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Religion in the Schools

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I. Introduction

About sixty years ago, the United States Supreme Court decided Everson v. Board of Education, 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 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

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1 330 U.S. 1 (1947).
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 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.\(^7\)

\(^2\) 330 U.S. 1 (1947).


\(^4\) 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 (2007-2008) (“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.”).


At issue was a New Jersey program reimbursing parents for the costs incurred in transporting their children to school. After pointing out that the program provided reimbursement to parents of schoolchildren generally (because public school children also took city buses to get to and from school), the Court examined whether the Establishment Clause precluded the state’s providing financial assistance to those families with children going to religious schools.

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” 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.” 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.’”

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

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Politics, 23 Touro L. Rev. 561, 563 (2007) (“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).

See notes 19-26 and accompanying text infra (explaining that the Everson Court upheld the constitutionality of the program). 8 See Everson, 330 U.S. at 3

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

See id. at 17 (noting that the program involved “spending taxraised 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”).

See Note, The Released Time” Cases Revisited: A Study of Group Decisionmaking by the Supreme Court, 83 Yale L.J. 1202, 1202 (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 busses.”) 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)

Everson, 330 U.S. at 15.

Id. at 16.

Id. (citing Reynolds v. United States, 98 U.S. 145, 164 (1878))
activities or institutions suggests that tax monies cannot be spent to support such institutions. Arguably, the state’s reimbursing parochial school transportation costs with tax monies supports religious institutions, both because the state’s doing so might enable students to go to those schools who might otherwise be unable to do so 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.

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. Allegedly expansive interpretation of the Establishment Clause notwithstanding, the Court did not hold that the New Jersey program violated constitutional guarantees. 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. Analyzing the program as an attempt by the state to help parents get their children to and from accredited schools less dangerously, the Court denied both that the state was thereby supporting

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14 See Rosenberger v. Rector and Visitors of University of Virginia 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.”).
16 See Everson, 330 U.S. at 17 (“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)
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.
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 (“we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils”).
20 See id. at 7 (describing the legislation as “reimbur[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 See 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”).
religious schools\textsuperscript{22} and that the “high and impregnable”\textsuperscript{23} wall between church and state had been breached.\textsuperscript{24}

Everson sent very mixed messages,\textsuperscript{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,\textsuperscript{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 for the Court to clarify the limitations imposed by the Establishment Clause.

\textbf{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 \textit{McCollum v. Board of Education},\textsuperscript{27} given Everson, or to predict the outcome in \textit{Zorach v. Clauson},\textsuperscript{28} given Everson and McCollum, protestations to the contrary by members of the Court notwithstanding.\textsuperscript{29}

At issue in \textit{McCollum} was a program of release-time during which students would receive religious instruction by privately paid religious teachers\textsuperscript{30} in the school building classrooms.\textsuperscript{31} Attendance would be taken at these classes, and the secular teachers would receive the attendance reports.\textsuperscript{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.\textsuperscript{33}

\begin{itemize}
\item \textsuperscript{22} See id. (“The State contributes no money to the schools. It does not support them.”).
\item \textsuperscript{23} Id.
\item \textsuperscript{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 breached it here.”).
\item \textsuperscript{25} See Joseph P. Viteritti, Davey’s Plea: Blaine, Blair, Witters, and the Protection of Religious Freedom, 27 \textit{Harv. J.L. & Pub. Pol'y} 299, 326 (2003) (“the landmark Everson opinion that grounded a generation of secularist case law was a jumble of mixed messages”).
\item \textsuperscript{26} See notes and accompanying text supra.
\item \textsuperscript{27} 333 U.S. 203 (1948).
\item \textsuperscript{28} 343 U.S. 306 (1952).
\item \textsuperscript{29} See note 37 and accompanying text infra (noting that the \textit{McCollum} Court suggested that \textit{McCollum} was mandated by Everson).
\item \textsuperscript{30} \textit{McCollum}, 333 U.S. at 205 (“religious 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”).
\item \textsuperscript{31} See id. at 209.
\item \textsuperscript{32} Id.
\item \textsuperscript{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.”).
\end{itemize}
The McCollum Court noted that students were required by law to go to school, and that they would be released from that duty contingent upon their attending the religious classes. 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,” suggesting that the program at issue was barred by Everson. 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 tax-supported public school buildings used for the dissemination of religious doctrines,” 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.”

