Chapter Seventeen: Board of Education of Westside Community Schools v. Mergens by and Through Mergens (1990)

When Is A Grilled Cheese Sandwich NOT A Grilled Cheese Sandwich?

Three Big Things:

1. The Equal Access Act of 1984 prohibited any public school which permitted "non-curricular" clubs to meet on school property from picking and choosing which clubs they allowed based on ideologies or beliefs. The trick was figuring out what counted as "non-curricular."

2. Westside High School argued that organizations like Chess Club and Scuba Club were essentially (if not directly) curriculum-related in that they were extensions of the sorts of things the school promoted as a whole, and should therefore not trigger the requirements of the act.

3. The Supreme Court determined that once schools open the door to non-curricular clubs (anything not directly related to or required by a class for which students received credit), they had to allow pretty much anyone else as well. If it was something the school would tolerate during the day (nothing violent or overtly racist, etc.), then they could meet on the same terms as other clubs outside of school hours.

Background

In *Widmar v. Vincent* (1981), the Supreme Court determined that when the University of Missouri (Kansas City) made its facilities available to extra-curricular groups outside of normal school hours, it created a "limited open forum." If religious student organizations wished to use the facilities on the same terms as other groups, they must be allowed to do so. Not only was this NOT a violation of the Establishment Clause (as the University had feared), but denying equal access was a form of inhibiting students' "free exercise" of religion. Justice Lewis Powell, writing for the majority in *Widmar*, explained it this way:

> *The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech. In this context, we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion…*
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> *It is possible – perhaps even foreseeable – that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion…*

A few years later, the U.S. Congress – no doubt hoping to seize the moment – passed the Equal Access Act of 1984. It essentially took the standard expressed in *Widmar* and applied it to public schools. Any district which prevented students from having meetings or forming clubs on the basis of the "religious, political, philosophical, or other content of the speech at such meetings" would lose federal funding and receive a very nasty glare from D.C.

The Legislature had been frustrated in their previous efforts to work around or overturn the Court's "anti-prayer" and "anti-Bible" decisions in *Engel v. Vitale* (1962) and *Abington v. Schempp* (1963), and despite his general popularity, President Reagan had made little progress on his promised Amendment to put the government back in charge of teaching kids what they should believe about Jesus. (OK, that's not entirely fair. Reagan wanted an Amendment to leave it up to each *state* how to teach students about Jesus.)

The Equal Access Act included surprisingly practical guidelines. It distinguished between curricular organizations and those unrelated to specific coursework. Meetings had to be student-driven and not facades for

outside groups coming in to run things. Perhaps most significantly, they had to be entirely voluntary and outside classroom hours. Before school was fine, lunch was fine, after school was fine – any time other clubs or groups could meet. Faculty "advisors" could attend (there are liability issues when minors are left to their own devices for extended periods of time) but not participate and certainly not lead.

All in all, it was a rather reasonable piece of legislation. That alone makes it something of a novelty in terms of Congress and public education.

Bridget Wants A Bible Study

Bridget Mergens was a student at Westside High School in Omaha, Nebraska. In 1985, she asked her principal for permission to form a Christian club at the school. They'd read and discuss the Bible, pray together, and enjoy what those on the inside call "fellowship." Membership would be open to anyone, however, regardless of their beliefs – because, you know… *school*.

Bridget suggested they skip the required "faculty sponsor" part. (Presumably she was under the impression this might improve her chance for approval.) The principle said no. She went to the Associate Superintendent, who turned her down as well. Their initial argument (inferred from the court's response) seems to have been that there could be no clubs without a sponsor, and that this club couldn't have a faculty sponsor because it would violate the Establishment Clause. Bridget, being a persistent little thing (Luke 18:1-5), took her case to the School Board, which backed school administration.

