

**RELIGION IN THE SCHOOLS: ON PRAYER, NEUTRALITY,
AND SECTARIAN PERSPECTIVES**

*Mark Strasser**

I. Introduction	185
II. The Changing Jurisprudence on Religion in the Schools	186
A. Everson	186
B. The Release-Time Cases.....	190
C. Religious Student Groups' Use of University Facilities.....	205
D. Religious Worship v. Speech about Religion.....	212
E. Religious Students Groups Using High School Facilities.....	219
III. Conclusion	240

I. INTRODUCTION

About sixty years ago the United States Supreme Court decided *Everson v. Board of Education*,¹ a case marking the beginning of modern Establishment Clause jurisprudence. Since then, in cases ranging from challenges to programs providing on-site religious education during school hours to challenges of school refusals to permit after-school lectures from a religious perspective, the Court has had several opportunities to clarify the respects in which religious education may be associated with public schools without violating constitutional guarantees. The Court's analysis of the implicated issues has been remarkably inconsistent, both in tone and in substance. Indeed, the reasoning most recently embraced by the Court not only invalidates much of what had seemed foundational just a short time ago, but sets the

* Trustee Professor of Law, Capital University Law School, Columbus, Ohio.

1. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

stage for a repudiation of one of the central tenets of the jurisprudence, namely, that certain kinds of religious activities have no place in the public schools while classes are in session.

This Article traces the development of Establishment Clause jurisprudence with respect to religion in the public schools, noting how the Court's analyses and justifications have changed over time, protestations to the contrary notwithstanding. The Article examines how the logic of the Court's current approach would permit practices long thought to violate Establishment Clause guarantees, concluding that the current approach is radically misconceived as a matter of both constitutional law and good public policy.

II. THE CHANGING JURISPRUDENCE ON RELIGION IN THE SCHOOLS

Establishment Clause jurisprudence has been anything but consistent since World War II. While one might expect some variation because the Clause's guarantees are implicated in such a variety of cases and contexts, one would not expect to see such inconsistency within one particular area, such as the degree to which sectarian activities can take place within public schools. Yet, even within that area, the Court has sometimes interpreted the Clause to require strict separation between church and state, at other times interpreted the Clause to accord states great discretion with respect to the kinds of assistance they afford to religious instruction, and at still other times interpreted the Clause to impose an affirmative obligation on states to permit religious views to be expressed within the public schools. In short, the current jurisprudence in this area is simply incoherent, which does not bode well for reasonable and plausible analyses regarding either the degree to which religious activities and practices are permissible in public schools in particular or for the degree to which religion and the state can overlap more generally.

A. *Everson*

*Everson v. Board of Education of Ewing Township*² is the seminal case in modern Establishment Clause jurisprudence.³ The Court not

2. *Id.*

3. See Antony Barone Kolenc, "Mr. Scalia's Neighborhood": A Home for Minority Religions?, 81 ST. JOHN'S L. REV. 819, 859 (2007) (discussing "the seminal decision of *Everson v. Board of Education*"). See also James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547, 556 (2007); Alan E. Garfield, *What Should*

only held that the Establishment Clause has been incorporated against the states through the Fourteenth Amendment,⁴ but in addition articulated its understanding of the seemingly expansive limitations imposed by the Establishment Clause.⁵ The opinion has sometimes been characterized as representing a staunch separationist approach to church/state relations,⁶ although there is reason to doubt that such a characterization accurately captures the decision.⁷

At issue was a New Jersey program reimbursing parents for the costs incurred in transporting their children to school.⁸ After pointing

We Celebrate on Constitution Day? 41 GA. L. REV. 453, 473 (2007) (discussing *Everson*); Martha A. Boden, *Compassion Inaction: Why President Bush's Faith-Based Initiatives Violate the Establishment Clause*, 29 SEATTLE U. L. REV. 991, 1003 (2006) ("The 1947 landmark *Everson* decision is widely regarded as the beginning of modern Establishment Clause jurisprudence.").

4. See *Everson*, 330 U.S. at 15. See also Carl H. Esbeck, *The 60th Anniversary of the Everson Decision and America's Church-State Proposition*, 23 J.L. & RELIGION 15, 15 (2007-08) ("It is easy enough to state the reason for the decision's prominence, for it was in *Everson* where the Establishment Clause was first 'incorporated' through the Fourteenth Amendment and made applicable to the actions of all state and local governments.").

5. See Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 16 (2000) (noting that "in *Everson*, a five-Justice majority rejected the constitutional challenge in the case at hand, but all nine Justices endorsed a broad interpretation of the Establishment Clause . . ."); James M. Boland, *Constitutional Legitimacy and the Culture Wars: Rule of Law or Dictatorship of a Shifting Supreme Court Majority?* 36 CUMB. L. REV. 245, 282 (2005-06) ("The *Everson* Court accepted a broad meaning of the Establishment Clause . . ."); Christopher Pierre, Note, "With God All Things Are Possible," Including Finding Ohio's State Motto Constitutional under the Establishment Clause of the First Amendment, 49 CLEV. ST. L. REV. 749, 753 (2001) (noting that a "broad interpretation of the Establishment Clause was first advanced in 1947 by Justice Hugo Black in the landmark case of *Everson v. Board of Education*"). See also *Everson*, 330 U.S. at 15 (offering a "broad interpretation to the 'establishment of religion' clause").

6. See John M. Kang, *Deliberating the Divine: On Extending the Justification from Truth to Religious Expression*, 73 BROOK. L. REV. 1, 65 (2007) (suggesting that the "staunch commitment to separation of church and state characterized the Court's Establishment Clause jurisprudence from *Everson* to the 1980s"); Bradley S. Tupi, *Religious Freedom and the First Amendment*, 45 DUQ. L. REV. 195, 219 (2007) (suggesting that *Everson* "laid the foundation for today's secularist jurisprudence"); Thomas A. Schweitzer, Bruce Ledewitz, *American Religious Democracy: Coming to Terms with the End of Secular Politics*, 23 TOURO L. REV. 561, 563 (2007) (book review) ("For decades following *Everson*, Supreme Court jurisprudence reflected, and most of the Academy supported, a secular consensus which adhered strictly to the wall of separation between Church and State.") (internal quotations omitted).

7. See *infra* notes 19-26 and accompanying text (explaining that the *Everson* Court upheld the constitutionality of the program).

8. *Everson v. Bd. of Educ.*, 330 U.S. 1, 3 (1947). The Court states:

A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation of children to and from schools. The appellee, a township board of education, acting pursuant to this statute authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of

out that the program provided reimbursement to parents of schoolchildren generally (because public school children also took city buses to get to and from school⁹), the Court examined whether the Establishment Clause precluded the state's providing financial assistance to those families with children going to religious schools.¹⁰

The Court began its analysis by explaining that neither the state nor federal government "can pass laws which aid one religion, aid all religions, or prefer one religion over another"¹¹ and, further, that "[n]o 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."¹² The Court concluded by suggesting that "in the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"¹³

The *Everson* language on its face appears to preclude a great deal. For example, the prohibition on passing laws that aid religion would seem to preclude a state's paying the transportation costs of those children attending religious schools. Further, the suggestion that taxes cannot be levied to support religious activities or institutions¹⁴ suggests that tax monies cannot be spent to support such institutions.¹⁵ Arguably, the state's reimbursing parochial school transportation costs with tax monies supports religious institutions, both because the state's doing so

transportation of some children in the community to Catholic parochial schools.

Id.

9. *Id.* at 17 (noting that the program involved "[s]pending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools").

10. See Note, "The Released Time" Cases Revisited: A Study of Group Decision making by the Supreme Court, 83 YALE L.J. 1202, 1207 (1974) ("*Everson* involved a challenge to the constitutionality of a local ordinance reimbursing parents of children who attended church-related schools for their children's bus fares on the town's public buses."). While there is no name associated with the note, it has since been identified as having been written by Justice Alito. See 83 YALE L.J. Pocket Part 1202 (Sept. 1, 2005) (attributing the note to now-Justice Alito).

11. *Everson*, 330 U.S. at 15.

12. *Id.* at 16.

13. *Id.* (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

14. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 840 (1995) ("[A] tax levied for the direct support of a church or group of churches . . . would run contrary to Establishment Clause concerns dating from the earliest days of the Republic.>").

15. See Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 4-5 (2006) ("From the very beginning of the modern era in Establishment Clause jurisprudence, for example, the Court could definitively assert that no tax money should ever be used to support religious institutions . . .").

might enable students to go to those schools who might otherwise be unable to do so¹⁶ and because the schools might otherwise feel pressured to subsidize some of the transportation costs, e.g., by charging less for other school services than they otherwise would have.¹⁷ Given the Court's broad reading of the Establishment Clause, one might well have predicted that the Court would strike down the New Jersey program at issue.¹⁸

Allegedly expansive interpretation of the Establishment Clause notwithstanding, the Court did not hold that the New Jersey program violated constitutional guarantees.¹⁹ The Court seemed to view the reimbursement program as a safety measure that would allow students to get to school more safely via bus rather than via more dangerous methods such as walking (where the child might have to cross busy streets) or hitchhiking.²⁰ Analyzing the program as an attempt by the state to help parents get their children to and from accredited schools less dangerously,²¹ the Court denied both that the state was thereby supporting religious schools²² and that the "high and impregnable"²³ wall between church and state had been breached.²⁴

16. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 17 (1947) ("There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets . . .").

17. Indeed, it might be argued that transportation costs are as important as various other costs associated with parochial schooling. *See id.* at 48 (Rutledge, J., dissenting). Justice Rutledge states: Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. Nor is it any the less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve. No rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation.

Id.

18. *See id.* (Rutledge, J., dissenting) ("No rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation.").

19. *Id.* at 17 ("[W]e cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils . . .").

20. *Id.* at 7 (comparing the legislation to "reimburs[ing] needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or 'hitchhiking'").

21. *Id.* at 18 (suggesting that the statute "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools").

22. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) ("The State contributes no money to the schools. It does not support them.").

23. *Id.*

24. *Id.* ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not

Everson sent very mixed messages,²⁵ making it difficult for lower courts to discern the prevailing limitations imposed by the Establishment Clause. The Court used expansive language to describe the limitations imposed by the Clause,²⁶ but nonetheless upheld a program that would benefit religious schools, e.g., by increasing their enrollments. Lower courts would have to wait for subsequent cases from the Court to clarify the limitations imposed by the Establishment Clause.

B. The Release-Time Cases

While subsequent cases afforded the Court an opportunity to clarify the jurisprudence, no such clarification was forthcoming. Indeed, it would have been difficult to predict the outcome in *McCollum v. Board of Education*,²⁷ given *Everson*, or to predict the outcome in *Zorach v. Clauson*,²⁸ given *Everson* and *McCollum*, protestations to the contrary by members of the Court notwithstanding.²⁹

At issue in *McCollum* was a program of release-time during which students would receive religious instruction by privately paid religious teachers³⁰ in the school building classrooms.³¹ Attendance would be taken at these classes, and the secular teachers would receive the attendance reports.³² Students not wishing to attend these religious classes would leave their classrooms to go to another room within the same building to further their secular studies.³³

breached it here.”).

25. See Joseph P. Viteritti, *Davey's Plea: Blaine, Blair, Witters, and the Protection of Religious Freedom*, 27 HARV. J.L. & PUB. POL'Y 299, 326 (2003) (“[T]he landmark *Everson* opinion that grounded a generation of secularist case law was a jumble of mixed messages”).

26. See *supra* notes 14-24 and accompanying text.

27. *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

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

29. See *infra* note 37 and accompanying text (noting that the *McCollum* Court suggested that *McCollum* was mandated by *Everson*).

30. *McCollum*, 333 U.S. at 205 (“[R]eligious teachers, employed by private religious groups, were permitted to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law.”).

31. *Id.* at 209.

32. *Id.*

33. *Id.* (“Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies.”).

The *McCullum* Court noted that students were required by law to go to school,³⁴ and that they would be released from that duty contingent upon their attending the religious classes.³⁵ The Court struck down the program because it involved “a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith,”³⁶ suggesting that the program at issue was barred by *Everson*.³⁷ The government was engaging in behaviors that might be thought to violate the Establishment Clause in two distinct ways— “not only are the state’s taxsupported [sic] public school buildings used for the dissemination of religious doctrines,”³⁸ but, in addition, the state “affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state’s compulsory public school machinery.”³⁹

Yet, the fact that the school buildings were tax-supported was not as important as the Court had implied. The buses used to transport the students in *Everson* were also tax-supported,⁴⁰ and that did not suffice to make the New Jersey program unconstitutional. Further, not only were tax-supported buses being used, but the state was reimbursing the cost of the fares, making the state even more directly involved in helping students to receive religious instruction. Thus, claims to the contrary notwithstanding, it was not obvious after *Everson* that the program at issue in *McCullum* was unconstitutional just because taxes helped pay for the building in which the instruction took place.

34. *Id.*

35. *Id.* at 209-10.

36. *McCullum v. Bd. of Educ.*, 333 U.S. 203, 210 (1948).

37. *Id.* at 211 (suggesting that “the Illinois program is barred by the First and Fourteenth Amendments if we adhere to the views expressed both by the majority and the minority in the *Everson* case”).

38. *Id.* at 212.

39. *Id.*

40. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 3 (1947) (“The appellee, a township board of education, acting pursuant to this statute authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system.”); See also James E. Zucker, *Better a Catholic than a Communist: Reexamining McCullum v. Board of Education and Zorach v. Clauson*, 93 VA. L. REV. 2069, 2073 (2007) (discussing the “Court’s 1947 decision in *Everson v. Board of Education*, which upheld a school board’s practice of reimbursing parents for the cost of transporting their children on public buses to parochial schools”); Mark J. Chadsey, *Thomas Jefferson and the Establishment Clause*, 40 AKRON L. REV. 623, 623 n.5 (2007) (“In *Everson*, the question before the Court was whether New Jersey could direct local school boards to reimburse parents of students, including some attending parochial schools, for money spent on public bus transportation to and from school.”).

Even the fact that Illinois's compulsory school law was viewed as aiding religious instruction in *McCullum* was not as important as the Court seemed to imply. Many states had compulsory schooling laws that required parents to send their children to approved public or private schools. For example, New Jersey required that students attend approved schools,⁴¹ which included public and parochial schools.⁴² Yet, this law aided religious instruction in that the law provided an incentive to attend approved parochial schools. Parochial schools were given further aid when the Court upheld that state's decision to authorize the reimbursement of the costs of transporting the children to those approved institutions providing religious education.⁴³ Nonetheless, New Jersey's having provided invaluable aids in helping children to receive religious instruction did not thereby make the program unconstitutional.