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, 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 McCollum was unconstitutional just because taxes helped pay for the building in which the instruction took place.

Even the fact that Illinois’s compulsory school law was viewed as aiding religious instruction in McCollum 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

34 Id.
35 Id. at 209-10.
36 Id. at 210.
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, 330 U.S. at 3 (“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 McCollum 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.”).
required that students attend approved schools,\textsuperscript{41} which included public and parochial schools.\textsuperscript{42} Yet, this law aided religious instruction in that the law provided an incentive to attend approved parochial schools.\textsuperscript{42} 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.\textsuperscript{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 \textit{Everson} would suggest that the Illinois program also passed muster, almost all members of the Court\textsuperscript{44} believed that the Establishment Clause precluded Illinois from permitting religious teaching in public school buildings. One way to understand the difference between \textit{Everson} and \textit{McCollum} is in the kind of aid afforded by the state—\textit{Everson} upheld the constitutionality of the state’s promoting health and safety, while \textit{McCollum} struck down the state’s promoting religious instruction. Yet, interpreting the decisions as representing this categorical distinction is misleading, if not simply wrong.\textsuperscript{45} For example, in his \textit{McCollum} concurrence, Justice Frankfurter noted:


\textsuperscript{42} See \textit{Everson}, 330 U.S. at 18 (noting both 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” ) (citing \textit{Pierce v. Society of Sisters}, 268 U.S. 510 (1925)).

\textsuperscript{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”).

\textsuperscript{44} The only member of the Court to dissent in \textit{McCollum} was Justice Reed. See \textit{McCollum}, 333 U.S. at 238.

\textsuperscript{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 \textit{Everson} opinion, offered his understanding of it in \textit{Allen}. See \textit{Board of Ed. v. Allen}, 392 U.S. 236, 252-53 (1968) (Black, J., dissenting) it 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. 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.
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.  

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 
onetheless 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.  

That the Court did not believe all release-time programs unconstitutional was made clear in 
Zorach v. Clauson, 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.”  Students who did not attend these religious classes would remain in school. The Court 
contrasted the New York program with the Illinois program that had been at issue in McCollum, noting that

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46 McCollum, 333 U.S. at 231 (Frankfurter, J.).
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).
49 Id. at 308.
50 Id. (“Those not released stay in the classrooms.”).
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 McCollum to pay the religious instructors53—rather, the public funds expended were the de minimis funds,54 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, McCollum had been written in such a way as to suggest that this was not an important distinction.56 For example, the McCollum Court had suggested that the reporting of attendance at the religious classes to the secular teachers 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

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51 Id. at 308-09 (“The case is therefore unlike McCollum v. Board of Education, 333 U.S. 203, 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 McCollum, 333 U.S. at 208 (“The council employed the religious teachers at no expense to the school authorities.”).
54 See id. at 234 (Jackson, J., concurring)
   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.
55 See id. at 239 n.2 (Reed, J., dissenting)
   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.
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)
   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.
57 See McCollum, 333 U.S. at 209-10
   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.
58 Zorach, 343 U.S. at 308 (“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.”).
The Zorach Court rejected that students were coerced into taking the religion classes, reasoning that the school authorities “do no more than release students whose parents so request.” Yet, no one had been forced to take the religion classes in McCollum. Rather, the students who had chosen not to participate in the Illinois religious instruction program felt alienated and humiliated, but that could hardly have been attributed to the state.

Justice Frankfurter had suggested in McCollum 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. Church leaders had decided that religious schooling during the week would only be successful if it could take place during regular school hours. 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.” Rather, they were involved in the sense that but for the

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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. Board of Ed., 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 See McCollum, 333 U.S. at 232 (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.”).

63 See id. (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 See id. at 232-33 (Jackson, J., concurring)

65 Id. at 222 (Frankfurter, J., concurring)

66 Id. (Frankfurter, J., concurring) (“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, 343 U.S. at 311.
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, the religious instruction program would have foundered.

Yet, Zorach also involved releasing students during regular school hours to receive religious instruction. As Justice Frankfurter noted in 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, versus in effect closing the school for some children but keeping it in session for others.

