

The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools

Official school board recognition of student-initiated religious activity in public high schools has been consistently held to violate the establishment clause.¹ The courts have concluded that such recognition would produce a religious effect and therefore be unconstitutional. This view rests on the assumption that high school students are too immature to distinguish the school board's passive accommodation of student-initiated religious activity from its active endorsement of religion.

This Note first demonstrates that student-initiated religious expression is protected speech. A school board may therefore discriminate against religious speech only to advance a compelling state interest. The Note then turns to a consideration of the most relevant state interest: avoidance of an establishment clause violation. It finds that both case law dealing with controversial nonreligious issues and studies on adolescent psychology indicate that the high school student is able and likely to distinguish between accommodation and endorsement. The courts' emphasis in the religious context on the students' supposed lack of intellectual and emotional maturity should therefore be abandoned. Instead of imposing a blanket prohibition on all student-initiated religious activity in the high school, courts should focus on the character of the activity and on whether the school board's involvement is sufficient to raise establishment clause concerns.² Finally, the Note argues that public high schools should regulate

1. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion. . . .").

2. The analysis of this Note applies only to grades 10-12, and not to elementary or junior high schools. Also, it applies only to student-initiated activity held before or after school or during unscheduled free time within school hours. See *infra* pp. 514-15.

The following fictitious request for school board recognition of student-initiated religious activity describes the kind of activity at issue in this Note:

Students for Religious Growth, a group of twenty-five students from grades 10 through 12, requests permission to become part of Our Public High School's program of student-initiated extracurricular activities. The purpose of Students for Religious Growth is to develop through worship, discussion, and reflection a personal religious awareness, an understanding of other religions, and a tolerance of conflicting views.

We wish to meet on school premises to facilitate participation for current members and to allow other students who so desire to join the group. Our meetings would be held only before or after the school day, or during unscheduled free time within school hours. We request school support only in the form of a meeting place and a faculty supervisor to comply with the school's safety and order regulations.

Students for Religious Growth will assume full responsibility for organizing, scheduling, and directing the activities of the group. The group will in no way attempt to claim official

extracurricular religious expression only according to "content-neutral" standards or to further a compelling state interest.

I. Student-Initiated Religious Expression as Protected Speech

Any discussion of the constitutional dimensions of student-initiated religious expression must begin by considering whether such expression is protected speech under the First Amendment. In *Healy v. James*,³ the Supreme Court affirmed that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁴ Accordingly, it held that the First Amendment protected student political groups from denial of official recognition as a result of the college president's dislike for the group's viewpoint.⁵ The Court noted that the president's denial of recognition "was a form of *prior restraint*, . . . [and that] a 'heavy burden' rests on the College to demonstrate the appropriateness of that action."⁶ More specifically, in *Widmar v. Vincent*,⁷ the Court explicitly held that college students' religious worship and discussion are "forms of speech and association protected by the First Amendment."⁸ The Court, following the analysis defined in *Healy*, then inquired whether the university met the "heavy burden" necessary to justify restricting students' protected speech.⁹

The Court's willingness to construe student expression as protected speech has not been limited to the college context. In *Tinker v. Des Moines Independent School District*,¹⁰ it held that the wearing of arm-bands by high school and junior high school students was "closely akin to 'pure speech' . . . [and thus] entitled to comprehensive protection under the First Amendment."¹¹ It then stated that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."¹² Thus, the religious expression of high school students comes within the scope of First Amendment protection of free speech.¹³

Even though high school students' religious expression is protected

approval or endorsement of its activities or views. Students for Religious Growth seeks only to become one of the many student-initiated activities already recognized to pursue students' extracurricular interests.

3. 408 U.S. 169 (1972).

4. *Id.* at 180 (quoting *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 506 (1969)).

5. *Id.* at 187.

6. *Id.* at 184 (emphasis added).

7. 454 U.S. 263 (1981).

8. *Id.* at 269.

9. *Id.* at 270-77.

10. 393 U.S. 503 (1969).

11. *Id.* at 505-06.

12. *Id.* at 511.

13. See *infra* note 37 (discussing student free speech rights).

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speech, the school board is not obligated to *provide* a student group with a forum for extracurricular expression. Such an affirmative obligation, mandated by the free exercise clause,¹⁴ would arise only when no alternative means of expression exists.¹⁵ Because students have opportunities outside the public high school for religious expression and worship, the board has no such affirmative obligation.¹⁶

The free speech analysis leads to a different result, however, when the school voluntarily opens a forum for extracurricular activity; that is, when it “makes its facilities generally available for the [extracurricular] activities of registered student groups.”¹⁷ After having permitted students to initiate extracurricular activity, the school board may not discriminate among proposed programs according to its approval of the content of those programs.¹⁸ Though not all regulation according to content is per se unconstitutional, the school board does bear a heavy burden in demonstrating a compelling state interest in denying recognition to religious groups while recognizing other more secularly oriented groups.¹⁹ Avoidance of an establishment clause violation would undoubtedly be one such state interest.²⁰ Indeed, courts have upheld school board denial of recognition primarily on this ground.²¹ Accordingly, our inquiry into the constitutionality of student-initiated religious expression now turns to whether such expression necessarily violates the establishment clause.

II. Establishment Clause Concerns

In *Lemon v. Kurtzman*,²² the Supreme Court articulated a three-part “purpose-effect-entanglement” test to determine an establishment clause violation. To be deemed constitutional, the state action must have a “secu-

14. U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”).

15. *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038, 1048 (5th Cir. 1982) (“A school is obligated to provide religious facilities only if its failure to do so would effectively foreclose a person’s practice of religion.”); see *Abington School Dist. v. Schempp*, 374 U.S. 203, 223 (1963); *Brandon v. Board of Educ.*, 635 F.2d 971, 977 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-8, at 835 (1978).

16. See *Brandon*, 635 F.2d at 977.

17. *Widmar v. Vincent*, 454 U.S. 263, 264-65 (1981).

18. As the Court has stated:

There is an “equality of status in the field of ideas,” and government must afford all points of view an equal opportunity to be heard. Once a forum 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.

Police Dep’t v. Mosley, 408 U.S. 92, 96 (1971); see *Widmar v. Vincent*, 454 U.S. 263, 267 (1981).

19. See *supra* p. 500.

20. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981); *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

21. See *infra* note 26.

22. 403 U.S. 602 (1971).

lar . . . purpose," its primary effect must be one that "neither advances nor inhibits religion," and it must not foster "excessive government entanglement with religion."²³ Since the courts, especially in the high school context, have generally not been troubled by the purpose part of the test,²⁴ our analysis focuses initially on the effects part, and then considers the potential problem of excessive entanglement.

