Religious Meetings in the Public High School: Freedom of Speech or Establishment of Religion?

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Student religious groups' demands to be allowed to meet on school premises during activity periods present serious free speech and Establishment Clause[1] problems. This Article suggests that cases such as Widmar v. Vincent *and* Lynch v. Donnelly *indicate that the Supreme Court may be inclined to treat such demands as free speech problems and to undervalue their Establishment Clause implications. The Article argues that instead the Court should treat the approval of such meetings as a violation of the Establishment Clause.*

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*Professor of Law, University of Arizona. I am very grateful to Mary Judge Ryan for valuable research assistance and important insights in church-state issues.

It was not my privilege to have been a faculty colleague, or, of course, a student of Ed Barrett's. I have, however, had the good fortune to learn much from him through his contributions to legal literature and, even more important to me, through personal contact over the years. Ed was a powerful influence on me when he served as a member of an advisory committee of the ABA Project on Minimum Standards of Criminal Justice for which I was a reporter. His cool, detached approach to some very volatile issues, matched by his intellectual honesty, taught me lessons I have never forgotten. And when I became dean of the law school at the University of Arizona, in a state where both Ed and I had personal ties, he was a welcome adviser with the insights and wisdom born of his experience in the University of California system, particularly as the founding dean of the law school at U.C. Davis. I suspect Ed does not know how important a model he has been for those of us who had a chance to learn from him. I am pleased to be able to join in honoring him at this important point in his distinguished career.

[1] I am with the late Mel Nimmer in holding that First Amendment, Free Exercise Clause, and Establishment Clause should always be capitalized. Although, in keeping with A UNIFORM SYSTEM OF CITATION Rule 8 (14th ed. 1986), the *U.C. Davis Law Review* does not normally capitalize such terms, they are capitalized in this Article.

INTRODUCTION

On an otherwise uneventful day, a group of public high school students request permission to meet during their school's twice-weekly activity period when the Spanish Club, the Chess Club, the Student Council, the Karate Club and others hold regular meetings. The new group wants to hold prayer meetings, read the Bible, and share their religious experiences. They claim that the school, by allowing student clubs to meet in classrooms during the school day, has created a public forum and that the Supreme Court decision in *Widmar v. Vincent*[2] requires the school to give them the same access to meeting rooms that other groups receive. The principal and her lawyer are in a quandary. *Widmar* did provide *university* students a free speech right of access to meeting rooms, despite a claim that granting access would violate the Establishment Clause. But perhaps public high schools and their students are different.

Several courts have faced this issue, with mixed results. Although their reasoning varies, most courts have held that such meetings violate the Establishment Clause.[3] Congress adopted the *Widmar* reasoning in a statute mandating access to "limited open forums" in secondary schools without regard to the "religious, political, philosophical, or other content of the speech at such meetings."[4] The question is unlikely to go away. In fact, one unsuccessful attempt has already been made for

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[2] 454 U.S. 263 (1981).

[3] Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391 (10th Cir. 1985) (religious meetings before class held to violate Establishment Clause); Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984) (religious meetings during scheduled activity periods violate Establishment Clause), *vacated on other grounds*, 106 S. Ct. 1326 (1986); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982) (supervised meetings before or after school violate Establishment Clause), *cert. denied*, 459 U.S. 1155 (1983); Brandon v. Board of Educ. of Guilderland Cent. School Dist., 635 F.2d 971 (2d Cir. 1980) (prayer meeting in classroom before school violates Establishment Clause), *cert. denied*, 454 U.S. 1123 (1981). For an excellent analysis of the problem of claims of access to public school facilities by student religious groups, see Strossen, *A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?*, 71 CORNELL L. REV. 143 (1985), published before the Supreme Court decided *Bender*, 741 F.2d 538, on other grounds. Professor Strossen argues that courts should reject a per se rule prohibiting religious meetings on high school premises and should employ instead an ad hoc test to determine whether the school has created a neutral, open student forum and whether reasonable students would infer that the school did not endorse religion.

[4] Equal Access Act, 28 U.S.C. §§ 4072-4074 (1982).

Supreme Court review of the issue.[5] It seems inevitable that eventually the Court will have to address this problem, which has substantial importance for the public schools and for those who insist that education must have a religious component.

I shall argue that blindly applying *Widmar*'s public forum rationale to secondary schools would give too little weight to the purpose of the Establishment Clause and would undermine school officials' necessary authority to set educational policy. Both student and community interests would best be served by adhering to the Court's free speech analysis employed in *Tinker v. Des Moines School District*,[6] and to its establishment rationale developed in *Engel v. Vitale*,[7] *Abington School District v. Schempp*,[8] and *Wallace v. Jaffree*.[9] The Court's recent decisions, however, suggest that it may be about to alter historic church-state relationships in the public schools. This Article examines both the rationale of these recent decisions and the consequences that might flow from applying them to student religious groups' claims of access.

I. Establishment Cases: The Search for Coherence

The quest for religious liberty led many early settlers to America, and the desire to protect against religious oppression was a major influence in the design of the American constitutional experiment.[10] Consequently, the First Amendment's religion clauses sought to guard religious freedom while at the same time keeping religion separate from government. The religion clauses prohibit Congress from enacting laws "respecting an establishment of religion," and from infringing on the free exercise of religion. Courts have experienced problems applying the religion clauses, particularly the Establishment Clause. The tangled and ambiguous evidence of the framers' original intent, the nation's strong religious heritage, American society's increasingly pluralistic nature, and the tension between the Establishment and Free Exercise

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[5] Bender v. Williamsport Area School Dist., 106 S. Ct. 1326 (1986) (vacating appeal of Third Circuit ruling for lack of standing to appeal).

[6] 393 U.S. 503 (1969).

[7] 370 U.S. 421 (1962).

[8] 374 U.S. 203 (1963).

[9] 472 U.S. 38 (1985).

[10] *See generally* C. Antieau, A. Downey, & E. Roberts, Freedom From Federal Establishment (1964); L. Levy, *No Establishment of Religion: The Original Understanding*, in Essays on American Constitutional History (L. Levy ed. 1972); A. Stokes & L. Pfeffer, Church and State in the United States (rev. ed. 1964).

