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RELIGIOUS LIBERTY IN THE PUBLIC HIGH SCHOOL: BIBLE STUDY CLUBS

INTRODUCTION

In 1969, the United States Supreme Court declared, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹ In *Tinker v. Des Moines School District*, the Court further asserted, "Students in school as well as out of school are 'persons' under the Constitution. They are possessed of fundamental rights which the state must respect. . . ."² Even prior to *Tinker* the Court had stressed the importance of protecting constitutional freedom in public schools.³ *Tinker* upheld a high school student's first amendment freedom of speech when that student spoke out against the Viet Nam war by wearing a black armband.⁴ The Court, however, pointed out that while the high school citizen has certain constitutional rights a problem arises when the exercise of those rights conflicts with the constitutional rules by which the school authorities must abide.⁵ Such a problem arises when a student expresses his right to exercise freely his religion at a public high school. Although the student possesses a freedom of religious exercise, the public school has a mandate to refrain from acting in a manner which establishes religion in the school.⁶

1. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969).

2. *Id.* at 511.

3. *Shelton v. Tucker*, 364 U.S. 479 (1960) (striking on Arkansas statute requiring teachers to file annually a list of organizations to which they belong). "The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools." *Id.* at 487.

4. 393 U.S. at 503. The Court held that the wearing of armbands was "closely akin to 'pure speech' which . . . is entitled to comprehensive protection under the First Amendment." *Id.* at 506. The individual exercising such speech, however, must do so without "materially and substantially interfere[ing] with the requirements of appropriate discipline in the operation of the school. . . ." *Id.* at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966) (upholding students' right to wear freedom buttons)). See generally Devine, *A Note on Tinker*, 7 WAKE FOREST L. REV. 539 (1971); Note, *Symbolic Speech, High School Protest and the First Amendment*, 3 J. FAM. L. 119 (1960); Note, *Constitutional Law—Symbolic Speech—Wearing of Arm Bands to Protest Viet Nam War*, 20 MERCER L. REV. 505 (1969).

5. 393 U.S. at 507.

6. The first amendment provides: "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." U.S. CONST. amend. I. The first clause of the amendment is

The conflict between the high school student's religious exercise and the school's anti-establishment stance has historically resulted in the denial of the student's desired expression.⁷ For two decades, state and federal courts have constructed a virtually insurmountable wall between church and state—a wall erected at the expense of high school students' freedom of religious expression. State-required prayer has been banned from the classroom.⁸ Compulsory Bible reading exercises have been declared unconstitutional.⁹ Legislative enactments¹⁰ and school policies¹¹ permitting student-initiated voluntary prayer have

known as the establishment clause. It guarantees the state's and the church's mutual independence. The second clause of the amendment is known as the free exercise clause. It guarantees the individual's freedom to exercise his religious beliefs. Both clauses were made applicable to the states through the fourteenth amendment in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

7. See *infra* notes 104-57 and accompanying text.

8. *Engel v. Vitale*, 370 U.S. 421 (1962) (enjoining New York Board of Education from continuing its use of an official prayer required at beginning of each school day). See *infra* notes 89-92 and accompanying text.

9. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (invalidating Pennsylvania statute requiring reading of at least ten Bible verses, without comment, at start of each school day).

10. *Karen B. v. Treen*, 653 F.2d 897, 899 (5th Cir. 1981) (Louisiana statute providing that a "school board may authorize the appropriate school officials to allow each classroom teacher to ask whether any student wishes to offer a prayer" declared unconstitutional), *aff'd mem.*, 455 U.S. 913 (1982); *Kent v. Commissioner of Educ.*, 380 Mass. 235, 402 N.E.2d 1340 (1980) (Massachusetts law allowing a period of prayer in all grades in all public schools offered by a student volunteer declared unconstitutional).

The Massachusetts and Tennessee legislatures have struggled with this issue. See Opinions of the Justices to the House of Representatives, 387 Mass. 1201, 440 N.E.2d 1159 (1982) (advising legislature that proposed bill providing for a moment of meditation or voluntary prayer to begin each class day is unconstitutional) and cases cited *infra* note 11. *But see* *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976) (three judge panel) (dismissing students' complaint regarding Massachusetts' statute requiring a period of silence for prayer or meditation). The court determined that the inclusion of the word "meditation" and the framing of the statute in the disjunctive ("meditation 'or' prayer"), saved it from violating the establishment clause. See generally *Kauper, Prayer, Public Schools and The Supreme Court*, 61 MICH. L. REV. 1031 (1963); Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. REV. 364 (1983).

11. *Commissioner of Educ. v. School Comm. of Leyden*, 358 Mass. 776, 267 N.E.2d 226 (1971) (enjoining school committee from implementing a resolution allowing, *inter alia*, students to participate in voluntary religious exercises of prayer and Bible reading), *cert. denied*, 404 U.S. 849 (1971). *Contra* *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965) (denying injunction to parents of public school students, thereby upholding school district's policy of allowing students to pray before classes begin). *Reed* is an anomaly among prayer cases and has received strong criticism. *Brandon v. Board of Educ.*, 635 F.2d 971, 979 n. 9 (2d Cir. 1980) ("While the outcome of the case was questionable even in 1965, the Supreme Court's adoption of the entanglement test in 1969, . . . seriously undercuts the holding."), *cert. denied*, 454 U.S. 1123 (1981).

been declared unconstitutional. School policies prohibiting student-initiated voluntary prayer have been upheld.¹² Student-initiated voluntary religious clubs have been prohibited.¹³ In each case the courts found that permitting the religious expression was an impermissible act tantamount to establishing a religion.¹⁴

Students at public universities have also been confronted with a denial of their requests to express their religion.¹⁵ In 1981, however, the Supreme Court determined that the religious beliefs of public university students could be accommodated. In

12. *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980) (upholding school district's refusal to allow students to meet for communal prayer before classes), *cert. denied*, 454 U.S. 1123 (1981); *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.) (upholding school principal's ban on student-initiated prayer), *cert. denied*, 382 U.S. 957 (1965).

13. *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982) (school district's permission allowing students to gather at school before or after school hours on the same basis as other school groups declared unconstitutional), *cert. denied*, 103 S.Ct. 800 (1983); *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980) (district's refusal to allow students to meet as a group for communal prayer before classes upheld), *cert. denied*, 454 U.S. 1123 (1981); *Hunt v. Board of Educ.*, 321 F. Supp. 1263 (S.D. W. Va. 1971) (memorandum order) (school board's refusal to grant permission to high school students to meet as a group before school upheld); *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (2-1 decision) (school district's refusal to permit students' Bible club to meet upheld), *cert. denied*, 434 U.S. 877 (1977); *Trietley v. Board of Educ.*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978) (school board's refusal to permit formation of Bible study clubs in high school upheld). *Contra Bender v. Williamsport Area School Dist.*, 563 F. Supp. 697 (M.D. Pa. 1983) (school district's refusal to permit student prayer club to meet during the school's activity period held unconstitutional). *See infra* notes 104-57 and accompanying text.

14. *See, e.g., Lubbock Civil Liberties Union*, 669 F.2d at 1048 ("Our examination of [the policy] according to the purpose, effect and entanglement analysis articulated by the Supreme Court indicates, as to all three questions, impermissible establishment of religion exists."); *Brandon*, 635 F.2d at 980 ("Establishment clause considerations must prevail in this context."). *Accord Hunt*, 321 F. Supp. at 1267; *Johnson*, 68 Cal. App. 3d at 14-15, 137 Cal. Rptr. at 51; *Trietley*, 65 A.D.2d at 451, 409 N.Y.S.2d at 916-17.

15. When students at the University of Delaware sought to accommodate their religious beliefs by worshipping in their dormitories they were confronted with a lawsuit by the University. *University of Delaware v. Keegan*, 318 A.2d 135 (Del. Ch. 1974), *rev'd*, *Keegan v. University of Delaware*, 349 A.2d 14 (Del. Super. Ct. 1975) (granting students the right to worship only in a commons room of the dormitory), *cert. denied*, 424 U.S. 934 (1976). The Delaware Supreme Court emphasized that it was dealing with a peculiar situation involving only a university campus dormitory. *Id.* *See also Chess v. Widmar*, 480 F. Supp. 907 (W.D. Mo. 1979) (memorandum opinion and order) (upholding University of Missouri-Kansas City's refusal to recognize a religious club on campus), *rev'd*, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom.*, *Vincent v. Widmar*, 454 U.S. 263 (1981). The district court in *Chess* criticized the Delaware Supreme Court's reversal, finding its outcome "not supported by the controlling law." 480 F. Supp. at 916.

Widmar v. Vincent,¹⁶ after declaring religious worship a protected form of speech,¹⁷ the Court stated that a policy of accommodation does not violate the establishment clause if it passes a three-pronged test: (a) is there a secular purpose; (b) is its primary effect neither the advancement nor inhibition of religion; and (c) does it avoid fostering an excessive entanglement with religion.¹⁸ The Court concluded that the university's accommodation of its students' religious clubs (by recognizing them and permitting them to use university facilities) passed this test.¹⁹ As a result, the Court held that where a university creates a forum for student organizations or clubs, discrimination against Bible study groups under the rationale that allowing such clubs would violate the establishment clause is a content-based discriminatory policy which is constitutionally offensive and unnecessary.²⁰

The seemingly logical extension of these rights from the university to the high school campus has yet to take place on a national level. Three courts have heard high school Bible club cases since the *Widmar* decision. Two of these courts²¹ have distinguished their cases from *Widmar*. The third court has followed *Widmar* and applied its holding to a high school Bible study group case.²² The Supreme Court has failed to clarify the situation.²³

The thesis of this comment is that when a public high school provides an activity period for its student body, a student-initi-

16. 454 U.S. 263 (1981) (8-1 decision). See generally Smart, *Widmar v. Vincent and the Purposes of the Establishment Clause*, 9 J.C. & U.L. 469 (1982-83) (written by lead counsel for student group in the case); Note, *Constitutional Law—First Amendment—State University Regulation Prohibiting Use of Facilities for Religious Worship or Teaching Violates Free Speech Rights*, 66 MARQ. L. REV. 178 (1982). See *infra* notes 158-71 and accompanying text.

17. 454 U.S. at 269.

18. *Id.* at 271. This three-pronged test was first set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (declaring unconstitutional a Pennsylvania statute providing, *inter alia*, funds to be paid to teachers in nonpublic schools). See *infra* notes 28-103 and accompanying text.

19. 454 U.S. at 271-75.

20. *Id.* at 277.

21. *Lubbock Civil Liberties Union*, 669 F.2d at 1048 ("This reliance [on *Widmar*] is misplaced."); *Brandon*, 635 F.2d at 980 ("A high school classroom, however, is different.").

22. *Bender*, 563 F. Supp. at 716 ("*Widmar* appears nearly 'on point.'").

