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Counterpoint:

Free Speech and Nonestablishment in the Public Schools

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Mark Twain, learning of New York newspaper accounts of his death, is said to have cabled from London that "the report of my death was an exaggeration."[1] So too, the solemn report in the Spring 1991 issue of the JOURNAL OF LAW & EDUCATION[2] of the "dramatic return" of "organized student sponsored prayer to American public schools" must be viewed with healthy skepticism. The 1984 Equal Access Act[3] and its validation in the *Board of Education of Westside Commuity Schools v. Mergens*[4] decision are important events, but not for the "return" of prayer to the public schools. Their importance lies, instead, in the reaffirmation of the Free Speech rights of students in the public schools. And if there was ever any doubt about the "return" of state-prescribed prayer which *was* forced to "leave" the public schools, this doubt was dispelled by the *Lee v. Weisman* decision[5] of 1992. What is significant in the *Mergens* and *Lee* decisions is the unequivocally bright line drawn by the Court between the libertarian protections afforded private religious expression in the public schools and the libertarian proscriptions against involuntary state-prescribed religious expression.[6]

The Equal Access Act upholds the equal rights of all students to gain access to school property for extracurricular student-initiated speech.[7] Con-

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1. Mark Twain, Cablegram from London to New York to a New York Newspaper, June 2, 1897, *reported in* B. Evans, DICTIONARY OF QUOTATIONS 211 (1968).

2. Charles J. Russo & David L. Gregory, *The Return of School Prayer: Reflections on the Libertarian-Conservative Dilemma,* 20 J. L. & EDUC. 167 (1991) (hereinafter "Russo & Gregory").

3. 20 U.S.C. §§ 4071-4074.

4. 496 U.S. 226 (1990).

5. 505 U.S. ____, 112 S. Ct. 2649 (1992); *see also,* Wallace v. Jaffree, 472 U.S. 38 (1985).

6. *Cf. Mergens,* 496 U.S. at 250.

7. The Equal Access Act not only protects student meetings involving religious speech; it forbids discrimination on the basis of "the religious, political, philosophical or other content of the speech at [student] meetings." 20 U.S.C. § 4071(a).

trary to the assertions of Russo and Gregory, the Equal Access Act was not a victory for "anti-libertarian" forces.[8] The limited student expression which the Equal Access Act affirmed is in fact more consonant with classic libertarian principles of individual autonomy than at odds with them. If anything, the record revealed anti-libertarian tendencies in the educational establishment.[9] Administrators had frequently smothered student expression, misunderstanding the Establishment Clause, seeking to avoid controversy, or becoming confused over contradictory court decisions.[10] Even after enactment of the Equal Access Act, many public school administrators and their attorneys remained committed to a path of resistance that not only subverted the Act and undermined the libertarian principles it advanced, but led to a "tortured history in the federal courts."[11]

The origins of the Equal Access Act were not in a "conservative" master agenda or some conspiracy hatched in the Reagan-Bush White House, but in the spontaneously simple, yet persuasive, complaints of individual students who were prohibited by school administrators from praying or discussing religious subjects on school property, while their counterparts were permitted to meet and use school property for a variety of self-directed speech purposes. For example, in Williamsport, Pennsylvania, students were encouraged to form clubs and groups and hold meetings during a regularly scheduled student activity period at the public high school; but when the student group Petros applied for permission to use the period to read scriptures, pray, and discuss religious questions, its application was denied. No other student group had ever been denied the opportunity to participate in the student activity period, notwithstanding two persuasive United States Supreme Court holdings making it clear that students do not shed their rights to free expression at the schoolhouse gate.[12] The school system's denial eventually led to litigation by

8. *Cf.* Russo & Gregory, *supra* note 2, at 174. Professors Russo and Gregory also warn that the "fundamental" tenet of local control of public schools, originating in the Northwest Ordinance of 1787, is jeopardized by passage of the Equal Access Act. But whatever threat the Act may pose to "local control" of the schools, it is de minimis compared to the controls and restrictions voluntarily assumed by the public education establishment's perennial feeding frenzy at federal and state appropriations troughs. Moreover, the substantial number of Supreme Court cases dealing with the public schools since 1950 demonstrates that the tenet of "local control" of schools has always yielded when constitutional principle is involved.

9. S. REP. No. 357, 98th Cong., 2d Sess. 10-20 (1984).

10. *Id.* at 6-7.

