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Constitutional Law - First Amendment - State University Resolution Prohibiting Use of Facilities for Student Religious Worship or Teaching Violates Free Speech Rights. (Widmar v. Vincent)

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CONSTITUTIONAL LAW—First Amendment—State University Regulation Prohibiting Use of Facilities for Student Religious Worship or Teaching Violates Free Speech Rights. *Widmar v. Vincent*, 102 S. Ct. 269 (1981).

Religious activities in public schools have been the subject of intense and controversial litigation for a number of years. The constitutional issues involved in these disputes arise from the first amendment of the United States Constitution,[1] which assures personal freedom in the exercise of religious belief[2] and speech[3] and also prohibits Congress and the states[4] from making any "law respecting an establishment of religion."[5] Interpretation of the relative effect of these clauses on the constitutionality of student-initiated religious worship in a state university was the subject of a

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1. U.S. CONST. amend. I provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. The portion of the first amendment which states that "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ," U.S. CONST. amend. I, is referred to as the "free exercise clause."

3. The portion of the first amendment which states that "Congress shall make no law . . . abridging the freedom of speech . . . ," U.S. CONST. amend. I, is referred to as the "free speech clause."

4. Provisions of the first amendment have been incorporated into the fourteenth amendment and, therefore, apply to state governments as well as the federal government. *See* Everson v. Board of Educ., 330 U.S. 1 (1947) (incorporating establishment clause, which is that portion of the first amendment which states that "Congress shall make no law respecting an establishment of religion . . . ," U.S. CONST. amend. I); Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating free exercise clause); Gitlow v. New York, 268 U.S. 652 (1925) (incorporating free speech clause).

5. One of the most often quoted definitions of the establishment clause was written by Justice Black in 1947:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

recent United States Supreme Court decision. In *Widmar v. Vincent*[6] the Court held that a university which makes facilities generally available for meetings of registered student groups cannot exclude a group because its meetings include religious worship.

This note will analyze the *Widmar* decision in terms of the Court's application of first amendment principles. In addition, it will analyze the potential impact of the decision on student-initiated religious activities in public secondary schools[7] as well as at state colleges and universities.

I. THE CASE

Widmar v. Vincent[8] involved a student group, Cornerstone, which had regularly met in University of Missouri at Kansas City facilities from 1973 to 1977 in accordance with a university policy designed to promote the activities of registered student groups as a "cooperative aid to academic study."[9] In 1977 the university became aware that Cornerstone's activities included aspects of "religious worship,"[10]

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6. 102 S. Ct. 269 (1981).

7. The impact of the decision on public elementary schools is not considered because of various differences in elementary and secondary school policy and because it is not likely that religious worship in elementary schools would be student-initiated.

8. 102 S. Ct. 269 (1981). The case name in both the district court and court of appeals was *Chess v. Widmar*. These prior decisions provide many of the facts. 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, 102 S. Ct. 269 (1981).

9. Chess v. Widmar, 635 F.2d 1310, 1312 (8th Cir. 1980), *aff'd sub nom.* Widmar v. Vincent, 102 S. Ct. 269 (1981).

10. The university made this determination based on a letter from Cornerstone's attorney which contained the following description of the meetings:

> Typical Cornerstone meetings in University facilities usually include the following:
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> 1. The offering of prayer;
> 2. The singing of hymns in praise and thanksgiving;
> 3. The public reading of scripture;
> 4. The sharing of personal views and experiences (in relation to God) by various persons;
> 5. An exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles; and
> 6. An invitation to the interested to meet for a personal discussion.
>
> As you probably already know, these meetings are open to the public. Any students, be they Jewish, Christian, Moslem, or any other persuasion are invited, and, in fact, actively recruited by the students in Cornerstone.

and informed the group it could no longer meet in university buildings. The exclusion was based upon a university regulation prohibiting the use of buildings or grounds "for purposes of religious worship or religious teaching."[11] Adoption of the exclusionary regulation was required, in the opinion of the Board of Curators,[12] by the establishment clause of the Missouri Constitution,[13] which requires a strict separation between the church and the state.