While there are ways to analogize the New Jersey and Illinois programs for constitutional purposes so that the Court's upholding the travel expense reimbursement in *Everson* would suggest that the Illinois program also passed muster, almost all members of the Court believed that the Establishment Clause precluded Illinois from permitting religious teaching in public school buildings.⁴⁴ One way to understand the difference between *Everson* and *McCullum* is in the kind of aid afforded by the state—*Everson* upheld the constitutionality of the state's promoting health and safety, while *McCullum* struck down the state's promoting religious instruction. Yet, interpreting the decisions as representing this categorical distinction is misleading, if not simply wrong.⁴⁵ For example, in his *McCullum* concurrence, Justice Frankfurter noted:

41. See Richard Albert, *Popular Will and the Establishment Clause: Rethinking Public Funding to Religious Schools*, 35 U. MEM. L. REV. 199, 213 (2005) (discussing "the requirements imposed by the state under compulsory education laws").

42. See *Everson*, 330 U.S. at 18 (noting that "parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose").

43. *Id.* (reasoning that the statute authorizing the payment of transportation costs to religious schools "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools").

44. The only member of the Court to dissent in *McCullum* was Justice Reed. See *McCullum*, 333 U.S. at 238.

45. That said, others on the Court emphasized the importance of the distinction between the promotion of health and safety on the one hand and the promotion of religious instruction on the other. Justice Black, who wrote the *Everson* opinion, offered his understanding of it in *Allen*. See *Bd. of Educ. v. Allen*, 392 U.S. 236, 252-53 (1968) (Black, J., dissenting). Justice Black states:

[I]t is not difficult to distinguish books, which are the heart of any school, from bus fares, which provide a convenient and helpful general public transportation service.

Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable. We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid 'released time' program. We find that the basic Constitutional principle of absolute separation was violated when the State of Illinois, speaking through its Supreme Court, sustained the school authorities of Champaign in sponsoring and effectively furthering religious beliefs by its educational arrangement.⁴⁶

Thus, it was not at all clear that the Court was willing to paint the different programs with a broad brush, and then uphold or strike down the programs at issue in light of whether the program was designated as "instructional" rather than as "promoting health or safety." Justice Frankfurter implied that the constitutionality of release-time programs depended upon unspecified factors or combinations of factors. While he did not thereby communicate which factors were important for constitutional purposes, he nonetheless suggested that some release-time programs might or did pass muster. Yet, if all of the release-time programs involved religious instruction and some of them (based on the unspecified factors) did not violate constitutional guarantees, then it seems clear that the fact that a release program involved religious instruction rather than the promotion of health or safety did not alone suffice to establish the program's unconstitutionality.⁴⁷

That the Court did not believe all release-time programs unconstitutional was made clear in *Zorach v. Clauson*,⁴⁸ where the Court considered a New York City program releasing students during the school day so that they could go off-campus to receive religious instruction or engage in "devotional exercises."⁴⁹ Students who did not

With respect to the former, state financial support actively and directly assists the teaching and propagation of sectarian religious viewpoints in clear conflict with the First Amendment's establishment bar; with respect to the latter, the State merely provides a general and nondiscriminatory transportation service in no way related to substantive religious views and beliefs.

Id.

46. *McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948).

47. Indeed, some members of the *McCollum* Court believed at the time *McCollum* was decided that the New York program was constitutional, a view that was later validated in *Zorach*. See Zucker, *supra* note 40, at 2095 (suggesting that both Justices Reed and Burton believed that the New York plan passed constitutional muster).

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

49. *Id.* at 308.

attend these religious classes would remain in school.⁵⁰ The Court contrasted the New York program with the Illinois program that had been at issue in *McCullum*, noting that the latter had permitted religious teachers to use the public classrooms,⁵¹ whereas the former involved “neither religious instruction in public school classrooms nor the expenditure of public funds.”⁵²

Of course, it is not as if public funds were being used in *McCullum* to pay the religious instructors⁵³—rather, the public funds expended were the de minimis funds⁵⁴ involved in permitting tax-supported public property to be used for religious instruction.⁵⁵ While there was no religious instruction on public school grounds in *Zorach*, *McCullum* had been written in such a way as to suggest that this was not an important distinction.⁵⁶ For example, the *McCullum* Court had suggested that the reporting of attendance at the religious classes to the secular teachers

50. *Id.* (“Those not released stay in the classrooms.”).

51. *Id.* at 309 (“The case is therefore unlike *McCullum v. Board of Education* . . . which involved a ‘released time’ program from Illinois. In that case the classrooms were turned over to religious instructors.”).

52. *Id.* at 308-09.

53. *McCullum v. Bd. of Educ.*, 333 U.S. 203, 208 (1948) (“The council employed the religious teachers at no expense to the school authorities . . .”).

54. *See id.* at 234 (Jackson, J., concurring). Justice Jackson states:

It can be argued, perhaps, that religious classes add some wear and tear on public buildings and that they should be charged with some expense for heat and light, even though the sessions devoted to religious instruction do not add to the length of the school day. But the cost is neither substantial nor measurable

Id.

55. *See id.* at 239 n.2 (Reed, J., dissenting). Justice Reed states:

There is no extra cost to the state but as a theoretical accounting problem it may be correct to charge to the classes their comparable proportion of the state expense for buildings, operation and teachers. In connection with the classes, the teachers need only keep a record of the pupils who attend. Increased custodial requirements are likewise nominal. It is customary to use school buildings for community activities when not needed for school purposes.

Id.

56. *Id.* at 240 (Reed, J., dissenting) (“From the tenor of the opinions I conclude that their teachings are that any use of a pupil's school time whether that use is on or off the school grounds, with the necessary school regulations to facilitate attendance, falls under the ban.”). *See also Zorach*, 343 U.S. at 316 (Black, J., dissenting). Justice Black states:

I see no significant difference between the invalid Illinois system and that of New York here sustained. Except for the use of the school buildings in Illinois, there is no difference between the systems which I consider even worthy of mention. In the New York program, as in that of Illinois, the school authorities release some of the children on the condition that they attend the religious classes, get reports on whether they attend, and hold the other children in the school building until the religious hour is over.

Id.

integrated the public and religious education in a way that was prohibited by the Establishment Clause.⁵⁷ But the same kind of attendance reporting and, thus, integration was present in *Zorach*,⁵⁸ which would make *Zorach* seem constitutionally vulnerable.⁵⁹

The *Zorach* Court rejected that students were coerced into taking the religion classes,⁶⁰ reasoning that the school authorities “do no more than release students whose parents so request.”⁶¹ Yet, no one had been forced to take the religion classes in *McCollum*.⁶² Rather, the students who had chosen not to participate in the Illinois religious instruction program felt alienated and humiliated,⁶³ but that could hardly have been attributed to the state.⁶⁴

57. See *McCollum*, 333 U.S. at 209-10. The Court states:

The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes.

Id.

58. *Zorach v. Claiborne*, 343 U.S. 306, 308 (1952) (“The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have not reported for religious instruction.”).

59. Yet, it should be noted that in *Everson*, where the Court upheld the cooperation between church and state, the state had to rely on the attendance reports provided by the religious schools. See *Everson v. Bd. of Educ.*, 44 A.2d 333, 335 (N.J. 1945) (“The payments to parents were in satisfaction of advancements made by them; and the amount was fixed upon the basis of the actual number of days' attendance as indicated upon each pupil's report card.”).

60. *Zorach*, 343 U.S. at 311.

61. *Id.*

62. *McCollum v. Bd. of Educ.*, 333 U.S. 203, 232 (1948) (Jackson, J., concurring) (“[C]omplainant's son may join religious classes if he chooses and if his parents so request, or he may stay out of them.”). But see *McGowan v. Maryland*, 366 U.S. 420, 452 (1961) (“In *McC[o]llum*, state action permitted religious instruction in public school buildings during school hours and required students not attending the religious instruction to remain in their classrooms during that time. The Court found that this system had the effect of coercing the children to attend religious classes.”).

63. *McCollum*, 333 U.S. at 232 (Jackson, J., concurring) (“The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating.”).

64. *Id.* at 232-33 (Jackson, J., concurring). Justice Jackson states:

The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress. . . . [N]o legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him

Id.

Justice Frankfurter had suggested in *McCullum* that it was somewhat misleading to analyze the state's role in the release-time program solely in terms of whether the state was coercing attendance. He explained that there had been attempts to hold church school classes during the week after school, but that this had not been successful because children had resisted attending religious instruction classes during playtime.⁶⁵ Church leaders had decided that religious schooling during the week would only be successful if it could take place during regular school hours.⁶⁶ But making the religious instruction available during regular school hours made the public school personnel more actively involved in the success of the program, although not in the sense that "any one or more teachers were using their office to persuade or force students to take the religious instruction."⁶⁷ Rather, they were involved in the sense that but for the willingness of the schools to give students the constrained choice between remaining in school to pursue secular studies or, instead, having the opportunity to receive religious instruction during school hours so that valued after-school playtime would not be diminished,⁶⁸ the religious instruction program would have foundered.

Yet, *Zorach* also involved releasing students during regular school hours to receive religious instruction.⁶⁹ As Justice Frankfurter noted in

65. *Id.* at 222 (Frankfurter, J.) ("Out of these inadequate efforts evolved the week-day church school, held on one or more afternoons a week after the close of the public school. But children continued to be children; they wanted to play when school was out, particularly when other children were free to do so.").

66. *Id.* ("Church leaders decided that if the week-day church school was to succeed, a way had to be found to give the child his religious education during what the child conceived to be his 'business hours.'").

67. *Zorach v. Clauson*, 343 U.S. 306, 311(1952).

68. It may well be that play time would nonetheless be diminished. Presumably, those not attending the religious studies program would be in some kind of study hall. See Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 92 (2004) ("[T]he program in essence suspended the duration of the school day by not holding classes for those who were not released and requiring them to stay in study hall."); Paul E. Salamanca, *The Role of Religion in Public Life and Official Pressure to Participate in Alcoholics Anonymous*, 65 U. CIN. L. REV. 1093, 1121 (1997) (noting that *McCullum* and *Zorach* "also shared, presumably, the characteristic of subjecting nonparticipating students to what might be considered dead time in study hall"). Cf. *Zorach*, 343 U.S. at 309 (noting appellants' argument that "the classroom activities come to a halt while the students who are released for religious instruction are on leave"). But this would mean that the students could get their homework done while in school, thus freeing up other time that would have been spent doing homework. Cf. Michael W. McConnell, *Neutrality under the Religion Clauses*, 81 NW. U. L. REV. 146, 163 n.73 (1986) ("I could imagine that the opportunity to get one's homework done at school would be highly regarded.").

69. *Zorach*, 343 U.S. at 308 ("New York City has a program which permits its public schools

his *Zorach* dissent, there is a difference between closing the schools as a general matter, thereby freeing the children to attend religious schools or other activities, and in effect closing the school for some children but keeping it in session for others.⁷⁰

When analyzing whether the state is violating Establishment Clause guarantees by participating in a release-time program, one should consider how individuals who do not receive the religious instruction will be spending their time. Some commentators suggest that the students who did not participate in the religious programming might have found the secular alternative rather uninteresting,⁷¹ which would have incentivized attendance at the religious classes. Justice Frankfurter implied that there was a kind of coercion involved in the program, suggesting that “formalized religious instruction is substituted for other school activity which those who do not participate in the released-time program are *compelled* to attend.”⁷² He noted that if the school’s “doors are closed, they are closed upon those students who do not attend the religious instruction, in order to keep them within the school.”⁷³ It was this element of coercing or, to put it another way, incentivizing the religious instruction that worried Justice Black, who viewed the relevant issue as “whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery.”⁷⁴ He argued that “New York is manipulating its compulsory education laws to help religious sects get pupils. This is not separation but combination of Church and State.”⁷⁵

The *Zorach* Court disputed Justice Black’s analysis, explaining that insofar as “an ‘establishment’ of religion [is] concerned, the separation must be complete and unequivocal. The First Amendment within the

to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises.”)

70. *Id.* at 320 (Frankfurter, J., dissenting) (“There is all the difference in the world between letting the children out of school and letting some of them out of school into religious classes.”).

71. See Thomas C. Berg, *Church-State Relations and the Social Ethics of Reinhold Niebuhr*, 73 N.C. L. REV. 1567, 1630 n.277 (1995) (“By requiring non-participating students to sit idly in study halls during the release time period, it imposed costs on such students and may have encouraged them to attend the religious classes.”). See also Salamanca, *supra* note 68, at 1121 (describing the study hall time as “dead time”).

72. *Zorach v. Clauson*, 343 U.S. 306, 321 (1952) (Frankfurter, J., dissenting) (emphasis added).

73. *Id.* (Frankfurter, J., dissenting).

74. *Id.* at 318 (Black, J., dissenting).

75. *Id.* (Black, J., dissenting).

scope of its coverage permits no exception; the prohibition is absolute.”⁷⁶ However, the Court noted that the First Amendment “does not say that in every and all respects there shall be a separation of Church and State,”⁷⁷ reasoning that if the release program were unconstitutional, a whole host of other practices would also be unconstitutional.

Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; ‘so help me God’ in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: ‘God save the United States and this Honorable Court.’⁷⁸

Yet, the Court’s recounting this “parade of horrors”⁷⁹ undercuts its own analysis in two different respects. First, it is not at all clear that it would be so terrible if indeed some of the practices discussed by the Court were discontinued. For example, it is not so clear that great costs would be incurred were the Court to stop opening each session with “God save the United States and this Honorable Court,” although it might be argued that the Court’s opening each session that way does not impose a great harm on anyone.⁸⁰

Second, the Court had just been suggesting that the jurisprudence at issue carefully considers aspects of each case. If that is true, however, the guiding principles might well allow the Court to make distinctions among practices, permitting some and prohibiting others. It would thus not be at all clear that the Court’s holding that the New York system violated constitutional guarantees would mean that other practices, e.g.,

76. *Id.* at 312.

77. *Id.*

78. *Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952).

