GOD AND KIDS AT SCHOOL: VOLUNTARY RELIGIOUS ACTIVITIES IN THE PUBLIC SCHOOLS

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In at least two federal circuits, high school students may meet before or after school to discuss Hitler, Marx, and Neitzsche but not Buddha, Jesus, or Mohammed. They may read Kinsey on sex but not the Apostle Paul on love. This odd state of affairs is the result of two recent decisions, *Brandon v. Board of Education (Brandon)*[1] and *Lubbock Civil Liberties Union v. Lubbock Independent School District (Lubbock)*,[2] which held that such discussions violated the establishment clause of the first amendment. As a result of these and related decisions, politicians have tried to develop means to escape the results of *Brandon* and *Lubbock*. For example, President Reagan has proposed an amendment to the Constitution to permit school prayer[3] and Senator Jesse Helms of North Carolina has proposed a bill that would strip the federal courts of jurisdiction to hear cases on prayer in schools.[4]

These legislative responses may not be necessary to reverse *Brandon* and *Lubbock*, however, since the United States District Court for the Middle District of Pennsylvania has recently held in *Bender v. Williamsport Area School District (Bender)*[5] that high school students may meet to pray and discuss religion in student-initiated and student-led extracurricular organizations. *Bender* relied heavily on the 1982 Supreme Court decision in *Widmar v. Vincent*[6] in holding that a

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[1] 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123, *reh'g denied*, 455 U.S. 983 (1982).

[2] 669 F.2d 1038, *reh'g denied en banc*, 680 F.2d 424 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 800 (1983).

[3] *See infra* text accompanying notes 149-51.

[4] *See infra* text accompanying notes 155-59.

[5] 563 F. Supp. 697 (M.D. Pa. 1983), *appeal docketed*, No. 813-3284 (3d Cir. 1983).

[6] 454 U.S. 263 (1981) (providing such right to public *university* students).

denial of equal access to student-initiated religious groups was an impermissible infringement of the students' free speech rights. These cases present a constitutional dilemma, calling for a resolution of this conflict among the federal courts over the interrelationship of the free speech, free exercise, and establishment clauses of the first amendment. We will propose a constitutional test for resolving this issue and will discuss why the current legislative attempts to avoid the constitutional problems raised by school prayer are ill-advised.

I. Case Law

A. *Brandon*

In *Brandon*, several students attending a local public high school organized "Students for Voluntary Prayer." This group asked the principal for permission to hold prayer meetings in a classroom just before the beginning of the school day. No faculty supervision or involvement was sought. The principal refused to allow the meetings, and his decision was supported by the Board of Education. The students then brought suit in federal district court against the Board of Education, the superintendent of schools, and the principal, seeking damages and an injunction to forbid the defendants from prohibiting the prayer meetings. The district court dismissed the complaint[7] and the court of appeals affirmed.[8]

The Second Circuit, in an opinion by Judge Kaufman, reduced first amendment jurisprudence to "three major policies underlying religious freedom: voluntarism of religious thought and conduct, government neutrality towards religion, and the separation of church and state."[9] The court's initial task was to decide whether the school district's action "exhibited a degree of hostility towards a particular religious organization sufficient to transgress the principle of government neutrality, thereby violating the Free Exercise Clause."[10] Citing

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[7] Brandon v. Board of Educ., 487 F. Supp. 1219 (N.D.N.Y.), *aff'd*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123, *reh'g denied*, 455 U.S. 983 (1982).

[8] *Brandon*, 635 F.2d at 971.

[9] *Id.* at 974. The court cited Professor Tribe's treatise and a law student note for this proposition. *Id.*; *see* L. Tribe, American Constitutional Law § 14-4, at 818-19 (1978); Note, *Government Neutrality and Separation of Church and State: Tuition Tax Credits*, 92 Harv. L. Rev. 696 (1979).

[10] *Brandon*, 635 F.2d at 975-76.

Wisconsin v. Yoder[11] and *Sherbert v. Verner*,[12] the court stated that this analysis requires an inquiry into "the relative importance of a particular religious ritual and the degree to which exercise of that practice is infringed by government action."[13] The *Brandon* court noted that in *Yoder* and *Sherbert* individuals were forced to choose between "fundamental religious beliefs" and state requirements or benefits.[14] In each case, therefore, the government action requiring such a choice was struck down.

The restrictions on the Students for Voluntary Prayer, according to the court, did not interfere with fundamental religious beliefs.[15] Even if group prayer were doctrinally required,

> [t]he choice for the students in this case [would be] much less difficult [than that presented in *Sherbert* and *Yoder*] because the school's rule does not place an absolute ban on communal prayer, nor are sanctions faced or benefits forfeited. While school attendance is compelled for several hours per day, five days per week, the students, presumably living at home, are free to worship together as they please before and after the school day and on weekends in a church or any other suitable place.[16]

The court specifically distinguished cases—such as that of a Moslem student whose religion requires prayer and prostration at certain times during each day—in which a school district may be forced to make "accommodations to permit the students to withdraw momentarily from the class" because to do otherwise would interfere with the students' fundamental beliefs.[17] The court also distinguished public schools from university campuses, military installations, and prisons on the grounds that college students, soldiers, and inmates may have

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[11] 406 U.S. 205 (1972). In *Yoder*, the Supreme Court held that Pennsylvania's compulsory education laws violated the free exercise rights of Amish parents and children. Because the religious faith of the Amish encourages minimal contact with the outside world after the eighth grade, the State's strong interest in education was not sufficiently compelling to require further schooling. *Id.* at 216-17.

[12] 374 U.S. 398 (1963). The *Sherbert* Court held that South Carolina could not deny unemployment benefits to Sabbatarians on account of appellant's refusal to work on Saturdays.

[13] *Brandon*, 635 F.2d at 976.

[14] *Id.*

[15] *Id.* at 977.

[16] *Id.* The Supreme Court has held that a released time program is constitutional despite the students being brought together by compulsory education laws. *See* Zorach v. Clauson, 343 U.S. 306 (1952).

[17] *Brandon*, 635 F.2d at 977.

no other forum in which to exercise their religions.[18] Thus, the court found no infringement of the students' free exercise rights.[19]

The Second Circuit further concluded that even if the school district's action infringed on the students' free exercise rights, "a 'compelling state interest'. . . was present" because "an authorization of student-initiated voluntary prayer would have violated the Establishment Clause by creating an unconstitutional link between church and state."[20] The court based this declaration upon the well-established test for violations of the establishment clause: "A state statute or regulation does not contravene the Establishment Clause if (1) the enactment has a secular purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not foster an excessive entanglement with religion."[21] According to the court, a school policy allowing all student groups, religious or otherwise, to meet on school grounds "reflects a secular, and clearly permissible purpose—the encouragement of extracurricular activities."[22] Thus, the first component of the test was met.

The "effect" test was defined by the Second Circuit as: "does a particular policy which is neutrally applied to religious organizations merely accommodate religious interests, or does it advance those nonsecular interests impermissibly?"[23] In assessing the effect of voluntary prayer groups, the court noted the "unique role" of the public schools in conveying fundamental values to the nation's youth: "To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit."[24] Moreover, the court questioned the voluntary nature of the prayer meetings, suggesting that attendance by the captain of the football team or other members of the "in-crowd" would constitute some sort of psychological coercion in the " 'captive audience' setting of a school."[25] Yet, the court also remarked that a

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[18] *Id.*

[19] *Id.* at 977-78.

[20] *Id.* at 978.