Clauses,[11] all have combined to make developing a coherent set of principles extremely difficult. Criticisms that the Court has not met the challenge very successfully are quite common, even in the Court's own opinions.[12]

Descriptions of the line between church and state have ranged from Justice Black's high and impregnable "wall of separation" in *Everson v. Board of Education*[13] to a "blurred, indistinct, and variable barrier" whose location sometimes can be only "dimly perceive[d]."[14] The assertion in *Everson* that government may give *no* aid to religion has given way to the *Lemon v. Kurtzman*[15] test. The *Lemon* test holds that government aid that is indirect and incidental to a secular government goal does not violate the Establishment Clause. To paint with a broad theoretical stroke, some of the earlier Establishment opinions reflect the notion that the Constitution requires a rigorous separation of church and state.[16] More recently, Chief Justice Burger has asserted that strict

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[11] The tension exists because, as the Court noted in Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970), the religion clauses are cast in absolute terms and either, "if expanded to a logical extreme, would tend to clash with the other." For example, in Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court held that applying compulsory school attendance laws to the Amish violated their right of religious freedom. If the Court had read the Establishment Clause so as to make exempting the Amish an impermissible establishment of religion, obviously an impasse would have been created. For a useful discussion of the tension and a proposal for its resolution, see Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980).

[12] Mueller v. Allen, 463 U.S. 388, 393 (1983) ("It is not at all easy, however, to apply this Court's various decisions construing the Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools."); *see also* Choper, *supra* note 11, at 674. Last Term, Justice Rehnquist asserted that the Court's entire Establishment jurisprudence has been tainted fatally with historical error since *Everson*. "As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means." Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting). He would have held that the First Amendment did not prohibit Alabama's endorsement of prayer in its schools. *See generally* the historical examination in R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982).

[13] 330 U.S. 1, 16 (1947).

[14] Lemon v. Kurtzman, 403 U.S. 602, 612-14 (1971).

[15] *Id.* at 612.

[16] *Everson*, 330 U.S. 1. In McCollum v. Board of Educ., 333 U.S. 203 (1948), Justice Frankfurter, who dissented in *Everson* because the Court failed to see that the New Jersey bus transportation statute breached the wall, delivered a scholarly concurring opinion that merits rereading. *See id.* at 212.

neutrality toward religion is not enough. Rather, government must attempt to benignly accommodate religion.[17] Justices are now categorized as "separationists" or "accommodationists," or sometimes as moving from one position to the other.[18]

In recent years the Court has moved toward an increasing accommodation of religion. Justice Powell's observation that we are a long way from the evils that inspired the First Amendment[19] suggests that claims of religious freedom weigh more heavily on some Justices' minds than do fears of religious strife and oppression. In 1983, the Court upheld in *Muller v. Allen*[20] a Minnesota tax deduction for school expenses, even though the deduction overwhelmingly benefited parents of parochial school children. The Court also held in *Marsh v. Chambers*[21] that a state legislature could appoint and pay a chaplain to open its daily sessions with prayer. Separationists were further depressed by the Court's 1984 decision in *Lynch v. Donnelly*[22] that a municipally owned and displayed nativity scene did not violate the Establishment Clause.

But the Court seemed to return to the separationist principle when, during the 1984 Term, it struck down two attempts to provide educational assistance to parochial schools in *Aguilar v. Felton*[23] and *Grand Rapids School District v. Ball*.[24] Further, in *Wallace v. Jaffree*[25] the Court held that the First Amendment's prohibition against state-mandated prayer in the public schools extended to Alabama's statutorily required moment of silence when the state had obviously adopted the statute to encourage prayer.

In the prayer and Bible reading cases culminating in *Jaffree*, the Court interpreted the Establishment Clause so as to prohibit using state facilities and activities to promote religious purposes. The Court made this interpretation despite claims that such use of state property was

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[17] Lynch v. Donnelly, 465 U.S. 668, 673 (1984): "Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."

[18] Jones, *Accommodationist and Separationist Ideals in Supreme Court Establishment Clause Decisions*, 28 J. CHURCH AND STATE 193 (1986); Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey*, 60 NOTRE DAME L. REV. 1094 (1985).

[19] Wolman v. Walter, 433 U.S. 229, 263 (1977) (Powell, J., separate opinion).

[20] 463 U.S. 388 (1983).

[21] 463 U.S. 783 (1983).

[22] 465 U.S. 668 (1984); Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall - A Commentary on* Lynch v. Donnelly, 1984 DUKE L.J. 770.

[23] 469 U.S. 878 (1985).

[24] 469 U.S. 1014 (1985).

[25] 472 U.S. 38 (1985).

necessary to prevent infringing on religious liberty.

In another context, however, a similar demand for accommodation of religious exercise was successful. In *Widmar v. Vincent*,[26] the Court held that university students had a right to use campus facilities for meetings devoted to prayer, Bible reading, and religious discussions. Significantly, the Court treated *Widmar* primarily as a free speech case. It addressed the Establishment Clause issue only secondarily, holding that permitting use of the meeting room would not violate the Establishment Clause.

In the 1985 Term, the plaintiffs in *Bender v. Williamsport Area School District*[27] claimed that *Widmar* required allowing public high school students to hold prayer meetings during school club activity periods. However, the Court declined to reach this serious constitutional issue, holding instead that the appellant had lacked standing in the court of appeals.[28] Chief Justice Burger and Justices White, Rehnquist, and Powell dissented from the Court's decision on the standing question. They would not only have reached the merits, but on the merits would have decided the issue in the students' favor.[29]

Given the increasing activity of evangelical religious groups and the Equal Access Act's extension of the *Widmar* rationale to public high schools, the *Bender* issue will likely return. This Article's thesis is that the Court's public forum rationale in *Widmar*, and its apparent insensitivity to the interests of religious minorities and nonadherents as exhibited in *Lynch*, suggest that when the issue does return the Court may saddle the public schools with problems from which the Establishment Clause should have spared them.

II. *Widmar v. Vincent*: The University as a Public Forum

In *Widmar v. Vincent*,[30] a student group known as Cornerstone formed at the University of Missouri at Kansas City (UMKC). UMKC denied the group use of campus facilities for religious meetings because a regulation prohibited using state buildings and grounds for " 'purposes of religious worship or religious teaching.' " Cornerstone had a core membership of about twenty evangelical Christian students, but its meetings sometimes drew as many as 125 students. Those meetings generally included "prayer, hymns, Bible commentary, and discus-

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[26] 454 U.S. 263 (1981).
[27] 106 S. Ct. 1326 (1986).
[28] *Id.* at 1335.
[29] *Id.* at 1336, 1338.
[30] 454 U.S. 263 (1981).

sion of religious views and experiences."[31]

When UMKC refused to allow them to meet on campus, the students sued in federal district court. They claimed that the university had violated their rights to religious free exercise, equal protection, and freedom of speech. The district court rejected their claims, holding that allowing students to use state buildings for religious services would unconstitutionally aid religion.[32] The Eighth Circuit Court of Appeals, employing a free speech analysis, reversed.[33]

The Supreme Court, in an opinion by Justice Powell, affirmed the Eighth Circuit by an eight to one vote. Justice Stevens concurred in the judgment and Justice White dissented.[34]

In Justice Powell's view, the questions were whether Cornerstone had a free speech right of access to university facilities and whether UMKC had excluded the group because of the content of its proposed speech. Justice Powell therefore centered his analysis on the general problem of speakers' right of access to public property. In doing so, he invoked the so-called public forum doctrine. First, he noted that UMKC encouraged students to participate in a wide variety of extracurricular activities. To facilitate these activities, the university made meeting rooms available to recognized student groups. The university had allowed over 100 groups, ranging from ethnic to political groups, from fencing and bridge to chess and karate clubs, to meet on campus.[35]

The Court found that by opening its buildings to such meetings, UMKC had "created a forum generally open for use by student groups."[36] The students' desire to use public property for religious worship did not deprive them of their right of access to the property, since worship is a form of speech protected by the First Amendment. Having created a public forum (although limited to students), the university could not exclude a student group because of the content of its speech, unless such action was necessary to protect some compelling state interest.[37]

UMKC argued that allowing worship meetings in its buildings would violate the Establishment Clause. Justice Powell agreed that the need to avoid violating the Establishment Clause "may be characterized

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[31] *Id.* at 265 n.2.