A. *The Effect of Student-Initiated Religious Activity*

Courts have consistently held that school board recognition of student-initiated religious activity has the effect of advancing religion and therefore violates the second prong of the *Lemon v. Kurtzman* test. The conclusion that such recognition leads to an unconstitutional advancement of religion rests in large part on the assumption that high school students are impressionable and immature, and thus incapable of understanding a school board's true role when it recognizes student-initiated religious activity. This assumption, however, is inconsistent with the position taken by courts in other First Amendment cases involving public high school students and is at odds with current views about the cognitive capacity of adolescents.

23. *Id.* at 612-13. For an extensive history of establishment clause doctrine, see Note, *The Constitutionality of Student-Initiated Religious Meetings on Public School Grounds*, 50 U. CIN. L. REV. 740, 741-59 (1981).

24. In practice the courts have considered state action sufficiently secular in its purpose so long as the state's motive is "arguably nonreligious." L. TRIBE, *supra* note 15, § 14-8, at 835; see *Mueller v. Allen*, 51 U.S.L.W. 5050, 5052 (U.S. June 29, 1983) ("[G]overnment assistance programs have consistently survived [the purpose] inquiry even when they have run afoul of other aspects of the *Lemon* framework. . . . This reflects . . . our reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute.").

The secular purpose threshold is indeed so low that it can usually be met simply by citing a state disclaimer of religious purpose, *Lemon*, 403 U.S. at 613, or, in the case of school involvement with religion, an arguably educational goal, *Chess v. Widmar*, 635 F.2d 1310, 1312 n.1 (8th Cir. 1980), *aff'd sub nom. Widmar v. Vincent*, 454 U.S. 263 (1981). *But see Stone v. Graham*, 449 U.S. 39, 42-44 (1980) (per curiam) (legislative disclaimer insufficient where state requirement has predominantly religious purpose); *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038, 1044-45 (5th Cir. 1982) (rejecting school board claim of secular purpose in recognizing student religious group).

Moreover, a purpose is not deemed "religious" merely because it "coincide[s] with the beliefs of one religion or [takes] its origins from another." L. TRIBE, *supra* note 15, § 14-8, at 835; see *Harris v. McRae*, 448 U.S. 297, 319 (1980) ("It does not follow that a statute violates the establishment clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'").

Religious purpose has been the decisive factor in striking down a state action only when the predominant or sole reason for such action could be the advancement of religion. See *Stone*, 449 U.S. at 42-44 (state requirement that Ten Commandments be posted on wall of each public school found to result from preeminently religious purpose); *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968) ("The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the *sole reason* that it is deemed to conflict with a particular . . . interpretation of the Book of Genesis by a particular religious group.") (emphasis added).

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1. *Brandon, Widmar, and the Emphasis on Immaturity*

In *Brandon v. Board of Education*²⁵ and other cases dealing with religion in the high school setting,²⁶ the supposedly impressionable nature of the audience has prompted the courts to conclude that official recognition of a student-initiated religious organization unavoidably produces a primarily religious effect. In *Brandon*, the Second Circuit stated that:

To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit An adolescent may perceive "voluntary" school prayer in a different light if he were to see the captain of the school's football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the "captive audience" setting of a school.²⁷

The argument that a primarily religious effect could be caused by the inability of high school students to perceive correctly the role of the school board contains two parts. First, students could conclude that the board was endorsing, rather than merely accommodating, religion. Second, mistaken imputation of state endorsement of religion could produce the unintended but real effect of changing the audience's religious practices or views.

Courts have consistently employed this argument when examining whether school board involvement with religion produces a primarily religious effect. They have decided the underlying constitutional question by

25. 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). In *Brandon*, public high school students who organized a group called "Students for Voluntary Prayer" instituted an action for declaratory, injunctive, and monetary relief against the local school board for an allegedly unconstitutional refusal to allow the group to conduct communal prayer meetings in the school immediately before the school day began. *Id.* at 973. The court held that if the school board had granted recognition to the prayer group it would have violated the establishment clause. *Id.* at 979.

26. See *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038, 1048 (5th Cir. 1982) (school district policy permitting students to gather voluntarily at school with supervision either before or after regular school hours for educational, moral, religious, or ethical purposes violated establishment clause and was not necessary to avoid violation of free exercise clause); *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 15-17, 137 Cal. Rptr. 43, 51-53 (1977) (denied public high school students declaratory and injunctive relief from a school district's refusal to grant formal recognition of their religious organizations, concluding that an unintended religious effect would result if such organizations were granted recognition and extended support); see also *Hunt v. Board of Educ.*, 321 F. Supp. 1263, 1266-67 (S.D. W. Va. 1971) (holding that school recognition of student-initiated religious activity would result in state advancement of religion); *Trietley v. Board of Educ.*, 65 A.D.2d 1, 6-8, 409 N.Y.S.2d 912, 916-17 (1978) (same); *Commissioner of Educ. v. School Comm.*, 358 Mass. 776, 778-80, 267 N.E.2d 226, 227-28 (1971) (same), *cert. denied*, 404 U.S. 849 (1971). *But see Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965) (holding that student-initiated religious activity is constitutionally permissible).

27. 635 F.2d at 978.

assuming that the cognitive capacity of high school students is not adequately developed. Thus, in the high school setting, the immaturity of the student makes any accommodation of student-initiated religious activity an unconstitutional advancement of religion. In contrast, when the state is involved with religious activity in other settings, the courts generally assume that the relevant audience is capable of correctly perceiving when the state's purpose is secular.²⁸ Consequently, the courts are willing to tolerate religious accommodation by the state in settings other than the public high school.

The conclusion that student immaturity leads to an establishment clause violation is further supported by a Supreme Court dictum in *Widmar v. Vincent*.²⁹ There, the Court held that a state university regulation prohibiting the use of university buildings on grounds "for purposes of religious worship or religious teaching"³⁰ was unconstitutional, and rejected claims that allowing such religious use would violate the establishment clause. In *Widmar*, the Court noted that "[u]niversity students are . . . less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."³¹ Thus, *Widmar* appears to endorse implicitly the result and reasoning of prior lower court decisions that denied permission for student-initiated religious activities in public high schools.

