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## Essay

### CHURCH, STATE AND THE SUPREME COURT: CURRENT CONTROVERSY

Jesse Choper\*

#### I.

Let me begin by outlining the basic test that the Supreme Court began developing in 1970 (though with roots reaching back at least another decade) to adjudicate problems under the first provision of the Bill of Rights: that Congress shall make no law respecting an establishment of religion.<sup>1</sup> This clause of the First Amendment has, since the middle 1940s, been held fully applicable to the states through the Fourteenth Amendment.<sup>2</sup> Government action that aids religion in some meaningful way will be held to violate the Establishment Clause unless it satisfies three criteria. Specifically, to survive a challenge under the Supreme Court test, the government action (1) must have a secular purpose, (2) must have a primary effect that does not advance or inhibit religion, and (3) cannot produce excessive entanglement between government and religion.<sup>3</sup>

I believe that the major weakness in the Court's approach, one both of logic and policy, lies in the first prong of its test, the proviso that if government action has a religious purpose, that alone makes it unconstitutional.

As a matter of policy, this principle casts substantial doubt on many

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\* Dean and Professor of Law, University of California at Berkeley (Boalt Hall). B.S. 1957, Wilkes College; LL.B. 1960, University of Pennsylvania; L.H.D. 1967, Wilkes College.

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1. U.S. CONST. amend. I.

2. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

3. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

deeply engrained practices in American society. For example, our national motto is "In God We Trust." It appears on all coins and currency and in a number of other places. It seems to me that no one can seriously argue that our national motto has anything but a religious purpose. Yet, under the Supreme Court's doctrine that a religious purpose alone produces a violation of the Establishment Clause, "In God We Trust," our national motto, is unconstitutional.

From the days of President Washington to President Reagan, United States presidents have proclaimed a National Day of Thanksgiving. It has been quite clear that the thanksgiving urged is to the deity. Again, no one can seriously argue that the purpose is other than religious. But, under the Supreme Court's doctrine that a religious purpose alone produces a violation of the Establishment Clause, this practice is also unconstitutional.

How does the Court reconcile this tension between its doctrine and these deeply engrained national practices? As I will illustrate, when the Supreme Court's doctrine conflicts with one of these deeply engrained practices that the Court feels uncomfortable about striking down as being violative of the Establishment Clause, the Court simply ignores its own doctrine and upholds the practice.<sup>4</sup>

As a matter of logic, the Supreme Court's approach in this area is subject to criticism. The Court's doctrine under the Establishment Clause, that any government action that has a religious purpose is unconstitutional, is in conflict with the Court's doctrine under the other religion clause of the First Amendment, the Free Exercise Clause. Under that provision, the Court has held that not only is government permitted to act for religious purposes,<sup>5</sup> but at least under certain circumstances it must act for religious purposes by granting an exemption from an ordinary civil regulation to people because, and only because, they hold a particular religious belief.<sup>6</sup> I think the only fair way to characterize that aspect of the Supreme Court's Free Exercise Clause doctrine is to say that the Court is requiring government to act for a religious purpose. Thus, on the one hand, the Court says that under the Establishment Clause it is unconstitutional for the government to act for a religious purpose, but on the other hand, under the Free Exercise Clause the Court periodically holds that the government must act for a religious purpose.

It seems incumbent upon one who has been as critical as I have of the Court's approach to suggest some alternative, and I shall: The Establishment Clause should be held to be violated when two criteria are met: (1) when government action is found to have a religious purpose, *and* (2) when it is shown that the action meaningfully endangers religious liberty.<sup>7</sup> I should add that, as a matter of both historic and contemporary

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4. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 786-92 (1983).

5. *Corporation of the Presiding Bishop v. Amos*, 107 S. Ct. 2862 (1987).

6. *Hobbie v. Unemployment Appeal's Comm'n*, 107 S. Ct. 1046 (1987) (intentional government advancement of religion is sometimes required); *Thomas v. Review Bd. of the Indiana Employment Security Div.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

7. See Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict* 41 U. PITT. L. REV. 673 (1980).

values, one of the plainest violations of religious liberty occurs when government spends compulsorily raised tax funds for religious purposes.<sup>8</sup>

## II.

I should now like to consider two major areas of current controversy under the Establishment Clause. The first, official government acknowledgment of religion, best illustrates where the Supreme Court has ignored its own doctrine.

