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Religion in Public Schoolrooms—Striking a Balance Between Freedom of Speech and Establishment of Religion: *Bender v. Williamsport Area School District*

It is common practice for public schools and universities to make their facilities generally available to registered student groups for activities. In the landmark case of *Widmar v. Vincent*,[1] the Supreme Court, on free speech grounds, prohibited a university from denying a religious student group equal access to university facilities. The Court held that granting student groups equal access to facilities available as limited open forums did not violate the establishment clause.[2] Despite finding that the establishment clause was not breached in *Widmar*, the Court acknowledged a potential conflict between two first amendment provisions—the guarantee of free speech and the prohibition against the establishment of religion. This conflict became concrete for the first time in *Bender v. Williamsport Area School District*,[3] a Third Circuit case which the Supreme Court has recently agreed to review.

I. The Bender Case

The Williamsport Area School District adopted a policy establishing a regularly scheduled activity period.[4] The purpose of the activity period was to encourage students to organize clubs and hold meetings at the high school.[5] After being granted "activity" status, clubs were permitted to meet during the thirty

1. 454 U.S. 263 (1981).

2. *Id.* at 271.

3. 741 F.2d 538 (3d Cir. 1984), *cert. granted*, 105 S. Ct. 1167 (1985).

4. *Id.* at 9. Pa. Stat. Ann. tit. 24, § 13-1327 (Purdon 1962 & Supp. 1984) makes school attendance mandatory in Pennsylvania. The state law requires students to participate in a minimum amount of instruction per year. *Id.* §§ 15-1501, -1504. The minimum requirement is variously calculated but may be broken down to 180 school days per year. Each day is to consist of seven hours, minus one and one-half hours for lunch and breaks. *Bender*, 741 F.2d at 543. "We are not told if the activity period count[s] toward the minimum requirement at Williamsport, nor have" any attempts by the court "at calculation provided a definitive answer." *Id.* at 543 n.7.

5. Bender v. Williamsport Area School Dist., 563 F. Supp. 697, 698 (M.D. Pa. 1983).

minute activity period each Tuesday and Thursday.[6] The only qualification for an acceptable activity was that it "contribute to the intellectual, physical, or social development of the students and is otherwise considered legal and constitutionally proper."[7]

Students were able to choose from among twenty-five different clubs.[8] Students who did not wish to participate in a club were given several options. They could "study in the library, visit the school's computer station, examine career or college placement materials, or simply remain in their home rooms until the next class period begins."[9]

In September 1981 Lisa Bender and several of her classmates requested permission to form a club called "Petros" that

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6. *Bender*, 741 F.2d at 543. At Williamsport Area High School the school day began at 7:45 A.M., when all students were required to be in their homerooms. At 7:57 A.M. on Tuesdays and Thurdays, after attendance had been taken, the 30 minute activity period began.

7. *Id.* at 544 (emphasis deleted). PA. STAT. ANN. tit. 24, § 5-511 (Purdon 1962) provides:

> (a) The board of school directors in every school district shall prescribe, adopt, and enforce such reasonable rules and regulations as it may deem proper, regarding (1) the management, supervision, control or prohibition of exercises, athletics, or games of any kind, . . . and other activities related to the school program, . . . and (2) the organization, management, supervision, control, financing, or prohibition of organizations, clubs, societies and groups of the members of any class or school . . . .
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> . . . .
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> (c) The board of school directors may (1) permit the use of school property, real or personal, for the purpose of conducting any activity related to the school program, or by any school or class organization, club, society, or group, (2) authorize any school employe or employes to manage, supervise and control the development and conduct of any such activities, (3) employ or assign any school employe to serve in any capacity in connection with any of such activities.

8. *Bender*, 741 F.2d at 544, n.8. Included in the activity period were the following student clubs:

> Student Government; Key Club (a student service organization performing community work); Class Organizations (officers for each class); Business English Club; Future Homemakers of America (devoted to learning good home practices and providing service to various charity organizations); Vocational Technical Club; Spanish Club; Speech and Drama Club; Ecology Club; The *Cherry & White* (student literary art magazine); *Billtown Banner* (student newspaper); *La Memoire* (student yearbook); Band; Choir; Office Aides (assisting in filing, answering telephones, and running errands).
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> Other clubs which have been approved in the past and might be renewed if interest warranted include Archery; Art; Audubon; Aviation; Bowling; Chemistry; Chess; Field, Forest and Stream; Future Nurses; Future Teachers; German; Poetry; Photography; and Ski Clubs.

Id.

9. *Id.* at 543.

would meet during the school's activity period. The organization was to be a nondenominational prayer group, organized for the purpose of promoting spiritual growth and positive attitudes in the lives of its members.[10] Membership and participation was to be voluntary and open to all students.

The group was permitted to hold one organizational meeting that was attended by approximately forty-five students.[11] A teacher was present to act as monitor and take attendance.[12] After the initial meeting, the high school principal withheld permission for further meetings pending an investigation of their legality. After consultation with the school's attorney, the Williamsport School Board wrote to Lisa Bender, stating in part: "[T]he solicitor [has] advised the Board that to approve your proposal would be a violation of existing case law and therefore, an improper action. The Board [has] decided, therefore, to deny your appeal."[13] The students appealed the decision, but the Board affirmed its action, denying the appeal based on the solicitor's opinion.[14]

The students brought suit for declaratory and injunctive relief under 42 U.S.C. § 1983, alleging that the school board's action violated their constitutional rights of free speech and free exercise of religion.[15] The district court granted summary judgment in favor of the school district and against the students on the free exercise claim. However, the court "agreed with the students that their free speech rights had been abridged, and that, under these circumstances, the establishment clause did not provide a compelling state interest to justify that abridgment."[16] Therefore, the district court granted summary judgment in favor of the students on the free speech claim.