2. *James, Tinker, and the Maturity of High School Students in Non-religious Cases*

The view of the high school student adopted by the courts in religious cases conflicts directly with the position taken when nonreligious forms of

28. See *Marsh v. Chambers*, 51 U.S.L.W. 5162, 5164 (U.S. July 5, 1983) (practice of beginning each session of state legislature with prayer by chaplain paid by state did not "symbolically plac[e] the government's 'official seal of approval on one religious view.'"); *O'Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979) (government financial support of papal mass had intended secular effect of accommodating free expression and affirming principle of freedom of demonstration); *Bogen v. Doty*, 598 F.2d 1110, 1114 (8th Cir. 1979) (practice of having prayers led by local unpaid clergyman preceding county board meetings did not have a religious effect: "a primary effect of this activity will simply be the accomplishment of the board's purpose of establishing order and a solemn tone for the meeting"); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 33-34 (10th Cir. 1973) (maintenance of illuminated granite monolith, on which the Ten Commandments together with other symbols were inscribed, involved a primarily secular rather than religious purpose and effect); *Citizens Concerned for Separation of Church & State v. City & County of Denver*, 508 F. Supp. 823, 826-827 (D. Colo. 1981) (Denver's secular purpose in appropriating funds for inclusion of nativity scene in its Christmas block-long lighting display had primarily secular effect); *Allen v. Morton*, 333 F. Supp. 1088, 1092-97 (D.D.C. 1971) (construction and maintenance of crèche in "Christmas Pageant of Peace" celebration on federal park land immediately adjacent to White House did not have substantial religious impact).

29. 454 U.S. 263 (1981).

30. *Id.* at 265 n.3.

31. *Id.* at 274 n.14.

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First Amendment activity are at issue. For example, in *James v. Board of Education*,³² the Second Circuit held that a school board could not, without violating the First Amendment, discharge a high school teacher who wore a black armband in class to protest the Vietnam War. The court concluded that “[i]t does not appear . . . that any student believed the armband to be anything more than a benign symbolic expression of the teacher’s personal views.”³³ Thus the court found no danger of mistaken imputation of expression to the school board; the students were deemed able to distinguish between personal and official views and to form their own opinions without undue influence from others.

A comparison of the reasoning in *Brandon* and *James* raises two questions. First, if students are mature enough to isolate a teacher’s views from those of the school board, why are they not able to distinguish a school board’s accommodation of student-initiated religious expression from the endorsement of religion? Second, if students are not coerced by a teacher’s active endorsement of a political viewpoint inside the classroom, why would they be coerced by the school board’s passive accommodation of student-led religious activity outside the classroom? The contradiction is particularly striking given that the judge who wrote both the *James* and *Brandon* opinions acknowledged in *James* that “a teacher may have a far more pervasive influence over a student than would one student over another.”³⁴

The Second Circuit’s emphasis in *James* on freedom of expression was grounded in *Tinker v. Des Moines Independent School District*.³⁵ There, three public school students, thirteen, fifteen, and sixteen years old, were suspended from school for wearing black armbands to protest the war in Vietnam. The Court held that the students’ conduct was not disruptive, did not impinge on the rights of others, and was within the protection of the free speech clause of the First Amendment. Although *Tinker* did not explicitly discuss the students’ maturity, intelligence, and impressionability, it is fair to conclude that “implicit in upholding the rights of students to express themselves peacefully on school premises is the assumption that both the disseminating students and their target audience are capable of dealing with controversy and indeed should be encouraged to do so.”³⁶

In cases involving political, social, and moral issues, the courts, follow-

32. 461 F.2d 566 (2d Cir. 1972).

33. *Id.* at 574.

34. *Id.* at 573.

35. 393 U.S. 503 (1969).

36. Nahmod, *First Amendment Protection for Learning and Teaching: The Scope of Judicial Review*, 18 WAYNE L. REV. 1479, 1491 (1972) (emphasis added). Nahmod argues that *Tinker* and the underground newspaper cases have blurred the line between high school and university students. *Id.*

ing the principles laid down in *Tinker*, have denied local school boards the authority to censor or control the student body's exposure to ideas that the school board does not support.³⁷ Courts have imposed these limits on school board authority despite the substantial educational interest of school boards in avoiding the imputation of unendorsed views.³⁸ Even where there is a significant risk of students imputing controversial speech to the school board, as in a school-sponsored newspaper or political expression by a teacher, the school board still has not been permitted to censor such expression. Indeed, the Court has underscored the importance of exposing students to a broad range of ideas and has stated that "the classroom is peculiarly the 'marketplace of ideas.'"³⁹

The court's view of the high school student should not change merely because religious speech is involved. While establishment clause concerns are present only when religious speech is at issue, the school board, when dealing with nonreligious speech, still has a "substantial interest" in preventing mistaken imputation. Indeed, this substantial interest is essentially similar to the First Amendment right of an individual to refuse to foster ideas that he finds repugnant:

[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all A system which secures the right to proselytize religious, political and ideological causes must

37. Post-*Tinker* cases include: *Gambino v. Fairfax City School Bd.*, 429 F. Supp. 731, 736-37 (E.D. Va. 1977) (enjoining school board from prohibiting the publication in school newspaper of article entitled "Sexually Active Students Fail to Use Contraception"), *aff'd per curiam*, 564 F.2d 157 (4th Cir. 1977); *Bayer v. Kinzler*, 383 F. Supp. 1164, 1165-66 (E.D.N.Y. 1974) (high school officials would violate students' First Amendment rights by restraining distribution of school newspaper containing information about birth control), *aff'd*, 515 F.2d 504 (2d Cir. 1975); *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960, 970-72 (5th Cir. 1972) (First Amendment rights of high school seniors violated when school board suspended them for distributing an "underground" newspaper that advocated review of laws regarding marijuana use and offered information about birth control). In these cases, the courts were willing to allow student exposure to the controversial issues in question in spite of the danger of a mistaken belief on the part of students that the school was approving of the viewpoint expressed and the risk that the students would be unduly influenced by others. *But cf. Quarterman v. Byrd*, 453 F.2d 54, 57 (4th Cir. 1971) (scope of First Amendment rights should vary with age and maturity of students; high school setting places special limitations on First Amendment rights).

38. See *Thomas v. Board of Educ.*, 607 F.2d 1043, 1049 (2d Cir. 1979) (school has "substantial educational interest in avoiding the impression that it has authorized a specific expression"), *cert. denied*, 444 U.S. 1081 (1980).

39. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon . . . that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritarian selection.'") (citation omitted).

While *Keyishian* dealt with students at the university level, the view expressed in that case has been echoed in cases dealing with high schools students. See *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 715 (D. Mass. 1978) ("The most effective antidote to the poison of mindless orthodoxy is ready access to a broad sweep of ideas and philosophies.").

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also guarantee the concomitant right to decline to foster such concepts.

