceptable encroachment of religion upon public policy considerations to those confirming rather than supplementing the dictates of reason.²⁵⁵ Frederick Schauer explains that in ideal liberal theory, religion should be excluded from public policy considerations, but realizes that public officials will inevitably rely on religious predilections regardless of the theory posed.²⁵⁶ In place of Greenawalt's *strategy of accomodation*, however, Schauer offers a *strategy of resistance* to minimize the risk of improper religious influence.²⁵⁷

Of course the issue has more than scholarly significance. A requirement of a secular purpose is embodied in the first of the three *Lemon* tests. Nonetheless the Court has traditionally avoided inquiries into the sectarian basis of legislation. Thus in *McGowan v. Maryland*,²⁵⁸ the Court held the religious history of Sunday closing laws to be irrelevant to the constitutionality of such laws which also serve a secular purpose. In contrast, the Court in *Epperson v. Arkansas*,²⁵⁹ *Edwards v. Aguillard*,²⁶⁰ and *Wallace v. Jaffree*,²⁶¹ invalidated on religious purpose grounds, laws in the public school setting respectively prohibiting the teaching of evolution, teaching creation-science along with evolution, and requiring a moment of silence. On the other hand, the Court in *Corporation of Presiding Bishop v. Amos*,²⁶² upheld a religious exemption to Title VII of the Civil Rights Act of 1964 prohibiting employment discrimination by private employers because the statute had the "permissible legislative purpose to alleviate significant governmental interference with the ability of religious or-

252. Garvey, *A Comment on Religious Convictions and Lawmaking*, 84 MICH. L. REV. 1288, 1294 (1986).

253. Smith, *Religious Activism: The Historical Record*, 27 WM. & MARY L. REV. 1087 (1986).

254. *Id.* at 1094.

255. Zimmerman, *To Walk a Crooked Path: Separating Law and Religion in the Secular State*, 27 WM. & MARY L. REV. 1095, 1108-09 (1986).

256. Schauer, *May Officials Think Religiously?* 27 WM. & MARY L. REV. 1075, 1083 (1986).

257. *Id.* at 1084-85.

258. 366 U.S. 420, 431 (1961).

259. 393 U.S. 97 (1968).

260. 107 S. Ct. 2573 (1987).

261. 472 U.S. 38 (1985).

262. 107 S. Ct. 2862 (1987).

ganizations to define and carry out their religious missions."²⁶³

Applied to the Equal Access Act, the religious motivation, if any, of the legislators would not be determinative of the EAA's constitutionality. The EAA serves, at minimum, supplementary free speech and equal protection purposes. Extracurricular fora enhance the free flow of ideas and stimulate the moral development of those who initiate and participate in the activities. Moreover, the subjects addressed certainly would encompass nonrational issues involving the nature of a life well lived and the eternal implications of beliefs and actions. In addition the EAA serves the secular purpose of facilitating free exercise so that the extant secular curriculum appears less threatening and less coercive to those following a different belief system. That is, religious needs such as group prayer, the availability of a forum to discuss the theological implications of a secular science or secular discussion of the relativity of morality or the presentation of other materials which could be described under the popular reference of secular humanism,²⁶⁴ would go a long way toward taking the secular sting out of compulsory education laws without jeopardizing the state's exclusive commitment to science and critical rationality. The state's civil religion would be given a preferred status by being part of the formal curriculum, but would then compete with alternative belief systems handled on an extracurricular basis, for ultimate allegiance. The preferred status could be justified as serving a compelling state interest in educating the youth along the lines of critical rationality; the allowance for extracurricular activities teaching other belief systems would satisfy the least restrictive alternative requirements.

On the separate issue of the absence, prevalence, or irrelevance of instances of organic solidarity within the community, it is not necessarily true that organic solidarity is non-existent in modern pluralistic society. Therefore, there may be no need to supply its functional equivalency through erecting, consciously or implicitly, civil religion. The family, the tribe, the religious community, the trade union, the sports team, the political party may provide the locus for the solidarity of variant groups. Indeed, it is the force of such particularized solidarity that prompts many of the free exercise challenges in the courts. The issue is not whether such organic entities exist, or whether, as McConnell suggests, they serve, as intended by the

263. *Id.* at 2868.

264. For a discussion of the phenomenon of secular humanism as part of the core curriculum of public education, with establishment implications, see Note, *The Establishment Clause, Secondary Religious Effects, and Humanistic Education*, 91 *YALE L.J.* 1196 (1982).

Framers, the republican cause of civic virtue.²⁶⁵ Rather, the real question is whether and under what circumstances the state will allow religious associations discretionary space even though their vision varies from that which the state would impose. The question is whether the state's belief system of secular humanism is to be given not only a preferred curricular status as the embodiment of rationality, but an exclusive and authoritarian approbation as constitutive of a life well lived for modern man.

Robert Cover, to the contrary, has brilliantly distinguished the relative roles served by state, as compared with religious, normative orders.²⁶⁶ Cover observes that the world-creating normative universe of religious communities cohere around shared commitments, ritual, common meaning, and close interpersonal relationships. Their psychological motif is unity. Unswerving adherence to tradition, orthodox readings of sacral texts, or the inspiration of priestly directives provides the centripetal force that keeps such communities from fragmenting into disparate groups.

