



10-1981

Widmar v. Vincent

Lewis F. Powell Jr.

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Inclined to think
CA 8 is right, & no
clear conflict

U. of Mo. sought to restrict
a student religious group from
holding weekly bible meetings in
student center.

In a suit by the group (Resp),
the DC sustained the University
ban - holding that allowing religious
meetings on state prop. violated the
Establishment Clause.

CA 8 reversed, holding the
student center was a "public forum,"
used by variety of students groups.
The ban denied free exercise

PRELIMINARY MEMORANDUM

January 9, 1980 Conference of religion.
List 1, Sheet 3

No. 80-689

WIDMAR

v.

Also probably ~~denied~~
freedom of speech. Healy v. James
Cert to CA 8. (Gibson, Heaney,
Stephenson) (En Banc Denied)

VINCENT (Student Org. at
U. of Mo.)

Federal/Civil

Timely

1. SUMMARY: Whether a state university consistent with the
Free Exercise Clause may prohibit a recognized student group from
using university facilities for religious worship services or
teaching.

2. FACTS AND DECISION BELOW: Resp is an officially
recognized student organization on the campus of the University

Discuss. Whether a state university is a "public
forum" for Free-Exercise purposes seems an important ques-
tion.

GM

of Missouri. From 1973 until 1977 resp sought and obtained permission to use university facilities for its weekly bible studies and worship services. In 1977, the university prohibited this practice on the ground that resp's meetings violated regulations adopted by the Board of Curators in 1972. The regulations provide that no university buildings may be used for purposes of religious worship or religious teaching by their student or nonstudent groups.

Eleven student members of resp brought suit in federal DC claiming that the university had deprived them of their rights to free exercise of religion and freedom of speech. The federal DC found that the University's ban on religious activities in university owned buildings is required by the Establishment Clause. A University policy permitting regular religious services in university buildings would have the primary effect of advancing religion. No free exercise right was violated since it did not appear that the practice of holding religious services in a university owned building is a matter of deep religious conviction to these plaintiffs. It also found that the infringement, if any, of free exercise rights was justified by a compelling state interest - Missouri's long history of strict separation of church and state.

The CA reversed. The CA first noted that the University had undertaken a policy of permitting a wide variety of student groups to use the student center and other facilities for meeting, discussions, and so on. It has created an "open forum" for the activities of its recognized student groups. The

University's only condition is that no religious worship or religious teaching may take place. The Court held that if the University's limitation applied to all religious speech, it would be invalid because the university has no right to regulate content.

The Court then rejected the University's contention that the regulation was constitutionally required by the Establishment Clause. The CA conceded that a neutral policy would have a secular purpose and would avoid an entanglement with religion, but it disagreed with the conclusion that such a policy would have the primary effect of advancing religion. 'An open door policy would no more commit the University to religious goals than they are now committed to the goals of the SDS, for example. See Healy v. James 408 U.S.169 (1972). Moreover, in contrast with a neutral policy, the regulation has the primary effect of inhibiting religion. It singles out and stigmatizes certain religious activity and in consequence discredits religious groups.

Finally, the Free Exercise Clause compels government to make some accommodation to religious realities and needs. Equal access to a public facility is such an accommodation. See O'Hair v. Andrus, 613 F. 2d. 913 (DC Cir. 1979) where the CA held the mall could be used for the Pope. This case is distinguishable from those that involve the requested use of classrooms for prayer or bible study by high school student groups. High school students require more supervision than do young adults of college age and

the high school, unlike the university, is not a "public forum" or a self contained community.

On request for hearing en banc Judges Bright and McMillan dissented primarily on the grounds that the Missouri Constitution is more restrictive than the First Amendment and specifically prohibits entanglement of church and state. .

3. CONTENTIONS: Petr's claim that this decision conflicts with a federal DC opinion which had previously addressed the issue of religious worship in a public college. Ditman v. Western Washington University __F. Supp.__ (W.D. Wash. 1980) (on appeal to the CA 9). The decision below ignores the pertinent Supreme Court Establishment Clause cases and errs because it requires a public university to open up its buildings and grounds supported and maintained by public tax monies, to regular religious worship services. Cf. Tilton v. Richardson, 430 U.S. 672 (1971). It also contends that the decision below ignored state constitutional issues. Petrs distinguish this from O'Hair in that a mall, unlike a university, is multi-purposed and must be open to the public. The mall is an area, unlike a college campus, where any group can go and "make a statement".

4. DISCUSSION: In my view, there is no ~~no~~ Establishment Clause problem with allowing a variety of religious organizations to use public buildings for such things as bible study. Whether or not an open door policy is required by the Free Exercise Clause is a more difficult question. I tend to agree with the result reached by the CA 8.

The CA 2 recently decided in Brandon v. Board of Education of Guilderland, 49 L.W. 2355 (1980) that a school board's refusal to permit high school students to conduct prayer meetings on school premises does not violate the Free Exercise Clause. There the court found that the school's rule was not restrictive and was supported by a compelling state interest in the state's desire to avoid Establishment Clause problems. Moreover, "to an impressionable student the mere appearance of secular involvement in religious activities might indicate that the state has placed imprimatur on particular religious creed". The Court distinguished this case from a university where those facilities have been identified as a "public forum". Thus, even if the CA 2 is correct in Brandon, an question not free from doubt, this case is distinguishable.

There are three responses, including two amicus.

12/9/80
JBP

Knauss

Op in petn.

I think that Justice White made a good argument for considering this question important. He also shows that a real conflict exists.

GM

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

NO. 80-689 - WIDMAR V. VINCENT Circulated: 9 FEB 1981

Recirculated: _____

JUSTICE WHITE, dissenting,

In this case, the University of Missouri - Kansas City, which permits student organizations to use certain university facilities for political, cultural, educational, social and recreational events, prohibits the use of similar facilities for the purpose of either religious worship or religious teaching. A religiously-oriented student group brought suit challenging the regulation on various constitutional grounds, including the claim that the regulation infringed the constitutional rights of its members to practice their religion and to engage in religious speech. The district court sustained the regulation, holding among other things, "that the university's present ban on religious services in its buildings is required by the establishment clause" of the United States Constitution. Chess v. Widmar, 480 F.Supp. 907, 916 (WD Mo. 1979).

The Court of Appeals for the Eighth Circuit reversed. That court held that religious speech is protected under the First and Fourteenth Amendments and that since the effect of the regulation was to single out those groups involved in religious activities and communication, the regulation was unconstitutional because it burdened the constitutional rights of the groups' members and was not justified by a compelling state interest in avoiding an establishment of religion. The court found that an open access

rule permitting all student groups to use the facilities would not violate the Establishment Clause since the University could not be said to be promoting any one religion. Indeed, the Court of Appeals held, because the prohibition had the effect of inhibiting religion and creating an entanglement between religion and the University in that school officials would be called upon to determine what proposed events involved religious worship or teaching, the regulation itself violated the Establishment Clause.

The First Amendment prohibits any law "respecting an establishment of religion, or prohibiting the free exercise thereof." These two clauses, both cast in absolute terms, are in considerable tension, and constitutional adjudication under these provisions requires a balanced accommodation of their competing values. See Walz v. Tax Commission, 397 U.S. 664, 668-669 (1970). Typically, Establishment Clause cases have involved either compelled religious training or exercises in public schools, see Zorach v. Clauson, 343 U.S. 306 (1952); Engel v. Vitale, 370 U.S. 421 (1962), or government aid to religious organizations, see Lemon v. Kurtzman, 403 U.S. 602 (1971); Tilton v. Richardson, 403 U.S. 672 (1971). In my view, the above decisions do not provide clear guidance on the question presented in this case. Here, we are faced with a fundamentally different question concerning the extent to which a state may act to assure that it is not using its facilities to promote religious activities. Even assuming that a state university could, if it desired, provide open access to its facilities to all groups

without violating the Establishment Clause, cf. Zorach, supra, the question remains whether a university must provide such access. Accordingly, the cases permitting a state to provide access to a public facility for a religious purpose are not necessarily apposite to the issue presented here. Cf. O'Hair v. Andrus, ___ U.S.App.D.C. ___, 613 F.2d 931 (1979) (permitting the Pope to use government property for a religious service since government had a policy of open access to the facility).

Certainly, the asserted goal of assuring the state's independence from any religious activity is valid. States should be provided some range of discretion in forwarding their legitimate nonentanglement interest under the Establishment Clause. While it may appear that permitting a religious group to use university meeting rooms does not involve much entanglement with religion, it may well be that a state has the constitutional power to make that determination for itself.¹ The Court of Appeals determined that the state had not demonstrated a compelling state interest justifying the challenged prohibition. But no decision of this Court has explicitly determined that the compelling state interest test, as opposed to some lesser standard, is appropriate in a case involving competing First

¹ Missouri's determination to pursue the separation of church and state is reflected in its constitution. See, e.g., Americans United v. Rogers, 538 S.W.2d 711, 720 (Mo.), cert. denied, 429 U.S. 1029 (1976); Paster v. Tussey, 512 S.W.2d 97, 101-102 (Mo. 1974), cert. denied sub nom. Reynolds v. Paster, 419 U.S. 1111 (1975). It has been noted that Missouri has a long history of maintaining "a very high wall between church and state." Luetkemeyer v. Kaufmann, 364 F.Supp. 376 (W.D.Mo. 1973), aff'd, 419 U.S. 888 (1974).

Amendment values. Thus, this case poses a difficult and important question concerning the relationship between the Establishment Clause and the Free Exercise Clause.

Review is also warranted because lower state and federal courts have reached divergent results involving similar claims by religious groups against state rules involving educational institutions. Compare Brandon v. Board of Education, ___ F.2d ___

(CA2 Nov.17, 1980) (upholding high school officials' refusal to permit use of school building for religious groups); Hunt v. Board of Education, 321 F.Supp. 1263 (SD W.Va. 1971) (upholding high school regulation prohibiting use of school building for religious purposes);² Dittman v. Western Washington University, ___ F.Supp. ___, No. 79-1189V (W.D. Wash. 1980), appeal docketed, No. 80-3120 (9th Cir. 1980) (upholding university rule charging religious-oriented groups for rooms while providing such facilities free to nonreligious student groups) with Keegan v. University of Delaware, 349 A.2d 14 (Del. 1975), cert. denied, 424 U.S. 934 (1976) (rejecting university's attempt to enjoin religious group from conducting services in the dormitory).

Given that a conflict exists on an important and difficult question of constitutional law, I would grant the writ of certiorari.

² The issues involved in Brandon and Hunt concerned high schools. The Court of Appeals in this case distinguished those cases on this ground, finding that a university is an open forum thus limiting any restraints on First Amendment values which might be otherwise possible. While this distinction may have some legitimacy, and indeed may ultimately control this case, the state's interest in separation of church and state is equally valid in both contexts.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 17, 1981

*I like you
Byron
2/19*

RE: No. 80-689 Widmar v. Vincent

Dear Byron:

Will you please add at the foot of your dissent
in the above:

"Justice Brennan would grant the
petition for certiorari."

Sincerely,

Bill

Mr. Justice White

cc: The Conference

2/17/81

*This is nothing new. Justice
Brennan voted to grant at the
conferences.*

GM

Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
✓ Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 4

From: Mr. Justice White

Circulated: _____

Recirculated: 17 FEB 1981

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

GARY E. WIDMAR ET AL. v. CLARK VINCENT ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80-589. Decided February —, 1981

JUSTICE WHITE, dissenting.

In this case, the University of Missouri-Kansas City, which permits student organizations to use certain university facilities for political, cultural, educational, social and recreational events, prohibits the use of similar facilities for the purpose of either religious worship or religious teaching. A religiously-oriented student group brought suit challenging the regulation on various constitutional grounds, including the claim that the regulation infringed the constitutional rights of its members to practice their religion and to engage in religious speech. The District Court sustained the regulation, holding among other things, "that the university's present ban on religious services in its buildings is required by the establishment clause" of the United States Constitution. *Chess v. Widmar*, 480 F. Supp. 907, 916 (WD Mo. 1979).

The Court of Appeals for the Eighth Circuit reversed. That court held that religious speech is protected under the First and Fourteenth Amendments and that since the effect of the regulation was to single out those groups involved in religious activities and communication, the regulation was unconstitutional because it burdened the constitutional rights of the groups' members and was not justified by a compelling state interest in avoiding an establishment of religion. The court found that an open access rule permitting all student groups to use the facilities would not violate the Establishment Clause since the University could not be said to be promoting any one religion. Indeed, the Court of Appeals held, because the prohibition had the effect of inhibiting religion and creating an entanglement between religion and the

University in that school officials would be called upon to determine what proposed events involved religious worship or teaching, the regulation itself violated the Establishment Clause.

The First Amendment prohibits any law "respecting an establishment of religion, or prohibiting the free exercise thereof." These two clauses, both cast in absolute terms, are in considerable tension, and constitutional adjudication under these provisions requires a balanced accommodation of their competing values. See *Walz v. Tax Commission*, 397 U. S. 664, 668-669 (1970). Typically, Establishment Clause cases have involved either compelled religious training or exercises in public schools, see *Zorach v. Clauson*, 343 U. S. 306 (1952); *Engel v. Vitale*, 370 U. S. 421 (1962), or government aid to religious organizations, see *Lemon v. Kurtzman*, 403 U. S. 602 (1971); *Tilton v. Richardson*, 403 U. S. 672 (1971). In my view, the above decisions do not provide clear guidance on the question presented in this case. Here, we are faced with a fundamentally different question concerning the extent to which a State may act to assure that it is not using its facilities to promote religious activities. Even assuming that a state university could, if it desired, provide open access to its facilities to all groups without violating the Establishment Clause, cf. *Zorach*, *supra*, the question remains whether a university *must* provide such access. Accordingly, the cases permitting a State to provide access to a public facility for a religious purpose are not necessarily apposite to the issue presented here. Cf. *O'Hair v. Andrus*, — U. S. App. D. C. —, 613 F. 2d 931 (1979) (permitting the Pope to use government property for a religious service since government had a policy of open access to the facility).

Certainly, the asserted goal of assuring the State's independence from any religious activity is valid. States should be provided some range of discretion in forwarding their legitimate nonentanglement interest under the Establishment Clause. While it may appear that permitting a religious group to use university meeting rooms does not involve much entanglement with religion, it may well be that a State has

the constitutional power to make that determination for itself.¹ The Court of Appeals determined that the State had not demonstrated a compelling state interest justifying the challenged prohibition. But no decision of this Court has explicitly determined that the compelling state interest test, as opposed to some lesser standard, is appropriate in a case involving competing First Amendment values. Thus, this case poses a difficult and important question concerning the relationship between the Establishment Clause and the Free Exercise Clause.

Review is also warranted because lower state and federal courts have reached divergent results involving similar claims by religious groups against state rules involving educational institutions. Compare *Brandon v. Board of Education*, — F. 2d — (CA2 Nov. 17, 1980) (upholding high school officials' refusal to permit use of school building for religious groups); *Hunt v. Board of Education*, 321 F. Supp. 1263 (SD W. Va. 1971) (upholding high school regulation prohibiting use of school building for religious purposes); ² *Dittman v. Western Washington University*, — F. Supp. —, No. 79-1189V (WD Wash. 1980), appeal docketed, No. 80-3120 (CA9 1980) (upholding university rule charging religious-oriented groups for rooms while providing such facilities free to nonreligious student groups) with *Keegan v. University of Delaware*, 349

¹ Missouri's determination to pursue the separation of church and state is reflected in its constitution. See, e.g., *Americans United v. Rogers*, 538 S. W. 2d 711, 720 (Mo.), cert. denied, 429 U. S. 1029 (1976); *Paster v. Tussey*, 512 S. W. 2d 97, 101-102 (Mo. 1974), cert. denied *sub nom. Reynolds v. Paster*, 419 U. S. 1111 (1975). It has been noted that Missouri has a long history of maintaining "a very high wall between church and state." *Lustkemeyer v. Kaufmann*, 364 F. Supp. 376 (WD Mo. 1973), *aff'd*, 419 U. S. 888 (1974).

² The issues involved in *Brandon* and *Hunt* concerned high schools. The Court of Appeals in this case distinguished those cases on this ground, finding that a university is an open forum thus limiting any restraints on First Amendment values which might be otherwise possible. While this distinction may have some legitimacy, and indeed may ultimately control this case, the state's interest in separation of church and state is equally valid in both contexts.

A. 2d 14 (Del. 1975), cert. denied, 424 U. S. 934 (1976) (rejecting university's attempt to enjoin religious group from conducting services in the dormitory).

Given that a conflict exists on an important and difficult question of constitutional law, I would grant the writ of certiorari.

JUSTICE BRENNAN would grant the petition for certiorari. (

persuader me
WHP

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

3rd DRAFT

Circulated: _____

Recirculated: 19 FEB 1981

SUPREME COURT OF THE UNITED STATES

GARY E. WIDMAR ET AL. V. CLARK VINCENT ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80-889. Decided February —, 1981

JUSTICE WHITE, with whom JUSTICE POWELL joins,
dissenting.

In this case, the University of Missouri-Kansas City, which permits student organizations to use certain university facilities for political, cultural, educational, social and recreational events, prohibits the use of similar facilities for the purpose of either religious worship or religious teaching. A religiously-oriented student group brought suit challenging the regulation on various constitutional grounds, including the claim that the regulation infringed the constitutional rights of its members to practice their religion and to engage in religious speech. The District Court sustained the regulation, holding among other things, "that the university's present ban on religious services in its buildings is required by the establishment clause" of the United States Constitution. *Chess v. Widmar*, 480 F. Supp. 907, 916 (WD Mo. 1979).

The Court of Appeals for the Eighth Circuit reversed. That court held that religious speech is protected under the First and Fourteenth Amendments and that since the effect of the regulation was to single out those groups involved in religious activities and communication, the regulation was unconstitutional because it burdened the constitutional rights of the groups' members and was not justified by a compelling state interest in avoiding an establishment of religion. The court found that an open access rule permitting all student groups to use the facilities would not violate the Establishment Clause since the University could not be said to be promoting any one religion. Indeed, the Court of Appeals held, because the prohibition had the effect of inhibiting reli-

gion and creating an entanglement between religion and the University in that school officials would be called upon to determine what proposed events involved religious worship or teaching, the regulation itself violated the Establishment Clause.

The First Amendment prohibits any law "respecting an establishment of religion, or prohibiting the free exercise thereof." These two clauses, both case in absolute terms, are in considerable tension, and constitutional adjudication under these provisions requires a balanced accommodation of their competing values. See *Walz v. Tax Commission*, 397 U. S. 664, 668-669 (1970). Typically, Establishment Clause cases have involved either compelled religious training or exercises in public schools, see *Zorach v. Clauson*, 343 U. S. 306 (1952); *Engel v. Vitale*, 370 U. S. 421 (1962), or government aid to religious organizations, see *Lemon v. Kurtzman*, 403 U. S. 602 (1971); *Tilton v. Richardson*, 403 U. S. 672 (1971). In my view, the above decisions do not provide clear guidance on the question presented in this case. Here, we are faced with a fundamentally different question concerning the extent to which a State may act to assure that it is not using its facilities to promote religious activities. Even assuming that a state university could, if it desired, provide open access to its facilities to all groups without violating the Establishment Clause, cf. *Zorach*, *supra*, the question remains whether a university must provide such access. Accordingly, the cases permitting a State to provide access to a public facility for a religious purpose are not necessarily apposite to the issue presented here. Cf. *O'Hair v. Andrus*, — U. S. App. D. C. —, 613 F. 2d 931 (1979) (permitting the Pope to use government property for a religious service since government had a policy of open access to the facility).