The First Amendment protects the right of individuals . . . to refuse to foster . . . an idea that they find morally objectionable.⁴⁰

Because of the school board's traditional role in supporting the values of the community, it has a compelling interest in avoiding any misunderstanding of its views on *all* religious, political, and ideological issues. Thus, it is theoretically unsound to focus on the alleged immaturity of high school students only in cases involving religion.⁴¹

3. *Adolescent Psychology and the View of the High School Student as an Independent Individual*

Research in the field of adolescent psychology suggests that high school students are generally independent and capable of critical inquiry. It therefore supports the Second Circuit's assessment in *James* and contradicts that court's view in *Brandon*. Three basic conclusions may be drawn from the empirical research. First, adolescence is a time of markedly increased cognitive capacity.⁴² The adolescent has the capability to engage in

40. *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977) (citation omitted); see *Lipp v. Morris*, 579 F.2d 834, 835-36 (3d Cir. 1978) (statute requiring public school students to stand at attention during pledge of allegiance struck down because student has right to resist forced expression of patriotism); *Gavett v. Alexander*, 477 F. Supp. 1035, 1045 (D.D.C. 1979) (statute directing government to sell firearms at a discount only to members of certain rifle associations struck down in part because it infringed on fundamental interests of individuals who wished not to be associated with a group whose views they found obnoxious). In *Wooley*, the Court held that a New Hampshire driver need not have the motto, "Live Free or Die," posted on his license plate if such an ideology is repugnant to him. Implicit here was a recognition that endorsement of the ideological statement might be imputed to the owner of the vehicle upon which it was posted, and that the owner has a First Amendment right to resist such imputation.

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), however, the Supreme Court held that California state constitutional provisions that permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited did not violate the free speech rights of the owner under the First and Fourteenth Amendments. The Court specifically distinguished the case from *Wooley* on the ground that when an owner invites the public to enter premises, the views disseminated by patrons on the premises "will not likely be identified with those of the owner." *Id.* at 87.

41. In addition, an imputation problem could be remedied by a disclaimer. The Court has held that mistaken imputation can be easily prevented by posting signs or notices that effectively disclaim any endorsement or support of the views expressed during the student-initiated religious activity. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) ("[A]ppellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages."). Such disclaimers would prevent mistaken ideas about school recognition of the religious activity by emphasizing the school's secular objectives and its promotion of freedom of expression.

42. Stage theories of cognitive and moral development, based on the work of Jean Piaget, suggest that people develop new *modes* of thought in a series of clearly definable stages. Piaget discovered that differences in thinking between adolescence and childhood are differences in *kind* and not just degree.

fairly sophisticated and complex intellectual functions. Second, adolescence is a time of increasing independence with respect to both authority figures and peers;⁴³ the adolescent is increasingly able to reject the views of others. Third, adolescence is a time when a new self-identity is established and personal ideals and values are formed.⁴⁴ In his attempt to create a

His research suggests that the more sophisticated cognitive capacity of the adolescent, particularly the late adolescent, is sufficient to allow the student to form his own ideas, to debate and disagree with his peers, and to act on his own beliefs as an autonomous individual. Piaget concluded that "[t]he great novelty that characterizes adolescent thought . . . does not reach its point of equilibrium until the age of fourteen or fifteen." Piaget, *The Intellectual Development of the Adolescent*, in *ADOLESCENCE* 23 (G. Caplan & S. Lebovici eds. 1969). In other words, Piaget's research showed that most of the adolescents tested could think on an abstract, logical level by the age of 14 or 15.

Based on his research, Piaget formulated a four-stage theory of mental and moral development, concluding that the last stage, the formal operational stage, typically occurs between the ages of 12 and 15. In this stage, the child begins to think in abstract terms, to reason by hypothesis, and to consider ideological problems. The child sets aside his belief in the infallibility of his parents and teachers, and no longer accepts adult authority without question; he becomes capable of independent analysis and autonomous moral thought. See also Osterrieth, *Adolescence: Some Psychological Aspects*, in *ADOLESCENCE* 14-15 (G. Caplan & S. Lebovici eds. 1969) (describing evolution of formal thought process). Thus, by the time the adolescent enters high school at approximately the age of 15, he should generally be able to engage in critical inquiry, debate, and discussion at a fairly abstract and sophisticated level.

A great deal of research has confirmed Piaget's view that formal operational thought and autonomous morality are typically reached during adolescence. See Gallagher & Noppe, *Cognitive Development and Learning*, in *UNDERSTANDING ADOLESCENCE* 208-16 (J. Adams ed. 1976). Gallagher and Noppe conclude that much of the later research has confirmed the basic validity of Piaget's findings, citing in particular Lovell's follow-up study in which the results of Piaget's experiments were substantially reproduced. *Id.* at 215.

A few studies have concluded, however, that the achievement of formal operational thought during adolescence may not be as prevalent as Piaget's research suggests it to be. See Kohlberg & Gilligan, *The Adolescent as a Philosopher: The Discovery of the Self in a Postconventional World*, 100 *DAEDALUS* 1051, 1065 (1971) (reporting findings that only 45% of the adolescents tested had reached formal operations by age 15). Of course, the fact that some adolescents are unable to perform certain functions requiring formal thought does not indicate that there are no significant differences between the intellectual development of the adolescent and the child. Indeed, even those researchers and theorists that dispute stage theories of cognitive development agree that "[t]here are differences of major practical significance between the cognitive activity of the adolescent and the child." Keating, *Thinking Processes and Adolescence*, in *HANDBOOK OF ADOLESCENT PSYCHOLOGY* 215 (J. Adelson ed. 1980).

43. The adolescent's increasing independence suggests that the courts' fear of undue influence from peer pressure in the context of student-initiated religious activity at the high school level is unfounded; peer group values are not as significant as is commonly assumed. "We can be fairly confident in saying that conformity is at its height among the early adolescent group but that it diminishes significantly from about fourteen or fifteen onward Evidently, by middle adolescence some individuals are beginning to be able to see the advantages to be gained by independence, and the number taking such a view clearly increases rapidly from this stage onward." Coleman, *Friendship and the Peer Group in Adolescence*, in *HANDBOOK OF ADOLESCENT PSYCHOLOGY* 424-25 (J. Adelson ed. 1980). Thus the danger of conformity decreases rapidly during high school.

Moreover, there is reason to believe that peer pressure may be even less significant with regard to student decisions on religious matters. "Although the adolescent moves initially in the direction of the more liberal peer group, there is evidence . . . to suggest that, for basic life decisions, the standards of the family carry more weight than the peer group when the two are in conflict." Hamacheck, *Development and Dynamics of the Self*, in *UNDERSTANDING ADOLESCENCE* 162 (J. Adams ed. 1976). Thus, if the family discourages participation in the religious activity, it is unlikely that peer pressure alone will induce the unwilling student to participate.