[21] *Id.* (citing Committee for Pub. Ed. & Religious Liberty v. Regan, 444 U.S. 646, 653 (1980) and Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* Judge Kaufman's fears about the impressionability of school children do not square with his earlier pronouncements in that regard. In Russo v. Central School Dist. No. 1, 469 F.2d

brief appearance by a clergyman at a high school graduation ceremony would create no constitutional problem.[26] The court concluded that the "effect" test would be violated by allowing the prayer meetings. Any such meetings occurring during the official school day "would create an improper appearance of official support, and the prohibition against impermissibly advancing religion would be violated."[27]

Finally, the Second Circuit noted that the "entanglement" test would also be violated by voluntary prayer groups because of the need for school officials to monitor the activities.[28] Such supervision was required by state law to maintain safety and order.[29] It would also be necessary "to guarantee that participation in the prayer meetings would always remain voluntary,"[30] even though such state administrative supervision of the religious activities "threatens the voluntarism of religious observance and violates the principle of separation," thus entangling church and state.[31]

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623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973), Judge Kaufman, writing for the court, held that a teacher's refusing to lead the flag salute would not harm students:

> We do well to note that her pupils were not fresh out of their cradles: she had charge of a tenth grade homeroom class consisting of students ranging in ages between fourteen and sixteen years. Young men and women at this stage of development are approaching an age when they form their own judgments. They readily perceive the existence of conflicts in the world around them; indeed, unless we are to screen them from all newspapers and television, it will be only a rather isolated teenager who does not have some understanding of the political divisions that exist and have existed in this country. Nor is this knowledge something to be dreaded. As we said in *James*: "schools must play a central role in preparing their students to think and analyze and to recognize the demagogue."

Id. at 633; *accord* James v. Board of Educ., 461 F.2d 566 (2d Cir. 1972) (11th graders sufficiently mature to cope with teacher's wearing armband in Vietnam protest). Apparently, Judge Kaufman believes that high school students are only immature and dangerously impressionable when it comes to matters of religion. *See also* Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974) (high school students mature enough to read information about contraception and abortion; court refused to uphold school officials' seizure of student newspaper containing four-page supplement composed of such information, *aff'd mem.*, 515 F.2d 504 (2d Cir. 1975); Wilson v. Chancellor, 418 F. Supp. 1358, 1368 (D. Or. 1976) (court noted, "high school students are surprisingly sophisticated, intelligent, and discerning. They are far from easy prey for even the most forcefully expressed, cogent, and persuasive words.").

[26] *Brandon*, 635 F.2d at 979.

[27] *Id.* The official school day begins when the students are discharged from their buses, not when their homeroom period begins. *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

The court quickly dismissed the students' claims that their constitutional rights of free speech, freedom of association, and equal protection had been violated. Freedom of association arguments failed because, in the court's view, a public school is not a "public forum."[32] Distinguishing a high school from a public university, the court declared that "[w]hile students have First Amendment rights to political speech in public schools . . . sensitive Establishment Clause considerations limit their right *to air religious doctrines*."[33] This perceived unconstitutionality was compounded because the students would be praying rather than just discussing religion.[34]

The equal protection argument was also summarily rejected by the Second Circuit. First, the use of the school by secular groups did not raise establishment clause problems.[35] Second, the court found that the argument lacked merit "since all religious groups are equally denied access to school facilities."[36]

B. *Widmar*

After *Brandon*, the United States Supreme Court considered the right of religious groups to have access to public university facilities. In *Widmar*, the Court addressed a University of Missouri at Kansas City policy which encouraged student organizations to meet on campus. "Cornerstone," a religious group, had met on the campus for four years before the University denied the group the right to meet.[37] The University's decision was based on a regulation of its Board of Curators that prohibited the use of the University facilities " 'for purposes of religious worship or teaching.' "[38] In a relatively brief opinion that did not address free exercise issues, the Supreme Court held that the University could not exclude religious groups if it permitted other student groups to meet on campus.

The Court's opinion began with the premise that:

> [t]hrough its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify

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[32] *Id.* at 980.
[33] *Id.* (citations omitted and emphasis supplied).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Widmar*, 454 U.S. at 265.
[38] *Id.*

> its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.[39]

Once this "open forum" has been created, the University must show a compelling state interest to regulate the content of student discussions. Moreover, content-based exclusions must be narrowly drawn.[40] These stringent requirements originate, according to the Court, in the first amendment rights of freedom of speech and association.[41]

The University argued that the problems under the establishment clause created by allowing religious groups to meet constituted a compelling state interest that would validate the University's exclusionary policy.[42] The Court disagreed, concluding that the benefits to religion were "incidental."[43] Upon consideration, it found that the "open access" policy of the University had a secular purpose and would avoid an excessive entanglement with religion.[44] Finally, with respect to the primary effect test, the Court concluded that "[a]t least in the absence of empirical evidence that religious groups will dominate [the University's] open forum, we agree . . . that the advancement of religion would not be the forum's 'primary effect.' "[45]

C. *Lubbock*

In *Lubbock*, the Lubbock Civil Liberties Union (LCLU) sued the Lubbock Public School District seeking declaratory and injunctive relief, damages, and attorneys' fees on the grounds that certain policies of the district violated the first and fourteenth amendments to the Constitution.[46] In particular, the LCLU argued that the following policy of the school district was unconstitutional:

> The school board permits students to gather at the school with supervision either before or after regular hours on the same basis as other groups as determined by the school administration to meet

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[39] *Id.* at 267-68.

[40] *See id.* at 270.

[41] *Id.* at 269; *see, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

[42] *Widmar*, 454 U.S. at 270.

[43] *Id.* at 274.

[44] *Id.*

[45] *Id.* at 275.

[46] *Lubbock*, 669 F.2d at 1039.

> for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary.[47]

A complicated set of events led to the adoption of this policy by the Lubbock School District. In 1971, several Lubbock residents complained to the school district about religiously-oriented school assemblies. In response, the school district adopted a policy statement calling for "neutrality of all personnel regarding religious activities, a prohibition against the encouragement of any particular religious activity, [and] the prohibition of any speakers on religion in any assembly . . . ."[48] The school district, however, failed to follow this policy in any respect. As a result, the district received further complaints leading to the adoption of another policy statement, but no change in the district's practices resulted. Finally, the LCLU brought a law suit attacking the allegedly religious practices of the school district. In response, the school district adopted a new policy upon which the *Lubbock* court focused.[49]

The trial court held that the policy was not unconstitutional because it allowed any student group to assemble at the school for voluntary meetings.[50] Moreover, any additional expense to the school district resulting from such meetings would be borne by the individual groups.[51] Relying heavily on *Brandon*, the court of appeals reversed, finding that the school district's policy violated the establishment clause of the first amendment.[52]

The establishment clause issues (only dicta in *Brandon*[53]) were of paramount concern in *Lubbock* because the case dealt with an attack on a school policy allegedly favoring religion. The Fifth Circuit began its analysis by noting that *Everson v. Board of Education*,[54] the first federal establishment clause case, announced "the guiding principle of religious neutrality."[55] The court of appeals recognized that upon this

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[47] *Id.* at 1041 & n.7 (new policy approved by Board of Trustees in August 1980).

[48] *Id.* at 1039.

[49] *Id.* at 1040-41.

[50] *Id.* at 1041.

[51] *Id.* at 1041-42.

[52] *Id.* at 1038.

[53] *See Brandon*, 635 F.2d at 978-79.

[54] 330 U.S. 1 (1947). The *Lubbock* court cited *Everson* as the first modern case to apply the establishment clause to the states through the fourteenth amendment. *Lubbock*, 669 F.2d at 1042.

[55] *Lubbock*, 669 F.2d at 1042.

foundation, "many religious activities occurring in school facilities during school hours have been declared unconstitutional."[56]

The court then examined the facts in *Lubbock* in light of the three-part test outlined in *Brandon*. Citing *Brandon*, the court observed that a neutral policy of fostering extracurricular activities may not raise constitutional problems under the secular purpose test.[57] In *Lubbock*, however, the court saw the policy in the context of a statement that was "obviously concerned with religious beliefs and the place of *religion* in the public schools."[58] The court reasoned as follows:

> The language of the paragraph itself, stating that students may gather "on the same basis as other groups" indicates that the *focus* of this paragraph is with students who wish to meet for educational, *religious*, moral and ethical purposes. Thus, it is conceivable that the "pre-eminent purpose," . . . is to promote meetings of a religious nature.[59]

The second establishment clause test, whether the primary effect of the policy either advances or inhibits religion, "necessarily inquires whether the consequences of the district's policy is to place its imprimatur upon religious activity."[60] Again citing *Brandon*, the court noted the impressionability of primary and secondary school students, and found that the district's policy of permitting religious meetings implied that such meetings were a "part of the District's extracurricular program" of which the school officials approved.[61] This perception, concluded the court, impermissibly advanced religion.[62]

The court rejected the school district's defense that the religious activities would be voluntary, citing *Karen B. v. Treen*[63] for the proposition that "'an Establishment Clause violation does not depend

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[56] *Id.* at 1043; *see id.* at 1043-44 (collecting cases).