Certainly, the asserted goal of assuring the State's independence from any religious activity is valid. States should be provided some range of discretion in forwarding their legitimate nonentanglement interest under the Establishment Clause. While it may appear that permitting a religious group to use university meeting rooms does not involve much

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entanglement with religion, it may well be that a State has the constitutional power to make that determination for itself.¹ The Court of Appeals determined that the State had not demonstrated a compelling state interest justifying the challenged prohibition. But no decision of this Court has explicitly determined that the compelling state interest test, as opposed to some lesser standard, is appropriate in a case involving competing First Amendment values. Thus, this case poses a difficult and important question concerning the relationship between the Establishment Clause and the Free Exercise Clause.

Review is also warranted because lower state and federal courts have reached divergent results involving similar claims by religious groups against state rules involving educational institutions. Compare *Brandon v. Board of Education*, — F. 2d — (CA2 Nov. 17, 1980) (upholding high school officials' refusal to permit use of school building for religious groups); *Hunt v. Board of Education*, 321 F. Supp. 1263 (SD W. Va., 1971) (upholding high school regulation prohibiting use of school building for religious purposes);² *Dittman v. Western Washington University*, — F. Supp. —, No. 79-1189V (WD Wash. 1980), appeal docketed, No. 80-3120 (CA9 1980) (upholding university rule charging religious-oriented groups for rooms while providing such facilities free to nonreligious

¹ Missouri's determination to pursue the separation of church and state is reflected in its constitution. See, e. g., *Americans United v. Rogers*, 538 S. W. 2d 711, 720 (Mo.), cert. denied, 429 U. S. 1029 (1976); *Paster v. Tussey*, 512 S. W. 2d 97, 101-102 (Mo. 1974), cert. denied *sub nom. Reynolds v. Paster*, 419 U. S. 1111 (1975). It has been noted that Missouri has a long history of maintaining "a very high wall between church and state." *Lutkemeyer v. Kaufmann*, 364 F. Supp. 376 (WD Mo. 1973), aff'd, 419 U. S. 888 (1974).

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student groups) with *Keegan v. University of Delaware*, 349 A. 2d 14 (Del. 1975), cert. denied, 424 U. S. 934 (1976) (rejecting university's attempt to enjoin religious group from conducting services in the dormitory).

Given that a conflict exists on an important and difficult question of constitutional law, I would grant the writ of certiorari.

JUSTICE BRENNAN would grant the petition for certiorari,

February 19, 1981

No. 80-689 Widmar v. Vincent

Dear Byron:

Please add my name to your dissent from denial of
cert.

Sincerely,

Mr. Justice White

LFP/lab

Copies to the Conference

WIDMAR

VB.

VINCENT

Relisted for Mr. Justice White.

4ve joined
BRW

Grant

[illegible]

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

✓

November 18, 1981

Re: No. 80-689 Widmar v. Vincent

Dear Lewis:

Please join me.

Sincerely,

Wm

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

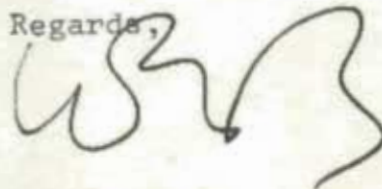
November 18, 1981

Re: 80-689 - Widmar v. Vincent

Dear Lewis:

I join.

Regards,

A large, stylized handwritten signature, likely of Justice Powell, written in dark ink.

Justice Powell

Copies to the Conference

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Nov 25
before

November 18, 1981

9 go
to Conference.

Re: No. 80-689 - Wildmar v. Vincent

Dear Lewis:

This will confirm my joinder in your third draft circulation of November 17.

Sincerely,



Justice Powell

cc: The Conference

[note to Justice Powell only]

→ P.S. I hope that Byron will see fit to eliminate his citation of United States v. Lee, on page 8 of his dissenting opinion, so that this case need not be held until Lee comes down.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 21, 1981

Dear Mr. Lind:

Enclosed please find page proofs for Polk County, No. 80-824, and Widmar, No. 80-689.

The Polk County proofs seem fine. A lineup is still unavailable. Justice Blackmun dissents. Justice Marshall has not yet joined any opinion. The other Justices have all joined the opinion of the Court. The Chief Justice, although he has joined, will also file a brief concurrence. In sum, we are waiting for Justice Marshall to complete the lineup.

I have indicated two sets of changes on the Widmar proofs. The first occur in the first paragraph of the second page; their import is essentially to convey the contingency surrounding claims about the effects of policies that have not actually been implemented. The more important change involves the second paragraph. Substantive changes in Part III B of the opinion will require this section of the syllabus to be changed substantively as well. I have therefore included a xerox copy of part III B of the most recent circulated draft.

The tentative in Widmar calls for Justice White to dissent and Justice Stevens to file an opinion concurring in the judgment of the Court. All other members are tentatively committed to join the opinion of the Court.

Sincerely,

Dick Fallon

No. 80-689, Widmar v. Vincent

Insert at page 8 as indicated.

November 23, 1981

TO: MR. JUSTICE POWELL
FROM: DICK FALLON
RE: Widmar v. Vincent: Justice White's Third Draft

The change in Footnote 10, as edited by you, appears below. It seems fine to me. On my copy of the opinion I have also noted small changes requested by Justice Brennan and the Chief Justice; they will go to the printer with the next draft.

If you think the next circulation likely to be the last, it ~~might be useful to "run this by" an editor once again.~~

RIDER A, for insertion as Footnote 10, page 8:

10. As the dissent emphasizes, the Establishment Clause requires the State to distinguish between "religious" speech--speech, undertaken or approved by the State, the primary effect of which is to support an Establishment of Religion--and "nonreligious" speech--speech, undertaken or approved by the State, the primary effect of which is not to support an Establishment of Religion. This distinction is required by the plain text of the Constitution. It is followed in our cases.

E.g., Stone v. Graham, ____ U.S. ____ (November 17, 1980). The dissent attempts to equate this distinction with its view of an alleged constitutional difference between religious "speech" and religious "worship." See dissenting opinion, post, at 5 & n. 4. We think that the distinction advanced by the dissent lacks a foundation in either the Constitution or in our cases, and that it is judicially unmanageable.

November 27, 1981

TO: MR. JUSTICE POWELL
FROM: DICK FALLON
RE: Widmar v. Vincent and Justice Stevens's Opinion

Attached please find a marked draft of this much-circulated opinion. I have marked changes on pages 4, 5, 7, and 13. The only one of substance occurs on page 7, where I have suggested a footnote responding to Justice Stevens's opinion concurring in the judgment. It is attached as a "Rider" to page 7.

My reasons for suggesting the changes are as follows:

Good changes
Page 4. Footnotes 5 and 6 have come to seem to me to be almost "schizophrenic." Footnote 5 makes a strong statement that students do have rights. Footnote 6 then seems to "take away" some of what Footnote 5 appeared to "give." In order to present a more coherent picture, I think it better to reflect the "balancing" of concerns in a single footnote. Due to the problem of excessive length, I have cut a substantial chunk from the center. ✓

Page 5. One footnote has been renumbered. I have suggested adding one phrase to clarify that the prohibition against "content discrimination" is limited to the "public forum." As ✓

Justice Stevens rightly argues, the University can of course make content discriminations in structuring courses and grading examinations. *yes!*

Page 7. I have suggested a footnote, attached as a Rider, intended as a response to Justice Stevens. You might want to delete the explicit reference to Justice Stevens; that seems to me a matter of style. Substantively, however, he has raised an implicit question about the scope of the holding. I think that question should be answered. This footnote reflects an attempt to do so.

Page 13. The word "here" was added to the most recent draft at the request of Justice Brennan. Rereading the opinion, however, I am struck that it is jarringly redundant. The sentence already contains one other "here", an "in this case", and an "as well". Something has to go. *yes, but see below.*

Dick - Our opinion already make clear that JPS's concern is not justified. See n5 (especially as revised) & text on p 13 (second sentence in sent full ft). I think we could forego any answer. I have, however, tried my hand at an alternative suggestion

No. 80-689, Widmar v. Vincent

In this case we hold that a public university, which makes its facilities available for the activities of all other student groups, may not exclude a student group wishing to engage in religious worship and discussion.

This case, Widmar v. Vincent, involves the policies of the University of Missouri at Kansas City. The University has chosen to provide facilities for all student groups wishing to meet on campus. For a period of about four years, the University allowed a religious group called Cornerstone to meet in University facilities. In 1977, however, University officials decided that Cornerstone could no longer meet in the buildings available to all other student groups. The University took this step based on the group's desire to engage in religious worship and discussion.

Eleven student members of Cornerstone sued the University in the federal district court, claiming a violation of their rights under the First Amendment. The district court dismissed the suit, because it found that religious speech and association were not entitled to the same protections as other speech and association under the First Amendment. The court of appeals reversed this decision. We are in essential agreement with the court of appeals.

By its policy of accommodating their meetings, the University created for its students a public forum, in which all students had an equal right to speak and to associate. Having done so, the University then sought to enforce a content-based discrimination against religious speech and association. These are forms of speech and association protected by the First Amendment. Because of the fundamental principle that state regulation of speech must be content neutral, the University would need to present a compelling interest in order to justify discrimination against religious speech.

The University argues first that allowing the use of its public buildings for religious worship and discussion would offend the Establishment Clause of the Constitution of the United States. Under the peculiar facts of this case, however--in which the University would not be sponsoring religious speech any more than the speech of other student group using university facilities--we cannot agree. The University also argues that it could not allow religious groups the same benefits as all other groups without providing support for religion forbidden by the Missouri State constitution. But the rights of the excluded group are protected by the First Amendment of the Constitution of the United States. This is the Supreme law of the land, which must in this case prevail over the state interest asserted by the University.

Justice Stevens has filed a separate opinion concurring in the judgment of the Court. Justice White has filed a dissent.

lfp/ss 12/05/81

80-689 Widmar v. Vincent

File

This case, here from the Court of Appeals for the Eighth Circuit, involves the validity of a regulation of the University of Missouri/at Kansas City.

The university provides facilities/for all student groups/that wish to meet on campus. More than a hundred such groups - including a religious group named Cornerstone - were officially recognized by the university. The Cornerstone group was informed/that it could no longer meet/in university buildings. The exclusion was based on a regulation/that prohibited the use of its buildings or grounds/"for purposes of religious worship or religious teaching".

Brought down on 12/8/81

This suit was instituted by members of Cornerstone, ^{They} who alleged a violation of their rights/to free exercise of religion/and freedom of speech under the First/and Fourteenth/Amendments to the Constitution.

The university defended on the ground/that use of its facilities for religious worship or discussion/would offend the Establishment Clause of the Constitution/as well as the Missouri Constitution.

All The DC ~~decided~~ ^{dismissed} the suit, agreeing with the U's position.

The District Court dismissed the suit, agreeing with the university's position. The Court of Appeals reversed. *In our opinion to-day,* ¹ We agree with the Court of Appeals.

We hold that religious worship and discussion are forms of speech and association protected by the First Amendment. A state university's regulation of speech must be content neutral, absent a showing of a compelling state interest that justifies some discrimination. And a university policy of neutrality as to the content of speech *does not* ~~would not be~~ sponsoring religion any more than the speech of other student groups.

A university's mission is education, and our decision today is entirely consistent with the authority of a university to impose reasonable regulations - compatible with that mission - upon the use of its campus and facilities. In this case, however, the University created a public forum from which only religious groups were excluded.

The decision of the Court of Appeals is affirmed.

Justice Stevens has filed a separate opinion, concurring in the judgment. Justice White has filed a dissenting opinion.

Court Voids College Ban On Religious Services

By Fred Barbash
Washington Post Staff Writer

The Supreme Court ruled yesterday that public colleges and universities may not prevent campus organizations from conducting religious services on campus, even though it means that state-financed facilities are used to benefit religion.

In an 8-to-1 decision in one of the most important church-state cases of recent years, the justices struck down a University of Missouri ban on organized prayer and Bible reading at its Kansas City campus.

Justice Lewis F. Powell Jr., writing for the majority, said that a ban on religious worship and prayer is a ban on free speech. Universities are public forums, he said, and may not prohibit one form of expression while allowing all others.

While yesterday's decision does not alter the ban on prayer in public secondary and elementary schools imposed by the court in the 1960s, it

undoubtedly will fuel the currently intense debate over those earlier rulings. The lone dissenter yesterday, Justice Byron R. White, expressed concern that "all of these cases would have to be reconsidered" under the majority's reasoning yesterday.

The court has always treated universities differently from grade schools, where pupils are believed to be of an "impressionable" age.

Most public universities already permit prayer and religious worship in their facilities. Had the court upheld the Missouri ban, imposed because officials there thought a permissive policy amounted to state sponsorship of religion, the other schools would have been forced to rethink their policies. That likely would have led to objections from state legislators, and the Supreme Court might have found itself once again embroiled in a major political

See COURT, A7, Col. 1

College Ban on Religious Services Struck Down by the Supreme Court

COURT, From A1

controversy. The University of Missouri at Kansas City officially recognizes more than 100 student organizations and routinely provides facilities for their use. Among those groups was Cornerstone, a Christian organization that had been freely using facilities from 1972 to 1977. In 1977, however, the university told the group that its meetings, which regularly included prayer and Bible reading, would no longer be permitted.

University officials contended that they had no choice but to ban the group. Allowing Cornerstone's activities on the taxpayer-financed campus, they said, amounted to an "establishment" of religion, forbidden by the First Amendment to the Constitution.

The students argued, under the standard grounds for such challenges, that the ban infringed their right to the free exercise of religion. But they also contended that religious worship was a form of speech and therefore entitled to the free speech protections of the First Amendment. That has not been so clear in prior Supreme Court rulings.

Yesterday, upholding the 8th U.S. Circuit Court of Appeals in *Widmar vs. Vincent*, Powell agreed with the students.

"The University of Missouri has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion," Powell said. "These are forms of speech and association protected by the First Amendment."

Speech may not be regulated or banned because somebody doesn't

like its content, he said. The university did just that by differentiating between "religious speech" and, for example, political speech.

"... Having created a forum generally open to student groups," Powell said, "the university seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral and the university is unable to justify this violation under applicable constitutional standards."

The university, citing the court's justifications for banning prayers in grade schools, had contended that allowing Cornerstone's worship would amount to state sponsorship of religion.

Powell disagreed. "An open forum in a public university does not confer any imprimatur of state approval on religious sects or practices," he said, any more than allowing the Young Socialist Alliance meetings gives state approval to socialism. Any benefit conferred on religion by permitting Cornerstone's worship is "incidental," Powell said, quoting a prior court ruling that if the Constitution barred general benefits to religious groups "a church could not be protected by the police and fire departments or have its public sidewalk kept in repair."

Justice John Paul Stevens, in a concurring opinion, agreed that the ban was impermissible, but he gave different reasons than Powell. The university simply had no valid reason for banning the group, Stevens said, and he said the majority went too far when it said the university could not make decisions based on

the content of speech on its campus. White, in his dissent, said the proposition that religious worship is no different from any other form of expression is "plainly wrong."

"Were it right, the religion clauses [of the First Amendment] would be emptied of any independent meaning in circumstances in which religious practice took the form of speech."

If the majority "were right that no distinction may be drawn between verbal acts of worship and other verbal acts," he said, all of the cases concerning religious worship in public institutions would have to be reconsidered.

Among the cases cited by White was one banning prayer in public grade schools, a ruling conservatives are now trying to reverse through Congress, in bills stripping the courts of certain powers.

In a footnote the majority opinion noted that unlike grade school children, "university students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality toward religion."

Powell and church-state experts interviewed yesterday also said that grade schools have never been considered "public forums" for expression of political views.

In addition, university clubs do not require supervision by teachers as do activities in elementary and high schools. The courts have held that that supervision could create the impression in younger children that they had an obligation to participate in prayer or that the school was endorsing the religious worship.

A UNIVERSITY CURB ON RELIGION UPSET

Supreme Court Backs Student Group on the Right to Meet in a Campus Facility

By LINDA GREENHOUSE

Special to The New York Times

WASHINGTON, Dec. 8 — The Supreme Court ruled today, 8 to 1, that a public university that permits student groups to meet on campus for secular activities must also allow student religious groups to meet for worship and religious study.

The Court struck down a regulation adopted by the University of Missouri that prohibited the use of university property "for purposes of religious worship or religious teaching." The regulation was challenged by an evangelical Christian student group called Cornerstone, one of more than 100 recognized student organizations at the university's Kansas City campus, that was denied the use of a room for its weekly Saturday night meetings.

The Court today based its ruling on the students' constitutional rights of free speech and association, rather than on their right to the free exercise of their religion. Associate Justice Lewis F. Powell Jr., writing for the majority, said it was not necessary to decide the "free exercise" issue in light of the Court's free speech holding.

The case, arriving at the Supreme Court at a time of renewed political interest in the relationship between religion and Government, attracted widespread notice, with a number of major religious organizations filing briefs. The dissent was by Justice Byron R. White.

No Change on Prayer Issue

Justice Powell emphasized that "the basis for our decision is narrow." The ruling, applying only to voluntary religious practices at state-supported universities, indicates no change in the Court's view that the Constitution bars officially sponsored prayer in the public schools.

The decision is significant, nevertheless, in that it provides what may be the Court's clearest explanation so far of how religious observance fits within the free speech guarantees of the First Amendment.

The university had defended its policy on the ground that the Constitution required a prohibition against any religious activity on campus. To facilitate student religious practice in any way, the university said, would be to give religion the "symbolic approval" of the State of Missouri and to breach the constitutionally required separation between church and state.

"The university's argument," Justice Powell said, "misconceives the nature of this case" by focusing almost exclusively on the establishment clause, the constitutional bar against governmental "establishment" of religion.

Exclusion Over Speech Content

"The university has opened its facilities for use by student groups," he continued, "and the question is whether it can now exclude groups because of the content of their speech."

"Religious worship and discussion," Justice Powell said, "are forms of speech and association protected by the First Amendment." The Government may discriminate against a type of constitutionally protected speech, the opinion continued, only if it can "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."

It is only at this point that the establishment clause properly becomes part of the analysis, Justice Powell said. Missouri argued that the establishment clause — maintaining the separation between church and state — was itself the "compelling state interest" that justified the ban on religious activity. But numerous Supreme Court decisions over the last decade interpreting the establishment clause have required a more precise examination.

Associate Justice John Paul Stevens, while agreeing with the majority's conclusion, did not join Justice Powell's opinion. He said that for reasons of academic freedom the university should have to show only a "valid" rather than a "compelling" justification for its policy.

Dissent by Justice White

Associate Justice White, in dissent, said the majority was "plainly wrong" in equating religious worship with non-religious speech. If "no line may ever be drawn" between worship and other speech, he said, "the majority would have to uphold the university's right to offer a class entitled 'Sunday Mass.'"

Instead, Justice White said, the Court should have examined the burden that the university's policy placed on the students' ability to practice their religion. Noting that the students could have met "about a block and a half" from the campus, Justice White concluded that the burden was "minimal" and that the policy should have been upheld.

The decision, *Widmar v. Vincent*, No. 80-689, upheld a decision by the United States Court of Appeals for the Eighth Circuit.

Another Federal appeals court, the Second Circuit, in New York, last year reached an opposite conclusion in a similar case, upholding the refusal by the board of education in Guilderland, N.Y., to allow public school students to hold voluntary religious meetings on school grounds before the start of the school day. The students have asked the Justices to hear their appeal. The Supreme Court has applied different standards to college students and younger students in past religion cases and may announce soon whether it will hear the New York case.

George F. Will

Washington Post, Dec 14, 1981

Confused About Religion

The Constitution has emerged without new wounds from another brush with the Supreme Court. This is especially gratifying because the case concerned an issue about which the court has been and remains especially confused: the "establishment" of religion.

The court has held, 8-1, that the University of Missouri, Kansas City, erred when it promulgated a regulation prohibiting the use of university property for "religious worship or religious teaching." A student religious group sued, claiming violation of First Amendment rights of freedom of speech and free exercise of religion.

A lower court held that the university was right in thinking that the regulation was not only permissible but mandatory because of the constitutional ban on "establishment" of religion.