23. The Court has had opportunity to hear both *Lubbock* and *Brandon*. *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 800 (1983); *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). The Court refused to hear *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977) on procedural grounds. (appeal was not from decision of highest court).

ated voluntary Bible study club has a constitutional right to exist. This comment consists of four parts. The first part examines the constitutional border which exists in the first amendment religion clauses and the tests promulgated by the courts to protect that border.²⁴ The second part examines the courts' application of these tests to cases involving high school Bible study clubs.²⁵ The third part examines *Widmar v. Vincent*.²⁶ The fourth part argues the proposition set forth in the thesis.²⁷

POLICING THE CONSTITUTIONAL BORDERS: THE TESTS

Inherent within the first amendment religion clauses is a conflict:²⁸ the government shall make no law respecting the establishment of a religion and it shall not prohibit the free exercise of religion. The intent of the framers²⁹ was to create two social entities, state and church.³⁰ These two entities were to be separate; neither was to interfere with the other. The framers intended that the state and the church should not be one, inter-related body. Nor should one exercise control over the other.³¹ Of course, such a separation is ideal, not real.³² Yet a separation

24. See *infra* notes 28-103 and accompanying text.

25. See *infra* notes 104-57 and accompanying text.

26. See *infra* notes 158-71 and accompanying text.

27. See *infra* notes 172-205 and accompanying text.

28. Professor Nowak would call it a "natural antagonism." See J. NOWAK, CONSTITUTIONAL LAW 1029 (2d ed. 1983).

29. "There is a seemingly irresistible impulse to appeal to history when analyzing issues under the religion clauses. This is unfortunate because there is no clear history as to the meaning of the clauses." *Id.* For the Supreme Court's diverse understanding of the early history of these clauses, the following cases provide a broad spectrum of analysis. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 681-87 (1970) (Brennan, J., concurring); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 214-24 (1948) (Frankfurter, J., concurring); *Everson v. Board of Educ.*, 330 U.S. 1, 8-16 (1947).

30. See, e.g., *Everson*, 330 U.S. at 31-32 (Rutledge, J., dissenting) ("[The object of the First Amendment] was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.") See also *McCollum*, 333 U.S. at 212 ("[T]he First Amendment rests upon the premise that both religion and government can but work to achieve their lofty aims if each is left free from the other within its respective sphere.").

31. For the various "working relationships" a state and a church may create, see R. BATES, RELIGIOUS LIBERTY: AN INQUIRY 9-14, 239-52 (1945); C. COBB, PAKISTAN, THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION 11-15 (1957); M. KELLER, CHURCH AND STATE ON THE EUROPEAN CONTINENT 23-31 (1953); I. A. STOKES, CHURCH AND STATE IN THE UNITED STATES 151-69 (1950).

32. See *Walz*, 397 U.S. at 670 ("No perfect or absolute separation is really possible."); *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 740, 746 (1976) ("[A] hermetic separation of the two is an impossibility.").

as real as that envisioned in a wall is the constitutional goal.³³

This image of a wall of separation leaves a picture of concrete tangibility. Nothing could be further from the truth.³⁴ Repeatedly the courts have strained to identify the line marking a proper separation of church and state. Such a line, however, has been elusive.³⁵ It has tended to meander,³⁶ and occasionally is only dimly perceived.³⁷

At the very least the religion clauses mean that "neither a state or Federal Government can set up a church."³⁸ But, of course, they mean more than this.³⁹ More generally the clauses mean that the government should not intrude into the realm of religion. The state may not prohibit religion, but, neither may it sponsor religion. The government must remain benevolently

33. See *Reynolds v. United States*, 98 U.S. (8 Otto) 145, 164 (1878) (quoting T. Jefferson, *Reply from Thomas Jefferson to an Address by a Committee of the Danbury Baptist Association*, in 8 WORKS OF THOMAS JEFFERSON 113 (Washington ed. 1861)).

34. Even portraying the concept of separation with the image of a wall has proven to be the source of controversy. Some justices cling to it for its image as an easily grasped separation. See, e.g., *McCullum*, 333 U.S. at 231 (Frankfurter, J., concurring) ("Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not a fine line."); *Stein v. Oshinsky*, 348 F.2d 999, 1002 (2d Cir.) (inferring that the wall cannot be built too high), cert. denied, 382 U.S. 957 (1965). Others criticize the image itself: "A rule of law should not be drawn from a figure of speech." *McCullum*, 333 U.S. at 247 (Reed, J., dissenting).

35. "The fact is that the line which separates the secular from the sectarian in American life is elusive." *Abington School*, 374 U.S. at 231 (Brennan, J., concurring). Justice Brennan explained, "The difficulty of defining the boundary with precision inheres in a paradox central to our scheme of liberty. While our institutions reflect a firm conviction that we are a religious people, those institutions by solemn constitutional injunction may not officially involve religion in such a way as to prefer, discriminate against, or oppress a particular sect or religion." *Id. Accord* *Board of Educ. v. Allen*, 392 U.S. 236, 242 (1967) (the line is not easy to locate); *Gaines*, 421 F. Supp. at 341 (the line is an elusive one); *Keegan*, 318 A.2d at 138 (same).

36. *Walz*, 397 U.S. at 669 (The "course of constitutional neutrality in this area cannot be an absolutely straight line."). See also *Sherbert v. Verner*, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting) ("[The line] is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation.").

37. *Lemon*, 403 U.S. at 612.

38. *Everson*, 330 U.S. at 15. But see *McCullum*, 333 U.S. at 244 (Reed, J., dissenting) (the establishment clause may only have been intended to prevent the establishing of a state church). *Accord* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 928 (1833).

39. *McGowan v. Maryland*, 366 U.S. 420, 442 (1960) ("[This Court] has found that the First and Fourteenth Amendments afford protection against religious establishment far more extensive than merely to forbid a national or state church.").

neutral.⁴⁰ It should seek to accommodate religion without supporting it.⁴¹ As Justice Douglas said in *Zorach v. Claiborn*,⁴² "When the state encourages religious institutions or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."⁴³ But too much accommodation may result in establishment.

It was for this reason that, in *Lemon v. Kurtzman*,⁴⁴ the Court announced a tripartite test.⁴⁵ For the government to allow any activity which is religiously oriented, that activity must pass all three prongs of the test. If the activity fails the test, it violates the first amendment establishment clause. The test provides that, "First, the statute must have a secular legislative

40. *Walz*, 397 U.S. at 669. See also *Abington School*, 374 U.S. at 222 ("wholesome neutrality"); *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736, 745 (1976) ("scrupulous neutrality").

41. See *McCollum*, 333 U.S. at 255-56 (Reed, J., dissenting) ("The prohibition enactments respecting the establishment of religion do not bar every friendly gesture between church and state."). See also *Johnson*, 68 Cal. App. 3d at 10, 137 Cal. Rptr. at 47 ("[Not] all cooperation between the secular and the religious is condemned.").

42. 343 U.S. 306 (1952) (upholding New York City's program of releasing elementary and secondary students from their classes for a period of time for religious instruction).

43. *Id.* at 313-14. The Court continued:

To hold that it may not [accommodate] would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction.

Id. at 314. See also *Engel*, 370 U.S. at 433-34 (separation is not hostility); *Abington School*, 374 U.S. at 306 (Goldberg, J., concurring) (untutored devotion to the concept of neutrality can "lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.").

44. 403 U.S. 602 (1971).

45. *Id.* at 612-13. The first two questions of the test originated in *Abington School*, 374 U.S. at 222 (actually articulating *McGowan*, 366 U.S. at 442). The third question originated in *Walz*, 397 U.S. at 674. The addition of the third test was over Justice White's objection. *Roemer*, 426 U.S. at 768 (dissenting) ("I have never understood the constitutional foundation for this added element; it is at once both insolubly paradoxical and—as the Court has conceded from the outset—a 'blurred, indistinct, and variable barrier.'") (citations omitted).

purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."⁴⁶ The remainder of this section examines each part of the *Lemon* test.

Secular Purpose

The secular purpose prong of the *Lemon* test is the easiest to satisfy. The showing of the least colorable secular design will succeed in overcoming the hurdle.⁴⁷ An examination of the leading cases in two areas—state financial aid to religious causes and state permission of religious activity in the classroom—demonstrates this.

In *Everson v. Board of Education*,⁴⁸ the Board resolved to reimburse parents for the bus fares expended by them for the transportation of their children to school.⁴⁹ The Court determined that the resolution (and the enabling statute) merely pro-

46. *Lemon*, 403 U.S. at 602-03.

47. *Resnick v. Eash Brunswick Township Bd. of Educ.*, 77 N.J. 88, 389 A.2d 944, 954 (1978) ("For an enactment to pass the test of having a secular purpose, little more is required than a reasonable legislative statement announcing a colorable secular design."). One scholar has noted: "It is not within the provision of the Court to psychoanalyze any legislation, state or federal. . . . In practice the Court has been deferential to mere indicia of a non-religious purpose found in the statute itself or extracted from its legislative history." L. MANNING, *THE LAW OF CHURCH-STATE RELATIONS* 117 (1981). *But see* *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam). The *Stone* Court struck a Kentucky statute requiring the posting of the Ten Commandments in the public classroom. Despite the secular purpose expressed in the legislation, the Court found it to be sectarian in purpose and did not even apply the other two tests. *See also* *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981) (striking Louisiana statute permitting voluntary prayer and meditation, finding unexpressed sectarian purposes), *aff'd mem.*, 455 U.S. 913 (1982). *But see* *Gaines v. Anderson*, 421 F. Supp. 337 (D.C. Mass. 1976) (using the disjunctive coordinator "prayer 'or' mediation" created a secular purpose). *Contra* Opinions of the Justices to the House of Representatives, 387 Mass. 1201, 440 N.E.2d 1159, 1161 (1982) (finding the disjunctive unpersuasive in its analysis).

The intent may be stated in a legislative preamble. *See, e.g.*, *Tilton v. Richardson*, 403 U.S. 672, 678 (1971). It may also be judged by the general unstated purpose of the activity. *See, e.g.*, *Johnson*, 68 Cal. App.3d at 49, 137 Cal. Rptr. at 12 ("[I]t is only necessary to observe [the activity] is in the abstract secular in nature.").

48. 330 U.S. 1 (1947). *See generally* Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260 (1968); Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969).

49. The reimbursement was to be paid to parents of both public and parochial schools. *Everson*, 330 U.S. at 3. *Everson*, a taxpayer in the district, challenged the right of the Board to reimburse parents of parochial students contending that such action violated the establishment clause of the first amendment, forcing residents, like himself, "to pay taxes to help support and maintain schools dedicated to, and which regularly teach, the Catholic Faith." *Id.* at 5.

vided a general program to help parents get their children to and from accredited schools.⁵⁰ The resolution did not prefer or discriminate against religious schools. Because the reimbursement payments were not directly disbursed to the schools, the Court concluded that New Jersey's purpose was not sectarian in nature.

