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# THE PUBLIC FORUM DOCTRINE IN SCHOOLS

JAMES M. HENDERSON, SR.\*

At the American Center for Law and Justice,<sup>1</sup> we love the *Tinker*<sup>2</sup> case. We frequently grapple with it to bring it into the service of our clients. Many in our constituency share Provost Hafen's view of children: although they should become autonomous, well-rounded individuals who participate fully as citizens in our democracy,<sup>3</sup> they do not begin life that way. Our society wants public schools to provide our children with the guidance and direction necessary to become fully autonomous and responsible members of society.

The public has been frustrated here in New York because the citizenry

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<sup>1</sup> Pat Robertson, head of the Christian Broadcasting Network, founded the American Center for Law and Justice in 1991. The Center is based in Virginia Beach, Virginia, and has 25 lawyers on staff. The Center's lawyers have won five of the six cases they have argued before the United States Supreme Court. See Mark Curriden, *Defenders of the Faith*, 80 A.B.A. J., Dec. 1994, at 86, 89 (listing eight Christian public interest law firms).

<sup>2</sup> *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969). In *Tinker*, school officials suspended 3 public school students for wearing black armbands in protest of the Vietnam War and the students filed suit. *Id.* at 504. The United States District Court for the Southern District of Iowa upheld the constitutionality of the school's action on the ground that the suspension was reasonable to prevent a disturbance of school discipline. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 258 F. Supp. 971, 973 (S.D. Iowa 1966), *aff'd*, 383 F.2d 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503 (1969). The Eighth Circuit Court of Appeals affirmed without opinion. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 383 F.2d 988 (8th Cir. 1967), *rev'd*, 393 U.S. 503 (1969). The Supreme Court reversed, concluding that the students' display was "akin to 'pure speech'" and comprehensively protected under the First Amendment. *Tinker*, 393 U.S. at 505-06. The Court articulated that students, whether in or out of school, are "persons" under the Constitution. *Id.* at 511. The Court, however, concluded that conduct which "materially disrupts classwork or involves substantial disorder or invasion of rights of others is . . . not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513. The Court determined that since the students' display was not of such nature, the suspension was unconstitutional. *Id.* at 514. For a more detailed discussion of *Tinker*, see Alexis I. Crow & John W. Whitehead, *Beyond Establishment Clause Analysis in Public School Situations: The Need To Apply The Public Forum and Tinker Doctrines*, 28 TULSA L.J. 149, 188-211 (1992) (discussing *Tinker* and arguing it should be preferred method of analysis).

<sup>3</sup> See generally Bruce O. Hafen & Jonathan O. Hafen, *Hazelwood Progeny: Autonomy and Student Expression in the 1990s*, 69 ST. JOHN'S L. REV. 379 (1995).

has suffered certain disadvantages by living in this state. One significant disability is having suffered through the regime of a New York State Attorney General, Robert Abrams. Attorney General Abrams' view of the appropriate role of religion in public life is, frankly, bizarre. Since briefs to the United States Supreme Court are generally written with some care and precision,<sup>4</sup> it is fair to presume that Attorney General Abrams meant what he said in his brief in *Lamb's Chapel v. Center Moriches Union Free School District*.<sup>5</sup> Attorney General Abrams explained New York's justification for treating church applications to use public schools differently from requests by other civic and social groups by asserting, "[r]eligious advocacy . . . serves the community only in the eyes of its adherents and yields a benefit only to those who already believe."<sup>6</sup>

The *Lamb's Chapel* case, of course, is about *community access* to school facilities after school hours, not a student's right to free speech at those facilities.<sup>7</sup> I know we are here to talk about *Tinker*. The notion,

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<sup>4</sup> See generally, STERN ET AL. SUPREME COURT PRACTICE 543-76 (6th ed. 1986) (detailing method of brief writing to Supreme Court).

<sup>5</sup> 113 S. Ct. 2141 (1993).