This was stranger than it may at first seem, given several factors. One, this was Nebraska – a perennial "red state." Two, this was happening in 1985, a mere year after the passage of the Equal Access Act – big news all across the country, and of particular interest to school officials who, as a general rule, don't like being sued. Three, there's no way to read the act as suggesting that religious clubs can't have teacher sponsors – merely that they can't participate in the actual discussions or activities. If administration actually played that angle (as the record suggests), it was nonsense… and they should have *known* it was nonsense.

So why would the district fight this particular request so vigorously? That's part of what made (and makes) this particular issue so interesting.

Let's Start A "Contemporary Legal Issues" Club

Mergens, with the support of a few friends and parents, filed suit in their district court. They argued that in addition to violating the Equal Access Act, the school was denying them their freedom of speech, association, and religion as guaranteed in the First Amendment (applied to the states via the Fourteenth). The district clearly had dozens of non-curricular clubs – including Chess Club, Rotary Club, a Scuba Diving Club (naturally very big in, um… Omaha), Photography Club, National Honor Society, Future Business Leaders of America, etc.

The district's defense was innovative, and perhaps even sincere. All thirty or so of the clubs already established at Westside, they argued, were, in fact, *curriculum-related*. And since there were no extra-curricular clubs meeting on school property, the Equal Access Act did not apply. The Act assumed a "limited public forum" – and Westside hadn't created one, legally speaking.

Rotary club? That was an extension of citizenship and public service, important school values and an essential part of each social studies course. Chess club? That was math and science and problem-solving, actual standards in several courses. Photography? Obviously a voluntary extension of art class. And scuba diving? Dude, physical education is a legit course – don't write it off so easily. But this "Bible Club"? This was different. This was "extra-curricular." Unlike Scuba Club.

As a backup, they asserted that even if the Equal Access Act *did* apply, it was unconstitutional – so it didn't matter.

The district court accepted this reasoning and rejected Mergens' claims. The case was appealed to the 8th U.S. Circuit Court of Appeals who reversed that decision and found in favor of Bridget's Bible Club. The district – oddly tenacious, it seemed – appealed to the Supreme Court, which agreed to hear the case in 1990.

If You Give A Mouse A Bible Club…

The most likely explanation for Westside's stubbornness had nothing to do with opposition to the kids' faith. There's at least one reference in court records suggesting that Westside's principle encouraged the club to meet in the church next door to the school. The Court's majority opinion mentioned that "the school apparently permits [students] to meet informally after school," suggesting that at some point the school agreed not to chase them out of the building as long as they didn't call themselves an official school club. This still meant being ignored in official club listings and left out of announcements, but it hardly evinced a hostility towards the general idea of kids getting together to study the Bible and pray.

On the other hand, what would be the implications of this "limited public forum" described in the Equal Access Act if the club *were* officially permitted? None of the existing clubs were particularly "issue-driven" or controversial. The school wasn't wrong that they largely promoted existing school values and the usual "be a good citizen" stuff.

If the Protestants could have a club, however, then by law so could the Catholics. Next could come other faiths or issue-driven groups. Young Republicans. Young Democrats. Wiccans. Gay students. Black students. Atheists. Pro-life clubs. Pro-choice clubs. Oh god, Dungeons & Dragons could stage a comeback!

While the community would probably have been fine with students voluntarily meeting after school to read the Bible and pray, it's not much of a stretch to imagine some would have been less-thrilled at the idea of their tax dollars supporting (in their minds) the Gay-Straight Alliance or Black Lives Matter (neither existed yet under those names, but the ideas were certainly nascent). Would the school approve Anarchy Club? Sodomites 4 Satan? MSNBC watch parties? At some point they'd reject a group based on its content and quite possibly be sued. At that point, all bets were off as to the fallout. Better to heed the advice of noted American philosopher Barney Fife: "Nip it, nip it, nip it in the BUD!"

In other words, it seems unlikely that the district fought against Bible Club because they didn't understand the legal implications. More likely, they fought against it because they *did*.