11. Jimenez, *Beyond Mergens: Ensuring Equality of Student Religious Speech Under the Equal Access Act,* 100 YALE L.J. 2149, 2151 (1991).

12. Widmar v. Vincent, 454 U.S. 263 (1981); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969).

Williamsport students alleging denial of their constitutional Free Speech and Free Exercise rights.[13]

A few years earlier, in *Widmar v. Vincent,* the United States Supreme Court had held that student meetings on university property for religious teaching and worship did *not* violate the Establishment Clause where the university opened up its facilities generally for student meetings. The Court also concluded that student-initiated religious speech, including religious worship, was entitled to the same constitutional protection under the First Amendment as any other speech.[14]

Notwithstanding this precedent, many misinformed and/or cautious or confused secondary school administrators (and school board attorneys) proceeded to deny student requests to meet on school property for religious purposes at numerous venues throughout the country.[15] These denials resulted in confrontation on two fronts: Lawsuits, like the one in Williamsport, were initiated across the country by students asserting their First and Fourteenth Amendment rights of equal access to school property for speech activities.[16] And Congressional hearings were convened to investigate charges of unlawful discrimination and denial of constitutional rights against students with religious interests.

As the *Williamsport* lawsuit wended its way through the federal court system to the Supreme Court, congressional hearings exposed a pattern of official misapprehension about the reach of the Establishment Clause and a pervasive misunderstanding of student rights and constitutional law. As a coordinate branch of government charged no less than the Supreme Court with upholding the Constitution, Congress determined that it was necessary to correct this pattern of official discrimination.[17] After exhaustive scrutiny, amendment, and redrafting as the result of input from numerous scholars such as Professor Lawrence Tribe and representatives of most of the major civil liberties groups in the United States, the Equal Access Act was enacted by large bi-partisan congressional majorities[18] to "clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and free exercise of religion."[19] Given this pur-

13. Bender v. Williamsport Area Sch. Dist., 563 F. Supp. 697, 699 (M.D. Pa. 1983).

14. Widmar v. Vincent, 454 U.S. at 269.

15. S. REP. No. 357, *supra* note 9, at 10-20.

16. Bell v. Little Axe Indep. Sch. Dist. No. 70, 766 F.2d 1391 (10th Cir. 1985); Nartowicz v. Clayton County Sch. Dist., 736 F.2d 646 (11th Cir. 1984); Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied,* 459 U.S. 1155 (1983); Brandon v. Guilderland Bd. of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123 (1981); Johnson v. Huntington Beach Union High Sch. Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied,* 434 U.S. 877 (1977).

17. *Mergens,* 496 U.S. at 239.

18. *Id.*

19. S. REP. No. 357, *supra* note 9, at 3.

pose, and the broad bipartisan support that the Equal Access Act achieved, the Act can hardly be termed "anti-libertarian" or a victory for "political conservatives."[20] It was, more accurately, a victory for the First Amendment.

The *Williamsport* constitutional challenge reached the Supreme Court in February 1985, six month after the Equal Access Act became law. The district court had followed the reasoning of *Widmar,* finding Williamsport Area High School's "activity period" to be an open forum to which students were constitutionally entitled to equal access. On appeal, the Third Circuit Court of Appeals reversed, finding high school students more impressionable and the high school setting more "structured" than higher education.[21]

The Supreme Court reversed the judgment of the Third Circuit on an unrelated, narrow "standing" issue, reinstating the original "public forum" holding of the district court.[22] The narrowness of the grounds of decision did not prevent four justices of the Supreme Court from expressing their view that *Widmar*'s First Amendment "equal access" principles would apply to public secondary schools. Justice Powell, the author of *Widmar* and a former Chairman of the Richmond, Virginia, school board, joined in this view. He wrote: "I do not believe — particularly in this age of massive media information — that the few years difference in age between high school and college students justifies departing from *Widmar.*"[23]

Russo and Gregory[24] assert that the student liberties guaranteed by the Equal Access Act rest "not upon the unilateral initiative of students, but rather upon the prerogatives granted by the Congress through the federal Equal Access Act and enforced against local governments *qua* school districts." This conclusion ignores substantial scholarly and judicial opinion to the contrary. Even prior to passage of the Equal Access Act and the *Williamsport* decision, Professor Tribe stated his opinion that "[t]he Supreme Court's failure to address [student-initiated speech in public secondary schools] subsequent to *Widmar v. Vincent* should not be confused with a contrary view on the part of the Court."[25] Likewise, Judge Arlin Adams, in his dissent in the Third Circuit *Williamsport* decision, recognized that just because "we here are concerned with a *high school,* does not mean we are free to ignore the nature of the free speech rights en-