<sup>6</sup> Brief for Respondent Attorney General at 24, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993) (No. 91-2024). In *Lamb's Chapel*, an evangelical church claimed the school district violated its constitutional rights when the district rejected the church's request to use school facilities after school hours to show a film series addressing contemporary family problems from a religious viewpoint. *Id.* at 2144-45. Under state law and school district policy, school facilities were made available after school hours for a variety of specified purposes, none of which were specifically related to religious uses. *Id.* In addition to these specified uses, the law and policy permitted the use of the facilities for community purposes. *Id.* In order to justify the denial of *Lamb's Chapel's* request, therefore, the Attorney General surprisingly argued that religion does not serve the community.

In his concurring opinion, Justice Scalia characterized the New York Attorney General's view of the First Amendment as "strange" and stated that it was a "strange notion . . . that a Constitution which *itself* gives 'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids the endorsement of religion in general." *Id.* at 2151 (Scalia, J., concurring). Justice Scalia further articulated that those who adopted the Constitution believed that the public virtues encouraged by religion benefited the public at large. See *id.*: see also *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (stating that U.S. Constitution "affirmatively mandates accommodation, not merely tolerance of all religions").

<sup>7</sup> In *Lamb's Chapel*, the Supreme Court concluded that the school district's refusal to grant the church access to school facilities solely because it sought to display a film series with a distinctly Christian perspective violated the church's First Amendment right to free speech. *Lamb's Chapel*, 113 S. Ct. at 2147. The Court reasoned that since the school district had opened school facilities to private organizations who used the property for purposes similar to those of the *Lamb's Chapel*, the church was denied access "solely because the film dealt with the subject from a religious standpoint." *Id.* Additionally, the Court held that the church's use of school facilities did not violate the Establishment Clause. *Id.* at 2148. The Establishment Clause remained unfringed because the "film would not have been [shown] during school hours, would not have been sponsored by the school, and would have been open to the public, not just to

however, that religion and religious groups have little to offer the community as a whole is bizarre. Those of us who were children of the television generation certainly can recall the frequent suggestion, during Saturday morning cartoons, to attend a House of Worship each weekend. This suggestion came in the form of public service announcements sponsored by groups such as Religion in Public Life and the Advertising Council.

*Tinker* has remained a bulwark in our legal representation of our student clientele. At the American Center for Law and Justice, we frequently invoke the case in service of student religious activities and cite it in our briefs as though it were good law. I believe *Tinker* remains good law simply because the Supreme Court has not shown the intellectual candor to overrule it. Unfortunately, however, it appears that *Tinker* is being supplanted in the lower courts by other standards.<sup>8</sup> Furthermore, those courts are not following the Supreme Court's attenuations of *Tinker* in either *Bethel School District v. Fraser*<sup>9</sup> or *Hazelwood School District v.*

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church members." *Id.* To support this conclusion, the Court pointed to its prior decision in *Widmar v. Vincent*, 454 U.S. 263, 275 (1981), where it held that the interest of the state in avoiding an Establishment Clause violation might compel the abridgement of speech otherwise protected by the First Amendment, but only if there was a realistic danger that the community might think the government was endorsing religion. *Lamb's Chapel*, 113 S.Ct. at 271-72. As it did in *Widmar*, the Court in *Lamb's Chapel* held there was no realistic danger of the community perceiving government endorsement of religion if the school district opened its facilities to the church. *Id.* at 2148.