44. The importance of adolescence as a time of self-identification was established largely through the work of Eric Erikson. See E. ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968). Erikson's theory of adolescence complements Piaget's conclusion that the adolescent is capable of autonomous moral

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new self-identity, the adolescent is exposed to a broad range of values and experiences.

An adolescent's increased independence and self-identification enables him to differentiate himself from the authority figures he depended on as a child.⁴⁵ Adolescents expect respect and tolerance from school authorities, and are quick to notice when these authorities attempt to control their activities.⁴⁶ Additionally, because their cognitive capacity has significantly developed since childhood, adolescents can understand the difference between "neutral accommodation" and "indoctrination." Given the increased cognitive capacity and the psychological separation between the self and authority figures that occurs during adolescence, high school may in fact be a time when the distinction between tolerance based on mutual respect and explicit approval of student expression is particularly clear—even more clear, perhaps, than in later stages of life. Thus, not only is the high school student able to make such a distinction, he is also likely to do so.

This understanding of adolescent psychology supports the conclusion that fears of adolescent impressionability and immaturity do not justify limitations on high school students' religious expression and activity. Further, it undercuts the *Brandon* view that impressionability and immaturity lead to a violation of the second prong of the *Lemon v. Kurtzman* test. Indeed, school board recognition of student-initiated religious activity need not raise establishment clause concerns. Instead, it may represent a commendable tolerance of a diversity of views and an approval of First Amendment free speech values.⁴⁷

thought by noting that adolescence is the time when many facets of an individual's personality come together to form a coherent sense of self. *Id.* at 159-65. Erikson emphasizes that adolescence is a transitional stage between childhood and adulthood in which the adolescent is engaged in determining who he is and what he is to become. *Id.* In seeking to establish a new identity and in adopting new ideas, the adolescent increasingly questions and challenges the authority figures of his childhood. *Id.* at 28, 30, 246-47. Thus, the process of self-identification requires the adolescent to make sharp distinctions between his views and the views of others.

45. See Windmiller, *Moral Development*, in UNDERSTANDING ADOLESCENCE 186 (J. Adams ed. 1976) ("[W]here once the child derived his identity from his integration within the family structure, now in order to achieve his own sense of self there must be at least a psychological separation from the family unit. During the process of identity formation the adolescent is constantly testing out ideas and seeking confirmation of his new self."). Thus, independence, self-identification, and psychological separation from authority figures are interrelated processes.

46. See K. GARRISON & K. GARRISON, PSYCHOLOGY OF ADOLESCENCE 79 (1975) ("The adolescent is likely to resent authoritative control. The self-conscious attitude so clearly displayed at this stage of life marks him as an individual on the alert, watching for someone to consider him as a child and thus boss him around.").

47. In *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979), for example, the court noted that the permission of religious expression on government property (in this case a papal mass on the National Mall) promoted the principle of freedom of demonstration and accommodation of diverse viewpoints:

Appellants say that the government permit for this occurrence on the renowned National Mall sends an implied message—to the nation and to the world—of government approval (and therefore "establishment") of this church service. It implies no more approval for this church

B. *Minimizing Entanglement*

The third prong of the *Lemon v. Kurtzman* test, excessive entanglement with religion, is also relevant to the constitutionality of student-initiated religious activity. Courts have suggested that such activity not only will produce a primarily religious effect but also may raise insurmountable "excessive entanglement" problems.⁴⁸ The courts' concern has been that the school will become so entangled with the religious activity that it is no longer simply accommodating, but rather endorsing, the activity.⁴⁹

Behind this concern may lie a more fundamental objection: that there is no place for religion in the public schools.⁵⁰ Thus, any entanglement between church and public high school would be deemed "excessive." This fundamental objection is perhaps implicit in the contrast between the courts' willingness to reject excessive entanglement claims outside the high school setting⁵¹ and to accept such claims in the high school setting. The objection that there is no place for religion in the public schools, however, has never been an acceptable component of the constitutional analysis of the establishment clause. Indeed, the acceptance of such an objection would render the constitutional analysis useless and preordain the outcome of any establishment clause claim in the public school setting.

The courts' concern with the excessive entanglement problem may also be explained by the relationship between excessive entanglement and the

than for any other group using the Mall. The message that it does send to the world is approval of the principle of freedom of demonstration, for all groups, for all religions, even for those opposing religion.

Id. at 936.

48. See *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038, 1047 (5th Cir. 1982) (holding that use of school facilities and continuing supervision creates excessive entanglement); *Brandon v. Board of Educ.*, 635 F.2d 971, 979 (2d Cir. 1980) ("[A]n excessive involvement of the state in religious matters would have resulted if the students' requests [for religious extracurricular activity] were granted."), *cert. denied*, 454 U.S. 1123 (1981).

49. See *Roemer v. Maryland Pub. Works*, 426 U.S. 736, 747-48 (1976) ("Neutrality is what is required . . . [T]he State's efforts to perform a secular task, and at the same time avoid aiding in the performance of a religious one, may not lead into such an intimate relationship with religious authority that it appears either to be *sponsoring* or to be *excessively interfering* with the authority.") (emphasis added); see also *Zorach v. Clauson*, 343 U.S. 306, 315 (1952) (distinguishing permissible accommodation from impermissible endorsement by school authorities). *But cf.* Note, *supra* note 23, at 776 ("[T]he [excessive entanglement] question reduces to whether or not student initiated religious meetings on school grounds result in continuing official surveillance that produces strife and ill-will between church and state.").

50. See, e.g., D. BOLES, *THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS* 269-97 (1965) (discussing separatist attitudes of educators toward religion in public schools); W. MUIR, *PRAYER IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE* 37-58 (1967) (discussing attitudes toward religion in public schools and, in particular, separatist attitude of certain school officials that religion has no place in the public schools).

51. See *Roemer v. Board of Pub. Works*, 426 U.S. 736, 747 (1976) (upholding constitutionality of statute authorizing state aid to private Maryland institutions of higher learning, including religiously affiliated institutions, which met certain minimum criteria); *O'Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979) (government financial support of papal mass on National Mall held not to be excessive entanglement).

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purpose and effect components of the three-part establishment clause test. Although the Supreme Court has framed the test as consisting of three discrete elements, the logic behind the establishment clause suggests that the central concern of the courts is the effect of state action on religion.⁵² While entanglement is generally stated to be a separate indication of constitutionality, it can also be viewed as an evidentiary device for determining whether state action will produce a religious effect. This accords with the courts' concern that excessive entanglement will cause a primarily religious effect through active endorsement rather than mere accommodation of the activity.

In evaluating an excessive entanglement claim in the high school context, one needs to consider two issues: First, the quantity of support the school extends to the activity; and second, the manner in which the school board allows the activity to be conducted. The consideration of these issues can provide criteria for the design of permissible student-initiated religious programs.