Onward the Christians soldiered, to an appeals court, which held for them. It ruled that the regulation constituted unconstitutional discrimination against a category of speech—religious speech—because of its content. The forces of Darkness pressed on to the Supreme Court, but Justice Lewis F. Powell Jr., an agent of Light if ever there was one, spoke for the majority in sustaining the appeals court and the religious group.

He employed the cumbersome, not to say rococo, criteria the court has constructed to test whether a state practice offends the Establishment Clause: does the practice have a secular purpose? Does its primary effect neither enhance nor inhibit religion? Does it foster excessive state entanglement with religion? Powell concluded that university openness toward religious groups would serve the secular purpose of, and have the primary effect of, enhancing intellectual exchange, with negligible "entanglement."

The fact that the court did not say a university can prohibit religious "worship" but not religious "discussion" may indicate that prudence is tempering the court's recent appetite for constitutional hair-splitting. The dissenting justice, Byron White, suggests such a distinction, but Powell calls it "judicially unmanageable."

White argues that a university may, without violating the Establishment Clause, permit its property to be used for religious purposes, but that the clause does not stipulate what the state is required to do. And he asks, interestingly: if

all religious worship comes under the protection of free speech, what additional purpose is served by the constitutional guarantee of "free exercise" of religion? The protection of free speech should be sufficient.

Furthermore, last term the court held that posting the Ten Commandments in a classroom constitutes "establishment" of religion. Clearly the court then thought the content of religious communication could justify discrimination against it.

Justice John Paul Stevens, although joining the majority, argues that the court's particular approach to analysis of this question undermines the academic freedom of public universities. "A university," he says, "legitimately may regard some subjects as more relevant to its educational mission than others." If two groups request the use of the only suitable facility at a particular time, one for frivolity, the other for rehearsing "Hamlet," the First Amendment does not require that the room be reserved for the group that asked first. The university could prefer the content of one form of expression over the other.

The intellectual tangles and potential problems that White and Stevens note are unintended results of unnecessary complexity woven by the court since it abandoned the correct construction of the Establishment Clause. Properly construed, it requires the state to be neutral between religion and irreligion—with the predictable and often intended effect of enhancing the latter.

It is the court's fault that the university was confused about what the Establishment Clause requires. It is the university's fault that the university argued that providing a forum for the religious group would undermine its secular purpose of providing a forum for the exchange of ideas. The university may be terminally confused about various important ideas, including the idea of a university.

The sort of people who favor proscribing religious groups probably would unhesitatingly favor campus hospitality for groups advocating communism, homosexuality, astrology, even supply-side economics. But the court has so muddled the nation's mind concerning the Establishment Clause, the university felt a constitutional duty to drive off campus a group whose interest is the religion that is a wellspring from which the nation and its Constitution derive.

December 30, 1981

80-689 Widmar v. Vincent

Dear Byron and John:

I enclose copy of a letter of December 23 from Marc D. Stern, "of counsel" on the amicus brief filed in this case by the American Jewish Congress. Mr. Stern is correct in the sense my citation of Brandon in footnote 13 does not support, without some qualification, the text of the note. The same is true of the citation in the same note of Hunt. Accordingly, I propose simply to omit both citations, leaving the substance of the note as written. I have discussed this with Henry Lind and he agrees.

We denied cert in Brandon at our December 14 Conference. That case involved serious "entanglement" problems and I continue to think denial of cert there was clearly the correct disposition.

I bring this to your attention as Byron dissented in Widmar and John wrote a concurring opinion. I am not bothering the other Justices, as I cannot imagine that they have even your theoretical interest.

Sincerely

Justice White

Justice Stevens

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 21, 1982

Re: No.80-1396, Brandon v. Board of Education

MEMORANDUM TO THE CONFERENCE

The cert list for the February 19 Conference includes a petition for rehearing in No. 80-1396, Brandon v. Board of Education. As noted in the petition, this case is mischaracterized in Footnote 13 of the Slip Opinion in No. 80-689, Widmar v. Vincent.

When this error came to my attention, I arranged with Henry Lind to have the reference to this case omitted from the Widmar opinion that will be printed in the U.S. Reports. I also advised Byron and John--the two Justices who had not joined the Court opinion in Widmar. As reflected in my letter to them of December 30th (copy enclosed), the inadvertent inaccuracy in Widmar does not--in my opinion--affect our earlier denial of cert in Brandon.

Brandon involves serious "entanglement" problems not implicated in Widmar, including those raised by the requirement of New York law that student religious meetings in school facilities would require faculty supervision. See 635 F.2d, at 979. The difference in maturity between high school and college students also provides a distinguishing factor. See Widmar, slip op. at 10 n.14; Brandon, 635 F.2d, at 978, 980.

I would deny the petition for rehearing.

L. F. P.
L.F.P., Jr.

11/3/81

Note from Justice Rehnquist:

Lewis -

I agree with your draft in Widmar v. Vincent with the possible exception of the "overbreadth" analysis. As to the "overbreadth" analysis as to the Mo. constitutional provision justification as a "compelling interest" to justify an exclusion. Isn't the supremacy clause enough?

WHR

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 3, 1981

No. 80-689 Widmar v. Vincent

Dear Lewis,

Please join me in the proposed opinion. It is handled very well. I have several minor suggestions which I would ask you to consider.

On page 6 of the draft it states "We agree that the University has a compelling interest in complying with its constitutional obligations." This statement may be unnecessarily broad, since it implies that compliance with any constitutional provision constitutes a compelling interest for disobeying any other provision. While this may in fact be true, the Court might want to leave itself more room to maneuver in future cases. The statement could be easily dropped from this opinion and the following sentence reworded: "We disagree with the University's conclusion that" *See my Rider*

Footnote 13 on page 9 might mention the University's argument that the students themselves seemed to admit that holding meetings on campus influences other students' perceptions. For example, this language could be added to the end of the footnote (no new paragraph): The University argues that the Cornerstone students themselves admitted in affidavits that "[s]tudents know that if something is on campus, then it is a student organization, and they are more likely to feel comfortable attending a meeting." Similarly, the students claimed that meeting off campus "tends to make students think that there is something 'wrong' with us." Affidavit of Florian Frederick Chess, Joint Appendix at 18, 19 (Sept. 29, 1977). In light of the large number of groups meeting on campus, however, we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place. And in any case, the University has a less restrictive *Wick - condense this*

alternative available if it wishes to remove any inference of State sponsorship: It may disseminate statements disavowing endorsement of any particular campus meetings. In fact, the University's student handbook already notes that the University's name will not "be identified in any way with the aims, policies, programs, products, or opinions of any organization or its members." 1980-1981 UMKC Student Handbook, at 25. } *Then sufficient*

Finally, I am somewhat concerned about the citation to Luetkemeyer in footnote 16, page 10. The parenthetical explanation could imply that this Court found the State had a compelling interest in complying with its own constitution. In fact, this Court summarily affirmed a lower court opinion to that effect. This Court, therefore, either could have agreed with the finding of a compelling interest or could have concluded that the state's practice infringed no constitutionally protected right. To avoid this problem, I would replace the parenthetical explanation with a phrase like this: See Luetkemeyer ... (1974), in which the district court found Missouri had a compelling interest in compliance with its own constitution. OK

Sincerely,

Sandra

Justice Powell

Copies to the Conference

November 4, 1981

TO: MR. JUSTICE POWELL
FROM: DICK FALLON
RE: Responses to Widmar draft

Five Chambers have now entered formal or informal responses to Widmar. I would recommend awaiting further response before re-circulating, but I wanted to alert you to the current status as I understand it.

Justice White has indicated that he will dissent.

Justice Rehnquist has communicated, directly to you and again through his clerk. He dislikes the "overbreadth" analysis of Section III B. He would rely entirely on the Supremacy Clause to dismiss the University's argument under its state constitution. I would strongly hesitate to make the change requested. I think it is true that the Supremacy Clause elevates First Amendment "rights" above the State's interest. The problem is one of circularity in argument: The question is whether there are First Amendment rights here; and the answer to this question requires a balancing of the free speech "interests" of the respondents against the State's "interest" in compliance with its constitution. In other words, I think that direct reliance on the

Supremacy Clause--without allowing some consideration of the state's "interest"--would be entirely conclusory and therefore unpersuasive.

Justice O'Connor has "joined." She asks three changes. Two are entirely stylistic, and I would recommend that they be made (even though one will make for a decidedly "un-lean" footnote). The third request--the first presented in her memo--asks deletion of a sentence on page six: "We agree that the University has a compelling interest in complying with its constitutional obligations." She seems to concede that the sentence is "true," but objects that it is misleadingly "broad." I do not agree. In addition, deletion of the sentence would leave it unclear why the opinion even bothers to inquire whether the State's constitutional obligation is implicated--i.e., why it even bothers with the Establishment Clause analysis. I would therefore reject this suggestion, on which Justice O'Connor does not seem to insist. I gather she will be satisfied if the other changes are included in the next circulation.

Justice Brennan has asked for the addition of one sentence to footnote 12. In effect, it reserves the possibility that provision of a public forum, under some situation that he does not specify, might possibly violate the Establishment Clause. This proposal is slightly puzzling and slightly troubling. A sentence on page 10 already seems to reserve this possibility: "At least in the absence of empirical evidence that religious groups will dominate UMKC's public forum, we agree with the Court of Appeals that the advancement of religion would not be the

forum's primary effect." This sentence immediately follows Footnote 14. If Justice Brennan's sentence were to be accepted, this would be the more logical place to put it. But then it would be redundant. It would also conflict with a suggestion by Justice Blackmun, see infra, that the implication of the quoted sentence ("At least in the absence...") should be weakened.

Justice Blackmun, according to his clerk, would like to see the addition of a sentence to Note 12: "Because we decide this regulation is an infringement on respondent's free speech and association interests, we need not decide the extent to which it might infringe their Free Exercise rights." I have no objection to this, except that its tone is inconsonant with Justice Brennan's proposed amendment. This problem could be solved if Justice Brennan's sentence were put in Footnote 14; but there it would much strengthen the implication that, in a proper case, a public forum might offend the Establishment Clause. And Justice Blackmun's second substantive request is for the substitution of (unspecified) language weakening this implication.

It is hard for me to guess the strength of Justice Blackmun's concern. His clerk said that he generally liked the opinion and admired the way it "walks the tightrope." He also made several trivial suggestions, which can easily be accommodated in a recirculation. These may mollify him.

For the time being, I have no strong intuition how to proceed. If you think a prompt recirculation desirable to try to "lock in" Justices Brennan and Blackmun, I would tentatively suggest that an altered version of both their suggestions should

be included in footnote 12, where they both wanted their amendments to appear. The end of the paragraph would then read as follows (with changes underscored):

"Here the University's forum is already available to other groups, and respondents' claim to use that forum does not--as in Brandon or Hunt--rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide this case. Accordingly, we need not inquire into the extent, if any, to which Free Exercise interests are infringed by the challenged University regulation. Neither do we reach the difficult questions that would arise if State accommodation of Free Exercise and Free Speech rights should, in a particular case, conflict with the prohibitions of the Establishment Clause."

The first of the underscored sentences would be for Justice Blackmun, the second for Justice Brennan. I reiterate that any recirculation should include a number of trivial suggestions offered by Justice Blackmun, which might also help to win his vote.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 4, 1981

✓

Re: 80-689 - Widmar v. Vincent

Dear Lewis,

I shall probably file a dissent in
this case.

Sincerely yours,

By

Justice Powell

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

✓

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

November 4, 1981

RE: No. 80-689 Widmar v. Vincent

Dear Lewis:

My hope was that you might be willing to add a sentence at the end of footnote 12 on page 8 along the following lines:

"This is not to say that governmental sanction of the use of such rights for religious worship at a public forum may not in other circumstances violate the Establishment Clause."

Sincerely,

But

Justice Powell

November 5, 1981

TO: MR. JUSTICE POWELL
FROM: DICK FALLON
RE: Justice White's Dissent in Widmar v. Vincent

"The dissent argues that "religious worship" is not speech generally protected by the "free speech" guarantee of the First Amendment and the "equal protection" guarantee of the Fourteenth Amendment. If "religious worship" were protected "speech," the dissent reasons, "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech." Dissenting opinion, post, at 4. This argument is both novel and difficult to comprehend. The dissent does not deny that speech about religion is speech is entitled to the general protections of the First Amendment. See id., at 3 & n.1. It does not argue that descriptions of religious experiences fail to qualify as "speech." Nor does it repudiate last Term's decision in Krishna, which assumed that religious appeals to nonbelievers constituted protected "speech." Rather, the dissent seems to attempt a distinction between the kinds of religious speech explicitly protected by our cases and a new class of religious "speech acts," see dissenting opinion at 5,

comprising "worship." Worship, like pornography, is then said to lie beyond the protection of the "free speech" clause of the First Amendment. Perhaps Justice White "knows it when he sees it." We find at least three difficulties with his attempted distinction.

First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," *id.*, at 2-3, cease to be "singing, teaching, and reading"--all apparently forms of "speech," despite their religious subject matter--and become unprotected "worship."

Second, even if the distinction could be made intelligible, it is highly doubtful that it would lie within the judicial competence. Cf. *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953). Merely to draw the distinction would require the university--and ultimately the courts--to inquire into the significance of various words and practices to different religious faiths. Such an inquiry would tend inevitably to entangle the State with religion in a manner forbidden by our cases.

Finally, the dissent fails to establish the relevance of the distinction on which it seeks to rely. The dissent apparently wishes to to preserve the vitality of the Establishment Clause. See dissenting opinion, post, at 4. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, see *Krishma*, supra, than for religious worship by persons already converted. It is

far from clear that the State gives greater support in the latter case than in the former.

050689G

Add This as footnote 6a to the last line of text on page 5.

November 5, 1981

TO: MR. JUSTICE POWELL

FROM: DICK FALLON

RE: Justice White's Dissent in Widmar v. Vincent

Justice White has now circulated his dissent. It relies principally on an argument that "religious worship" is not "speech" protected generally by the "free speech" guarantee of the First Amendment. Its protection, if any, must come from the "Free Exercise Clause." This is a direct intellectual challenge to the theory of the draft opinion, and I think it should be met. Very tentatively, I would recommend the following rider, to be added as a footnote on page 5. It would follow the sentence: "These are forms of speech and association protected by the First Amendment."

36
Short -
The dissent argues that "religious worship" is not speech generally protected by the "free speech" guarantee of the First Amendment and the "equal protection" guarantee of the Fourteenth Amendment. If "religious worship" were protected "speech," the dissent reasons, "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech." Dissenting opinion, post, at 4. This

is a ^{novel} argument. ~~is both novel and difficult to comprehend.~~ The dissent does not deny that speech about religion is speech ~~is~~ entitled to the general protections of the First Amendment. See id., at 3 & n.1. It does not argue that descriptions of religious experiences fail to qualify as "speech." Nor does it repudiate last Term's decision in Krishna, ^{supra}, which assumed that religious appeals to nonbelievers constituted protected "speech." Rather, the dissent seems to attempt a distinction between the kinds of religious speech explicitly protected by our cases and a new class of religious "speech acts," ~~see~~ dissenting opinion, at 5, comprising "worship." There are at least three difficulties with this distinction.

First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," id., at 2-3, cease to be "singing, teaching, and reading"--all apparently forms of "speech," despite their religious subject matter--and become unprotected "worship."

Second, even if the distinction ^{drew an arguably principled line,} ~~could be made intelligible~~ it is highly doubtful that it would lie within the judicial competence ^{to administer.} Cf. Fowler v. Rhode Island, 345 U.S. 67, 70 (1953). Merely to draw the distinction would require the university--and ultimately the courts--to inquire into the significance of ^{and in varying circumstances by the same facts} various words and practices to different religious faiths. Such ~~an~~ inquiry ^{is} would tend inevitably to entangle the State with religion in a manner forbidden by our cases. E.g.,

Waltz v. Tax Commission, 397 U.S. 664, 668 (1970).

Finally, the dissent fails to establish the relevance of the distinction on which it seeks to rely. The dissent apparently wishes to ~~to~~ preserve the vitality of the Establishment Clause. See dissenting opinion, post, at 4. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, see Krishma, supra, than for religious worship by persons already converted. It is far from clear that the State gives greater support in the latter case than in the former.

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

November 5, 1981



RE: No. 80-689 Widmar v. Vincent

Dear Lewis:

I agree.

Sincerely,

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL



November 5, 1981

Re: No. 80-689 - Widmar v. Vincent

Dear Lewis:

I await the dissent.

Sincerely,

T.M.

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 5, 1981



RE: No. 80-689 Widmar v. Vincent

Dear Lewis:

I agree.

Sincerely,



Justice Powell

cc: The Conference

November 5, 1981

80-689 Widmar v. Vincent

Dear Bill:

Thank you for your note of November 4.

I also have word from Harry that he would like a sentence added to note 12 along the following lines:

"Because we decide this regulation is an infringement on respondents' free speech and association interests, we need not decide the extent to which it might infringe their free exercise rights."

I have no objection to saying this. Yet, because of the difference in tone, I propose to blend your suggestion and Harry's into the following language to be added at the end of note 12:

"Accordingly, we need not inquire into the extent, if any, to which Free Exercise interests are infringed by the challenged University regulation. Neither do we reach the difficult questions that would arise if State accommodation of Free Exercise and Free Speech rights should, in a particular case, conflict with the prohibitions of the Establishment Clause."

As you spoke to me first, I will make this change and recirculate if it meets with your approval. I think it is prudent to leave both of these questions wide open, without inviting marginal litigation.

With my thanks.

Sincerely,

Justice Brennan

lfp/ss

November 5, 1981

80-689 Widmar v. Vincent

Dear Bill:

This refers to the little note you sent me on the bench in which you inquired whether the Supremacy Clause alone does not justify dismissing the University's argument under its state constitution.

I hesitate to rely solely on that Clause, although I agree - of course - that it elevates First Amendment rights above the state's interest. But the question before us is whether there are First Amendment rights upon which respondents may rely. The answer to this question requires a weighing - as I see it - of the asserted free speech and assembly interests of the respondents against the state's interest in complying with its constitution.

I would prefer to leave §III-B substantially as I have drafted it, as it seems more persuasive and less conculsory than relying entirely on the Supremacy Clause.

Sincerely,

Justice Rehnquist

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 5, 1981

Re: 80-689 - Widmar v. Vincent

Dear Lewis:

For two reasons I am reluctant to join the Court's opinion. First, I do not believe that it is correct to characterize the University's school activity program as a "public forum," as that concept was developed in Hague v. CIO, 307 U.S. 496, 515. The facilities are available to students; by hypothesis, the public is excluded. The relationship between a university and its student body is sufficiently different from the relationship between the sovereign and the citizenry to make it inappropriate to consider the public forum concept equally applicable to both.

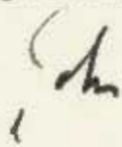
Second, the characterization of the exclusion of religious groups as based on the content of their speech is, in my judgment, somewhat imprecise. The University's regulation is content neutral in the sense that it evidences no hostility to, or disagreement with, the point of view of any particular speaker. It excludes a certain category of subject matter from the student activity program; like the exclusion of political advertisements from buses, in one sense the exclusion is content-neutral and in another sense it is content-based.

The distinction is of some importance because school facilities are often in short supply. In allocating such facilities university administrators may reasonably conclude that some subjects are more relevant than others to campus life or to the particular academic objectives of the school. In this context, the notion that they must support their judgments by reference to "a compelling state interest" seems too strict to me.

Even if I cannot join your opinion, I intend to concur in the Court's judgment. In this case, there is no question about the availability of adequate facilities. Student participation in Cornerstone meetings is entirely voluntary. No danger of apparent University sponsorship of a religion is disclosed by the record. Since the University's only justification for the exclusion--its fear of violating the Establishment Clause--is without merit, as you demonstrate, and since no other significant justification has been advanced, the regulation must fall for it unquestionably does inhibit the students' right to speak and to associate freely.