This type of analysis proposed by Justice Black in parochial-aid cases has been typical. Twenty years later, in *Board of Education v. Allen*,⁵¹ Justice White looked to the *Everson* analysis to determine whether New York's education law, requiring the state to loan textbooks free of charge to all students in grades seven to twelve, violated the establishment clause. The law did not distinguish between students at public or parochial institutions.⁵² The Court concluded that the express purpose of the law was to further the educational opportunities available to the young.⁵³ Holding that only secular books may be loaned, the Court determined that the statute was completely neutral with respect to religion.⁵⁴

Using *Everson* and *Allen* as guideposts, the Court has regularly found a secular purpose when the government provides indirect financial aid to religious schools.⁵⁵ It has not, however,

50. *Id.* at 18.

51. 392 U.S. 236 (1967). See generally Note, *Constitutional Law—Establishment Clause of the First Amendment—Free Textbook Loans to Pupils in Private Schools Held Constitutional*, 37 *FORDHAM L. REV.* 123 (1969).

52. *Everson*, 330 U.S. at 238.

53. *Id.* at 243.

54. *Id.* at 248. Another important element in the New York plan was the fact that title to the books remained with the state and that the loan was made not to the schools, but to the students. *Id.* at 243. Thus, the Court found: "[N]o funds or books are furnished to parochial schools, and the financial benefit is to the parents and children, not to the schools." *Id.* at 243-44 (footnote omitted).

55. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court was confronted with a Pennsylvania statute which provided state funds to nonpublic elementary and secondary schools. The funds were intended to reimburse the schools for the cost of their teachers' salaries and for textbook and supplementary instructional material expenditures. *Id.* at 606-07. While the statute failed one of the other prongs, the Court found the statute to have a secular purpose. Broadly stated, the statute was "intended to enhance the quality of the secular education in all schools." *Id.* at 613. See generally Gianella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 *SUP. CT. REV.* 147.

In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court examined the Higher Education Facilities Act of 1963. 20 U.S.C. §§ 711-12 (Supp. 1974). The Act authorized financial aid in the form of grants and loans to institutions of higher education. An exception excluded "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . primarily in connection with any part of the program of a school or department of divinity." *Tilton*, 403 U.S. at 675. The case called into question grants to four church-related colleges and universities. The Court found the overall purpose of the act was to "accommodate rapidly growing numbers of youths

found secular purposes so regularly in the second category of cases, the "religious activity in the classroom" controversies.

In *School District of Abington Township v. Schempp*,⁵⁶ the plaintiff challenged a Pennsylvania statute which required the reading of the Bible in the classroom.⁵⁷ The school district contended that the daily exercises were beneficial to all children regardless of their religious belief. The secular purposes, it argued, were to promote moral values, to contradict the materialistic trends of our times, and to teach the students the heritage of Judeo-Christian literature.⁵⁸ The Court disagreed. All acts taken together were inconsistent with the contention that these exercises had a secular purpose. Instead, their purpose was sectarian and thus in direct violation of the first amendment.⁵⁹

While *Abington School* dealt with *required* religious exercises, laws allowing *voluntary* daily religious exercises have

who aspire to a higher education." *Id.* at 678. The fact that some institutions were religious did not deter from this overall purpose.

In *Meek v. Pittenger*, 421 U.S. 349 (1975), the Court examined another Pennsylvania program of financial aid to nonpublic schools. This aid was in the form of auxiliary services—counseling, testing and health services. Even though the recipients of the services were students at parochial schools, the Court looked to the overall purpose and found it to be the safeguarding of the children's intellectual development. *Id.* at 385.

In *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736 (1976), the Court upheld a Maryland grant program "to private colleges, among them religiously affiliated institutions, subject only to the instruction that the funds not be used for 'sectarian purposes.'" *Id.* at 739. The Court found the secular purpose to be "one of supporting private higher education generally, as an economic alternative to a wholly public system." *Id.* at 754.

Most recently, the Court has upheld a New York statute reimbursing church-sponsored schools for performing various testing and reporting services required by the State. In *Committee for Pub. Educ. v. Regan*, 444 U.S. 644 (1980), the Court held that the secular purpose behind the legislative enactment was "to provide educational opportunity of a quality which will prepare [New York] citizens for the challenges of American life in the last decades of the twentieth century." *Id.* at 655. *See also* *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 669 (1970) (property tax exemptions to religious organizations for property used solely for religious purposes upheld).

56. 374 U.S. 203 (1963). Although *Abington School* chronologically follows the leading case of *Engel*, it was the first to articulate the secular purpose test.

57. The Court recited the specific law: "[A]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading or attending such Bible reading, upon the written request of his parent or guardian." *Id.* at 205. The companion case of *Murray*, considered a Maryland statute which provided for public school opening exercises consisting primarily of the "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer." *Id.* at 211.

58. *Id.* at 223.

59. *Id.* at 224.

also failed the secular purpose test. In *Jaffree v. Wallace*,⁶⁰ a United States court of appeals examined Alabama's school prayer statutes.⁶¹ Turning to the first prong of the *Lemon* test the court simply recognized that prayer is an essentially religious practice. The statutes could therefore serve no secular purpose.⁶² The voluntariness was deemed irrelevant to the

60. 705 F.2d 1526 (11th Cir. 1983). This case is particularly interesting. Originally the district court granted a preliminary injunction. *Jaffree v. Board of Comm'rs*, 544 F. Supp. 727 (S.D. Ala. 1982). After a hearing on the merits, it dismissed the complaint. *Jaffree v. Board of Comm'rs*, 554 F. Supp. 1104 (S.D. Ala. 1983) (mem. opinion). Chief Judge Hand examined the facts in light of the first amendment decisions the Supreme Court had made. *Id.* at 1108-25. He concluded that "the United States Supreme Court [had] erred in its reading of history." *Id.* at 1128. The basis for his decision was that "the Establishment Clause of the First Amendment to the United States Constitution [did] not prohibit the state from establishing a religion." *Id.* On February 11, 1983, Justice Powell, acting in his capacity as Circuit Justice, granted a stay of the judgment pending the petitioner's appeal to the United States Court of Appeals for the Eleventh Circuit. *Jaffree v. Board of School Comm'rs*, 103 S. Ct. 842 (1983) (mem. opinion). On appeal, a unanimous panel reversed Judge Hand's dismissal order, finding the statute to be in violation of the establishment clause. *Jaffree v. Wallace*, 705 F.2d 1520, *reh'g denied*, 713 F.2d 614 (11th Cir. 1983) (four justices dissenting). See also 129 CONG. REC. S 2704 (daily ed. Mar. 11, 1983) (statements of Sen. Helms). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 829 (1978); P. FREUND, *THE LEGAL ISSUES IN RELIGION AND THE PUBLIC SCHOOLS* 23 (1965); Choper, *Religion in The Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329 (1963); Kauper, *supra* note 10; Note, *supra* note 10.

61. The statutes stated:

At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

Ala. Code § 16-1-20.1 (1982).

From henceforth, any teacher or professor in any public educational institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may lead the willing students in the following prayer to God:

Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools. In the name of our Lord. Amen.

Ala. Code § 16-1-20.2 (1982). The court found the statutes to be both voluntary and non-denominational. *Jaffree*, 705 F.2d at 1735.

62. *Jaffree*, 705 F.2d at 1734. See *Karen B.*, 653 F.2d at 901 (since prayer is a primarily religious activity in itself, its observance in public school classrooms has an obvious religious purpose), *aff'd mem.*, 102 S. Ct. 1267 (1982). See also *Kent v. Commissioner of Educ.*, 380 Mass. 235, 402 N.E.2d 1340 (1980). In *Kent*, the Supreme Court of Massachusetts was asked to declare unconstitutional a Massachusetts school prayer law. MASS. GEN. LAWS ANN. ch. 71 § 1A (West 1979). The Act called for a daily period of prayer offered by a student volunteer. The court, dealing with the secular purpose, directed attention to the preamble. It focused on the word "prayer" and con-

court's analysis. Thus, in comparing the two areas of religious aid to the nonpublic school and religious activity in the public school, one can see that unless religion is injected into the policy with which the statute is associated, the secular purpose prong of the tripartite test is easily met.⁶³

Primary Effect

The second prong of the *Lemon* test requires that the government policy or law not have as its principal or primary effect the advancement or the inhibition of religion. It is agreed that this is the most confusing prong of the *Lemon* test.⁶⁴ The problem is one of definition. The Supreme Court has never defined "primary effect."⁶⁵ Without definition, we shall proceed by example. Again, the cases fall into the two categories of financial state aid to religious activity and religious activity in the classroom.

As seen above, state aid to religion can take several forms. Theoretically, any form of financial aid to church-sponsored activity advances religion to some degree. For example, in *Bradfield v. Roberts*,⁶⁶ a hospital operated by a religious order received a federal grant to construct a new building. The grant was upheld as not advancing religion in spite of the fact that the hospital was solely operated by a religious order. The Court reasoned that because the hospital's corporate charter required it to limit its operation to a wholly secular nature, the fact that its business was conducted by the Roman Catholic Church was

cluded, "[P]rayer is necessarily religious, not secular." 380 Mass. at 238, 402 N.E.2d at 1344. Counsel for the commissioner argued that a prayer "beseeching a secular objective" would suffice for the secular purpose." *Id.* The court properly found this unpersuasive. Two years later, the Massachusetts Supreme Court affirmed this decision when responding to questions proposed by the Massachusetts House of Representatives. Opinions of the Justices, 387 Mass. 1201, 440 N.E.2d 1159 (1982). Concerning the legislation, the court declared, "The purpose of [the bill] is clear—the bill seeks to encourage the recitation of prayer in schools. . . . The effect of the statute would be to return prayer to the public schools. [It would] come into clear conflict with the prohibition of the Establishment Clause." *Id.* at 261, 440 N.E.2d at 1162.

63. Comment, *Religious Meetings on Public School Property*, 15 LOY. L.A.L. REV. 103, 109 (1981).

64. Treiman, *Religion in The Public Schools*, 9 N. KY. L. REV. 229, 238-39 (1982).

65. Justice Powell went so far as to note that "[M]etaphysical judgments [determining the 'principal or primary effect'] are [neither] possible [nor] necessary." *Nyquist*, 413 U.S. 756, 783 at n. 39 (1973). As one author has commented, "[The Supreme Court] chose instead, to write in converse terms of that which is nonprimary in effect. From that process, the antonym emerged cloaked in other adjectives, i.e., remote, indirect, independent, incidental." L. MANNING, *supra* note 47, at 136.

66. 175 U.S. 291 (1899).

immaterial.⁶⁷

More typical is the state aid given to parochial schools via bus transportation, textbook loans, and subsidies in the form of tax exemptions. Chief Justice Burger posited that the focus in such cases should not be on whether some benefit accrues to religious institutions as a result of the legislation, but whether its principal or primary effect advances religion.⁶⁸

In *Everson v. Board of Education*,⁶⁹ the court examined New Jersey's bus fare reimbursement program. The plaintiff-taxpayer argued that religion is advanced when parents send their children to religious sponsored schools and receive a monetary reimbursement. Justice Black even speculated that "some children might not be sent to the church schools if the parents were compelled to pay their children's bus fare out of their own pockets. . . ."⁷⁰ The Court, however, analogized the situation to the state support of church schools which arises from police and fire protection and other public services.⁷¹ The Court concluded that because the state did not support the schools in these acts, neither did it in bus fare repayments. Thus, the New Jersey law did not advance religion.

