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The Equal Access Controversy: The Religion Clauses and the Meaning of 'Neutrality'

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THE EQUAL ACCESS CONTROVERSY: THE RELIGION CLAUSES AND THE MEANING OF "NEUTRALITY"

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There are three basic positions in the controversy over equal access of student religious groups to public school facilities: (1) The free speech and free exercise clauses require public schools to grant religious groups the same access that they grant nonreligious groups; (2) the establishment clause requires public schools to deny access to religious groups even if they grant access to nonreligious groups; and (3) the Constitution does not dictate a result, thus permitting public schools to decide for themselves whether to grant religious groups equal access to school facilities. Professor Laycock endorses the first of these positions.[1] I cannot agree. In my view, the third position best accommodates the conflicting constitutional interests. The Constitution requires public schools neither to exclude religious groups from public school facilities nor to grant such groups equal access.[2]

Professor Laycock bases his conclusion that the Constitution "*requires* a right of equal access for religious speech"[3] on the premise that "the Constitution requires the government to be neutral toward religion."[4] Thus, if a public school permits nonreligious groups to meet in school facilities, the premise of neutrality requires the school to grant access to religious groups as well. Neutrality, however, is not a self-defining concept. Its meaning may vary depending on the context and nature of the issue. Consider, for example, the fourteenth amendment's guarantee that no state shall deny any person the equal protection of the laws. Under this guarantee, a state must grant equal protection to opticians and optometrists, to men and women, to blacks and whites. But the meaning of equal protection will vary depending on the nature of the classification. Different classifications threaten the values underlying the guarantee of equal protection in different ways. Accordingly, different

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

2 *See* Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823, 847 (1983).

3 Laycock, *supra* note 1, at 3 (emphasis in original).

4 *Id.* at 1-2.

classifications must be tested by different standards of review. The same is true of neutrality.

Professor Laycock implicitly concedes that a public school does not violate the free speech or free exercise rights of a religious group if it denies all student groups access to school facilities.[5] Thus, the threat to free speech or free exercise in the equal access context derives not from the denial of access, but from the unequal treatment of religious groups. To what extent, if any, does such unequal treatment threaten the values underlying the free speech and free exercise guarantees?

The Supreme Court's analysis of political expression provides a useful analogy. The protection of political speech, like religious speech, lies at the very core of the first amendment. The Court often has recognized, however, that government may grant special benefits to nonpolitical speech without extending those benefits to political speech, so long as it does not expressly favor any particular political viewpoint. In *Lehman v. City of Shaker Heights*,[6] the Court upheld the constitutionality of a city's policy permitting the interior of its transit vehicles to be leased for the display of commercial messages, while excluding all political messages. In *Greer v. Spock*,[7] the Court upheld the constitutionality of a military base's policy permitting civilian speakers to address military personnel on subjects ranging from business management to drug abuse, while prohibiting speech of a partisan political nature. And in *Cornelius v. NAACP Legal Defense and Educational Fund*,[8] the Court upheld the constitutionality of an Executive Order permitting charitable organizations to solicit contributions from federal employees through the Combined Federal Campaign, while excluding political advocacy organizations from the campaign.[9]

As these decisions illustrate, governmental policies that disadvantage political speech as a class trigger standards of review that are less stringent than those appropriate for policies that expressly disadvantage specific political viewpoints. This is because policies that disadvantage political speech as a class are less threatening to first amendment values than laws that expressly disadvantage specific points of view.[10]

A similar principle governs religious expression. As the Supreme Court has long recognized, the "clearest command" of the religion

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[5] *Id.* at 3, 13-14.

[6] 418 U.S. 298 (1974).

[7] 424 U.S. 828 (1976).

[8] 473 U.S. 788 (1985).

[9] *See also* Buckley v. Valeo, 424 U.S. 1 (1974); Broadrick v. Oklahoma, 413 U.S. 601 (1973); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

[10] *See generally* Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 239-42 (1983) [hereinafter Stone, *Content Regulation*]; Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 100-15 (1978) [hereinafter Stone, *Restrictions of Speech*].

clauses is that "one religious denomination cannot be officially preferred over another."[11] Any law that expressly grants "a denominational preference" is "suspect" and must be tested by "strict scrutiny in adjudging its constitutionality."[12] Denominational discrimination in the religious context is the analog of viewpoint discrimination in the political context. Governmental policies that expressly discriminate against specific religious denominations are therefore appropriately tested by the same stringent standards of review that the Court uses to test the constitutionality of governmental policies that expressly discriminate against specific political viewpoints. The corollary is also true, however. Governmental policies that grant special benefits to nonreligious expression as a class should be tested by the same—less demanding—standards that the Court uses to test the constitutionality of governmental policies that grant special benefits to nonpolitical expression as a class. In the religious, as in the political, realm the broader subject-matter classification is less threatening to core first amendment values.