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, 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.” He noted that if the school’s “doors are closed, they are closed upon those students who do not attend the

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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) (“the 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 McCollum 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. 308 (“New York City has a program which permits its public schools 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, 343 U.S. at 321 (Frankfurter, J., dissenting) (emphasis added).
religious instruction, in order to keep them within the school.” 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.” 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.”

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 scope of its coverage permits no exception; the prohibition is absolute.” 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,” 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.’

Yet, the Court’s recounting the “parade of horribles” 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

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73 Id. (Frankfurter, J., dissenting).
74 Id. at 318 (Black, J., dissenting).
75 Id. (Black, J., dissenting).
76 Id. at 312.
77 Id.
78 Id. at 312-13.
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., 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 McCollum were similar. For example, in McCollum, 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 McCollum was where the program was taking place. “Except for the use of the school buildings in Illinois, there is no difference between the

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).
81 See Zorach, 343 U.S. at 313
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.”)
82 Id. at 316 (Black, J., dissenting) (“the 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) (“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”).
systems which I consider even worthy of mention.”

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

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, although that factor will become less important in the subsequent case law. 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.

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84 Id. (Black, J., dissenting) See also Inke Muchlhoff, 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 McCollum, the religious instruction in Zorach took place outside of the public school buildings.”). 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) 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. 88 See notes 116-281; 318-37 and accompanying text infra (discussing Widmar v. Vincent, 454 U.S. 263 (1981), Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993); and Good News Club v. Milford Central School, 533 U.S. 98 (2001)).
Of course, the Zorach Court did not specify why the New York but not the Illinois program passed constitutional muster. The Court did explain, “Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person.” 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 the recognition 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

89 Zorach, 343 U.S. at 314.
90 Id.
91 McCollum, 333 U.S. at 211.
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.”).
Some suggest that Zorach is best understood as responding to the public outcry produced by McCollum, implying that the Court simply modified its position to quell the uprising in public opinion. Focusing in particular on the opinion written by Justice Douglas, others suggest that Douglas was motivated by the political ambition to run for president, although at least two points counsel against that interpretation. Justice Douglas expressly claims that he did not see McCollum 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 McCollum case was unconstitutional. It was our view at the time that the present type of ‘released time’ program was not prejudged by the McCollum case, a conclusion emphasized by the reservation of the question in the separate opinion by Mr. Justice Frankfurter in which Mr. Justice Burton joined.

There is some irony in Justice Douglas’s citing Justice Frankfurter’s McCollum 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

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97 Cf. Zorach, 343 U.S. at 317 (Black, J., dissenting) (“I am aware that our McCollum decision on separation of Church and State has been subjected to a most searching examination throughout the country. Probably few opinions from this Court have attracted more attention or 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)
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.
McCormick dissent explicitly mentioned the New York program,\(^{101}\) suggesting that while he believed that program constitutional the McCormick 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 McCormick and Zorach were compatible.\(^{105}\)

A separate question is why. While it is true that the teaching occurred in the school in McCormick and off-site in Zorach, it is not clear why that was constitutionally significant.\(^{106}\) The extra cost to the state in McCormick cannot plausibly account for the difference.\(^{107}\) Perhaps it was 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.\(^ {109}\)

\(^{101}\) See McCormick, 333 U.S. at 250-52 (Reed, J., dissenting).

\(^{102}\) Id. at 252 (Reed, J., dissenting).

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.

\(^{103}\) 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, 330 U.S. at 28 (Routledge, J., dissenting). Justice Burton signed on to Justice Routledge’s dissent. See also McCormick, 333 U.S. at 212 (Franfurter, J.) (“We dissented in Everson v. Board of Education, 330 U.S. 1, 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 McCormick 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 McCormick, 333 U.S. at 234 (1948) (Jackson, J., concurring).

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.

\(^{108}\) See School Dist. of Abington Township v. Schempp 374 U.S. 203, 262 (1963) (Brennan, J., concurring) (“The deeper difference was that the McCormick program placed the religious instructor in the public school
While it may be possible to reconcile Zorach, Everson and McCollum substantively, there is no gainsaying that Zorach sets a much different tone than do Everson and McCollum. Both the Everson and McCollum Courts discussed the impregnable wall between Church and State, while the Zorach Court wrote, “We are a religious people whose institutions presuppose a Supreme Being.” Lest the implications of its view be unclear, the Zorach Court suggested, “When 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.” 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,” which would amount to “preferring those who believe in no religion over those who do believe.” 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 approach to the accommodation of religion within the public school setting.