The Decision

The Supreme Court determined that Westside's existing activities were non-curricular enough that they had a "limited open forum," and the Equal Access Act did *not* violate the Establishment Clause. The school would let the kids have their Bible Club. Justice Sandra Day O'Connor wrote most of the opinion for the majority and the rest for a plurality of justices, while several who supported the result wrote concurrences differing in some of the details or focusing on different factors. Justice John Paul Stevens was the sole voice of dissent, which at least simplified the math on that side of things.

Justice O'Connor's mostly-majority opinion recapped the history of the case, including the role of *Widmar v. Vincent* (1981) and the Equal Access Act which was clearly intended to apply the standards outlined in *Widmar* to public schools. The sticking point, she acknowledged, was the use of the term "noncurriculum related student group" in the Act. The bill's authors somehow overlooked that one tiny little detail – like when you forget to

add coffee to your cream and sugar or bring your car with you to the gas station. O'Connor weighed several possible approaches to resolving this before arriving at the Court's solution:

> *In our view, a student group directly relates to a school's curriculum if the subject matter of the group is actually taught… in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit. We think this limited definition of groups that directly relate to the curriculum is a common sense interpretation of the Act that is consistent with Congress' intent to provide a low threshold for triggering the Act's requirements.*
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> *For example, a French club would directly relate to the curriculum if a school taught French in a regularly offered course or planned to teach the subject in the near future. A school's student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school…*
>
> *On the other hand, unless a school could show that groups such as a chess club, a stamp collecting club, or a community service club fell within our description of groups that directly relate to the curriculum, such groups would be "noncurriculum related student groups" for purposes of the Act. The existence of such groups would create a "limited open forum" under the Act and would prohibit the school from denying equal access to any other student group on the basis of the content of that group's speech…*

In other words, if Westside had a Scuba Club but not a Scuba Class, they'd have to allow Bible Club as well – along with any ideological undesirables seeking similar sanctuary.

As to the Establishment Clause, the Equal Access Act passed the "Lemon Test" on all three fronts. It had a secular legislative purpose (equal access and protection of different viewpoints or beliefs), it did not substantially advance or hinder religion (it merely stayed out of the way), and it didn't create excessive entanglement (the school wasn't funding or regulating the meetings beyond what it would do for anything else happening on campus). "Indeed," O'Connor explained, "the message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."

Perhaps hoping the message would resonate more effectively if marinated in a light snark sauce, she circled back for a double tap:

> *{T}here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis… The proposition that schools do not endorse everything they fail to censor is not complicated.*

So there you go.

Cautious Concurrence

Justice Anthony Kennedy, joined by Justice Antonin Scalia, agreed with the decision, but for slightly different reasons than those explained by Justice O'Connor. Justice Thurgood Marshall, joined by Justice William Brennan, on the other hand, had something more extensive on his mind:

> *I agree with the majority that "noncurriculum" must be construed broadly to "prohibit schools from discriminating on the basis of the content of a student group's speech." As the majority demonstrates,*

> *such a construction "is consistent with Congress' intent to provide a low threshold for triggering the Act's requirements." …*
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> *The Act's low threshold for triggering equal access, however, raises serious Establishment Clause concerns where secondary schools with fora that differ substantially from the forum in* Widmar *are required to grant access to student religious groups…*

Justice Marshall explained that the University of Missouri—Kansas City (the institution prompting the *Widmar* case) had over a hundred different organizations on campus, many of which were political or issue-driven. There was little danger any reasonable person could believe that so many conflicting ideologies were simultaneously promoted by the University. The University also took great pains to ensure that none of these groups promoted themselves as official extensions of UMKC.

Westside, on the other hand, had for years openly embraced and promoted its extracurricular clubs and extolled the roles they played in the developing student character. They were part of the overall culture of the school, just like the football team or band. While Marshall and Brennan had no problem with the addition of Bible Club to the mix, this sort of enthusiastic endorsement by school officials would be inappropriate for a religious group. It would be too easy, they argued, for the average student to assume that the district was advocating this new option on the same terms as the rest.