79. *Hein v. Freedom for Religion Found., Inc.*, 127 S.Ct. 2553, 2571 (2007).

80. *Cf. Marsh v. Chambers*, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting) (discussing the Court’s presumed view that “features of our public life such as ‘God save the United States and this Honorable Court,’ ‘In God We Trust,’ ‘One Nation Under God,’ and the like” are at most “*de minimis*” violations of the Establishment Clause).

permitting a student to attend a religious service rather than school on a particular day in accord with her parents' wishes, would also be constitutionally objectionable.⁸¹

In his dissent, Justice Black noted some of the ways in which the systems at issue in *Zorach* and *McCullum* were similar. For example, in *McCullum*, the state used its power to get the children into the schools and, further, would only release from school those who attended the religious classes.⁸² The same might have been said of the program at issue in *Zorach*.⁸³ Indeed, Justice Black suggested that the sole difference between the programs upheld in *Zorach* and struck down in *McCullum* was where the program was taking place. "Except for the use of the school buildings in Illinois, there is no difference between the systems which I consider even worthy of mention."⁸⁴

Justice Jackson seemed particularly incensed by the suggestion that anyone who would strike the New York plan was hostile to religion. "As one whose children, as a matter of free choice, have been sent to privately supported Church schools, I may challenge the Court's suggestion that opposition to this plan can only be antireligious,

81. See *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). The Court states:

We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds. The nullification of this law would have wide and profound effects. A catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher requires parental consent in writing. In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether 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 does not alter the character of the act.

Id.

82. *Id.* at 316 (Black, J., dissenting) ("[T]he state did use its power to further the program by releasing some of the children from regular class work, insisting that those released attend the religious classes, and requiring that those who remained behind do some kind of academic work while the others received their religious training.").

83. *Id.* (Black, J., dissenting) ("[T]he school authorities release some of the children on the condition that they attend the religious classes, get reports on whether they attend, and hold the other children in the school building until the religious hour is over.").

84. *Id.* (Black, J., dissenting). See also Inke Muehlhoff, *Freedom of Religion in Public Schools in Germany and in the United States*, 28 GA. J. INT'L & COMP. L. 405, 415 (2000) ("Unlike the facts in *McCullum*, the religious instruction in *Zorach* took place outside of the public school buildings . . .").

atheistic, or agnostic.”⁸⁵ Regrettably, the charge that those who would strike a religious program must be hostile to religion has been made repeatedly since then.⁸⁶

Substantively, it is not clear how to read *Zorach*. Perhaps, as Justice Jackson suggests, the *Zorach* Court is emphasizing the importance of the location of the religious teaching,⁸⁷ although that factor will become less important in the subsequent case law.⁸⁸ Perhaps *Zorach* is suggesting that the Illinois program at issue in *McCollum* was struck down because it included several factors: the state used its coercive power to get the students in the schools and to keep them there unless they opted to participate in the religious program, the programs were integrated in that the religious school teachers were reporting attendance to the secular teachers, the students who did not attend the religious classes were required to remain in school and perform secular work, the program occurred while public school was in session, and the program was on-site. Because the teaching took place off-site in the New York program at issue in *Zorach*, all of the *McCollum* factors were not present in *Zorach* and thus the New York and Illinois programs were distinguishable.

Of course, the *Zorach* Court did not specify *why* the New York, but not the Illinois, program passed constitutional muster. The Court did explain that “[g]overnment may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any

85. *Zorach*, 343 U.S. at 324 (Jackson, J., dissenting).

86. See *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (implying that prohibiting the exhibition of the Ten Commandments would “evince a hostility to religion”). Cf. *Wallace v. Jaffree*, 472 U.S. 38, 84 (1985) (O’Connor, J., concurring in the judgment) (“The Court does not hold that the Establishment Clause is so hostile to religion that it precludes the States from affording schoolchildren an opportunity for voluntary silent prayer.”).

87. See Norman Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey*, 60 NOTRE DAME L. REV. 1094, 1097-98 (1985). Redlich states:

In *McCollum* and *Zorach* there emerged a distinction that was to find more detailed expression in the opinions of the Burger Court: teaching religion on public school premises is an impermissible endorsement of religion, but a program of cooperation that enables the public and religious schools to perform their independent functions in their own ways might be permissible.

Id.

88. See *infra* notes 116-281, 318-37 and accompanying text (discussing *Widmar v. Vincent*, 454 U.S. 263 (1981); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); and *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001)).

person.”⁸⁹ However, these points were not particularly helpful because neither Illinois nor New York financed religious groups or blended secular and sectarian education or used secular institutions to impose religion on anyone. So, too, while the Court noted that there was “no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence,”⁹⁰ the Court failed to explain why its striking down the New York program would have been hostile to religion whereas its striking down the Illinois program did not “manifest a governmental hostility to religion or religious teaching”⁹¹ but, instead, simply recognized that “both religion and government can best work to achieve their lofty aim if each is left free from the other within its respective sphere.”⁹²

One of the many confusing aspects of the *Everson-McCollum-Zorach* line of cases is how or whether they can be reconciled or, perhaps, explained. A factor that is tempting to consider is how the composition of the Court had changed during the period. The Justices deciding *Everson* and *McCollum* were Justices Vinson, Black, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge and Burton.⁹³ There were two changes on the Court by the time that *Zorach* was decided—Justice Minton replaced Justice Rutledge and Justice Clark replaced Justice Murphy.⁹⁴

Yet, the changes on the Court will not alone explain the different results in *McCollum* and *Zorach*, since there was only one dissent in *McCollum*.⁹⁵ Three Justices in the majority in *McCollum* were also in the majority in *Zorach*—Chief Justice Vinson, and Justices Burton and Douglas (who wrote the opinion).⁹⁶

Some suggest that *Zorach* is best understood as responding to the public outcry produced by *McCollum*,⁹⁷ implying that the Court simply

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

90. *Id.*

91. *McCollum v. Bd. of Educ.*, 333 U.S. 203, 211 (1948).

92. *Id.* at 212.

93. See Alito, *supra* note 10, at 1208 n.41 (1974).

94. See *id.* at 1208 n.41.

95. See *McCollum*, 333 U.S. at 238 (Reed, J., dissenting).

96. Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 149 n.153 (2001) (“The new justices were Tom Clark and Sherman Minton. But new personnel cannot alone explain the change from *McCollum* to *Zorach*. Three carryover justices switched their votes: Chief Justice Fred Vinson, William Douglas (who wrote *Zorach*), Harold Burton.”).

97. Cf. *Zorach v. Clauson*, 343 U.S. 306, 317 (1952) (Black, J., dissenting) (“I am aware that

modified its position to quell the uprising in public opinion.⁹⁸ Focusing in particular on the opinion written by Justice Douglas, others suggest that Douglas was motivated by the political ambition to run for president,⁹⁹ although there is reason to reject that interpretation. Justice Douglas expressly claimed that he did not see *McCullum* and *Zorach* as incompatible—

Three of us—The Chief Justice, Mr. Justice Douglas and Mr. Justice Burton—who join this opinion agreed that the ‘released time’ program involved in the *McCullum* case was unconstitutional. It was our view at the time that the present type of ‘released time’ program was not prejudged by the *McCullum* case, a conclusion emphasized by the reservation of the question in the separate opinion by Mr. Justice Frankfurter in which Mr. Justice Burton joined.¹⁰⁰

There is some irony in Justice Douglas’s citing Justice Frankfurter’s *McCullum* concurrence, given Frankfurter’s dissent in *Zorach*. However, Justice Frankfurter’s failure to specify the conditions that would make a release-time program constitutionally permissible may have been the product of a tactical decision on his part. Precisely because those signing onto his concurrence might not have been in agreement about which factors were significant for constitutional purposes, he might have refused to specify what those factors were in order to get the others to sign onto his opinion. Justice Reed in his *McCullum* dissent explicitly mentioned the New York program,¹⁰¹

our *McCullum* decision on separation of Church and State has been subjected to a most searching examination throughout the country. Probably few opinions from this Court in recent years have attracted more attention or stirred wider debate.”).

98. Michal R. Belknap, *God and the Warren Court: The Quest for “A Wholesome Neutrality,”* 9 SETON HALL CONST. L.J. 401, 412 (1999). Belknap states:

McCullum triggered an outraged reaction by religious groups, almost all of which operated some form of released time program. To quiet this furor, the Court in *Zorach v. Clauson* upheld a New York City plan under which students were allowed to leave school grounds during the school day to receive religious instruction or attend devotional exercises at religious centers.

Id.

99. See L. Scott Smith, *From Typology to Synthesis: Recasting the Jurisprudence of Religion*, 34 CAP. U. L. REV. 51, 86 n.255 (2005). See also Bruce Allen Murphy, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 311 (New York: Random House 2003) (“For Jackson, his colleague appeared to be taking this proreligion position because of his thoughts about the need to win the support of a Catholic constituency for a possible run for the presidency later that year.”).

100. *Zorach*, 343 U.S. at 315 n.8.

101. See *McCullum v. Bd. of Educ.*, 333 U.S. 203, 250-52 (1948) (Reed, J., dissenting).

suggesting that while he believed that program constitutional the *McCullum* opinion implied that it was not.¹⁰²

Both Chief Justice Vinson and Justice Douglas were part of the majority opinion in *Everson*,¹⁰³ so it might be tempting to think that their votes to uphold the program at issue in *Zorach* were easier to predict than Justice Burton's, who was in the dissent in *Everson*.¹⁰⁴ Yet, there is evidence that Justice Burton believed all along that *McCullum* and *Zorach* were compatible.¹⁰⁵

A separate question is why. While it is true that the teaching occurred in the school in *McCullum* and off-site in *Zorach*, it is not clear why that was constitutionally significant.¹⁰⁶ The extra cost to the state in *McCullum* cannot plausibly account for the difference.¹⁰⁷ Perhaps it was

102. *Id.* at 252 (Reed, J., dissenting). Justice Reed states:

Since all these states use the facilities of the schools to aid the religious education to some extent, their desire to permit religious education to school children is thwarted by this Court's judgment. Under it, as I understand its language, children cannot be released or dismissed from school to attend classes in religion while other children must remain to pursue secular education. Teachers cannot keep the records as to which pupils are to be dismissed and which retained. To do so is said to be an 'aid' in establishing religion; the use of public money for religion.

Id.

103. In *Engel v. Vitale*, 370 U.S. 421 (1962), Justice Douglas implies that *Everson* was in error. *See id.* at 443 (Douglas, J. concurring) ("The *Everson* case seems in retrospect to be out of line with the First Amendment.").

104. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 28 (1947) (Routledge, J., dissenting). Justice Burton signed on to Justice Routledge's dissent. *See also* *McCullum*, 333 U.S. at 212 (Frankfurter, J.) ("We dissented in *Everson v. Board of Education* . . . because in our view the Constitutional principle requiring separation of Church and State compelled invalidation of the ordinance sustained by the majority."). Justice Burton signed on to this opinion. *See id.*

105. *See* Alito, *supra* note 10, at 1220-21 (Justice Burton "insisted to both Justices Black and Frankfurter that in order for him to join their opinions they must not invalidate the New York released time plan.").

106. Joseph M. McMillan, *Zobrest v. Catalina Foothills School District: Lowering the Establishment Clause Barrier in School-Aid Controversies*, 39 ST. LOUIS U. L.J. 337, 345 (1994) ("The only significant difference between the invalid program in *McCullum* and the permissible one in *Zorach* was that in the latter case the students left school early to attend religion classes at an off-campus location.").

107. *See* *McCullum v. Bd. of Educ.*, 333 U.S. 203, 234 (1948) (Jackson, J., concurring). Justice Jackson states:

In this case, however, any cost of this plan to the taxpayers is incalculable and negligible. It can be argued, perhaps, that religious classes add some wear and tear on public buildings and that they should be charged with some expense for heat and light, even though the sessions devoted to religious instruction do not add to the length of the school day. But the cost is neither substantial nor measurable, and no one seriously can say that the complainant's tax bill has been proved to be increased because of this plan. I think it is doubtful whether the taxpayer in this case has shown any substantial property injury.

the symbolism of having such classes held in a public school,¹⁰⁸ although the Court would not find that rationale particularly compelling in subsequent cases.¹⁰⁹

While it may be possible to reconcile *Zorach*, *Everson* and *McCullum* substantively, there is no gainsaying that *Zorach* sets a much different tone than do *Everson* and *McCullum*. Both the *Everson* and *McCullum* Courts discussed the impregnable wall between Church and State,¹¹⁰ while the *Zorach* Court wrote that “[w]e are a religious people whose institutions presuppose a Supreme Being.”¹¹¹ Lest the implications of its view be unclear, the *Zorach* Court suggested that “[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.”¹¹² Indeed, the Court explained that prohibiting the program at issue “would be to find in the Constitution a requirement that the government show a callous indifference to religious groups,”¹¹³ which would amount to “preferring those who believe in no religion over those who do believe.”¹¹⁴ Thus, whether or not the Court’s substantive position had changed, the tone in *Zorach* signaled that the Court might be adopting a much different

Id.

108. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 262 (1963) (Brennan, J., concurring) (“The deeper difference was that the *McCullum* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not.”); *Cf. McCullum*, 333 U.S. at 231.

Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a ‘wall of separation,’ not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. ‘The great American principle of eternal separation’-Elihu Root's phrase bears repetition-is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity.

Id.

109. See *infra* notes 213-50, 251-81, 318-37 and accompanying text (discussing *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); and *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001)).

110. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947); *McCullum*, 333 U.S. at 212.

111. See *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

112. *Id.* at 313-14.

113. *Id.* at 314.

114. *Id.*

approach to the accommodation of religion within the public school setting.

C. Religious Student Groups' Use of University Facilities

One of the points emphasized by Justice Frankfurter was that the state's keeping those children in school who did not attend the religious classes made the state a more active player in inducing students to take the religious instruction. He believed that the Establishment Clause precluded the state from having such a role, although a majority of the Court did not agree that such a state role was precluded if the religious teaching took place off-site. Neither *McCullum* nor *Zorach* addressed the inverse question, namely, whether having such instruction on-site but not during class time was prohibited by the Establishment Clause. While the Court would discuss that specific question in later cases,¹¹⁵ the Court addressed related questions in *Widmar v. Vincent*,¹¹⁶ offering an analysis that would play a central role in the Court's subsequent analyses of the conditions under which instruction about religious matters could take place in the public schools.