The Court of Appeals for the Third Circuit reversed and

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10. *Id.* at 542.

11. *Id.* at 543.

12. *Id.* at 544. "[T]he monitor was not required to participate in the program's activities . . . . At the first Petros meeting, a monitor was present, but took no part in the proceedings." *Id.* at 552. The students characterized "the monitor's activities as benign and neutral." *Id.* In fact, affidavits indicate that "[t]he monitor took attendance, then spent the remaining time grading papers." *Id.* at 566 (Adams, J., dissenting).

13. *Id.* at 543. The School Board also wrote that "neither the School Board nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not permit public schools to authorize or support religious activities on school property." *Id.*

14. *Bender*, 563 F. Supp. at 701.

15. *Bender*, 741 F.2d at 541.

16. *Id.*

held: (1) the student members of Petros had a "valid first amendment right to engage in their proposed activity";[17] (2) the Williamsport Area School District had created a limited forum and the Petros program came within the prescribed parameters of that forum;[18] (3) the school district might object to the presence of Petros in the school as violating the establishment clause;[19] and (4) "the interest in protecting free speech within the context of the activity period as it exists at Williamsport Area High School is outweighed by the establishment clause."[20]

In reaching these conclusions, the Third Circuit applied the Supreme Court's three-prong test for determining establishment clause violations as announced in *Lemon v. Kurtzman*.[21] The *Bender* court determined that permitting Petros to meet on school property during the activity period violated the second and third prongs of the *Lemon* test: the activity would advance religion[22] and engender excessive government entanglement with religion.[23]

After finding an establishment clause violation and conceding the existence of a conflicting right of free speech, the court struck a balance in favor of the establishment clause. The court reasoned that the creation of the limited forum instilled in school authorities complete discretion to abolish the activity period or to limit it to strictly curricular subject matter.[24] Furthermore, the court reasoned that public schools have never been a forum for religious expression and that the lost "opportunity would be compensated in substantial measure by alternative means of communication which exist throughout the community."[25] Finally, the court concluded that if the right of free speech prevailed, establishment clause dangers would be "unavoidable, and to a large extent unremediable."[26] Thus, the court held that, balancing the respective constitutional interests that would be lost or gained, "there is a greater vindication of the protections of the Constitution if the Establishment Clause pre-

17. *Id.* at 550.
18. *Id.* at 550.
19. *Id.* at 557.
20. *Id.* at 559.
21. 403 U.S. 602 (1971).
22. *Bender*, 741 F.2d at 555.
23. *Id.*
24. *Id.* at 559-60.
25. *Id.* at 560.
26. *Id.*

vail[s] in this instance."[27] Based on these conclusions, the court denied Petros the opportunity to meet on school property during the school activity period.

II. ANALYSIS

The issue before the *Bender* court was how to resolve the conflict between the students' first amendment free speech claim and the school district's claim that the establishment clause prohibition overrides guarantees of free speech in the limited forum context.[28] The Third Circuit decided in favor of the school district, finding that the establishment clause prevailed. This result improperly expanded the scope of the establishment clause. The *Bender* court not only erred in finding a violation of the establishment clause, but also misapplied its own balancing test in concluding that the school district's establishment clause claim should prevail over the students' free exercise claim.

A. Petros' Presence Does Not Violate the Establishment Clause

The first amendment protection of religious freedom reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[29] The initial phrase, commonly referred to as the establishment clause, has been used to promote separation between church and state. The purpose of the establishment clause, as set out by the Founding Fathers, was to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity."[30] Traditionally, controversies concerning school prayer, religious instruction in the schools, and financial assistance to religious schools involved establishment clause challenges.[31] These con-

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27. *Id.*

28. The court conceded, without discussion, that the students had a right to free apeech guaranteed by the first amendment. Likewise, the court accepted the fact that the Williamsport School District created a limited forum. It is only after clearing these hurdles that the constitutional conflict presented below surfaces.

29. U.S. CONST. amend. I.

30. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1969).

31. School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (the Court considered officially organized prayer in the schools); McCollum v. Board of Educ., 333 U.S. 203 (1948) (the Court considered the propriety of using public classrooms for voluntary religious instruction during hours of compulsory attendance); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) (action by students seeking to engage in voluntary prayer meetings during the school day).

flicts drew into question state action that may impermissibly support and encourage the establishment of religion.

In *Lemon v. Kurtzman*[32] the Supreme Court adopted a tripartite test for determining whether a government policy violates the establishment clause. First, does the policy have a secular legislative purpose? Second, does the proposed action have a primary effect that neither advances nor inhibits religion? Third, does the activity avoid excessive government entanglement with religion?[33] The *Lemon* test is still applied by courts to resolve establishment clause controversies.[34] Each question must be answered in the affirmative to avoid violation of the establishment clause.

1. Does the policy have a secular legislative purpose?

The existence of a secular legislative purpose is perhaps the most fundamental requirement for not violating the establishment clause. This inquiry focuses on whether the government policy that allows the activity has a secular purpose. Religious considerations may not be the motivating force. The district court and court of appeals agreed that the Williamsport Area High School activity period was clearly adopted under the aegis of a secular legislative purpose. The district court found that the avowed purpose of "creating the activity period was to promote the intellectual, physical, and social development of its students."[35]

The policy of permitting student groups to meet during the activity period was not adopted to provide a forum for religious discussion. As in *Widmar v. Vincent*,[36] the forum was created to facilitate the exchange of ideas. The mere fact that Petros wished to take advantage of the forum did not convert the policy's secular purpose into a nonsecular or religious purpose.[37] In fact, as the district court noted, "the policy long predated Pe-

32. 403 U.S. 602 (1971).