C. Religious Student Group’s 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 McCollum nor Zorach addressed the inverse question,

classroom in precisely the position of authority held by the regular teachers of secular subjects, while the Zorach program did not.”) Cf. McCollum, 333 U.S. at 231 (Frankfurter, J.) 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.


110 See Everson, 330 U.S. at 18; McCollum, 333 U.S. at 212.

111 See Zorach, 343 U.S. at 313.

112 Id. at 313-14.

113 Id. at 314.

114 Id.
namely, whether having such instruction on-site but not during classtime hours was prohibited by the Establishment Clause. While the Court would discuss that specific question in later cases, the Court addressed related questions in **Widmar v. Vincent**, 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. The Court noted that the university had set up a forum for use by student groups, and that it was precluding the plaintiff group from using the forum based on the members’ desire to engage in religious activities. While a university forum is distinguishable from other fora such as parks or streets because of the school’s educational mission, the Court nonetheless suggested that the school could not prevent the group from using the forum unless that limitation could withstand examination under strict scrutiny.

The University attempted to justify its exclusion by suggesting that its doing otherwise would have violated its Establishment Clause obligations. The Court agreed that complying with constitutional

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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 (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. (emphasis in original).
122 Id. at 269-70 (holding that in 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.
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.”).
obligations implicated a compelling interest, but denied that the state’s permitting the group to meet violated Establishment Clause guarantees.

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, 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. 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.

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. As the Widmar Court recognized, an important issue in dispute was whether this benefit should be classified as “incidental” in light of the relevant jurisprudence.

Two reasons were offered to think 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. Second, that there was such a broad

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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 meets 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 Id. (rejecting that “the primary effect of the public forum, open to all forms of discourse, would be to advance religion”).
129 Id. (citing Committee for Public Education v. Nyquist, 413 U.S. 756, 771 (1973)).
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.”).
array of nonreligious and religious speakers\textsuperscript{132} suggested that the primary effect of the forum was secular rather than sectarian.\textsuperscript{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.\textsuperscript{134}

Consider \textit{Tilton v. Richardson},\textsuperscript{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: “First, 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?”\textsuperscript{136}

When analyzing the Effects prong, the Court noted that the important consideration was not whether a religious institution had received some benefit but, instead, whether the program’s primary effect was the advancement of religion.\textsuperscript{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.\textsuperscript{138} Grants and loans would only be used for “defined secular purposes,”\textsuperscript{139} and the Act expressly prohibited the used of

\textsuperscript{132}Id. (“the forum is available to a broad class of nonreligious as well as religious speakers; there are over 100 recognized student groups at UMKC”).
\textsuperscript{133}Id. (suggesting that the forum’s being open to so many groups was “an important index of secular effect.”)
\textsuperscript{134}See id. (“We are satisfied that any religious benefits of an open forum at UMKC would be ‘incidental’ within the meaning of our cases.”).
\textsuperscript{135}403 U.S. 672 (1971)
\textsuperscript{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.
\textsuperscript{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”).
\textsuperscript{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 institution”).
\textsuperscript{139}Id.
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,’ 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 statue 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

140 Id. at 679-80.
141 Id. at 679
142 413 U.S. 734 (1972).
143 See id. at 736.
144 See id. at 739.
145 Id. at 743.
146 Id. at 742.
purely secular function without at the same time promoting sectarian interests, or (2) the funding was going to promote religious activity even if the school was predominantly secular in nature. Basically, the Hunt Court suggests that as long as the funds go only to secular projects, the primary effects prong of the Establishment Clause will not be violated.

In Committee for Public Education and Religious Liberty v. Nyquist, 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.” 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. 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. Because the state would not 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 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. Noting that it had long since rejected that the state was precluded from providing even incidental benefits to religious organizations, the Court indicated that it was following the previous

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 Id. (“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.”).
150 Id. at 774.
151 Id.
152 Id. at 775 (admitting that 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
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”).
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. The
Roemer Court rejected a position that the Widmar Court seemed to endorse, viz., that the state’s supporting
religious activities is permissible as long as secular activities are promoted as well. 

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 forum and it may also have been true that the benefits were being provided to a
“broad spectrum of groups,” 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 Effects prong of the Establishment Clause. Further, no exception
had been offered suggesting that such funding was 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
effects 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.