[57] *Id.* at 1044.

[58] *Id.* (emphasis in original).

[59] *Id.* (*citing* Stone v. Graham, 449 U.S. 39, 41 (1980)) (emphasis in original). Although the language of the policy was merely inclusive of religious activity, the court, without any record to support its position, found a religious purpose. We find such reasoning incongruous.

[60] *Id.* at 1045.

[61] *Id.*

[62] *Id.* at 1046.

[63] 653 F.2d 897 (5th Cir. 1981) (Louisiana statute and derivative school board regulations allowing students to begin school day with prayer before class struck down), *aff'd*, 455 U.S. 913 (1982).

upon the presence of actual government coercion.' "[64] That the meetings would be before or after school did not mitigate the establishment clause problem. Rather, the court focused on the district's "compulsory education machinery, which [makes] students available to attend even voluntary meetings, and its implicit support and approval of the religious meetings."[65]

The court also discovered undue government entanglement with religion; thus, the school's policy contravened the third part of the establishment clause test. The court rejected the district's contention that the absence of district funds foreclosed the question of entanglement.[66] According to the Fifth Circuit, the use of school facilities and the need to supervise religious meetings "create the entanglement which leads to an impermissible establishment of religion."[67]

Finally, the court dismissed the school district's defense that the policy was required by the free exercise clause. The court noted that "[a] school is obligated to provide religious facilities only if its failure to do so would effectively foreclose a person's practice of religion."[68] Since children only attend school nine months a year, a few hours a day, the court concluded that the students could adequately practice their religion elsewhere.[69] Finally, the Fifth Circuit distinguished a public high school from a state university, characterizing the district's reliance on the public forum concept enunciated in *Widmar v. Vincent*[70] as "misplaced."[71]

D. *Bender*

In *Bender*, the court was confronted with students who wished to form a club to pray and to study the Bible during the same time that other student organizations were permitted to meet under the school district's regular policy with respect to student groups. Not only was the request denied, but it marked the first such denial under the well-

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[64] *Lubbock*, 669 F.2d at 1046 (quoting *Karen B.*, 653 F.2d at 897).

[65] *Id.* The court was apparently not swayed by the possibility that meetings would be held before or after the running of school buses and the beginning or end of the official school day. *See id.*

[66] *Id.*

[67] *Id.* at 1047.

[68] *Id.* at 1048.

[69] *Id.*

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

[71] *Lubbock*, 669 F.2d at 1048. The public forum argument had been previously rejected in *Brandon*. *Brandon*, 635 F.2d at 980.

established school policy. The students brought suit in federal district court alleging that the denial violated the free speech, free exercise, and establishment clauses of the first amendment as well as the equal protection clause of the fourteenth amendment.[72] The court agreed with the students on free speech grounds only.[73]

The *Bender* court held that a student-initiated organization, "Petros," which had requested permission to meet during a regularly-scheduled activity period for prayer and Bible reading, was entitled to do so under the dictates of *Widmar*. The local school district had previously denied Petros the opportunity to meet, although it had allowed all other student-initiated groups to do so. At issue was a school district policy expressly designed to encourage the organization of student clubs and groups which would hold meetings at the school.[74]

Simply stated, the case involved "a number of students, acting voluntarily and free of outside influences, [who] requested permission to form a club and meet during the school's activity period on the same basis as other student organizations."[75] The request was denied because the students wished to engage in religious speech.[76] The school officials made a distinction between religious speech and all other types of speech because they believed that the establishment clause required them to do so.[77] The students therefore invoked the free speech and free exercise clauses to support their "right to pray," while the school officials invoked the establishment clause as a defense thereto.[78] With this background, the court considered the parties' cross-motions for summary judgment.[79]

1. Free Exercise

Responding to the students' free exercise claims, the district court applied a two-tiered analysis.[80] The initial threshold of free exercise analysis considers whether the state has " 'condition[ed] receipt of an important benefit upon conduct proscribed by a religious faith' or

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[72] *Bender*, 563 F. Supp. at 701.
[73] *Id.* at 700.
[74] *Id.* at 698.
[75] *Id.* at 699.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 702.

'deni[ed] such a benefit because of conduct mandated by religious belief.' "[81] If the state has made the benefit conditional upon religious conduct, the second tier of the analysis dictates that the action will pass constitutional muster only if the state is able to demonstrate both a compelling interest and the absence of less restrictive means to serve that interest.[82] The court found that the school's action did not fail the first tier because it did not condition a benefit on conduct proscribed, or deny a benefit on the grounds of conduct prescribed by a religious belief. The students could meet to pray and discuss religion in another place at another time.[83] Accordingly, the court held that the students' free exercise rights were not violated.[84]

2. Free Speech

The court next considered the students' free speech rights with respect to the school district's denial of recognition to Petros and its refusal to allow the group to hold meetings on the same basis as other groups.[85] In its analysis of plaintiff's claim that a "public forum" was created by the provision of an activity period, the court noted that the *use* to which an area is put is the ultimate issue.[86] The court agreed that the school's otherwise nonforum nature took on a "limited public forum"[87] status as a result of the activity period provision and concluded that "a content-based decision to exclude subject matter would require compelling state interest scrutiny."[88]

Since the only justification offered by the school for its failure to recognize Petros was that it did not wish to violate the establishment clause, the court considered whether such a recognition would be a constitutional violation. If it would not, there could be no compelling

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[81] *Id.* (quoting Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981) (denial of unemployment benefits because of plaintiff's religiously based decision not to work in armament factory held to violate free exercise clause of first amendment).

[82] *Id.* The district court cited both *Yoder* and *Sherbert* as support for the second tier. See *supra* notes 11 & 12 for a description of those cases.

[83] *Bender*, 563 F. Supp. at 703. The court emphasized that refusing the students' request "does not force them to forego their religious belief in group worship." *Id.*

[84] *Id.*

[85] *Id.* at 704.

[86] *Id.* at 704-05. The court pointed out that "the mere fact that the government owns a piece of property is not dispositive of the question whether the property is a 'forum' for public use." *Id.* at 705.

[87] The district court's use of the term specifically referred to the status of public property which the government has, by allowing it to be utilized for expressive activity, changed from its traditional nonforum character. *Id.*

[88] *Id.* at 706.

state interest to allow for the content-based distinction in the limited public forum.[89] The court found no such establishment clause violation.[90]

First, the policy at issue had a clear secular purpose.[91] The court next considered whether the policy had the "primary effect" of advancing religion.[92] After noting the distinction between governmental advancement and governmental accommodation of religion,[93] the court concluded that the "spectrum of student groups at the Williamsport Area High School is sufficiently broad to indicate that recognition of Petros would benefit religion only incidentally."[94] Concomitantly, after noting that the establishment clause proscribes hostility to, as well as the advancement of, religion,[95] the court found no "imprimatur" of the state on Petros's activity.[96] This holding was based on the "play in the joints" of the first amendment which allows the government to act in this area with "benevolent neutrality."[97]

Finally, the court held that there was no "excessive entanglement" between the state and religion based on its assessment that the entanglement created by allowing Petros to meet was limited and incidental.[98] Therefore, since there was no potential violation of the establishment clause, the school did not present a constitutionally acceptable justification for its content-based exclusion of the students from the benefits of the activity period. Accordingly, plaintiffs were granted summary judgment.[99]

II. Mixed First Amendment Cases

One of the authors has previously described cases such as *Brandon*, *Lubbock*, and *Bender* as *Mixed First Amendment Cases* because

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[89] *Id.* at 707.

[90] The three-prong test enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971) was employed by the court to arrive at this conclusion. *Bender*, 563 F. Supp. at 708.

[91] *Bender*, 563 F. Supp. at 709. The court stressed that the focus of the secular purpose test is the government policy in question—not the activity which is the subject of that policy. *Id.*

[92] *Id.*

[93] *Id.* at 709-10.

[94] *Id.* at 712.

[95] *Id.* at 714.

[96] *Id.* at 715.