In *Board of Education v. Allen*,⁷² the Court examined the primary effect of New York's textbook loan program. Petitioners contended that religion was advanced by the furnishing of secular textbooks without charge to students at parochial schools.⁷³ The Court even suggested that the provision of free books might make it more likely that some parents would prefer to send their children to a sectarian school.⁷⁴ The Court reasoned, however, that religious schools have the dual goals of religious instruction and secular education.⁷⁵ Noting that the religious schools do an acceptable job of providing their students with a secular education,⁷⁶ the Court held that free books, like the state-paid fares in *Everson*, did not demonstrate an unconstitutional degree of support for a religious institution.⁷⁷ Eight years later, the Court declared that many valid legislative programs provide indirect

67. *Id.* at 298.

68. *Tilton v. Richardson*, 403 U.S. 291 (1971). *See infra* note 78.

69. 330 U.S. 1 (1947).

70. *Id.* at 17.

71. *Id.* at 17-18.

72. 392 U.S. 236 (1967).

73. *Id.* at 240.

74. *Id.* at 244.

75. *Id.* at 245.

76. *Id.* at 248.

77. *Id.* at 244.

incidental benefit to religious institutions.⁷⁸

78. "It is clear that not all legislative programs that provide indirect incidental benefit to a religious institution are prohibited by the Constitution. The problem, like many problems in Constitutional law, is one of degree." *Meek*, 421 U.S. at 359 (citations omitted). See *Roemer*, 426 U.S. at 747 ("Everson and *Allen* put to rest any argument that the state may never act in such a way that has the incidental effect of facilitating religious activity."); *Hunt v. McNair*, 413 U.S. 734, 743 (1973) (same effect).

In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court held that the federal grants for the construction of libraries, language laboratories and other secular facilities could be given to church supported colleges and universities. The primary effect of the legislation was not to advance religion. *Id.* at 679-80. It is important to note that the court was able to separate, in each school, sectarian activities from secular ones. See *id.* at 680-82.

Two years later, in *Hunt v. McNair*, 413 U.S. 734 (1973), when called upon to judge a similar state program in South Carolina, the Court, upholding the grants, explained: "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed into the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." *Id.* at 743.

In *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973), tuition tax grants were given to low income families with children in parochial schools. The Court found the amendments to New York's education and tax law to be ultimately subsidies which would "advance the religious mission of sectarian schools," and went much further than the bus fare reimbursements of *Everson*. *Id.* at 779-80. See also *Sloan v. Lemon*, 413 U.S. 825 (1973) (same result with a Pennsylvania enactment). The *Nyquist* Court hinted that the legislation did not provide for a strict separation of the funds with a specific designation for their secular use. A provision of this sort may have passed judicial scrutiny. 413 U.S. at 774. See *Wolman v. Walter*, 433 U.S. 299 (1977) and *Committee for Pub. Educ. v. Regan*, 444 U.S. 446 (1980), where the Court upheld the use of public funds for various testing services for church sponsored schools. These tests were not susceptible to religious uses.

In *Levitt v. Committee for Pub. Educ.*, 413 U.S. 783 (1973), New York appropriated twenty-eight million dollars to reimburse nonpublic schools for "expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of pupil health records, recording of personnel qualifications and various other reports." *Id.* at 474. Referring to *Nyquist*, the Court noted similar flaws in the legislation which would have allowed specifically undesignated money to be used for religious purposes. The Court also pointed out that the tests which the funds would pay for would be prepared by "teachers under the authority of religious institutions, . . . drafters, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." *Id.* at 480. The aid was invalidated. *Id.*

Two years later, in *Meek v. Pittinger*, 421 U.S. 349 (1975), the Court examined another Pennsylvania state aid program. While it upheld an *Allen*-like loan of textbooks to the students, it invalidated two other forms of support. The first form of aid was a loan of instructional equipment. Rather than being a loan to the students, the Court found the state to be loaning the equipment to the schools themselves. *Id.* at 366. The other form of aid was "auxiliary services," such as counseling, testing and reporting. Here, as in *Levitt*, the Court feared the possibility of misuse, which would allow religion to seep into the institution. *Id.*

In *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736 (1976), the Court examined a Maryland statute providing for public aid given to eligible colleges and universities. The Court determined that the colleges, formally af-

Turning to the second category of cases, it should be noted that when religion enters the classroom door during school hours, a primary effect of advancement is normally found. This advancement is better known as sponsorship.⁷⁹ When the primary effect of the religious activity demonstrates governmental endorsement or active involvement, the Supreme Court will find a violation of the establishment clause.

In *Illinois ex rel. McCollum v. Board of Education*,⁸⁰ the Board of Education gave permission to representatives of the Catholic, Protestant, and Jewish faiths to give religious instruction to willing students once a week in the public school buildings.⁸¹ While student participation was voluntary, parental consent was needed to excuse the student to another classroom in the school.⁸² The Court concluded that the state's tax-supported buildings were being used to teach religious doctrine.⁸³ This was not the separation of church and state envisioned in the first amendment.⁸⁴ The school board's permission, therefore, was terminated.

Four years later the Court examined a similar New York program in *Zorach v. Clauson*.⁸⁵ The Court upheld the New York system in the most pro-religion opinion it has ever written. Justice Douglas distinguished *Zorach* from *McCollum* as involving neither religious instruction in the public school classrooms nor the expense of public funds.⁸⁶ The program in *Zorach* permitted willing students to leave the school grounds during the school day and go to a classroom or religious institution nearby

filiated with the Roman Catholic Church, were not "pervasively sectarian." *Id.* at 755. Moreover, it found that there were stipulations as to the specific use of the funds—nonsectarian uses. *Id.* at 759-60.

79. *Walz*, 397 U.S. at 668.

80. 333 U.S. 203 (1948). See generally Note, *The "Released Time" Cases Revisited: A Study of Group Decisionmaking*, 83 YALE L.J. 1202 (1974).

81. These instructors were hired and paid by private religious groups. *McCollum*, 333 U.S. at 205.

82. *Id.* at 207-09.

83. *Id.* at 212.

84. *Id.* See Comment, *supra* note 65, at 110 n. 39 (The presumption was that the religious program came into the school and that the student who did not wish to participate bore the burden of removing himself from the program. In this way, the school condonation of the program produced a subtle, coercive effect). Also note that appellant contended subtle pressures were brought to bear in the students who sought not to participate. 333 U.S. at 207 n.1. Further, the Court determined the "State's compulsory public school machinery" was being used by sectarian groups to coercively provide pupils for their cause. *Id.* at 212.

85. 343 U.S. 306 (1952). See generally Reed, *Church-State and the Zorach Case*, 27 NOTRE DAME LAW. 529 (1952).

86. 343 U.S. at 308-09.

where the religious instruction was given.⁸⁷ Religion was not advanced, only accommodated. The physical separation of the religious instruction from the school grounds was a sufficient buffer to advancement. While questioning the wisdom of such a program, the Court left its mark of constitutional approval on it.

In *Engel v. Vitale*,⁸⁸ the Court was confronted with New York's school prayer law. In 1951, the New York State Board of Regents created the "Regents' Prayer."⁸⁹ The Board of Education directed the school district's principal to have the prayer recited at the beginning of each school day. Because the prayer was voluntary, students could be excused entirely from the exercise.⁹⁰ The Court reasoned that the primary effect of the exercise was to advance an officially approved religious doctrine by way of government endorsement.⁹¹ The Court held the practice unconstitutional and explained that the government could not participate in such a program without being responsible for a negative coercive influence on nonparticipating students.⁹² The

87. Again, parental consent was required. *Id.* at 308 n. 1. Those students not released remained in their classroom. *Id.* at 308. The institutions were responsible for maintaining attendance. *Id.* This was the cooperative, accommodating spirit which touched off the statement: "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedules of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual need." *Id.* at 313-14.

88. 370 U.S. 421 (1962) (6-1 decision; Justices Frankfurter and White did not take part in the decisions; Justice Stewart dissented). See generally Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 75 (1962).

89. The prayer stated, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, our teacher and our Country." 370 U.S. at 422. For an interesting look at the background and national reaction to the *Engel* decision, see L. BUZZARD, *SCHOOLS: THEY HAVEN'T GOT A PRAYER* 40-47 (1982).

90. 370 U.S. at 423 n. 2.

91. The Court admitted that the prayer seemed "relatively insignificant," but pointed to the warning of James Madison:

[I]t is proper to take alarm at the first experiment on our liberties.

* * * Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Id. at 436 (quoting J. Madison, *Memorial and Remonstrance against Religious Assessments*, 2 THE WRITINGS OF MADISON 183, 185-86 (1901)).

92. "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel*, 370 U.S. at 431. Justice Black, writing for the majority, declared that the establishment clause "[m]ust at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious

lower federal and state courts have consistently followed this rationale.⁹³ Religious activities simply cannot be accommodated in the classroom without having a primary effect of advancement.

Excessive Government Entanglement

The third test, excessive entanglement, has only been applied by the Supreme Court in cases involving financial aid to a religious activity.⁹⁴ The test focuses on the end result of the gov-

program carried on by government." *Id.* at 430. The facts that the prayer was termed "non-denominational" and that students could remove themselves from the classroom during its recitation were irrelevant. *Id.*

On the heels of *Engel* came *Abington School*, 374 U.S. 203 (1963). *See supra* notes 56-59 and accompanying text. While it was this opinion which first set forth the primary effect test, the Court did not articulate it (concentrating predominately on the secular purpose aspect of the test). *See Abington Steel*, 374 U.S. at 222. It seems obvious enough, however, to make the logical extension that if the recitation of a state written prayer is offensive to the establishment clause, the daily reading of the Bible and the recitation of the Lord's Prayer in unison is likewise offensive. *Id.* at 223. As for religious activity in the classroom, the Court said, there is no such thing as a "relatively minor encroachment." *Id.* at 225. Note, however, that in invalidating the religious exercises, the Court reserved judgment on the use of the Bible or religion "when presented objectively as part of a secular program of education." *Id.*

93. *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.) (ban on student-initiated, voluntary prayer upheld), *cert. denied*, 382 U.S. 957 (1965); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981) (Louisiana prayer statute declared unconstitutional), *aff'd mem.*, 102 S. Ct. 1267 (1982); *Kent v. Commissioner of Educ.*, 380 Mass. 235, 402 N.E. 1340 (1980) (Massachusetts prayer statute declared unconstitutional); *Commissioner of Educ. v. School Comm. of Leyden*, 358 Mass. 776, 267 N.E.2d 226 (voluntary religious exercises enjoined), *cert. denied*, 404 U.S. 849 (1971). *See also* *Opinions of the Justices*, 387 Mass. 1201, 440 N.E.2d 1159 (1982) (advising the Massachusetts House of Representatives as to the unconstitutionality of proposed "silent moment" bill). *Contra Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965) (allowing students to pray before classes begin).