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 Effects 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

156 Id. (emphasis added) (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 thought 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, 454 U.S. at 274 (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.
160 See note 136 and accompanying text supra (offering the three prongs of the test announced in Lemon v.
Kurtzman, 403 U.S. 602 (1971)).
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 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.

\(^{161}\) *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.”).

\(^{162}\) *See id.* at 269 n.6.

\(^{163}\) *See id.* n.6 (emphasis in original).

\(^{164}\) *See id.* n.6 (emphasis in original).
At issue in Heffron v. International Society for Krishna Consciousness\(^\text{165}\) 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.”\(^\text{166}\) The Krishnas were permitted to roam the Fair discussing their religious views,\(^\text{167}\) but were only allowed to solicit donations from a booth.\(^\text{168}\)

The Court accepted that “oral and written dissemination of the Krishnas’ religious views and doctrines is protected by the First Amendment.”\(^\text{169}\) Nonetheless, the Court upheld the restriction as a valid time, place, manner restriction.\(^\text{170}\) 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.\(^\text{171}\)

The Widmar Court suggested that the case law “acknowledged the right of religious speakers to use public forums on equal terms with others.”\(^\text{172}\) 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


\(^{166}\) Id. at 642.

\(^{167}\) Id. at 643-44 ("the 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.

\(^{170}\) 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.”) and id. at 655 ("Accordingly, the only question is the Rule's validity as a time, place, and manner restriction.").

\(^{171}\) Widmar, 454 U.S. at 284 (White, J., dissenting)

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 \textit{qua} speech is not different from any other variety of protected speech as a matter of constitutional principle.

\(^{172}\) Id. at 272 (citing Heffron and Saia v. New York, 334 U.S. 558 (1948)).
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, \textsuperscript{173} Saia v. New York. \textsuperscript{174} At issue in Saia was a city law forbidding “the use of sound amplification devices except with permission of the Chief of Police.”\textsuperscript{175} Saia was a minister who used sound equipment to “amplify lectures on religious subjects.”\textsuperscript{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 equipment to be used.\textsuperscript{177} Apparently, individuals had complained because they had found the volume annoying.\textsuperscript{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:

\textquote{[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.} \textsuperscript{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 for constitutional purposes. Or, perhaps, even though they are not the same, they should both be permitted in a public forum, 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 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.

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


183 Id. at 225.
At issue in *Schempp* was a Pennsylvania law requiring that Bible verses be read at the beginning of each school day. After the Bible passage was read, the Lord’s Prayer would be recited by the schoolchildren in unison. There was no requirement that the Bible passage be from a particular Bible and, in fact, passages from different Bibles were read in the school at issue. No questions, comments, or interpretations were permitted to accompany the readings.

Students objecting to the readings either could leave the classroom or could remain in the classroom but refuse to participate. The Schempps 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.

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. The Court rejected that by striking down the ceremony it was thereby endorsing a “religion of secularism,” noting

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184 *See id.* at 205
   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.’

185 *Id.* at 205-06
   They sought to enjoin the appellant school district, wherein the Schempp children attend 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.

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 *Id.* ("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.
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.”

One infers that the Schempp Court would not have struck down on Establishment Clause grounds a school program in which Comparative Religion was the first class of the day. Yet, if starting the schoolday each day with a Bible reading and prayer is prohibited by the Establishment Clause, 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. 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, even if the line is difficult to draw in some cases.

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

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194 Id.
195 Id. at 205.
196 Id. ("we 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, 454 U.S. at 282 (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.").
198 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.”
199 See Widmar, 454 U.S. at 284-85 (White, J., dissenting)
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)
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 Schempp, 374 U.S. at 229 (Douglas J., concurring).
201 Id. at 229 (Douglas J., concurring).
Schempp was not the first time that the Court had struck down religious exercises in the public schools. At issue in Engel v. Vitale, which involved the following: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.” 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.” The fact that New York permitted students to remain silent or be excused from the room did not save the practice from constitutional invalidation. 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.” As such, the program violated Establishment Clause guarantees.

Even after Widmar, the Court affirmed that prayer in school was unconstitutional. In Wallace v. Jaffree, the Court examined an Alabama minute-of-silence-or-voluntary-prayer statute, striking it down because it was enacted to promote religion and, indeed, had no secular purpose. 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” and

203 Id. at 423.
204 Id. at 422.
205 Id. at 424.
206 Id. at 430 (“the 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.
208 472 U.S. 38 (1985)
209 See id. at 40 n.2

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.”