The *Widmar* Court examined whether the University of Missouri at Kansas City could preclude the use of school facilities by a student group wishing to engage in religious discussion and worship.¹¹⁷ The Court noted that the University had set up a forum for use by student groups¹¹⁸ and that it was precluding the plaintiff group from using the forum based on the members' desire to engage in religious activities.¹¹⁹ While a university forum is distinguishable from other fora such as parks or streets¹²⁰ because of the school's educational mission,¹²¹ the Court nonetheless suggested that the school could not prevent the group from

115. See *infra* notes 213-50, 251-81, 318-37 and accompanying text (discussing *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); and *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001)).

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

117. *Id.* at 265.

118. *Id.* at 267.

119. *Id.* at 269 (suggesting that the University was "discriminat[ing] against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion").

120. *Id.* at 268 n.5 (noting that a "university differs in significant respects from public forums such as streets or parks or even municipal theaters").

121. *Id.* (noting that the "university's mission is education"). The University described its own mission as "providing a 'secular education' to its students." See *id.* at 268 (emphasis in original).

using the forum unless that limitation could withstand examination under strict scrutiny.¹²²

The University attempted to justify its exclusion by suggesting that doing otherwise would have violated its Establishment Clause obligations.¹²³ The Court agreed that complying with constitutional obligations implicated a compelling interest,¹²⁴ but denied that the state's permitting the group to meet violated Establishment Clause guarantees.¹²⁵

To some extent, the differing views on whether the Establishment Clause barred the student group from having access to the forum can be attributed to differing understandings of what would be implicated were such access permitted. The University argued that its granting the religious group access would in effect mean that the University had created a religious forum,¹²⁶ whereas the Court suggested that the proper way to characterize the issue was to examine whether the University could exclude groups from an open forum based on the religious content of their speech.¹²⁷ Perhaps because of these differing ways of viewing the issue at hand, the Court rejected that the primary effect of opening the forum to this religious group would be to advance religion.¹²⁸

Of course, permitting a religious group to meet on campus would afford that organization some benefit. However, a religious organization's receipt of "incidental" benefits is not barred by the Establishment Clause.¹²⁹ As the *Widmar* Court recognized, an important

122. *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981). The Court held that:

[I]n order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must . . . satisfy the standard of review appropriate to content-based exclusion. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Id.

123. *Id.* at 270-71 ("The University first argues that it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause of the Constitution of the United States.").

124. *See id.* at 271 ("We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling.").

125. *See id.* at 271-73 (suggesting that permitting the group to meet satisfies the requirements of the three-part *Lemon* Test).

126. *Id.* at 273 (noting the University characterization of the relevant question as "whether the creation of a religious forum would violate the Establishment Clause").

127. *Id.*

128. *Widmar v. Vincent*, 454 U.S. 263, 273 (1981) (rejecting that "the primary effect of the public forum, open to all forms of discourse, would be to advance religion").

129. *Id.* (citing *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 771 (1973)).

issue in dispute was whether this benefit should be classified as “incidental” in light of the relevant jurisprudence.¹³⁰

Two reasons were offered to justify that permitting a religious organization access to an open forum in a university setting would only afford incidental benefits. First, because many different types of groups had access to the forum, the University’s permitting the religious group to participate would not communicate state endorsement of that group’s beliefs or practices.¹³¹ Second, that there was such a broad array of nonreligious and religious speakers¹³² suggested that the primary effect of the forum was secular rather than sectarian.¹³³

Certainly, one possible way of distinguishing between affording an incidental benefit to religion on the one hand and having a primary effect of promoting religion on the other would be to examine whether the state had implicitly endorsed religion or, instead, had accorded benefits to many different groups among which one or a few happened to be religious. Yet, at least one difficulty with the Court’s using this approach was that this was not how the Court had determined in the past whether a benefit was incidental, and the Court was allegedly deciding whether the benefit conferred was incidental in light of the past case law.¹³⁴

Consider *Tilton v. Richardson*,¹³⁵ which involved a challenge to a federal act providing construction grants to private colleges and universities. The Court spelled out the relevant Establishment Clause test: “[f]irst, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion?”¹³⁶

When analyzing the effect prong, the Court noted that the important consideration was not whether a religious institution had received some

130. *Id.* at 274.

131. *Id.* (“First, an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices.”).

132. *Id.* (“[T]he forum is available to a broad class of nonreligious as well as religious speakers; there are over 100 recognized student groups at UMKC . . .”).

133. *Id.* (suggesting that the forum’s being open to so many groups was “an important index of secular effect”).

134. *See* *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (“We are satisfied that any religious benefits of an open forum at UMKC would be ‘incidental’ within the meaning of our cases.”).

135. *Tilton v. Richardson*, 403 U.S. 672 (1971).

136. *See id.* at 678. The Court also considered whether the Act inhibited the free exercise of religion. *See id.* *See also id.* at 689.

benefit but, instead, whether the program's *primary effect* was the advancement of religion.¹³⁷ The Court explained that the federal act at issue had been carefully drafted to assure that only secular functions of religious institutions would receive funding.¹³⁸ Grants and loans would only be used for "defined secular purposes,"¹³⁹ and the Act expressly prohibited the use of funds for "religious instruction, training, or worship."¹⁴⁰ The *Tilton* Court made clear that the Establishment Clause does not bar all state programs that afford *secular* benefits to religious institutions, even if the state's affording secular benefits would free up funds of the religious institution for sectarian uses.¹⁴¹ That those monies were freed up would be described as an incidental rather than primary effect of the secular aid.

In *Hunt v. McNair*,¹⁴² the Court examined the constitutionality of a South Carolina law authorizing the issuance of revenue bonds for the benefit of the Baptist College of Charleston.¹⁴³ Because these bonds would be tax-exempt, the College would be able to market the bonds at a significantly lower rate of interest than it would otherwise have to pay.¹⁴⁴ The *Hunt* Court rejected the argument that no aid is permissible because "aid to one aspect of an institution frees it to spend its other resources on religious ends,"¹⁴⁵ thus echoing the position articulated in *Tilton* that funds expended on secular projects need not violate Establishment Clause guarantees.

After rejecting the "all aid is forbidden" view, the *Hunt* Court clarified the process by which to determine whether a program's primary effect is to advance religion, explaining that to "identify 'primary effect,'

137. *Id.* at 679 (explaining that the "crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion").

138. *Id.* (noting that the act "was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions").

139. *Id.*

140. *Id.* at 679-80.

141. *Tilton v. Richardson*, 403 U.S. 672, 679 (1971).

Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services.

Yet all of these forms of governmental assistance have been upheld.

142. *Hunt v. McNair*, 413 U.S. 734 (1973).

143. *See id.* at 736.

144. *See id.* at 739.

145. *Id.* at 743.

we narrow our focus from the statute as a whole to the only transaction presently before us.”¹⁴⁶ Thus, the Court was not to consider all of the institutions benefited by the statute and then see whether, for example, most were religiously affiliated. Rather, the Court was to narrow its focus and examine the effect of the statute on the particular institution at issue.

When focusing on the effect on the institution in the case at hand, the Court would find the funding to have the primary effect of advancing religion when either of two conditions was true: (1) religion was so pervasive in the institution that it would be difficult to fund (what would usually be) a purely secular function without at the same time promoting sectarian interests,¹⁴⁷ or (2) the funding was going to promote religious activity even if the school was predominantly secular in nature.¹⁴⁸ Basically, the *Hunt* Court suggests that as long as the funds go only to secular projects, the effect prong of the Establishment Clause will not be violated.

In *Committee for Public Education and Religious Liberty v. Nyquist*,¹⁴⁹ the Court offered an analysis mirroring the salient considerations articulated in *Tilton* and *Hunt*. Examining a New York program offering state funds to sectarian schools for maintenance and repair, the Court noted with disapproval that there had been no attempt to restrict funds so that they would only be used for the “upkeep of facilities used exclusively for secular purposes.”¹⁵⁰ Nothing would have prevented a school from using the state funds to pay individuals to maintain the chapel or to renovate classrooms where religion was taught.¹⁵¹ The *Nyquist* Court struck down this *direct* funding of religious expression, all the while accepting the view articulated by the *Hunt* and *Tilton* Courts that state aid could be used to support secular functions in sectarian schools, even if that aid would *indirectly* support religion by freeing up monies for sectarian uses.¹⁵² Because the state would not

146. *Id.* at 742.

147. *Id.* at 743 (“Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . .”).

148. *Hunt v. McNair*, 413 U.S. 734, 743 (1973) (“Aid normally may be thought to have a primary effect of advancing religion . . . when it funds a specifically religious activity in an otherwise substantially secular setting.”).

149. *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973).

150. *Id.* at 774.

151. *Id.*

152. *Id.* at 775. The Court admitted that:

itself be helping these institutions to engage in religious activities, the Establishment Clause would not bar that kind of funding.

Or, consider *Roemer v. Board of Public Works of Maryland*¹⁵³ in which the Court considered a Maryland program that gave funds to private colleges, provided that the funds would not be used for sectarian purposes.¹⁵⁴ Noting that it had long since rejected that the state was precluded from providing even incidental benefits to religious organizations,¹⁵⁵ the Court indicated that it was following the previous jurisprudence by characterizing incidental religious benefits as those that might result because an institution's resources had been freed up by virtue of the state's having provided secular benefits.¹⁵⁶ The *Roemer* Court rejected a position that the *Widmar* Court seemed to endorse, namely, that the state's supporting religious activities is permissible as long as secular activities are promoted as well.¹⁵⁷

Given the existing jurisprudence, it is difficult to see how the religious benefits at issue in *Widmar* could be considered "incidental." While it may well have been true that students at the University would not have inferred state endorsement of the beliefs of the religious group by virtue of that group's being afforded access to the forum¹⁵⁸ and it may also have been true that the benefits were being provided to a "broad spectrum of groups,"¹⁵⁹ those same points might have been made in the previous cases to justify state funding of sectarian activities. But the Court had repeatedly made clear that the state could not fund sectarian activities without violating the effect prong of the Establishment Clause. Further, no exception had been offered suggesting that such funding was

the provision of such neutral, nonideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas.

Id.

153. *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736 (1976).

154. *Id.* at 739.

155. *Id.* at 747 (suggesting *Everson* "put to rest any argument that the State may never act in such a way that has the incidental effect of facilitating religious activity").

156. *Id.* (noting that it was not "blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends").

157. *See id.* ("The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.")

158. *See Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (rejecting that the University was giving an "imprimatur of state approval on religious sects or practices" by permitting the group to meet on campus).

159. *Id.*

permissible as long as many other activities were funded so that there would be no inference of endorsement. Indeed, given *Hunt*'s explanation that the primary effect analysis requires the Court to focus on the challenged state action, it does not matter for purposes of deciding a program's primary effect whether there is a broad rather than a narrow array of recipients. The breadth of the range of recipients might well matter if the Court were examining whether there was a secular purpose, but that is a different prong of the test.¹⁶⁰

In one sense, the *Widmar* Court was correct to reject the University's claim that its affording access to the religious group would involve its setting up a special religious forum. Rather, the University would simply be giving access to this group, just as it had to so many other groups. Yet, for purposes of the effect prong analysis where the focus is on whether the state aid will be used to promote sectarian activities, the University's action should have been treated *as if* the University would be setting up a separate forum for the religious group. If, indeed, the group would be engaging in sectarian activities that the state was prohibited from supporting, then the past jurisprudence suggested that the state could not open up the forum to that group, even if the forum was open to many other groups that did not engage in sectarian activity. The different kinds of funding at issue in the *Tilton-Roemer* line of cases passed muster because they did not directly support *any* sectarian activity rather than, for example, because they would promote a little sectarian activity and a lot of secular activity. The funding at issue in *Nyquist* did not pass muster because it might have promoted sectarian activity in addition to secular activity. Basically, the *Widmar* Court radically altered the jurisprudence while claiming merely to apply it.

Allegedly, the University of Missouri at Kansas City was engaging in content-based discrimination without an adequate justification when not affording the religious student group access to university facilities.¹⁶¹ Yet, the University had merely been following the example set by the Court in the *Tilton-Roemer* line of cases in which the Court had suggested that the state was precluded from promoting sectarian activities. Indeed, one of the lessons of that line of cases is that the State

160. See *supra* note 136 and accompanying text (offering the three prongs of the test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

161. *Widmar*, 454 U.S. at 277 (“[T]he 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 . . .”).

must consider content when deciding whether its affording benefits comports with Establishment Clause limitations. The funding at issue in the University cases passed muster precisely because it would not be used to construct or maintain buildings where sectarian instruction would take place, and the New York funding program at issue in *Nyquist* was struck down precisely because those funds might have been used to promote sectarian activities.

D. Religious Worship v. Speech about Religion

One of the important features of the *Widmar* opinion was its refusal to distinguish between religious worship and speech about religion.¹⁶² The Court recognized that “speech *about* religion is speech entitled to the general protections of the First Amendment,”¹⁶³ and then noted that the *Heffron* Court had assumed that “religious appeals to nonbelievers constituted protected ‘speech,’”¹⁶⁴ as if *Heffron* thereby established that speech about religion and religious worship were equivalent for constitutional purposes. Yet, citing *Heffron* as support for such a proposition was surprising for a number of reasons.

At issue in *Heffron v. International Society for Krishna Consciousness (ISKCON)*¹⁶⁵ was a Minnesota State Fair regulation that “require[d] a religious organization desiring to distribute and sell religious literature and to solicit donations at a state fair to conduct those activities only at an assigned location within the fairgrounds even though application of the rule limits the religious practices of the organization.”¹⁶⁶ The Krishnas were permitted to roam the Fair discussing their religious views,¹⁶⁷ but were only allowed to solicit donations from a booth.¹⁶⁸

The Court accepted that “oral and written dissemination of the Krishnas’ religious views and doctrines is protected by the First Amendment.”¹⁶⁹ Nonetheless, the Court upheld the restriction as a valid

162. *See id.* at 269 n.6.

163. *See* *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981) (emphasis in original).

164. *See id.* at n.6 (emphasis in original).

165. *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640 (1981).

166. *Id.* at 642.

167. *Id.* at 643-44 (“[T]he Rule does not prevent organizational representatives from walking about the fairgrounds and communicating the organization’s views with fair patrons in face-to-face discussions . . .”).