1. *Quantity of Support*

The excessive entanglement test does not pose a complete bar to state aid to religious organizations. The neutral accommodation of religion, sec-

52. The Supreme Court has often construed the establishment clause as a guarantee of religious voluntarism. For example, in *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947), it stated:

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.

Similarly, in *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), Justice Goldberg wrote that "[t]he fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, [and] that it effect no favoritism among sects or between religion and nonreligion." *Id.* at 305 (Goldberg, J., concurring).

An alternative view is that the basic premise behind the establishment clause is not the notion of voluntarism, but a notion of separatism requiring "a wall . . . between church and state." See L. TRIBE, *supra* note 15, § 14-3, at 817. This principle of separation was designed to "safeguard the state against ecclesiastical deprivations and incursions," *id.*, §14-3, at 816, and "to protect the church from the danger of destruction which . . . inevitably flowed from control by even the best-intentioned civil authorities," *Engel v. Vitale*, 370 U.S. 421, 434 n.20 (1962). Thus, James Madison advised "an entire abstinence [sic] of the Government from [religious] interference in any way whatever, beyond the necessity of preserving public order, and protecting each sect against trespass on its legal rights by others." 9 THE WRITINGS OF JAMES MADISON 487 (G. Hunt ed. 1910).

The logical implications of this principle would require the maintenance of wholly separate religious and secular spheres. The courts, however, have recognized that this wall of separation is in fact "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). Thus, Tribe, discussing the twin values of separatism and voluntarism that lie behind the religion clauses of the Constitution, concludes that "voluntarism may be the more fundamental." L. TRIBE, *supra*, § 14-4, at 818-19; see Gianelli, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 81 HARV. L. REV. 513, 514-22 (1968) (supporting proposition that voluntarism is predominant principle behind establishment clause).

ular in purpose and effect, is clearly permissible.⁵³ To deny religious organizations all protection and support solely because of their religious character 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."⁵⁴

Courts have held that, given a secular purpose and effect, some state entanglement with religion is permissible, but have not explicitly determined at what point entanglement becomes "excessive." In general, religious entanglement is permissible only when it has the effect of accommodating, and not endorsing, religious activity.⁵⁵ *Zorach v. Clauson*⁵⁶ provides more specific guidance in the public school context. There, a teacher was permitted to cooperate in a student-off-campus release program "to the extent of making it possible for her students to participate in it."⁵⁷ This case suggests that courts may judge state support of student-

53. See *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding, against establishment claim, student release program allowing public school students to leave school building for religious instruction and devotional exercises).

Justice White argued that neutral accommodation of religion should be permissible, pointing out that the "limits of permissible state accommodation of religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself." *Lemon v. Kurtzman*, 403 U.S. 602, 664 (1971) (White, J., concurring in part and dissenting in part) (citation omitted). Thus, more accommodation than that which is compelled by the free exercise clause is permissible. But Justice White is quick to qualify that in order for unrequired accommodation to avoid an establishment clause violation, its purpose and effect must be secular. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 768-70 (1976) (White, J., concurring).

54. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

55. See *supra* note 49.

56. 343 U.S. 306 (1952).

57. *Id.* at 313 (emphasis added). The Supreme Court made clear that the teacher's cooperation in a religious program would not constitute excessive entanglement regardless of "[w]hether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students." *Id.* at 313. The Second Circuit's recent comments in *Brandon v. Board of Educ.*, 635 U.S. 971, 979 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), regarding the supposedly excessive entanglement caused by teacher supervision of student religious activity, directly contradict the Supreme Court's position in *Zorach*. The Second Circuit found the continual aspect of the supervision determinative of causing excessive entanglement: "[T]he School Board has demonstrated that an excessive involvement of the state in religious matters would have resulted if the students' request were granted. . . . [I]f the state must engage in continual administrative supervision of nonsecular activity, church and state are excessively intertwined." 635 F.2d at 979; see *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982).

For cases implicitly following the *Zorach* doctrine of discounting the continual character of the entanglement, see *Widmar v. Vincent*, 454 U.S. 263 (1981) (weekly use of university buildings for religious worship and study and university scheduling and general administrative monitoring of meetings as one of many extracurricular activities did not constitute excessive entanglement); *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (occasional audits of grant subsidy program not excessive entanglement); *Holt v. Thompson*, 66 Wis. 2d 659, 225 N.W.2d 678 (1975) (filing of weekly or monthly attendance reports by the public school to insure released students go to religious centers represents only insignificant entanglement). See generally Toms & Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 EMORY L.J. 3, 24-26 (1978) (discussing excessive entanglement in public high schools); Note, *supra* note 23, at 773-79 (arguing that

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initiated religious activity to be permissible accommodation so long as it does not exceed the amount minimally required to maintain the activity's existence.

The "minimally required support" principle suggested in *Zorach v. Clauson*⁵⁸ is an appropriate evidentiary standard. It allows the court to determine whether the school board's support will itself advance religion, or whether it will merely sustain the activity's existence and allow "the advancement of religion [to] come . . . from the voluntary support of its followers."⁵⁹ While this standard does not identify the precise point at which state support turns from accommodation to endorsement, it does direct the court's attention to potentially dangerous gratuitous support. Such aid may unnecessarily supplement the voluntary efforts of the activity's participants and cause state advancement of religion.⁶⁰ Thus, a school board's showing that it has extended only enough support to allow the activity to continue its existence is probative of accommodation of religious interests, and consequently, of a primarily secular effect. On the other hand, a finding that the school board has extended more than the minimally required support is probative of state advancement of religious interests, and consequently, of a primarily religious effect.

The language used by some courts could imply that religious organizations in the high school setting may be given as much support as other student-initiated extracurricular activities, and that such support would not violate the establishment clause.⁶¹ This argument, however, is flawed because it focuses on equality rather than accommodation. Proving that a student-initiated religious activity receives the same quantity of support as student-initiated secular activity does not determine whether the quantity of support merely accommodates, or rather endorses, the religious activity. The relevant concern must be whether the quantity of the state's support for religion produces a primarily religious effect, and not whether the support is greater or less than the support extended to secular activities.

Similarly, a school board cannot justify exceeding the minimally required support standard by showing that its sole purpose was to confer

student-initiated religious activity in public school classroom need not constitute excessive entanglement).

58. 343 U.S. 306, 313 (1952).