There have been two important Supreme Court cases in the last five years. In 1983, in *Marsh v. Chambers*,<sup>9</sup> Nebraska paid a chaplain \$320 for each month that the legislature was in session to open each legislative day with a prayer. The Court held that this was not a violation of the Establishment Clause, quite frankly acknowledging that it was ignoring its own doctrine. If it had relied on its three-part test, it would have held the practice unconstitutional. After all, what purpose but a religious one is there in having a clergyman open each legislative session with a prayer? In approving this practice, the Court instead relied on history, on longstanding tradition in this country at both the federal and state levels, and on the specific intent of the framers.<sup>10</sup>

How do I think this problem ought to be resolved? First, as indicated, I think that it is plain that Nebraska's practice had a religious purpose. Second, since there was a meaningful expenditure of tax-raised funds for religious purposes (\$320 a month), that poses a danger to religious liberty. Thus, I would have found a violation of the Establishment Clause.

A year later, in *Lynch v. Donnelly*,<sup>11</sup> the city of Pawtucket, Rhode Island had erected a large Christmas display each holiday season in a privately owned park. This display included a Santa Clause house, reindeer, a Christmas tree, and carolers, as well as a nativity scene depicting the birth of Christ. The total cost of the creche, paid for ten years earlier, was about \$1365. It currently cost the city \$20 each year to erect the creche and to take it down. There was no maintenance cost involved at all. The inclusion of the nativity scene in this otherwise, overall secularly oriented Christmas display was challenged as being unconstitutional. The Court again found no violation of the Establishment Clause, reasoning that the purpose was not exclusively religious.<sup>12</sup>

How would I resolve the question? Although I would conclude that inclusion of the creche was for a religious purpose, I would not find a violation of the Establishment Clause because I am not persuaded that there was any meaningful danger to religious liberty. No one was forced to do anything, and to the extent that there were any tax funds presently used, it seems to me to be de minimis. Since I can find no coercing, compromising, or influencing of anyone's religious beliefs, I would find no violation of the

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8. See Kauper, *Church and State: Cooperative Separatism*, 60 MICH. L. REV. 1, 5-6 (1961); *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947).

9. 463 U.S. 783 (1983).

10. *Id.* at 786-92.

11. 465 U.S. 668 (1984), *reh'g denied*, 466 U.S. 994 (1984).

12. *Id.* at 681-82.

Establishment Clause. It is true that this creche was offensive to people who believe in the strict separation of church and state. But it does not seem to me that the Establishment Clause was meant to protect against offense. Rather, in my judgment, it was intended to protect against dangers to religious liberty and, in the absence of such dangers, I would find no violation of the Establishment Clause despite the existence of a religious purpose.

### III.

A second major subject of current controversy concerns religion in the public schools. Just as the area of government acknowledgment of religion best illustrates the Supreme Court ignoring its own doctrine, the subject of religion in the public schools best illustrates the Supreme Court adhering to its own doctrine.<sup>13</sup>

There were a series of important cases on the subject in the 1940s, the 1950s, and the 1960s. They involved released time for religious instruction and, more controversially, prayer and Bible reading.<sup>14</sup> But nearly two decades had passed when, in 1980, the Burger Court had its first significant case on this topic. In *Stone v. Graham*,<sup>15</sup> a Kentucky statute required that a copy of the Ten Commandments, paid for by private funds, be posted in every public classroom. The Court held that this violated the Establishment Clause. Taking its own doctrine seriously, something that it does not do all the time, the Court reasoned that posting the Ten Commandments plainly serves a religious purpose, and that produces a violation of the Establishment Clause.<sup>16</sup>

I disagree with the Court's conclusion. I agree that posting the Ten Commandments in public school classrooms had "no secular legislative purpose."<sup>17</sup> But I do not find that this poses any serious threat to religious liberty. Since this program was paid for by private money, there was no use of tax raised funds to support religion. Moreover, I am not persuaded that anyone's religious beliefs are coerced, compromised, or even influenced in any significant way by simply having this religious message posted in the public schools.

Similarly, I disagree with the Warren Court's earlier decision in *Epperson v. Arkansas*,<sup>18</sup> which involved an Arkansas statute modeled on the old Tennessee Monkey Law made famous in the *Scopes*<sup>19</sup> case. The Arkansas statute forbade the teaching of evolution in the public schools. The Court, investigating the statute's history, found that "fundamentalist sectarian conviction was . . . [its] reason for existence."<sup>20</sup> Since it had a religious purpose, it was held to violate the Establishment Clause. Although I agree that the

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13. *But see Zorach v. Clauson*, 343 U.S. 306 (1952).