Members of Cornerstone brought suit in the United States District Court for the Western District of Missouri, alleging that the regulation violated their rights of free exercise of religion, equal protection and freedom of speech under the first and fourteenth amendments to the United States Constitution.[14] In granting the university's motion for summary judgment, the district court found that the exclusionary regulation was required by the establishment clause

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> Although these meetings would not appear to a casual observer to correspond precisely to a traditional worship service, there is no doubt that worship is an important part of the general atmosphere. There also is no doubt that the undecided and the uncommitted are encouraged and challenged to make a personal decision in favor of trusting in Jesus Christ both for salvation and for the power to live an abundant Christian life on earth.

Chess v. Widmar, 635 F.2d 1310, 1313-14 (8th Cir. 1980), *aff'd sub nom.* Widmar v. Vincent, 102 S. Ct. 269 (1981).

11. The text of the regulation is as follows:

> 4.0314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. Student congregations of local churches or of recognized denominations or sects, although not technically recognized campus groups, may use the facilities, commonly referred to as the student union or center or commons under the same regulations that apply to recognized campus organizations, provided that no University facilities may be used for purposes of religious worship or religious teaching. The general 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. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. This provision does apply to such buildings as may be designated under provision of part .0106.

Chess v. Widmar, 635 F.2d 1310, 1313 (8th Cir. 1980), *aff'd sub nom.* Widmar v. Vincent, 102 S. Ct. 269 (1981). The parties stipulated that there is no chapel on the University of Missouri at Kansas City campus. *Id.* at 1313 n.2.

12. *Id.* at 1316.

13. MO. CONST. art. 1, § 6; art. 1, § 7; art. 9, § 8.

14. Chess v. Widmar, 480 F. Supp. 907, 908 (W.D. Mo. 1979), *rev'd*, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom.* Widmar v. Vincent, 102 S. Ct. 269 (1981).

of the United States Constitution and rejected the argument that it violated free exercise and free speech rights of the students.[15]

The Court of Appeals for the Eighth Circuit reversed.[16] Its decision was affirmed by the Supreme Court, which limited its holding to an analysis of the free speech and establishment clause concerns[17] presented by the narrowly defined factual situation.[18]

II. BACKGROUND

Much has been written about the intent of the framers of the first amendment with respect to the "religion clauses"[19] since application of their provisions to situations involving the relationship between church and state is, at best, complex.[20] The free exercise clause can be stated as a means of assuring personal freedom of religious belief or nonbelief.[21] The establishment clause prohibits the government not only from creating a state church, but also from taking any steps toward the establishment of religion.[22] Although separation between church and state is required, some aspects of state "accommodation" of religion are not only permissible but necessary in order to allow free exercise of belief.[23] Therefore, both tension and harmony exist between the religion clauses.

Supreme Court decisions with respect to religion and public schools illustrate the Court's attempts to reconcile both the supporting and conflicting elements of the religion

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15. *Id.* at 907.

16. Chess v. Widmar, 635 F.2d 1310, 1310 (8th Cir. 1980), *aff'd sub nom.* Widmar v. Vincent, 102 S. Ct. 269 (1981).

17. Widmar v. Vincent, 102 S. Ct. 269, 276 n.13 (1981).

18. *Id.* at 278.

19. *See supra* notes 2 & 4. The establishment and free exercise clauses are together referred to as the "religion clauses."

20. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14 (1978); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381 (1967); Harrison, *The Bible, The Constitution and Public Education*, 29 TENN. L. REV. 363 (1962).

21. *See* Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

22. *See* McGowan v. Maryland, 366 U.S. 420 (1961).

23. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970); Zorach v. Clauson, 343 U.S. 306 (1952).

clauses. "Release time"[24] programs for religious instruction are permissible[25] except when they are conducted on school property and under the supervision of the school administration.[26] The state may constitutionally provide financial assistance to parochial school children for bus transportation,[27] and textbooks for the study of secular subjects,[28] but it cannot subsidize the salaries of parochial school teachers even for the teaching of secular subjects.[29]

Numerous decisions have dealt with religious activities and worship on the elementary and secondary levels of public education. Religious activities initiated by school authorities and teachers have uniformly been found to be in violation of the establishment clause, even though they were nondenominational and participation was not required.[30]

In *Lemon v. Kurtzman*[31] the United States Supreme Court established a tripartite test for determining whether a state action violates the establishment clause. The *Lemon* Court stated:

> In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the establishment clause intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity."
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> Every analysis in this area must begin with consideration of the cumulative criteria developed by the court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the stat-

24. Public school "release time" programs consist of releasing pupils at particular times during regular school hours for the purpose of receiving religious instruction. *See generally* Harrison, *supra* note 20, at 371-74.