94. This third prong of the establishment test originated in *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664 (1970). In *Walz*, the Court was confronted with a taxpayer who sought to enjoin the New York City Tax Commissioner from granting property tax exemptions to religious organizations. It determined the legislative purpose of granting tax exemptions to all nonprofit, quasi-public corporations was secular in nature, and declared the primary effect to be neither sponsorship nor inhibition. *Id.* at 672-76. In its creation of the entanglement issue, the Court noted that elimination of the exemption would *expand* the administrative involvement of church and state. *Id.* at 674. It would do so by "giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow on the train of those legal processes." *Id.* "[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Id.* at 675. The Court concluded that the continued exemption would not create excessive entanglement. The decision ultimately hinged on the historical aspect of Church exemptions. "It appears that at least up to 1885 this Court reflecting more than a century of our history and uninterrupted practices, accepted without discussion the proposi-

ernment legislation. "The test," Chief Justice Burger said, "is inescapably one of degree."⁹⁵

In *Lemon v. Kurtzman*,⁹⁶ the Court found Pennsylvania's Nonpublic Elementary and Secondary Education Act⁹⁷ to have both a secular purpose and a primary effect which did not advance or inhibit religion.⁹⁸ The Court then examined the resulting relationship between the state and the religious schools.⁹⁹ The state-aid of partial teacher salary reimbursement was to be limited to courses offered in the public schools and materials approved by state officials.¹⁰⁰ The Court reasoned that the restrictions and surveillance necessary for teachers to play a strictly non-ideological role give rise to entanglements between church and state.¹⁰¹ A continuing relationship comprised of audits, accountings, inspections, and evaluations would be a state of impermissible excessive entanglement.¹⁰² The Court, therefore, held that the program violated the establishment clause.

It is important to note that the relationship between state and church after the legislation is enacted is not required to be as simple and as uninvolved as before it was enacted. The *Lemon* test looks for *excessive* entanglement. *Some* entanglement is permissible and most legislation will necessarily leave the relationship between church and state more complicated and involved than before.¹⁰³

tion that federal and state grants of tax exemptions to churches were not a violation of the Religion Clauses of the First Amendment." *Id.* at 680.

95. *Id.* at 674.

96. 403 U.S. 602 (1970). *See supra* note 55.

97. PA. STAT. ANN., Tit. 24, §§ 5601-5609 (Supp. 1971) (repealed 1977).

98. 403 U.S. at 613-14.

99. The Court set forth the areas to examine. "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.* at 615.

100. *Id.* at 621. The program provided for direct payments to the religious institutions. *Id.* This, the Court determined, would result in "a relationship pregnant with involvement and . . . could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards. . . ." *Id.* (quoting *Walz*, 397 U.S. at 675).

101. 403 U.S. at 620-21.

102. *Id.* at 621-22.

103. *See, e.g., Tilton v. Richardson*, 403 U.S. 672, 687 (1970) (inspections necessary to determine that the facilities are devoted to similar education are minimal and not excessively entangling). The area which is most susceptible to excessive entanglement is that where the government is involved in a "comprehensive, discriminating, and continuing state [of] surveillance." *Tilton*, 403 U.S. at 621-23. In non-financial aid cases, the "surveillance" problem would be described as a "supervision" problem. *See Brandon*, 635 F.2d at 974 (2d Cir. 1981), *cert. denied*, 454 U.S. 1123 (1982).

BORDER CHECK AT THE BIBLE STUDY CLUBS

Six courts have applied the *Lemon* test to the issue of Bible study clubs in public high schools.¹⁰⁴ In all but one case¹⁰⁵ the courts have held that the existence of Bible study clubs in the public schools is an unconstitutional violation of the establishment clause. This comment examines each case chronologically.

In *Hunt v. Board of Education*,¹⁰⁶ the Board prohibited high school students from voluntarily meeting on school premises as a prayer and Bible study group.¹⁰⁷ The plaintiff students alleged a denial of freedom of speech, freedom of assembly, and the free exercise of religious beliefs.¹⁰⁸ Making no reference to the three part *Lemon* test, the Court relied on decisions prohibiting schools from renting out their facilities to the public for regular religious meetings and summarily dismissed the complaint.¹⁰⁹ The court held that separation of church and state allowed school authorities to make this prohibition.¹¹⁰

In *Johnson v. Huntington Beach Union High School District*,¹¹¹ the school refused to permit a voluntary Bible study club to meet on the campus. The district had a policy which distinguished between sponsored clubs and recognized clubs.¹¹² The students wanted only to be recognized, not sponsored. The procedure they had to follow was to apply to the district and receive its approval.¹¹³ On January 8, 1974, the district passed an interim policy allowing religious clubs to meet on campus. When the Orange County legal counsel informed the district that it was unconstitutional to permit such activity, the district

104. See cases cited *supra* note 13.

105. *Bender v. Williamsport Area School Dist.*, 563 F. Supp. 697 (M.D. Pa. 1983).

106. 321 F. Supp. 1263 (S.D. W.Va. 1971) (mem. order).

107. The School district's policy was to uniformly deny all requests for the use of school buildings for religious purposes. *Id.* at 1264.

108. *Id.* at 1263.

109. *State ex rel. Greisinger v. Grand Rapids Board of Educ.*, 88 Ohio App. 364, 100 N.E.2d 294 (1949), *cert. denied*, 340 U.S. 820 (1950) (forbidding Jehovah Witnesses from using a public school auditorium for public religious meetings). The court also referred to 47 AM. JUR. SCHOOLS § 213, a section referring to using a school as a place of meetings. *Hunt*, 321 F. Supp. at 1264.

110. *Hunt*, 321 F. Supp. at 1264.

111. 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977). See generally Buchanan, *Accommodation of Religion in the Public Schools: A Plea for Careful Balancing of Competing Constitutional Values*, 28 UCLA L. REV. 1000, 1025-46 (1981).

112. *Johnson*, 68 Cal. App. 3d at 6 n. 3, 137 Cal. Rptr. at 45 n. 3.

113. *Id.* at 7, 137 Cal. Rptr. at 45-6.

rescinded its resolution.¹¹⁴ Over one hundred students petitioned for formal recognition of a religious club. The district rejected the petition. The students then filed suit requesting injunctive and declaratory relief. The lower court held such relief would cause a breach in the wall between church and state.¹¹⁵ On appeal the students contended their club was entitled to both recognition and use of the school's facilities just as other student organizations.¹¹⁶ In applying the *Lemon* test, the *Johnson* court noted the secular purpose test was difficult to apply.¹¹⁷ The court invalidated the policy, however, finding that it violated the second and third prong of the test. Because the club held its meetings on the school campus, the court concluded that the financial assistance of free use of school facilities, classrooms, heat, and light would impermissibly advance religion.¹¹⁸ The court also determined that to recognize the group would place an "imprimatur on the religious activity."¹¹⁹ As for the excessive entanglement prong, the court focused on the administrative sponsorship which the school would be required to provide. The court anticipated that the school would need to approve activities, oversee the club's financial accounts, and review the club's membership. Such acts, the court determined, would foster excessive entanglement.¹²⁰ The divided court therefore held that a policy of accommodation of this sort would overstep constitutional limits and make the state a party to an impermissible establishment of religion.¹²¹

114. *Id.*, 137 Cal. Rptr. at 46.

115. To allow the students declaratory relief would "cause the state to penetrate the federal and state barriers between church and state." *Id.* at 8, 137 Cal. Rptr. at 46 (footnote omitted).

116. *Id.* at 8 n.7, 137 Cal. Rptr. at 47 n.7.

117. *Id.* at 12, 137 Cal. Rptr. at 49. The Court properly focused the first prong of the test on the overall policy: the "power to permit student organizations to conduct their activities on school campuses during the school day." *Id.*

118. *Id.* at 12, 137 Cal. Rptr. at 49.

119. *Id.* at 12-13, 137 Cal. Rptr. at 49.

120. *Id.* at 14, 137 Cal. Rptr. at 49. The court also noted a possibility for political divisiveness which might have a coercive effect on members of less orthodox religions who would have insufficient support to form a club. *Id.*

121. The strongly worded dissent by Justice McDaniel, pointed out that recognition of the club would not be the *affirmative* sponsorship warned of in *McCollum*, *Engel*, and *Abington School*. *Johnson*, 68 Cal. App. 3d at 21, 137 Cal. Rptr. at 55. He criticized the majority for their "misconception of what 'sponsorship' by the school actually entailed," *id.* at 23, 137 Cal. Rptr. at 56, and argued for an accommodation as permitted under *Zorach*. As to the primary effect, McDaniel turned to *Hunt* and *Lemon* and contended, "If the state can permissibly lend the massive power of its treasurer in aid of a sectarian institution to help finance the construction of educational facilities, it seems that to allow a group of high school students to use school rooms to discuss the Bible is well within the rule. . . ." *Johnson*, 68 Cal. App. 3d at 29, 137 Cal. Rptr. at 60. McDaniel lamented,

One year later, in *Trietley v. Board of Education of the City of Buffalo*,¹²² the New York Supreme Court, Appellate Division affirmed the dismissal of several students' petitions to compel the Board to permit the formation of Bible study clubs on campus. In denying the students recognition afforded to other recognized clubs, the court applied the *Lemon* test. Concerning the first prong, the court focused on the narrow issue and asked whether the formation of Bible study clubs would constitute a secular purpose. It found the purpose to be religious.¹²³ The court described the primary effect of such formation as the "advancement of religious philosophy contained in the Bible."¹²⁴ Regarding the excessive entanglements, the court found that without constant supervision, the Bible clubs could become exclusively sectarian classes in religious instruction within the public supported school system.¹²⁵ The court concluded that inasmuch as the Board had never permitted any other religious club to form, plaintiffs' rights to equal protection were not infringed.¹²⁶

In *Brandon v. Board of Education of Guilderland School District*,¹²⁷ the federal circuit court affirmed the dismissal of a student's petition for injunctive and declaratory relief against the school district for the refusal to allow a prayer group to meet on school grounds.¹²⁸ Applying the *Lemon* test, the court found the secular purpose of a policy granting student groups access to school facilities to be the encouragement of extracurricular ac-

I see the necessity for a reevaluation of the cases construing the Establishment Clause. With due respect for the sincerity of those who have authored the cases relied upon by the majority, it seems to me that their sweeping interpretations of the simple phrase . . . have distorted all out of rational proportion both what the framers of the Constitution intended and what is fundamental to the survival of an ethical society.

Id. at 30, 137 Cal. Rptr. at 60-61. It is interesting to note that in his dissent to reverse the lower court's holding, Justice McDaniel announced: "Lest this tract be construed by anyone to be an artfully disguised effort to promote and advance the teachings of the Bible, let it be known that I am an ardent and practicing Buddhist and a member of the Nichiren Shoshi Shoka Gak-kai." *Id.* at 35 n. 10, 137 Cal. Rptr. at 64 n. 10.

122. 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978).

123. *Trietley*, 65 A.D.2d at 6, 409 N.Y.S.2d at 916.

124. *Id.* It also referred to the rent-free facilities which would be used by the students. *Id.* at 6, 409 N.Y.S.2d at 917.

125. *Id.* at 7, 409 N.Y.S.2d at 917.