14. *M'Cullum v. Board of Educ.*, 333 U.S. 203 (1948) (released time); *Zorach v. Clauson*, 343 U.S. 306 (1952) (released time); *Engel v. Vitale*, 370 U.S. 421 (1962) (prayer); *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (Bible reading).

15. 449 U.S. 39 (1980), *reg'h denied*, 449 U.S. 1104 (1981).

16. *Id.* at 42.

17. *Id.* at 41.

18. 393 U.S. 97 (1968).

19. *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927).

20. *Epperson*, 393 U.S. at 108.

law was enacted for a religious purpose, I do not find that it posed any meaningful threat to anyone's religious liberty. While I think it is very bad educational policy, that does not make it unconstitutional. Despite the fact that the Arkansas Monkey Law had a religious purpose, since it posed no meaningful danger to religious liberty, I would not find a violation of the Establishment Clause.

A case decided several years ago, *Wallace v. Jaffree*,<sup>21</sup> was the Burger Court's second effort in the area of religion in the public schools. It concerned an Alabama statute requiring a minute of silence for "meditation or voluntary prayer" at the beginning of every public school day. In a 6-3 decision, the Court found that this law was motivated solely by religious purposes. There was powerful support in the record for this conclusion. Statements by the bill's sponsor in the Alabama legislature made plain that its purpose was to enable voluntary prayer to be re-introduced into the Alabama public schools. Thus, the Court reasoned, since government action undertaken for a religious purpose violates the Establishment Clause, the law was unconstitutional.<sup>22</sup>

There are several observations to be made about this prominent pronouncement by the Court on the question of religion in the public schools. First, the separationists won the battle but lost the war in respect to silent prayer. They won the battle because the Alabama statute was held unconstitutional. They lost the war because a majority of the Court made clear that it would uphold a moment of silence statute if its legislative history indicated that it was not enacted exclusively for religious purposes. Indeed, there are cases now winding their way to the Supreme Court in which I believe the Court will find that the moment of silence statute involved was not motivated entirely by religious ends (disingenuous as some of the legislative history may be in respect to that), and the Court will uphold the laws.<sup>23</sup> On the other hand, the accommodationists, who really have won on the issue of silent prayer, appear to have lost their effort to reintroduce more elaborate religious programs in the public schools. It seems clear to me that, given its willingness to reject the Alabama moment of silence law, the Court is not prepared to overturn the earlier decisions forbidding oral prayer and Bible reading in public schools.

Second, I think that *Wallace v. Jaffree*<sup>24</sup> was an unfortunate decision. At bottom, I think it was wrongly decided. I agree that the Alabama statute was passed for one reason only: to give children in public schools an opportunity to pray. (Indeed, at least within current vision, I believe this to be the purpose of all moment of silence statutes.) But since I do not find that a minute of silence for prayer poses any meaningful danger to religious liberty, I would not find a violation of the Establishment Clause.<sup>25</sup> I think that there

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21. 472 U.S. 38 (1985).

22. *Id.* at 56-60.

23. *May v. Cooperman*, 582 F. Supp. 1458 (D. N.J. 1984), *aff'd*, 580 F.2d 240 (3d Cir. 1985), *jurisdiction postponed by Karcher v. May*, 107 S. Ct. 946 (1987).

24. 472 U.S. 38 (1985).

25. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 371 (1963).

is a critical difference between an opportunity for silent prayer in the schools and a program of oral prayer or Bible reading. In the latter situations, even if children are given the opportunity to be excused, they are going to feel peer pressure to participate despite the fact that, at least for some children, this is contrary to their religious beliefs. But there is nothing in a moment of silence situation that is going to make any child feel pressure to do something contrary to his or her religion. Those who want to pray can do so. Those who are atheists can think that there is no God. Others can simply meditate during the moment of silence period. My guess is that many, if not most, elementary and secondary school children will turn their thoughts to matters having nothing to do with religion during the period of silence.