168. *Id.* at 644 (noting that the rule required each exhibitor to “conduct its sales, distribution, and fund solicitation operations from a booth rented from the Society”).

169. *Id.* at 647.

time, place, manner restriction.¹⁷⁰ Yet, nowhere in the *ISKCON* opinion was there a discussion of the difference between describing religious views and engaging in religious worship, much less the suggestion embraced by the *Widmar* Court that the two are equivalent for constitutional purposes.¹⁷¹

The *Widmar* Court suggested that the case law “acknowledged the right of religious speakers to use public forums on equal terms with others.”¹⁷² Yet, this is to compound the confusion. The University was not denying the speakers access to the forum because they were religious—rather, the forum was not being provided to those who wished to engage in sectarian activities. Religious speakers would of course have access to the forum, although the forum could not be used, for example, to engage in prayer.

Perhaps the *Widmar* Court believed that the past jurisprudence did not accurately capture the dictates of the Establishment Clause. But that is a separate claim. Rather than address what the Court had held in the past, the *Widmar* Court simply pretended that the Court had said or done something else, and then applied the hypothesized rulings to the matter at hand.

Consider the other case cited by the Court in support of the rights of religious speakers,¹⁷³ *Saia v. New York*.¹⁷⁴ At issue in *Saia* was a city law forbidding “the use of sound amplification devices except with permission of the Chief of Police.”¹⁷⁵ *Saia* was a minister who used sound equipment to “amplify lectures on religious subjects.”¹⁷⁶ The statute was struck down because there were no specified standards in light of which the police chief was to decide whether to permit the sound

170. See *id.* at 654 (“In our view, the Society may apply its Rule and confine the type of transactions at issue to designated locations without violating the First Amendment.”); *Id.* at 655 (“Accordingly, the only question is the Rule’s validity as a time, place, and manner restriction.”).

171. *Widmar v. Vincent*, 454 U.S. 263, 284 (1981) (White, J., dissenting). Justice White states:

A large part of respondents’ argument, accepted by the court below and accepted by the majority, is founded on the proposition that because religious worship uses speech, it is protected by the Free Speech Clause of the First Amendment. Not only is it protected, they argue, but religious worship *qua* speech is not different from any other variety of protected speech as a matter of constitutional principle.

Id.

172. *Id.* at 272 (citing *Heffron v. New York*, 334 U.S. 558 (1948)).

173. *Id.*

174. *Heffron v. New York*, 334 U.S. 558 (1948).

175. *Id.* at 558.

176. *Id.* at 559.

equipment to be used.¹⁷⁷ Apparently, individuals had complained because they had found the volume annoying.¹⁷⁸

There is no discussion of what this religious individual was saying and, of course, no discussion of whether discourse on religious subjects and religious worship are equivalent for constitutional purposes. Further, in *Saia*, no question was presented regarding whether the state was prohibited, permitted, or required to *support* his speech. Rather, at issue was whether the state could restrict his speech by giving a public official unfettered discretion with respect to the conditions under which the speech could be amplified. Neither *Saia* nor *Heffron* was helpful in determining whether the state was obligated to provide support for religious worship in the same way that it provided support for discourse on religious or non-religious subjects.

Justice Stevens justified the *Widmar* result in the following way:

[T]he policy under attack would allow groups of young philosophers to meet to discuss their skepticism that a Supreme Being exists, or a group of political scientists to meet to debate the accuracy of the view that religion is the “opium of the people.” If school facilities may be used to discuss anticlerical doctrine, it seems to me that comparable use by a group desiring to express a belief in God must also be permitted.¹⁷⁹

Yet, Justice Stevens has not captured the relevant issue. Young religious and areligious philosophers could meet to discuss whether and why they believed or did not believe in God without engaging in religious worship. Political scientists could meet and discuss whether religion has been a curse or blessing for humankind without offering prayers. Indeed, one can assert one’s belief in God without at the same time petitioning God for forgiveness or some other sort of benefit.

Perhaps prayer should simply be treated as an assertion that God exists, at least for constitutional purposes.¹⁸⁰ Or, perhaps, although not

177. *Id.* at 560. The Court states:

To use a loud-speaker or amplifier one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. The statute is not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted.

Id.

178. *Id.* at 562 (“In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying.”).

179. *Widmar v. Vincent*, 454 U.S. 263, 281 (1981) (Stevens, J., concurring in the judgment).

180. *But see* Daniel O. Conkle, *The Establishment Clause and Religious Expression in*

the same, both prayer and assertions that God exists should be permitted in a public forum,¹⁸¹ as should assertions that God does not exist or that prayer is an exercise in self-delusion. The point here is merely that the kinds of justifications offered by the Court were specious, which undercuts both the persuasiveness of the holding and perceptions of the integrity of the Court.

The Court itself had previously accepted that there is an important difference for constitutional purposes between talking about God and engaging in religious worship or indoctrination. For example, the Court noted in *School District of Abington Township v. Schempp*¹⁸² that:

it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.¹⁸³

At issue in *Schempp* was a Pennsylvania law requiring that Bible verses be read at the beginning of each school day.¹⁸⁴ After the Bible passage was read, the Lord's Prayer would be recited by the schoolchildren in unison.¹⁸⁵ There was no requirement that the Bible

Governmental Settings: Four Variables in Search of a Standard, 110 W. VA. L. REV. 315, 317 (2007) ("Worshipful expression, such as prayer, is more troublesome than non-worshipful statements or affirmations."); Kathleen A. Brady, *The Push to Private Religious Expression: Are We Missing Something?*, 70 FORDHAM L. REV. 1147, 1238 (2002) ("Prayer, unlike other types of student expression, involves communication with the Divine, and required presence at an act of worship with which one disagrees might, for some people, be close to blasphemy.").

181. See Conkle, *supra* note 180, at 326 (suggesting that *Widmar* is an easy case).

182. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

183. *Id.* at 225.

184. See *id.* at 205. The Court states:

The Commonwealth of Pennsylvania by law, 24 Pa.Stat. s 15-1516, as amended, Pub.Law 1928 (Supp.1960) Dec. 17, 1959, requires that "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."

Id.

185. *Id.* at 205-06. The Court states:

They sought to enjoin the appellant school district, wherein the Schempp children attend

passage be from a particular Bible¹⁸⁶ and, in fact, passages from different Bibles were read in the school at issue.¹⁸⁷ No questions, comments, or interpretations were permitted to accompany the readings.¹⁸⁸

Students objecting to the readings either could leave the classroom or could remain in the classroom but refuse to participate.¹⁸⁹ The Schempps¹⁹⁰ had considered having their children excused from the exercises but had feared that the children's relationships with teachers and classmates would thereby have been adversely affected.¹⁹¹

The Court upheld the trial court determination that the Bible reading and the recitation of the Lord's Prayer was a religious ceremony and, as such, forbidden by the Establishment Clause.¹⁹² The Court rejected that by striking down the ceremony it was thereby endorsing a "religion of secularism,"¹⁹³ noting that the "study of the Bible or of religion, when presented objectively as part of a secular program of education, may . . . be effected consistently with the First Amendment."¹⁹⁴

One infers from *Schempp* that Establishment Clause guarantees would not have been violated by a school program in which Comparative Religion was the first class of the day. Yet, if starting the

school, and its officers and the Superintendent of Public Instruction of the Commonwealth from continuing to conduct such readings and recitation of the Lord's Prayer in the public schools of the district pursuant to the statute.

Id.

186. *Id.* at 207 ("The student reading the verses from the Bible may select the passages and read from any version he chooses.").

187. *Id.* ("During the period in which the exercises have been conducted the King James, the Douay and the Revised Standard versions of the Bible have been used, as well as the Jewish Holy Scriptures.").

188. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 207 (1963) ("There are no prefatory statements, no questions asked or solicited, no comments or explanations made and no interpretations given at or during the exercises.").

189. *Id.* ("The students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises.").

190. The law was challenged by Edward Schempp his wife, Sidney, and their two children, Roger and Donna. *See id.* at 206.

191. *Id.* at 208 ("Edward Schempp testified at the second trial that he had considered having Roger and Donna excused from attendance at the exercises but decided against it for several reasons, including his belief that the children's relationships with their teachers and classmates would be adversely affected.").

192. *See id.* at 223 ("We agree with the trial court's finding as to the religious character of the exercises. Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause.").

193. *Id.* at 225.

194. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963).

school day each day with a Bible reading and prayer¹⁹⁵ is prohibited by the Establishment Clause,¹⁹⁶ then there must be something special about prayer or religious worship that can be taken into account in First Amendment analyses. A separate issue involves the conditions, if any, under which prayer is permissible in public schools.¹⁹⁷ However, the *Widmar* Court should not have pretended that no line can be or ever has been drawn between religious worship and discussions about religion,¹⁹⁸ even if the line is difficult to draw in some cases.¹⁹⁹

In his *Schempp* concurrence, Justice Douglas noted that “the Establishment Clause is not limited to precluding the State itself from conducting religious exercises.”²⁰⁰ He explained that the Establishment Clause is violated when “public funds, though small in amount, are being used to promote a religious exercise.”²⁰¹

Schempp was not the first time that the Court had struck down religious exercises in the public schools. At issue in *Engel v. Vitale*²⁰² was the daily recitation of the “Regents’ prayer,”²⁰³ which involved the

195. *Id.* at 205.

196. *Id.* (“[W]e hold that the practices at issue and the laws requiring them are unconstitutional under the Establishment Clause, as applied to the States through the Fourteenth Amendment.”).

197. *Widmar v. Vincent*, 454 U.S. 263, 283 (1981) (White, J., dissenting) (“A state university may permit its property to be used for purely religious services without violating the First and Fourteenth Amendments. With this I agree.”). *See also* *Wallace v. Jaffree*, 472 U.S. at 67 (O’Connor, J., concurring in the judgment) (“Nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the schoolday.”).

198. *See Widmar*, 454 U.S. at 284-85 (White, J., dissenting). Justice White states:

Just last Term, the Court found it sufficiently obvious that the Establishment Clause prohibited a State from posting a copy of the Ten Commandments on the classroom wall that a statute requiring such a posting was summarily struck down. That case necessarily presumed that the State could not ignore the religious content of the written message, nor was it permitted to treat that content as it would, or must, treat, other-secular-messages under the First Amendment’s protection of speech. Similarly, the Court’s decisions prohibiting prayer in the public schools rest on a content-based distinction between varieties of speech: as a speech act, apart from its content, a prayer is indistinguishable from a biology lesson. (citations omitted).

Id.

199. *Id.* at 285 (White, J., dissenting) (“Although I agree that the line may be difficult to draw in many cases, surely the majority cannot seriously suggest that no line may ever be drawn.”). *See also Schempp*, 374 U.S. at 231 (Brennan, J., concurring) (“The fact is that the line which separates the secular from the sectarian in American life is elusive.”).

200. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 229 (1963) (Douglas J., concurring).

201. *Id.* at 229 (Douglas J., concurring).

202. *Engel v. Vitale*, 370 U.S. 421 (1962).

203. *Id.* at 423.

following: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”²⁰⁴ The *Engel* Court noted that there was “no doubt that New York’s program of daily classroom invocation of God’s blessings as prescribed in the Regents’ prayer is a religious activity.”²⁰⁵ The fact that New York permitted students to remain silent or be excused from the room did not save the practice from constitutional invalidation.²⁰⁶ The *Engel* Court did not equate prayer with discussion of religious subjects, instead suggesting that the “program of daily classroom invocation of God’s blessings as prescribed in the Regents’ prayer is a religious activity, [which] . . . is a solemn avowal of divine faith and supplication for the blessings of the Almighty.”²⁰⁷ As such, the program violated Establishment Clause guarantees.

Even after *Widmar*, the Court affirmed that prayer in school might be unconstitutional. In *Wallace v. Jaffree*,²⁰⁸ the Court examined an Alabama minute-of-silence-or-voluntary-prayer statute,²⁰⁹ striking it down because it was enacted to promote religion and, indeed, had no secular purpose.²¹⁰ However, as Justice O’Connor pointed out in her concurrence in the judgment, a moment of silence statute might not offend constitutional guarantees, precisely because “a moment of silence is not inherently religious”²¹¹ and because “a pupil who participates in a

204. *Id.* at 422.

205. *Id.* at 424.

206. *Id.* at 430 (“[T]he fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program’s constitutional defects”).

207. *Id.* at 424.

208. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

209. *See id.* at 40 n.2. The Court states:

Alabama Code § 16-1-20.1 (Supp.1984) provides: “At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.”

Id.

210. *See id.* at 56. The Court states:

In applying the purpose test, it is appropriate to ask “whether government’s actual purpose is to endorse or disapprove of religion.” [citing *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring)] In this case, the answer to that question is dispositive. For the record not only provides us with an unambiguous affirmative answer, but it also reveals that the enactment of § 16-1-20.1 was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose.

Id.

211. *Id.* at 72 (O’Connor, J., concurring).

moment of silence need not compromise his or her beliefs, [because] . . . a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others.”²¹² Both before and after *Widmar*, members of the Court have had no difficulty in differentiating prayer and religious worship from other kinds of discussions involving religion.

E. Religious Students Groups Using High School Facilities

A little less than a decade after *Widmar*, the Court examined whether a high school could preclude a student group from using its facilities after school to “read and discuss the Bible, to have fellowship, and to pray together.”²¹³ In *Board of Education of Westside Community Schools v. Mergens By and Through Mergens*,²¹⁴ the Court examined a Nebraska high school’s refusal to permit students to form a Christian club.²¹⁵ At issue was whether federal law precluded the high school from denying recognition to this student group and, if so, whether that federal law violated Establishment Clause guarantees.²¹⁶

The *Mergens* plurality construed the statute as prohibiting the school from recognizing some non-curricular student clubs such as a chess club or stamp collecting club,²¹⁷ and then refusing to recognize other clubs based on the content of that group’s speech.²¹⁸ After finding that the school did recognize some non-curricular clubs,²¹⁹ the plurality found that the school’s refusal to grant the student club official recognition violated the federal act.²²⁰

212. *Id.* (O’Connor, J., concurring).

213. Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 232 (1990).

214. *Id.* at 226.

215. *Id.* at 232.

216. *See id.* at 231. The Court states:

This case requires us to decide whether the Equal Access Act, 98 Stat. 1302, 20 U.S.C. §§ 4071-4074, prohibits Westside High School from denying a student religious group permission to meet on school premises during noninstructional time, and if so, whether the Act, so construed, violates the Establishment Clause of the First Amendment.