I am not sure you will want to (or be able to) accommodate my concerns, but I thought you would want to know what they are.

Respectfully,



Justice Powell

Copies to the Conference

lfp/ss 11/05/81

Rider A, p. 6 (Widmar)

We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. It does not follow, however, that an "equal access" policy would be incompatible with this Court's Establishment Clause cases.

TO: MR. JUSTICE POWELL
FROM: DICK FALLON
RE: Justice Stevens's Widmanr Views

If you wish to respond to Justice Stevens's communication of yesterday, I think you might consider speaking directly to what seems to be his underlying concern--namely, that the Court should not make it too difficult for the University to allocate scarce facilities to their best educational use. He seems worried that the "public forum" notion restricts the University's capacity to make choices of this kind. Quite the contrary is true. In the first place, the opinion clearly recognizes that the University campus could never be an open forum--even for its students--in the classic sense. This is the point of the Footnote 6, quoting Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969): First Amendment rights must be analyzed in light of the special characteristics so the school environment." Perhaps more important, the invocation of "public forum" jurisprudence explains the source of the students' rights. By creating a forum generally open to all student groups, the University has implicitly conceded that there is no scarcity problem at the present time. It has thus implicitly conceded the right of the

religious groups to share equally in the forum, absent some compelling reason to keep them out. This kind of analysis is entirely neutral about the University's obligations in a case where there was no open forum--most notably in a case in which there was a need to allocate scarce classroom or other facilities to their best educational use. By not grounding the students' access rights in an open-forum model, Justice Stevens may implicitly require the University to bear the same burden of justifying exclusions in a case of scarcity as in a case of resources ample to accommodate all. The draft opinion places the decision on the narrowest possible ground. Given the complexities of the subject matter, this is the best course.

November 5, 1981

TO: MR. JUSTICE POWELL
FROM: DICK FALLON
RE: Justice White's Dissent in Widmar v. Vincent

Justice White has now circulated his dissent. It relies principally on an argument that "religious worship" is not "speech" protected generally by the "free speech" guarantee of the First Amendment. Its protection, if any, must come from the "Free Exercise Clause." This is a direct intellectual challenge to the theory of the draft opinion, and I think it should be met. Very tentatively, I would recommend the following rider, to be added as a footnote on page 5. It would follow the sentence: "These are forms of speech and association protected by the First Amendment."

"The dissent argues that "religious worship" is not speech generally protected by the "free speech" guarantee of the First Amendment and the "equal protection" guarantee of the Fourteenth Amendment. If "religious worship" were protected "speech," the dissent reasons, "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech." Dissenting opinion, post, at 4. This

is a novel

1 argument, ~~is both novel and difficult to comprehend~~. The dissent does not deny that speech about religion is speech ~~is~~ entitled to the general protections of the First Amendment. See id., at 3 & n.1. It does not argue that descriptions of religious experiences fail to qualify as "speech." Nor does it repudiate last Term's decision in Krishna, which assumed that religious appeals to nonbelievers constituted protected "speech." Rather, the dissent seems to attempt a distinction between the kinds of religious speech explicitly protected by our cases and a new class of religious "speech acts," see dissenting opinion at 5, comprising "worship." There are at least three difficulties with this distinction.

First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," id., at 2-3, cease to be "singing, teaching, and reading"--all apparently forms of "speech," despite their religious subject matter--and become unprotected "worship."

Second, even if the distinction ~~could be made intelligible~~, *drawn an arguably principled line,* it is highly doubtful that it would lie within the judicial competence ^{to identify,} Cf. Fowler v. Rhode Island, 345 U.S. 67, 70 (1953).

Merely to draw the distinction would require the university--and ultimately the courts--to inquire into the significance of ~~various~~ words and practices to different religious faiths ^{and in varying circumstances by the same faith.} Such

2 an inquiry ^{see} would tend inevitably to entangle the State with religion in a manner forbidden by our cases.

Finally, the dissent fails to establish the relevance of the distinction on which it seeks to rely. The dissent apparently wishes to ~~to~~ preserve the vitality of the Establishment Clause. See dissenting opinion, post, at 4. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, see Krishma, supra, than for religious worship by persons already converted. It is far from clear that the State gives greater support in the latter case than in the former.

AM

November 6, 1981

80-689 Widmar v. Vincent

Dear John:

Thank you for your letter. Although, as you suggest, I do not think I can accommodate your concerns by revisions of the draft opinion, I share the following thoughts on what seems to be your principal concern: namely, that a university should be able, without interference, to allocate scarce facilities to their best educational use.

My opinion clearly recognizes that a university campus is not an open forum in the classic sense, even for its students. In footnote 6, after a quote from Tinker, my draft says:

"A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied its authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."

In this case, as you agree, there is no "scarcity problem". Rather, the university has created a forum open to all 100 or more of its student groups. The only reason assigned by it for excluding this religious group is the Establishment Clause - not that the speech of the religious group would be incompatible with the educational aims of the university.

I believe the opinion rests on the narrowest ground consistent with our cases. I agree fully that the area is one of inherent complexities, but my opinion leaves a university administration with substantially the freedom you have in mind.

Sincerely,

Justice Stevens

lfp/ss

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

Circulated: _____

Recirculated: 11/6/81

*9' or reviewed
& answered this
Printed*

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-689

GARY E. WIDMAR, ET AL., PETITIONERS v.
CLARK VINCENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[November —, 1981]

JUSTICE WHITE, dissenting.

In affirming the decision of the Court of Appeals, the majority rejects petitioners' argument that the Establishment Clause of the Constitution prohibits the use of university buildings for religious purposes. A state university may permit its property to be used for purely religious services without violating the First and Fourteenth Amendments. With this I agree. See *Committee for Public Education v. Nyquist*, 413 U. S. 756, 813 (WHITE, J., dissenting); *Lemon v. Kurtzman*, 403 U. S. 602, 661 (Opinion of WHITE, J.); The Establishment Clause, however, sets limits only on what the State may do with respect to religious organizations; it does not establish what the State is *required* to do. I have long argued that Establishment Clause limits on state action which incidentally aids religion are not as strict as the Court has held. The step from the permissible to the necessary, however, is a long one. In my view, just as there is room under the Religion Clauses for state policies that may have some beneficial effect on religion, there is also room for state policies that may incidentally burden religion. In other words, I believe the states to be a good deal freer to formulate policies that affect religion in divergent ways than does the majority. See *Sherbert v. Verner*, 374 U. S. 398, 422-423 (Harlan, J., dissenting). The majority's position

will inevitably lead to those contradictions and tensions between the Establishment and Free Exercise Clauses warned against by Justice Stewart in *Sherbert v. Verner, Id.*, at 416.

The university regulation at issue here provides in pertinent part:

"No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or non-student groups. Student congregations of local churches or of recognized denominations or sects, although not technically recognized campus groups, may use the facilities . . . under the same regulations that apply to recognized campus organizations, provided that no University facilities may be used for purposes of religious worship or religious teaching."

Although there may be instances in which it would be difficult to determine whether a religious group used university facilities for "worship" or "religious teaching," rather than for secular ends, this is not such a case. The regulation was applied to respondents' religious group, Cornerstone, only after the group explicitly informed the University that it sought access to the facilities for the purpose of offering prayer, singing hymns, reading scripture, and teaching biblical principles. Cornerstone described their meetings as follows: "Although these meetings would not appear to a casual observer to correspond precisely to a traditional worship service, there is no doubt that worship is an important part of the general atmosphere." J. A., at 34.¹ The issue here is

¹ Cornerstone was denied access to university facilities because it intended to use those facilities for regular religious services in which "worship is an important part of the general atmosphere." There is no issue here as to the application of the regulation to "religious teaching." Reaching this issue is particularly inappropriate in this case because nothing in the record indicates how the University has interpreted the phrase "religious teaching" or even whether it has ever been applied to activity that

only whether the University regulation as applied and interpreted in this case is impermissible under the federal Constitution. If it is impermissible, it is because it runs afoul of either the Free Speech or the Free Exercise Clause of the First Amendment.

A large part of respondents' argument, accepted by the court below and implicitly accepted by the majority, is founded on the proposition that because religious worship uses speech, it is protected by the Free Speech Clause of the First Amendment.² Not only is it protected, they argue, but religious worship qua speech is not different from any

was not clearly "religious worship." The District Court noted that plaintiffs did not contend that they were "limited, in any way, from holding on-campus meetings that do not include religious worship services." J. A., at 38. At oral argument, counsel for the University indicated that the regulation would not bar discussion of biblical texts under circumstances that did not constitute "religious worship." Transcript of Oral Argument, at 9. The sole question in this case involves application of the regulation to prohibit regular religious worship services in university buildings.

² Given that the majority's entire argument turns on this description of religious services as speech, it is surprising that the majority assumes this proposition to require no argument. The majority assumes the conclusion by describing the University's action as discriminating against "speakers based on their desire to engage in religious worship and discussion." *Supra*, at 5. As noted above, it is not at all clear that the University has or intends to discriminate against "religious discussion"—as a preliminary matter, it is not even clear what the majority means by "religious discussion" or how it entered the case. That religious worship is a form of speech, the majority takes to have been established by three cases. *Heffron v. International Soc'y for Krishna Consciousness, Inc.* — U. S. — (1981); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Saia v. New York*, 334 U. S. 558 (1948). None of these cases stand for this proposition. *Heffron* and *Saia* involved the communication of religious views to a non-religious, public audience. Talk about religion and about religious beliefs, however, is not the same as religious services of worship. *Niemotko* was an equal protection challenge to a discriminatory denial of one religious group's access to a public park. The Court specifically stated that it was not addressing the question of whether the state could uniformly deny all religious groups access to public parks. 340 U. S. at 272.

other variety of protected speech as a matter of constitutional principle. I believe that this proposition is plainly wrong. Were it right, the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech.

Just last term, the Court found it sufficiently obvious that the Establishment Clause prohibited a state from posting a copy of the Ten Commandments on the classroom wall that a statute requiring such a posting was summarily struck down. *Stone v. Graham*, —U. S.— (Nov. 17, 1980). That case necessarily presumed that the state could not ignore the religious content of the written message, nor was it permitted to treat that content as it would, or must treat, other—secular—messages under the First Amendment's protection of speech. Similarly, the Court's decisions prohibiting prayer in the public schools rest on a content based distinction between varieties of speech: as a speech act, apart from its content, a prayer is indistinguishable from a biology lesson. See *Engel v. Vitale*, 370 U. S. 421 (1962); *School District of Abington Township v. Schempp*, 374 U. S. 203 (1963). Operation of the Free Exercise Clause is equally dependent, in certain circumstances, on recognition of a content based distinction between religious and secular speech. Thus, in *Torcaso v. Watkins*, 367 U. S. 488 (1961), the Court struck down, as violative of the Free Exercise Clause, a state requirement that made a declaration of belief in God a condition of state employment. A declaration is again a speech act, but it was the content of the speech that brought the case within the scope of the Free Exercise Clause.

There may be instances in which a state's attempt to disentangle itself from religious worship would intrude upon secular speech about religion. In such a case, the state's action would be subject to challenge under the Free Speech Clause of the First Amendment. This is not such a case. This case involves religious worship only; the fact that that worship is

accomplished through speech does not add anything to respondents' argument. That argument must rely upon the claim that the state's action impermissibly interferes with the free exercise of respondents' religious practices. Although this is a close question, I conclude that it does not.

Plausible analogies on either side suggest themselves. Respondents argue, and the majority agrees, that by permitting any student group to use its facilities for communicative purposes other than religious worship, the University has created a "public forum." *Supra*, at 4. With ample support, they argue that the state may not make content based distinctions as to what groups may use, or what messages may be conveyed in, such a forum. See *Police Department v. Mosley*, 408 U. S. 92 (1972); *Cox v. Louisiana*, 379 U. S. 536. The right of the religious to nondiscriminatory access to the public forum is well established. See *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Murdock v. Pennsylvania*, 319 U. S. 105 (1943). Moreover, it is clear that there are bounds beyond which the University could not go in enforcing its regulation: I don't suppose it could prevent student's from saying grace before meals in the school cafeteria, or prevent distribution of religious literature on campus.³

Petitioners, on the other hand, argue that allowing use of their facilities for religious worship is constitutionally indistinguishable from directly subsidizing such religious services: It would "[fund] a specifically religious activity in an otherwise substantially secular setting." *Hunt v. McNair*, 413 U. S. 734, 743 (1934). They argue that the fact that secular student groups are entitled to the in-kind subsidy at issue

³There are obvious limits on the scope of this analogy. I know of no precedent holding that simply because a public forum is open to all kinds of speech—including speech about religion—it must be open to regular religious worship services as well. I doubt that the state need stand by and allow its public forum to become a church for any religious sect that chooses to stand on its right of access to that forum.

80-689—OPINION

6

WIDMAR v. VINCENT

here does not establish that a religious group is entitled to the same subsidy. They could convincingly argue, for example, that a state University that pays for basketballs for the basketball team is not thereby required to pay for bibles for a group like Cornerstone.⁴

A third analogy suggests itself, one that falls between these two extremes. There are a variety of state policies which incidentally benefit religion that this Court has upheld without implying that they were constitutionally required of the state. See *Board of Education v. Allen*, 392 U. S. 236 (1968) (state loan of textbooks to parochial school students); *Zorach v. Clauson*, 343 U. S. 306 (1952) (release of students from public schools, during school hours, to perform religious activities away from the school grounds); *Everson v. Board of Education*, 330 U. S. 1 (1947) (state provision of transportation to parochial school students). Provision of university facilities on a uniform basis to all student groups is not very different from provision of text books or transportation. From this perspective the issue is not whether the state must, or must not, open its facilities to religious worship; rather, it is whether the state may choose not to do so.

Each of these analogies is persuasive. Because they lead to different results, however, they are of limited help in reaching a decision here. They also demonstrate the difficulty in reconciling the various interests expressed in the Religion Clauses. In my view, therefore, resolution of this case is best achieved by returning to first principles. This requires an assessment of the burden on respondents' ability freely to exercise their religious beliefs and practices and of the state's interest in enforcing its regulation.

⁴There are, of course, limits to this subsidy argument. *Sherbert, supra*, and *Thomas, supra*, demonstrate that in certain circumstances the state may be required to "subsidize," at least indirectly, religious practices, under circumstances in which it does not and need not subsidize similar behavior founded on secular motives.

Respondents complain that compliance with the regulation would require them to meet "about a block and a half" from campus under conditions less comfortable than those previously available on campus.⁵ I view this burden on free exercise as minimal. Because the burden is minimal, the state need do no more than demonstrate that the regulation further some permissible state end. The state's interest in avoiding claims that it is financing or otherwise supporting religious worship—in maintaining a definitive separation between church and state—is such an end. That the state truly does mean to act toward this end is amply supported by the treatment of religion in the state constitution.⁶ Thus, I believe the interest of the state is sufficiently strong to justify the imposition of the minimal burden on respondents' ability freely to exercise their religious beliefs. See *United States v. Lee*, — U. S. — (No. 80-767).

On these facts, therefore, I cannot find that the application of the regulation to prevent Cornerstone from holding religious worship services in university facilities violates the First and Fourteenth Amendments. I would not hold as the majority does that if a university permits students and others to use its property for secular purposes, it must also furnish facilities to religious groups for the purposes of worship and the practice of their religion. Accordingly, I would reverse the judgement of the Court of Appeals.

⁵ Respondents also complain that the university action has made their religious message less attractive by suggesting that it is not appropriate fare for the college campus. I give no weight to this because it is indistinguishable from an argument that respondents are entitled to the appearance of an endorsement of their beliefs and practices from the university.

⁶ Since 1820, the Missouri Constitution has contained provisions requiring a separation of church and state. The Missouri Supreme Court has held that the state constitutional provisions are "not only more explicit but more restrictive than the Establishment Clause of the United States Constitution." *Paster v. Tussey*, 512 S. W. 2d 97 (1974).

November 6, 1981

80-689 Widmar v. Vincent

Dear Sandra:

Thank you for your join, and also for your suggestions.

In the second draft that I am circulating today, I have included - I believe - the substance of your thoughts.

Sincerely,

Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR



November 7, 1981

No. 80-689 Widmar v. Vincent

Dear Lewis,

The revised draft of the referenced case incorporates various amendments which are completely satisfactory as far as I am concerned, and which improve an already excellent opinion.

Sincerely,

Sandra

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 7, 1981

Re: No. 80-689 - Widmar v. Vincent

Dear Lewis:

I agree with virtually everything in the draft but, I have trouble with your conclusion in Part IIIB, that we need not decide whether the relevant provisions of the Missouri Constitution constitute a compelling state interest outweighing an abridgment of the First Amendment rights to free speech and association. You reach this conclusion by suggesting that the regulation here is overbroad, since it prohibits religious "teaching" as well as religious "worship." Religious teaching is a form of "worship" and there is no explanation, however, why religious teaching should receive greater First Amendment protection than religious worship, or why infringement of the latter is more easily justified by the state constitutional provisions relied on by petitioners. Are not your distinctions rather close to those you correctly criticize the dissent for making, see page 5 n.7.

I would feel more comfortable with a straightforward conclusion that Missouri's interest in maintaining the separation of church and state, to the extent it is even implicated here, cannot serve as the justification for significant infringement of the First Amendment freedoms in question.

Regards,

WEB

Justice Powell

Personal

P.S. I will understand if you
feel you cannot accept 166
view in order to hold your
"traps." W.

November 9, 1981

TO: MR. JUSTICE POWELL
FROM: DICK FALLON
RE: The Chief Justice's Response to Widmar

If I understand his memorandum correctly, the Chief Justice has advanced a preference very similar to that expressed by Justice Rehnquist: He would like to see the rejection of the University's interest under the State constitution put directly on Supremacy grounds, without resort to an overbreadth analysis. He also makes the nice point that the "overbreadth" analysis assumes a distinction between "religious worship" and "religious teaching"--a distinction that the opinion attacks in its response to the dissent. I think that the language of the opinion could be re-cast in order to avoid any appearance of internal inconsistency. But it may also be worth considering some attempt to accommodate the Chief Justice and Justice Rehnquist. *yes*

In offering an earlier recommendation against accommodating Justice Rehnquist, I was animated by two concerns. First, I thought it preferable to preserve the possibility of "balancing"; I would be reluctant to hold that a State constitutional interest--no matter how strong--could never outweigh a federal

constitutional interest--no matter how marginally implicated--in a particular case. Second, I thought it desirable to keep this decision on the narrowest possible ground, without needing to construe the Missouri constitution.

Based on further reflection, I believe that both concerns could be satisfied by substitution of some careful language, along the lines of the following, beginning at the top of page 12. (I repeat one sentence from page 12, in order to show the continuity):

It is also unnecessary for us to decide whether, under the Supremacy Clause, a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment. We limit our holding to the case before us.

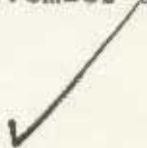
First Amendment ^{rights} interests are entitled to the ^{special} greatest constitutional solicitude. Our cases require the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content. See, e.g., Carey v. Brown, 447 U.S. 455 (1980); Police Dept. v. Moseley, 408 U.S. 92 (1972). In this constitutional context, we are unable to recognize the State interest asserted here--an interest in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution--as sufficiently "compelling" to justify content-based discrimination against religious speech.

If you think it worthwhile to pursue changes along these lines, you might want to consider raising the matter first with Justice O'Connor, who had also expressed concerns--though very different ones--about this section of the opinion. She was eager to avoid making any unnecessary law in this very difficult area. Because of the narrowness of the language I have suggested, I think it quite possible that she would be willing to go along. I would be happy to sound her clerk--and possibly Justice Blackmun's as well--if you would like me to do so. In conclusion, I would add only that I do not mean in this memorandum to "promote" the changes I have mentioned. I am essentially satisfied with the opinion as it stands. On the other hand, I appreciate the importance of getting a Court. And I find the suggested language substantively unobjectionable.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 9, 1981



Re: No. 80-689 - Widmar v. Vincent

Dear Lewis:

Please join me in your recirculation of November 6.