25. Zorach v. Clauson, 343 U.S. 306 (1952).

26. McCollum v. Board of Educ., 333 U.S. 203 (1948).

27. Everson v. Board of Educ., 330 U.S. 1 (1947).

28. Board of Educ. v. Allen, 392 U.S. 236 (1968).

29. Lemon v. Kurtzman, 403 U.S. 602 (1971).

30. *See* Abington School Dist. v. Schemp, 374 U.S. 203 (1963) (Bible reading); Engle v. Vitale, 370 U.S. 421 (1962) (prayers). *See generally* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 561-80 (1968); Harrison, *supra* note 20, at 374-80.

31. 403 U.S. 602 (1971).

> ute must not foster "an excessive government entanglement with religion."[32]

This test has been applied in a number of lower federal and state court cases[33] in which the courts were asked to determine whether religious activities in public secondary schools violated the establishment clause even though they were voluntarily initiated by the students. These decisions have unanimously held such activities to be a violation. In these cases the courts also considered whether an establishment clause prohibition on religious activity violated other first amendment rights of the students. They concluded that rights of free exercise of religion or free speech were not violated,[34] or that students were not denied access to all "public forums"[35] for religious expression,[36] or that even if there was

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32. *Id.* at 612-13 (footnotes omitted). In a later case the Court clarified the application of the test by specifying that if a statute fails to satisfy any one of the three tests, it is violative of the establishment clause. Stone v. Graham, 449 U.S. 39, 40 (1980).

33. *See* Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982); Karen B. v. Treen, 653 F.2d 897 (2d Cir. 1981); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 970 (1982); Hunt v. Board of Educ., 321 F. Supp. 1263 (S.D. W. Va. 1971); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977); Trietley v. Board of Educ., 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978).

34. Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1048 (5th Cir. 1982); Karen B. v. Treen, 653 F.2d 897, 902 (2d Cir. 1981); Brandon v. Board of Educ., 635 F.2d 971, 977 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 970 (1982); Hunt v. Board of Educ., 321 F. Supp. 1263, 1266-67 (S.D. W. Va. 1971); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, —, 137 Cal. Rptr. 43, 52-53, *cert. denied*, 434 U.S. 877 (1977); Trietley v. Board of Educ., 65 A.D.2d 1, —, 409 N.Y.S.2d 912, 916-17 (1978).

35. "Public forums" are places, such as streets, sidewalks and parks, which have achieved special status with respect to first amendment rights of citizenry.

> Their classification as public forums serves as constitutional shorthand for the proposition that, in addition to its usual obligation of content-neutrality (an obligation that exists whether or not a public forum is involved), government cannot regulate speech-related conduct in such places except in narrow ways shown to be necessary to serve significant governmental interests. Thus such places cannot be put off limits to leafleting, parading, or other first amendment activities merely to spare public expense or inconvenience; more focused regulations of "time, place, or manner" are constitutionally compelled—even if the regulation challenged as invalid leaves would-be speakers or paraders with ample alternatives for communicating their views.

L. TRIBE, *supra* note 20, at 689 (citations omitted).

36. Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1048 (5th Cir. 1982); Brandon v. Board of Educ., 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 970 (1982); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 1, —, 137 Cal. Rptr. 43, 52-53, *cert. denied*, 434 U.S. 877 (1977); Trietley v. Board of Educ., 65 A.D.2d 1, —, 409 N.Y.S.2d 912, 917 (1978).

some infringement of constitutional rights, it was justified by a compelling state interest in upholding the provisions of the establishment clause.[37]

Religion clause cases involving the higher levels of education have taken a somewhat different course from those involving the lower educational levels. Professor Giannella discusses this difference in terms of principles of academic freedom and the purposes of secular instruction about religion. He also explores the view that a university should be seen as a community in which the student temporarily resides, thereby justifying greater accommodation of the student's religious interests than is necessary at the lower educational levels where the student lives at home.[38] Although *Widmar* is the first case to reach the United States Supreme Court on the issue of whether the establishment clause is violated by student-initiated religious worship, a state court previously held that such activities do not violate the establishment clause and that their prohibition is an infringement on other first amendment rights of the students. In *Keegan v. University of Delaware*[39] the Delaware Superior Court decided a prohibition on the use of dormitory common areas for student religious purposes was a violation of the free exercise rights of the students.[40]

The Supreme Court's decision in *Widmar* confirms that state universities cannot exclude student-initiated religious worship where the university has made facilities generally available to student groups. Therefore, a dichotomy has developed which treats similar student-initiated religious activities and worship in the public schools differently, depending upon whether the place involved is a state university or a public secondary school.