Justice Stevens' Dissent

The lone voice of dissent, Justice John Paul Stevens, was having none of it.

> *Can Congress really have intended to issue an order to every public high school in the nation stating, in substance, that if you sponsor a chess club, a scuba diving club, or a French club – without having formal classes in those subjects – you must also open your doors to every religious, political, or social organization, no matter how controversial or distasteful its views may be? I think not.*

Well, gosh – when you put it *that* way…

Justice Stevens agreed with the majority that determining appropriate application of the Equal Access Act hinged on the definition of "noncurriculum related student group." He agreed that the Court should look to Congress' intent to help do so, and that Congress clearly meant to apply the principles of *Widmar* to schools like Westside. The Act was obviously intended to prevent discrimination against religious groups once a "limited open forum" had been established and contained language to prevent school officials from evading the Act's requirements through sophistry – creatively redefining terms to fit their desired outcome.

At that point, however, Justice Stevens believed the majority had lost their black-robed minds.

> *What the Court of Appeals failed to recognize, however, is the critical difference between the university forum in* Widmar *and the high school forum involved in this case. None of the clubs at the high school is even arguably controversial or partisan.*
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> *Nor would it be wise to ignore this difference. High school students may be adult enough to distinguish between those organizations that are sponsored by the school and those which lack school sponsorship even though they participate in a forum that the school does sponsor. But high school students are also young enough that open fora may be less suitable for them than for college students…*

That's why Congress, in his understanding, left it up to school officials to decide whether to limit school clubs to those clearly supporting institutional ideals and goals – things the district could safely promote and encourage – or whether to open them up to more mature topics, as was the case in *Widmar*.

Once opened to political or religious ideologies, the district must honor the "limited public forum." But, Justice Stevens insisted, neither Chess Club nor Scuba Club did that.

> *I believe that the distinctions between Westside's program and the University of Missouri's program suggest what is the best understanding of the Act: an extracurricular student organization is "noncurriculum related" if it has as its purpose (or as part of its purpose) the advocacy of partisan theological, political, or ethical views. A school that admits at least one such club has apparently made the judgment that students are better off if the student community is permitted to… compete along ideological lines… [I]t seems absurd to presume that Westside has invoked [this] strategy by recognizing clubs like Swim Timing Team and Subsurfers which, though they may not correspond directly to anything in Westside's course offerings, are no more controversial than a grilled cheese sandwich…*
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> *[A] high school could properly sponsor a French club, a chess club, or a scuba diving club… because their activities are fully consistent with the school's curricular mission… Nothing in* Widmar *implies that the existence of a French club… would create a constitutional obligation to allow student members of the Ku Klux Klan or the Communist Party to have access to school facilities.*

Justice Stevens' reasoning hearkened back to that of the district court which first heard the case (and wasn't so far removed from Justices Marshall and Brennan in their concurrence). He seemed to share the same sorts of concerns which likely motivated Westside officials to turn down Bridget Mergens in the first place.

Aftermath

The courts have largely held to the standards established in *Widmar* and legislated by the Equal Access Act, in some cases extending them by inference to circumstances not specifically addressed in either.

A few years after *Mergens*, in *Lamb's Chapel v. Center Moriches Union Free School District* (1993), the Court held that schools allowing community groups to use their facilities after hours could not deny the same access to a group based on its religious message. In *Rosenberger v. Rector and Visitors of the University of Virginia* (1995), the Court required the University to fund religious student publications on the same terms it did for other non-curricular student periodicals. *Good News Club v. Milford Central School* (2001) offered a few minor variations on the theme but was otherwise a repeat of *Lamb's Chapel* – with the same outcome.