Sincerely,



Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

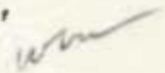
November 9, 1981

Re: No. 80-689 Widmar v. Vincent

Dear Lewis:

Thank you for responding to the note I sent you on the bench asking whether you might see fit to change some of your emphasis on "overbreadth." Your response that you believe such an analysis to be the narrowest way of disposing of the University's State Constitution claim does not, at least at the present time, persuade me. Because I am uneasy about any extension of the overbreadth doctrine, I think for the present I will simply see how the matter shakes down.

Sincerely,



Justice Powell

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 9, 1981

80-689 Widmar v. Vincent

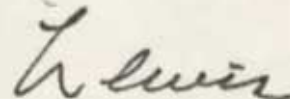
Dear Bill, Harry and Sandra:

Both Bill Rehnquist and the Chief have been concerned about what they perceive to be the "emphasis" in Part III-B of my opinion on "overbreadth" analysis. Bill has advised me today that at least for the present, he cannot join the opinion.

I would like to accommodate Bill and the Chief. Indeed, I may need one of them for a Court. I enclose a draft of language to be added on p. 12, if this meets with your approval.

I do not think this addition would affect in any material way either the holding or basic analysis of the opinion.

Sincerely,



Justice Brennan
Justice Blackmun
Justice O'Connor

lfp/ss

Proposed Substitute Language for the Text in

Widmar v. Vincent, No. 80-689, beginning at the top of page 12:

The Missouri courts have not ruled whether a general policy of accommodating student groups, applied equally to those wishing to gather to engage in religious and non-religious speech, would offend the State Constitution. We need not, however, determine how the Missouri courts would decide this issue. It is also unnecessary for us to decide whether, under the Supremacy Clause, a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment. We limit our holding to the case before us.

First Amendment rights are entitled to special constitutional solicitude. Our cases require the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content. See, e.g., Carey v. Brown, 447 U.S. 455 (1980); Police Dept. v. Moseley, 408 U.S. 92 (1972). In this constitutional context, we are unable to recognize the State interest asserted here--an interest in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution--as sufficiently "compelling" to justify content-based discrimination against religious speech.

November 9, 1981

80-689 Widmar v. Vincent

Dear Bill, Harry and Sandra:

Both Bill Rehnquist and the Chief have been concerned about what they perceive to be the "emphasis" in Part III-B of my opinion on "overbreadth" analysis. Bill has advised me today that at least for the present, he cannot join the opinion.

I would like to accommodate Bill and the Chief. Indeed, I may need one of them for a Court. I enclose a draft of language to be added on p. 12, if this meets with your approval.

I do not think this addition would affect in any material way either the holding or basic analysis of the opinion.

Sincerely,

Justice Brennan
Justice Blackmun
Justice O'Connor

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

✓

November 10, 1981

No. 80-689 Widmar v. Vincent

Dear Lewis,

The proposed new language to be added on
page 12 of your draft in the referenced case meets with
my approval.

Sincerely,

Sandra

Justice Powell

cc: Justice Brennan
Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 12, 1981

Re: No. 80-689 - Widmar v. Vincent

Dear Lewis:

Please join me.

Sincerely,

T.M.

T.M.

Justice Powell

cc: The Conference

lfp/ss 11/13/81

Rider A, Widmar

WIDA SALLY-POW

Add a new footnote 9A at the end of the first paragraph on page 8:

9A. It is, of course, sometimes necessary to distinguish between "religious" and "non-religious" speech, but not where the state has created a public forum for general use. The dissent cites ~~on~~ Stone v. Graham, ____ U.S. ____, (November 17, 1980), ^{as} ~~It is~~ an example of this distinction. The state had posted the Ten Commandments on the walls of grade school classrooms, implying state approval of the Commandments' religious basis. The dissent's hypotheticals of "class[es] entitled 'Sunday Mass' and 'The History of the Catholic Church'" are irrelevant to this case. The dissent blurs the critical distinction between a state university itself acting to further a

religion or its establishment, and the case before us where the university itself - having established an open forum for student groups - acts to deny speech therein by otherwise qualified student religious groups.

Widmar RIDER

This is a proposed footnote 9A, to be added at the end of the first paragraph on page 8. It is intended to answer the second draft of Justice White's dissent.

We do not deny, as the dissent suggests we do, see dissenting opinion, post, at 4-5, that these cases sometimes require the State to distinguish between "religious" and "non-religious" speech. Clearly we relied on such a distinction in last Term's decision in Stone v. Graham, ___ U.S. ___ (November 17, 1980), in which we held that the State could not post the Ten Commandments on the wall of a gradeschool classroom. Because such posting might imply state approval of the Commandments' religious basis, the challenged policy offended the Establishment Clause. The dissent offers a contrary account of Stone.__ It would apparently explain the decision by reference to a distinction between "religious speech" and "religious worship"--a distinction that it terms necessary if the Court is not to authorize the University to offer a class entitled "Sunday Mass." See dissenting opinion, post, at 5. We find this distinction as unnecessary as it is generally unhelpful, see note 7, supra. The Establishment Clause would of course bar such a class if it

connoted state sponsorship of religion or otherwise implied approval of the Mass's religious content. No distinction between "speech" and "worship" is needed to explain why this is so. The Establishment Clause bars state action--in the form of speech as much as any other--that is intended to advance religion. It does not require an inquiry into when speech constitutes worship.

The Establishment Clause requires the State to distinguish between speech, undertaken or approved by the State, that supports an Establishment of Religion and speech, undertaken or approved by the State, that does not support an Establishment of Religion. This distinction is required by the plain text of the Constitution. It is followed in our cases. The dissent attempts to use this distinction, which is constitutionally required, as ~~the~~ the basis for a distinction between "religious speech" and religious "worship." It is our position that this latter distinction lacks a foundation in either the Constitution or in our cases, and that it is judicially unmanageable

November 16, 1981

Re: No. 80-689 - Widmar v. Vincent

Dear Lewis:

This is in response to your note of November 9 with its proposed draft of language to be added on page 12 of your opinion for this case.

Thurgood has now joined you, so you have a Court. Of course, if you can accommodate both Bill Rehnquist and the Chief, you will have a larger Court.

I must confess, however, that your proposed new language leaves me mildly uncomfortable. I suspect this is because it serves to emphasize even more a difficulty I had with your original opinion but which I did not express -- that the opinion never really acknowledges the existence of respondents' Free Exercise interest. Its entire emphasis has been, and continues to be, on Free Speech interests.

In an effort not to be merely obstructionist, I could go along if the second paragraph of your proposed addition were changed to read as follows:

On one hand, respondents' First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content. See, e.g., Carey v. Brown, 447 U.S. 455 (1980); Police Dept. v. Moseley, 408 U.S. 92 (1972). On the other hand, the State interest asserted here -- in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution -- is inherently limited by the Free Exercise Clause. In this constitutional context, we are unable to recognize ~~that~~ interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech.

the
state's

I would hope that this change would be acceptable to the Chief and to Bill Rehnquist. If it is, you have a substantial Court.

Sincerely,

Justice Powell

cc: Justice Brennan
Justice O'Connor

Harry

and in this case by the Free Speech Clause as well.

Proposed Substitute Language for the Text in

Widmar v. Vincent, No. 80-689, beginning at the top of page 12:

The Missouri courts have not ruled whether a general policy of accommodating student groups, applied equally to those wishing to gather to engage in religious and non-religious speech, would offend the State Constitution. We need not, however, determine how the Missouri courts would decide this issue. It is also unnecessary for us to decide whether, under the Supremacy Clause, a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment. We limit our holding to the case before us.

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Insert Justice Blackmun's Language Here

TO: MR. JUSTICE POWELL
FROM: DICK FALLON
RE: Widmar v. Vincent

Justice Blackmun has now offered a draft of "acceptable" language for Part IIIB of the opinion (page 12). It is attached, together with a copy of the language circulated by this Chambers. I would recommend only two small changes in Justice Blackmun's draft, both of which I have marked onto the attached copy. The first reiterates the Free Speech element of the case in conjunction with the Free Exercise reference that Justice Blackmun requests. I think this change necessary to prevent the opinion from becoming "schizophrenic." Written essentially on a "free speech" basis, it can sensibly add, but not substitute, a "free exercise" reference at the very end. The second suggested change is entirely stylistic.

Also attached is a redrafted Rider, answering the dissent. It is intended for insertion at the end of the first paragraph on page 8. This redrafted Rider essentially "tracks" what you drafted in response to my original suggestion.

57K

Add a new footnote 9A at the end of the first paragraph on page 8:

9A. As the dissent argues, it is sometimes necessary to distinguish between "religious" and "nonreligious" speech. See, e.g., Stone v. Graham, ____ U.S. ____ (November 17, 1980). But our cases have never required the State to distinguish between religious and nonreligious speech by private speakers in a public forum. The dissent's hypotheticals of classes entitled "Sunday Mass" and "The History of the Catholic Church" are irrelevant to this case. By relying on them, the dissent blurs the critical distinction between a state university itself acting to further a religion or its establishment, and the case before us, in which the university has created a public forum for use by private speakers.

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 16, 1981

Re: No. 80-689 - Widmar v. Vincent

Dear Lewis:

This is in response to your note of November 9 with its proposed draft of language to be added on page 12 of your opinion for this case.

Thurgood has now joined you, so you have a Court. Of course, if you can accommodate both Bill Rehnquist and the Chief, you will have a larger Court.

I must confess, however, that your proposed new language leaves me mildly uncomfortable. I suspect this is because it serves to emphasize even more a difficulty I had with your original opinion but which I did not express -- that the opinion never really acknowledges the existence of respondents' Free Exercise interest. Its entire emphasis has been, and continues to be, on Free Speech interests.

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The state's

I would hope that this change would be acceptable to the Chief and to Bill Rehnquist. If it is, you have a substantial Court.

Sincerely,

Justice Powell

cc: Justice Brennan
Justice O'Connor

Harry

*and in this case by the
Free Speech Clause as well.*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

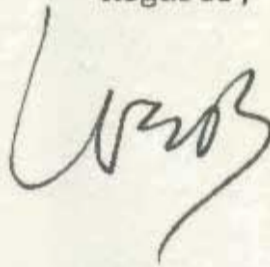
November 16, 1981

Re: No. 80-689 - Widmar v. Vincent

Dear Lewis:

In light of the problems in the Princeton case, does the second sentence, first full paragraph on page 5, need something to "save" the Princeton point? You might wish to add something like "with respect to persons having a right to be on university premises," or words to that effect.

Regards,

A handwritten signature in dark ink, appearing to be 'JP' or 'J.P.', written in a cursive, stylized manner.

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 17, 1981

RE: No. 80-689 Widmar v. Vincent

Dear Lewis:

I have already joined you in the above and of course
continue to. May I suggest one thought about your recir-
culation of November 17? At page 12, fourth and third
lines from the bottom, would you mind changing "inherently
limited" to "limited here"?

OK

Sincerely,

Bill

Justice Powell

November 17, 1981

80-689 Widmar v. Vincent

Dear Chief and Bill:

I have tried, in my 3rd draft circulated herewith, to meet your concerns with respect to reliance on overbreadth. See page 12.

I have cleared the new language with several of the Justices who had joined it earlier.

Sincerely,

The Chief Justice
Justice Rehnquist

lfp/ss

U. of Mo's policy is to allow all
rhf 09/16/81 ~~recognized~~ student groups to use
the Student Center for meetings, lectures, etc.
It therefore had established a public forum.

But it prohibited, by Regulation (p. 3, n. 1),
use of the Center for "purpose of religious
worship or teaching". A different Reg. provided
that Chapels could be so used.

Resp., a ~~recognized~~ ^{religious} student group, brought
their suit claiming denial of 1st Amend rights.

CA 8 agreed and invalidated the restricted Reg.
It held, correctly, that "religious speech" is
protected speech; that the U. had created a
public forum & could no more deny access to
Resp. than to Students for Democratic Action.

The University (Pet.) argues there is an
"Establishment Clause" case & must be so analyzed.

As students BENCH MEMORANDUM could "exercise"
their religion elsewhere (e.g. Chapel), the
TO: Mr. Justice Powell state interest in not furthering
FROM: Dick Fallon Establishment was ~~no~~ ^{more} weighty
DATE: September 16, 1981 (But what ^{about} allowing use of
RE: No. 80-689, U. of Mo. v. Vincent et al. chapel?)
Widmar et al.

Amici argue that "religious speech" is not
"speech" in First Amend. sense. But could prayer
be forbidden in a public park?

Question Presented

This case presents the question whether a University,
which has made its facilities available for the activities of
all other registered student groups, may close the facilities
to registered student groups wishing to engage in religious
worship and religious discussion.

CA 8's analysis is correct. Here an existing
public forum was at issue. Is quite diff. from
cases where a religious sect request that a
special forum be provided for it.

Analytical Approach of the Memorandum

Reversing the district court, the Eighth Circuit answered this question in the negative. The University, it concluded, could not justify its discriminatory treatment of religious speech. The reasoning of the Court of Appeals impresses me as thoroughly persuasive. For this reason, this memorandum is written in somewhat unusual form. In the first section I summarize the court of appeals' opinion. But I also also try to clarify the court's implicit assumptions and to defend them against alternative analytical approaches. This seemed to me to be the approach most likely to avoid repetitiveness. The second section of the memorandum is then devoted to consideration of the arguments of the parties. Arguments are first explored, then critiqued.

In view of the approach that I have taken, I should describe at the outset the two ways in which this case can be viewed.

(1) The Court of Appeals saw this as a "public forum" case. The University had created a public forum. Having done so, it could not exclude speech, based on its religious content, without a compelling justification. The State can provide none on the facts of this case. For reasons that will become clear, I think that the facts make this the sounder approach.

(2) The University sees this as a "Religion Clauses" case. On one side lies the "Free Exercise" interest of the student religious groups; on the other side lies the State's

"Establishment Clause" interest in avoiding entanglement. If the case is seen this way, it is important that the students could practice their religion elsewhere. The State's "Establishment Clause" interest may therefore be the more weighty.

I. THE REASONING OF THE COURT OF APPEALS: EQUAL ACCESS TO A PUBLIC FORUM

The Eighth Circuit reasoned from the premise that the University of Missouri had created a limited public forum. This may have been a voluntary step, which the University bore no obligation to take.¹ In taking it, however, the University

¹It is the University's policy to permit recognized student groups to use the student center and certain other facilities for their meetings, lectures, programs, and other events. Each student is required to pay an activity fee--\$41 per semester during 1978-1979--to defray maintenance and janitorial costs. From 1973-1977, the appellant Cornerstone conducted regular weekly meetings within University facilities. It was and remains a registered student organization. In 1977, however, the University halted Cornerstone's use of University buildings as the site for its meetings. It did so pursuant to University Regulation 4.0314.0107, which provides in pertinent part: "No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups." The Regulation explained that "The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of the Board of Curators, by the Constitution and laws of the State."

Without explanation of the constitutional justification for the distinction, the Regulation continued that "No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities." The next regulation provided that "Regular chapels established on University grounds may be used for religious services...." Reg. 4.0314.0108.

Regulation

assumed the burden of justifying the exclusion of any particular kind of speech. See, e.g., Carey v. Brown, 48 U.S.L.W. 4756, 4758 (1980), quoting Police Dept. v. Mosley, 408 U.S. 92, 95-96 (1972) ("Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."). There is no doubt that religious speech is protected by the First Amendment.²

In order to mark religious speech for exclusion, the State must therefore advance some important if not compelling interest. See, e.g., Carey, supra, 48 U.S.L.W. at 4858 (only a compelling interest could justify content-based distinction); ✓ Healy v. James, 408 U.S. 169, 184 (1972) ("heavy burden" rests on college to justify denial of facilities to SDS).³ yes

²The court cited Fowler v. Rhode Island, 345 U.S. 67 (1953) (city may not exclude certain kinds of religious speech from its parks) and Murdock v. Pennsylvania, 319 U.S. 105 (1943). This Court implicitly reiterated this principle only last Term. See Heffron v. International Society for Krishna Consciousness, Inc., 49 USLW 4762, 4764 (1981) ("The State does not dispute that the oral and written dissemination of the Krishnas' religious views and doctrines is protected by the First Amendment.") (citations omitted). of course

³Justice White's proposed dissent from a denial of cert in this case, in which you had planned to concur, argued that "no decision of this Court has explicitly determined that the compelling state interest test, as opposed to some lesser standard, is appropriate in a case involving competing First Amendment values." The "competing value" that he had in mind was the State's interest in avoiding "entanglement" of the sort contemplated by the Establishment clause. Strictly speaking, Footnote continued on next page.

Here the State claims a compelling interest in avoiding entanglement with religion. Provision of State facilities as a place of worship, the State argues, would entail financial and other support of religion. It was financial support of this kind that the Court proscribed in Tilton v. Richardson, 403 U.S. 672 (1971). Although the Tilton Court upheld financial aid to a sectarian institution, the State argues that it was careful to circumscribe the license that it granted. Congress had provided that federally-subsidized buildings must not be used for sectarian or religious worship for a period of 20 years. The Court held that this was not enough. "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious uses, the original federal grant will in part have the [constitutionally impermissible] effect of advancing religion." Tilton, the State argues, thus stands for the proposition that State funds

Justice White would appear to be correct that this Court has not explicitly stated the standard to be applied. But it is not apparent that this is a legally powerful fact.

Justice White's draft appeared to concede that the university had created a public forum. See Draft Dissent at 3 n.2. And his opinion in Heffron, *supra*, clearly recognized that religious speech is entitled to First Amendment protection. This seems to me to be conclusive. The cases establish that only a compelling state interest will justify a content-based restriction on free speech in a public forum. Cf. Heffron, 49 USLW at 4764 ("A major criterion of a valid time, place, and manner restriction is that the restriction 'may not be based upon either the content or the subject matter of the speech.'"). If so, the real question in the case is: At what point--if any--does the State's interest in avoiding entanglement with religion become sufficiently compelling to exclude religious speech from a public forum?

may not be used to provide buildings for use by religious organizations.

The District Court had found Tilton to be controlling. But the Eighth Circuit held that it was not. Tilton had contemplated the possibility that a sectarian institution might actually convert federally funded buildings into chapels or otherwise stamp them with the imprimatur of religion. The case had actually upheld the validity of federal building grants, subject only to the condition that the buildings not be used primarily for religious worship. Tilton was therefore significantly different on its facts. It did not control.

CA 8 applied
Not being governed by Tilton, the State assistance contemplated in this case must be assessed under a settled three-part test, reiterated by this Court as recently as Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646, 653 (1980). "First, the [governmental regulation] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ***; finally, the [regulation] must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971), quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970).

In this case two prongs of the test were admittedly not problematic. The district court had held that a policy permitting religious speech in University facilities would (1) have a neutral purpose and (3) would avoid "entanglement" with religion. The district court had concluded, however, that such

a policy would fail the test's second prong: that it would (2) have the "primary effect" of advancing religion. The court of appeals therefore addressed itself mainly to this prong of the test. It reasoned as follows:

CA 8 reasoning - following use would not have primary effect of advancing religion

"We cannot agree...that such a policy would have the primary effect of advancing religion. Rather, it would have the primary effect of advancing the University's admitted secular purpose--to develop students' 'social and cultural awareness as well as their intellectual curiosity.' It would simply permit students to put their religious ideas and practices in competition with the ideas and practices of other groups, religious or secular. It would no more commit the University, its administration or its faculty to religious goals than they are now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance, the Young Democrats of the Women's Union."