[32] Chess v. Widmar, 480 F. Supp. 907 (W.D. Mo. 1979).

[33] Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980).

[34] Widmar v. Vincent, 454 U.S. 263 (1981).

[35] *Widmar*, 635 F.2d at 1312 n.1.

[36] *Widmar*, 454 U.S. at 267.

[37] *Id.* at 269-70.

as [a] compelling [state interest]," but held that allowing the meetings would not violate the clause.[38] Applying the *Lemon v. Kurtzman*[39] test, the Court easily found that creating a public forum for exchanging ideas was a permissible secular purpose. Simply giving equal access to a forum does not undermine the state's secular purpose, since granting access implies no approval of the speaker's message. Given the wide range of views that might be expressed in the forum opened by UMKC, the school clearly did not adopt or approve all or any of them.[40]

Nor, Justice Powell found, would granting access to Cornerstone lead to the excessive entanglement between church and state that *Lemon* also prohibits. He noted that the risk of destructive entanglement would be greater if UMKC monitored student meetings to try to distinguish between permissible discussions *about* religion and forbidden religious worship.[41]

The serious *Lemon* question in *Widmar* was whether granting access to student religious groups would have the primary effect of advancing religion. The Court held that any aid to religion would be "incidental" to the university's secular purpose of providing a forum for all student speakers.[42] Providing a forum was a neutral act. College students are adults and capable of appreciating the neutrality of an open forum policy. The state no more approves the message of student religious groups in this situation than it does by providing churches with fire and police protection.[43] Therefore, the claimed justification for the university's exclusion of religious groups failed, and it follows that the content-based exclusion of Cornerstone violated the students' free speech rights.[44]

Under the circumstances, the Court's analysis in *Widmar* is attractive and the result satisfying. Cornerstone was one among over 100 diverse campus organizations. Its members simply wanted to use university meeting rooms as a forum to express their religious commitments. Decisions such as *Carey v. Brown*[45] and *Police Department v. Mosley*[46] demand exacting scrutiny when the state undertakes content-based

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[38] *Id.* at 271, 273.
[39] 403 U.S. 602 (1971).
[40] *Widmar*, 454 U.S. at 274.
[41] *Id.* at 272 n.11.
[42] *Id.* at 274.
[43] Everson v. Board of Educ., 330 U.S. 1, 17-18 (1947) (dictum).
[44] *Widmar*, 454 U.S. at 277.
[45] 447 U.S. 455 (1980).
[46] 408 U.S. 92 (1972).

speech regulation.[47] On a college campus, which should be a place of intellectual ferment and a free market of new and frequently conflicting ideas, and where student life goes on without much official control or supervision, one could not reasonably view the mere granting of equal access as indicating any state approval of religion.

Despite the correct result, the Court's rationale has troubling potential. Justice Powell's easy resort to the public forum doctrine may obscure the Court's expansion of the forum from the streets, parks, and open public meetings into public buildings. The expansion gives private speakers, rather than public officials, control of at least a portion of those buildings. Moreover, the public forum doctrine, when applied in undiluted form, shifts oversight of public property from local officials to the courts. When this is done to vindicate the right of equal access to speak on public property, the doctrine is appealingly speech-protective. But when it is employed to require the government to alter the use of public property in ways that may substantially change the property's fundamental mission, the intrusion on public administration may not be justified. *Widmar* illustrates the seriousness of the problem. Although decided primarily in free speech terms, *Widmar* held that the Constitution *requires* UMKC to allow worship services on its premises.

The public forum concept has been immensely useful in opening the streets and parks to people wishing to express minority viewpoints through distributing religious literature, delivering evangelical talks, and more recently, demonstrating about all manner of public issues, particularly civil rights.[48] Justice Roberts articulated the doctrine in its most pristine form in *Hague v. C.I.O.*:

> Wherever the title of streets and parks may rest, they 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. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[49]

The cases following *Hague* include some contradictions,[50] but the

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[47] *Widmar*, 454 U.S. at 270.

[48] Kalven, *The Concept of the Public Forum*, 1965 SUP. CT. REV. 1.

[49] 307 U.S. 496, 515 (1939).

[50] Once the location of the claimed forum shifted from the streets and parks, as in *Hague*, 307 U.S. 496, or the state capitol grounds, as in Edwards v. South Carolina, 372 U.S. 229 (1963), to other types of public property, the Court began to have difficulty agreeing on a common approach to the use of public property for speech. *Compare* Brown v. Louisiana, 383 U.S. 131 (1966) (Fortas, J., for a plurality of three; concluding that First Amendment protected standing in reading room of library as a

public forum analysis is generally speech protective. The interests that favor regulating speech have seldom proven compelling enough to justify denying access to a forum.

However, courts have increasingly extended the doctrine to new problems in which its application is less helpful. Justice White identified two types of property that qualify for treatment as public forums in *Perry Education Association v. Perry Local Educators Association*.[51] When the property, by tradition as in *Hague*, or by government action as in *Widmar*, is opened to public use for expression, the state may not deny all access for expressive purposes and may only enforce content-based regulations that are carefully tailored to serve a compelling state interest. The state may also impose content neutral, narrowly drawn time, place, and manner regulations that serve important governmental interests and "leave open ample alternative channels of communication."[52] There is a right of access to traditional forums for expression; in the so-called "designated public forums," there is at least a right of equal access.[53] The state may prohibit people from using all other government property for expressive purposes so long as the restriction is reasonable and not imposed to discriminate against a particular viewpoint.[54]

Despite the doctrine's apparent analytical simplicity, it may becloud free speech analysis more than it assists it when the access question moves from streets and parks to other kinds of public property. In *United States Postal Service v. Greenburgh Civic Associations*,[55] the Court upheld a federal statute prohibiting the deposit of unstamped "mailable matter" in householders' mailboxes. Treating the mailbox as property controlled by the Postal Service, the Court simply held that a mailbox is not a public forum. Therefore, noncontent-based restrictions

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protest of racial segregation) *with* Adderley v. Florida, 385 U.S. 39 (1966) (upholding trespass conviction for peacefully demonstrating on county jail grounds). For a careful review of the Supreme Court's struggle with problems of speech activities on public property, see Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233.