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37. Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1048 (5th Cir. 1982); Brandon v. Board of Educ., 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 970 (1982); Hunt v. Board of Educ., 321 F. Supp. 1263, 1266 (S.D. W. Va. 1971); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, —, 137 Cal. Rptr. 43, 52-53, *cert. denied*, 434 U.S. 877 (1977).

38. *See* Giannella, *supra* note 30, at 381-83.

39. 349 A.2d 14 (Del. Super. Ct. 1975).

40. *Id.* at 17.

III. THE DECISION

In writing for the majority,[41] Justice Powell found that through its policy of providing meeting facilities the university had created a forum generally open to registered student groups and therefore had "assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms."[42] He stated that "with respect to persons entitled to be there, . . . the First Amendment rights of speech and association extend to the campuses of state universities."[43] The majority also determined that "religious worship and discussion" are forms of free speech protected by the first amendment,[44] and, therefore, in order to justify its regulation prohibiting religious worship and teaching, the university must show that it is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[45]

The university argued that allowing religious worship in its facilities was a violation of the establishment clause of the United States Constitution and that the state had a compelling interest in complying with its constitutional obligations. The majority agreed that if an open forum policy which did

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41. Chief Justice Burger and Justices Brennan, Marshall, Blackmun, Rehnquist and O'Connor joined Justice Powell in the majority opinion.

42. Widmar v. Vincent, 102 S. Ct. 269, 273 (1981).

43. *Id.* at 273. *See* Healey v. James, 408 U.S. 169 (1972); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

44. Widmar v. Vincent, 102 S. Ct. 269, 274 (1981). It was the majority's determination that "religious worship and discussion" are forms of speech protected by the first amendment which sparked a portion of Justice White's dissent. He argued for a distinction between religious worship and other forms of religious speech. *Id.* at 282 (White, J., dissenting). In his opinion, unless the distinction is drawn, "the Religion Clauses would be emptied of independent meaning in circumstances in which religious practice took the form of speech." *Id.* The majority's response was that such a distinction lacks intelligible content, is beyond judicial competence to administer, and lacks relevance to the preservation of the establishment clause. *Id.* at 274 n.6.

In most cases involving religion clause concerns, establishment clause prohibitions are balanced against the possibility of free exercise restraints. It is unclear whether the Court's analysis of *Widmar* in terms of free speech is due to a fact situation (exclusion from an open forum) found in free speech conflicts, or whether it signals a shift in policy with respect to establishment clause cases. If the decision does represent such a shift, it is then unclear whether application of free speech considerations to situations formerly determined on the basis of free exercise considerations will have a significant impact.

45. *Id.* at 274. *See* Carey v. Brown, 447 U.S. 455 (1980).

not exclude religious worship and teaching was, in fact, in violation of the establishment clause, then the exclusionary regulation would be justified on the basis of a "compelling state interest."[46] However, the majority did not find that such a nonexclusionary open forum policy would be violative of the establishment clause.

The Court analyzed the establishment clause issue according to the tripartite test specified in *Lemon v. Kurtzman*.[47] The Court agreed with the conclusion of both the district court and the court of appeals that a nonexclusionary open forum policy would have a secular purpose and would avoid excessive entanglement with religion.[48] The Court also found that such a policy would not have the primary effect of advancing religion because any benefits to religion would be merely "incidental benefits"[49] which do not "violate the prohibition against the 'primary advancement' of religion."[50] Two factors were found particularly relevant. First, use of an open forum would not confer any imprimatur of state approval on religion.[51] Second, the provision of benefits to a broad spectrum of groups indicates the secu-

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46. Widmar v. Vincent, 102 S. Ct. 269, 276 (1981).

47. 403 U.S. 602, 612-13 (1971). *See supra* text accompanying notes 31-37.