[97] *Id.* at 714. The court cited Walz v. Tax Comm'n, 397 U.S. 664 (1970), to support its conclusion that flexibility exists in the establishment clause when the government neither sponsors nor interferes with religious exercises. *Id.*

[98] *Bender*, 563 F. Supp. at 715.

[99] *Id.* at 716.

they pit the two religion clauses of the first amendment against each other.[100] On one hand, the students in *Brandon* argued that they had a free exercise right (as well as a free speech right) to engage in religious activities before or after school. To forbid such activities, therefore, would be to abridge their rights under the free exercise clause of the first amendment. On the other hand, those opposing the religious activities argued that since the religious activities would take place on school property with school supervision, that accommodation would constitute an unconstitutional establishment of religion under the establishment clause of the first amendment.

These Mixed First Amendment Cases differ from the more traditional "school prayer" cases such as *Engel v. Vitale*[101] and *School District of Abington Township v. Schempp*[102] in which the schools initiated religious activity (prayer and Bible reading) during the school day. *Engel* and *Schempp* are more properly described as Pure Establishment Cases because they involve only the establishment clause of the first amendment.[103] During instructional time, the school has virtually complete authority over the students' activities. Absent extraordinary circumstances, students' free exercise rights (as well as their right to freedom of speech) are subject to the school's authority to determine the contents of the school day. In Pure Establishment Cases involving religion in the schools, the appropriate standard of review should be the "minimal evidence test" which provides that "only a minimal amount of religious purpose or primary effect should be necessary to strike down a law. There must be overwhelming secular justifications to permit the court to uphold a law in the face of a clearly discernible religious purpose or effect."[104]

The minimal evidence test, however, is not appropriate in Mixed First Amendment Cases.[105] Rather, a test must be developed that takes into account both the establishment clause and the free exercise clause

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[100] Drakeman, *Prayer in the Schools: Is New Jersey's Moment of Silence Law Constitutional?*, 35 RUTGERS L. REV. 341, 354 (1983).

[101] 370 U.S. 421 (1962).

[102] 374 U.S. 203 (1963).

[103] See Drakeman, *supra* note 100, at 353 for discussion of this category.

[104] *Id.* at 354.

[105] In ACLU v. Albert Gallatin Area School Dist., 307 F. Supp. 637 (W.D. Pa. 1969), the court held that a school program which allowed a student to choose and read a scriptural passage and the Lord's Prayer over the loudspeaker at the beginning of the school day was unconstitutional. Without calling them such, the opinion distinguished Mixed First Amendment Cases:

> While I am required to declare unconstitutional the legislative action of the School Board and the programs which were brought about by reason of such legislative

components of these cases.[106] *Bender*, *Brandon*, and *Lubbock* do not provide much guidance in this area. The *Bender* court quickly dismissed the students' free exercise claims on the ground that the students could freely meet elsewhere to pray and discuss religion.[107] In *Brandon*, the court concluded that any free exercise claim would fail because of the "compelling state interest" involved in a violation of the establishment clause.[108] In *Lubbock*, the court recognized a free exercise right in the schools only where there is a threat of "foreclos[ing] a person's practice of religion."[109] In other words, the courts in *Lubbock* and *Brandon* appear to be treating the after-school religious activities as pure establishment cases—the free exercise considerations are relevant only if they are extraordinary or overwhelming. This approach, however, ignores the distinction between extracurricular activities and activities that are part of the school's instructional mission.

The minute by minute control by the administration of the students' day necessarily relaxes at the bell ending each instructional period. While the school still has responsibility for the well-being of its students, and naturally some control over the type of student activities, the school's right to make content-based decisions about the nature of extracurricular activities should be restricted, especially when the school opens its facilities to a variety of after-school student groups. In a situation of this type, schools and courts must take into account the students' free exercise and free speech rights. Although we welcome the *Bender* court's recognition of students' free speech rights, the importance of the free exercise clause must not be ignored. Thus, our discussion will focus primarily on the interaction of the religion clauses of the first amendment in these Mixed First Amendment Cases.

> action, I do not here indicate that the Amendment prohibits the free exercise of religion, since the opposite is true . . . . Thus, I make no ruling of what effect, if any, the free actions of children, meeting on their own time and of their own volition, even though on school premises, would have. I merely indicate here that such exercises are not proper when conducted by direction of the public school authorities.

Id. at 642.

[106] The view that the religion clauses must be balanced is not a new one. *See, e.g.*, Buchanan, *Accommodation of Religion in the Public Schools: A Plea for Careful Balancing of Competing Constitutional Values*, 28 UCLA L. REV. 1000 (1981). Nevertheless, no clear and readily applicable test has yet been developed and accepted by the courts.

[107] *Bender*, 563 F. Supp. at 703.

[108] *Brandon*, 635 F.2d at 978.

[109] *Lubbock*, 669 F.2d at 1048.

In all the cases discussed above, the courts have been forced to decide whether an establishment clause problem exists. When they have found an establishment clause problem (such as in *Brandon* and *Lubbock*), the courts have declared the contested activity unconstitutional. This premise also exists in *Bender* and *Widmar*, but in those cases the courts decided that no establishment clause problem was created by the use of school facilities by students for religious purposes. Hence, on very similar facts, courts have interpreted the establishment clause in diametrically opposed ways.

A. *A First Amendment Balancing Test*

We believe that courts should interpret the establishment clause in light of the demands of the other clauses of the first amendment. By so doing, they will be free to acknowledge that establishment clause issues are not black and white, but inevitably exist in shades of gray. Accordingly, we propose a balancing test for Mixed First Amendment Cases.

Rather than assuming that an establishment clause concern will automatically cancel out any free exercise right, a court deciding these issues should weigh the potential establishment clause problem against the free exercise right (and/or the free speech right) asserted. This approach is particularly appropriate in the context of the public schools that are filled, as pointed out in *Brandon*, with impressionable children.[110] The risk that state support will create a bias in favor of one or all religions is not necessarily greater than the risk of bias against religion created by removing religious activities from the group of permissible extracurricular activities. If, as the *Brandon* court suggested, one of the primary goals of the first amendment religion clauses is to ensure government neutrality towards religion, the full weight of all the clauses of the first amendment must be balanced.[111]

B. *Application of the Balancing Test*

Although some might like to view the analysis of free exercise rights or establishment clause problems as absolute, it is inevitably a matter of degree. Some measure of government support of religion has

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[110] *See supra* note 24 and accompanying text.

[111] *See supra* note 9 and accompanying text.

been permitted by the courts, despite the establishment clause, particularly where not doing so would seriously infringe on the free exercise rights of certain groups. Governmental accommodations for religious observance in prison and the military are examples of this implicit balancing of the free exercise and establishment issues.[112] If the government does not provide chaplains to these captive groups, the members of the groups will have little or no access to religious leaders. In these cases, the goal of total "neutrality" is sacrificed because of the government's inability to respect the important free exercise rights of servicemen and criminals in any other manner.

Indeed, the government need not sponsor or pay official chaplains to allow the military or prison populations to engage in personal or group religious practices. Many religious traditions do not require ordained or specially qualified priests, nor is there any reason for the government to pay ministers, priests and rabbis to give them access to their captive congregations. The government, with the blessing of the courts, has decided that in the extraordinary situations of military service and prison life, the goal of neutrality must simply fall by the wayside. In its place, the government has set up a sponsorship of particular religious traditions. In short, the free exercise claims of the adherents of mainstream religious groups in prison and on the battlefield have completely overwhelmed the establishment clause problems.

Likewise, in *Brandon*, the court recognized the possibility that an absolute exclusion of all religious activities from school grounds might place an excessive burden on students whose religions required acts of devotion during the school day. In such cases, the court suggested, the school would have to ignore the establishment clause issues because of the importance of the free exercise right asserted.[113] In essence, the court accepted the theoretical necessity of a balancing test in certain situations. Rather than encourage the courts to try to set general rules about religious activities in the schools and then wait for the exceptions to develop (the *Brandon* approach), we suggest that it would

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[112] *See Schempp*, 374 U.S. at 296-99 (Brennan, J., concurring) (discussing provision for churches and chaplains); *see also* Katcoff v. Marsh, No. 79 Civ. 2986 (E.D.N.Y. Feb. 1, 1984) (provision for military chaplains does not violate establishment clause).