[51] 460 U.S. 37 (1983).

[52] *Id.* at 45.

[53] *Widmar*, 454 U.S. at 267 n.5.; *cf.* Police Dept. v. Mosley, 408 U.S. 92 (1972). *Mosley* invalidated an ordinance that barred picketing within a certain distance of a school, but excepted labor picketing. The Court's decision rested on equal protection grounds. *See generally* Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117 (1975).

[54] *Perry Educ. Ass'n*, 460 U.S. at 46.

[55] 453 U.S. 114 (1981).

were permissible.[56] Justice Brennan, concurring in the result, pointed out that the Court's analysis of the free expression issue ended with the finding that there was no public forum.[57] He would have gone further to determine whether the civic associations' proposed use of mailboxes was incompatible with the primary function of postal systems. Since he concluded that the statute was a reasonable time, place, and manner regulation and that alternative methods of expression were available to the associations, he concurred in the result. In his view, the Court's use of the public forum doctrine prevented weighing free expression values against the government's interest in limiting access to the Postal Service. The *Greenburgh* decision seems correct, but the opinion leaves the impression that an almost mechanical invocation of the public forum doctrine prevented analyzing the values at stake.

The result in *Perry*[58] was somewhat more questionable. There the Court held that even though a school teachers' certified union was given access to an interschool mail system, a rival union had no right of equal access because the system was not a public forum. The school could, the Court said, grant unequal access based on subject matter and speaker identity so long as the distinctions were reasonable in light of the property's intended purpose.[59] Again, once it rejected the public forum label, the Court engaged in virtually no free expression weighing of individual and government interests.

The difficulties created by the Court's reliance on the public forum analysis are perhaps best illustrated by *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*[60] In *Cornelius*, the Court in a four to three decision upheld excluding litigation and political advocacy organizations from the designated gifts portion of the Combined Federal Campaign (CFC). In order to further its own administrative interests, to protect its employees from multiple solicitations, and to facilitate organized charitable giving, the federal government assisted in organizing the CFC to conduct a single charity drive among its employees.[61] The government gave CFC access to the thousands of government employees who were allowed to use the payroll deduction system in making contributions.[62] The government excluded litigation and advocacy groups,

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[56] *Id.* at 131 n.7.

[57] *Id.* at 140 (Brennan, J., concurring in the judgment).

[58] 460 U.S. 37.

[59] *Id.* at 46.

[60] 105 S. Ct. 3439 (1985).

[61] *Id.* at 3444.

[62] *Id.*

such as the NAACP Legal Defense and Education Fund and others, from participating. The groups sued, claiming that since solicitation for charitable contributions is a form of protected speech, their exclusion violated the First Amendment.[63]

Justice O'Connor, writing for a four member majority, held that the charity drive was not a public forum, general or limited. She reasoned that not all government property is a public forum, even if it is used as an instrumentality for communication.[64] Traditional public forums aside, whether an instrumentality has become a public forum by government designation depends on the government's intent in creating the forum. Courts will infer intent from the scope of access the government has granted and from the very nature of the property itself.[65] If a court finds that the government did not intend to create a public forum, the government need only show that the limited access is reasonable and speech content neutral.[66] In *Cornelius*, the government justified excluding so-called litigation and advocacy organizations because of its policy of supporting traditional health and welfare organizations, and to avoid the appearance of political favoritism. The government also felt that including activist organizations would create controversy among federal employees and thereby jeopardize the campaign's success. The Court agreed that these justifications were "reasonable" grounds for limiting access to a "*nonpublic* forum."[67]

However, since the Court felt that the government might have engaged in speech content-based discrimination against the excluded organizations, it remanded the case for further proceedings.

Justice Blackmun, joined by Justice Brennan in delivering a vigorous dissent, charged that the Court's opinion "[t]ransforms the First Amendment into a mere ban on viewpoint censorship, ignores the principles underlying the public forum doctrine, flies in the face of the decisions in which the Court has identified property as a limited public forum, and empties the limited public forum concept of all its meaning."[68] In his view, the Court had manipulated the definition of a public forum to avoid measuring the government's exclusion of certain groups against the requirement of a compelling state interest.[69]

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[63] *Id.* at 3446.
[64] *Id.* at 3450.
[65] *Id.* at 3449.
[66] *Id.* at 3451.
[67] *Id.* at 3454 (emphasis added).
[68] *Id.* at 3456.
[69] *Id.* at 3462 (Blackmun, J., dissenting).

Justice Stevens also renewed his argument that the public forum doctrine, when extended beyond streets and parks, is not analytically helpful. He thought that the Court's preoccupation with the public forum concept led it to ignore that the government had excluded respondents from participating in a drive in which the employee specifically *designates* the recipient. Justice Stevens also felt that the alleged justifications for the exclusions were, in that light, without merit.[70]

One feature of *Cornelius* is particularly relevant to determining whether student religious groups have a right of access in public schools. The Court focused on the primary purpose of the governmental institution to which access was sought. The Court seems to have concluded that the needs of a "traditional" charity drive in the federal workforce justified excluding controversial organizations. Treating the charity drive as a public forum would have made excluding such groups and carrying out legitimate objectives more difficult, since the government would have had to show that a *compelling* interest necessitated the exclusions. The Court's reasoning, although somewhat circular, reflects great deference to the government's judgment as to who to include in its charity drive.

Justice Stevens noted essentially this same problem in his *Widmar* concurrence.[71] There he argued that applying the public forum doctrine jeopardized academic freedom in public universities.[72] His point was that framing the issue as whether the university, by encouraging and facilitating the meetings of student groups, had created a public forum, tended to denigrate the special characteristics of a university. Also, it diminished the power of the faculty and administration to determine the educational atmosphere appropriate to the institution. Since he concluded that allowing the religious group to meet in university buildings would convey no message of approval of their religion, he agreed that the university could not base its discriminatory exclusion on the Establishment Clause. But he did raise a warning flag that ready resort to the public forum doctrine risked substituting a label for careful analysis of the free speech and the institutional interests involved.[73] That warn-

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[70] *Id.* at 3467 (Stevens, J., dissenting).

[71] Widmar v. Vincent, 454 U.S. 262, 277 (1981) (Stevens, J., concurring in judgment).

[72] *Widmar*, 454 U.S. at 278 (Stevens, J., concurring).