33. *Lemon*, 403 U.S. at 612-13.

34. Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); *Bender*, 563 F. Supp. at 697.

35. *Bender*, 563 F. Supp. at 708-09.

36. 454 U.S. 263 (1981).

37. *See, e.g., id.* at 271 n.10; Brandon v. Board of Educ., 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

tros' request."[38] Based on this evidence, the court of appeals concluded that the general activity program adopted in *Bender* had neither a religious objective nor a nonsecular purpose.[39] Therefore, the school district's policy had a secular legislative purpose.[40]

2. Is the primary effect of the proposed action to advance or inhibit religion?

To pass the second prong of the *Lemon* test, the primary effect of the regulation or action must be one that neither advances nor inhibits religion.[41] The Third Circuit concluded in *Bender* that permitting Petros to meet in school facilities had the effect of advancing or sponsoring religion because it communicated a message of government endorsement.[42] The court had to distinguish *Widmar v. Vincent*[43] in order to reach such a conclusion.

In *Widmar*, the Supreme Court concluded that a policy accommodating use of university facilities by religious groups did not lead to a perception that the school was promoting religion.[44] However, the Third Circuit reasoned that, unlike *Widmar*, the *Bender* case was based on "special circumstances inherent in a high school" that "create heightened dangers in the context of the establishment clause."[45]

The special circumstances mentioned by the court of appeals were the immaturity and impressionability of high school

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38. *Bender*, 563 F. Supp. at 709.

39. *Bender*, 741 F.2d at 551.

40. While the *Bender* court found a complete absence of religious objective or nonsecular purpose, such a finding may not have been necessary. The issue is merely whether the policy has "a" secular legislative purpose. *Lemon*, 403 U.S. at 612; Lynch v. Donnelly, 104 S. Ct. 1355, 1363 n.6 (1984). This appears to permit the coexistence of several purposes. So long as one purpose is secular, then the policy should pass this prong of the *Lemon* test. Thus, it appears that the *Bender* court went beyond the requirements of this prong of the *Lemon* test.

41. *Lemon*, 403 U.S. at 612.

42. *Bender*, 741 F.2d at 555. The *Lemon* test requires the primary or principal effect to be one that neither advances not inhibits religion. The *Bender* court, in finding an establishment clause violation, found that permitting Petros to meet would have an effect of advancing religion. The court thus neatly sidestepped the issue of whether this was the primary or principal effect. In essence, the Third Circuit failed to address the proper standard.

43. 454 U.S. 263 (1981).

44. *Id.* at 273-74.

45. *Bender*, 741 F.2d at 552.

students.[46] These factors, according to the court, could result in students misperceiving neutrality and accommodation as advancement and enforcement of religion. The court also determined that the presence of a teacher to take attendance would create the impression that the school endorsed religious activity.[47]

Conceding that high school students differ from university students in terms of maturity and impressionability, the *Bender* decision underrates the independence and perception of high school students. In *Russo v. Central School District No.1*,[48] the Second Circuit discussed this topic in regard to students between the ages of fourteen and sixteen:

> 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."[49]

In *Seyfried v. Walton*,[50] a decision handed down three years before *Bender*, the Third Circuit expressed similar confidence in the independence and perception of high school students. While attempting to reconcile the seemingly contradictory goals of exposing young minds to the clash of ideologies in the free marketplace of ideas and providing teenagers with a solid foundation of basic moral values, the Third Circuit noted that it could

> take judicial notice of the progressively higher levels of intellectual and emotional development of students in the later

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46. *Id.*

47. *Id.* at 552-53.

48. 469 F.2d 623 (2d Cir. 1972).

49. *Id.* at 633. In *Russo*, the Second Circuit held that a high school teacher's dismissal for refusing to participate in the pledge of allegiance violated her first amendment rights. *Id.* at 631-32. The court reasoned that despite the impressionability of the students, the teacher's conduct was protected expression. *Id.* Thus, while the facts of *Russo* are not directly related to *Bender*, its compromise in favor of free speech and the presence of a teacher are relevant. *Russo* seems to contradict the notion in *Bender* that the presence of a monitor or teacher creates the impression that the school endorses religious activity.

50. 668 F.2d 214 (3d Cir. 1981).

> grades of secondary school. . . . High school students . . . are at an age approaching both adulthood and franchise. As the Second Circuit has noted in a related context, "[i]t would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth."[51]

The Third Circuit's observation in *Seyfried* is in harmony with research in the field of adolescent psychology.[52] Data collected by Jean Piaget, Eric Erickson, and others indicate "that high school students are generally independent and capable of critical inquiry."[53] The research suggests that three conclusions may be drawn: (1) "adolescence is a time of markedly increased cognitive capacity"; (2) "adolescence is a time of increasing independence with respect to both authority figures and peers; the adolescent is increasingly able to reject the views of others"; and (3) "adolescence is a time when a new self-identity is established and personal ideals and values are formed."[54]

As a result of teenagers' development during adolescence, psychologists generally agree that teenagers are capable of understanding "the difference between 'neutral accommodation' and 'indoctrination.' "[55] Thus, the findings of adolescent psychologists support "the conclusion that fears of adolescent impressionability and immaturity do not justify limitations on high school students' religious expression and activity."[56] This undercuts the Second Circuit's view in *Brandon v. Board of Educa-*

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51. *Id.* at 219-20 (citing James v. Board of Educ., 461 F.2d 566, 574 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972)). If high school students are intellectual and mature enough to discuss complicated political issues without believing the school is supporting a particular party or view, then why are the same students not capable of discussing religion?

52. Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 YALE L.J. 499, 507-09 (1983).

53. *Id.* at 507; *see also* ERICKSON, IDENTITY: YOUTH AND CRISIS (1968); Coleman, *Friendship and the Peer Group in Adolescence*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY 424-25 (J. Adelson ed. 1980); Gallagher & Noppe, *Cognitive Development and Learning*, in UNDERSTANDING ADOLESCENCE 208-16 (J. Adams ed. 1976); Hamacheck, *Development and Dynamics of the Self*, in UNDERSTANDING ADOLESCENCE 162 (J. Adams ed. 1976); Keating, *Thinking Processes and Adolescence*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY 215 (J. Adelson ed. 1980); Kohlberg & Gilligan, *The Adolescent as a Philosopher: The Discovery of the Self in a Postconventional World*, 100 DAEDALUS 1051 (1971); Osterrieth, *Adolescence: Some Psychological Aspects*, in ADOLESCENCE 14-15 (G. Caplan & S. Lebovici eds. 1969); Piaget, *The Intellectual Development of the Adolescent*, in ADOLESCENCE 23 (G. Caplan & S. Lebovici eds. 1969).

54. Note, *supra* note 52, at 507-08.

55. *Id.* at 509.

56. *Id.*

tion[57] "that impressionability and immaturity lead to a violation of the second prong of the *Lemon v. Kurtzman* test."[58] Even the school district in *Bender* officially recognized that "students are sufficiently mature to benefit" from the activity period "committed to student-initiated activities."[59]

In order to avoid *Widmar* and the Supreme Court's support of religious accommodation, the Third Circuit emphasized the immaturity and impressionability of high school students. This approach is misleading because it improperly focuses on a benefit to religious institutions caused by student immaturity. While maturity may be a factor in some circumstances, it is not dispositive. Rather than considering whether some benefit accrues to a religious institution as a consequence of the legislative program, the crucial inquiry under the second prong of the *Lemon* test is whether a program's principal or primary effect is to advance religion.[60] In other words, does a particular policy, neutrally applied to religious organizations, merely accommodate religious interests or does it impermissibly advance those interests?[61] The establishment clause will allow an incidental benefit that accrues to a religious institution, but it will not tolerate action that advances or enforces religion.[62]

In *Widmar* the Supreme Court faced a factual situation strikingly similar to *Bender* and rejected the argument that a decision to accord religious groups a right of equal access to a limited forum would have the primary effect of advancing religion.[63] Rather, the Court held that any benefit to religion would be incidental to the school's policy. The Court based its holding on two factors:

> First, an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. . . . [S]uch a policy "would no more commit the Univer-

57. 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

58. Note, *supra* note 52, at 509. *See Brandon*, 635 F.2d at 978.

59. *Bender*, 741 F.2d at 565 (Adams, J., dissenting). Arguably, students mature enough to decide whether or not to use the activity period are also equally capable of deciding what activity to participate in.

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

61. *Brandon*, 635 F.2d at 978. The *Bender* court apparently failed to consider accommodation of religious interests. It chose to focus on a benefit accruing to religious institutions without considering the accommodation and incidental benefits permitted by the Supreme Court.

62. Lubbock Civil Liberities Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1045 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).

63. *Widmar*, 454 U.S. at 273.

> sity . . . to religious goals" than it is "now committed to the goals of the students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities.
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> Second, the forum is available to a broad class of nonreligious as well as religious speakers; there are over 100 recognized student groups at UMKC. The provision of benefits to so broad a spectrum of groups is an important index of secular effect.[64]

These same factors apply in the high school setting of *Bender*. Groups initiated and directed by students would not result in any imprimatur of state approval of religious sects or practices. The limited forum was made available for all students to use on an equal basis without committing the school to the goals of any one group. Likewise, the broad spectrum of groups available to the high school students is an important factor in showing a secular effect.[65] The establishment clause was not intended to deprive religion of the general benefits available to citizens and institutions alike. "[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all. . . . [Otherwise] a church could not be protected by the police and fire department, or have its public sidewalk kept in repair."[66]

A partial explanation of the result in *Bender* is that the court of appeals applied the wrong standard. Rather than applying the previously announced standard of incidental benefit or primary effect, the Third Circuit declared the appropriate standard to be that a government practice may not "have the effect of communicating a message of government endorsement or disapproval of religion."[67] This ignores the primary effect test adopted by the Supreme Court in *Lemon*.

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64. *Id.* at 274.

65. *See supra* note 8. In *Widmar* the Court found that over 100 groups were allowed to use the university facilities. 454 U.S. at 274. In *Bender*, the court identified approximately 25 groups that were using or had used the high school facilities. 741 F.2d at 544, n.8. A possible explanation for the distinction between the number of groups lies in the broader curriculum offered at universities and the larger and more diversified student body at universities. These factors may explain the larger number of groups utilizing the university facilities. However, these differences do not alter the fact that the Williamsport Area High School offered its facilities to a a broad spectrum of student activities.

66. Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 746-47 (1976).