<sup>8</sup> For cases declining to incorporate the *Tinker* rationale and, instead, following a public forum analysis approach in student speech cases, see *Brody v. Spang*, 957 F.2d 1108, 1117-22 (3d Cir. 1992) (applying public forum test to Establishment Clause challenge where inclusion of religious benedictions and invocations at graduation ceremonies were at issue); *Planned Parenthood of S. Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 822-28 (9th Cir. 1991) (applying public forum analysis to high school educator's decision to reject family-planning advertisements in school publications); *San Diego Comm. Against Registration and the Draft v. Governing Bd. of the Grossmont Union High Sch. Dist.*, 790 F.2d 1471, 1474-78 (9th Cir. 1986) (using public forum analysis in 42 U.S.C. § 1983 civil rights challenge to rejection of anti-draft advertisement in school newspaper). For cases applying both the public forum analysis and Establishment Clause analysis, see *Garnett v. Renton Sch. Dist. No. 403*, 874 F.2d 608, 613 (9th Cir. 1989) (applying not only *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) public forum analysis but also Establishment Clause to uphold public school's denial of student religious group to meet on campus), *vacated and cert. granted*, 465 U.S. 914 (1990); *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 763 (9th Cir.) ("[W]hen the explicit Establishment Clause proscription against prayer in the public schools is considered, the protections of political and religious speech are inapposite." (quoting *Brandon v. Board of Educ.*, 635 F.2d 971, 980 (2d Cir. 1980)), *cert. denied*, 454 U.S. 863 (1981).

<sup>9</sup> 478 U.S. 675 (1986) (concluding that suspension of student for use of lewd and sexually explicit speech during school assembly did not violate student's First Amendment right of free speech).

*Kuhlmeier*.<sup>10</sup> In my opinion, the principal danger to First Amendment rights specifically recognized and granted by *Tinker* is the application of the public forum doctrine in the school setting.<sup>11</sup> This doctrine is used to resolve requests to use public property for purposes of free speech.

In its fundamental motif, the public forum doctrine first separates

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<sup>10</sup> 484 U.S. 260, 273 (1988) (holding that school officials did not violate student's right to free speech by exercising editorial control over form and substance of student speech in school sponsored expressive activities "so long as their actions are reasonably related to legitimate pedagogical concerns").

<sup>11</sup> The public forum doctrine originated in the 1930s out of the "[C]ourt's efforts to address the recurring and troublesome issue of when the First Amendment gives an individual or group the right to engage in expressive activity on government property." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 815 (1985) (explaining public forum analysis and corresponding standards of scrutiny). In *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939), the Supreme Court recognized that "streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 515. Nevertheless, a person only has the privilege to use the public streets and parks for speech purposes and therefore the government can regulate it. *Id.* at 516. "[I]t is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied." *Id.* In *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983), the Supreme Court identified the following two distinct types of public fora when reviewing governmental limitations on public access to public property: (1) traditional areas of public assembly and debate; and (2) limited public forums—public property which the government has opened to the public for expressive activity. *Id.* at 45. The first category includes public streets and parks. *Cornelius*, 473 U.S. at 802. "In these quintessential public for[a]," the content-based regulation of speech will be upheld if it is "necessary to serve a compelling state interest and it is narrowly drawn to achieve that end." *Perry Educ. Ass'n*, 460 U.S. at 45. A regulation that merely limits the time, place, and manner of the speech in a content-neutral fashion will be upheld if it is "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.*

Public property classified as a limited public forum is governed by the same standards applied to a traditional public forum. *Id.* at 46. A number of factors, however, must be evaluated to determine when public property is a limited public forum. These factors include "policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum . . . the nature of the property and its compatibility with expressive activity to discern the government's intent." *Cornelius*, 473 U.S. at 802. The courts utilize these factors when they consider whether particular school facilities are public fora. See *infra* note 19 and accompanying text.

With respect to free speech in schools, commentators have suggested that the public forum doctrine is more restrictive than the *Tinker* approach. See, e.g., Crow & Whitehead, *supra* note 2, at 211 (suggesting that *Tinker* analysis is less intrusive and more in keeping with notion of school as marketplace of ideas); Rosemary C. Salamone, *Public Forum Doctrine and the Perils of Categorical Thinking: Lessons from Lamb's Chapel*, 24 N.M. L. REV. 1, 24 (1994) (contending that formalistic forum analysis is flawed and would benefit from principles of *Tinker* approach). But see James C. Dever, III, Note, *Tinker Revisited: Fraser v. Bethel School District and Regulation of Speech in the Public Schools*, 1985 DUKE L.J. 1164, 1193 (submitting that *Tinker* approach is actually same as public forum analysis).