This paragraph ably summarizes the reasoning of the Eighth Circuit. It also illuminates the Eighth Circuit's disagreement with the district court; and it does much to clarify the essential point of disagreement among the parties in this Court. As framed by the Eighth Circuit, the question was one of "equal access." The court had reasoned from the outset that the University had created a public forum.⁴ Under standard

⁴This reasoning provides an implicit answer to the argument that the "primary effect" of opening the buildings would be to advance religion. The "open forum" policy was adopted not to promote religion, but to encourage student fellowship and the

Footnote continued on next page.

yes

First Amendment analysis, the burden therefore rested on those who wished to treat religious speech as constitutionally exceptional.

The district court, by contrast, began from a "Religion Clauses" perspective. In its view, the case needed to be analyzed as a conflict--requiring a balancing resolution--between the competing interests of the Free Exercise and Establishment Clauses. Expressed another way, the district court assumed a special difficulty about providing facilities to a religious group, and its analysis flowed from that worry.

In my judgment the Eighth Circuit adopted much the better mode of analysis. In the first place, its analysis--unlike that of the district court--attaches significance to the fact that the State has created a public forum in which content censorship is presumptively proscribed. When the case is

free exchange of ideas. It is the effect of this entire policy that must be assessed, not the extension of this policy to religious groups and speakers. Once the forum was opened, religious speakers could not be excluded due to the content of their speech. But the primary effect of creating the forum was not to promote religion, any more than it was to promote the views of other speakers who might utilize the forum that the University provided.

Because a public forum already exists, this case is fundamentally unlike Brandon v. Board of Education, 635 F.2d 971 (CA2 1980) and other cases in which schools have denied the requests of student groups to provide a forum in order to permit them to practice their rights under the Free Exercise clause. That is a different case--the one imagined by Justice White in which the Establishment and Free Exercise clauses are arguably brought into direct conflict. Here, no special privileges are sought for religious speakers under the Free Exercise clause. The argument is that religious speakers may not be denied that which is already available to speakers of all other kinds.

Public
forum
- not
established
for any
particular
group

analyzed as a conflict of Free Exercise and Establishment concerns, the separate First Amendment concern for avoidance of content-based restrictions simply falls out of the picture.

Yet this factor is crucial, as can be seen from a comparison with some of the cases to which this one (Widmar) has been analogized. For example, in his proposed dissent from a denial of cert, Justice White argued that "lower state and federal courts have reached divergent results involving similar claims by religious groups against state rules involving educational institutions." He cited Brandon v. Board of Education, supra, and Hunt v. Board of Education, 321 F. Supp. 1263 (SD W. Va. 1971) as cases in which courts had upheld schools' refusals to permit the use of public school facilities for religious purposes. But those cases--in which students claimed a Free Exercise right to have the school open its facilities to them, though not necessarily to other groups--are significantly different from this one. In Brandon and Hunt the schools had not created public forums. The schools had not chosen to provide their facilities to independently organized student groups. Against this background, the students asked the schools to take an affirmative step on behalf of their organizations alone. When such a demand is made--and justified by an appeal to Free Exercise rights--a tension with Establishment concerns does arise. Religious speakers ask special benefits from the State, so that they can practice their religion. But that is not this case. As Judge Kaufman recognized in his opinion in Brandon, 635 F.2d at 980, the

Cases cited in Byronie's dissent from denial of cert. did not involve existing "public" forums.

} yes

student religious group here sought merely to share in the benefits accorded to all other student groups--to avoid discrimination based on what they wished to say at their meetings. Judge Kaufman thus had no difficulty in reconciling his Brandon decision with the result in this case: "The facilities of a university ~~have~~ ... ~~have~~ been identified as a 'public forum,' where religious speech and association cannot be prohibited." id. That was not so in the case of the high school classroom, and the difference was dispositive.

There is a second reason why the "public forum" analysis should be preferred to the "Religion Clauses" approach of the district court. Unless it is assumed prima facie that religious groups and religious speech are entitled to the same protection as other speech, every government action that affects a religious organization--no matter how remotely--must be suspect under the Establishment Clause. Consider the example of a public park, in which sundry orators routinely speak from the stumps of State-owned trees. Could the State exclude only those speakers who wished to speak on religious topics? Indeed, must it do so, under the Establishment Clause?

If the burden is to justify a policy of allowing religious speakers--if the assumed norm is one in which the right to speak belongs to everyone but religious speakers-- it is clear that the effect of extending the policy to include religious speech will always be to advance religion. This is why Professor Tribe describes as "metaphysical" the effort to distinguish and apply the "primary effect," see Regan, supra,

yes

44 U.S. at 653 and the "direct and immediate effect" standard of Committee for Public Education v. Nyquist, 413 U.S. 756, 783 n.39 (1973). See L. Tribe, American Constitutional Law 840 (1978). Yet virtually no one--apparently not even the University of Missouri--would defend the constitutionality of excluding religious speech from the streets and parks. *Right!*

In Widmar, for example, the University struggles to distinguish O'Hair v. Andrus, 613 F.2d 931 (CA-DC 1979). In that case the court considered a challenge to the use of the National Mall for the celebration of Mass by Pope John Paul II. Noting that the Free Exercise Clause actually compels "government to make some accomodation to religious realities and needs," Judge Leventhal's thoughtful opinion held that "equal access to a public facility generally open to the public" represented the only workable principle. Id. at 935. In attempting to distinguish O'Hair, the University attaches constitutional relevance to the distinction between a public park and a public building. It is true that there may sometimes be differences between a public building and the public streets and parks. These outdoor facilities have "immemorially been held in trust for use by the public and ... have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Heffron, supra, 49 USLW at 4765, quoting Hague v. CIO, 307 U.S. 496, 515 (1939). But restrictions based on the nature of the public forum have traditionally rested on the "State's interest in protecting the safety and convenience of persons using a public

forum," Heffron, supra, 49 USLW at 4765, not on an interest in censoring the content of what is said, see Carey, supra, 48 USLW at 95-96 ("Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and they may not be justified by reference to content alone.").⁵

Based on the foregoing arguments, I would conclude that the provision of equal access to religious speakers--at least in the absence of powerful evidence of State intent to advance religion--does not offend the Establishment Clause. The Establishment Clause thus fails to justify the claim of a compelling constitutional interest in denying this benefit--which is available to all others--to those who would use it for religious speech.⁶

⁵The University also seems to advance a second argument for distinguishing between public parks on the one hand and public buildings on the other. The use of a building is different, the University says, because of the greater financial cost. This too is unpersuasive. It may generally cost more to provide access to a building than access to parkland, but this is only a contingent accident. In O'Hair the government spent more than \$128,000 for services rendered out-of-doors during the papal mass.

⁶Cf. Heffron, supra ("These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their viewsIf Rule 6.05 is an invalid restriction on the activities of [the Krishnas], it is no more valid with respect to the other social, political or charitable organizations....").

Three other arguments for upholding the University's restrictive rule are not treated so well in the opinion of the Eighth Circuit. Nonetheless, they merit serious discussion.

University also relies on — First, the University argues that the tradition of academic freedom entitles it to special latitude in establishing its own rules. Further, this Court has noted that impressionable minds should not be encouraged to see the State's imprimatur on religious activities. See, e.g., Roemer v. Board of Public Works, 426 U.S. 736, 750, 764 (1976). But these arguments are two-edged in the context of this case. It is the University's mission to provide a free market of ideas, in which all points of view are included. If there is anywhere where content-censorship is abhorrent, it is in the context of a University. This is also an answer to the concern about the State's imprimatur. College students are presumably mature enough to benefit from exposure to a broad range of ideas. Unlike children in primary and even secondary schools, they should be able to see that the University does not sanction the ideas of all those who use its facilities--not those of a religious group any more than those of the SDS.

New point The second argument is based on State law. Dissenting from a denial of a petition for rehearing en banc, two judges argued that the Missouri State Constitution created a compelling interest in denying State support to religious speech. The Missouri constitution provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination." Art.

I, § 7. According to the dissenting opinion, "The Missouri courts have long interpreted these provisions to be more restrictive than the first amendment to the United States constitution in prohibiting expenditures of public funds in a manner tending to erode an absolute separation of church and state." Moreover, the challenged University regulation stated in terms that "The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of the Board of Curators, by the Constitution and laws of the State...."

There are various difficulties in evaluating this argument. First, it is far from clear how the Missouri courts would apply the Missouri constitution in this case. The State itself is not a party to the case; the Attorney General has not filed an amicus brief. Moreover, the Missouri Supreme Court's most recent relevant decision upheld a program of tuition grants to students attending private colleges, including those with sectarian affiliations. American University v. Rogers, 538 S.W.2d 711, cert. denied, 429 U.S. 1029 (1976). Based on this opinion, it is at least uncertain that an "equal access" policy would offend the state constitution. On the other hand, the Rogers opinion rests heavily on the notion that the grants go to the students, not the colleges. And it also argues for deference to the legislature, while reaffirming earlier opinions that do strike

down legislation that would not offend the federal constitution.

Yes - a serious question

Leaving the question of what the law of Missouri is, there is a related question whether a Missouri policy of separation, stricter than the federal constitutional requirement, could qualify as a compelling state interest in a constitutional balancing test. In Leutkemeyer, et al. v. Kaufmann, et al, 364 F.Supp. 376, 386 (W.D. Mo. 1973), aff'd, 419 U.S. 888 (1974), the district court held that it could, but only in certain instances. The Eighth Circuit treated these concerns only in a footnote, No. 7, which must be regarded as ambiguous. But the footnote appears to hold that the State interest in separation is not compelling in the factual setting of this case, and that it does not seem to have been regarded as compelling even by the University itself. As the court noted, "The regulation at issue specifically states that the ban on the use of University facilities for religious worship or teaching is not to be interpreted 'to forbid the offering of prayer or other appropriate recognition at public functions held in University facilities.'" A further University regulation provides that "Regular chapels established on University grounds may be used for religious services but not for regular recurring services of any groups. Special rules and procedures shall be established for each such chapel by the Chancellor."

These regulations belie the claim that the University sees a compelling State interest in maintaining the kind of "strict" separation of church and State that it purports to defend in

this Court. Cf. Carey, supra, 48 U.S.L.W. at 4758 (statute's over-inclusiveness and under-inclusiveness undermines claim that it can be justified by reference to asserted State interest). Under the circumstances, it seems preferable to avoid the hard questions of Missouri and federal constitutional law that would otherwise arise. Accordingly, ^{Dick} I would hold that the regulation in issue is underinclusive; that it does not effectively serve the alleged State interest in rigid separation of church and state; and that it therefore cannot be justified on that basis.

Alternatively, I believe that the issue could be met as follows: It is at least unclear that the Missouri Supreme Court would hold that the state constitution forbids the extension of equal protection to religious teaching and worship. Even if it did, the state interest would not be compelling in this case. The extent of state support would be de minimis; there would be no "entanglement"; there would be no imprimatur of State approval here--or at any rate substantially less than than occurs through the maintenance of University chapels and the saying of prayers at public ceremonies.

State's final argument The other argument deserving consideration would attempt to distinguish between religious speech and religious worship.⁷

⁷Judge Kauffman invoked this distinction in his opinion in Brandon, supra. Specifically, he suggested that it was constitutionally significant that the high school students sought use of a classroom for purposes of religious worship, rather than speech about religious topics. See 635 F.2d at 978.

(The University regulation here at issue purported to exclude "religious worship or religious teaching.") On this view, religious "speech" would enjoy traditional First Amendment protection; religious worship could be excluded under the Establishment Clause. This distinction possesses some intuitive plausibility. On the surface, it might appear to express both the constitutional respect for speech and the constitutional wariness of entanglement with particular forms of worship. But such a distinction would involve the government in the task of defining what was and was not "worship."⁸ "The administration of such a test would [itself] impermissibly entangle government and religion." O'Hair v. Andrus, supra, 613 F.2d at 936. This proposed solution thus fails. Surely the Constitution does not require the State to make choices that entangle it with religion in this way.

II. OTHER ARGUMENTS: THE BRIEFS

A. Petitioners

1. Arguments

⁸ In Fowler v. Rhode Island, 345 U.S. 67, 70 (1953), the Court struck down an ordinance that would have required a distinction between religious services that were and those that were not permissible in a public park. The Court held:

"It is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment....To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another."

Appearing in this Court as the petitioner, the University of Missouri contends most adamantly that permitting religious use of Univeristy facilities would have the "primary effect" of advancing religion. The "primary effect" test, it says, forbids any governmental action with a "substantial religious impact." Brief at 17. Here it sees such an impact arising through financial support and an "aura of implied approval."

Interlocking argument
 Petitioners also advance a subtle and sophisticated argument that the constitution does not recognize the complex concept of "religious speech." The constitution, they assert, recognizes "speech" and it recognizes "religion." But constitutional concerns implicating religion must be assessed in the context of the "Establishment Clause." It is important to begin any analysis from this perspective. It is mistaken to begin with a free-speech, public-forum model, in which distinctions based on content bear a heavy burden of justification. To do so inevitably assigns the "Establishment Clause" a secondary importance, where the constitution intended it at least to have parity.

Petitioners also claim that Missouri has a special state interest in barring public expenditures for the benefit of religion. They argue, finally, that the University is not a traditional public forum; application of that concept is therefore inappropriate.

A strong amicus brief by the B'Nai B'rith in essence reasserts the claim that "religious speech" is not "speech" in

the usual sense. Government interaction with religion falls into three categories: the proscribed, the mandated, and the permissible. See Walz v. Tax Commission, 397 U.S. 664 (1970). Here, no one's rights to the free exercise of religion have been violated. The claim, instead, is that the government is obliged to take affirmative steps in the aid of religion. (It is assumed throughout that no free-speech right of equal access to a public forum is implicated; this is another way of saying that "speech" and "religion" are separate constitutional concepts.) Analysis can stop at this point. No affirmative reason exists why aid must be provided. Even assuming that some reason does exist, the State's interest in maintaining separation would override it.

The American Jewish Congress also argues that this is essentially an "Establishment Clause" case. The First Amendment requires a distinction between sectarian and non-sectarian speech. Free speech doctrines do not apply to the former in the way that they do to the latter.

2. Analysis

you | Petitioners' most powerful argument is, in essence, that "religious speech" is not "speech." In justification they point to the structure of the constitution, which at least in some sections--notably the Establishment Clause--treats religion as a concern distinct from others. To regard "religious speech" as "speech," they reason, is to ignore this implicit distinction; worse, it is to risk the very

entanglement with religion that the Establishment Clause was intended to prevent.

There are two objections to this argument. The first is linguistic: It is odd not to treat "religious speech" as "speech." *it is indeed!*

- ① Could a municipality forbid prayer in a public park? *Q*
- ② Could it ban conversations about religious subjects? Perhaps under some circumstances it could. If so, however, it should surely have to meet a heavy burden of justification, not merely explain that it was withholding support for religion.

Exactly

The second objection is practical. Government could not make the distinction between "religious speech" and "non-religious speech" without involving itself deeply in religious questions. There would be repeated arguments over definitions. The line suggested would therefore lead to increased entanglement in religion--the very result that the Establishment Clause was meant to foreclose.

B. Respondents

1. Arguments

Respondents argue that the government cannot regulate speech on the basis of content. Equality of access to a public forum does not violate the Establishment Clause. The State does not place its imprimatur on religious speech in a public forum. It fosters a climate of lively intellectual exchange, in which the State has a neutral interest.

Amici argue that the University is inherently infused with First Amendment concerns about the vitality of free exchange in ideas. The State interest in limiting speech is virtually

nonexistent there. This case is unlike cases in which the State has exposed elementary school children to religious matter. The State imprimatur is absent here; the elements of voluntarism and maturity are greater. Many of the classic free speech and public forum cases have involved religious expression. Maintenance of an open and accessible public forum is not an establishment of religion.

The regents of the University of California note that they, and presumably many other college administrations, open their buildings equally to religious and non-religious speech. They argue that their policy does not offend the Establishment Clause.

2. Analysis

you Respondents and amici characterize this as a free-speech, public-forum case. Petitioners see it as essentially an Establishment Clause case. This brings the University of California regents to view this Court as facing a choice between the two. For the reasons stated above, I would analyze this case within a "public-forum model." It should be pointed out, however, that different cases would call for different analyses. The State is under no obligation to create a public forum. It need not open every public building to public use. When it moves, however, it must move even-handedly. Absent weighty justification, the State may not differentiate among speeches or speakers on the basis of content. you

III. SUMMARY

1. This case is different from one in which religious speakers ask the State to provide them with special benefits needed if they are to "exercise" their religion. The question here involves discrimination against religious speech. Having voluntarily created a public forum, the University of Missouri could not exclude religious speech without demonstrating a compelling justification for its attempt at content regulation.

2. The Establishment Clause does not forbid the State to grant religious speakers equal access to a public forum. It therefore fails to provide a justification for the University's regulation.

3. The State's interest in avoiding entanglement, which is broadly defined by the State constitution also, also fails to justify the regulation attempted here. The regulation was impermissibly underinclusive: the University permits prayers at its public functions and it maintains chapels for use by religious congregations.

4. The decision of the Court of Appeals should therefore be affirmed.

*I agree.
A relatively
easy case for me.*

80-689 WIDMAR v. VINCENT *CAS*

Argued 10/6/81

*(Establishment Clause issue - University
of Mo - public forum)*

Ayer

a recognized campus group.

Only religious groups are denied
right to use student ~~union~~ buildings.

x x x

City of Kansas City could prohibit
religious services or preaching in
a public park.

x x x

WJB asked about Christmas Tree
on Mall (Ayer answered - well,
I think - that Christmas Tree has
become national symbol)

x x x

Draws distinction bet. "regular"
& "episodic meetings (e.g. ~~Pope on~~
Pope on the Mall). But as
J.P.S. noted - & Ayer acknowledged
- that Mo. U.'s Reg would forbid
a single religious use.

x x x

Byron suggested there may be
circumstances in which ~~religious~~
religious services could ~~be~~ lawfully
be prohibited or regulated - &

?
Time,
place,
manner?

Smart (Rush)

There must be a compelling state interest.

→ Brief for Anti-~~Defamation~~ Defamation League argues this interest is the desire of University of avoid violating Establishment Clause.

WJB mentioned the language of Mo. Const.: Counsel said these do not go beyond Fed Const. This issue was not raised below & has not been decided in MO.

Key is "equal accommodation"

WJB noted this is dif. issue from Healy - no Estab. Clause issue there
x x x

The Reg. allows a religious group to hold a business meeting - but Q arises as to when "business" becomes "religious"

Could exclude all off-campus groups.

WJB noted that advanced degrees in religion are given by State Universities
~~Smart~~

Reference in Brief to Jefferson at U Va. But as Sandra noted 14th amend had not incorporated the 1st

App 8-1

The Chief Justice App.

Reg. is "content" specific, but there was a public forum.

There is a "speech" rather than religion case.

Justice Brennan App.

The Regulation burdens the Free Exercise of Religion by the Student groups. State failed to show a compelling interest.

We should write narrowly - not get into use of streets, parks, etc.

Write op. focusing on facts.

Would have dif. if outside groups were seeking to come in

Justice White Rev.

Should not compel a University to allow religious use of a bldg - violates Establishment Clause

Justice Marshall *Aff*

Agree with W & B

Justice Blackmun *Aff*

Public forum.

*University allows all other
recognized groups.*

Write narrowly

Justice Powell *Aff*

Agree with C & J, W & B & H & A & B

CA 8's up. is right.

*Would not be favoring a religious
group. It would be treating all alike.*

*There is a 1st Amend - free speech -
case for purpose of analysis.*

Justice Rehnquist *aff.*

Had it not been for 14th Amend.,
~~the~~ University could have excluded whomsoever
it wished.

But agrees this is free speech case

Justice Stevens *aff.*

agrees this is free speech case

Justice O'Connor *aff*

Agrees in free speech case

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-689

GARY E. WIDMAR, ET AL., PETITIONERS v. CLARK
VINCENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[October —, 1981]

JUSTICE POWELL delivered the opinion of the court.

This case presents the question whether a state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.