[113] *Brandon*, 635 F.2d at 977. On the other hand, the court implicitly required that all religious students, except those belonging to the most rigorously demanding sects, must "compartmentalize" their religious beliefs. Within this rubric the practice of religion is relegated to set times and places, and students may be precluded from making it a dynamic force in their lives. This view is inconsistent with benevolent neutrality.

make more sense to start with a well-defined, but necessarily flexible balancing test. Each competing constitutional issue will thus have a fair hearing in court.

Moreover, contrary to what appears to be the unarticulated premise of the *Brandon* and *Lubbock* opinions, we do not believe that the absence of religion constitutes state neutrality. Rather, neutrality requires that the state treat belief and disbelief with equal respect. To include religion is to advance it; to exclude religion is to impair it. The nature of religion (or at least most Western religious traditions) demands an affirmation or a denial from each individual.[114] Similarly, the first amendment simultaneously prohibits establishment and prescribes free exercise. When these constitutional mandates come into conflict, they cannot be reconciled by simply ignoring the free exercise claim on the grounds that the state will allow students freely to exercise their religious beliefs elsewhere. Indeed, as the Supreme Court noted in a case which involved first amendment rights exercised by the public in the vicinity of a high school,[115] " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' "[116]

1. Hypothetical Situation

For the purposes of discussion and analysis, we will consider a hypothetical school district which has adopted a policy permitting high school students to gather at their school, with supervision, outside of regular instructional time for extracurricular activities. We will assume for this purpose that the policy and "legislative history" are silent as to whether religious groups may meet, but the school has permitted all responsible student groups (including religious groups) to meet.

2. Establishment Clause

Since articles on the establishment clause are legion, and the courts in *Brandon* and *Lubbock* more than adequately described the

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[114] *See, e.g.*, I *Kings* 18:20-31; *John* 3:1-21.

[115] Grayned v. City of Rockford, 408 U.S. 104 (1972).

[116] *Id.* at 118-19 n.40 (quoting Schneider v. State, 308 U.S. 147, 163 (1939)); *accord* Healy v. James, 408 U.S. 169 (1972). The alternative forum argument was implicitly rejected in *Widmar*. Justice White, however, dissented from this opinion and viewed a requirement that students meet off-campus as a "minimal" burden on their free exercise right. *Widmar*, 454 U.S. at 288-89 (White, J., dissenting).

establishment clause problems in these types of cases, we will only briefly review the establishment clause issues. Every establishment clause issue must, of course, begin with the Supreme Court's three-pronged analysis: (1) secular purpose; (2) primary effect of neither advancing nor inhibiting religion; and (3) no excessive entanglement between the state and religion. Any state action (including public school practices) must pass all of these tests to survive constitutional scrutiny.

As noted in *Brandon*, a neutral policy which encourages extracurricular activities reflects a "clearly permissible purpose."[117] Since there is no evidence suggesting a particular focus on religion-oriented activities in the hypothetical situation (as opposed to the court's finding in *Lubbock*), the "secular purpose" test should be easily satisfied. Moreover, it has been acknowledged that a finding of religious purpose will not invalidate an action if it also has substantial secular justifications.[118] Thus, even if the school district made a point of including religious groups in a list of permissible student activities, the policy would still not run afoul of the secular purpose test. Student extracurricular activities, from athletics to debating, have too long been a valuable part of the American educational system to hold otherwise.

The "primary effect" test permits some degree of advancement of religion, but substantial aid to religion is clearly impermissible. We must acknowledge that one effect of permitting religious groups to meet on school property is the advancement of religion. The importance of this effect is increased by both the impressionable nature of public school students and the presence of a school teacher or administrator at the meetings.[119] By providing "official" space and supervision, the school district is, to some extent, providing "official support" for religion.[120] Thus, by providing school buildings and supervision for

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[117] *Brandon*, 635 F.2d at 978.

[118] It is important to note that some reference to religion will not invalidate state action under this test. *See, e.g.*, Florey v. Sioux Falls School Dist. 49-5, 619 F.2d 1311, 1315-16 (8th Cir.) ("The First Amendment does not forbid all mention of religion in public schools; it is the *advancement* or *inhibition* of religion that is prohibited . . . . [W]hen the primary purpose served by a given school activity is secular, that activity is not made unconstitutional by the inclusion of some religious content." (emphasis in original)), *cert. denied*, 449 U.S. 101 (1980).

[119] *But see supra* note 25.

[120] *Cf.* Larkin v. Grendel's Den, Inc., 103 S. Ct. 505 (1982) (statute which granted "veto power" over liquor license applications to churches within 500 feet radius violated establishment clause).

student religious groups, the school district runs afoul of the primary effect test under the establishment clause.[121]

Although a violation of one element of the three-part analysis is sufficient to create a violation of the establishment clause as it has been judicially construed, by acknowledging that first amendment analysis requires careful balancing, courts would be free to review the facts with respect to all three of the applicable tests. Moreover, balancing would allow courts to recognize that such cases are not clear, and that competing interests and apparent "violations" must be weighed and considered. Accordingly, we must turn to the third test to complete the "establishment" side of the equation. This final test is the "entanglement" question: Does the school district's policy lead to an "impermissible degree of entanglement?"

The *Brandon* and *Lubbock* courts found evidence of excessive entanglement in the need for school supervision of student religious activities. While it could be argued that such supervision is unnecessary, we will assume that the school district believes it prudent to require teachers or administrators to oversee all student activities. We will further give the school district the benefit of the doubt by assuming that the supervision will be completely nonparticipatory. That is, the supervisor will simply watch to make sure that the students are

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[121] The effect test is an important component of the balancing test because it is a two-edged sword. The state may not cut religion out nor may it cut religion in. As a result, the effect test requires examination of the essence of neutrality.

The Supreme Court appears implicitly to have recognized the free exercise element in establishment clause cases. By including the question whether the state action has the primary effect of neither advancing *nor inhibiting* religion, the Court has tacitly created a balancing test. We suggest that courts consciously develop a more clearly articulated balancing test, because (as discussed below) in virtually every decision dealing with the use of public property for religious purposes the action either advances or inhibits religion. Therefore, without careful balancing, how one frames the relevant questions with respect to the effect test largely determines the final result. For example, if the two choices being considered are: (1) a hypothetical school district policy with an express exclusion of religious groups (perhaps in deference to *Brandon* and *Lubbock*), and (2) the hypothetical policy as described above, then the primary effect of electing the latter policy is to advance religion. By so doing, religious groups obtain the use of school facilities to which they are not otherwise entitled. This is essentially the logic of *Brandon* and *Lubbock*. The same situation, however, can be interpreted in a completely different manner. Instead of viewing the policy as giving religious groups a special benefit, it can be seen as bestowing the same benefit on all groups. Therefore, to exclude religious activities would be to inhibit religion (and perhaps create problems under the equal protection clause as well). *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92 (1972). In *Mosley*, the Supreme Court held that a statute which prohibited all but peaceful labor picketing within 150 feet of a high school violated the equal protection clause. As the court stated:

safe and that, as the *Brandon* court suggested, the religious exercises are truly voluntary.[122] Thus, for the purpose of our hypothetical, even if the supervisor shares the religious beliefs of the students, he or she will not take part in any of the activities, nor will the supervisor (or the school) designate the activities as school-sponsored.

The court of appeals in *Lubbock*, after quoting similar language from *Brandon*, concluded that "the use of the District's facilities and its continuing supervision of the religious meetings create the entanglement which leads to an impermissible establishment of religion."[123] Thus, it appears, any official presence and supervision at religious activities, even if limited to solely secular and official actions, will constitute an excessive entanglement.

We are not convinced that the Supreme Court intended the entanglement test to be read that broadly, or that the establishment clause requires such a reading. The entanglement test had its origins in Justice Harlan's concurring opinion in *Board of Education v. Allen*[124] and Chief Justice Burger's majority opinion in *Walz v. Tax Commission*.[125] These cases merely added entanglement as a danger to consider, not as a strict test. When the issue of entanglement became a part of the opinions of the Court in *Lemon v. Kurtzman*[126] and *Tilton v. Richardson*,[127] again it was only reinforcement. In *Committee for Public Education & Religious Liberty v. Nyquist*,[128] however, the question of entanglement became a full-blown consideration, with special emphasis placed on the issue of potential political divisiveness.