[73] Farber and Nowak extensively criticize the Court's tendency to mechanically invoke the public forum doctrine to resolve difficult issues of public property access for First Amendment purposes. *See* Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984). The authors argue that there are not three types of public fora but

ing seems particularly appropriate when, as in *Bender*, the issue is not university control of campus life, but public school board control of a high school schedule.

III. *Lynch v. Donnelly*: Accommodation of Religion

This Article has argued that extending the public forum doctrine in *Widmar v. Vincent*[74] to a public high school would undermine the separationist rationale articulated in *Everson v. Board of Education*.[75] It would tempt the Court to employ a free speech analysis in a way that *requires* the state to facilitate religious worship, thereby implying state approval of religion. Although the separationist rationale would prohibit such approval, the rationale appears increasingly vulnerable.

The Court's decision in *Lynch v. Donnelly*[76] indicates greater tolerance for government action associating the state with the symbols of a particular religion. Each Christmas holiday season, in a private park in the heart of its business district, the City of Pawtucket, Rhode Island, erects a display of Christmas figures. The figures include Christmas trees, a Santa Claus house, reindeer pulling a sleigh, colored lights, and a banner reading "Seasons Greetings." In the foreground of the display is a nativity scene.

> The figures in the nativity scene are approximately life sized . . . they include kings bearing gifts, shepherds, animals, angels, and Mary and Joseph kneeling near the manger in which the baby lies with arms spread in apparent benediction. All of the figures face the manger in which the baby lies; several have their hands folded and/or are kneeling. The figures' poses, coupled with their facial expressions, connote an atmosphere of de-

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three basic types of First Amendment problems. They suggest that, rather than follow a geographical test that bases the citizen's right of access on the kind of public property involved, the Court should employ an analysis that openly balances society's interest in free expression against the harmful effects that expression would have on the government's intended use of its property or facility. The authors call this analysis a "focused balancing test." *Id.* at 1240. By employing the test, the Court would face directly the question whether the excluded speech is incompatible with the intended use of the government's property. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969), in which a student was held to have a First Amendment right to wear a black armband in the classroom, is perhaps a case in which the Court employed an analysis similar to that suggested by Farber and Nowak. *Cf.* Adderley v. Florida, 385 U.S. 39 (1966), in which the Court did not. *See also* Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 Stan. L. Rev. 121 (1982).

[74] 454 U.S. 262 (1981).

[75] 330 U.S. 1 (1947).

[76] 465 U.S. 668 (1984).

votion, worship, and awe. . . ."[77]

A lawsuit challenging the city's maintenance of the nativity scene as a violation of the Establishment Clause caused a storm of controversy. The mayor led the "pro-creche" forces, holding a press conference to deplore the challenge to a community tradition of over forty years and to accuse the plaintiffs of trying to take "Christ out of Christmas." The issue was debated in letters to the editor and on a three hour talk show.[78] After a hotly contested trial, the federal district court held that while the city could constitutionally join in celebrating the national Christmas holiday, its display of a central symbol of Christianity violated the Establishment Clause.[79]

On appeal, a divided panel of the First Circuit Court of Appeals affirmed but on a different ground.[80] Viewing the city's action as discriminating between Christian and non-Christian religions, the court held that the display could not survive the strict scrutiny required by *Larson v. Valente*.[81]

The Supreme Court, in a five to four decision, held that the city's nativity scene did not violate the Establishment Clause.[82] The opinion, written by Chief Justice Burger, is the Court's strongest statement of the accommodationist interpretation of the religion clauses.

The Chief Justice's opening observation that, given the nation's religious history, neither church nor state could exist totally isolated from the other, forecast the direction of the Court's analysis. While Jefferson's " 'wall' of separation" was a useful reminder of the need for separation of church and state, it was after all only a figure of speech and not an "accurate description" of real life.[83] The Chief Justice then delivered what may be the most significant statement of the accommodationist position: "Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[84] To support this sweeping proposition, the Court cited *Zorach v. Clausen*,[85] which allowed children to leave school to attend their church's religion classes, and *Illinois* ex rel. *McCollum v. Board of Educa-*

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[77] Donnelly v. Lynch, 525 F. Supp. 1150, 1156 (D.R.I. 1981) (citation omitted).
[78] *Id.* at 1150, 1154-59.
[79] *Id.* at 1178.
[80] Donnelly v. Lynch, 691 F.2d 1029 (1st Cir. 1982).
[81] 456 U.S. 228 (1982).
[82] *Lynch*, 465 U.S. 668.
[83] *Lynch*, 465 U.S. at 673.
[84] *Id.*
[85] 343 U.S. 306 (1952).

tion,[86] in which the Court rejected religious instruction in public schools, but noted that our tradition of protecting religious free exercise prohibited hostility toward religion.

Justice Douglas did say in *Zorach* that when the state, through its public schools, adjusts its schedules to allow students to attend religion classes in church, "it follows the best of our traditions."[87] But his statement hardly indicates that the Establishment Clause mandates such accommodation. Sometimes the state must create exceptions to apparently applicable laws to avoid violating free exercise rights.[88] But to invoke that notion in an establishment case suggests that the state must go beyond neutrality to facilitate religion.

To demonstrate that the nation historically has acknowledged the powerful role of religion in our national life, the opinion recited the myriad ways that church and state have touched each other, from the appointment of chaplains by the First Congress, the Presidential Proclamation of Thanksgiving Day, and the adoption of the national motto "In God We Trust," to the recognition of Christmas as a national holiday.[89] In a people with a very strong religious tradition, it is natural that their governmental institutions will reflect some aspects of that tradition. From its review of this history, the Court concluded that taking a "rigid, absolutist" view of the Establishment Clause would be impossible. In a stroke that seems to narrow the clause's effect, the Court observed that its scrutiny is aimed at determining whether government action "establishes a religion or . . . tends to do so."[90]

The Court has "found it useful" in these cases to employ the *Lemon v. Kurtzman*[91] test, but Chief Justice Burger, who authored the so-called test, pointed out that the Court had refused to be bound by a single formula. He noted that the Court did not apply the *Lemon* analysis in *Marsh v. Chambers*,[92] upholding the practice of appointing legislative chaplains, or in *Larson*,[93] striking down legislation that discriminated between religions. Nevertheless, the Chief Justice proceeded to apply the *Lemon* analysis to this case.