I

It is the stated policy of the University of Missouri at Kansas City¹ to encourage the activities of student organizations. The University officially recognizes over 100 student groups. It routinely provides University facilities for the meetings of registered organizations. Students pay an activity fee of \$41 per semester (1978-1979) to help defray the costs to the University.

From 1973 until 1977 a registered religious group named Cornerstone regularly sought and received permission to conduct its meetings in University facilities.² In 1977, how-

¹The University of Missouri at Kansas City (UMKC) is one of four campuses of the University of Missouri, an institution of the State of Missouri.

²Cornerstone is an organization of evangelical Christian students from various denominational backgrounds. According to an affidavit filed in 1977, "perhaps twenty students . . . participate actively in Cornerstone and form the backbone of the campus organization." Affidavit of Florian

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2

WIDMAR *v.* VINCENT

ever, the University informed the group that it could no longer meet in University buildings. The exclusion was based on a regulation, adopted by the Board of Curators in 1972, that prohibits the use of University buildings or grounds "for purposes of religious worship or religious teaching."⁵

Eleven University students, all members of Cornerstone, brought suit to challenge the regulation in Federal District

Chess (Sept. 29, 1977), quoted in *Chess v. Widmar*, 480 F. Supp. 907, 911 (WD Mo. 1979). Cornerstone held its on-campus meetings in classrooms and in the student center. These meetings were open to the public and attracted up to 125 students. A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences.

⁵The pertinent regulations provide as follows:

"4.0314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. . . . The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. . . .

"4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for recurring services of any groups. Special rules and procedures shall be established for each chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group."

There is no chapel on the campus of the University of Missouri at Kansas City. The nearest University chapel is at the Columbia campus, approximately 125 miles east of UMKC.

Before 1977 University officials were unaware of the religious character of Cornerstone's meetings. The District Court found that University officials had never "authorized a student organization to utilize a University facility for a meeting when they had full knowledge that the purposes of the meeting include[d] religious worship or religious teaching." *Chess v. Widmar*, *supra*, at 910.

Court for the Western District of Missouri.⁴ They alleged that the University's discrimination against religious activity and discussion violated their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States.

Upon cross motions for summary judgment, the District Court upheld the challenged regulation. *Chess v. Widmar*, 480 F. Supp. 907 (WD Mo. 1979). It found the regulation not only justified, but required, by the Establishment Clause of the Federal Constitution. *Id.*, at 916. Under *Tilton v. Richardson*, 403 U. S. 672 (1971), the court reasoned, the State could not provide facilities for religious use without giving prohibited support to an institution of religion. *Id.*, at 915-916. The District Court rejected the argument that the University could not discriminate against religious speech on the basis of its content. It found religious speech entitled to less protection than other types of expression. *Id.*, at 918.

The Court of Appeals for the Eighth Circuit reversed. *Chess v. Widmar*, 635 F. 2d 1310 (CA8 1980). Rejecting the analysis of the District Court, it viewed the University regulation as a content-based discrimination against religious speech, for which it could find no compelling justification. *Id.*, at 1315-1320. The Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kinds. According to the Court of Appeals, the "primary effect" of such a policy would not be to advance religion, but rather to further the neutral purpose of developing students' "social and cultural awareness as well as [their]

⁴Clark Vincent, the respondent, and Florian Chess, the named plaintiff in the action in the District Court, were among the students who initiated the action on October 13, 1977. Named as defendants were the petitioner Gary Widmar, the Dean of Students at UMKC, and the University's Board of Curators.

intellectual curiosity.’” *Id.*, at 1317 (quoting from the University bulletin’s description of the student activities program, reprinted in *id.*, at 1312, n. 1).

Essentially for the reasons stated by the Court of Appeals, we now affirm.

II

Through its policy of accommodating the meetings of registered student groups, the University has created for its students a quasi-public forum.⁵ Having done so, the University assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a public forum, even if it was not required to create the forum in the first place. See, e. g., *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm’n*, 429 U. S. 167, 175 and n. 8. (1976) (although a State may conduct business in private session, “where the State has opened a forum for direct citizen involvement,” exclusions bear a heavy burden of justification); *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 555–559 (1975) (because municipal theater was a public forum, city could not exclude a production without satisfying constitutional safeguards applicable to prior restraints).

The University’s institutional mission, which it describes as providing a “secular education” to its students, Brief for

⁵ The concept of a “public forum” rests on the recognition, first expressed in *Hague v. CIO*, 307 U. S. 496, 515 (1939), that

“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”

See also *Police Dept. v. Mosley*, 408 U. S. 92 (1972); *Cox v. Louisiana*, 379 U. S. 536 (1965).

Petitioners 44, does not exempt its actions from constitutional scrutiny.⁸ Our cases leave no doubt that the First Amendment rights of speech and association reach state university campuses with undiminished force. See, e. g., *Healy v. James*, 408 U. S. 169, 180 (1972); *Tinker v. Des Moines Independent School District*, 393 U. S. 503, 506 (1969); *Shelton v. Tucker*, 364 U. S. 479, 487 (1960).

Here the University of Missouri has discriminated against groups and speakers based on their desire to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. See, e. g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Saia v. New York*, 334 U. S. 558 (1948).

⁸This Court has recognized that the campus of a public university possesses many of the characteristics of a public forum. "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" *Healy v. James*, 408 U. S. 169, 180 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Id.*, at 181-182. We have therefore held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. *Id.*, at 181, 184.

On the other hand, First Amendment rights must of course be analyzed "in light of the special characteristics of the school environment." *Tinker v. Des Moines Independent School District*, 393 U. S. 503, 506 (1969). A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied its authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.

In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. See *Carey v. Brown*, 447 U. S. 455, 461, 464-465 (1980).⁷

III

In this case the University claims a compelling interest in maintaining strict separation of church and State. It derives this interest from the "Establishment Clauses" of both the Federal and Missouri Constitutions.

A

The University first argues that it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause of the Constitution of the United States.⁸ We agree that the University has a compelling interest in complying with its constitutional obligations. But we disagree with its conclusion that an "equal access" policy would be incompatible with this Court's Establishment Clause cases. Those cases hold that a policy will not offend the Establishment Clause if it can

⁷ See also *Healy v. James*, 408 U. S. 169, 184 (1972):

"It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which . . . may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."

⁸ "Congress shall make no law respecting an establishment of religion. . . ." U. S. Const., Amdt. 1. The Establishment Clause has been made applicable to the States through the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940).

pass a three-pronged test: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the [policy] must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971). See also *Committee for Public Education v. Nyquist*, 413 U. S. 756, 773 (1973).

In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose⁹ and would avoid entanglement with religion.¹⁰ But the District Court con-

⁹The University's secular purpose is to provide a forum in which students can exchange ideas. It does not undermine this purpose that some groups will use the forum to engage in religious speech. We do not understand petitioners to argue that a State could—much less that it must—exclude religious speech from the streets or from the parks that it maintains as public forums. Yet the State's purpose remains as secular when the forum is a room within a government building, see *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U. S. 167 (1976) (meeting room); *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546 (1975) (municipal theatre), as when it involves the streets or the parks, see *Police Department v. Mosley*, 408 U. S. 92 (1972) (outdoor picketing); *Hague v. CIO*, 307 U. S. 496 (1939) (streets and other public places).

This case is therefore quite different from those in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but not by others. See *McCollum v. Board of Education*, 333 U. S. 203 (1948). The Establishment Clause does not require, but actually forbids, State hostility toward religion. See *Zorach v. Clauson*, 343 U. S. 306, 312 (1952).

¹⁰We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship and religious speech." See *Chess v. Widmar*, *supra*, at 1318. Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs

cluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion.¹¹

The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause.¹² The Uni-

meet the constitutional definition of religion." *O'Hair v. Andrus*, 613 F. 2d 931, 936 (CA DC 1979) (footnote omitted); see L. Tribe, *American Constitutional Law* § 14-16 (1978). There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

¹¹ In finding that an "equal access" policy would have the primary effect of advancing religion, the District Court relied primarily on the decision of this Court in *Tilton v. Richardson*, 403 U. S. 672 (1971). In *Tilton* this Court upheld the grant of federal financial assistance to sectarian colleges for secular purposes. Although Congress had provided that federally subsidized buildings could not be used for sectarian or religious worship for 20 years, the Court considered this restriction insufficient: "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests the original federal grant will in part have the [constitutionally impermissible] effect of advancing religion." *Id.*, at 683. From this statement the District Court derived the proposition that State funds may not be used to provide or maintain buildings used by religious organizations.

We do not believe that *Tilton* can be read so broadly. In *Tilton* the Court was concerned that a sectarian institution might convert federally funded buildings to religious uses or otherwise stamp them with the imprimatur of religion. But nothing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after *Tilton* have acknowledged the right of religious speakers to use public forums on equal terms with others. See, e.g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Saia v. New York*, 334 U. S. 558 (1948).

¹² This case is different from the cases in which religious groups claim that the denial of facilities not available to other groups deprives them of their rights under the Free Exercise Clause. See *Brandon v. Board of Educ.*, 635 F. 2d 971, 975-976 (CA2 1980), cert. pending, No. 80-1396; *Hunt v. Board of Education*, 321 F. Supp. 1263, 1266 (SD W. Va. 1971). Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not—as in *Brandon* or *Hunt*—rest solely on rights claimed under the Free Exercise Clause. Respondents'

versity has opened its facilities to student groups, and the question is whether it can now exclude groups because of the content of their speech. See *Healy v. James*, 408 U. S. 169 (1972). In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to the range of an open forum's likely effects. It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion. *Committee for Public Education v. Nyquist*, 413 U. S. 756, 771 (1973); see, e. g., *Roemer v. Board of Public Works*, 426 U. S. 736 (1976); *Hunt v. McNair*, 413 U. S. 734 (1972); *McGowan v. Maryland*, 366 U. S. 420, 422 (1961).

We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases. Two factors are especially relevant.

First, an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . 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. *Chess v. Widmar*, *supra*, at 1317.¹³

claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case. It is for this reason that we have declined petitioners' invitation to couch our discussion in terms of respondents' rights under the Free Exercise Clause.

¹³ University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion. See *Tilton v.*

Second, the forum is available to a broad class of non-religious as well as religious speakers; there are over 100 recognized student groups UMKC. The provision of benefits to so broad a spectrum of groups is an important index of secular effect. See, e.g., *Wolman v. Walter*, 433 U. S. 229, 240-241 (1977); *Committee for Public Education v. Nyquist*, *supra*, 413 U. S., at 756, 781-782 and n. 38 (1973). If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Roemer v. Maryland*, 426 U. S. 736, 747 (1976) (plurality opinion); quoted in *Committee for Public Education v. Regan*, 444 U. S. 646, 658, n. 6 (1980).¹⁴ At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we therefore agree with the Court of Appeals that the advancement of religion would not be the forum's "primary effect."

B

Arguing that the State of Missouri has gone further than the Federal Constitution in proscribing indirect State support for religion,¹⁵ the University claims a compelling interest in complying with the applicable provisions of the Missouri Constitution.¹⁶

The Missouri courts have not ruled whether a general pol-

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¹⁵ See, e.g., *American United v. Rogers*, 538 S.W. 2d 711, 720, (Mo.) (en banc), cert. denied, 429 U. S. 1029 (1976) (holding Missouri Constitution requires stricter separation of church and state than does Federal Constitution); *Harfst v. Hogen*, 163 S.W. 2d 609, 613-614 (Mo. 1947) (en banc) (same).

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icy of accommodating student groups, applied equally to those wishing to gather to engage in religious and non-religious speech, would offend the State Constitution. We need not, however, determine how the Missouri courts would decide this issue. It is also unnecessary for us to decide whether, under the Supremacy Clause,¹⁷ a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment. Even if a State's interest were compelling, its regulations would have to protect that interest without unnecessary abridgment of protected rights of speech and association. See, e. g., *Carey v. Brown*, 447 U. S. 455, 465 (1980); *Shelton v. Tucker*, 364 U. S. 479, 489 (1960). Measured against this standard, the University's policy of discrimination against religious speech and association fails on grounds of overinclusiveness.

The University regulation challenged in this case applies to "religious teaching" as well as "religious worship." It is therefore substantially overbroad. We can imagine no compelling State interest—which would be cognizable under the Supremacy Clause—in banning all types of religious "teaching" in an otherwise-open forum, including, for example, informal conversational "instruction." As we have noted in the past, "[b]road prophylactic rules in an area of free expression are fatal. Precision of regulation must be the touchstone." *Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620, 637 (1980), quoting *NAACP v. Button*, 371 U. S. 415, 438 (1963) (omitting citations).

IV

Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and

with its own constitution).

¹⁷ U. S. Const., Art. VI, § 2.

manner regulations.¹⁸ We also affirm the continuing validity of cases, *e. g.*, *Healy v. James*, 408 U. S. 169, 188-189 (1972), that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.

The basis for our decision is narrow. Having created a public forum, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that the State should be content-neutrality, and the University is unable to justify this violation under applicable constitutional standards.

For this reason, the decision of the Court of Appeals is,

Affirmed.

¹⁸ See, *e.g.*, *Grayned v. City of Rockford*, 408 U. S. 104, 116 (1972). ("The nature of a place, the pattern of its normal activities, dictate the kinds of regulations to time, place, and manner that are reasonable.").

Dick Fallon 2-3073

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CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-689

GARY E. WIDMAR, ET AL., PETITIONERS v. CLARK
VINCENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[October —, 1981]

JUSTICE POWELL delivered the opinion of the court.

This case presents the question whether a state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.

I

It is the stated policy of the University of Missouri at Kansas City¹ to encourage the activities of student organizations. The University officially recognizes over 100 student groups. It routinely provides University facilities for the meetings of registered organizations. Students pay an activity fee of \$41 per semester (1978-1979) to help defray the costs to the University.

From 1973 until 1977 a registered religious group named Cornerstone regularly sought and received permission to conduct its meetings in University facilities.² In 1977, how-

¹The University of Missouri at Kansas City (UMKC) is one of four campuses of the University of Missouri, an institution of the State of Missouri.

²Cornerstone is an organization of evangelical Christian students from various denominational backgrounds. According to an affidavit filed in 1977, "perhaps twenty students . . . participate actively in Cornerstone and form the backbone of the campus organization." Affidavit of Florian

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ever, the University informed the group that it could no longer meet in University buildings. The exclusion was based on a regulation, adopted by the Board of Curators in 1972, that prohibits the use of University buildings or grounds "for purposes of religious worship or religious teaching."³

Eleven University students, all members of Cornerstone, brought suit to challenge the regulation in Federal District

Chess (Sept. 29, 1977), quoted in *Chess v. Widmar*, 480 F. Supp. 907, 911 (WD Mo. 1979). ¹ Cornerstone held its on-campus meetings in classrooms and in the student center. These meetings were open to the public and attracted up to 125 students. A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences.

² The pertinent regulations provide as follows:

"4.0314.0107 ☐ No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. . . . The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. . . .

"4.0314.0108 ☐ Regular chapels established on University grounds may be used for religious services but not for recurring services of any groups. Special rules and procedures shall be established for each chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group."

There is no chapel on the campus of the University of Missouri at Kansas City. The nearest University chapel is at the Columbia campus, approximately 125 miles east of UMKC.

Before 1977 University officials were unaware of the religious character of Cornerstone's meetings. The District Court found that University officials had never "authorized a student organization to utilize a University facility for a meeting when they had full knowledge that the purposes of the meeting include[d] religious worship or religious teaching." *Chess v. Widmar*, *supra*, at 910.

Court for the Western District of Missouri.⁴ They alleged that the University's discrimination against religious activity and discussion violated their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States.

Upon cross motions for summary judgment, the District Court upheld the challenged regulation. *Chess v. Widmar*, 480 F. Supp. 907 (WD Mo. 1979). It found the regulation not only justified, but required, by the Establishment Clause of the Federal Constitution. *Id.*, at 916. Under *Tilton v. Richardson*, 403 U. S. 672 (1971), the court reasoned, the State could not provide facilities for religious use without giving prohibited support to an institution of religion. *Id.*, at 915-916. The District Court rejected the argument that the University could not discriminate against religious speech on the basis of its content. It found religious speech entitled to less protection than other types of expression. *Id.*, at 918. ✓

The Court of Appeals for the Eighth Circuit reversed. *Chess v. Widmar*, 635 F. 2d 1310 (CA8 1980). Rejecting the analysis of the District Court, it viewed the University regulation as a content-based discrimination against religious speech, for which it could find no compelling justification. *Id.*, at 1315-1320. ✗ Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kinds. ✗ According to the Court of Appeals, the "primary effect" of such a policy would not be to advance religion, but rather to further the neutral purpose of developing students' "social and cultural awareness as well as [their]

The court held that the

Id., at
1317 ✓

⁴Clark Vincent, the respondent, and Florian Chess, the named plaintiff in the action in the District Court, were among the students who initiated the action on October 13, 1977. Named as defendants were the petitioner Gary Widmar, the Dean of Students at UMKC, and the University's Board of Curators.

intellectual curiosity.'" *Id.*, at 1317 (quoting from the University bulletin's description of the student activities program, reprinted in *id.*, at 1312, n. 1).

Essentially for the reasons stated by the Court of Appeals, we now affirm.

II

the University has created a forum generally open for use by student groups.

Through its policy of accommodating ~~the~~ meetings of registered student groups, the University has created for its students a quasi-public forum. Having done so, the University assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a public forum, even if it was not required to create the forum in the first place. See, e. g., *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U. S. 167, 175 and n. 8. (1976) (although a State may conduct business in private session, "where the State has opened a forum for direct citizen involvement," exclusions bear a heavy burden of justification); *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 555-559 (1975) (because municipal theater was a public forum, city could not exclude a production without satisfying constitutional safeguards applicable to prior restraints).

The University's institutional mission, which it describes as providing a "secular education" to its students, Brief for

5.

This Court has recognized that the campus of a public university possesses many of the characteristics of a public forum. "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" *Healy v. James*, 408 U. S. 169, 180 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Id.*, at 181-182. We have therefore held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. *Id.*, at 181, 184.

6.

The concept of a "public forum" rests on the recognition, first expressed in *Hague v. CIO*, 307 U. S. 496, 515 (1939), that

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

See also *Police Dept. v. Mosley*, 408 U. S. 92 (1972); *Cox v. Louisiana*, 379 U. S. 536 (1965).

(Footnote Continued on Page 5)

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5

extend into the
campuses of
state universities.

Petitioners 44, does not exempt its actions from constitutional scrutiny. Our cases leave no doubt that the First Amendment rights of speech and association reach state university campuses with undiminished force. See, e.g., *Healy v. James*, 408 U. S. 169, 180 (1972); *Tinker v. Des Moines Independent School District*, 393 U. S. 503, 506 (1969); *Shelton v. Tucker*, 364 U. S. 479, 487 (1960).

Here the University of Missouri has discriminated against groups and speakers based on their desire to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. See, e.g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Saia v. New York*, 334 U. S. 558 (1948).

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(footnote 6 contd)

Although a university may create a forum with many of the essential elements of "publicity," see note 5, ¹supra, our cases have recognized that

no/5

First Amendment rights must be analyzed "in light of the special characteristics of the school environment." *Tinker v. Des Moines Independent School District*, 393 U. S. 503, 506 (1969). A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied its authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.

We continue to adhere to that view.

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In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. See *Carey v. Brown*, 447 U. S. 455, 461, 464-465 (1980).⁷

more
#

III

less #

In this case the University claims a compelling interest in maintaining strict separation of church and State. It derives this interest from the "Establishment Clauses" of both the Federal and Missouri Constitutions.

A

The University first argues that it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause of the Constitution of the United States.⁸ We agree that the University has a compelling interest in complying with its constitutional obligations. But we disagree with its conclusion that an "equal access" policy would be incompatible with this Court's Establishment Clause cases. Those cases hold that a policy will not offend the Establishment Clause if it can

⁷ See also *Healy v. James*, 408 U. S. 169, 184 (1972):

"It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which . . . may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."