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views . . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.

Id. at 96; *see also* Cox v. Louisiana, 379 U.S. 559 (1965); Wilson v. Chancellor, 418 F. Supp. 1358 (D. Or. 1976) (school board's banning of all political speakers violated equal protection clause).

[122] *Brandon*, 635 F.2d at 979.

[123] *Lubbock*, 669 F.2d at 1047.

[124] 392 U.S. 236, 249 (1968) (Harlan, J., concurring). Justice Harlan quoted Justice Goldberg's concurring opinion in School Dist. of Abington Township v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) to support his belief that the government's attitude toward religion should be based on a position of neutrality. *Allen*, 392 U.S. at 249 (Harlan, J., concurring).

[125] 397 U.S. 664, 670 (1970).

[126] 403 U.S. 602, 618-22 (1971).

[127] 403 U.S. 672, 684-88 (1971).

[128] 413 U.S. 756, 794-98 (1973).

The "entanglement" cases in the Supreme Court thus far have primarily involved government aid to religious *institutions.*[129] The Court has not had occasion to apply this test to cases, like our hypothetical, in which the establishment clause problem is not aid to an institution but aid to the exercise of religious activities generally. Such cases should be viewed differently. In our hypothetical, there is no risk that the school bureaucracy will become unduly enmeshed in some religious organization. Rather, the extent of supervision will be little more than that exercised by police and fire departments over churches. Churches, as social institutions, must comply with a host of secular laws and regulations ranging from restrictions on the use of candles to zoning provisions. The school supervision of student religious activities need not involve any more entanglement with religion (or religious institutions) than the health and safety regulations that govern every type of religious and secular institution.

In summary, the hypothetical program allowing religious groups to use school property outside of instructional time contains elements that begin to tip the scales to the side of an unconstitutional establishment of religion. The effect of the program will be to advance religion somewhat, and there may be some small degree of entanglement between the school authorities and the religious groups. We must now consider the "free exercise" side of the problem to see where the scales will reach equilibrium.

3. Free Exercise Clause

As with the establishment clause, many authors have addressed the nature and impact of the free exercise clause. Accordingly, we will only briefly review the boundaries of the free exercise clause, particularly as applied to students.

At the most basic level, the free exercise clause prohibits the government from infringing on the free exercise of religion. This prohibition, however, is not absolute. The most notable exception is where the religious activity violates a sufficiently strong public policy. The Mormons, for example, have been forbidden by state law to

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[129] *See, e.g.*, Mueller v. Allen, 103 S. Ct. 3062 (1983); Committee for Pub. Ed. & Religious Liberty v. Regan, 444 U.S. 646 (1980); Wolman v. Walter, 433 U.S. 229 (1977) (plurality opinion); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (plurality opinion); *cf.* Larkin v. Grendel's Den, Inc., 103 S. Ct. 505 (1982) (statute vesting in schools and churches power to prevent issuance of liquor licenses violates establishment clause).

practice religiously-mandated polygamy.[130] The Supreme Court upheld such a state law despite a challenge by a Mormon based on the free exercise clause. Noting that the government may not restrict the content of religious belief, the Court held that it can, in this kind of case, restrict the expression of that belief in illegal activities.[131]

In *Sherbert v. Verner*,[132] the Court considered South Carolina's withholding of state unemployment benefits from a Sabbatarian who refused to work on Saturdays. The Court, in an opinion by Justice Brennan, held that because of the free exercise clause,[133] such a denial of benefits could not be constitutionally justified. The two-part free exercise test spawned by Chief Justice Warren in *Braunfeld v. Brown*[134] was invoked as the initial inquiry.[135] For a plaintiff to succeed in a free exercise case, he must show a substantial burden on his religious exercise as a result of the statute or policy under review. If such a substantial burden is shown, however, the burden may be justified if a "compelling state interest" exists which outweighs the impairment.[136] The *Sherbert* Court found that the withholding of unemployment benefits was invalid under this test since the denial of such benefits to Sabbatarians did indeed have a strong coercive effect on the plaintiff's free exercise rights without the showing of a compelling state interest.[137]

The *Brandon* and *Lubbock* courts appeared to follow this type of reasoning in addressing (or, more accurately, not addressing) free exercise issues. The courts' reasoning appeared to be that because the establishment clause is the law of the land, there is a strong public policy against any government support of religion; accordingly, the religious activities of the students may be restricted as long as the content of the students' beliefs is not regulated. Such reasoning is inherently damaging to free exercise by inhibiting religious exercise, even if within appropriate confines, and by relegating religious belief to a "compartment" of a student's life away from school.

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[130] Reynolds v. United States, 98 U.S. 145 (1878).

[131] *Id.* at 164.

[132] 374 U.S. 398 (1963).

[133] *Id.* at 403.

[134] 366 U.S. 599 (1961).

[135] *Sherbert*, 374 U.S. at 403-04.

[136] *Id.* at 403; *cf.* NAACP v. Button, 371 U.S. 415, 438-39 (1963) (state must demonstrate compelling interest to justify curtailment of freedom of expression and association).

[137] *Sherbert*, 374 U.S. at 409.

The courts have placed "time, place, and manner" restrictions on the constitutionally protected free exercise of religion. Although the Supreme Court has acknowledged that public school students do not leave their rights at the schoolhouse gate,[138] the legitimate interest of the state in conducting orderly classes permits the schools to restrict students from spontaneously bursting into prayer or psalms during advanced algebra or auto mechanics. Rather, students must exercise their religious beliefs at times more appropriate for that kind of independent activity. Appropriate regulation is *not* prohibition, however. Indeed, in the free speech context, freedom to exercise first amendment rights in another forum does not alone justify restraint of the activity.[139] Such a restriction is a crucial denial of a most important benefit—one's first amendment rights. Extracurricular activity periods provided by the school before, during, or after the school day are appropriate times for free exercise. Absent establishment clause considerations, there is no reason to distinguish between religious activities and other types of extracurricular activities typically engaged in by public school students. Thus, public school students have a right, under the free exercise clause, to engage in religious activities during extracurricular periods at school.

As noted above, we do not agree that the establishment clause has precedence over the free exercise clause. There is indeed a strong public policy favoring the free exercise of religion. The Supreme Court has often allowed the government to exercise a "benevolent neutrality" toward religion and religious institutions, thus suggesting that the free exercise clause may, in fact, hold the superior position. Following this line of reasoning, any restriction on religious exercise would be unconstitutional unless the religious activity involved potential loss of life or liberty. Since there seems to be no way to decide which clause of the first amendment should have absolute priority, we believe that they should be balanced against each other in individual situations with preference given to the free exercise clause in close cases.[140]

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[138] Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969).

[139] *See supra* notes 115-16.

[140] *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664 (1970) (state's posture toward religious exercise should be one of benevolent neutrality). The Supreme Court has gone even further in supporting religious exercise than we prefer in upholding the practice of legislative chaplains in Marsh v. Chambers, 103 S. Ct. 3330 (1983). *See* Drakeman, *Antidisestablishmentarianism: The Latest (and Longest) Word from the Supreme Court in* Marsh v. Chambers, 5 CARDOZO L. REV. 153 (1983).

The question remains whether the violation of the establishment clause caused by the students' exercise of religion in the public schools is sufficient to constitute a compelling state interest. If so, the government may (and perhaps must) restrict the students from engaging in the desired religious activities. In *Brandon* and *Lubbock*, the courts focused on the impressionability of the public school students in finding an unconstitutional primary effect of advancing religion. In both cases, the court concluded that an apparent government sponsorship of religious activities would violate the constitutional principle of neutrality. Yet, under the first amendment, although the primary effect of a government action may not advance religion, it also may not inhibit religion. By excluding religion (and only religion) from all of the activities in which public school children may engage, the government is conveying a strong message to impressionable youths: Religion is something that must not be discussed within the hallowed halls of academia.[141] This message violates the principle of neutrality.