Briefly stated, the *Lemon* test inquires whether the state action had a secular purpose, whether its primary effect was to advance or inhibit

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[86] 333 U.S. 203 (1948).
[87] *Zorach*, 343 U.S. at 314.
[88] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).
[89] *Lynch*, 465 U.S. at 675-78.
[90] *Id.* at 678.
[91] 403 U.S. 602 (1971).
[92] 463 U.S. 783 (1983).
[93] 456 U.S. 228.

religion, and whether it created excessive government entanglement with religion.[94] The district court in *Lynch* found that, in light of the creche's obvious religious symbolism, the city had no secular purpose in displaying it. However, the Supreme Court held that the district judge had mistakenly focused "almost exclusively" on the nativity scene.[95] Instead, he should have viewed the Christmas scene as a whole and determined whether the entire display had a secular purpose. Viewing Pawtucket's action in this way, the Court found that the city had simply joined in the celebration of the national holiday, and that the creche's inclusion was only a recognition of the holiday's historical origin. This was a legitimate secular purpose and for the district court to find otherwise was "clearly erroneous."[96]

The Court also disagreed with the district court's finding that the display impermissibly benefited Christianity. Any potential benefit, said the Chief Justice, was certainly no greater than the benefits of certain approved practices, such as legislative prayers, Sunday closing laws, and lending textbooks to parochial students. Any aid that might flow was surely "indirect, remote and incidental" in the same way as are presidential proclamations recognizing the Christmas holiday's religious origins, or exhibitions of religious paintings in public art galleries.[97] The Court has never held that such indirect benefits flowing from a secularly motivated act violate the Establishment Clause.

After agreeing that the Christmas scene involved no "administrative entanglement," and rejecting the notion that political divisiveness alone could make unconstitutional the city's otherwise proper action, the Chief Justice returned to a basic theme underlying his opinion:

> The Court has acknowledged that the "fears and political problems" that gave rise to the Religion Clauses in the 18th century are of far less concern today. *Everson*, 330 U.S., at 8. We are unable to perceive the Archbishop of Canterbury, the Bishop of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed.[98]

Justice O'Connor, in an important concurrence, sought to clarify the *Lemon* test. In her view, the important questions underlying the test's first two prongs are whether the state intended to convey endorsement

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[94] *Lemon*, 403 U.S. at 612-13.
[95] *Lynch*, 465 U.S. at 680.
[96] *Id.* at 681.
[97] *Id.* at 681-83.
[98] *Id.* at 686.

or disapproval of religion, and whether, even unintentionally, the action conveyed the appearance of approval or disapproval. Since Christmas is a national holiday, she thought that the traditional use of the creche, while not eliminating its religious significance, spared its display in this context from conveying a message of approval of Christianity. Since the city's intent was merely to celebrate a public holiday, and since its display could not reasonably be regarded as an endorsement of Christianity, *Lemon*'s purpose and effect prongs were satisfied.[99]

Justice Brennan's dissent, joined by Justices Marshall, Blackmun, and Stevens, objected strongly to the Court's lukewarm endorsement of the *Lemon* test. Justice Brennan also attacked the Court's cavalier treatment of the trial court's finding that the municipal creche was intended to and did convey an endorsement of Christianity. Pointing out that Pawtucket could celebrate the national Christmas holiday in many ways without using a deeply religious symbol, Justice Brennan thought that no number of secular figures surrounding the creche could obscure the city's "support for the sectarian symbolism that the nativity scene evokes."[100] He thought it obvious that the message conveyed to non-Christians was that their government had excluded them. This, he said, was "an insult and an injury that, until today, could not be countenanced by the Establishment Clause."[101]

The Court's decision in *Lynch* was startling. Its use of the *Lemon* test was, in the words of one commentator, "half-hearted and unpersuasive."[102] Chief Justice Burger's opinion nearly eliminated the purpose test by submerging the religious symbol in the display's secular aspects and insisting that the purpose of the *entire* display should determine whether the city acted with a properly secular motive. The opinion comes close to converting the creche into a secular object by suggesting that displaying the creche in this way is the same as exhibiting religious art in a museum.

Perhaps most significant is the Court's deflection of the argument

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[99] *Id.* at 693 (O'Connor, J., concurring). Since Justice O'Connor's refinement of the *Lemon* test involves a concession that the government action in these cases does advance religion to some degree, her reform of standards may be viewed as a dilution of the separationist rationale of that case. A forceful argument, however, is that her "refinement" simply reflects a realistic view of the unavoidable contacts between church and state. Under this view, the test of whether the state action reasonably implies approval or disapproval of religion does respond to the evils against which the Establishment Clause was aimed.

[100] *Id.* at 705 (Brennan, J., dissenting).

[101] *Id.* at 709.

[102] McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 2 n.5.

that the display aided religion by holding that the aid was no greater than many other "indirect" advancements of religion that have passed Establishment Clause scrutiny. As Chief Justice Burger pointed out, comparing the relative benefits to religion of different relationships between government and religion is impossible. Given the tangled history of religion in American public life, drawing lines is most difficult. The line drawing is almost impossible if the Court insists on weighing each practice approved in history against every new proposed aid to religion to determine whether the new scheme gives "more" aid than the accepted one. The use of this rhetorical device does not satisfactorily rebut the showing that this display impermissibly advanced religion.

It is true that, in Justice Douglas' much misunderstood and now much quoted phrase in *Zorach*, "[w]e are a religious people . . . ."[103] At birth, the nation was predominantly Protestant and several of the new states had established religions.[104] Our early history was filled with attempts by Protestant Christians to put government to the service of their sectarian interests. Many of the "ceremonial deisms" found in our public life and institutions, such as the national motto, the legend on our coins, the pledge of allegiance, and the national anthem, reflect that history.

However, to focus on these evidences of religious influences in our national life and to somehow measure a challenged state action against them ignores the dangers against which the religion clauses were intended to guard. The question is not whether the Pawtucket creche aided religion more or less than lending textbooks to parochial school students. Rather, the question is whether the creche so identified the city with a particular religion that it tended to trigger the evils that inspired the First Amendment. The Constitution's framers knew from experience that too close a relationship between church and state would endanger religious freedom and lead to political strife along religious lines.[105]

Thus, the Court's reasoning and result are unpersuasive. Sensitivity to the inevitable impact on minority religions and on nonbelievers when the relationship between the state and the religious majority is too close

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[103] *Zorach*, 343 U.S. at 313.

[104] *See generally* L. LEVY, THE ESTABLISHMENT CLAUSE (1986).