20. *Cf.* Russo & Gregory, *supra* note 2, at 167, 174.
21. Williamsport Area Sch. Dist. v. Bender, 741 F.2d 538, 552-53 (3d Cir. 1984).
22. Bender v. Williamsport Sch. Dist., 475 U.S. 534, 541-49 (1986).
23. *Id.* at 556 (Powell, J., dissenting).
24. Russo & Gregory, *supra* note 2, at 168.
25. S. REP. No. 357, *supra* note 9, at 8.

joyed by the students."[26] This sentiment was, of course, echoed later in the *Williamsport* case by Justice Powell and three other justices. To say, then, as Russo and Gregory do,[27] that the protections afforded by the Equal Access Act are rooted in the mere command of majoritarian rule, is to ignore that equal access is primarily grounded in First Amendment liberties.

They also make the argument that "the individual student's right to pray silently in public high schools has always been free from effective governmental restraint, and remained unaltered by decisions such as *Engel* and *Schempp.*"[28] While it is probably true that students have not been prohibited *individually* from praying silently in schools,[29] prior to the Equal Access Act, students in many schools were in fact prohibited from gathering *collectively* in schools and expressing themselves openly on religious or other controversial topics, and yet at the same time other students *were* free to meet collectively and express themselves on virtually all *but* religious topics. The real issue is thus not individual "silent" prayer, but equal treatment and a level playing field for student expression in the schools.

A recent development that adds perspective and balance to the speech rights endorsed in the Equal Access Act and *Mergens* is the Supreme Court's decision last term in *Lee v. Weisman,* where a nonsectarian graduation commencement invocation and benediction were found to violate the Establishment Clause. While space does not permit a detailed analysis of the decision, the boundaries drawn in the *Lee* decision make it clear that, barring a constitutional amendment, state-prescribed prayer in any form is banished from the public schools.

Lee sets a very low threshold for official involvement in religious practices in schools to acquire "the imprint of the State" and thereby become unconstitutional.[30] In addition, Justice Kennedy's use of a two-part "coercion" test[31] takes on the characteristics of a "hair trigger" when it is

26. 741 F.2d at 547.

27. Russo & Gregory, *supra* note 2, at 168, 174.

28. Russo & Gregory, *supra* note 2, at 168, referring to Engel v. Vitale, 370 U.S. 421 (1962), and School Dist. of Abington v. Schempp, 374 U.S. 203 (1963).

29. Even this may be doubtful. For example, in 1989, ten-year-old Audrey Pearson of Woodbridge, Virginia was prohibited by her public school principal from reading her Bible on a school bus during the one-hour trip to and from her home. This violation of her rights was remedied only after intervention by attorneys with The Rutherford Institute. *See* Haywood, *Protect Religious Speech, Says Rutherford Institute,* CHATTANOOGA NEWS-FREE PRESS, Oct. 21, 1989, at B1.

30. *Lee,* 505 U.S. ____, 112 S. Ct. at 2649, 2657.

31. This two-part test was offered earlier in his *Mergens* concurrence and his dissent in County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 659 (1989).

linked, as in *Lee,* with psychological opinion that peer pressure "coerces" students to conform to ceremonial religious exercises.[32]

In sum, "[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 Clause protect."[33] Far from "anti-libertarian," the free expression rights advanced in *Mergens, Bender* and the Equal Access Act, balanced by the strong separationist language of *Lee,* promote libertarian precepts, and recognize the inherent tensions, undergirding student free speech and nonestablishment rights in the public schools.

32. As a jurisprudential matter, the dissent expresses justifiable concern with what could readily turn out to be "a boundless, and boundlessly manipulable, test of psychological coercion, which promises to do for the Establishment Clause what the Durham rule did for the insanity defense." *Lee,* 505 U.S. ____, 112 S.Ct. at 2679 (Scalia, J., dissenting). Reliance on psychological evidence also raises the question whether such evidence will now be acceptable to advance the Associational, Free Exercise and Due Process/Parental Rights claims of students who allege that school textbooks, school courses or practices, or school celebrations like Halloween unfairly coerce them, cause undue psychological pressures, and create peer pressure that infringes on their rights of conscience.

33. *Mergens,* 496 U.S. at 250 (plurality opinion).