67. *Bender*, 741 F.2d at 551 (quoting Lynch v. Donnelly, 104 S. Ct. 1355, 1368 (1984) (O'Connor, J., concurring)); *see also supra* note 61. The issue before the court on this prong of the *Lemon* test was whether the primary effect of the action was to inhibit or advance religion. One may infer from this standard that one of the effects of an action

In concluding that this activity would communicate government endorsement of religion, the Third Circuit relied on three arguments. First, the court argued that since high school attendance is compulsory there is an imprimatur of state sponsorship.[68] While this is true, it exaggerates the practical effect of the student activity period. Each student was compelled to be at school during the school day. However, attendance at activities was strictly voluntary, and provision was made for students not desiring to take advantage of the activity period.[69] The court's focus on the compulsory nature of school ignores the purpose of the activity period. In fact, compulsory education is irrelevant to the activity period. "The coercive power of the state in no way favors a student's decision to select any particular activity."[70]

Second, the court reasoned that the presence of a teacher, as a monitor, necessarily imparts "the impression to students that the school's authority . . . is implicated in the relevant activity."[71] This argument was based on the students' immaturity and impressionability. However, as discussed above, high school students are increasingly independent of authority figures and are capable of understanding "the difference between 'neutral accommodation' and 'indoctrination.' "[72] As a result, this argument does not support a finding that the activity failed the second prong of the *Lemon* test.

Third, the *Bender* court misapplied precedent. The court relied on *McCollum v. Board of Education*[73] and distinguished *Zorach v. Clauson*[74] to conclude that when "organized religious activity occurs within a public school" a message of endorsement and encouragement is transmitted.[75] In *McCollum* the Supreme Court was confronted with the use of public school facilities dur-

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may be to inhibit or advance religion so long as that is not the primary effect. The court must determine the point on a continuum at which the breakpoint is reached, beyond which the effect is primary and thus impermissible. The *Bender* court did not apply the primary effect standard. Rather, *Bender* used a lower standard by requiring only that the effect be that religion is advanced. *Bender*, 741 F.2d at 551 (citing Lynch v. Donnelly, 104 S. Ct. 1355, 1368 (1984) (O'Connor, J., concurring)). It is uncertain, but unlikely, that the Supreme Court intended to use such a low standard.

68. *Bender*, 741 F.2d at 553; *see supra* note 4.

69. *Bender*, 741 F.2d at 543; *see supra* note 9 and accompanying text.

70. *Bender*, 741 F.2d at 566 (Adams, J., dissenting).

71. *Id.* at 552-53; *see supra* note 12.

72. Note, *supra* note 52, at 509.

73. 333 U.S. 203 (1948).

74. 343 U.S. 306 (1952).

75. *Bender*, 741 F.2d at 553.

ing school hours. The students were given the option of attending a religion class or attending a class required by the school curriculum. The Court properly held that the first amendment prohibited this type of activity. The Court reasoned that those choosing to attend a religion class were "released in part from their legal duty."[76]

Bender, while factually similar to *McCollum*, is clearly distinguishable. In *McCollum* there was no valid secular purpose in providing classrooms for religious instruction, while in *Bender* the activity period had a secular purpose.[77] Furthermore, in *McCollum* only religious activity was allowed special access to school facilities, while in *Bender* access was "provided to a wide range of groups as part of a larger program of extracurricular activity."[78] Inasmuch as *McCollum* provided access to school facilities only for religious purposes, the primary effect was to promote religion. This argument cannot he made in *Bender*.

The court's erroneous reliance on *McCollum* was partially caused by its incorrect distinction of *Zorach*. In *Zorach* the Supreme Court confronted a New York statute permitting released time religious instruction. The Court approved the practice of allowing students to leave school property during school hours to participate in religious instruction away from school.[79] The Court emphasized that this practice was permissible despite *McCollum* because the released time program did not involve religious instruction in public classrooms or the expenditure of public funds.

The same distinctions apply in *Bender* and make *Bender* more like *Zorach* than *McCollum*. In *Bender* the only funds involved were those required to light and heat the facility. The Supreme Court has clearly held that the "Establishment Clause does not prohibit a de minimis expenditure from the public fisc to incidentally aid religion."[80] The expenditures in *Bender* only

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76. *McCollum*, 333 U.S. at 209-10.

77. *Bender*, 563 F. Supp. at 698.

78. *Bender*, 741 F.2d at 553-54.

79. *Zorach*, 343 U.S. at 315. The *Zorach* court followed *McCollum* but refused to extend it to a release-time program.

80. *Bender*, 563 F. Supp. at 715; *see, e.g.*, Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976) (the Court upheld a state statute that authorized the payment of state funds to any private institution of higher learning within the state—even one formally affiliated with the Catholic church—that met certain minimum criteria and refrained from awarding only seminarian or theological degrees); *Walz v. Tax Comm'n*, 397 U.S. 664 (1969) (the Court held that federal or atate grants of tax exemptions to churches do

incidentally aid religion. Furthermore, the *Bender* court was not confronted with a situation involving religious instruction in public classrooms. While religious discussions would obviously occur, no instruction was involved. Instruction connotes teaching, and teaching requires the presence of an instructor. No teacher from the high school or religious leader from the community would be instructing the students in Petros' meetings. Thus, while religious discussions would take place, no religious instruction would occur in public classrooms.[81]

Apparently recognizing these factual similarities between *Bender* and *Zorach*, the *Bender* court focused on the fact that Petros' meetings would occur on school premises. To the *Bender* court, the off-premises/on-premises distinction was the critical distinction between *McCollum* and *Zorach*. Thus, because the activity in *Bender* occurred on school premises, the Third Circuit concluded that *McCollum* was the most relevant authority. As pointed out above, however, the crucial factors identified by the Supreme Court in *Zorach* were the expenditure of public funds and the existence of religious instruction. The Third Circuit erred by overemphasizing that the activity took place on school premises.