claims to eliminate those that do not involve a claim of state encroachment on the right to freedom of speech. Then, where pure speech or expressive conduct are threatened by governmental action, it is necessary to "identify the nature of the forum because the extent to which the Government may limit access depends on whether the forum is public or nonpublic."<sup>12</sup> Forum classification is critical. As one United States circuit court of appeals noted, "[t]he nature of the forum, as either public or non-public, determines the standards courts must apply in reviewing the propriety of state action infringing upon speech or expressive conduct."<sup>13</sup> Once a court determines the type of forum and its corresponding standard of review, the court must decide whether the asserted justifications for the exclusion of expressive activity satisfy the relevant standard.<sup>14</sup>

The public forum doctrine is nearly adequate as a template for the resolution of issues related to the right to have access to the public's eyes and ears. In its essence, the doctrine counsels governmental restraint in those places where exercises of free speech rights are expected, such as streets, sidewalks, and parks.<sup>15</sup> Any government action which attempts to limit speech in these areas will be scrutinized closely by the courts.<sup>16</sup>

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<sup>12</sup> *Cornelius*, 473 U.S. at 797.

<sup>13</sup> *Naturist Soc'y., Inc. v. Fillyaw*, 958 F.2d 1515, 1521 (11th Cir. 1992).

<sup>14</sup> See *Cornelius*, 473 U.S. at 797.

<sup>15</sup> See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2711, 2716-17 (1992) (Kennedy, J., concurring) (stating that "[p]ublic places are of necessity the locus for discussion of public issues, as well as to protect against arbitrary government action. . . . The types of property we have recognized as the quintessential public forums are streets, parks, and sidewalks"); *Perry Educ. Ass'n*, 460 U.S. at 45 ("At one end of the spectrum are streets and parks which 'have immemorially been held in trust for the use of the public . . . .'") (quoting *Hague*, 307 U.S. at 515). Additionally, this restraint is advocated for governmentally-owned properties that lack a traditional use for expressive purposes by the public, but have been opened deliberately for such uses. See *Perry Educ. Ass'n*, 480 U.S. at 37-38.

<sup>16</sup> In public forums such as parks and streets, the state may enforce a content-based regulation on speech only if it satisfies a strict scrutiny test: the regulation is necessary to a compelling state interest and it is narrowly tailored to achieve this interest. See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-36 (1992) (declaring unconstitutional county ordinance that based fee required for parade permit upon administrator's assessment of possible hostility relating to speech, and where statute was not narrowly construed to further state's interests); *Burson v. Freeman*, 504 U.S. 191, 196-211 (1992) (subjecting content-based restriction on electioneering within 100 feet of entrance to polling place to strict scrutiny analysis and concluding that compelling state interest justified restriction); *Boos v. Barry*, 485 U.S. 312, 321-29 (1988) (determining that statute prohibiting display of any political sign within 500 feet of foreign embassy was unconstitutional because it was content-based restriction on political speech and was not narrowly tailored); *Carey v. Brown*, 447 U.S. 455, 464-67 (1980) (concluding that Illinois statute which generally prohibits residential picketing, but exempts peaceful labor dispute picketing, violated Equal Protection Clause of Fourteenth Amendment because statute discriminated based on content of communication and was not narrowly tailored to serve

The public forum doctrine also provides a framework for reviewing restrictions on places that are not associated with freedom of speech, such as jailhouses, post office property, and military bases.<sup>17</sup> In such places, we are not accustomed to observing the right to expressive freedom. Consequently, the standards provided by the doctrine for review of governmental action in these nonpublic forums afford greater discretion to regulatory authorities.<sup>18</sup>

Lower standards of scrutiny will be applied to governmental restrictions on student speech activities where one applies the public forum doctrine rather than *Tinker* and its progeny. The difficulty of proving a traditional association use of various school venues for expressive activities will bring about diminished scrutiny because the Supreme Court appears to favor this type of record in these cases. Instead, courts will address students' speech rights in a piecemeal fashion to decide whether a particular hallway, meeting room, or lawn has commonly been viewed as "open" based on the facts of a particular case.<sup>19</sup>