Some districts have chosen to eliminate extra-curricular activities entirely rather than open their doors to kids wanting to meet under the auspices of Gay-Straight Alliance (GSA), Muslim Students Club, or any of the variations of Atheist or Satan Club. Districts are permitted to refuse groups promoting behavior or values clearly antithetical to the school's mission (the KKK, for example, could be refused without much constitutional danger – although the Communists would probably get their club), but the boundaries of this discretion are still being tested here and there.

Local courts have also periodically confronted variations of the issue (if the district cancels *all* clubs to avoid allowing Teen Q-Anon to meet, does that violate the spirit of the law?) By and large, however, the principles established in *Mergens* have remained firm for over three decades and there's little reason to expect them to change anytime soon.

Excerpts from Board of Education v. Mergens (1990), Majority Opinion by Justice Sandra Day O'Connor

{Edited for Readability}

In *Widmar v. Vincent* (1981), we invalidated, on free speech grounds, a state university regulation that prohibited student use of school facilities "for purposes of religious worship or religious teaching." In doing so, we held that an "equal access" policy would not violate the Establishment Clause under our decision in *Lemon v. Kurtzman* (1971). In particular, we held that such a policy would have a secular purpose, would not have the primary effect of advancing religion, and would not result in excessive entanglement between government and religion…

In 1984, Congress extended the reasoning of *Widmar* to public secondary schools. Under the Equal Access Act, a public secondary school with a "limited open forum" is prohibited from discriminating against students who wish to conduct a meeting within that forum on the basis of the "religious, political, philosophical, or other content of the speech at such meetings" … A "limited open forum" exists whenever a public secondary school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time" …

Unfortunately, the Act does not define the crucial phrase "noncurriculum related student group." Our immediate task is therefore one of statutory interpretation… Any sensible interpretation of "noncurriculum related student group" must… be anchored in the notion that such student groups are those that are not related to the body of courses offered by the school. The difficult question is the degree of "unrelatedness to the curriculum" required for a group to be considered "noncurriculum related." …

In light of [the Act's proclaimed] legislative purpose, we think that the term "noncurriculum related student group" is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school. In our view, a student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course…

For example, a French club would directly relate to the curriculum if a school taught French in a regularly offered course or planned to teach the subject in the near future. A school's student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school. If participation in a school's band or orchestra were required for the band or orchestra classes, or resulted in academic credit, then those groups would also directly relate to the curriculum…

On the other hand, unless a school could show that groups such as a chess club, a stamp collecting club, or a community service club fell within our description of groups that directly relate to the curriculum, such groups would be "noncurriculum related student groups" for purposes of the Act. The existence of such groups would create a "limited open forum" under the Act and would prohibit the school from denying equal access to any other student group on the basis of the content of that group's speech…

To the extent that petitioners contend that "curriculum related" means anything remotely related to abstract educational goals…, we reject that argument. To define "curriculum related" in a way that results in almost no

schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing student groups, would render the Act merely hortatory…

[These students] seek equal access in the form of official recognition by the school. Official recognition allows student clubs to be part of the student activities program, and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair. Given that the Act explicitly prohibits denial of "equal access… to… any students who wish to conduct a meeting within [the school's] limited open forum" on the basis of the religious content of the speech at such meetings, we hold that Westside's denial of respondents' request to form a Christian club denies them "equal access" under the Act…

Petitioners contend that, even if Westside has created a limited open forum within the meaning of the Act, its denial of official recognition to the proposed Christian club must nevertheless stand because the Act violates the Establishment Clause of the First Amendment, as applied to the States through the Fourteenth Amendment. Specifically, petitioners maintain that, because the school's recognized student activities are an integral part of its educational mission, official recognition of respondents' proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students.

We disagree. In *Widmar*, we applied the three-part Lemon test to hold that an "equal access" policy, at the university level, does not violate the Establishment Clause… We concluded that "an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose," and would in fact avoid entanglement with religion… We also found that, although incidental benefits accrued to religious groups who used university facilities, this result did not amount to an establishment of religion… Indeed, the message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion…

We think the logic of *Widmar* applies with equal force to the Equal Access Act… Congress' avowed purpose – to prevent discrimination against religious and other types of speech – is undeniably secular… Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law. Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to endorse or disapprove of religion…

[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis (*Tinker v. Des Moines ISD*, 1969; *West Virginia BOE v. Barnette*, 1943). The proposition that schools do not endorse everything they fail to censor is not complicated.