210 See id. at 56

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.

211 Id. at 72 (O’Connor, J., concurring in the judgment).
because “a pupil who participates in a moment of silence need not compromise his or her beliefs, [since] . . .
. 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.” Thus, both pre- and post 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.” In Board of Education of Westside Community Schools v. Mergens By and Through Mergens, the Court examined a Nebraska high school’s refusal to permit students to form a Christian
club. 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.

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, and then refusing to recognize
other clubs based on the content of that group’s speech. After finding that the school did recognize some
non-curricular clubs, the plurality found that the school’s refusal to grant the student official recognition
violated the federal act.

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

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212 Id. (O’Connor, J., concurring in the judgment).
215 Id. at 232.
216 See id. at 231.
217 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.
218 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.”).
219 Id. at 240.
219 See id. at 245 (“we think it clear that Westside’s existing student groups include one or more ‘noncurriculum related student groups.’”)
220 Id. at 247.
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.\textsuperscript{221}

The plurality rejected that argument, noting that the state is permitted to accord incidental benefits to religious groups,\textsuperscript{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.”\textsuperscript{223} Students would be unlikely to mistake the school’s recognizing the student group with the school’s endorsing that group\textsuperscript{224} 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.\textsuperscript{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,

\begin{quote}
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 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.\textsuperscript{226}
\end{quote}

\textsuperscript{221}Id. at 249.  
\textsuperscript{222}Id. at 248 (noting that it had previously found in \textit{Widmar} that “although incidental benefits accrued to religious groups who used university facilities, this result did not amount to an establishment of religion”).  
\textsuperscript{223}Id.  
\textsuperscript{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 \textit{Tinker v. Des Moines Independent Community School Dist.}, 393 US 503 (1969)).  
\textsuperscript{225}See id. at 251
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 \textit{Widmar}, 454 U.S. at 274, 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.  
\textsuperscript{226}Id. at 261 (Kennedy, J., concurring in part and concurring in the judgment).
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 Mergens228 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 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

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,”) and 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, 454 U.S. at 274 n.14 (quoting University of Missouri student handbook)).
230 See id. (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 id. at 251 (“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. (“petitioners' fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students”).
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 notes 330-33 and accompanying text infra (discussing the Court’s dismissal of perceived endorsement worries in Good News Club).
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 McCollum236 and, indeed, he cited McCollum for support of his position.237 After all, the religious activities in McCollum also were not run by school officials, although McCollum differed from Mergens in that the only non-curricular activity was the religious studies class whereas in McCollum 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 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

235 Mergens, 496 U.S. at 269 (Marshall, J., concurring in the judgment).
236 See note 39 and accompanying text supra.
237 See Mergens, 469 U.S. at 250 (Marshall, J., concurring in the judgment).
238 For a list of the activities, see id. at 253-58
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 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)

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.
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. Second, the Mergens plurality modified the Widmar maturity rationale by suggesting that it had equal applicability to high school students.

One might have expected the Widmar plurality to have engaged in more discussion of McCollum 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 McCollum was to suggest that the location of the classes was important—they could not be conducted on-site but could be conducted off-site. But the club meetings were 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 more than it did 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

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241 See Widmar, 454 U.S. at 274 n.14 (“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, 685-686 (1971)).

242 See id. n.14.

243 Mergens, 469 U.S. at 248 (“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 (“we 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 note 87 and accompanying text supra.
exercise,” 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, 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.” Yet, it had been the student peer pressure that had motivated the challenges in McCollum and Schempp, 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 one looked to Widmar and rejected much if not all of the preceding jurisprudence. 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, 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. Religious purposes were not included among the permissible designated purposes.