In sum, the Third Circuit failed to focus on the proper criteria for determining whether there had been a violation of the *Lemon* test's second prong. The court found that permitting Petros to meet on school property during the activity hour would have *an* effect of benefiting religion. However, the *Lemon* standard permits incidental benefits of the kind present in *Bender*. In order to fail the second prong of the *Lemon* test, advancement of religion must be the primary effect of the proposed action. That a school's policy has *an* effect of benefiting religion is not enough; it must be the primary effect. While the evidence showed that the activity incidentally benefited religion, the Third Circuit did not find sufficient evidence to conclude that endorsement and advancement of religion was the primary effect of tbe program. The lack of an imprimatur of state approval of

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not violate the establishment clause); Everson v. Board of Educ., 330 U.S. 1 (1947) (the Court held that the first amendment did not prohibit a state from spending tax-raised funds to pay the bus fares of parochial school pupils as part of a general program under which the state paid the fares of pupils attending public and other schools).

81. However, the Supreme Court has declared that "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions." *Zorach*, 343 U.S. at 314.

any religion and the broad spectrum of groups allowed to participate in the activity period mean that the court could have permitted Petros to meet during the activity period without having the primary effect of either advancing or inhibiting religion.

3. Does the activity avoid excessive government entanglement?

The entanglement test was first adopted by the Supreme Court in *Walz v. Tax Commission*[82] and was subsequently made a prong of the *Lemon* test.[83] While the primary effect prong is concerned with the substantive effect of state action, the entanglement analysis focuses on procedural impact.[84]

This prong of the *Lemon* test is not as predictable or concrete as the others. While the prong acknowledges that some entanglement will be permitted, it prohibits "excessive entanglement." Difficulty arises in distinguishing between mere entanglement and excessive entanglement. Despite the lack of clarity in this standard, the better argument is that the entanglement present in *Bender* was something less than excessive.

The Williamsport Area School District pointed to two factors causing excessive entanglement: (1) the expenditure of public funds, and (2) the presence of a teacher to monitor the meetings.[85] In *Bender* the expenditure of public funds could not have resulted in excessive entanglement. The only funds involved were those required to light and heat the facility, which the Supreme Court would permit as an incidental aid to religion.[86]

The use of a faculty advisor to ensure order involves some entanglement, but this entanglement is not excessive. The students' request for a monitor was prompted by the school district's unwritten policy that an adult must be present at student meetings.[87] The mere presence of a teacher to take attendance and maintain order does not result in excessive entanglement of church and state. The teacher's presence is "the functional equivalent of a policeman at a religious rally held in a public

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82. 397 U.S. 664 (1970).

83. *Lemon*, 403 U.S. at 613.

84. Brandon v. Board of Educ., 635 F.2d 971, 979 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 755 (1976).

85. *Bender*, 563 F. Supp. at 715.

86. *See supra* note 80 and accompanying text.

87. *Bender*, 563 F. Supp. at 715-16. This is evidenced by the group's willingness to withdraw the request for an advisor if necessary to avoid excessive entanglement.

park."[88] Both the policeman and the teacher in *Bender* would be "acting to fulfill an obligation to society by ensuring peaceful discussion."[89] As such, the entanglement is only "limited and incidental" and "inevitable in a complex modern society."[90]

The Third Circuit relied on "the fact that Petros would conduct its activity during the school day, within school premises, and under the official supervision of a school monitor."[91] The court found that the cumulative effect of these circumstances created the type of "intimate and continuing relationship between church and state" that the entanglement test was intended to prevent.[92] Support for this position can be drawn from the Second Circuit's decision in *Brandon v. Board of Education*.[93] The court in that case observed that "if the state must engage in continuing administrative supervision of nonsecular activity, church and state are excessively intertwined."[94]

If the school district granted Petros the opportunity to meet during the school day, on school premises, and under "official supervision," Petros would enjoy only the rights and privileges available to all other groups. Given the wide range of interests accommodated by the activity period, these benefits should be classified as general or incidental. Religious institutions are permitted to take advantage of such benefits.[95] Neutrality is the requirement. The Supreme Court has stated:

> The State must confine itself to secular objectives, and neither advance nor impede religious activity. . . . [T]he State's efforts to perform a secular task, and at the same time avoid aiding in the performance of a religious one, may not lead it into such an intimate relationship with religious authority that it appears either to be sponsoring or to be excessively interfering with that authority.[96]

The school district would actually be risking "greater 'entanglement' by attempting to enforce its exclusion of 'religious

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88. *Id.* at 715 (citing O'Hair v. Andrus, 613 F.2d 931, 935 (D.C. Cir. 1979)).

89. *Bender*, 563 F. Supp. at 715.

90. *Id.* (quoting Larkin v. Grendel's Den, Inc., 103 S. Ct. 505, 510 (1982)); *see supra* note 12.

91. *Bender*, 741 F.2d at 555.

92. *Id.* (quoting *Lemon*, 403 U.S. at 621-22).

93. 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

94. *Id.* at 979.

95. Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 746 (1976); *see supra* note 66 and accompanying text.

96. Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 747-48 (1976).

worship' and 'religious speech.' "[97] Any attempt to exclude would force the school district to determine which "words and activities fall within 'religious worship and religious teaching.' "[98] As the Supreme Court has noted, this task would be nearly impossible "in an age where many and various beliefs meet the constitutional definition of religion."[99]

Thus, the third and final prong of the *Lemon* test—whether the activity avoids excessive entanglement—is also answered affirmatively. The entanglement involved in *Bender* was incidental and general, not excessive. There is little threat that the government involvement will risk the politicization of religion. Furthermore, the existence of continuing government surveillance is greater when religious activities are prohibited.[100]

Inasmuch as there was no violation of any prong of the *Lemon* tripartite test, the failure of the school district's establishment clause defense is apparent. The school district could have succeeded by answering only one of the three questions negatively. The evidence indicated that each question should have been answered in the affirmative. Therefore, no constitutional confiict was involved, and the students' free speech right should have been enforced by permitting Petros to meet during the activity period.