126. *Id.*

127. 635 F.2d 971 (2d Cir. 1981), *cert. denied*, 454 U.S. 1123 (1982).

128. While the district court found an unstated secular purpose to the meetings it dismissed the complaint because the request failed to pass the second and third tests. *Id.* at 974. The primary effect was the advancement of religion; excessive entanglement was found in the "faculty surveillance [needed] to assure the meetings were voluntary." *Id.*

tivities.¹²⁹ Struggling with the primary effect test, the court concluded that the symbolic inference of state imprimatur in religious activity was too dangerous to permit.¹³⁰ To the impressionable student, religion would appear to be advanced.¹³¹ The student's request failed the excessive entanglement test because teachers would be required to monitor the activities and insure that participation would always remain voluntary.¹³² To the student's claim that she was not equally protected, the court responded that a high school is not a public forum where religious views could be freely aired.¹³³ In short, the student's religious speech and association rights were "severely circumscribed by the Establishment Clause in the public school setting."¹³⁴

In 1982, the first decision following the landmark case of *Widmar v. Vincent*¹³⁵ appeared. In *Lubbock Civil Liberties Union v. Lubbock Independent School District*,¹³⁶ the federal circuit court was called to examine a school district policy which expressly provided students with the right to form Bible clubs. The district court had found the policy to be constitutional.¹³⁷ In applying the *Lemon* test, the court of appeals chose to focus on the narrow purpose of the school's policy of recognition of Bible study clubs.¹³⁸ The court determined that the new policy granting equal rights to religious clubs was not secular because it was

129. *Id.* at 978 (referring to *Chess v. Widmar*, 635 F.2d 1217 (8th Cir. 1980) (coming to the same conclusion on the university campus), and *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (high school), *cert. denied*, 434 U.S. 877 (1977)).

130. *Brandon*, 635 F.2d at 978.

131. *Id.*

132. *Id.* at 979.

133. *Id.* at 908.

134. *Id.*

135. 454 U.S. 263 (1982) (upholding the right of a Bible club to exist in the public university context). See *infra* notes 158-71 and accompanying text.

136. 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 800 (1983). The school board intended to recognize religious clubs and extend to them the benefits afforded other groups. Specifically, the controverted section of the new policy stated:

4. The School Board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary.

Id. at 1041 n.7.

137. The district court stated that the purpose was to "encourage leadership, communication skills, and social awareness by allowing the voluntary association of students for educational, moral, religious, or ethical purposes." *Id.* at 1044. It pointed to *Brandon*, 635 F.2d at 978, for the proposition that a secular purpose can be found in recognizing Bible clubs. 669 F.2d at 1044.

138. *Lubbock Civil Liberties Union*, 669 F.2d at 1044.

designed to allow religious clubs to meet.¹³⁹ Regarding the primary effect of the policy, the court focused on the imprimatur which would be placed on religious clubs by school district recognition. The court concluded that the impressionable student might see the clubs as integrally related to the district's extra-curricular programs.¹⁴⁰ The court concluded the policy's principle effect was the advancement of religion.¹⁴¹ As to the excessive entanglement test, the court relied on *Brandon* for the proposition that continual supervision of students creates entanglement.¹⁴² The court concluded that the policy failed each of the three prongs of the *Lemon* test.¹⁴³

Bender v. Williamsport Area School District,¹⁴⁴ the most recent case to examine Bible clubs in the public high school, is the only case to uphold their constitutionality. In September of 1981, the plaintiff and several students requested permission from the principal of the Williamsport Area High School to form a club which would meet during the activity period of the day.¹⁴⁵ The club would be religious in nature, promoting spiritual growth and positive attitudes.¹⁴⁶ After discussing the matter with the superintendent of the district and receiving a legal opinion from the School District Solicitor, the principal denied the request.¹⁴⁷ The students appealed to the School Board which affirmed the principal's action.¹⁴⁸ The students then filed suit in district court. The court held that while the plaintiff's

139. *Id.* at 1045.

140. *Id.* The court quoted *Brandon*, 635 F.2d at 978 for the proposition that the appearance of secular involvement in religious activity, indicating state approval, is too dangerous to permit. The misapprehension is compounded by the fact that the clubs met "at a time closely associated with the school day." *Lubbock Civil Liberties Union*, 669 F.2d at 1046. The school district argued that the clubs would meet before or after the regular school hours. They would even meet before or after the school busses run. *Id.* The court responded that the meeting times of the clubs relative to the bus schedules was immaterial. *Id.*

141. *Lubbock Civil Liberties Union*, 669 F.2d at 1046.

142. *Id.* at 1047 (referring to *Brandon*, 635 F.2d at 979). The school district had admitted that it would supervise the students pursuant to state law.

143. *Lubbock Civil Liberties Union*, 669 F.2d at 1048.

144. 563 F. Supp. 697 (M.D. Pa. 1983).

145. *Id.* at 700. The club was to be called Petros, a greek word meaning "The Rock." W. BAUER, W. ARNDT & F. GINGRICH, A GREEK-ENGLISH LEXICON OF THE NEW TESTAMENT 660 (4th rev. ed. 1957). It refers to Jesus' response to his disciple Peter when Peter confessed Jesus' divine sonship. Referring to the confession, Jesus said, "You are Peter and upon this Rock I will build my church and the gates of Hades shall not prevail against it." *Matt.* 16:18. See W. ALLEN, A CRITICAL AND EXEGETICAL COMMENTARY ON THE GOSPEL ACCORDING TO S. MATTHEW 176 (3d ed. 1912).

146. *Bender*, 563 F. Supp. at 701. The organization was to be nondenominational. Participation was to be voluntary. *Id.*

147. *Id.*

148. *Id.*

free exercise rights were not violated by the defendant's action, her free speech rights were violated.¹⁴⁹ Relying on the Supreme Court's declaration in *Widmar* that religious speech is entitled to constitutional protection, the court concluded that the activity period created by the school was a forum generally open for use by students.¹⁵⁰ The court found that a content-based exclusion of speech, while permissible under certain circumstances, must surpass a compelling state interest test.¹⁵¹ The only state interest which the school board proposed was its mandate to not violate the establishment clause.¹⁵²

In applying the *Lemon* test, the court found a secular purpose to an activity period which would include religious clubs in the promotion of "intellectual, physical and social development of its students."¹⁵³ Under the second test, the court found that the primary effect of the policy was not the advancement of religion, but its accommodation. The court determined that Williamsport High School had over twenty-five other groups utilizing the activity period expressing a wide variety of interests. Therefore, the court concluded that treating the Bible club like the many other clubs would confer only a general benefit upon it rather than furthering its aims.¹⁵⁴ The court was unpersuaded by the school's concern that the students might misapprehend the school's actions and see a state imprimatur on the group.¹⁵⁵ Concerning excessive entanglement, the court found that the supervision required would be no more than the taking of attendance and the maintenance of order.¹⁵⁶ This would not excessively entangle the state and church.¹⁵⁷

149. *Id.* at 704.

150. *Id.* at 704 n. 8. See *Widmar*, 454 U.S. at 269 (religious speech is constitutionally protected).

151. *Bender*, 563 F. Supp. at 707.

152. *Id.*

153. *Id.* at 709.

154. *Id.* at 711. Cf. *Widmar*, 454 U.S. at 274. ("The forum is available to a broad class of non-religious as well as religious speakers; there are over 100 recognized student groups at UMKC. The provision of benefits to so broad a spectrum of groups is an important index of secular effect.")

155. "While this case does not involve students of the college age, neither does it involve children in the primary grades." *Bender*, 563 F. Supp. at 712.

156. The court determined "that there would be no more supervision than that which the state properly provided in securing the safety, security and general convenience for persons attending the celebration of Mass with the Pope at the National Mall. *Id.* at 715 (referring to *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979)). See also *Roemer*, 426 U.S. at 747 (the state properly provides government services like fire and police protection at no charge to religious groups).

157. The district court noted that its holding was a narrow one. "The court merely holds that *under the precise set of undisputed facts presented*, the defendants have created an open forum for the students' use, have excluded the plaintiffs by reason of their speech, and have not demonstrated

*WIDMAR V. VINCENT: BORDER SECURED AT THE PUBLIC
UNIVERSITY*

In *Widmar v. Vincent*,¹⁵⁸ the Supreme Court upheld, for the first time, the right of a religious club to coexist with other campus clubs. The controversy took place at the University of Missouri at Kansas City. In 1977, a campus-registered religious group named Cornerstone was denied use of the university buildings. The grounds for the denial were found in the university regulations prohibiting the use of school facilities by religious groups.¹⁵⁹ When Cornerstone challenged the regulations, the federal district court upheld the university's policy and granted the university summary judgment.¹⁶⁰ The court of appeals rejected the district court's analysis and held that religious speech, like other speech, is protected by the first amendment.¹⁶¹ The court of appeals determined that for the university to exclude Cornerstone it must have a compelling state

that the Establishment Clause requires such discrimination." *Bender*, 563 F. Supp. at 716 (emphasis in original).

158. 454 U.S. 263 (1981) (8-1 decision; White, J., dissenting).

159. The policy specifically required:

No University buildings or grounds . . . may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. . . . The prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of the Board of Curators, by the Constitution and laws of the State and is not open to any other construction.

Id. at 265-66 n. 3.

160. *Chess v. Widmar*, 480 F. Supp. 907 (W.D. Mo. 1979), *rev'd*, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom. Widmar v. Vincent*, 454 U.S. 263 (1981). The court found the policy to be not only reasonable, but required by the establishment clause. *Id.* at 916. In applying the *Lemon* test, the district court found the first and third factor would allow Cornerstone to meet in the buildings. *Id.* at 914. Concerning the secular purpose test, the court state, "[a] university policy that permitted *any* student group to meet in university-owned buildings for *any* purpose would aid all student groups, regardless of religious affiliation and would, therefore, reflect a clear secular purpose." *Id.* (emphasis in original). Concerning the third part of the test, the court concluded that "entanglement with religion would be completely avoided" since this secular policy "would make no distinction between groups or their purposes." *Id.* The second test, however, was found to bar the group. "This Court finds that a university policy permitting regular religious services in university-owned buildings would have the primary effect of advancing religion." *Id.* at 915-16. The court further cited the proposition that the state could not allow the religious student group to use the buildings without lending impermissible aid to religion. *Chess*, 480 F. Supp. at 915 (citing *Tilton v. Richardson*, 403 U.S. 672, 680-82 (1971)). The students argued that their activities, which admittedly included worship and religious teaching, constituted a form of speech which was being discriminated against. *Id.* The court dismissed this argument distinguishing religious speech from the first amendment protected right to speak. *Id.* at 918.