[105] L. LEVY, *The Original Meaning of the Establishment Clause of the First Amendment*, in ESSAYS IN HONOR OF LEO PFEFFER (J. Wood ed. 1985); *cf.* R. CORD, *supra* note 12. *See generally* T. CURRY, THE FIRST FREEDOMS (1986); L. LEVY, *supra* note 104.

should lead the Court rigorously to apply the *Lemon* test.[106] Justice O'Connor contributed a valuable insight when she observed that the state's endorsement of a religion "sends a message to nonadherents that they are outsiders, not full members of the political community . . . ."[107] However, the *Lynch* opinion seems to demonstrate solicitude for the attitudes of the religious majority, not sensitivity to the interests of religious minorities. The message to nonadherents was unmistakable, even though Justice O'Connor came to the conclusion that it was not.[108]

IV. *Bender v. Williamsport Area School District*

In light of *Widmar v. Vincent*[109] and *Lynch v. Donnelly*[110] the Supreme Court's granting of certiorari in *Bender v. Williamsport Area School District*[111] was cause for apprehension among separationists. *Bender* addressed whether a public high school student group called "Petros" had a constitutional right to meet for prayer and Bible reading during regularly scheduled activity periods. Several other groups, such as Student Government, the Business Club, the Spanish Club, and

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[106] For a thorough analysis of *Lynch*, see generally Dorsen & Sims, *The Nativity Scene Case: An Error of Judgment*, 1985 U. ILL. L. REV. 837, concluding that the Court, in failing to view the city's display of a Christian symbol from the perspective of those for whom the creche is not a religious symbol, deprived minority interests of Establishment Clause protection.

[107] *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

[108] Since *Lynch* was decided, several courts have dealt with similar cases involving government displays of religious symbols. *See, e.g.*, ACLU v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986) (city display of large, lighted cross during Christmas season held to be both a religious and a sectarian symbol of Christianity, not a traditional symbol of Christmas); ACLU v. City of Birmingham, 791 F.2d 1561 (6th Cir. 1986) (creche alone on lawn of city hall violates Establishment Clause); Friedman v. Board of Comm'rs, 781 F.2d 777 (10th Cir. 1985) (county seal on documents and vehicles bearing Latin cross with motto "Con Esta Vencemos" [With This We Overcome] conveyed appearance of approval of Christian religion); Burelle v. City of Nashua, 599 F. Supp. 792 (D.N.H. 1984) (creche alone on public property violates Establishment Clause); Greater Houston Chapter of the ACLU v. Eckels, 589 F. Supp. 222 (S.D. Tex. 1984) (three crosses and Star of David in part of public park set aside for "meditation" held to violate Establishment Clause).

Cf. McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court sub nom.*, Board of Trustees of Scarsdale v. McCreary, 471 U.S. 83 (1985) (private persons have free speech right to display nativity scene in public park that Court treated as public forum).

[109] 454 U.S. 263 (1981).

[110] 465 U.S. 668 (1984).

[111] 106 S. Ct. 1326 (1986).

the Ecology Club, met during the activity period. To avoid violating the Establishment Clause, school district officials had denied the Petros group permission to meet during the activity period. A federal district judge rejected the school's establishment claim and, citing *Widmar*, held that the denial violated the students' free speech rights.[112]

The Third Circuit Court of Appeals reversed in a two to one decision, holding that universities and high schools were so different that *Widmar* did not control. The court ruled that granting permission to hold religious meetings in public school during the school day would convey an impression of official approval and endorsement. Thus it would have the primary effect of advancing religion and would be unconstitutional.[113]

After granting certiorari, the Supreme Court noted a standing problem that the court of appeals had not addressed. After the district court's adverse decision, the Williamsport school board had voted eight to one not to appeal. The dissenting board member took an appeal in his own right, apparently believing that he had standing to do so since he was named personally as a defendant.

Justice Stevens, writing for a five member majority, concluded that the board member was sued in his official, not personal, capacity, that he had no personal stake in the litigation, and therefore that he had no standing to appeal. The Court thus vacated the court of appeals' decision, leaving the district court's decision in effect.[114]

Chief Justice Burger dissented in an opinion joined by Justices White and Rehnquist.[115] He disagreed on the standing issue and, reaching the merits, would have held the case clearly controlled by *Widmar*. Justice Powell, in a separate dissent, agreed that the school district had created a "forum generally open for student use."[116] In writing for the Court in *Widmar*, he had noted that university students are more mature than younger students, and hence better able to appreciate the school's neutrality toward groups using meeting rooms on campus. However, Justice Powell now declined to find that distinction controlling. Again focusing on the speech rather than the religion interests involved, he concluded that the age difference of the students did

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[112] Bender v. Williamsport Area School Dist., 563 F. Supp. 697, 716 (M.D. Pa. 1983).

[113] Bender v. Williamsport Area School Dist., 741 F.2d 538, 560-61 (3d Cir. 1984).

[114] *Bender*, 106 S. Ct. at 1335.

[115] *Id.* at 1336.

[116] *Id.* at 1338 (Powell, J., dissenting).

not deflect *Widmar*'s force as precedent.[117]

After this aborted appeal, we now know that at least three present members of the Court, Chief Justice Rehnquist and Justices Powell and White, believe that, given facts similar to those in *Bender*, the free speech clause requires allowing student groups to hold worship services on public high school premises at times designated by the school for group meetings.[118] Obviously, the factual context in which these cases arise is crucial.[119] For the case to survive an Establishment Clause challenge, the religious group must be student-initiated and completely independent of the school. The school must have opened its property to use for association and speech in such a way that courts can analogize the activity to a public forum. But barring some features of the forum that obviously undermine the school's claimed neutrality, student religious exercises during the school day now stand a very good chance of gaining constitutional protection.

In the view of the dissenters, *Bender*, like *Widmar*, was one of several free speech cases recognizing that students do not shed their constitutional rights when they enter the schoolhouse. Viewed as a parallel to *Tinker v. Des Moines School District*,[120] the district court's result in *Bender*, and the one the Supreme Court dissenters would have reached, has surface appeal since it allows students to gather together and express serious thoughts. However, such a decision would have troubling implications. Although *Tinker* took an important step in protecting students' right to express themselves in school so long as they do not disrupt the educational process, not everyone viewed the decision with approval.

Justice Black's dissent argued that the decision transferred control of the schools from local officials to the courts.[121] Justice Harlan, also in

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[117] *Id.* at 1339.

[118] The makeup of the Court has changed since *Bender*, as Chief Justice Rehnquist has succeeded retiring Chief Justice Burger and Justice Scalia has been elevated to the Court. It is unlikely that the balance of the Court in Establishment cases has changed very much. Predicting the votes of Supreme Court Justices in matters on which they have not previously broached their views is a risky and foolish game, but on facts similar to those in *Bender* the Court almost certainly would hold *Widmar* dispositive.

[119] *See generally* Strossen, *supra* note 3, at 166-79.

[120] 393 U.S. 503 (1969).

[121] *Id.* at 515 (Black, J., dissenting). For a provocative analysis of *Tinker* and subsequent cases, see Diamond, *The First Amendment and the Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477 (1981). For another attempt to examine children's rights in a broader perspective, see Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321 (1979), suggesting that the Court in *Tinker* essentially adopted John Dewey's philosophy of education as a basis for determining the

dissent, would have upheld the regulation absent a showing that the school officials were motivated by some constitutionally impermissible purpose, such as discrimination against certain viewpoints.[122]

The *Widmar-Bender* public forum rationale makes even greater inroads than *Tinker* on the authority of school officials. Educational decisions about schedules and the sorts of extracurricular activities that should be encouraged as compatible with the school's educational mission must, following *Bender*, be influenced by the knowledge that a court may find the decisions to have created a public forum. If it does, the school authorities will lose a significant degree of their authority to prescribe the school day.