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245 Schempp, 374 U.S. at 229 (Douglas J., concurring).
246 See notes 211-12 and accompanying text supra.
247 Mergens, 496 U.S. at 251 (emphasis in original).
248 See notes 62-64 and accompanying text supra.
249 See note 191 and accompanying text supra.
250 See notes 131-60 and accompanying text supra.
252 Id. at 386.
253 Id.
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.\textsuperscript{254} The request was denied because it was “church related,”\textsuperscript{255} notwithstanding that “school property could be used for ‘social, civic and recreational’ purposes.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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 from a religious standpoint.” 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, about whether same-sex marriage should be recognized, etcetera.\textsuperscript{259} 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.\textsuperscript{260}

\textsuperscript{254} See id. at 388-89.
\textsuperscript{255} Id. at 389.
\textsuperscript{256} Id. at 391.
\textsuperscript{257} Id. at 393.
\textsuperscript{258} Id.
\textsuperscript{259} 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.”).
\textsuperscript{260} Cf. Rosenberger v. Rector and Visitors of University of Virginia, 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.”).
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. 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.” Further, a wide variety of groups had repeatedly used the facilities. Under these circumstances, the Court reasoned, any benefits to a religious group would be “incidental.”

The Court cited Widmar as support for its conclusion that the religious benefits would have been incidental. 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 Christian perspective, 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. That request had been denied, and the Church had not challenged that denial in the courts. 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. One thus could not tell whether the Lamb’s Chapel Court

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261 Lamb’s Chapel, 508 U.S. at 394.
262 Id. at 395.
263 Id.
264 Id.
265 See id.
266 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”).
267 Id. at 387 n.2.
268 Id. n.2.
269 Id. n.2.
270 Id. n.2.
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.” 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.” 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 Schenpp court had expressly rejected that a course on world religions was the equivalent of engaging in religious prayer, notwithstanding that the content might be thought to involve religious instruction.

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 family and an exhortation to prayer. Precisely because religious purposes and

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271 Id. at 389 (citing 770 F.Supp. 91, 92, 98-99 (E.D.N.Y. 1991)).
272 Id. (citing 770 F.Supp. 91, 92, 98-99 (E.D.N.Y. 1991)).
273 See note 183 accompanying text supra.
274 See Lamb’s Chapel, 508 U.S. at 388 n.3.
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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.)
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 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,” 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 standpoint” 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. Indeed, because prayer might simply be described as presenting material from a religious viewpoint 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. Depending upon how Widmar, Lamb’s Chapel and other decisions are read, the Court’s position would seem a permit a

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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.)

275 Cf. Rosenberger, 515 U.S. at 867 (Souter, J., dissenting)
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.

276 Lambs Chapel, 508 U.S. at 393.
277 Id. at 394.
278 See note 155 supra (including Justice White’s dissent making this point).
279 See note 328 and accompanying text infra.
280 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.”).
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.\footnote{281}{See notes 318-37 and accompanying text infra (discussing rationales offered in Good News Club v. Milford Central School, 533 U.S. 98 (2001)).}

The proper interpretation of Lamb’s Chapel was a matter of dispute in \textit{Rosenberger v. Rector and Visitors of University of Virginia}.\footnote{282}{515 U.S. 819 (1995).} At issue in \textit{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,\footnote{283}{Id. at 827} which was defined as “any activity that ‘primarily promotes or manifests a particular belief[f] in or about a deity or an ultimate reality.’”\footnote{284}{See id. at 825 (citing University Guidelines at 66a).} School policy precluded paying the costs of certain student activities, including religious activities.\footnote{285}{Id. at 824-825}

The \textit{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.”\footnote{286}{Id. at 828 (citing Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972)).} 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.”\footnote{287}{Id. at 829 (citing R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992)).} The state must not engage in viewpoint discrimination,\footnote{288}{Id. (“These principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation.”).} even if permissibly engaging in content discrimination by setting up a limited public forum.\footnote{289}{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.”).}
At issue in the case was whether the University was engaging in content rather than viewpoint discrimination. By virtue of its having set up a limited public forum, the University was at the very least engaging in content discrimination. However, its having engaged in that kind of discrimination did not establish that it had acted unconstitutionally—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.”

Thus, a state actor’s engaging in content discrimination may be constitutional, whereas a state actor’s engaging in viewpoint discrimination is “presumed impermissible.”

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.” 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,” although the state may be justified in limiting discussion to certain topics.

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.