Id.

217. There were many clubs from which students could choose, some curricular and others not. *See id.* (“Students at Westside High School are permitted to join various student groups and clubs, all of which meet after school hours on school premises. The students may choose from approximately 30 recognized groups on a voluntary basis.”).

218. *Id.* at 240.

219. *See Mergens*, 496 U.S. at 245 (1990) (“[W]e think it clear that Westside’s existing student groups include one or more ‘noncurriculum related student groups.’”).

220. *Id.* at 247.

The next question was whether the Act violated Establishment Clause guarantees. The *Mergens* plurality interpreted the principal argument against permitting recognition of the student group to be that:

because the student religious meetings are held under school aegis, and because the State's compulsory attendance laws bring the students together (and thereby provide a ready-made audience for student evangelists), an objective observer in the position of a secondary school student will perceive official school support for such religious meetings.²²¹

The plurality rejected that argument, noting that the state is permitted to accord incidental benefits to religious groups,²²² and suggesting that a state's refusing to permit religious groups to use facilities open to others "would demonstrate not neutrality but hostility toward religion."²²³ Students would be unlikely to mistake the school's recognizing the student group with the school's endorsing that group²²⁴ and, in any event, steps could be taken to make sure that students did not mistakenly believe that the religious group had received the school's endorsement.²²⁵

Yet, the plurality's assurances to the contrary notwithstanding, even adults might be tempted to interpret the school's actions somewhat differently than the plurality would have one believe. Justice Kennedy, for example, wrote,

I should think it inevitable that a public high school "endorses" a religious club, in a commonsense use of the term, if the club happens

221. *Id.* at 249.

222. *Id.* at 248 (noting that it had previously found in *Widmar* that "although incidental benefits accrued to religious groups who used university facilities, this result did not amount to an establishment of religion").

223. *Id.*

224. *Id.* at 250 ("secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis" (citing *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 US 503 (1969))).

225. *See Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 251 (1990). The Court states:

To the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, see *Widmar*, 454 U.S. at 274, n. 14, 102 S.Ct. at 277, n. 14 (noting that university student handbook states that the university's name will not be identified with the aims, policies, or opinions of any student organization or its members), students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech.

Id.

to be one of many activities that the school permits students to choose in order to further the development of their intellect and character in an extracurricular setting.²²⁶

He believed that the program did not violate constitutional guarantees, however, because no coercion had been established, i.e., no students had been coerced into joining such a club.²²⁷

In his concurrence in the judgment, Justice Marshall noted that the plurality had ignored that the forum at issue in *Widmar* had differed substantially from the forum at issue in *Mergens*²²⁸ in that the University had more clearly disassociated itself from the respective religious club at issue than had the high school.²²⁹ He argued that schools permitting religious clubs on campus had the affirmative duty to disassociate themselves so that their endorsement of the club would not be inferred.²³⁰

The plurality dismissed this objection by noting that the school could do more to assure that students would not infer endorsement.²³¹ Basically, the plurality understood Justice Marshall's point but did not want to permit a school to refuse to recognize a religious club because of its own failure to disassociate itself from that club.²³² However, the plurality could have made clear that schools had to take affirmative steps

226. *Id.* at 261 (Kennedy, J., concurring in part and concurring in the judgment).

227. *Id.* (Kennedy, J., concurring in part and concurring in the judgment) ("The inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity.")

228. *Id.* at 265 (Marshall, concurring) ("But the plurality fails to recognize that the wide-open and independent character of the student forum in *Widmar* differs substantially from the forum at *Westside*.")

229. *See id.* (Marshall, J., concurring) ("Given the nature and function of student clubs at *Westside*, the school makes no effort to disassociate itself from the activities and goals of its student clubs."); *id.* at 266-67 (Marshall, J., concurring) (noting that "the University of Missouri took concrete steps to ensure that the University's name will not 'be identified in any way with the aims, policies, programs, products, or opinions of any organization or its members'" (citing *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) (quoting University of Missouri student handbook))).

230. *See id.* at 265 (Marshall, J., concurring in the judgment) ("The entry of religious clubs into such a realm poses a real danger that those clubs will be viewed as part of the school's effort to inculcate fundamental values. The school's message with respect to its existing clubs is not one of toleration but one of endorsement.")

231. *See Bd. of Educ. of Westside Cmty.Sch. v. Mergens*, 496 U.S. 226, 251(1990) ("To the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, . . . students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech." (citing *Widmar*, 454 U.S. at 274 n.14)).

232. *Id.* ("[P]etitioners' fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students.")

to prevent even mistaken endorsement.²³³ By not doing so, the plurality implied that it was not taking the problem of perceived endorsement very seriously, an attitude that would be reinforced in subsequent cases.²³⁴

Justice Marshall also objected that the *Mergens* plurality was not appreciating the role that the state was playing when requiring students to attend school and then permitting these clubs to meet on school grounds:

When the government, through mandatory attendance laws, brings students together in a highly controlled environment every day for the better part of their waking hours and regulates virtually every aspect of their existence during that time, we should not be so quick to dismiss the problem of peer pressure as if the school environment had nothing to do with creating and fostering it. The State has structured an environment in which students holding mainstream views may be able to coerce adherents of minority religions to attend club meetings or to adhere to club beliefs. Thus, the State cannot disclaim its responsibility for those resulting pressures.²³⁵

When making this point, he was echoing concerns articulated in *McCullum*²³⁶ and, indeed, he cited *McCullum* for support of his position.²³⁷ After all, the religious activities in *McCullum* also were not run by school officials. However, *McCullum* differed from *Mergens* in that the only non-curricular activity was the religious studies class, whereas in *McCullum* there were numerous activities such as chess club, photography, etc.²³⁸

The *Mergens* analysis was surprising for a number of reasons. The *Tilton* Court had made clear that colleges and universities should be treated differently than primary and secondary schools for purposes of Establishment Clause analysis,²³⁹ and it thus was surprising that *Widmar*

233. *Id.* at 263 (Marshall, J., concurring in the judgment) (“The Establishment Clause does not forbid the operation of the Act in such circumstances, but it does require schools to change their relationship to their fora so as to disassociate themselves effectively from religious clubs’ speech.”).

234. *See infra* notes 330-33 and accompanying text (discussing the Court’s dismissal of perceived endorsement worries in *Good News Club*).

235. *Mergens*, 496 U.S. at 269 (Marshall, J., concurring in the judgment).

236. *See supra* note 39 and accompanying text.

237. *See Bd. of Educ. of Westside Cmty.Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (Marshall, J., concurring).

238. *Id.* at 253-58 (for a list of the activities).

239. *Cf. id.* at 263 (1990) (Marshall, J., concurring in the judgment) (“The plurality’s Establishment Clause analysis pays inadequate attention to the differences between this case and

would be the model for *Mergens*.²⁴⁰ After all, the *Widmar* Court had noted that a university setting should be differentiated from that of a primary or secondary school, because university students are less impressionable than are younger students and so might be less likely to perceive a school's permitting a student religious club to meet on campus as representing some kind of endorsement by the school.²⁴¹ Nonetheless, two points might be made about the *Widmar* differentiation between younger students and university students. First, it was not clear that this cited difference played much of a role in the *Widmar* analysis and, indeed, the Court only mentioned the difference between the maturity levels of the different students in a footnote.²⁴² Second, the *Mergens* plurality modified the *Widmar* maturity rationale by suggesting that it had equal applicability to high school students.²⁴³

One might have expected the *Widmar* plurality to have engaged in more discussion of *McCullum* and *Zorach*. Ironically, the *Mergens* analysis suggested that *Zorach* was wrongly decided. Given that the release-time at issue in *Zorach* could only be used to attend classes in religious instruction, it would seem that New York was endorsing the religion classes, even though they were conducted off-site, and thus that the state was violating Establishment Clause guarantees.

As suggested by Justice Jackson in his *Zorach* dissent, one of the few ways to reconcile *Zorach* and *McCullum* was to suggest that the location of the classes was important²⁴⁴—they could not be conducted on-site but could be conducted off-site. But the club meetings were

Widmar and dismisses too lightly the distinctive pressures created by Westside's highly structured environment.”).

240. *But see id.* at 267 (Marshall, J., concurring in the judgment). Justice Marshall states:

Thus, the underlying difference between this case and *Widmar* is not that college and high school students have varying capacities to perceive the subtle differences between toleration and endorsement, but rather that the University of Missouri and Westside actually choose to define their respective missions in different ways.

Id.

241. *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) (“University 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.” (citing *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971))).

242. *See id.* at n.14.

243. *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 248 (1990) (“We think the logic of *Widmar* applies with equal force to the Equal Access Act.”). Further, the plurality suggested that Congress shared its view about the maturity of high school students. *See id.* at 250 (“[W]e note that Congress specifically rejected the argument that high school students are likely to confuse an equal access policy with state sponsorship of religion.”).

244. *See supra* note 87 and accompanying text.

occurring on-site rather than off-site in *Mergens*. Thus, *Mergens* seems difficult to reconcile as a constitutional matter with the previous cases most directly on point. While neither *McCollum* nor *Zorach* established that *Mergens* was wrongly decided, both cases suggest that the *Mergens* plurality needed to do much more to justify its position as a constitutional matter.

The *Mergens* plurality briefly mentioned the purpose of the club, but then offered the same analysis that it would have offered had the club been formed so that it could discuss matters of interest from a religious perspective. Yet, much of the jurisprudence has distinguished prayer and inherently religious activities from other sorts of activities. If, for example, Justice Douglas is correct that the Establishment Clause is violated when “public funds, though small in amount, are being used to promote a religious exercise,”²⁴⁵ then it would not matter whether the provision of those funds would be construed by an objective observer as an endorsement of religion. So, too, if Justice O’Connor was correct in her *Wallace* concurrence to distinguish between inherently religious activities and other activities that might be secular,²⁴⁶ then one would have expected some analysis of the different functions performed by the club. Thus, it might have been argued that while discussions from a religious perspective could not be precluded, paradigmatically religious activities like prayer were subject to different treatment.

The *Mergens* plurality gave short shrift to the claim that student peer pressure might have adverse effects on the high schoolers. “[T]he possibility of *student* peer pressure remains, but there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate.”²⁴⁷ Yet, it had been the student peer pressure that had motivated the challenges in *McCollum*²⁴⁸ and *Schempp*,²⁴⁹ and the Court had done nothing in those cases to undercut the seriousness of the difficulty thereby presented.

An important part of the *Mergens* analysis involved the view that permitting the club to meet on campus provided only *incidental* benefits to religion. Yet, these benefits could only be construed as “incidental” if

245. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 229 (1963) (Douglas J., concurring).

246. *See supra* notes 211-12 and accompanying text.

247. *Mergens*, 496 U.S. at 251 (emphasis in original).

248. *See supra* notes 62-64 and accompanying text.

249. *See supra* note 191 and accompanying text.

one looked to *Widmar* and rejected much if not all of the preceding jurisprudence.²⁵⁰ Nonetheless, this understanding of “incidental” offered in *Widmar* and repeated in *Mergens* would become further entrenched a few years later when the Court heard another case challenging a school’s refusal to allow its facilities to be used for religious purposes.

In *Lamb’s Chapel v. Center Moriches Union Free School District*,²⁵¹ the Court examined a New York law authorizing local school boards to adopt reasonable regulations for the use of school property for designated purposes while school was not in session.²⁵² Religious purposes were not included among the permissible designated purposes.²⁵³

At issue in particular was a request by an evangelical church to show a six-part film series containing lectures on family by James Dobson.²⁵⁴ The request was denied because it was “church related,”²⁵⁵ notwithstanding that “school property could be used for ‘social, civic and recreational’ purposes.”²⁵⁶ Regrettably, there was no further discussion of what was meant by “church-related.” For example, it could have involved a film in which viewers were called to prayer or instead it might merely have been discussing family issues from a particular Christian perspective.

The Court of Appeals had held that the rule at issue was viewpoint neutral, because it was “applied in the same way to all uses of school property for religious purposes.”²⁵⁷ However, the *Lamb’s Chapel* Court noted:

That all religions and all uses for religious purposes are treated alike . . . does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.²⁵⁸

A few points might be made about the Court’s analysis. First, there are a few different ways to understand “dealing with the subject matter

250. See *supra* notes 131-60 and accompanying text.

251. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

252. *Id.* at 386.

253. *Id.*

254. See *id.* at 388-89.

255. *Id.* at 389.

256. *Id.* at 391.

257. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993).

258. *Id.*

from a religious standpoint.”²⁵⁹ It might be thought to suggest that there is a uniform view among all religions about a particular matter, e.g., family matters, although that would be false. For example, there are widely divergent views about the role of women in the family, whether same-sex marriage should be recognized, etcetera.²⁶⁰ Yet, a different way to understand the point is that the religious standpoint does not stand for a particular substantive position; rather, such a standpoint is compatible with a whole range of views on particular matters. The religious viewpoint is distinctive in that it seeks to incorporate these varying substantive positions within a world view.²⁶¹

By precluding discussions from a religious viewpoint, the district was not precluding liberal or conservative discussions of family matters, since either kind of view might be presented from a non-religious perspective. Nonetheless, the school district was excluding certain kinds of views—those seeking to locate positions on particular issues within a (religious) world view. Because of this type of exclusion, it might be argued that there was viewpoint discrimination in *Lamb’s Chapel*.

The school district had worried that its permitting the use of school property for religious purposes would violate Establishment Clause guarantees.²⁶² However, the Court noted, the “showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members.”²⁶³ Further, a wide variety of groups had repeatedly used the facilities.²⁶⁴ Under these circumstances, the Court reasoned, any benefits to a religious group would be “incidental.”²⁶⁵

The Court cited *Widmar* as support for its conclusion that the religious benefits would have been incidental.²⁶⁶ The benefits were probably incidental even in light of the jurisprudence preceding *Widmar* if, in fact, this was merely a discussion offered from a particular

259. *Id.*

260. See Linda C. McClain, *Intimate Affiliation and Democracy: Beyond Marriage?*, 32 HOFSTRA L. REV. 379, 397 (2003) (“There are contests within religious communities over how best to interpret the import of such traditions on such matters as family, marriage, and the respective family roles of men and women.”).

261. *Cf. Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (“Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.”).

262. *Lamb’s Chapel*, 508 U.S. at 394.