161. *Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom. Widmar v. Vincent*, 454 U.S. 263 (1981).

interest.¹⁶² The court held that no such interest existed and granted Cornerstone the right to coexist with other campus organizations.¹⁶³

The Supreme Court viewed the case as discrimination by the university against religious speech.¹⁶⁴ It pointed out that the university had created a forum for use by the student groups and yet excluded those groups whose activity included religious speech.¹⁶⁵ The university's justification for exclusion (the establishment clause) was insufficient.¹⁶⁶

In applying the *Lemon* test, the *Widmar* Court approved of the circuit court's reasoning and conclusions.¹⁶⁷ The secular purpose was the creation of a forum in which students could exchange ideas. The primary effect of the policy was not the inhibition or advancement of religion; it merely advanced the exchange of ideas. The entanglement of the state and religion would be minimal because the state would not be called upon to do more than monitor the group. The Court further discussed the second test of primary effect. It termed the benefits which a religious student group would receive as merely incidental.¹⁶⁸ The Court pointed out that "an open forum in a public univer-

162. The university claimed that the compelling state interest was that to act otherwise would violate the establishment clause. *Id.*

163. The appellate court agreed with the district court's analysis of the first and third prong of the *Lemon* test. *See supra* note 156. It could not agree, however, that the primary effect of advancing religion was a necessary conclusion. It found that the policy would have the primary effect of not advancing religion, but of advancing the "University's admittedly secular purpose—to develop students' 'social and cultural awareness as well as [their] intellectual curiosity.'" *Chess*, 635 F.2d at 1317. Under such a policy the university would not be sponsoring religious activity, groups like Cornerstone would be the actual sponsors. The university's role would be *de minimus*.

The appellate court further corrected the district court's understanding of *Tilton*. *Tilton* was concerned, the court instructed, with control, not use, of a university buildings. *Id.* at 1319. Here, there was no question but that the university would retain control. *Id.*

164. *Widmar v. Vincent*, 454 U.S. 263, 267 (1981).

165. *Id.*

166. *Id.* at 270-76. "It does not follow . . . that an 'equal access' policy would be incompatible with this Court's Establishment Clause cases." *Id.* at 271.

167. *Id.* at 271-72 & n. 10.

168. *Id.* at 274. The Supreme Court further stated:

We are not oblivious to the range of an open forum's likely effects. It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion.

Id. at 273-74 (citations omitted).

sity does not confer any imprimatur of State approval,"¹⁶⁹ and likened the extension of general benefits to those of the public services the state already provides for churches and religious educational institutions in the way of fire and police protection.¹⁷⁰ The Court concluded:

Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.¹⁷¹

For these reasons, Cornerstone was accorded the full benefits given to every other student group on the campus of the University of Missouri at Kansas City.

BORDER ESTABLISHMENT AT THE HIGH SCHOOL

In *Widmar*, the Supreme Court expressly reserved the question whether an establishment clause defense would preclude application of its holding to the public high school.¹⁷² The Court also was not confronted with the question of whether the existence of an activity period for various clubs created an open forum at the high school level. What it did not reserve, however, was its conclusion that speech about religion and actual worship are protected forms of speech.¹⁷³ It is therefore proper to consider the concept of freedom of speech in the schools.

While school boards admittedly have the responsibility of managing the classrooms, they may not manage them in such a way as to violate a student's constitutional rights.¹⁷⁴ Generally, absent a specific showing of constitutionally valid reasons to regulate speech, students may freely express their views.¹⁷⁵ As

169. *Id.* at 274.

170. *Id.* at 274-75.

171. *Id.* at 277. The dissent of Justice White focused on the proposition that religious worship is not a protected form of speech. *Id.* at 284. He would allow a university to permit its buildings to be used for religious clubs, but he would not require it. *Id.* at 282.

172. *Id.* at 262 n. 14.

173. *Id.* at 269 & n. 6.

174. See *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969); *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (allowing unwilling students to excuse themselves from the recitation of the pledge of allegiance to the flag). See generally Note, *Constitutional Implications of Compulsory Flag Salute Statutes*, 12 GEO. WASH. L. REV. 70 (1943).

175. *Tinker*, 393 U.S. at 511. See generally Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477 (1981); Tushnet, *Free Expression and the Young Adult: A Constitutional Framework*, 1976 U. ILL. L.F. 746; Note, *Constitutional Rights of High School Students*, 23 DRAKE L. REV. 403 (1974). This proposition, however, is

discussed earlier, the school board of Des Moines, Iowa could not interfere with its armband-wearing students' expression of pure speech against the Viet Nam war.¹⁷⁶ The courts have even encouraged student expression in the public high schools, entitling them to relief when the school authorities have attempted to suppress views disseminated through the high school newspaper.¹⁷⁷ In *Zucker v. Panitz*, one such case, the court referred to *Tinker* and declared that free speech rights for students should not be confined to classroom discussion:

The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school. It is also an important part of the educational process. A student's rights therefore, do not embrace merely the classroom hours.¹⁷⁸

This is particularly true when a school creates a forum for its students by providing time and space for clubs and activities. Personal intercommunication flourishes in these marketplaces of ideas. While the school has not created a traditional public forum,¹⁷⁹ it has created a limited public forum for its students.¹⁸⁰

subject to the same restrictions placed on speech by adults. See *Cox v. Louisiana*, 379 U.S. 536 (1965). "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Id.* at 554.

It is naive to argue that the rights of students are totally identical to the rights of adults. Such has never been the case. See, e.g., *Nicholson v. Board of Educ.*, 682 F.2d 858, 863 (9th Cir. 1982) (students' rights are not coextensive with those of adults). Yet students do have rights. *Tinker*, 393 U.S. at 506. A model for entrusting these rights to students in a progressive fashion is provided by Professor Ladd. Ladd, *Civil Liberties for Students—At What Age?*, 3 J. LAW & EDUC. 251 (1974). He argues for endowing the citizens' rights as the student matures in gradual steps. *Id.* at 255. In the school, contractual agreements would be made between the teachers and their students.

176. See authorities cited *supra* note 4.

177. *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969).

178. *Id.* at 105 (quoting *Tinker*, 393 U.S. at 512).

179. A public forum is a place where citizens may freely assemble and express their views. See generally *Perry Educ. Ass'n. v. Perry Local Educators Ass'n.*, 103 S. Ct. 948 (1983); *International Society for Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Auth.*, 691 F.2d 155 (3d Cir. 1982); Kalven, *The Concept of Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1; Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233.

Traditional public forums include city streets, parks and sidewalks, *Hague v. CIO*, 307 U.S. 496 (1939), municipal theatres and auditoriums, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), and state capitol grounds, *Edwards v. South Carolina*, 372 U.S. 229 (1963). "The primary factor in determining whether property owned or controlled by the government is a public forum is how the locale is used." *International Society for Krishna Consciousness*, 691 F.2d at 160. The rule as to forums is that once

Once a right to speech has been established in an open forum, it is essential to determine how that right can be regulated. Unquestionably such regulation must be reasonable. Where the speech causes disturbance or coercion it may be regulated.¹⁸¹ Where it would cause interference with the forum's purpose, it may be restricted.¹⁸² When speech cannot be practically accom-

an area "is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone. . . ." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (declaring unconstitutional a city ordinance prohibiting peaceful picketing within 150 feet of schools). *See also Bonner-Lyons v. School Comm. of Boston*, 480 F.2d 442 (1st Cir. 1973). "[O]nce a forum is opened for the expression of views, regardless of how unusual the forum, . . . [no] censor may pick and choose between those views which may or may not be expressed." *Id.* at 444.

180. The Supreme Court defined a limited public forum as a category of public property which is not by tradition or designation a forum for public communication. *Perry Educ. Ass'n*, 103 S. Ct. at 955. In dicta, the Third Circuit recently declared, "Since the exchange of ideas is an essential part of the education process, but the need for discipline and order is great, a public high school is probably a limited forum also." *International Society for Krishna Consciousness, Inc.*, 691 F.2d at 160. *Accord Bender v. Williamsport Area School Dist.*, 563 F. Supp. 697, 705 (M.D. Pa. 1983). *Contra Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1036 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 800 (1983).

The *Brandon* court's rejection of the limited public forum argument rested on a line of lower court cases which led to the conclusion that "Establishment Clause considerations limit [a student's] right to air religious doctrines." 635 F.2d at 980. With the Supreme Court's later proclamation that religious speech is protected and that the establishment clause is *not* a necessary bar to accommodation, *Brandon's* foundation crumbled. Its holding that "the students' free speech and associational rights, cognizable in a 'public forum,' are severely circumscribed by the Establishment Clause in the public school setting," now stands refuted by *Widmar*. The rejection of the public forum doctrine by the Fifth Circuit in *Lubbock Civil Liberties Union* is also meaningless. The only foundation for its rejection was the *Brandon* holding. *Lubbock Civil Liberties Union*, 669 F.2d at 1048. *See generally Nahmod, Beyond Tinker: The High School as an Educational Public Forum*, 5 HARV. C.R.-C.L. L. REV. 278 (1970).

181. *Tinker*, 393 U.S. at 508-09; *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966); *Blackwell v. Issaquena Cty. Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966) (companion case of *Burnside*; here the court upheld the school's action of prohibiting students from wearing freedom buttons because of the great disturbances which were created).

182. *See Jones v. North Carolina Prisoner's Labor Union, Inc.*, 433 U.S. 119 (1977) (upholding prison regulations which restricted prisoners' freedom of association and free speech rights). The prisoners' freedom to speak was required to be "consistent with the inmates' status as prisoners and with the legitimate operational considerations of the institution." *Id.* at 130. *Compare Grayned v. City of Rockford*, 408 U.S. 104 (1972) (loud demonstration interfered with purpose of public school—atmosphere of silence for reading) *with Brown v. Louisiana*, 383 U.S. 131 (1966) (silent vigil protest allowed in library; no interference with public library's purpose).

modated, it may be regulated.¹⁸³ In Bible club cases there is no contention that a disturbance would be caused by their existence. Neither is there any interference with the school's purpose. The clubs would certainly be regulated just as the other school organizations are regulated.¹⁸⁴

The blockade against religious speech which the high school boards have attempted to erect has been the establishment clause. The contention is that religious speech may be restricted because of the establishment clause.¹⁸⁵ Consequently the three pronged *Lemon* test must be applied to examine whether Bible clubs are the type of religious speech that will be restricted.¹⁸⁶

The first prong of the test examines the purpose of a proposed state action which would involve religion. *Widmar* has shown that the primary focus of the test addresses the broader scope of the action and not just the narrow scope of the proposed policy.¹⁸⁷ The Supreme Court approved of the district court's analysis: "A [neutral] university policy that permitted *any* student group to meet in university-owned buildings for *any* purpose would aid all student groups, regardless of religious affiliation. . . ."¹⁸⁸ This analysis, applied to the high school context, results in the same conclusion.¹⁸⁹

The second prong of the test asks whether the primary effect of the new program advances or inhibits religion. The fear is that symbolic sponsorship or direct financial aid may be construed as an advancement of religion.¹⁹⁰ *Widmar* declared the benefits accorded a religious club in a university setting to be

183. See, e.g., *Cox v. Louisiana*, 379 U.S. at 554-55. "[One could not] insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement." *Id.*

184. It is interesting that the plaintiff suggested that her Bible club could be allotted even fewer benefits than other school clubs. *Bender*, 563 F. Supp. at 711, 713-14 (foregoing mention in the school yearbook and newspaper).