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substantial state interest in protecting citizens' privacy). A state, however, will be given more latitude to regulate speech in a content-neutral manner provided the restrictions are confined to a significant government interest and they leave open ample alternative channels for communication of the information. *See, e.g.*, *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2459-67 (1994) (declaring Congressional act requiring cable companies to carry local commercial and public broadcasting constitutional because act is content-neutral and therefore not subject to strict scrutiny test, and because statute only creates incidental burden on speech); *Ward v. Rock Against Racism*, 491 U.S. 781, 791-803 (1989) (upholding New York City's content-neutral regulation of music volume played at Central Park bandshell as serving government's interest and finding regulation justified if city's interest would be achieved less effectively absent regulation); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 50 (1986) (finding that zoning ordinance that prohibited adult theaters within 1000 feet of any residential zone, church, park, or school was constitutional provided governmental regulation served purposes unrelated to content of expression and allows for "reasonable alternative avenues of communication"); *Heffron v. International Soc'y For Krishna Consciousness*, 452 U.S. 640, 649-55 (1981) (upholding regulation of solicitation on Minnesota State Fairgrounds where regulation was content-neutral, legitimate state interest in maintaining orderly crowd movement existed, and alternative channels for communication were available).

<sup>17</sup> *See, e.g.*, *United States v. Kokinda*, 497 U.S. 720, 726-30 (1990) (holding that postal service regulation prohibiting certain type of speech did not violate constitutional protections since postal sidewalk was not considered traditional public forum) (plurality opinion); *Greer v. Spock*, 424 U.S. 828, 836-38 (1976) (concluding that government may regulate speech on military installations because bases are not traditional public forums); *Adderly v. Florida*, 385 U.S. 39, 41-42 (1966) (determining that jailhouse grounds do not constitute public forum).

<sup>18</sup> *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity provided the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.").

<sup>19</sup> *See, e.g.*, *Student Coalition for Peace v. Lower Merion Sch. Dist. Bd. of Sch. Directors*, 776 F.2d 431, 436 (3d Cir. 1985) (determining that athletic field did not become limited public

The public forum doctrine is very effective in protecting speakers in traditional public arenas. Thus, a pamphleteer need not prove that other speakers regularly have used the sidewalk along 42nd Street to invoke public forum analysis successfully. The Supreme Court, however, has articulated that it is seldom willing to interpret an occasional action or lapse by a government authority as a creation of a permanent public forum.<sup>20</sup> As a result, students' protections are limited and *Tinker* is diminished to the point of disappearance.

One of our chief interests at the American Center for Law and Justice, is the confluence of religion and public schools. I submit that this confluence assures that religious speech activities will continue to provide ample fodder for school controversies, just as race and gender relations will continue to be disputed issues. Although some may naively challenge that prediction, it is based on obvious precedent. Remember that the children in *Tinker* were the children of a minister employed by a religious organization. Although the *Tinkers'* black armbands appeared to us to be a form of political speech, they were undoubtedly as much an expression of religious views as they were a way to express opposition to the Vietnam War.

Today, school officials can only feign surprise when they observe students wearing black armbands to express political views or religious beliefs. Thus, I find perplexing the predictable chain of events that erupts when a student wears a T-shirt bearing a religious message to school.

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forum for purposes of regulating political speech where previous practice of permitting public access to field did not change its primary function); *Gittes v. Torgeisen*, No. 92-0933-R, 1995 U.S. Dist. LEXIS 8502 (W.D. Va. Jan. 31, 1995) (determining that university's campus drill field remained non-public forum); *Henry v. School Bd. of Colorado Springs Sch. Dist. No. 11*, 760 F. Supp. 856, 863 (D.Colo. 1991) (finding that no evidence supported conclusion that high school's hallways were open public fora for use by general public); *Nelson v. Moline Sch. Dist. No. 40*, 725 F. Supp. 965, 973-74 (C.D. Ill. 1989) (stating that hallways were not public forums when school had never opened hallways for public use).