This is not to suggest that school officials must have absolute power to impose content-based restrictions on expression in public schools. Even when public property is viewed as a "non-public forum," the state nevertheless is constitutionally prohibited from discriminating against viewpoints in granting or denying access.[123] The argument here is that the public forum doctrine undermines school officials' authority in too sweeping a fashion. Once the doctrine is triggered, the officials' authority over activities in the school is reduced to applying time, place, and manner regulations, or excluding only that expression that infringes on a compelling state interest.

Such a sweeping rule overlooks the nature of the public school and the need for educational authorities to control its operation. In contrast to university students, high school students are in the charge of their teachers and administrators from the time the educational day starts.[124] In *Bender*, for example, the school day began at 7:45 a.m., when all students were required to be in "their homeroom."[125] As soon as teachers took attendance, students participating in club activities went to their meeting rooms. Given the immaturity of the students and the pervasive nature of public school education, it is hard to say that such so-called activity periods built into the structure of the school day are not really a part of the school's educational process.

In a university setting, it may well be that meetings of student extracurricular groups have virtually no connection with the school's formal educational program. They may be facilitated simply because the stu-

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scope of the students' free speech rights in the school. *Id.* at 338-42.

[122] *Tinker*, 393 U.S. at 526 (Harlan, J., dissenting).

[123] Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 105 S. Ct. 3439, 3451 (1985).

[124] Brandon v. Board of Educ., 635 F.2d 971, 979 (2d Cir. 1980).

[125] *Bender*, 741 F.2d at 543.

dents are young adults spending a large part of their lives in the campus community and having the same rights of access to public forums as any other adult. But high school officials are responsible for the entire school day, and their prescription of its content should be determined by their judgment regarding the school's educational mission. Nonclassroom activities are an integral part of that mission.

Conveying knowledge about religion's role in American life is no doubt a proper, even essential, part of the educational process. In an important sense, current church-state cases reflect a heightened concern over the secularization of American society generally. Religious values have been replaced, many people believe, with something called secular humanism.[126] The formidable task of the courts is to preserve the constitutional barrier against entangling church and state while the nation grapples with the complex questions of the proper role of religion in public life. The Constitution does not prevent public schools from teaching about religion.[127] But a course on the Bible as literature or on religion in American history is quite different from facilitating religious worship services as a part of the school curriculum. If *Widmar* applies to the public high school, education officials would lose the power to decide whether particular activities would be helpful or harmful to the educational process. School officials might well conclude that the divisiveness that would flow from holding religious services during activity periods would actually increase rather than decrease religious intolerance.

The Supreme Court has frequently affirmed the special role that public education plays in American society.[128] The Court has also acknowledged that control of education is assigned to local authorities.[129] A decision in a *Bender*-type case that requires a school to accommodate a worship service during its school day substantially undermines the school's authority to determine whether such an event would be divisive and harmful to the educational process.

Much of the pressure to allow religious exercises during the school day comes from evangelical Christians. The fear that school day religious exercises will spill over into attempts to proselytize other students

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[126] A rich literature concerning what may well be a crisis of liberal democracy is represented by R. NEUHAUS, THE NAKED PUBLIC SQUARE (2d ed. 1986); A. REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE (1985).

[127] School Dist. of Abington v. Schempp, 374 U.S. 203, 225 (1963).

[128] *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 864 (1982) (plurality opinion).

[129] *Pico*, 457 U.S. at 864; Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 507 (1969).

is reasonable and could justify denying organized religious exercises a place in the school day. This is not to suggest that students do not have the constitutional right to express their religious beliefs and even try to persuade others to accept them, so long as they do not disrupt the educational process. But religious proselytization has a particular capacity for creating religious tensions, and school officials should have the constitutional power to decide that a program that may generate those tensions is incompatible with a stable educational atmosphere. Even more than displaying a municipally owned creche, official sanction of school day prayer meetings in rooms reserved for education-related activities will convey approval by the school. If, as I have argued, high school activity periods are a part of the school program and not simply a neutral forum, they will be seen by the students as having the approval of the school. If approval would violate the Establishment Clause, withholding that approval is not an act of hostility but a constitutionally required act.

It is true that religious groups would be treated differently from others whose activities could be approved by the state without violating the Constitution. It bears observing that religious groups are different because the First Amendment religion clauses make them so. Although the *Widmar-Bender* analysis treats this problem as a free speech issue, it is at bottom an activity that tends to establish religion in the public high school. To ignore the nature of the activity — a worship service — is to neuter the facts and to avoid the real issue.

Certainly a school board could reasonably foresee that permitting twice-weekly worship services in the school would be divisive. Divisiveness alone is not a test of constitutionality, but, as Justice O'Connor pointed out in *Lynch*, it is one of the evils that the Establishment Clause should guard against. Also, its existence is a warning that some view the underlying governmental action as advancing a particular religious viewpoint.[130] When that viewpoint is one shared by the majority religion in the community and is expressed in an aggressively evangelical way, the message of exclusion to nonadherents will be particularly strong. Employing the free speech clause to prevent authorities from avoiding this potential divisiveness intrudes unnecessarily on schools' ability to shape the educational process in the interests of the community.

This is not to say that high school students are consigned to the absolute power of school officials to stifle free expression or religious free

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[130] Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

exercise. The Constitution limits even the school's authority to determine curricular offerings or the content of the school library at some indeterminate extreme.[131] Further, despite political rhetoric to the contrary, students retain the right to pray in school, and the indications are strong that the Supreme Court will ultimately hold that the state may, in a wholly noncoercive and nondirective way, set aside a quiet time during which students may turn their minds to any subject they wish, including prayer.[132]

CONCLUSION

I have argued that religious exercises on public school premises during the curricular day raise serious Establishment Clause issues. *Lynch v. Donnelly*[133] suggests that a majority of the Court has shown insufficient concern for the effects of close identification of state with a majority religion. *Widmar v. Vincent*[134] fosters an almost automatic application of the public forum doctrine, ignoring the special nature of religious speech as well as the nature of the public secondary school. These decisions did not mandate application to high schools, but they provide a rationale that would move the Court further in the direction of affirmatively supporting religion. Such a move would injure religious minorities and nonadherents and would promote religious turmoil inimical to public education.

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[131] *Pico*, 457 U.S. at 868-69.
[132] Wallace v. Jaffree, 472 U.S. 38, 47 (1985) (O'Connor, J., concurring).
[133] 465 U.S. 668 (1984).
[134] 454 U.S. 263 (1981).