185. See *supra* notes 104-57 and accompanying text.

186. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See *supra* notes 28-103 and accompanying text.

187. *Widmar v. Vincent*, 454 U.S. 263 (1981).

188. *Chess v. Widmar*, 480 F. Supp. 907, 914 (W.D. Mo. 1979), *rev'd*, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom. Widmar v. Vincent*, 454 U.S. 263 (1981).

189. This conclusion results regardless of whether the policy is already in existence or if a school board is granting religious clubs rights previously denied when the board inserts the club into the already existing program. See, e.g., *Brandon*, 635 F.2d at 973; *Lubbock Civil Liberties Union*, 669 F.2d at 1039.

190. See *supra* notes 64-93 and accompanying text.

incidental.¹⁹¹ Two factors in the area of sponsorship, the spectrum of the groups and the maturity of the students, were deemed especially relevant.¹⁹² At the high school scene each of these factors are equally relevant. The more groups in existence, the stronger the case is for the Bible clubs to be recognized. The ultimate question of how many groups will suffice to be a relevant factor is one to which the Court gave no guidance. The lower courts will be left to decide this issue on their own. The existence of one hundred groups at the University of Missouri at Kansas City, however, was determined sufficient.¹⁹³ The *Bender* court held that twenty-five would suffice.¹⁹⁴

The maturity of the students circumvents the problem of state association, or the imprimatur of approval. The *Widmar* Court noted that college students were less impressionable than younger students and would be able to distinguish sponsorship from accomodation.¹⁹⁵ The question which must be answered, of course, is "at what age is one able to make such an appreciation and distinction?"¹⁹⁶ The Supreme Court has not provided guidance on this issue. Certainly an elementary school student would not be able to perceive a distinction between accomodation and endorsement. But it is difficult to argue that students in whom the states recognize the capacity to make incredibly difficult decisions cannot make the distinction of state sponsorship. As one judge has pointed out: "[T]he court can take judicial notice of the progressively higher levels of intellectual and emotional development of students in the latter grades of secondary schools. . . . High school students . . . are at an age approaching both adulthood¹⁹⁷ and franchise."¹⁹⁸

191. 454 U.S. at 274.

192. *Id.*, n. 14.

193. *Id.* at 274.

194. 563 F. Supp. at 711. The court noted that size of the group in the high school did not prevent it from being classified as a "broad" class. Indeed, the court recognized that a high school, because of its smaller population, would naturally have fewer organizations than normally found on university campuses. The court noted that the groups at Williamsport included a wide range of interests, including sports, government, social service, dramatics, journalism, language and music. *Id.*

195. 454 U.S. at 274 n. 14.

196. *See Ladd, supra* note 175.

197. While students in high school are legally minors, they are more and more gaining legal rights as adults. Many states have recognized that the youth of our nation should be accorded greater benefits and responsibility. The decision of many legislators to reduce the age of majority to eighteen reflects this new attitude. *See, e.g.*, HAWAII REV. STAT. § 577-1 (Supp. 1975) ("All persons, whether male or female, residing in the State, who have attained the age of eighteen, shall be regarded as of legal age and their period of minority to have ceased"); VT. STAT. ANN. tit. 1, § 173 (1972) ("Persons of

Widmar disposed of the argument that religion would be advanced by the financial aid in the form of rent-free classrooms and free utilities. "[I]f the Establishment Clause barred the extension of general benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'"¹⁹⁹ As for the excessive entanglement prong of the test, *Widmar* approved the court of appeals' statement that the universities would risk greater entanglement attempting to enforce exclusions of worship and prayer.²⁰⁰ The circuit court commented that the administrative entanglement of supervision at the high school level would create more problems.²⁰¹ Judge Nealon, in *Bender v. Williamsport Area School District*, held that supervision or monitoring is not necessarily excessively entangling.²⁰² He examined the court approved services which the state provided for the celebration of a papal Mass at the National Mall in 1977.²⁰³ In so doing the state involved itself in ensuring orderliness. He analogized the

the age of eighteen years shall be considered of age and until they attain that age, shall be minors.").

However, even youths under the age of eighteen are being accorded more rights. Minors who have sufficient capacity to understand the nature and consequences of proposed medical treatment may consent to that treatment on the same terms as an adult. See Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115 (1973). This right has been granted to minors statutorily in several states. See, e.g., MISS. CODE ANN. § 7129-81(h) (Supp. 1971) ("Any unemancipated minors of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment or procedures . . . may effectively consent to such treatment."). See generally STANDARDS RELATING TO RIGHTS OF MINORS, JUVENILE JUSTICE STANDARDS (1980).

198. *Seyfried v. Walton*, 668 F.2d 214, 219-20 (3d Cir. 1981) (Rosenn, J., concurring), cited with approval in *Bender v. Williamsport Area School Dist.* 563 F. Supp. 697, 712 (M.D. Pa. 1983).

199. *Widmar v. Vincent*, 454 U.S. at 274-75 (citing *Roemer*, 426 U.S. at 767).

200. *Chess v. Widmar*, 635 F.2d 1310, 1319 (8th Cir. 1980), *aff'd sub nom.* *Widmar v. Vincent*, 454 U.S. 263 (1981). The Supreme Court explained:

We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech." Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

454 U.S. at 272 n. 11 (citation omitted).

201. *Chess v. Widmar*, 635 F.2d at 1319. "[H]igh school students necessarily require more supervision than do young adults of college age."

202. *Bender*, 563 F. Supp. at 715.

203. Judge Nealon was referring to *O'Hair v. Andrus*, 613 F.2d 931 (D.C.Cir. 1979). There, the court denied petitioner an injunction enjoining the Mass pending appeal. The court noted the Interior Department would expend between \$128,450 and \$178,450 in connection with the Mass. *Id.* at 933. Finding this amount not to exceed that which would be expended for

ordering of a school meeting to this situation and determined that the classroom supervision would involve no more entanglement than that provided at the Mass.²⁰⁴ Remembering that involvement or supervision is permissible and *excessive* involvement or *excessive* supervision is impermissible, the excessive entanglement test is passed. Moreover, as in *Widmar*, to hold otherwise would risk greater entanglement.²⁰⁵

A careful analysis of the Bible club problem in light of *Widmar* allows for a similar outcome. Where a public high school creates the possibility for students to participate in non-instructional activities or groups, a voluntary club whose purpose is religious has a constitutional right to exist.

CONCLUSION

Unless the Supreme Court takes a case on similar issues, this area of Bible study clubs in the public high schools will remain in confusion. Until then, the type of Bible study club allowed in *Bender* is prohibited in the second and fifth judicial circuits, California, the Southern District of West Virginia and the Western District of Oklahoma.²⁰⁶ Legislation is now pending in the Senate in the form of a bill specifically extending the *Widmar* principle to federally funded high schools. Senate Bill 2928 provides:

That no public secondary school receiving Federal financial assistance, which generally allows groups of students to meet during non-instructional periods, shall discriminate against any meeting of students on the basis of the religious content of the speech at the meeting, if (1) the meeting is voluntary and orderly, and (2) no activity which is in and of itself unlawful is permitted.²⁰⁷

The bill has been adjudged constitutional by at least one scholar

other outdoor gatherings at the Mall, the court held for a neutrality of equal access. *Id.* at 935.

204. Judge Nealon analogized:

The teacher chosen to "monitor" the meetings would be the functional equivalent of a policeman at a religious rally held in a public park. Just as the policeman in the above situation is acting to fulfill an obligation to society by ensuring peaceful discussion, so too would a teacher acting as a monitor during Petros' meetings be fulfilling an obligation to the school by maintaining order among the students. While the teacher's presence certainly would involve some "entanglement" with the meetings, such "limited and incidental entanglement between church and state authority is inevitable in a complex modern society." In short, the "entanglement" would not be "excessive."

Bender, 563 F. Supp. at 715 (citations omitted).

205. See *supra* note 200.

206. See *supra* notes 104-57 and accompanying text.

207. S. 815 § 3, 98th Cong., 1st Sess., 129 CONG. REC. 2933 (1983) (proposed by Sen. Hatfield). See also 128 CONG. REC. S 11780-86 (daily ed. Sept. 17, 1982) (remarks concerning S. 2728, similar legislation).

of American constitutional law, Laurence Tribe.²⁰⁸ Again, however, the courts must test its validity. The likelihood that school districts would rather drop their religious activity accommodations rather than become involved in expensive litigation is great. This has recently been the case in Sonoma, California, Anderson County, South Carolina and Saddleback, California.²⁰⁹

Bender provides the only affirmative guidance to school districts.²¹⁰ When the Fifth Circuit struck down Lubbock's policy, four justices dissented to the denial of the school district's petition for rehearing.²¹¹ In dissent, the justices called for a responsible judiciary to give more guidance to school districts. Justice Reavley warned: "We should not forget . . . that the young student may also be given the impression that our government and

208. Telephone interview with Sen. Hatfield (Oct. 17, 1983).

209. These examples came from Senator Hatfield's amici curiae brief to the Supreme Court. *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 800 (1983), *reprinted in* 128 CONG. REC. S 16007, 16008 (daily ed. Dec. 21, 1982). The Amici related the situations:

In Sonoma, California, a group of high school students who had been meeting to discuss religious topics was recently disbanded by the school's principal after nearly ten years as a recognized student group. The school district's legal counsel, after reviewing this Court's decision in *Widmar* and the Fifth Circuit's decision in the instant case, advised the principal that Lubbock controlled in the high school setting and this prohibited the group's activities.

In Anderson County, South Carolina, students have been meeting weekly in school facilities for the past two years before school buses arrived for prayer, Bible study and religious discussions. The students have met on school premises pursuant to a written policy applying to non-student groups allowing use of the school facilities "to promote the general cultural, civic, religious, educational and social welfare of the community." The policy was clarified in November 1982 to make explicit that religious activity is not permitted during the school day. The group may continue to meet under this policy. The local affiliate of the American Civil Liberties Union has threatened to sue the school board if the religious activities continue.

In Saddleback, California, a written school policy permitted student groups to meet to discuss issues without regard to content and subject matter. The policy distinguished between sponsored clubs, which received financial support and supervision from the school, and student-initiated groups, which received no such support. A student-initiated group met during the school lunch period to discuss topical issues and read passages from the Bible. The American Civil Liberties Union filed suit against the school board, asking that the policy, as applied, be declared unconstitutional. The suit was dropped when a newly elected school board promulgated a new policy that allows only sponsored clubs.

128 CONG. REC. at S 16008-09. *See also* 128 CONG. REC. at S 11782 (daily ed. Sept. 17, 1982) (other examples of school board actions taken in response to requests for accommodation by students).

210. 563 F. Supp. 697 (M.D. Pa. 1983).

211. 680 F.2d 424 (5th Cir. 1982).

the courts and the schools are hostile to all religious belief and practice. I would consider that a very great wrong to the children, to the Constitution and to the nation."²¹² Absent a definitive answer from the Supreme Court, Justice Reavley's conclusion is not an unlikely possibility.

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212. *Id.* at 426.