The equal access controversy does not pose an issue of denominational discrimination. The decision not to grant equal access to religious groups distinguishes not between Jews and Christians or Buddhists and Mormons, but between religious and nonreligious expression. The demands of neutrality must be defined against this backdrop.

It might be argued at this point that the distinction between denominational classifications and religious/nonreligious classifications is too formalistic. In practice, a school policy denying equal access to religious groups may effectively exclude most religious expression, but nonetheless permit students to meet to discuss their skepticism that a "Supreme Being" exists or "the view that religion is the 'opium of the people.' "[13] Religious/nonreligious classifications, in other words, may not operate in a wholly neutral manner even with respect to speech about religion. They may effectively permit students to express some views about religion while barring others.

The same difficulty exists, however, in the political/nonpolitical context. Under the policy upheld in *Lehman*, for example, a theater could advertise a motion picture that portrays sex and violence, but the Legion of Decency could not post a message calling for "clean" films; an oil refinery could advertise its products, but an environmental group could not post a message demanding stricter enforcement of air pollution statutes; and a tobacco company could advertise its cigarettes, but a cancer society could not post a message calling for the prohibition of ciga-

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[11] Larson v. Valente, 456 U.S. 228, 244 (1982); *see also* Epperson v. Arkansas, 393 U.S. 97, 103-04, 106-07 (1968); Zorach v. Clauson, 343 U.S. 306, 314 (1952); Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

[12] *Larson*, 456 U.S. at 246.

[13] Widmar v. Vincent, 454 U.S. 263, 281 (1981) (Stevens, J., concurring).

rette advertising.[14] Indeed, these sorts of results are inevitable even when laws are entirely content-neutral. A policy permitting all student groups to meet in school facilities before but not after school, for example, might work to the advantage or disadvantage of particular religious or political groups. The Court has consistently and sensibly recognized, however, that the existence of these incidental effects does not alter the standard of review.[15]

I do not mean to suggest that classifications between religious and nonreligious expression are unproblematic. To the contrary, governmental policies that grant special benefits to nonreligious over religious expression pose serious first amendment questions. Such policies should be upheld only when they serve substantial governmental interests.[16] Nevertheless, they do not violate the "clearest command" of the first amendment, and it is important to keep denomination-based restrictions distinct from those that deal with religious expression as a class.

Two decisions—*Tinker v. Des Moines Independent School District*[17] and *Widmar v. Vincent*[18]—are generally cited in support of the proposition that the first amendment requires public schools to grant religious groups the same access to public school facilities that they grant to nonreligious groups. In *Tinker*, several students were suspended from school for wearing black armbands to protest the war in Vietnam. School officials defended this action on the ground that the armbands would generate controversy and distract students from their schoolwork. The Supreme Court held that the suspensions violated the first amendment. The Court observed that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[19] and that the challenged restriction could not be sustained without proof that the prohibited expression would " 'materially and substantially interfere with . . . the operation of the school.' "[20]

Tinker does not govern the equal access controversy. The rule held unconstitutional in *Tinker* was expressly viewpoint-based. As the Court emphasized, the "school authorities did not purport to prohibit the wear-

14 These, and other, examples of "the paradoxical scope" of banning political advertising can be found in Lehman v. City of Shaker Heights, 418 U.S. 298, 317-18 n.10 (1974) (Brennan, J., dissenting) (quoting Wirta v. Alameda-Contra Transit Dist., 68 Cal. 2d 51, 57-58, 434 P.2d 982, 986-87, 64 Cal. Rptr. 430, 434 (1967).

15 *See* Stone, *Content Regulation*, *supra* note 10, at 217-27.

16 Indeed, in cases like *Lehman*, *Greer*, and *Cornelius*, the Supreme Court has been too deferential in upholding laws that disfavor political expression. Although the Court is right to recognize that subject-matter restrictions are ordinarily less threatening to first amendment interests than are viewpoint-based restrictions, it should test laws that disfavor political speech with at least an "intermediate" standard of review. *See* Stone, *Restrictions of Speech*, *supra* note 10. I would apply that more demanding standard to laws disfavoring religious expression as well.