<sup>20</sup> See *Cornelius*, 473 U.S. at 802 ("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."). School facilities may be deemed public forums only if school authorities have, by policy or by practice, opened those facilities for "indiscriminate use by the general public." *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 47 (1983). The state is not required to maintain indefinitely the facility as an open public forum, however, for the time that it does, the state must maintain the same standards as apply in a traditional public forum. See *id.* at 46; see also *supra* note 8 (providing standards that apply to these forums). School officials may impose reasonable restrictions on speech in the school community when the facilities have been reserved for non-school purposes. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988); see also *Kokinda*, 497 U.S. at 727 ("[R]egulation of speech activity where the Government has not dedicated its property to First Amendment activity is examined only for reasonableness.").



School officials and courts must realize that there are many students who attend public schools who are "true believers," whether they are Evangelical Christians, Orthodox Jews, or Islamic Fundamentalists. These children are entitled to attend public schools and be religious. These students should not be coerced to abandon their spirituality in order to receive the benefit of public education. Consequently, conflicts arising from religious activities and speech will continue to be fuel for school controversy.

Since *Tinker* lies in a state of disuse, we rely more frequently on the Supreme Court decision in *Westside Community Schools v. Mergens*<sup>21</sup> to resolve these controversies. In *Mergens*, the Supreme Court rejected a facial challenge to the Equal Access Act,<sup>22</sup> holding that the Act did not violate the Establishment Clause,<sup>23</sup> and that a school district violated the Act when it refused to allow a student religious group to form and meet on campus.<sup>24</sup> Two key points emerge from *Mergens*. First, schools do not endorse everything that they allow students to say. Second, those students covered by the Equal Access Act are capable of distinguishing between government-sponsored speech endorsing religion and private speech endorsing religion.<sup>25</sup> The former is prohibited by the Establishment Clause;<sup>26</sup> the latter enjoys the protection of both the Free Exercise<sup>27</sup> and

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<sup>21</sup> 496 U.S. 226 (1990) (plurality opinion).

<sup>22</sup> 20 U.S.C. § 40710 (1992). This section provides in part that:

It shall be 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 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 of such meetings.

*Id.*

<sup>23</sup> *Mergens*, 496 U.S. at 247-53.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 250.

<sup>26</sup> See U.S. CONST. amend. I. The Supreme Court has said that the Establishment Clause prohibits the government from creating an official church, influencing others to believe or not to believe in a certain church, punishing citizens for their religious beliefs, and preferring one religion over another. See *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947).

In *Mergens*, students sought permission from school officials to form a Christian club at the school. The purpose of this organization was to read and discuss the Bible, to have fellowship, and to meet and pray together. *Mergens*, 496 U.S. at 232. Any student would be able to join this club, regardless of religious affiliation. *Id.* In fact, the organization would have the same rights as the school's secular clubs except the religious club would not have a faculty advisor. *Id.* The school district rejected the proposal because of the requirement that a student club have a faculty sponsor and because they believed the existence of a religious club at the school violated the Establishment Clause. *Id.* at 232-33. The Court found that the school maintained a limited open forum under the Equal Access Act and was prohibited from discriminating against students who wanted to meet on school premises to discuss religious issues during non-class hours. *Id.* at 246-47. Furthermore, the Court decided that the school district's recognition of this student group

free speech clauses.<sup>28</sup> The decline of *Tinker* is regrettable; and although we continually choose to represent it as good law in practice, the American Center for Law and Justice relies more and more on *Mergens* and other lower court decisions.

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would not violate the Establishment Clause. *Mergens*, 496 U.S. at 248. In noting that the Constitution protects private speech endorsing religion, the Court found students would not misconstrue the existence of the club as school support of religious activity. *Id.* at 250. The Court concluded by stating that the Equal Access Act did not “on its face contravene the Establishment Clause.” *Id.* at 253.

<sup>27</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.”).

<sup>28</sup> *Id.*