48. Widmar v. Vincent, 102 S. Ct. 269, 275 (1981). See 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, 102 S. Ct. 269 (1981), where the court said:

> 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. In addition, since such a policy would make no distinction between groups or their purposes, entanglement with religion would be completely avoided.

The Court of Appeals for the Eighth Circuit agreed with this reasoning. Chess v. Widmar, 635 F.2d 1310, 1317 (8th Cir. 1980), *aff'd sub nom.* Widmar v. Vincent, 102 S. Ct. 269 (1981).

49. In considering whether a governmental policy or regulation has a "primary effect" of advancing religion, the Court has held there is no violation of the establishment clause if there is "only a remote and incidental effect advantageous to religious institutions." McGowan v. Maryland, 366 U.S. 420, 450 (1961). *See also* Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 n.39 (1973).

50. Widmar v. Vincent, 102 S. Ct. 269, 276 (1981).

51. *Id.* The court of appeals stated that such a policy "would no more commit the University to . . . religious goals" than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance" or any other group eligible to use its facilities. Chess v. Widmar, 635 F.2d 1310, 1317 (8th Cir. 1980), *aff'd sub nom.* Widmar v. Vincent, 102 S. Ct. 269 (1981).

lar effect of the policy.[52] Therefore, a policy which does not exclude religious worship and teaching meets all three of the establishment clause tests and is constitutionally permissible.

The university also claimed that it had a compelling interest in complying with the applicable provisions of the Missouri Constitution,[53] which has been found by the Missouri Supreme Court to require a stricter separation of church and state than the Federal Constitution.[54] The majority, however, rejected this argument on the basis that the state's interest in a greater separation between church and state than that ensured by the establishment clause of the United States Constitution was not sufficiently compelling to justify infringement of the student group's right to free speech.[55]

The majority pointed out that its holding did not preclude the university from establishing reasonable time, place and manner regulations[56] and recognized the right to "exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education."[57] The narrowness of the basis of the Court's decision was also carefully specified:

> 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

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52. Widmar v. Vincent, 102 S. Ct. 269, 277 (1981). The Court noted that there are over 100 nonreligious and religious registered student groups to whom the use of university facilities is available (citing Wolman v. Walter, 433 U.S. 229, 240-41 (1977); Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 756, 781-82 n.38 (1973)).

53. *See supra* note 13.

54. Widmar v. Vincent, 102 S. Ct. 269, 277 (1981) (citing, e.g., American United v. Rogers, 538 S.W.2d 711, 720 (Mo. 1976) (en banc), *cert. denied*, 429 U.S. 1029 (1976) (holding that the Missouri Constitution requires stricter separation of church and state than does the United States Constitution)).

55. Widmar v. Vincent, 102 S. Ct. 269, 277 (1981).

56. *Id.* at 278 (citing Regents of Univ. of Cal. v. Baake, 438 U.S. 265, 312-13 (1978); Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment)).

57. Widmar v. Vincent, 102 S. Ct. 269, 278 (1981).

justify this violation under applicable constitutional standards.[58]

The concurring opinion of Justice Stevens expressed his fear that academic freedom might be undermined if a "compelling state interest" was necessary to exclude use of any "public forum" that a university created.[59] His concern was not that academic freedom with regard to the curriculum would be limited, but that it would be difficult to make decisions concerning time and space available to extracurricular activities unless content of proposed student activities was a permissible consideration.[60] However, he did agree that the university could not deny access unless it had a valid reason and that the establishment clause concerns with respect to both the United States and Missouri Constitutions were not valid.[61]

A major portion[62] of Justice White's dissent is based on his belief that the states are "a good deal freer to formulate policies that affect religion in divergent ways" than is reflected in the holding.[63] It is his contention that the establishment clause allows state policies which incidentally burden religion just as it allows policies which incidentally benefit religion.[64] He defines the issue as "not whether the state must, or must not, open its facilities to religious wor-

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58. *Id.*

59. *Id.* (Stevens, J., concurring).

60. *Id.* at 279. Justice Stevens suggests that if, for example, two groups of students made conflicting requests for the use of facilities, "one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of Hamlet," the university should not have to defend its decision on the basis of a "compelling state interest." *Id.* However, it appears that the majority dealt with this concern by not questioning the right of the university to make academic judgments as to the allocation of scarce resources. *Id.* at 278.