I also think that the decision is mistaken because it will generate litigation with respect to every moment of silence statute throughout the country, and at the time of the Alabama case about half the states had one. Lawsuits will be filed to determine whether or not the sole purpose of the law was religious, and as suggested above, I think that this is going to inspire a great deal of disingenuousness. Legislators are not going to make the mistake that was made by the sponsor in Alabama and openly concede a purpose for the statute that will produce a verdict of unconstitutionality.

It merits reemphasis that I understand and appreciate the fact that some people find a moment of silence for prayer at the beginning of the school day offensive. But I think that almost all governmental accommodations for religion may be offensive to some people. That does not make them unconstitutional. Indeed, under some circumstances, accommodations for religion have been held by the Supreme Court to be constitutionally required by the Free Exercise Clause.<sup>26</sup>

#### IV.

Having reviewed what the Burger Court has done on the subject of religion in the public schools, I turn to three major issues on the horizon in respect to this topic. The first has already been resolved by the Supreme Court.<sup>27</sup> In *Edwards v. Aguillard*, a Louisiana statute required the teaching of "creation science" whenever evolution is taught in the public schools. By a vote of 7-2 (although Justice White's association with the majority was half-hearted at best), the Court found that the law had "no clear secular purpose"<sup>28</sup> and, for that reason, violated the Establishment Clause. The major dispute between the majority and dissent concerned the factual question of just what the purpose of the statute was. Justice Brennan, speaking for the Court, concluded that it was to "endorse a particular religious doctrine." In contrast, Justice Scalia, joined by Chief Justice Rehnquist, found evidence that the Louisiana legislature had sought to "protect academic freedom" by expanding the number of scientific theories of the origin of the species to be taught.

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26. See *supra* note 6.

27. *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987).

28. *Id.* at 2578-83 (Act was facially invalid as violative of the Establishment Clause, because it lacked a clear secular purpose).

Regardless of which of these competing characterizations is accurate, I would find that the creation science law had a religious purpose. Just as was true in *Epperson v. Arkansas*, the law's impetus was to placate those religious fundamentalists whose beliefs rejected the Darwinian theory of evolution. But, under my approach, so long as the theory of creation science is taught in an objective rather than a proselytizing fashion, it does not seem to me to pose a danger to religious liberty. Indeed, if taught properly, it adds to the well rounded education of students. In fact, the Court has made clear that it is one thing for the public schools to undertake a program of religious instruction and it is another thing to educate children *about* religion. The Court has said for many years that the latter is not unconstitutional, if done in an objective fashion.<sup>29</sup> I would find that if creation science were taught objectively, it should not be held to violate the Establishment Clause despite the fact that the program of instruction is undertaken for a religious purpose.

## V.

The second major issue on the horizon concerns what has now become familiarly known as secular humanism. There have been two decisions in recent months by federal district courts, one in Alabama and one in Tennessee, that have dealt generally with this question. The federal district court in Alabama held, *inter alia*, that the Alabama public school system's use of various textbooks constituted advocacy of the religion of secular humanism because these books advanced secular moral values. The court found that this was official inculcation of religion and, taking the Supreme Court's doctrine seriously, held this to be a violation of the Establishment Clause, ordering that 44 of these books be removed from the public schools.<sup>30</sup> The Eleventh Circuit recently reversed<sup>31</sup> and my guess is that the Supreme Court will not grant review.

If the challenged books advocate religion, then, under prevailing doctrine, the decision of the federal district judge that there is a violation of the Establishment Clause is plainly correct. But I predict that, ultimately, the courts will hold that this is not the teaching of "religion." Even though the values advocated in the books may have been adopted by a group of people who consider themselves to comprise a religion—that is, the secular humanists—nonetheless, that does not make the books "religious" for purposes of the Establishment Clause. To put it another way, a set of values or beliefs does not become "religious" for purposes of the Establishment Clause simply because some people adopts them as their "religion." The fact that the basis for *secular* government action happens to be what other people have said is religious does not mean that the government is enforcing religion in violation of the Establishment Clause. If this were not true, then laws against murder and theft would be unconstitutional because these legal

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29. *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

30. *Smith v. Board of School Comm'rs of Mobile County*, 655 F.Supp. 939, 988 (S.D. Ala. 1987).