B. Balancing the Conflict Between Free Speech and the Establishment Clause

Even after finding a violation of the establishment clause, the Third Circuit was still "faced with a constitutional conflict of the highest order."[101] The students argued that the first amendment right of free speech required the school to grant them the opportunity to meet. On the other hand, the school district argued that the first amendment prohibits the establishment of religion and barred it from granting such permission.[102] The court conceded that the students enjoyed the right of free speech to engage in religious activity; however, it also held that allowing such an "activity would violate the mandate of the Es-

97. Widmar v. Vincent, 454 U.S. 263, 272 n.11 (1981).
98. *Id.*
99. *Id.* (quoting O'Hair v. Andrus, 613 F.2d 931, 936 (D.C. Cir. 1979)).
100. *Bender*, 741 F.2d at 568 (Adams, J., dissenting).
101. *Id.* at 557.
102. *Bender*, 563 F. Supp. at 699.

tablishment Clause."[103] Even if allowing Petros to meet violated the establishment clause, which the first part of this article demonstrates was clearly not the case, the *Bender* court incorrectly struck the balance in favor of the establishment clause.

There is little helpful precedent available to determine the proper balance between the establishment clause and free speech guarantees. Other courts have addressed comparable issues, but none have decided the question raised in the *Bender* case.[104] Consequently, the Third Circuit was faced with a case of first impression.[105]

The Third Circuit used a balancing test that required the court to weigh "the competing interests protected by each constitutional provision, given the specific facts of the case, in order to determine under what circumstances the net benefit which accrues to one of these outweighs the net harm done to the other."[106] The court reasoned that the balancing test was proper because the Framers of the Constitution must bave contemplated compromise and accommodation between conflicting con-

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103. *Bender*, 741 F.2d at 557.

104. Lubbock Civil Liberities Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983) (the court considered a suit brought against a school district challenging that district's stated policy of accommodating individual student prayer; no student claiming free speech rights was a party to that suit, however, and thus the constitutional conflict present in *Bender* was not before the *Lubbock* court); Brandon v. Board of Educ., 635 F.2d 971, 980 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) (the court did not address the conflict present in *Bender* since it found that "a high school is not a 'public forum' where religious views can be freely aired," and therefore there was no countervailing free speech right).

105. One day after the Third Circuit reached its decision in *Bender*, Congress adoptad the Equal Access Act, Pub. L. No. 98-377, 98 Stat. 1302 (1984) (codified at 20 U.S.C. §§ 4071-4074). The Act, signed by the President on 11 August 1984, makes it

> unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wisb to conduct a meeting within that limited forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

Id. at § 802(a), 98 Stat. 1302, 1302. The adoption of the Act may have a significant impact on *Bender* and cases that are factually similar. Ths Act clearly prohibits what *Bender* requires: discrimination against student groups who wish to meet and discuss religious topics within the scope of a limited forum.

However, the constitutionality of tbe Act has not been established. If the Supreme Court affirms the decision in *Bender*, then the Act may be unconstitutional as a violation of the establishment clause. On the other hand, if *Bender* is reversed and the arguments proposed in this note are applied to high schools, then the Act would not only be constitutional but also aupportive of the analysis of this note. Inasmuch as no court has, as of this date, interpreted the Act, no certain conclusions may be reached on the subject.

106. *Bender*, 741 F.2d at 559.

stitutional provisions.[107] The court felt that its role in determining which of the two conflicting constitutional rights should prevail in a given situation "is to maximize . . . the overall measure of the fundamental rights created by the Framers."[108]

While the question was concededly a close one, the Third Circuit held that in this case there would be a net benefit in constitutional rights if the establishment clause prevailed.[109] Thus, the *Bender* court concluded that the students' interest in free speech was outweighed by and must be compromised in favor of the establishment clause. The court cited three reasons to support its conclusion. First, since a limited forum had been created, the school authorities had full discretion to determine who could take advantage of it. Second, public schools are not forums for religious expression and, therefore, freedom of expression is conditional. Third, if the right to free speech prevailed in this instance, then the establishment clause dangers would be unavoidable and largely irremediable.[110]

The rationale and result of *Bender* cannot survive an examination of controlling precedent. The *Bender* court's first reason for balancing in favor of the establishment clause is not in harmony with pertinent case law. In *Widmar v. Vincent*[111] the Supreme Court held that any person entitled to be at school is endowed with first amendment rights of speech and association. Neither students nor teachers "shed their constitutional rights

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107. *Id.* at 558. Finding two constitutional rights in conflict, the court of appeals had to balance the two conflicting rights and favor one constitutional right over the other. In *Widmar* the Supreme Court indicated that under certain circumstances "the Establishment Clause 'may' provide a compelling state interest which could override free speech rights." *Id.* at 558 (citing *Widmar*, 454 U.S. at 271). However, the Court has never intimated that the establishment clause should generally supercede free speech rights. A constitutional hierarchy placing the establishment clause over the right to free speech was never intended. Thus, the proper test when these two constitutional rights clash is one that balances the free speech interest against the establishment clause interest. This requires a close analysis of the facts and circumstances of the given conflict. If the establishment clause interest outweighs the free speech interest, then there is a compelling state interest to restrict speech, and the right to free speech should give way to the establishment clause. On the other hand, if the right to free speech outweighs the establishment clause violation then the right to free speech should prevail. This was the test adopted by the court of appeals. It is in harmony with the Supreme Court's enunciation of the hierarchy of constitutional rights.