Laurence Tribe employs the term "semi-public forum" when referring to places such as schools and libraries where the government has powers denied in a true public forum to "preserve such tranquility as the facility's central purpose requires." L. TRIBE, *supra* note 20, at 690. It would seem reasonable that if "semi-public forums" are required to allocate scarce resources, they could also develop constitutionally permissible regulations denying access to groups whose messages are incompatible with the central purpose of the forum.

61. Widmar v. Vincent, 102 S. Ct. 269, 279-80 (1981).

62. Justice White also disagreed with the majority's opinion that religious worship is protected speech under the first amendment. *See supra* note 44 and accompanying text.

63. Widmar v. Vincent, 102 S. Ct. 269, 281 (1981) (White, J., dissenting). *See also* Sherbert v. Verner, 374 U.S. 398, 422-23 (1963) (Harlan, J., dissenting).

64. Widmar v. Vincent, 102 S. Ct. 269, 281 (1981).

ship; rather, it is whether the state may choose not to do so."[65] He concludes that the minimal burden on the group to meet off campus is justified by the state's interest in "avoiding claims that it is financing or otherwise supporting religious worship."[66]

IV. ANALYSIS

Widmar v. Vincent clearly specifies that when a state university adopts a policy making meeting facilities generally available to recognized student groups, it cannot exclude from that accommodation religious student groups.[67] If the decision is narrowly interpreted to apply only when a student-group forum is created by a policy of access to facilities and only when a state university is involved, then this decision will have limited impact on future cases. If, however, this decision is broadly interpreted to apply to public secondary schools where students wish to use the facilities to conduct religious activities and worship, then this decision will have widespread effect simply because of the greater number of secondary schools.

To date, there has not been a United States Supreme Court decision dealing with the constitutionality of excluding religious activities of student groups in public secondary schools. However, lower court decisions, both before and after *Widmar*, have held that use of school facilities by religious student groups violates the establishment clause even when the facilities have been made generally available to other student groups.[68]

Several of these decisions are based on a finding that public secondary schools are not public forums which give

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65. *Id.* at 284. Justice White cites cases which have allowed state policies which benefit religion, but which do not require states to provide such benefits. *See* Board of Educ. v. Allen, 392 U.S. 236 (1968) (state loan of textbooks to parochial school students); Zorach v. Clauson, 343 U.S. 306 (1952) (release of students from public schools for religious instruction off school premises); Everson v. Board of Educ., 330 U.S. 1 (1947) (state financed transportation for parochial school students).

66. Widmar v. Vincent, 102 S. Ct. 269, 284 (1981).

67. *Id.* at 278.

68. *See* Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1041 n.4 (5th Cir. 1982); Brandon v. Board of Educ., 635 F.2d 971, 974 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 970 (1982); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977).

rise to free speech rights of the students.[69] However, the Supreme Court held in *Tinker v. Des Moines Independent School District*,[70] a case which involved a public secondary school, that first amendment rights extend to students and teachers during school hours. Although *Tinker* did not specifically consider the issue of whether public secondary schools constituted a public forum,[71] several writers have construed this decision to suggest such a result,[72] and several district courts have treated public secondary schools as public forums with regard to religious activities.[73] In addition, the *Widmar* Court distinguished *Brandon v. Board of Education*[74] and *Hunt v. Board of Education*[75] on the grounds that, in those cases, religious groups were denied access to facilities not available to other groups.[76] It may be that in the future the Court will agree that public secondary schools can create the type of forum which will require a showing of compelling state interest to justify any content-based exclusions.

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69. Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1048 (5th Cir. 1982); Brandon v. Board of Educ., 635 F.2d 971, 980 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 980 (1982); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 4, 137 Cal. Rptr. 43, 45-46, *cert. denied*, 434 U.S. 877 (1977).

70. 393 U.S. 503 (1969).

71. The issue in *Tinker* involved the constitutionality of the school's prohibiting students from wearing black arm bands in protest of the Vietnam war. Therefore, the public forum issue did not arise as in *Widmar*, where the university purposely created a forum for all student activities with the exception of religious worship and teaching.

72. *See generally* Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931; Nahmod, *Beyond Tinker: The High School as an Educational Public Forum*, 5 HARV. C.R.-C.L. L. REV. 278 (1970); Comment, *The Public School as a Public Forum*, 54 TEX. L. REV. 90 (1975).