59. L. TRIBE, *supra* note 15, § 14-4, at 818 (1978).

60. The minimally required support standard captures the core notion of accommodation: "The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, . . . and [at the same time] that [government] work deterrence of no religious belief." *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

61. See *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) (no constitutional requirement that government be hostile to religion and "throw its weight against efforts to widen the effective scope of religious influence"); *O'Hair v. Andrus*, 613 F.2d 931, 934 (D.C. Cir. 1979) (fact that "religious and nonreligious groups and events are treated alike . . . undercuts appellant's Establishment claim").

related secular benefits on participating students. The excessive entanglement test provides a wholly separate indication of probable effect from that provided by the purpose test.⁶² That extensive school board support emanated from a purely secular intent does not prevent that support from becoming a source of religious advancement.⁶³ Thus, the probable effect of school board entanglement with religion should be examined by inquiring, without regard to school board intent, whether the support extended to the activity is greater than that minimally required for students to carry out that activity.⁶⁴

2. *Manner in Which the Activity Is Conducted*

In order for the school board to avoid advancing religion, it must also ensure that attendance at the religious activity is entirely student-initiated.⁶⁵ If the student is required to participate in, attend, or even take affirmative action to absent himself from the religious activity, his involvement with religion becomes school-initiated. In this sense, any audience that has not freely chosen to attend can be deemed "captive." If the school board allows a student religious activity to be conducted before a captive audience, it is imposing religion on those who might not otherwise have chosen to participate. Such a religious effect would clearly violate the establishment clause.⁶⁶

62. See *Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 657-62 (1980) (extensive separate "excessive entanglement" analysis of statute directing payments to nonpublic schools); *Roemer v. Board of Pub. Works*, 426 U.S. 736, 748 (1976) (recognizing the independent quality of the excessive entanglement test).

63. This point illustrates the need for the purpose and entanglement tests to be applied separately. Each is an *independent* gauge of the probable effect of a state action and measures different factors which could cause state involvement with religion to produce a primarily religious effect.

64. Rigorous adherence to the principle of minimally required support would allow the provision only of a meeting place and faculty supervisor to maintain safety and order. Under ordinary circumstances, nothing more would be necessary for the student religious activity "to sustain its existence" on school premises. Additional support would be permissible only if it could be shown that such support was necessary for the activity to continue its existence as a student-initiated and student-run program.

65. See *Abington School Dist. v. Schempp*, 374 U.S. 203, 224-25 (1963) (no state law or school board may require that Bible passages be read in schools at the beginning of each day—even if individual students may be excused from attending or participating in such exercises); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (statute requiring reading of a nondenominational prayer held to violate the establishment clause even though it allowed students to remain silent or to leave the room during prayer).

66. See *Collins v. Chandler Unified School Dist.*, 644 F.2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981). The court concentrated heavily on the element of a captive audience in denying permission for student-initiated prayer at voluntary school assemblies:

[T]he activity in our case goes beyond symbolic inference. The Chandler students must either listen to a prayer chosen by a select group of students or forego the opportunity to attend a major school function. It is difficult to conceive how this choice would not coerce a student wishing to be part of the social mainstream and, thus, advance one group's religious beliefs.

Id. at 762; see *Goodwin v. Cross County School Dist. No. 7*, 394 F. Supp. 417, 425-27 (E.D. Ark. 1973) (establishment clause violated when school board permitted members of student council to read Bible verses and recite the Lord's Prayer to the captive audience of a homeroom class).

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The courts must be alert to subtle forms of school-initiated attendance. Any incentive making attendance more desirable than absence impinges on establishment clause values. Student religious activity could, therefore, be held only before or after the school day, or during a free period, to prevent students from attending the activity as a means of avoiding unpleasant curricular matters.⁶⁷ School-initiated attendance would also result if faculty encouraged participation or took an active role in organizing or leading the group. Certainly, any "rebate for participation" such as forensic credit would induce attendance and thus be impermissible.⁶⁸

In general, courts can approve school board recognition and support of student-initiated religious activity only if the school board's purpose is not predominantly religious,⁶⁹ its support does not exceed that amount minimally required to sustain the activity's existence, and the activity does not involve a captive audience. In such cases, state advancement of religion would not occur, and the establishment clause could thus not be considered a compelling state interest to justify a blanket, content-based prior restraint on otherwise protected religious speech.

III. Other State Interests Justifying Exclusion of Student Religious Expression

Even if student-initiated religious expression cannot be restricted because of establishment clause concerns, the school board could regulate or exclude such speech for other "compelling state interests." The majority in *Widmar v. Vincent*⁷⁰ applied the standard of review generally appropriate for content-based exclusions: "[The University] must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."⁷¹ Later in the majority opinion, the Court again emphasized that it required "the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content."⁷²

While the *Widmar* Court thus seems to require a state interest of the same order as is necessary to justify prior restraints in other contexts,⁷³ it

67. This may be seen as simply the reverse notion of that expressed by the court in *Collins*, 644 F.2d 762. There, students were held to be religiously coerced when faced with the choice between not attending a desirable school function and attending religious activity connected with that function. Here, the student would be religiously "coerced" when faced with a choice between attending an undesirable school function and attending religious activities.

68. This is simply a more extreme case of the type of religious "coercion" referred to in *Collins*.

69. See *supra* note 24.

70. 454 U.S. 263 (1981).

71. *Id.* at 270.

72. *Id.* at 276.

73. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) ("Any system of prior restraints on expression comes to this court bearing a heavy presumption against its constitu-

also acknowledges the "right of the University to make academic judgments as to how best to allocate scarce resources."⁷⁴ The *Widmar* majority recognized that a "university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied its authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."⁷⁵

Justice Stevens, in his concurrence in *Widmar*,⁷⁶ saw these two themes embraced by the majority as fundamentally irreconcilable.⁷⁷ Indeed, it would seem difficult for the university to have virtually untrammelled discretion to make "allocative decisions" and "reasonable regulations" if it is subject to the same exacting scrutiny as are prior restraints imposed, for example, on the press.⁷⁸ Justice Stevens resolved this apparent conflict in favor of academic discretion. He contends that allocative decisions should and must consider the *content* of the proposed activity.⁷⁹ "Judgments of this kind should be made by academicians, not by federal judges, and their standards for decision should not be encumbered with ambiguous phrases like compelling state interest."⁸⁰ To allow the university sufficient administrative discretion, Justice Stevens would require that the school board have only "a valid reason" for denying recognition to student organizations.⁸¹

By decreasing the strength of the state interest necessary to justify a content-based regulation of student extracurricular expression, Justice Stevens implies that such expression is less worthy of constitutional protection than other speech protected by the First Amendment. This accords with Justice Stevens' willingness to rank the value of speech in other contexts. In *Young v. American Mini Theatres*⁸² and *FCC v. Pacifica Foundation*,⁸³ he indicates that offensive, but not obscene, speech could be regulated more easily than other forms of speech closer to the protective core of the First Amendment (for example, political speech).⁸⁴ In *Widmar*, he

tional validity.") (citation omitted); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965) (prior restraint on release of motion pictures bears a heavy burden of justification).