Excerpts from Board of Education v. Mergens (1990), Concurring Opinion by Justice Thurgood Marshall

{Edited for Readability}

I agree with the majority that "noncurriculum" must be construed broadly to "prohibit schools from discriminating on the basis of the content of a student group's speech." As the majority demonstrates, such a construction "is consistent with Congress' intent to provide a low threshold for triggering the Act's requirements" …

The Act's low threshold for triggering equal access, however, raises serious Establishment Clause concerns where secondary schools with fora that differ substantially from the forum in *Widmar* are required to grant access to student religious groups. Indeed, as applied in the present case, the Act mandates a religious group's access to a forum that is dedicated to promoting fundamental values and citizenship as defined by the school. The Establishment Clause does not forbid the operation of the Act in such circumstances, but it does require schools to change their relationship to their fora so as to disassociate themselves effectively from religious clubs' speech…

Westside currently does not recognize any student club that advocates a controversial viewpoint. Indeed, the clubs at Westside that trigger the Act involve scuba diving, chess, and counseling for special education students. As a matter of school policy, Westside encourages student participation in clubs based on a broad conception of its educational mission… Given the nature and function of student clubs at Westside, the school makes no effort to disassociate itself from the activities and goals of its student clubs.

The entry of religious clubs into such a realm poses a real danger that those clubs will be viewed as part of the school's effort to inculcate fundamental values. The school's message with respect to its existing clubs is not one of toleration but one of endorsement… But although a school may permissibly encourage its students to become well-rounded as student-athletes, student-musicians, and student-tutors, the Constitution forbids schools to encourage students to become well-rounded as student-worshippers. Neutrality toward religion, as required by the Constitution, is not advanced by requiring a school that endorses the goals of some noncontroversial secular organizations to endorse the goals of religious organizations as well…

To the extent a school tolerates speech by a wide range of ideological clubs, students cannot reasonably understand the school to endorse all of the groups' divergent and contradictory views. But if the religion club is the sole advocacy-oriented group in the forum, or one of a very limited number, and the school continues to promote its student-club program as instrumental to citizenship, then the school's failure to disassociate itself from the religious activity will reasonably be understood as an endorsement of that activity…

If Westside stood apart from its club program and expressed the view, endorsed by Congress through its passage of the Act, that high school students are capable of engaging in wide-ranging discussion of sensitive and controversial speech, the inclusion of religious groups in Westside's forum would confirm the school's commitment to nondiscrimination. Here, though, the Act requires the school to permit religious speech in a forum explicitly designed to advance the school's interest in shaping the character of its students…

Westside thus must do more than merely prohibit faculty members from actively participating in the Christian Club's meetings. It must fully disassociate itself from the Club's religious speech and avoid appearing to sponsor or endorse the Club's goals… [Otherwise,] because the school endorses the extracurricular program as part of its

educational mission, the inclusion of the Christian Club in that program will convey to students the school-sanctioned message that involvement in religion develops "citizenship, wholesome attitudes, good human relations, knowledge and skills." We need not question the value of that message to affirm that it is not the place of schools to issue it.

Excerpts from Board of Education v. Mergens (1990), Dissenting Opinion by Justice John Paul Stevens

{Edited for Readability}

Can Congress really have intended to issue an order to every public high school in the nation stating, in substance, that if you sponsor a chess club, a scuba diving club, or a French club – without having formal classes in those subjects – you must also open your doors to every religious, political, or social organization, no matter how controversial or distasteful its views may be? I think not. A fair review of the legislative history of the Equal Access Act discloses that Congress intended to recognize a much narrower forum than the Court has legislated into existence today.