73. Lawrence Univ. Bicentennial Comm'n v. City of Appleton, 409 F. Supp. 1319 (E.D. Wis. 1976); Vail v. Board of Educ., 354 F. Supp. 592 (D. N.H. 1973).

74. 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 970 (1982). Although the Court in *Widmar* distinguished *Brandon* on the ground that the student group was denied the use of facilities *not* available to other student groups, *Widmar*, 102 S. Ct. at 276, the court of appeals in *Brandon* stated "that the Equal Protection Clause of the Fourteenth Amendment [does] not require a religious organization to be treated in a manner similar to the secular student groups permitted to use the school facilities." *Brandon*, 635 F.2d at 974. This statement appears to indicate that *Brandon* is not distinguishable from *Widmar* on the public forum issue.

75. 321 F. Supp. 1263 (S.D. W. Va. 1971) (where secondary schools did not have open forum policy for student group meetings).

76. *Widmar*, 102 S. Ct. at 276 n.13.

Assuming that public secondary and elementary schools are then capable of creating public forums by making facilities generally available to student groups, the issue of whether use of those forums by student religious groups would be violative of the establishment clause must be addressed. Returning to the Court's tripartite test for the analysis of establishment clause cases, it is reasonable to assume that if public secondary schools proposed policies which provided for nondiscriminatory access to school facilities for all student groups, the courts would find that such policies had a "secular purpose."[77] However, the issues involved in determining whether such policies would create an excessive entanglement with religion and have the primary effect of advancing religion may prove to be more difficult to resolve.

In *Brandon*[78] and *Lubbock Civil Liberties Union v. Lubbock Independent School District*[79] the courts found that use of public secondary school facilities by student religious groups fostered "excessive entanglement" because of state laws which require supervision of students on school premises. Whether the degree of supervision required by state law of student groups in secondary schools is significantly greater than the "supervision" which a state university must provide in order to assure that student activities proceed in an orderly manner has not been determined. *Widmar* did not consider whether such "supervisory" activities as the provision of campus security, assignment of meeting places and clerical activities respecting student groups constituted a state "entanglement" with religion.

In *Widmar* the Court concluded that a policy granting access to religious groups did not have the "primary effect of advancing religion," in part, because students would not infer that the university supported religion from the mere fact that meetings were allowed in campus facilities.[80] The Court

77. The *Widmar* Court found secular purpose for such a policy. *Widmar*, 102 S. Ct. at 275. Secular purpose for a similar policy was also found in *Brandon*, 635 F.2d at 978. But see Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1044-45 (5th Cir. 1982), where a school district's policy allowing student groups to use facilities for religious meetings did not sufficiently serve secular interests.

78. *Brandon*, 635 F.2d at 979.

79. *Lubbock Civil Liberties Union*, 669 F.2d at 1047.

80. 102 S. Ct. at 276.

did distinguish between university students and younger students in this respect when it stated that "[u]niversity students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality toward religion."[81] In addition, lower court cases dealing with student-initiated religious activities have voiced strong establishment clause concerns on this very issue.[82]

V. CONCLUSION

It is possible that the *Widmar* decision signals a willingness of the present Court to reconsider the broad issue of religious activities in all public schools. *Widmar* goes so far as to say that a state university is constitutionally required to provide access to its facilities for any type of student religious speech, when there is general student access to that same forum.[83] Counsel for the respondents suggested that this line of reasoning could lead to the conclusion that nonstudent religious groups would have to be allowed access to public university forums, if other nonstudents have similar access.[84] It also appears that *Widmar* provides a strong basis for attacking lower court decisions which have prohibited student-initiated religious activities in public secondary schools. Ultimately, this trend could lead to an erosion of the establishment clause.

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81. *Id.* at 276 n.14.

82. *See, e.g., Lubbock Civil Liberties Union*, 669 F.2d at 1043; *Brandon*, 635 F.2d at 978. *See also* Roemer v. Board of Pub. Works, 426 U.S. 736, 750, 754 (1976); L. TRIBE, *supra* note 20, at 825, and cases cited therein.

83. Widmar v. Vincent, 102 S. Ct. 269, 278 (1981).

84. *Id.* at 282-83 n.4 (White, J., dissenting).