74. 454 U.S. at 276.

75. *Id.* at 268 n.5.

76. *Id.* at 277 (Stevens, J., concurring in judgment).

77. *Id.* at 277-78.

78. *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

79. 454 U.S. at 278 (Stevens, J., concurring in judgment).

80. *Id.* at 278-79.

81. *Id.* at 280. Justice Stevens does not explain why "a valid reason" is less ambiguous than "a compelling state interest."

82. 427 U.S. 50 (1976).

83. 438 U.S. 726 (1978) (plurality opinion).

84. *See id.* at 740-48 (recognizing that *Pacifica's* broadcast was protected speech, but noting that its "vulgar, offensive, and shocking character undercut absolute constitutional protection."); *American Mini Theatres*, 427 U.S. at 70 ("[E]ven though we recognize that the First Amendment will not

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suggests that it is the unique academic context that devalues the speech.⁸⁵

Such judicial value judgments seem constitutionally untenable.⁸⁶ In order for the Court to promulgate stable and consistent constitutional rulings, it must require the *same* degree of state interest to regulate the content of protected speech regardless of context and content. "Degrees of protection" could well lead to the "gentrification" of the marketplace of ideas. That is, by ranking speech, courts could confine expression to that which comports with the upper-middle class values of the judiciary.

Justice Stevens' error in *Widmar* seems to flow from a failure to distinguish the university's discretion to regulate curriculum matters from its discretion to regulate protected speech. Schools *do* have virtually untrammelled discretion to allocate resources and make reasonable regulations with regard to course offerings and schedules, faculty hiring, and book purchases for the school library.⁸⁷ But in those contexts, a forum for student expression and participation has not been opened.⁸⁸ Once such a forum has been opened, however, the school's discretion to regulate speech according to content must be subject to the same constitutional restrictions

tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate.").

85. *Widmar v. Vincent*, 454 U.S. 263, 278-80 (1981) (Stevens, J., concurring in the judgment).

86. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 761 (1978) (Powell, J., concurring in part and concurring in the judgment) ("I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection."); *Young v. American Mini Theatres*, 427 U.S. 50, 85 (1976) (Stewart, J., dissenting) ("What this case does involve is the constitutional permissibility of selective interference with protected speech whose content is thought to produce distasteful effects. It is elementary that a prime function of the First Amendment is to guard against just such interference."). Justice Brennan notes in his dissent in *Pacifica Foundation* that only a plurality in both *Young* and *Pacifica Foundation* embraced the notion, "completely antithetical to basic First Amendment values, that the degree of protection the First Amendment affords protected speech varies with the social value ascribed to that speech by five Members of [the] Court." *Pacifica Found.*, 438 U.S. at 762-63 (Brennan, J., dissenting).

Commentators have also criticized the notion of a scale of First Amendment protection. See, e.g., Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 451-453 (1980) (criticizing Court's willingness to weigh social value of protected expression); Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 96-99, 108-115 (1978) (recognition of judicial valuation of speech in *Young* and discussion of objective standards for subject matter restrictions); *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 151-57 (1978) (national standard of decency stated by Court in *Pacifica Foundation* will devolve into sentiment of individual judge). But see Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 749-58 (1980) (arguing content regulation cases reveal pattern of principled decisionmaking based on a variant of equal protection analysis).

87. See *Board of Educ. v. Pico*, 102 S. Ct. 2799, 2807-09 (1982) (courts should not "intervene in the resolution of conflicts which arise in the daily operations of school systems" unless "basic constitutional values" are "directly and sharply implicate[d] in those conflicts") (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1969)); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980) (school has "nearly plenary powers concerning curriculum, textbooks and other educational matters").

88. See *Widmar v. Vincent*, 454 U.S. 263, 268-70 (discussing when a public forum is opened).

placed on other content-based regulations of protected speech.⁸⁹

The majority in *Widmar* thus correctly articulated the standard for denying access on the basis of content to an open, extracurricular forum. If resources are limited, schools may use content-neutral standards—"first come, first served," number of student participants—to regulate entry. If content is the basis of a decision to recognize one group over another, the difference in educational value must be clear, articulable, and significant. This is especially true in the extracurricular context, where the values being cultivated are generally related not to the content of the extracurricular expression, but rather to student initiative and interaction.

The courts could objectively check school board discretion to regulate expression according to content by subjecting those discretionary decisions to a kind of "fairness doctrine."⁹⁰ Once a school recognized the educational significance of discussing one side of an issue, it could not deny access to a group discussing any other side of the issue on the basis of the content of the group's speech. Thus, if a school recognized a group discussing the anthropomorphic origins of religion or even atheistic existentialism, it would be compelled to recognize a group exploring new directions in contemporary Christian thought and worship. Applying a fairness doctrine to the extracurricular forum would help insure that decisions to allocate limited resources according to the content of speech are based on compelling policy considerations and not simply on the approval or disapproval of the content of the expression.

Conclusion

A public high school's official recognition of protected student-initiated religious expression need not violate the establishment clause. The courts, in striking down such recognition, have assumed that high school students lack sufficient intellectual and emotional maturity to distinguish between neutral accommodation and official endorsement, and that school recognition would therefore have a primarily religious effect. Yet, the courts have viewed high school students as mature enough to discuss controversial nonreligious issues without imputing endorsement of student views to the school board. Moreover, relevant psychological research indicates that students are able, and indeed are likely, to distinguish between accommodation and endorsement. Thus, school board recognition of student-initiated religious expression need not produce the effect of inducing or coercing the nonreligious to participate in religious activity.

89. *Id.* at 270.

90. *Cf.* *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 369-70, 400-01 (1969) (upholding "fairness doctrine" that requires radio and television broadcasters to present each side of public issue discussions with fair coverage).

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Courts can also conclude that excessive entanglement between church and state will not produce such a primarily religious effect so long as the quantity of school board support does not exceed the minimal amount required to sustain the activity's existence, and no captive audience is involved. Once the courts determine that granting recognition would not produce an establishment clause violation, they cannot allow the school board, after it has opened a forum generally to student organizations, to deny such recognition without a compelling educational reason. Any policy for granting recognition among competing proposals must be applied even-handedly and meet the requirements of a content-neutral "fairness" doctrine. Such an approach will not only increase the benefits accruing from student initiative and extracurricular activity, but also affirm and strengthen the principles of freedom of expression and association that lie at the very core of our democratic society.