Diversity, on the other hand, serves as the motivating theme for a world-maintaining nomos such as liberalism. The centrifugal force generated by legitimating diversity always threatens the very existence of such communities. Cover quotes Karl Barth to the effect: "The civil community as such is spiritually blind and ignorant. It has neither faith nor love nor hope. It has no creed and no gospel. Prayer is not part of its life, and its members are not brothers and sisters."²⁶⁷

The liberal community, in comparison, finds coherence and stability through rational principles justifying state authority by delineating minimalist obligations necessary for permitting coexistence in the midst of diversity. The entire thrust of the civil religion movement is to eliminate the differences between the world-creating nomos of the religious community and the world-maintaining nomos of the state. The state's so-called neutral value system would become the exclusive source of the citizen's allegiance, by constraint, rather than a mediating nomos which would allow competing normative orders to coexist peaceably.

Unless we are ultimately willing to collapse the differences between world-creating and world-maintaining normative universes, we should refuse to recognize a civil religion which enjoys the privileges

265. McConnell, 1985 SUPREME CT. REV. at 18-21.

266. Cover, *The Supreme Court 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

267. *Id.* at 14 n.37 (quoting K. Barth, *The Christian Community and the Civil Community*, in COMMUNITY, STATE, AND CHURCH 151 (1960)).

of the free exercise clause but suffers none of the restrictions of the establishment clause.²⁶⁸ The establishment of secular religion, simply stated, is constitutionally subject to the same limitations traditional religions must face. If so, we must finally choose between alternative models explaining the moral relationship between church and state. Reconciliationism offers a principled approach to reconciling the overlapping claims of free speech, free exercise and establishment.

Religious beliefs and communicative practices initiated by religious adherents participating in the public forum, under reconciliationism, would be afforded neutral treatment under free speech principles. Additionally, under free exercise principles, religious practices would be entitled to preferred treatment subject to the compelling interest of the state and the unavailability of less restrictive alternatives. Thus, even if other extracurricular activities were excluded from the public schools, the schools may have an affirmative obligation to provide a forum for those students who so desire to discuss, compare and evaluate on their own, the religious implications of the secularism established in the schools on the basis of science and morality.

CONCLUSION

The Supreme Court's anticipated resolution of the constitutionality of extracurricular religious activities in the public schools will largely depend on the interpretive paradigms of church and state relations applied by the various justices. Predicting an outcome on constitutional matters is always risky business; especially in the church and state area. Nonetheless, past opinions supply a basis for predicting the line of reasoning that the justices are likely to follow.

Justices Brennan and Marshall will likely focus their attention on the compatibility of the proposed practices with the *Lemon* tests and the paradigm of separationism. Because the secular purpose of providing a forum for the exchange of ideas on a neutral basis seems

268. Professor Tribe has noted that an overly broad concept of religion might become an "awful engine of destruction," of widely shared public values. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 831 (1978). Consequently, Tribe recommends that two definitions of religion be utilized in constitutional theory: a broad definition for the purposes of free exercise and a narrow definition for establishment reasoning. The objective, of course, is to extend establishment limitations only to traditional religious activities but to extend free exercise benefits beyond those groups. Professor Johnson correctly observes that "if the Supreme Court were to endorse Tribe's reasoning, it would lend support to the claim of some religious fundamentalists that the public schools and other governmental agencies are currently establishing a form of secular religion." Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 835 (1984).

persuasive, and the anticipated entanglement seems *de minimis*, the key factor, under the secular effect test, will be whether high school students are able to distinguish between sponsorship and toleration. Of course this sociological fact will be a matter for judicial notice of legislative facts, and may be heavily influenced by the justices' predilections regarding how high and how impregnable the wall needs be maintained. Also, a determination that high school students are incapable of dealing with controversial subjects will bode ill for advocates of student free speech such as Justices Brennan and Marshall.

Justice O'Connor, and perhaps Justice White, will probably analyze the case in free speech terms in favor of the neutrality paradigm. Because the student-initiated religious groups are merely seeking treatment on par with other student groups, their petitions will likely be viewed favorably. Of course the possibility remains that under a free speech characterization of the problem, any or all of the justices may treat the issue strictly under the Equal Access Act. If the Court largely defers to the school boards in the forum characterizations then schools would be allowed to exclude religious groups, notwithstanding the EAA, by conditioning group eligibility to curriculum-related requirements and determining that religion is noncurriculum-related by constitutional constraint.

Justice Rehnquist will likely develop a justification tied to the historical continuity of religious training as part of our common educational heritage. The religious training in this instance is distinguishable from state-directed religious training because of its origin and administration by student initiative. Accordingly, it will serve republican civic virtue, in the McConnell sense, without fear of monopolistic coercion because of the inevitability of diversity and voluntarism.

Justices Scalia and Kennedy are most likely to articulate opinions consistent with reconciliationism as outlined above. Briefly restated, reconciliationism would give free exercise enhanced respect over and above free speech values, and would reconcile free exercise values with establishment by avoiding state-imposed curricular religious training in favor of student-initiated extracurricular religious activities. Permitting such activities will compassionately respect the free exercise practices of the participants without presenting the fear of coercion applied to nonparticipants. Moreover, it will keep the state from establishing its own form of civil religion as having a preferred status in the competition for belief systems.

Justices Stevens and Blackmun are more difficult to predict. Both are likely to be concerned with satisfying *Lemon*, but both are also likely to be influenced by the neutral principles argument ap-

plied to such activities. Each may also respect the sense of traditional role played by private associations in inculcating religious values as a part of republican civic virtue. Again if they are convinced that such groups can exist as a matter of toleration rather than endorsement, they are likely to permit such activities.

Whatever the outcome of this case and issue, the moral and legal complexity of church and state problems in modern society will undoubtedly perplex the courts for some time to come. Until a consensus is achieved regarding the proper constitutional paradigm to be applied in such cases, plurality opinions and controversy will be the rule rather than the exception.