31. *Smith v. Board of School Comm'rs of Mobile County*, 827 F.2d 684 (11th Cir. 1987).

prohibitions coincide with the tenets of virtually every major religion in the world. Similarly, the government's entry into an arms control treaty, which might be four square in accord with the tenets of some pacifist religions, would surely not be a violation of the Establishment Clause. The values that underlie the government action are not "religious" for the purpose of sterilizing the government from acting in accordance with its own set of secularly oriented beliefs. That, I think, eventually will be the rationale that will reject decisions like that of the federal district judge in Alabama.

The case from Tennessee was based on a similar fact situation.<sup>32</sup> Parents of children who belonged to fundamentalist sects objected to the use of a certain textbook series. They urged that these books taught anti-Christian, secularly oriented values that were contrary to their religious beliefs. They did not, however, ask that the books be removed from the public school curriculum, as was the case in Alabama. Rather, in Tennessee, they asked that their children be excused from having to study from these books. The federal district judge agreed, reasoning that since these books are contrary to the religious beliefs of the complainants, they are entitled to an exemption under the Free Exercise Clause from having to use them; instead, the court held, they should be able to study the subject through some alternative arrangement such as an existing state program of home instruction.<sup>33</sup>

It bears emphasis that two different constitutional provisions were invoked in the two cases just discussed. In the Alabama case, the court held that use of the books violated the Establishment Clause. In the Tennessee case, the court held that the Free Exercise Clause required that the students be exempted from having to use the books. As should be obvious by now, violation of these different clauses of the Constitution calls for different remedies. The remedy in the Alabama case, which found that the use of the books violates the Establishment Clause, was that the books must be removed from the public school curriculum. The remedy in the Tennessee case, which found a violation of the Free Exercise Clause, was that the school could continue to use the books but that the religious fundamentalists who claimed that the use of these books infringed upon their religious beliefs had a personal constitutional right to be exempted from having to use them and instead could have home instruction as a substitute.

My reading of the popular press at the time of the Tennessee decision indicates that most observers felt that this ruling would eventually be reversed, as it has been by the Sixth Circuit. Nonetheless, a serious argument can be made under the Supreme Court's Free Exercise Clause doctrine that the district court's decision was correct.

In the early 1970s, in *Wisconsin v. Yoder*,<sup>34</sup> the Supreme Court held that the Free Exercise Clause entitled the Old Order Amish to an exemption from state imposed compulsory education beyond the age of 14 on the ground that the Amish's religious tenets forbid worldly secular education for their children beyond that age.<sup>35</sup> That is the rationale that the district judge

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32. *Mozart v. Hawkins County Pub. Schools*, 647 F. Supp. 1194 (E.D. Tenn. 1986).

33. *Id.* at 1203.

34. 406 U.S. 205 (1972).

35. *Id.* at 218.



in Tennessee used in saying that the religious fundamentalists were entitled to an exemption under the Free Exercise Clause from having to use these books in the public schools.<sup>36</sup>

I do not want to say that *Yoder* dictates the result in the Tennessee case. It is more complicated than that. The burden placed on the schools to accommodate the parents is probably going to be greater in the Tennessee context. It is one thing simply to let the Amish out; there are just fewer children in the public schools. But if a school is trying to teach reading and can do so for most children through use of the offensive books, but must permit some sort of home instruction for the objecting children, that may amount to a substantial burden. In reaching its conclusion, the Court balances the burden on the schools against the imposition placed on religion.

## VI.

The third major issue on the horizon in regard to religion in the public schools parades under the title of "equal access." The central background ruling, decided in 1981, is *Widmar v. Vincent*.<sup>37</sup> The University of Missouri at Kansas City permitted all student groups to use a public forum for meetings and activities. But it refused the forum to a religious group that wanted to use it "for religious worship and discussion" on the ground that for the University to permit the use of its facilities for this purpose would violate the Establishment Clause. The Supreme Court, with only one justice dissenting, held, first, that to exclude the religious group because of the content of their discussion was a violation of the First Amendment's Free Speech Clause, and, second, that it does not violate the Establishment Clause to permit this use of the college's facilities. The Court reasoned that there was a secular purpose to have a forum in which a wide variety of views could be exchanged. The Court conceded that there was an incidental benefit to religion in permitting religious groups to use these public premises, but since the University was not putting its imprimatur on any of the broad spectrum of groups that used the facilities, there was no primary effect that advanced religion.<sup>38</sup>

I think *Widmar* was correctly decided. Even if there was a religious purpose in permitting use of the facilities by the religious groups, there was no meaningful expenditure of tax funds for this end and no other significant danger to religious liberty.