As discussed above, we believe that neutrality is best served by offering students the opportunity to choose to meet with their peers for religious purposes on the same basis as they may meet for secular activities. If religious groups are permitted to meet along with secular groups, students will be free to choose among activities presenting a variety of viewpoints. It is this freedom, which allows belief and disbelief to compete for the affections of the public on equal terms, that the Constitution mandates.

By allowing all types of groups to meet during extracurricular periods, the school's potential entanglement with religion is relatively slight. If schools follow the mandates of *Brandon* and *Lubbock*, they must rigorously police student groups to ensure that no religious activities take place. If a student ethical society verges on the edge of religious ethics, a teacher may have to step in and end the discussion lest the school appear to sponsor religious debate. Each teacher will have to have an opinion on what constitutes "religious" so as to know when to sound the alarm. Students who seek to bring a religious

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[141] See, e.g., the strong language of the dissent from a denial of a rehearing in *Lubbock*:

> We should not forget, however, that the young student may also be given the impression that our government and the courts and the schools are hostile to all religious belief and practice. I would consider that a very great wrong to the children, to the Constitution and to the nation.

Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 680 F.2d 424, 426 (5th Cir. 1982) (Reavley, J., dissenting from denial of rehearing *en banc*).

perspective to an otherwise secular discussion may find themselves silenced.

On the other hand, under the hypothetical situation, teachers need only ensure that the students' activities are safe and voluntary. Rather than appearing to sponsor the activities, the school can legitimately step back and hold itself out as a passive observer, ready to intervene only as the welfare of the students demands. Teachers will not be forced to make ad hoc judgments about the nature and definition of religion. The Supreme Court has avoided defining religion for years, and scholars have reached no consensus. One can hardly expect school teachers to come up with a constitutional definition halfway through a high school debate on abortion or military aid to Latin America.

In short, we believe that the free exercise right should be given greater weight than the establishment clause problem in this balancing test. The constitutional principle of neutrality is best served when people are free to select any religion or no religion. Thus, our consideration of the free exercise and establishment issues shows the constitutionality of our hypothetical school district's plan. Additional weight in support of this conclusion, however, can be found in the first amendment freedom of speech.

C. *Additional Support—Freedom of Speech*

All Americans, including public school students, are entitled to express their opinions freely and without government interference. This freedom is, of course, subject to the same time, place, and manner restrictions applicable to the free exercise of religion. Absent such legitimate regulation, schools may not make content-based distinctions between the kinds of speech in which students may and may not engage. This basic principle of first amendment jurisprudence has long been considered axiomatic—except with respect to religious speech. *Widmar* represents the Supreme Court's view that religious speech also deserves constitutional protection, at least where college students are concerned. We applaud this shift and agree with the *Bender* court's extension of this principle to high school students.

Free speech is an adequate and appropriate ground for upholding the use of public facilities by religious groups on the same basis as other groups. We are disappointed, however, that considerations of free speech have obscured the threat to the free exercise clause. Indeed, even the *Bender* court, in finding no free exercise violation, implied that free exercise is no defense to an establishment clause

violation.[142] Accordingly, we continue to advocate the use of our test for Mixed First Amendment Cases while advocating free speech as an alternative ground for any such decision.

III. Political Responses

In response to the Fifth Circuit's decision in *Lubbock*, twenty-four members of the United States Senate took the unusual step of filing an amicus curiae brief with the Supreme Court urging that certiorari be granted. In that brief, the Senators asked that the Court grant a hearing of the case and reverse the Fifth Circuit's decision.[143] The brief made three major points. First, the Senators argued that the Court should grant certiorari to alleviate the confusion as to whether any student-initiated religious activities in public schools are permissible.[144] Second, the Senators argued that *Lubbock* violates the principal of neutrality towards religious exercise and requires that a state take an adversarial role with respect to students who wish to engage in religious speech.[145] Third, they characterized *Lubbock* as a violation of the free speech rights of students and as an approval of impermissible discrimination against religious speech.[146]

A. *Proposed Constitutional Amendments*

Senator Mark Hatfield, one of the twenty-four Senators who filed the brief, has introduced legislation that would prohibit public secondary schools which receive federal aid and which typically allow students to hold meetings during noninstructional school time from "discriminat[ing] against any meeting of students on the basis of the religious content of the speech at the meeting."[147] While such legisla-

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[142] *Bender*, 563 F. Supp. at 702-03. We believe that the first amendment freedom of association provides additional support for our conclusions. We have not discussed it here due to our focus on the religion clauses of the first amendment.

[143] The amicus brief is reproduced at 128 Cong. Rec. S16,007-09, Part II (1982).

[144] *Id.* at 16,008-09.

[145] *Id.* at 16,009.

[146] *Id.*

[147] S. 2928, 97th Cong., 2d Sess. § 1 (1982); *see* S. 1577, 97th Cong., 1st Sess. (1981) and S. 1378, 97th Cong., 1st Sess. §§ 401-406 (1981) (proposing individual right to participate in voluntary prayer in any public building, and forbidding states from abridging such right); S.J. Res. 199, 97th Cong., 2d Sess. (1982) (proposing constitutional amendment to permit prayer in public schools: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer."); *see also* S. 1742, 97th Cong., 1st Sess. § 2

tion, if passed, does not carry a constitutional mandate, it accentuates the issues to be considered in the inevitable challenge to the statute. A constitutional challenge to such a statute would necessarily be devoid of fact patterns that could partially obscure the constitutional issues. More importantly, such legislation, along with the amicus brief in *Lubbock*, illustrates the political force being applied in favor of permitting religious activity in any public forum.

Two proposed amendments to the United States Constitution are currently pending before Congress. In a ceremony commemorating the "National Day of Prayer" at the White House on May 6, 1982, President Reagan announced that he would soon submit a proposed school prayer amendment to Congress.[148] Accordingly, Senator Strom Thurmond introduced the following amendment on behalf of the President:

> Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer.[149]

If ratified, President Reagan's proposal would permit not only the kind of religious activities proscribed in *Brandon* and *Lubbock*, but would essentially repeal the Supreme Court decisions in *Engel v. Vitale*[150] and *School District of Abington Township v. Schempp*[151] which hold that school-sponsored prayer violates the establishment clause of the first amendment.

Senator Orrin Hatch has introduced a significantly narrower proposed amendment. His version reads:

> Sec. 1. Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or meditation in public schools. Neither the United States nor any State shall require any person to participate in prayer or meditation, nor shall they encourage any particular form of prayer or meditation.
>
> Sec. 2. Nothing in this Constitution shall be construed to prohibit equal access to the use of public school facilities by all voluntary student groups.[152]

(1981); S. 481, 97th Cong., 1st Sess. § 2 (1981) (prohibiting federal courts from reviewing voluntary school prayer cases arising under state law).

[148] *Remarks of Pres. Reagan*, 18 WEEKLY COMP. PRES. Doc. 588-89 (May 10, 1982).

[149] S.J. Res. 199, 97th Cong., 2d Sess. (1982).

[150] 370 U.S. 421 (1962).

[151] 374 U.S. 203 (1963).

[152] S.J. Res. 212, 98th Cong., 1st Sess. (1983).

In contrast to the President's proposal, Senator Hatch's amendment would permit only *silent* prayer to be sponsored by the public schools. It also specifically calls for the "equal access" approach developed in *Widmar* and *Bender* to be applied to all public schools.

Of course, it is pointless to ask whether these proposals are constitutional; if adopted, they will become a part of the Constitution. We can, however, comment on whether these proposals would be prudent.

There have been many discussions of the philosophical, political, and religious underpinnings of the individual rights provided for in the Bill of Rights. We will not try to settle these important issues. Rather, we will simply state a proposition that we believe is defensible on virtually all grounds: In a truly free country, all citizens must have freedom of religion. In a religiously diverse society such as ours, this freedom has two components. One is the freedom for all people to exercise their religions. This freedom is the basis of the free exercise clause. The second is the freedom from being coerced to participate, either physically or financially, directly or indirectly, in someone else's religion. The second point is the foundation for the establishment clause. In a nation composed solely of adherents of one religion, the freedom *from* religion (or the religion of others) is less important. But in our pluralistic culture of Protestants, Catholics, Jews, Mormons, and members of thousands of sects and cults of virtually all descriptions, as well as substantial numbers of people who profess no religion, citizens should be guaranteed freedom from having other people's religions forced on them by the institutions of government.