263. *Id.* at 395.

264. *Id.*

265. *Id.*

266. *See id.*

Christian perspective,²⁶⁷ since such a presentation would not have involved sectarian activities. Nonetheless, the Court cited *Widmar* in support of its conclusion that the benefits were incidental, as if *Widmar* were the culmination rather than the repudiation of past incidental benefit decisions.

The film series might be contrasted with worship services—the *Lamb's Chapel* Court noted that the Church had also asked to use school facilities for Sunday School and for Sunday morning church services for a year.²⁶⁸ That request had been denied,²⁶⁹ and the Church had not challenged that denial in the courts.²⁷⁰ The Court did not intimate how it would have viewed such a challenge, instead merely noting that the validity of the denial was not before it.²⁷¹ One thus could not tell whether the *Lamb's Chapel* Court was distinguishing the film series from the religious services or instead was suggesting that they were the same for constitutional purposes.

Part of the difficulty in analyzing *Lamb's Chapel* is that the Court merely suggested that the Church had “conceded that its showing of the film series would be for religious purposes.”²⁷² Yet, it would serve religious purposes to discuss a matter from a particular perspective just as it might also serve religious purposes to pray. Without further specification of which or what kind of religious purposes would be served, it is not even clear what the *Lamb's Chapel* Court was suggesting must be permitted.

The statute at issue did not permit use of the facilities for “religious worship or instruction.”²⁷³ Yet, “religious instruction” is amenable to different interpretations. For example, does a course in World Religions amount to religious instruction because those taking the course learn about different religious beliefs and practices? The *Schempp* court had expressly rejected that a course on world religions was the equivalent of engaging in religious prayer,²⁷⁴ notwithstanding that the content might be thought to involve religious instruction.

267. See *id.* at 396 (suggesting that this was merely a “presentation of a religious point of view about a subject the District otherwise opens to discussion on District property”).

268. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387 n.2 (1993).

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 389 (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 770 F. Supp. 91, 98-99 (E.D.N.Y. 1991)).

273. *Id.* (citing *Lamb's Chapel*, 770 F. Supp. at 98-99).

274. See *supra* note 183 accompanying text.

Would it promote religious purposes to present religious views on the family? Presumably. But there would seem to be a big difference between discussing what a particular religious group suggests is its ideal picture of a family²⁷⁵ and an exhortation to prayer.²⁷⁶ Precisely because religious purposes and religious instruction might be thought to cover such a wide range of topics and practices, the *Lamb's Chapel* opinion is compatible with a variety of views about what the Establishment Clause requires, permits, and prohibits. For example, the decision is quite compatible with the view that while a school district “discriminates on

275. See *Lamb's Chapel*, 508 U.S. at 388 n.3. The Court states:

Turn Your Heart Toward Home is available now in a series of six discussion-provoking films:

1) A FATHER LOOKS BACK emphasizes how swiftly time passes and appeals to all parents to ‘turn their hearts toward home’ during the all-important child-rearing years. (60 minutes.)

2) POWER IN PARENTING: THE YOUNG CHILD begins by exploring the inherent nature of power, and offers many practical helps for facing the battlegrounds in child-rearing—bedtime, mealtime and other confrontations so familiar to parents. Dr. Dobson also takes a look at areas of conflict in marriage and other adult relationships. (60 minutes.)

3) POWER IN PARENTING: THE ADOLESCENT discusses father/daughter and mother/son relationships, and the importance of allowing children to grow to develop as individuals. Dr. Dobson also encourages parents to free themselves of undeserved guilt when their teenagers choose to rebel. (45 minutes.)

“4) THE FAMILY UNDER FIRE views the family in the context of today's society, where a “civil war of values” is being waged. Dr. Dobson urges parents to look at the effects of governmental interference, abortion and pornography, and to get involved. To preserve what they care about most—their own families! (52 minutes.)

Note: This film contains explicit information regarding the pornography industry. Not recommended for young audiences.

5) OVERCOMING A PAINFUL CHILDHOOD includes Shirley Dobson's intimate memories of a difficult childhood with her alcoholic father. Mrs. Dobson recalls the influences which brought her to a loving God who saw her personal circumstances and heard her cries for help. (40 minutes.)

6) THE HERITAGE presents Dr. Dobson's powerful closing remarks. Here he speaks clearly and convincingly of our traditional values which, if properly employed and defended, can assure happy, healthy, strengthened homes and family relationships in the years to come. (60 minutes.)

Id.

276. Cf. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 867 (1995) (Souter, J., dissenting). Justice Souter states:

This writing is no merely descriptive examination of religious doctrine or even of ideal Christian practice in confronting life's social and personal problems. Nor is it merely the expression of editorial opinion that incidentally coincides with Christian ethics and reflects a Christian view of human obligation. It is straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ . . .

Id.

the basis of viewpoint . . . [if] permit[ting] school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint,²⁷⁷ the school district acts permissibly when permitting expressions of religious viewpoints but prohibiting prayer. For the Court to suggest that the “film series involved here no doubt dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the series dealt with the subject from a religious standpoint²⁷⁸ is by no means the equivalent of suggesting that if discussions of matters of public interest are permitted on school grounds then prayer must also be permitted. Otherwise, the decisions striking down prayer in school but permitting discussion of secular matter would be much harder to justify.²⁷⁹ Indeed, because prayer might simply be described as presenting material from a religious viewpoint²⁸⁰ and because teachers in public schools present lots of material from areligious viewpoints, it might be argued that by representing multiple viewpoints (including the viewpoint represented by prayer) the school could not be inferred to be endorsing any of them.²⁸¹

Depending upon how *Widmar*, *Lamb’s Chapel* and other decisions are read, the Court’s position would seem to permit a whole host of practices previously thought impermissible, because the school could not reasonably be thought to be endorsing a particular (religious) position. Regrettably, subsequent analyses offered by the Court have done little if anything to cabin what might be taught in public schools without offending Establishment Clause guarantees.²⁸²

The proper interpretation of *Lamb’s Chapel* was a matter of dispute in *Rosenberger v. Rector and Visitors of University of Virginia*.²⁸³ At issue in *Rosenberger* was a refusal by the University of Virginia to pay the printing costs incurred by one of the recognized student groups, Wide Awake Productions, because it was a religious activity,²⁸⁴ which

277. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993).

278. *Id.* at 394.

279. *See supra* note 155 (including Justice White’s concurrence making this point).

280. *See Lamb’s Chapel* at 395. *See also infra* note 328 and accompanying text.

281. *Cf. Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (“If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.”).

282. *See infra* notes 318-37 and accompanying text (discussing rationales offered in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001)).

283. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

284. *Id.* at 827. The Court states:

was defined as “any activity that ‘primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.’”²⁸⁵ School policy precluded paying the costs of certain student activities, including religious activities.²⁸⁶

The *Rosenberger* Court began its analysis by noting that it is “axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”²⁸⁷ The Court then explained that when the “government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”²⁸⁸ The state must not engage in viewpoint discrimination,²⁸⁹ even if permissibly engaging in content discrimination by setting up a limited public forum.²⁹⁰

At issue in the case was whether the University was engaging in content rather than viewpoint discrimination—it was at the very least engaging in the former kind of discrimination by virtue of its having set up a limited public forum. However, its having engaged in that kind of discrimination might pass constitutional muster; the *Rosenberger* Court recognized that the “necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”²⁹¹ Thus, a state actor’s engaging in content discrimination might well be

A few months after being given CIO status, WAP requested the SAF to pay its printer \$5,862 for the costs of printing its newspaper. The Appropriations Committee of the Student Council denied WAP’s request on the ground that Wide Awake was a “religious activity” within the meaning of the Guidelines

Id.

285. *Id.* at 825 (citing University Guidelines at 66a).

286. *Id.* at 824-825. The Court states:

The Guidelines also specify, however, that the costs of certain activities of CIO’s that are otherwise eligible for funding will not be reimbursed by the SAF. The student activities that are excluded from SAF support are religious activities, philanthropic contributions and activities, political activities, activities that would jeopardize the University’s tax-exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses.

Id.

287. *Id.* at 828 (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)).

288. *Id.* at 829 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)).

289. *Rosenberger*, 515 U.S. at 829 (“These principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation.”).

290. *See id.* (“The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”).

291. *Id.* (citing *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

constitutionally permissible, whereas a state actor's engaging in viewpoint discrimination is "presumed impermissible."²⁹²

To assess whether the content discrimination inherent in a limited public forum is justified, the Court will examine whether the State has "respect[ed] the lawful boundaries it has itself set."²⁹³ The state will not be permitted to exclude speech from a limited public forum if the "distinction is not 'reasonable in light of the purpose served by the forum,'"²⁹⁴ although the state may be justified in limiting discussion to certain topics.²⁹⁵

One might have expected that after noting the restrictions on content discrimination, the *Rosenberger* Court would then have explained why or how the state was not being reasonable in how it had set up the limitations of the public forum at issue. However, the Court did not offer that kind of analysis, instead holding that the University was engaging in impermissible viewpoint discrimination.²⁹⁶

The *Rosenberger* Court suggested that the most instructive case for handling the issues before it was *Lamb's Chapel*,²⁹⁷ which was described in the following way:

There, a school district had opened school facilities for use after school hours by community groups for a wide variety of social, civic, and recreational purposes. The district, however, had enacted a formal policy against opening facilities to groups for religious purposes. Invoking its policy, the district rejected a request from a group desiring to show a film series addressing various child-rearing questions from a "Christian perspective."²⁹⁸

The *Rosenberger* Court thought that the University of Virginia policy before it was analogous to the New York policy that it had struck down in *Lamb's Chapel*.

[H]ere, as in *Lamb's Chapel*, viewpoint discrimination is the proper way to interpret the University's objections to *Wide Awake*. By the very terms of the SAF prohibition, the University does not exclude

292. *Id.* at 830.

293. *Id.* at 829.

294. *Id.* (citing *Cornelius*, 473 U.S. at 804-06).

295. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

296. *Id.* at 830 (noting that "viewpoint discrimination . . . is presumed impermissible when directed against speech otherwise within the forum's limitations") (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)).

297. *Id.* at 830 ("The most recent and most apposite case is our decision in *Lamb's Chapel*.").

298. *Id.*

religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.²⁹⁹

Yet, it was not as if the state was picking out a particular viewpoint, e.g., a particular Christian perspective, and precluding only that viewpoint from being expressed. On the contrary, a whole class of viewpoints had been precluded, namely, those promoting a belief about the existence or non-existence of God.³⁰⁰ This limitation would not only apply to a whole host of Christian perspectives but also to other religious perspectives, as well as to areligious and antireligious perspectives.

The Court seemed confused when responding to the point that a broad range of views was precluded. For example, the Court suggested that the “dissent’s assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech.”³⁰¹ But the dissent had not been suggesting that there were only two possible views—religious and antireligious. On the contrary, the dissent had suggested that a whole class of views had been precluded—religious, non-religious and anti-religious—with varying viewpoints within those sub-classes.

Then, seeming to understand that the dissent was not characterizing the debate as bipolar, the Court suggested that the “dissent’s declaration that debate is not skewed so long as multiple voices are silenced is

299. *Id.* at 831.

300. *See id.* at 895-96 (Souter, J., dissenting).

If the Guidelines were written or applied so as to limit only such Christian advocacy and no other evangelical efforts that might compete with it, the discrimination would be based on viewpoint. But that is not what the regulation authorizes; it applies to Muslim and Jewish and Buddhist advocacy as well as to Christian. And since it limits funding to activities promoting or manifesting a particular belief not only “in” but “about” a deity or ultimate reality, it applies to agnostics and atheists as well as it does to deists and theists as the University maintained at oral argument.

Id.

301. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995).

simply wrong; the debate is skewed in multiple ways.”³⁰² Yet, this too does not capture the difference at issue.

Suppose that the subject of discussion was “family issues.” Certainly, were there fifteen possible views that might be articulated and were four of them barred from the discussion, the Court would be correct to suggest that such a policy would have skewed the debate in multiple ways. But that would be because some views were being permitted while others were being prohibited.³⁰³ Were no discussions of family permitted, there would be no viewpoint discrimination. A separate question would be whether restrictions on the forum would be reasonable in light of its purpose,³⁰⁴ but that is a different matter not involving a claim about viewpoint discrimination.³⁰⁵

The Court was not entirely clear what it meant when suggesting that the University had not excluded religion as a subject matter but instead had disfavored religious editorial viewpoints.³⁰⁶ Perhaps it meant that the school permitted discussions about religion but did not permit religious worship.³⁰⁷ Yet, this does not capture the University

302. *Id.* at 831-32.

303. *See id.* at 894-95 (Souter, J., dissenting). Justice Souter states:

Other things being equal, viewpoint discrimination occurs when government allows one message while prohibiting the messages of those who can reasonably be expected to respond It is precisely this element of taking sides in a public debate that identifies viewpoint discrimination and makes it the most pernicious of all distinctions based on content. Thus, if government assists those espousing one point of view, neutrality requires it to assist those espousing opposing points of view, as well. (citations omitted)

Id.

304. *See id.* at 829 (“The State may not exclude speech where its distinction is not ‘reasonable in light of the purpose served by the forum.’”) (citing *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 804-806 (1985)).

305. *Id.* at 897 (Souter, J., dissenting). Justice Souter states:

If a university wished to fund no speech beyond the subjects of pasta and cookie preparation, it surely would not be discriminating on the basis of someone's viewpoint, at least absent some controversial claim that pasta and cookies did not exist. The upshot would be an instructional universe without higher education, but not a universe where one viewpoint was enriched above its competitors.

Id.

306. *Id.* at 831.

307. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1995). The court states:

As we recognized in *Widmar*, official censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis. “[T]he dissent fails to establish that the distinction [between ‘religious’ speech and speech ‘about’ religion] has intelligible content. There is no indication when ‘singing hymns, reading scripture, and teaching biblical principles’ cease to be ‘singing, teaching, and reading’-all apparently forms of ‘speech,’ despite

policy at issue—a prohibition on promoting or manifesting a belief or lack of belief in God meant that discussions about God’s existence or non-existence were simply excluded from the forum.³⁰⁸ Religion as a subject matter was not excluded from the forum entirely, because religion addresses a range of issues including but not limited to questions concerning God’s existence, although a (possibly very large) subset of the discussion of religion has been taken off the table, namely, any discussions about God. The University would not have been authorizing discussions about religion without authorizing religious worship; instead, it would have precluded the discussion of God whether in the form of debate or prayer.