The question is the extent to which the *Widmar* principle of equal access by college students to college facilities applies to high schools. This issue is important for several reasons. First, in 1984, Congress passed the Equal Access Act<sup>39</sup> which requires that all secondary schools that receive federal funding and that permit their facilities to be used by students groups generally cannot deny use of these facilities by religious groups as well. That

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36. *Mozart*, 647 F. Supp. at 1199.

37. 454 U.S. 263 (1981).

38. *Id.* at 273-74.

39. Equal Access Act of 1984, Pub. L. No. 98-377, 98 Stat. 1302 (1984) (codified at 20 U.S.C. § 4071 (1984)).

directly puts the constitutional issue of whether *Widmar v. Vincent* applies to high schools.

Second, there was a case that recently wound its way to the Supreme Court, *Bender v. Williamsport Area School District*.<sup>40</sup> It involved a high school that had a student activity period at the beginning of every school day. Every student group in the school was permitted to meet in classrooms during that period in order to conduct their business, but the school denied this privilege to a group of students who wanted to use it for religious discussion and prayer. This denial was affirmed by the United States Court of Appeals for the Third Circuit.<sup>41</sup> The Supreme Court decided the case on a procedural issue without reaching the merits.<sup>42</sup>

How should this problem be approached? I do not believe that it is necessarily covered by *Widmar*. Regardless of whether there is a religious purpose in a school's permitting a religious group to use its facilities, the central question—and it seems to me that it is what really should concern the Court in respect to both the Establishment Clause and the Free Exercise Clause—is whether there is any meaningful threat to religious liberty. I think, as suggested earlier, that there is danger to religious liberty by oral prayer and Bible reading activities in public schools. Does permitting a religious group to have their own prayers and religious discussion during an activity period at the beginning of the school day pose a similar danger to religious liberty? I think it turns on such questions as: Are students in high school less mature than they are in college? To what extent do they feel peer group pressures to participate in these religious meetings of the religious organizations?

On the record in the *Williamsport* case, where there were twenty-five different clubs operating at the same time, I would think that there is a strong chance that there is no pressure on any student to attend the religious meetings and therefore to do something that might be contrary to his or her religious beliefs. I would not predict the outcome of this case, although I would speculate that there are three members of the Court (in addition to retired Justice Powell) who are likely to uphold this practice in high schools: Chief Justice Rehnquist and Justice White (who have already so indicated), and probably Justice Scalia. There are four who appear to be inclined to strike it down: Justices Brennan, Marshall, Blackmun and Stevens. Thus, I suggest that in this area of separation of church and state, the key may well be held by Justice O'Connor who has indicated a special sensitivity for issues of religious liberty in several other instances.

There is substantial potential significance in the Court's applying the equal access principle to public schools. If the Court were to hold that the Equal Access Act is constitutional, or that if the Williamsport Area School District makes its facilities available to all student groups it must also permit equal access by religious groups, this might well provide a way to change several of the Supreme Court's results in this area. For example, consider

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40. 106 S. Ct. 1326 (1986), *reh'g denied*, 106 S. Ct. 2003 (1986).

41. *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984).

42. *Bender*, 106 S. Ct. at 1335.

*Stone v. Graham*.<sup>43</sup> The public schools might be able to have the Ten Commandments posted on their walls if they did this as part of an "equal access" display—also including, for example, the Gettysburg Address, the Bill of Rights, and so on.

In the 1940s, the Court held that a program of released time classes for religious instruction on public school premises was unconstitutional. If the equal access principle is held to apply to public schools, then could a school have an on-premises released time program if it widened the range of alternatives by including classes in cooking, music, ballet, and the like? If the Court takes the initial step of equal access for use of *facilities* in public schools, then it may be pointing to a number of other steps to provide opportunities for practices that it had held to violate the Establishment Clause.

There is, however, one clear limitation. I do not think that a public school could have a program of prayer and Bible reading one day, reading of Shakespeare's sonnets the next day, recitation of the Gettysburg Address on the third day, and so forth. A program on one day that is religious poses a meaningful danger to religious liberty even though it will be followed on other days by programs that are not religious. It therefore would be held to violate the Establishment Clause and could not be cured on the basis of the equal access principle.

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43. 449 U.S. 39 (1980), *reh'g denied*, 449 U.S. 1104 (1981).