There are two potential problems if this "nonestablishment" principle is violated. First, even relatively minor breaches are an imposition on the freedom of American citizens, something which our country is dedicated to avoiding. Second, without strict enforcement of the nonestablishment principle, society will tend towards majority rule in matters of religion. When the majority is allowed to rule, those in the minority will lose not only their freedom from the religions of others, but more importantly, their freedom to exercise their own religions. As James Madison observed over two hundred years ago, "[T]he invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which Government is the mere instrument of the major number of the constitutents."[153]

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[153] 11 PAPERS OF JAMES MADISON 298 (W. Hutchinson ed. 1977) (letter from James Madison to Thomas Jefferson (Oct. 17, 1788)).

It is this unfortunate tendency towards majority rule in religious matters that has inspired President Reagan's proposed constitutional amendment. A similar motivation lies behind Senator Hatch's more careful approach. The resulting limitation on individual religious freedom from majority rule has already become manifest. Legislation has been introduced in a number of states that would take away all of the constitutional rights of adults for up to three months or more for "deprogramming," simply because they have converted to a religion and adopted a new way of life at odds with their familial traditions.[154]

There must be some "play in the joints" of the Constitution's treatment of religion so that a sensible resolution can be made of difficult cases such as the ones discussed in this article. As we have shown, there is ample room within our existing constitutional mandates for that flexibility. By applying the appropriate balancing analysis, courts can reach sensible positions in which the principles of free exercise and nonestablishment are both given their due.

To go beyond the first amendment as we know it, by adopting either of the proposed amendments, would be to violate the crucial nonestablishment principle that lies at the foundation of the even more important freedom of religious exercise. It would also be a substantial first step in a direction that may invite the official minimization and perhaps ridicule of nonmainstream religions by public school teachers and others. Even the proponents of these amendments would probably withdraw their support if it appeared that Buddha, Satan, or the Bhagwan would be the beneficiary of the prayer amendments. The difference between the amendments and our conclusion in this article is that both amendments permit the government to sponsor prayer in Pure Establishment Cases—i.e., where there is no free exercise factor in the equation. Whether the prayer sponsored is silent or verbal, the government is acting affirmatively to foster and encourage religious activities. This imprimatur is forbidden by the Constitution as currently comprised and has no place in the constitution of any free country. A step away from this principle is a step away from freedom.

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[154] *See, e.g.*, A. 6658, S. 4948, 206th N.Y. Leg., Ann. Sess. (1983); A. 1087, 200th N.J. Leg., 1st Sess. (1982); *see also* Aronin, *Cults, Deprogramming, and Guardianship: A Model Legislative Proposal*, 17 COLUM. J.L. & SOC. PROBS. 163, 201 n.256 (1982) (citing cult members' guardianship bills introduced in Conn., Minn., Ohio, Or., and Tex.).

B. *Senator Helms and Jurisdiction Stripping*

In 1981, Senator Jesse Helms of North Carolina introduced a bill that would strip the federal courts of jurisdiction to hear school prayer cases. Based on his assumption that the state courts would be more receptive than the federal courts to the concept of prayer in the schools, Senator Helms urged the adoption of a bill that would remove the jurisdiction of the federal courts in "any case arising out of any State statute, ordinance, rule, regulation, or any part thereof, or arising out of any act interpreting, applying, or enforcing a State statute, ordinance, rule, or regulation which relates to voluntary prayers in public schools and public buildings."[155]

The idea that Supreme Court precedents perceived as being wrong or unwise can be overcome through congressional removal of jurisdiction is not a new one. Although a full discussion of legislation designed to remove federal jurisdiction over "school prayer" cases is beyond the scope of this article and worthy of lengthy analysis, we wish to assert our view that such action is both constitutionally improper and unwise as a matter of policy. While we leave the bulk of the scholarly dispute to others,[156] we will briefly discuss the wisdom of jurisdictional limitation as it relates specifically to religious activity in public schools. To the extent that Senator Helms seeks to allow state courts to ignore *Brandon* and *Lubbock*, we believe that there are already ample reasons to follow the result in *Bender* and permit children to meet in school for religious purposes during noninstructional time. There is no need to take the extreme step of removing jurisdiction over school prayer cases from the federal courts.

We believe that Senator Helms' bill suffers from the same defects as the amendments offered by President Reagan and Senator Hatch.[157] In particular, Senator Helms' approach would allow each state to establish in the schools whatever religion the majority of its citizens elect, as long as the state courts (often elected bodies) approve. After

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[155] S. 481, 97th Cong., 1st Sess. §§ 1-2 (1981).

[156] *See, e.g.*, Freund, *Storm Over The American Supreme Court*, 21 MOD. L. REV. 345, 346 (1958); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364-65 (1953); Van Alstyne, *A Critical Guide to Ex Parte* McCardle, 15 ARIZ. L. REV. 229 (1973); Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1 (1913); Wechsler, *The Courts and Constitution*, 65 COLUM. L. REV. 1001, 1005-06 (1965).

[157] *See supra* text accompanying notes 140 & 150.

the adoption of Senator Helms' approach, it is possible that school children in different states would be officially praying to different gods. It was this tendency towards local majority rule in matters of religion that spawned the efforts of Thomas Jefferson, James Madison, and others to disestablish state churches and provide federal and state assurances of religious freedom.[158]

Finally, Senator Helms' bill may itself constitute an unconstitutional establishment of religion. Its purpose is to enable state legislatures and courts to ignore the Supreme Court's decisions prohibiting state sponsored prayer; thus, it is intended to allow the sponsorship of the kind of religious activity held unconstitutional in *Engel* and *Schempp*.[159] The bill has no secular purpose. Although there has been a dubious suggestion that it is designed to remove some of the burden from our overworked federal judicial system, this argument is unpersuasive. The number of school prayer cases in the federal courts is insignificant compared to the large volume of suits of every other kind. We also believe that Senator Helms' bill violates the establishment clause and is therefore unconstitutional in that it will also have a primary effect of advancing religion if its results follow the intent of its sponsor. If the state legislatures and courts were to allow school sponsored prayer, the effect of the legislation would be to support the religious traditions from which the prayers were taken. The effect of the bill would also be to inhibit religion since other religious traditions would not be similarly benefited.

Moreover, the entanglement test would most likely be violated. State legislatures and school officials would be called on to determine what kind of religious activity would be most appropriate in the schools. Many types of religious groups would lobby to be included, and the result would be an unnecessary and unpleasant entangling of the state government with religious organizations. In sum, the Helms proposal is an unacceptable and unconstitutional method of resolving the problem of religion in the schools.

IV. CONCLUSION

The issue of prayer in the public schools is not a simple one. We must be extremely careful to avoid any appearance that the schools

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[158] *See, e.g.*, H. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA (1910); S. PADOVER, JEFFERSON 74 (1942); 1 RANDALL, THE LIFE OF THOMAS JEFFERSON 219-20 (1858); IX WRITINGS OF JAMES MADISON 288 (G. Hunt ed. 1910); Drakeman, *Religion and the Republic: James Madison and the First Amendment*, 25 J. CHURCH & ST. 427 (1983).

[159] *See Engel*, 370 U.S. 421; *Schempp*, 374 U.S. 203.

are either supporting or denigrating religion because of the impressionability of school children and the power of the public schools as transmitters of American values. The *Brandon* and *Lubbock* approach, which suggests that we can best solve the problem by scrupulously avoiding any evidence of religious activity on school property, has failed to take into account the important role of religion in the lives of students and in our culture. Even students have free exercise rights, a fact the *Brandon* and *Lubbock* courts essentially ignored.

Even though the *Bender* court reached the right result, in our view, the opinion minimized the extent of students' rights under the free exercise clause. In these *Mixed First Amendment Cases*, where free exercise and establishment rights are opposed to one another, the courts should apply a balancing test. This test will enable the courts to weigh all of the competing principles at issue, thus permitting them to make the careful, sensitive analysis these cases demand. On balance, we believe that this analysis will lead the courts to conclude that public school students who are permitted to meet during noninstructional periods for a variety of activities should be permitted to meet for religious as well as secular activities. Only in this way will the students truly be given the freedom to be religious or not to be religious, as mandated by the Constitution.