The Act's basic design is easily summarized: when a public high school has a "limited open forum," it must not deny any student group access to that forum on the basis of the religious, political, philosophical or other content of the speech of the group… The Court correctly identifies three useful guides to Congress' intent. First, the text of the statute says that a school creates a limited open forum if it allows meetings on school premises by "noncurriculum related student groups," a concept that is ambiguous at best. Second, because this concept is ambiguous, the statute must be interpreted by reference to its general purpose, as revealed by its overall structure and by the legislative history. Third, the Act's legislative history reveals that Congress intended to guarantee student religious groups access to high school fora comparable to the college forum involved in *Widmar v. Vincent* (1981)…

The forum at Westside is considerably different from that which existed at the University of Missouri. In *Widmar*, we held that the University had created "a generally open forum." Over 100 officially recognized student groups routinely participated in that forum. They included groups whose activities not only were unrelated to any specific courses but also were of a kind that a state university could not properly sponsor or endorse. Thus, for example, they included such political organizations as the Young Socialist Alliance, the Women's Union, and the Young Democrats. The University permitted use of its facilities for speakers advocating transcendental meditation and humanism. Since the University had allowed such organizations and speakers the use of campus facilities, we concluded that the University could not discriminate against a religious group on the basis of the content of its speech. The forum established by the state university accommodated participating groups that were "noncurriculum related" not only because they did not mirror the school's classroom instruction, but also because they advocated controversial positions that a state university's obligation of neutrality prevented it from endorsing…

[There is a] critical difference between the university forum in *Widmar* and the high school forum involved in this case. None of the clubs at the high school is even arguably controversial or partisan. Nor would it be wise to ignore this difference. High school students may be adult enough to distinguish between those organizations that are sponsored by the school and those which lack school sponsorship even though they participate in a

forum that the school does sponsor. But high school students are also young enough that open fora may be less suitable for them than for college students. The need to decide whether to risk treating students as adults too soon, or alternatively to risk treating them as children too long, is an enduring problem for all educators… We would do no honor to Westside's administrators or the Congress by assuming that either treated casually the differences between high school and college students when formulating the policy and the statute at issue here.

For these reasons, I believe that the distinctions between Westside's program and the University of Missouri's program suggest what is the best understanding of the Act: an extracurricular student organization is "noncurriculum related" if it has as its purpose (or as part of its purpose) the advocacy of partisan theological, political, or ethical views. A school that admits at least one such club has apparently made the judgment that students are better off if the student community is permitted to, and perhaps even encouraged to, compete along ideological lines. This pedagogical strategy may be defensible or even desirable. But it… seems absurd to presume that Westside has invoked [this] strategy by recognizing clubs like Swim Timing Team and Subsurfers which, though they may not correspond directly to anything in Westside's course offerings, are no more controversial than a grilled cheese sandwich…

Nothing in *Widmar* implies that the existence of a French club, for example, would create a constitutional obligation to allow student members of the Ku Klux Klan or the Communist Party to have access to school facilities. More importantly, nothing in that case suggests that the constitutional issue should turn on whether French is being taught in a formal course while the club is functioning. Conversely, if a high school decides to allow political groups to use its facilities, it plainly cannot discriminate among controversial groups because it agrees with the positions of some and disagrees with the ideas advocated by others…

As I have already indicated, the majority, although it agrees that Congress intended by this Act to endorse the application of *Widmar* to high schools, does not compare this case to *Widmar*. Instead, the Court argues from two other propositions: first, that Congress intended to prohibit discrimination against religious groups, and, second, that the statute must not be construed in a fashion that would allow school boards to circumvent its reach by definitional fiat. I am in complete agreement with both of these principles. I do not, however, believe that either yields the conclusion which the majority adopts…

For all of these reasons, the argument for construing "noncurriculum related" by recourse to the facts of *Widmar*, and so by reference to the existence of advocacy groups, seems to me overwhelming.