The Court’s view is more understandable if, when explicating the University prohibition on publications that primarily promote a belief about a deity or ultimate reality,³⁰⁹ the Court omits the term “primarily.”³¹⁰ In that event, anything that promotes/manifests a belief in or about a deity or ultimate reality would be barred, which might be interpreted to mean that someone writing about family, for example, could not include in her discussion that her views were premised in some way on the existence or non-existence of God.³¹¹ But to offer such a reading is to analyze a policy that the University did not implement.

Had the Court understood the University policy as if it had omitted the word “primarily,” then one might have expected the Court to explain that the difficulty with the policy was not that it barred payment for

their religious subject matter-and become unprotected ‘worship.’”

Id.

308. *Cf. id.* at 836 (“And the term ‘manifests’ would bring within the scope of the prohibition any writing that is explicable as resting upon a premise that presupposes the existence of a deity or ultimate reality.”).

309. *Id.* The Court states:

The prohibition on funding on behalf of publications that “primarily promot[e] or manifes[t] a particular belie[f] in or about a deity or an ultimate reality,” in its ordinary and commonsense meaning, has a vast potential reach. The term “promotes” as used here would comprehend any writing advocating a philosophic position that rests upon a belief in a deity or ultimate reality.

Id.

310. *See id.* at 896 (Souter, J., dissenting).

311. *Cf. id.* at 837. The Court states:

If any manifestation of beliefs in first principles disqualifies the writing, as seems to be the case, it is indeed difficult to name renowned thinkers whose writings would be accepted, save perhaps for articles disclaiming all connection to their ultimate philosophy. Plato could contrive perhaps to submit an acceptable essay on making pasta or peanut butter cookies, provided he did not point out their (necessary) imperfections.

Id.

printing costs of publications discussing the existence or non-existence of God, but that it barred the payment of printing costs of publications that mentioned or even implied the existence or non-existence of God. Such a policy might be viewed as so sweeping as to be unreasonable. Indeed, the Court suggested that the Virginia policy “effects a sweeping restriction on student thought and student inquiry in the context of University sponsored publications,”³¹² although the Court never explained why that was so or why it was even plausible to construe the policy as having such a broad sweep.

If the problem with the policy was that it was so broad, then one might expect that a much narrower policy would not be subject to the same objections. Yet, one infers that the Court would not have been satisfied had the University of Virginia had a narrow policy, say, only precluding the funding of inherently sectarian publications. The Court noted, “If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is . . . used by a group for sectarian purposes, then *Widmar*, *Mergens*, and *Lamb’s Chapel* would have to be overruled.”³¹³

Yet, those cases would have to be overruled only if one defined “sectarian purposes” in a particular way and only if one read those cases as focused on those sectarian purposes. If, for example, the government was barred from funding sectarian activities such as prayer, that would not in addition bar the government from providing a venue in which a particular subject could be addressed from a religious perspective.

The *Rosenberger* Court referred to *Tilton*, *Hunt* and *Roemer* with approval, suggesting that they stood for the principle that there are “special Establishment Clause dangers where the government makes direct money payments to sectarian institution.”³¹⁴ But those cases did more than that, since they suggested that the state could not support sectarian activities even if the funds were awarded to a wide array of recipients. Ironically, after suggesting that it “does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises,”³¹⁵ and describing the

312. *Id.* at 836.

313. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 843 (1995).

314. *Id.* at 842.

315. *Id.* (citing *Widmar v. Vincent*, 454 U.S. 263, 269 (1981); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 252 (1990)).

benefits to religion accorded under such a program as “incidental,”³¹⁶ the *Rosenberger* Court said nothing about the apparent tension between its holding and the *Tilton-Hunt* line of cases that it had just cited with approval.

In his dissent, Justice Souter argued that “[u]sing public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money.”³¹⁷ Here, Justice Souter was capturing the view that had prevailed through *Roemer*. However, the Court now apparently believes that such funding is not barred as long as the principle of funding is religion-neutral. Further, a majority of the Court seems to believe that religious worship is equivalent to discussion from a religious perspective, as was made clear in a subsequent case involving after-school clubs for schoolchildren.³¹⁸

In *Good News Club v. Milford Central School*,³¹⁹ the Court examined whether a school district offended constitutional guarantees when denying recognition to an after-school club where students would engage in religious worship among other activities.³²⁰ The District Court had found that the club was not merely discussing secular matters from a religious point of view but instead was dealing with a subject matter that was “decidedly religious in nature.”³²¹

At issue was whether the limited public forum created by the school could exclude the group because of their religious focus. The Court noted that viewpoint discrimination is not permitted even in a limited

316. *Rosenberger*, 515 U.S. at 843-44.

317. *Id.* at 868 (Souter, J., dissenting).

318. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 103 (2001) (describing the organization challenging the school policy at issue as “a private Christian organization for children ages 6 to 12”).

319. *Id.* at 98.

320. *See id.* at 103. The Court states:

The Club sent a set of materials used or distributed at the meetings and the following description of its meeting: “The Club opens its session with Ms. Fournier taking attendance. As she calls a child’s name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve, *inter alia*, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members’ lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.”

Id.

321. *Id.* at 104 (citing *Good News Club v. Milford Cent. Sch.*, 21 F. Supp.2d 147, 154 (N.D.N.Y. 1998)).

public forum,³²² and that any content restrictions must be reasonable in light of the forum's purpose.³²³ The Court then reviewed its past cases, suggesting that in both *Lamb's Chapel* and *Rosenberger*, the Court had struck down policies effecting viewpoint discrimination against religious groups.³²⁴ The Court concluded that the refusal to recognize the Good News Club based on the religious nature of their practices was "indistinguishable from the exclusions in these cases,"³²⁵ and held that the Milford school was engaging in "viewpoint discrimination,"³²⁶ thereby obviating the need to decide whether the exclusion was reasonable in light of the limited public forum's purpose.³²⁷

Yet, *Lamb's Chapel*, *Rosenberger*, and *Good News Club* appeared to be very different cases. *Lamb's Chapel* involved a refusal to air a discussion of family issues from a religious perspective. *Rosenberger* involved an attempt by the University of Virginia to avoid the difficulty articulated in Justice Stevens' *Widmar* concurrence,³²⁸ namely, that individuals would be free to criticize but not defend religion. Because the University refused to fund any discussions primarily focused on God, students wishing to discuss God's existence or non-existence would similarly be restricted from the forum. Nonetheless, the Court suggested that this was religious viewpoint discrimination without making clear how the University's removing a subject matter from the forum constituted viewpoint discrimination.

Good News Club did not involve an attempt to remove a topic from discussion, e.g., arguments about God's existence. Rather, this restriction was on a particular type of expression, such as prayer. Thus, no viewpoints were excluded by the regulation at issue in *Good News*

322. *Id.* at 106 (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

323. *Id.* at 107 (citing *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

324. *See* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001). The Court states: In *Lamb's Chapel*, we held that a school district violated the Free Speech Clause of the First Amendment when it excluded a private group from presenting films at the school based solely on the films' discussions of family values from a religious perspective. Likewise, in *Rosenberger*, we held that a university's refusal to fund a student publication because the publication addressed issues from a religious perspective violated the Free Speech Clause.

Id.

325. *Id.*

326. *Id.* ("We hold that the exclusion constitutes viewpoint discrimination.")

327. *Id.* ("Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum.")

328. *See supra* note 179 and accompanying text.

Club unless it is argued that prayer offers a distinctive viewpoint that cannot be expressed in other types of discourse. But the Court was not suggesting that. Indeed, the Court rejected that “something that is ‘quintessentially religious’ or ‘decidedly religious in nature’ cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint,”³²⁹ suggesting that for Free Speech Clause purposes, there is “no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty or patriotism by other associations to provide a foundation for their lessons.”³³⁰

At least two points might be made about this alleged equivalence. First, claims to the contrary by the Court notwithstanding, it suggests that *no* viewpoints were excluded by the regulation at issue in *Good News Club*. Whatever had been excluded by the limitation on prayer could have been expressed in a discussion of the relevant topic from a sectarian perspective. Second, the Court has offered a non sequitur to support its position. Basically, by suggesting that religion provides as valid a foundation as patriotism, the Court is suggesting that there is no legitimate reason to discriminate against discussions from a sectarian perspective. But this is exactly what the district court had found was *not* occurring.³³¹ Rather, such perspectives could be presented, as long as method did not involve an inherently religious form such as prayer.

The *Good News Club* Court also rejected that the fact that elementary schoolchildren were involved made this case different from *Lamb’s Chapel* or *Rosenberger*.³³² The Court noted that the instructors were not schoolteachers³³³ and that young schoolchildren were not loitering around the classroom after the schoolday had ended and thus, presumably, would not hear the Club’s discussions or prayers from the hallway,³³⁴ perhaps as a way of suggesting that schoolchildren would not misperceive the inclusion as an endorsement by the school. Yet, children would come to know of the programs in other ways than through loitering, and young children might not be sophisticated enough to reject endorsement merely because the schoolteachers were not the instructors.

329. *Good News Club*, 533 U.S. at 111.

330. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111 (2001).

331. *See supra* note 320 and accompanying text.

332. *See Good News Club*, 533 U.S. at 113-14.

333. *Id.* at 118.

334. *Id.* at 117.

The *Good News Club* Court worried that the state's refusal to permit the club to use the school facilities would be perceived as hostility to religion,³³⁵ suggesting that "we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum."³³⁶ It is unclear whether the Court intended to contrast the *misperception* of endorsement with the *perception* of hostility, as if the failure to permit the club to use the facilities would rightly be perceived as hostile, whereas the inclusion might be misperceived as endorsement. In any event, the Court's mischaracterization of the policy at issue as viewpoint discrimination coupled with its failure to see that this case differed from those cases previously decided in ways that had been previously described as significant suggest that some members of the Court will not permit legal distinctions to stand in the way of prayer's resuming its "rightful" place in the schools.

The Court understood that *McCullum* had precluded the use of school facilities for religious instruction,³³⁷ but distinguished that case because in *Good News Club* there was "simply no integration and cooperation between the school district and the Club."³³⁸ Yet, given that the integration/cooperation factor was downplayed or ignored so that the Court could uphold the program at issue in *Zorach*,³³⁹ and given all of the other arguments offered by the Court, e.g., that prayer should not be distinguished for constitutional purposes from discussions from a religious perspective,³⁴⁰ it would seem that *Good News Club* might be used to justify a whole range of religious practices on-site during school time in the name of "neutrality."³⁴¹ Indeed, given all of the secular instruction that occurs during the day, it would be unsurprising for some members of the Court to claim that the failure to include religious instruction or prayer should be viewed as manifesting hostility to religion.

335. *Id.* at 118.

336. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001).

337. *Id.* at 116 n.6.

338. *Id.*

339. *See supra* note 58 and accompanying text (noting that *Zorach* also involved the integration and cooperation factor).

340. *See supra* note 328 and accompanying text.

341. *Good News Club*, 533 U.S. at 114.

III. CONCLUSION

The Court's Establishment Clause jurisprudence as applied to religion in the schools has varied greatly over the past sixty years. The articulated understanding of the Clause's restraints has run the gamut from strict separation to required accommodation. Members of the Court have suggested on the one hand that prayer can of course be kept out of school³⁴² and on the other that prayer must be treated in the same way for constitutional purposes as discussions of secular subjects whether from a religious or non-religious perspective.

The Endorsement Test has sometimes appeared to offer robust protections, precluding the state from favoring one religion over another or religion over non-religion. Yet, at other times, that test has seemed infinitely malleable, both in that the states could take simple steps to avoid imputations of endorsement and in that a state refusal to permit prayer might be interpreted as an attitude of hostility towards religion.³⁴³ Thus, while at one point it was absolutely clear that certain religious activities could not take place on-site during school hours, the rationales recently articulated by the Court suggest that such a position should now be viewed as at best controversial.

Widmar, *Good News Club*, *Rosenberger*, etcetera, do *not* stand for the proposition that because secular subjects are taught, prayers must be included during the school day—the school curriculum is not a limited public forum. Yet, presumably, states might be tempted to include prayer within the school day even if they are not constitutionally required to do so, and it is hardly clear that the Court would now say that the Establishment Clause forbids states from doing so.

The United States is becoming more and more religiously diverse.³⁴⁴ As a matter of public policy, this is hardly the time to permit

342. See *McCullum v. Bd. of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J., concurring) (suggesting that the members of the Court and, presumably, the state “can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in the schools”).

343. Cf. *Wallace v. Jaffree*, 472 U.S. 38, 85 (1985) (Burger, C.J., dissenting) (“To suggest that a moment-of-silence statute that includes the word “prayer” unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion.”).

344. See Kent Greenawalt, *Religiously Based Judgments and Discourse in Political Life*, 22 ST. JOHN'S J. LEGAL COMMENT. 445, 458 (2007) (“The United States is a country of great diversity in culture and religion. The percentage of our people that is neither Christian nor Jewish increases steadily”); Julie M. Arnold, Note, “Divine” Justice and the Lack of Secular Intervention: *Abrogating the Clergy-Communicant Privilege in Mandatory Reporting Statutes to Combat Child*

certain inherently religious activities back in the schools while classes are in session—doing so would only lead to further alienation and fragmentation within the general populace. Further, as a constitutional matter, the kinds of specious reasoning and mischaracterizations of past decisions that would have to be offered to achieve that result would lead to the gutting of the Establishment Clause. Regrettably, however, some of the Court’s recent decisions and rationales provide the basis for a radical reinterpretation of the Establishment Clause, thereby strengthening the suspicion that, in the words of Justice Scalia, “principle and logic have nothing to do with the decisions of this Court.”³⁴⁵

The religious, the areligious, and the antireligious may disagree about the desirability of having prayer during the school day. However, no one should approve of the Court’s mischaracterizations both of past decisions and of the local policies at issue in particular cases as a way of promoting a greater sectarian presence in the schools. The Court’s current approach to Establishment Clause guarantees will only lead to a growing loss of confidence in the efficacy of constitutional protections and in the Court’s own integrity, results that all can agree should be avoided at great cost.

Sexual Abuse, 42 VAL. U. L. REV. 849, 867 (2008) (noting that “religious diversity [is] continually increasing”).

345. *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