17 393 U.S. 503 (1969).

18 454 U.S. 263 (1981).

19 *Tinker*, 393 U.S. at 506.

20 *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

ing of all symbols of political or controversial significance."[21] Rather, "a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition."[22] This fact—that the challenged restriction involved the "prohibition of expression of one particular opinion"—was central to the Court's analysis.[23] The analogy in the religion context would be a school rule permitting students to wear all religious symbols except the Star of David. While that rule would be barred by *Tinker*, the equal access controversy poses no such issue.

In *Widmar*, the Supreme Court held that "a state university, which makes its facilities generally available for the activities of registered student groups," cannot constitutionally "close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion."[24] The Court explained that, by making its facilities available to more than 100 student organizations, the university voluntarily had created a public forum and that, in order to justify a content-based exclusion from a public forum, the university would have to show that the exclusion was "necessary to serve a compelling state interest."[25]

The decision in *Widmar* was premised on the doctrine that even subject-matter exclusions from a public forum are unconstitutional unless necessary to serve a compelling state interest.[26] Thus, in *Widmar* the exclusion of religious expression as a class was tested by stringent standards of review. But public high schools, junior high schools, and elementary schools are not universities, and courts should resist declaring them public forums. Unlike universities, public schools pose special problems of compelled attendance, they are expressly dedicated to the inculcation and "preservation of . . . values,"[27] and, as the Supreme Court itself noted in *Widmar*, they deal with students who are more "impressionable" than university students and less able to appreciate that a school's equal access policy reflects neutrality toward, rather than endorsement of, religion.[28] None of these considerations is sufficient to justify a denomination-based exclusion from public school facilities. A

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21 *Id.* at 510.

22 *Id.* at 510-11.

23 *Id.* at 511. *Compare* Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3166 (1986) (*Tinker* held inapplicable when school authorities disciplined high school student for using sexually suggestive language in speech, since "the penalties imposed . . . were unrelated to any political viewpoint").

24 *Widmar*, 454 U.S. at 264-65.

25 *Id.* at 270.

26 *See also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537-40 (1980); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

27 Ambach v. Norwick, 441 U.S. 68, 76 (1979).

28 *Widmar*, 454 U.S. at 274 n.14. Indeed, in two recent decisions, the Court explicitly has reaffirmed that although high school students do not shed their constitutional rights at the schoolhouse gate, their rights are necessarily restricted in the special environment of the school. *See* Bethel

denial of equal access to all religious groups is less threatening to first amendment values, however, and, at least in the public school context, should be tested by a less demanding standard of justification.

Public school officials should be free to decide for themselves—free of constitutional compulsion—whether to grant religious groups equal access to school facilities. The denial of equal access to religious groups need not be necessary to serve a compelling state interest in order to be constitutionally valid. The more appropriate standard is whether the exclusion serves a substantial state interest. Under that standard, the outcome seems clear. Just as government often has a substantial interest in accommodating free exercise values, even when a decision not to accommodate would not violate the free exercise clause,[29] so too the government may accommodate establishment values even when a decision not to accommodate would not violate the establishment clause. Thus, although a school's decision to grant equal access to religious groups may not violate the establishment clause, this access clearly poses a serious threat to core establishment clause concerns, such as implied endorsement, entanglement, and potential conflict along religious lines. In these circumstances, the decision to deny equal access does not violate the Constitution.[30]

School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3164-65 (1986); New Jersey v. T.L.O., 469 U.S. 325, 340, 348-50 (1985) (Powell, J., concurring).

29 *See* McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1.

30 The understanding of neutrality set forth in this Article has implications for issues beyond the equal access controversy. Consider, for example, a law granting a full tuition tax credit for attendance at all private, nonparochial schools. Although such a law is not neutral with respect to religion, it is consistent with the core command of denominational equality. In light of the state's substantial interest in not supporting religious education, such a law might well pass constitutional muster. *Cf.* Regan v. Taxation with Representation, 461 U.S. 540 (1983) (subsidizing lobbying by veterans but not other organizations does not violate first amendment); Harris v. McRae, 448 U.S. 297 (1980) (government funding of childbirth but not abortion does not violate constitutional right to abortion); Maher v. Roe, 432 U.S. 464 (1977) (same).