108. *Id.* at 559.

109. *Id.* at 559-60.

110. *Id.* The dangers the court spoke about are advancement of religion and excessive entanglement.

111. 454 U.S. 263, 268-69 (1981).

to freedom of speech or expression at the schoolhouse gate."[112] These rights are not absolute, but rather limited to fit the educational environment. However, when school authorities create a forum generally open to student groups, they must justify their discriminations and exclusions under applicable constitutional principles.[113] Therefore, once a limited forum has been created, school authorities do not have absolute or full discretion to decide who can take advantage of the forum. They are bound, when excluding student groups, by applicable constitutional principles.

The *Bender* court's second reason was that public schools are not a forum for religious expression. While this may be true as a general statement, it is not controlling in all factual settings. In *Perry Education Association v. Perry Local Educator's Association*[114] the Supreme Court held that when a limited forum is created the constitutional right of equal access extends to all entities of similar character and purpose. Coexistent with the creation of a limited or nonpublic forum is the right

> to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.[115]

The *Bender* court found that the Williamsport Area School District had created a limited or nonpublic forum.[116] Accordingly, it permitted the school district to distinguish between groups if, first, the right of access extended to all entities of similar character and, second, the distinctions were reasonable in accordance with the purpose of the forum.

Petros was similar in character to the other twenty-five student groups permitted to meet at Williamsport Area High School. It was a student-initiated group that met all the qualifications to be granted club status.[117] Thus, fairness and neutrality mandate that Petros be allowed to participate in the activity

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112. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969).
113. *Widmar*, 454 U.S. at 267.
114. 460 U.S. 37 (1983).
115. *Id.* at 49.
116. *Bender*, 741 F.2d at 549-50.
117. *Id.* at 544.

period. After having created a limited forum, the school district must justify its discriminations and exclusions. The school district's only justification for excluding Petros was that the establishment clause demanded it. However, an equal access policy is not incompatible with the establishment clause.[118] The purpose of the activity period was to encourage students to organize clubs and hold meetings that contributed "to the intellectual, physical, or social development of the students."[119] The response of the school district and principal to Petros demonstrates that the group met the purpose requirement of the activity period.[120] As a result, excluding Petros was not "reasonable in light of the purpose which the forum at issue serves."[121]

The final factor that caused the *Bender* court to tip the scale in favor of the establishment clause was that the establishment clause dangers—advancement of religion and excessive government entanglement—would be unavoidable and irremediable. This factor simply begs the question. Whenever a balancing test is implemented, one constitutional right will prevail at the expense of the other and some constitutional protection unavoidably will be abridged.[122] Thus, this factor should not play a significant part in the balancing test.

The balancing test weighs competing interests to determine which right should be enforced to result in a net benefit to constitutional rights.[123] This determination requires a close examination of the facts and circumstances of each case.

Enforcing the right of free speech in *Bender* would result in a net benefit of constitutional rights. This is demonstrated by several factors. First, by requiring the school district to permit Petros to meet, the court would not be creating a situation that results in any imprimatur of state approval of religious sects or

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118. *Widmar*, 454 U.S. at 271.

119. *Bender*, 741 F.2d at 544.

120. *See supra* note 13 and accompanying text.

121. *Perry*, 460 U.S. at 49.

122. *Bender*, 741 F.2d at 559. The result of concluding that the establishment clause violations outweighed the right to free speech is that the lost interest in free speech becomes irremediable. The same would be true of establishment clause rights if the right to free speech was enforced at the expense of the establishment clause.

123. *Id.* In the normal situation, "once a constitutional right has been duly established, the courts may not refuse to give it effect by rationalizing away its importance in a particular setting." *Id.* at 559 n.28. The analysis presented under the balancing test is limited "to the unique situation presented here, in which two constitutional provisions are in direct conflict, and thus where it is impossible to avoid deciding which of the two must control." *Id.*

practices. This is due largely to the fact that Petros is a self-initiated and self-directed group, rather than a state-sponsored or state-endorsed group. Further, the monitor was the only person present associated with the state. The monitor's conduct was benign and neutral. The monitor was responsible for attendance and keeping peace. At the only official Petros meeting, the monitor spent the time correcting papers.[124]

Second, the slight expenditure of public funds does not result in excessive government entanglement. The only funds involved would be the fixed expenses of lighting and heating one room for thirty minutes. Supreme Court decisions have upheld the conclusion that "a de minimis expenditure from the public fisc to incidentally aid religion" does not result in an establishment clause violation.[125]

Finally, by permitting Petros to meet, the school district would not be advancing religion, but rather accommodating a group that is similar in character to the other groups participating in the activity period. In other words, the court would only be making opportunities available to Petros that the school district had already made available to others. Thus, there would be a net benefit in constitutional rights if the students' right of free speech was enforced at the expense of the establishment clause.

III. Conclusion

An in-depth analysis of the *Lemon* tripartite test reveals that there was no establishment clause violation in *Bender*. As a result, there was no conflict between free speech and the establishment clause for the court to decide. The court should have enforced the students' right of free speech and permitted them to meet during the activity period. Assuming that an establishment clause violation occurred in *Bender*, the court was still faced with a constitutional conflict between freedom of speech and establishment of religion. The Third Circuit properly created a balancing test to weigh the competing interests. However, contrary to the conclusion reached by the Third Circuit, the facts and circumstances of *Bender* support a finding that a net benefit to constitutional rights would accrue if the students'

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124. *See supra* note 12.

125. *Bender*, 563 F. Supp. at 715; *see supra* note 86 and accompanying text.

right of free speech was enforced over the establishment clause claim.

John E. Leach