The Rosenberger Court suggested that the most instructive case for handling the issues before it was Lamb’s Chapel, 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

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290 Id. (citing Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806 (1985)).
291 Id. at 830.
292 Id. at 829.
293 Id. (citing Cornelius, 473 U.S. at 804-06)
294 See id.
295 Id. at 829-30 (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)).
296 Id. at 830 (“The most recent and most apposite case is our decision in Lamb's Chapel.”).
desiring to show a film series addressing various child-rearing questions from a “Christian perspective.” 297

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 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.298

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.299 This limitation would not only apply to a whole host of Christian perspectives but also to other religious perspectives as well as to atheistic 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

297 Id.
298 Id. at 831.
299 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.
speech.” 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 simply wrong; the debate is skewed in multiple ways.” 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 four of them were 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. Where no discussions of family were 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, but that is a different matter not involving a claim about viewpoint discrimination.

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. Perhaps it meant that the school permitted discussions about religion but did not permit religious worship. Yet, this

300 Id. at 831.
301 Id. at 831-32.
302 See id. at 894-95 (Souter, J., dissenting)
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.

303 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 Defense & Ed. Fund, Inc., 473 U.S. 788, 804-806 (1985)).
304 Id. at 897 (Souter, J., dissenting)
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.
305 Id. at 831.
306 See id. at 845
does not capture the University policy at issue--a prohibition on promoting or manifesting a belief or lack of belief in God means that discussions about God’s existence or non-existence were simply excluded from the forum.307 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,308 the Court omits the term “primarily.”309 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.310 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

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

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. . . .

Cf. id, at 838

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.

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

Cf. id, at 837

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.
for 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,” 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.”

Yet, those cases would have to 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.” 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,” and describing the benefits to religion accorded under such a program as “incidental,” the

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311 Id. at 836.
312 Id. at 843.
313 Id. at 842.
314 Id. (citing Widmar, 454 U.S. at 269; Mergens, 496 U.S. at 252).
315 Rosenberger, 515 U.S. at 843-44.
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, “Using 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.” 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.

In Good News Club v. Milford Central School, 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. 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.”

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 even in a limited public forum viewpoint discrimination is not permitted and that any content restrictions must be reasonable in light of the forum’s purpose. 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

316 Id. at 868 (Souter, J., dissenting).
319 See id. at 103
320 Id. at 104 (citing 21 F.Supp.2d 147, 154 (N.D.N.Y. 1998)).
321 Id. at 106 (citing Rosenberger, 515 U.S. at 829).
322 Id. at 107 (citing Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806 (1985)).
groups. 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,” and held that the Milford school was engaging in “viewpoint discrimination,” thereby obviating the need to decide whether the exclusion was reasonable in light of the limited public forum’s purpose.

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’s Widmar concurrence, 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 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,” suggesting that for Free Speech Clause purposes,

323 See id. 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.

324 Id.

325 Id. (“we hold that the exclusion constitutes viewpoint discrimination”).

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

327 See note 179 and accompanying text supra.

328 Good News Club, 533 U.S. at 111.
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.”

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. 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. The Court noted that the instructors were not schoolteachers 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, 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.

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, writing, “[W]e 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.” It is unclear whether the Court intended to contrast the misperception of endorsement with the perception of hostility, as

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329 Id.
330 See note 320 and accompanying text supra.
331 See Good News Club, 533 U.S. at 113-14.
332 Id. at 118.
333 Id. at 117.
334 Id. at 118.
335 Id.
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 McCollum had precluded the use of school facilities for religious
instruction,\textsuperscript{336} but distinguished that case because in Good News Club there was “simply no integration and
coop eration between the school district and the Club.”\textsuperscript{337} Yet, given that the integration/cooperation factor
was downplayed or ignored so that the Court could uphold the program at issue in Zorach,\textsuperscript{338} 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,\textsuperscript{339} 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.”\textsuperscript{340}
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.

\section*{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 school\textsuperscript{341} and on the other that prayer must be treated in the same

\textsuperscript{336} \textit{Id.} at 116 n.6.
\textsuperscript{337} \textit{Id.} n.6
\textsuperscript{338} See note 58 and accompanying text \textit{supra} (noting that \textit{Zorach} also involved the integration and
coop eration factor).
\textsuperscript{339} See note 328 and accompanying text \textit{supra}.
\textsuperscript{340} \textit{Good News Club}, 533 U.S. at 114.
\textsuperscript{341} See \textit{McCollum}, 333 U.S. at 235 (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”).
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. 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. As a matter of public policy, this is hardly the time to permit 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.”

342 Cf. Wallace, 472 U.S. at 85 (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.”).
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 mischaracterization of past decisions or 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.