⁸ "Congress shall make no law respecting an establishment of religion. . . ." U. S. Const., Amdt. 1. The Establishment Clause has been made applicable to the States through the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940).

Committee for Public Education v. Regan, 444 U.S. 646, 653 (1980);
Roemer v. Maryland Public Works Bd., 426 U.S. 736, 748 (1976).

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pass a three-pronged test: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the [policy] must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971). See ~~also~~ *Committee for Public Education v. Nyquist*, 413 U. S. 756, 773 (1978).

In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose⁹ and would avoid entanglement with religion.¹⁰ But the District Court con-

Note 9

It is the avowed purpose of UMKC to provide a forum in which students can exchange ideas. The University argues that use of the forum for religious speech would undermine this secular aim. But by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there. Undoubtedly many ~~ideas are advanced~~ ^{views are advocated} in the forum with which the University desires no association.

Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but not by others. See, e.g., McCullum v. Board of Education, 333 U.S. 203 (1948). In those cases the school may ~~be said~~ ^{appear} to sponsor the views of the speaker.

"We agree with the Court of Appeals that the University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship and religious speech.'" See *Chess v. Widmar*, *supra*, at 1818. Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs

cluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion."

The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause.* The Uni-

[Footnote moved to page 9]

meet the constitutional definition of religion." *O'Hair v. Andrus*, 613 F. 2d 931, 986 (CA DC 1979) (footnote omitted); see L. Tribe, *American Constitutional Law* § 14-16 (1978). There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

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 claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case. ~~It is for this reason that we have declined petitioners' invitation to couch our discussion in terms of respondents' rights under the Free Exercise Clause.~~

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IV

Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and

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¹⁷ U. S. Const., Art. VI, § 2.

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Nor do we question the right of the University to make academic judgments ~~about how~~ to allocate scarce resources--"to determine for itself on academic grounds who may teach what may be taught, how it shall be taught, and who may be admitted to study." Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment);

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see Regents of the Univ. of Cal. v. Bakke

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438 U.S. 265, 312-313 (1978) (Opinion of Powell, J., announcing the decision of the Court).

The basis for our decision is narrow. Having created a public forum, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that ~~the State~~ should be content-neutral~~s~~, and the University is unable to justify this violation under applicable constitutional standards.

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For this reason, the decision of the Court of Appeals is,

Affirmed.

#
¹⁸ See, e.g., Grayned v. City of Rockford, 408 U. S. 104, 116 (1972). ("The nature of a place, the pattern of its normal activities, dictate the kinds of regulations to time, place, and manner that are reasonable.") (quoting Wright, The Constitution on the Campuses, 22 Vand. L. Rev. 1027, 1042 (1969)).

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WIDMAR ET AL. v. VINCENT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80-689. Argued October 6, 1981—Decided December —, 1981

The University of Missouri at Kansas City, a state university, makes its facilities generally available for the activities of registered student groups. A registered student religious group that had previously received permission to conduct its meetings in University facilities was informed that it could no longer do so because of a University regulation prohibiting the use of University buildings or grounds "for purposes of religious worship or religious teaching." Members of the group then brought suit in Federal District Court, alleging that the regulation violated, *inter alia*, their rights to free exercise of religion and freedom of speech under the First Amendment. The District Court upheld the regulation as being not only justified, but required, by the Establishment Clause of the First Amendment. The Court of Appeals reversed, viewing the regulation as a content-based discrimination against religious speech, for which it could find no compelling justification, and holding that the Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kind.

Held: The University's exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral. Pp. 4-18.

(a) Having created a forum generally open for use by student groups, the University, in order to justify discriminatory exclusion from such forum based on the religious content of a group's intended speech, must satisfy the standard of review appropriate to content-based exclusions; i. e., it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Pp. 4-7.

(b) Although the University's interest in complying with its constitutional obligations under the Establishment Clause may be characterized as compelling, an "equal access" policy would not be incompatible with that Clause. A policy will not offend the Establishment Clause if it can

Page proof of syllabus as approved.

- Lineup included.
- Lineup still to be added. Please send lineup to me when available.

✓ Another copy of page proof of syllabus as approved to show—

- ✓ Lineup, which has now been added.
- Additional changes in syllabus.

HENRY C. LIND
Reporter of Decisions

Syllabus

pass the following three-pronged test: (1) It has a secular legislative purpose; (2) its principal or primary effect would be neither to advance nor to inhibit religion; and (3) it does not foster "an excessive government entanglement with religion." Here, it is conceded that an "equal access" policy would meet the first and third prongs of the test. In the context of this case and in the absence of any evidence that religious groups will dominate the University's forum, the advancement of religion would not be the forum's "primary effect." An "equal access" policy would therefore satisfy the test's second prong as well. Pp. 7-11.

(c) The State's interest in achieving greater separation of church and State than is already ensured under the Establishment Clause is not sufficiently "compelling" to justify content-based discrimination against religious speech of the student group in question. Pp. 11-13.

635 F. 2d 1310, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment. WHITE, J., filed a dissenting opinion.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: NOV 2 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-689

GARY E. WIDMAR, ET AL., PETITIONERS *v.* CLARK
VINCENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[October —, 1981]

JUSTICE POWELL delivered the opinion of the court.

This case presents the question whether a state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.

I

It is the stated policy of the University of Missouri at Kansas City¹ to encourage the activities of student organizations. The University officially recognizes over 100 student groups. It routinely provides University facilities for the meetings of registered organizations. Students pay an activity fee of \$41 per semester (1978-1979) to help defray the costs to the University.

From 1973 until 1977 a registered religious group named Cornerstone regularly sought and received permission to conduct its meetings in University facilities.² In 1977, how-

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² Cornerstone is an organization of evangelical Christian students from various denominational backgrounds. According to an affidavit filed in 1977, "perhaps twenty students . . . participate actively in Cornerstone and form the backbone of the campus organization." Affidavit of Florian

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ever, the University informed the group that it could no longer meet in University buildings. The exclusion was based on a regulation, adopted by the Board of Curators in 1972, that prohibits the use of University buildings or grounds "for purposes of religious worship or religious teaching."³

Eleven University students, all members of Cornerstone, brought suit to challenge the regulation in Federal District Court for the Western District of Missouri.⁴ They alleged

Chess (Sept. 29, 1977), quoted in *Chess v. Widmar*, 480 F. Supp. 907, 911 (WD Mo. 1979). Cornerstone held its on-campus meetings in classrooms and in the student center. These meeting were open to the public and attracted up to 125 students. A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences.

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"4.0314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. . . . The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. . . .

"4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for recurring services of any groups. Special rules and procedures shall be established for each chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group."

There is no chapel on the campus of the University of Missouri at Kansas City. The nearest University chapel is at the Columbia campus, approximately 125 miles east of UMKC.

Before 1977 University officials were unaware of the religious character of Cornerstone's meetings. The District Court found that University officials had never "authorized a student organization to utilize a University facility for a meeting when they had full knowledge that the purposes of the meeting include[d] religious worship or religious teaching." *Chess v. Widmar*, *supra*, at 910.

⁴Clark Vincent, the respondent, and Florian Chess, the named plaintiff

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that the University's discrimination against religious activity and discussion violated their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States.

Upon cross motions for summary judgment, the District Court upheld the challenged regulation. *Chess v. Widmar*, 480 F. Supp. 907 (WD Mo. 1979). It found the regulation not only justified, but required, by the Establishment Clause of the Federal Constitution. *Id.*, at 916. Under *Tilton v. Richardson*, 403 U. S. 672 (1971), the court reasoned, the State could not provide facilities for religious use without giving prohibited support to an institution of religion. *Id.*, at 915-916. The District Court rejected the argument that the University could not discriminate against religious speech on the basis of its content. It found religious speech entitled to less protection than other types of expression. *Id.*, at 918.

The Court of Appeals for the Eighth Circuit reversed. *Chess v. Widmar*, 635 F. 2d 1310 (CA8 1980). Rejecting the analysis of the District Court, it viewed the University regulation as a content-based discrimination against religious speech, for which it could find no compelling justification. *Id.*, at 1315-1320. The Court held that the Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kinds. *Id.*, at 1317. According to the Court of Appeals, the "primary effect" of such a policy would not be to advance religion, but rather to further the neutral purpose of developing students' "social and cultural awareness as well as [their] intellectual curiosity." *Id.*, at 1317 (quoting from the University bulletin's

in the action in the District Court, were among the students who initiated the action on October 13, 1977. Named as defendants were the petitioner Gary Widmar, the Dean of Students at UMKC, and the University's Board of Curators.

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description of the student activities program, reprinted in *id.*, at 1312, n. 1).

Essentially for the reasons stated by the Court of Appeals, we now affirm.

II

Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups.⁵ Having done so, the University assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a public forum,⁶ even

⁵This Court has recognized that the campus of a public university possesses many of the characteristics of a public forum. "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" *Healy v. James*, 408 U. S. 169, 180 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Id.*, at 181-182. We therefore have held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. *Id.*, at 181, 184.

⁶The concept of a "public forum" rests on the recognition, first expressed in *Hague v. CIO*, 307 U. S. 496, 515 (1939), that

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

See also *Police Dept. v. Mosley*, 408 U. S. 92 (1972); *Cox v. Louisiana*, 379 U. S. 536 (1965).

Although a university may create a forum with many of the characteristics of streets and public places, see n. 5, *supra*, our cases have recognized that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." *Tinker v. Des Moines Inde-*

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if it was not required to create the forum in the first place. See, e. g., *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U. S. 167, 175 and n. 8. (1976) (although a State may conduct business in private session, "where the State has opened a forum for direct citizen involvement," exclusions bear a heavy burden of justification); *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 555-559 (1975) (because municipal theater was a public forum, city could not exclude a production without satisfying constitutional safeguards applicable to prior restraints).

The University's institutional mission, which it describes as providing a "secular education" to its students, Brief for Petitioners 44, does not exempt its actions from constitutional scrutiny. Our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities. See, e. g., *Healy v. James*, 408 U. S. 169, 180 (1972); *Tinker v. Des Moines Independent School District*, 393 U. S. 503, 506 (1969); *Shelton v. Tucker*, 364 U. S. 479, 487 (1960).

Here the University of Missouri has discriminated against groups and speakers based on their desire to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. See, e. g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Saia v. New York*, 334 U. S. 558 (1948).

pendent School District, 393 U. S. 503, 506 (1969). We continue to adhere to that view. A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied its authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and non-students alike, or that a university must grant free access to all of its grounds or buildings.

*We agree that the interest
of the University in
complying with its
constitutional obligations
may be*

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WIDMAR v. VINCENT

In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. See *Carey v. Brown*, 447 U. S. 455, 461, 464-465 (1980).⁷

III

In this case the University claims a compelling interest in maintaining strict separation of church and State. It derives this interest from the "Establishment Clauses" of both the Federal and Missouri Constitutions.

A

The University first argues that it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause of the Constitution of the United States.⁸ We agree that the University has a compelling interest in complying with its constitutional obligations. But we disagree with its conclusion that an "equal access" policy would be incompatible with this Court's Establishment Clause cases. Those cases hold that a policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [governmental policy]

⁷ See also *Healy v. James*, 408 U. S. 169, 184 (1972):

"It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which . . . may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."

⁸ "Congress shall make no law respecting an establishment of religion. . . ." U. S. Const., Amdt. 1. The Establishment Clause has been made applicable to the States through the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940).

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WIDMAR v. VINCENT

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must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971). See *Committee for Public Education v. Regan*, 444 U. S. 646, 653 (1980); *Roemer v. Maryland Public Works Bd.*, 426 U. S. 736, 748 (1976).

In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose⁹ and would avoid entanglement with religion.¹⁰ But the District Court concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion.¹¹

⁹It is the avowed purpose of UMKC to provide a forum in which students can exchange ideas. The University argues that use of the forum for religious speech would undermine this secular aim. But by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there. Undoubtedly many views are advocated in the forum with which the University desires no association.

Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but not by others. See, e. g., *McCollum v. Board of Education*, 333 U. S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

¹⁰We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship and religious speech." See *Chess v. Widmar*, *supra*, at 1318. Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *O'Hair v. Andrus*, 613 F. 2d 931, 936 (CA DC 1979) (footnote omitted); see L. Tribe, *American Constitutional Law* § 14-16 (1978). There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

¹¹In finding that an "equal access" policy would have the primary effect

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The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities to student groups, and the question is whether it can now exclude groups because of the content of their speech. See *Healy v. James*, 408 U. S. 169 (1972).¹² In this context we are unpersuaded that the pri-

of advancing religion, the District Court in this case relied primarily on *Tilton v. Richardson*, 403 U. S. 672 (1971). In *Tilton* this Court upheld the grant of federal financial assistance to sectarian colleges for secular purposes, but circumscribed the terms of the grant to ensure its constitutionality. Although Congress had provided that federally subsidized buildings could not be used for sectarian or religious worship for 20 years, the Court considered this restriction insufficient: "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests the original federal grant will in part have the [constitutionally impermissible] effect of advancing religion." *Id.*, at 688. From this statement the District Court derived the proposition that State funds may not be used to provide or maintain buildings used by religious organizations.

We do not believe that *Tilton* can be read so broadly. In *Tilton* the Court was concerned that a sectarian institution might convert federally funded buildings to religious uses or otherwise stamp them with the imprimatur of religion. But nothing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after *Tilton* have acknowledged the right of religious speakers to use public forums on equal terms with others. See, e.g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Saia v. New York*, 334 U. S. 558 (1948).

¹² This case is different from the cases in which religious groups claim that the denial of facilities not available to other groups deprives them of their rights under the Free Exercise Clause. See *Brandon v. Board of Educ.*, 635 F. 2d 971, 975-976 (CA2 1980), cert. pending, No. 80-1396; *Hunt v. Board of Education*, 321 F. Supp. 1263, 1266 (SD W. Va. 1971). Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not—as in *Brandon* or *Hunt*—rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case.

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WIDMAR v. VINCENT

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mary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to the range of an open forum's likely effects. It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion. *Committee for Public Education v. Nyquist*, 413 U. S. 756, 771 (1973); see, e. g., *Roemer v. Board of Public Works*, 426 U. S. 736 (1976); *Hunt v. McNair*, 413 U. S. 734 (1972); *McGowan v. Maryland*, 366 U. S. 420, 422 (1961).

We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases. Two factors are especially relevant.

First, an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . 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. *Chess v. Widmar*, *supra*, at 1317.¹⁵

Second, the forum is available to a broad class of non-religious 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. See, e. g., *Wolman v. Walter*, 433 U. S. 229, 240-241 (1977); *Committee for Public Education v. Nyquist*, *supra*, 413 U. S., at 756, 781-782 and n. 38 (1973). If the Establishment Clause barred the extension of general bene-

¹⁵ University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion. See *Tilton v. Richardson*, 403 U. S. 672, 685-686 (1971).

fits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Roemer v. Maryland*, 426 U. S. 736, 747 (1976) (plurality opinion); quoted in *Committee for Public Education v. Regan*, 444 U. S. 646, 658, n. 6 (1980).¹⁴ At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's "primary effect."

B

Arguing that the State of Missouri has gone further than the Federal Constitution in proscribing indirect State support for religion,¹⁵ the University claims a compelling interest in complying with the applicable provisions of the Missouri Constitution.¹⁶

The Missouri courts have not ruled whether a general policy of accommodating student groups, applied equally to those wishing to gather to engage in religious and non-religious speech, would offend the State Constitution. We need not, however, determine how the Missouri courts would decide this issue. It is also unnecessary for us to decide whether, under the Supremacy Clause,¹⁷ a state interest, derived from its own constitution, could ever outweigh free

¹⁴ This Court has similarly rejected "the recurrent argument that all aid [to parochial schools] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Hunt v. McNair*, 413 U. S. 734, 743 (1973).

¹⁵ See, e. g., *American United v. Rogers*, 538 S.W. 2d 711, 720, (Mo.) (en banc), cert. denied, 429 U. S. 1029 (1976) (holding Missouri Constitution requires stricter separation of church and state than does Federal Constitution); *Harfst v. Hogen*, 163 S.W. 2d 609, 613-614 (Mo. 1947) (en banc) (same).

¹⁶ See *Leutkemeyer v. Kaufman*, 364 F. Supp. 376 (ED Mo. 1973), aff'd, 419 U. S. 88 (1974) (finding State has compelling interest in compliance with its own constitution).

¹⁷ U. S. Const., Art. VI, § 2.

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speech interests protected by the First Amendment. Even if a State's interest were compelling, its regulations would have to protect that interest without unnecessary abridgment of protected rights of speech and association. See, e. g., *Carey v. Brown*, 447 U. S. 455, 465 (1980); *Shelton v. Tucker*, 364 U. S. 479, 489 (1960). Measured against this standard, the University's policy of discrimination against religious speech and association fails on grounds of over-inclusiveness.

The University regulation challenged in this case applies to "religious teaching" as well as "religious worship." It is therefore substantially overbroad. We can imagine no compelling State interest—which would be cognizable under the Supremacy Clause—in banning all types of religious "teaching" in an otherwise-open forum, including, for example, informal conversational "instruction." As we have noted in the past, "[b]road prophylactic rules in an area of free expression are fatal. Precision of regulation must be the touchstone." *Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620, 637 (1980), quoting *NAACP v. Button*, 371 U. S. 415, 438 (1963) (omitting citations).

IV

Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations.¹⁸ Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources—"to determine for itself on academic grounds who may teach what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New*

¹⁸ See, e. g., *Grayned v. City of Rockford*, 408 U. S. 104, 116 (1972). ("The nature of a place, the pattern of its normal activities, dictate the kinds of regulations to time, place, and manner that are reasonable."). (quoting *Wright*, *The Constitution on the Campus*, 22 Vand. L. Rev. 1027, 1042 (1969)).

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Hampshire, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment); see *Regents of the Univ. of Cal. v. Bakke*, 438 U. S. 265, 312-313 (1978) (opinion of POWELL, J., announcing the decision of the Court). Finally, we also affirm the continuing validity of cases, *e. g.*, *Healy v. James*, 408 U. S. 169, 188-189 (1972), that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.

The basis for our decision is narrow. Having created a public forum, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.

For this reason, the decision of the Court of Appeals is,

Affirmed.

Dick Fallon X23073

25 copies

Second Draft

Please mark any changes on
here no matter how
frivolous.

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To: The Chief Justice
Justice Brennan
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Justice Stevens
Justice O'Connor

From: Justice Powell

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2nd
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SUPREME COURT OF THE UNITED STATES

No. 80-689

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[October —, 1981]

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WIDMAR v. VINCENT

ever, the University informed the group that it could no longer meet in University buildings. The exclusion was based on a regulation, adopted by the Board of Curators in 1972, that prohibits the use of University buildings or grounds "for purposes of religious worship or religious teaching."³

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There is no chapel on the campus of the University of Missouri at Kansas City. The nearest University chapel is at the Columbia campus, approximately 125 miles east of UMKC.

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⁴Clark Vincent, the respondent, and Florian Chess, the named plaintiff

Although the University had routinely approved Cornerstone meetings before 1977, the

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that the University's discrimination against religious activity and discussion violated their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States.

Upon cross motions for summary judgment, the District Court upheld the challenged regulation. *Chess v. Widmar*, 480 F. Supp. 907 (WD Mo. 1979). It found the regulation not only justified, but required, by the Establishment Clause of the Federal Constitution. *Id.*, at 916. Under *Tilton v. Richardson*, 403 U. S. 672 (1971), the court reasoned, the State could not provide facilities for religious use without giving prohibited support to an institution of religion. *Id.*, at 915-916. The District Court rejected the argument that the University could not discriminate against religious speech on the basis of its content. It found religious speech entitled to less protection than other types of expression. *Id.*, at 918.

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in the action in the District Court, were among the students who initiated the action on October 13, 1977. Named as defendants were the petitioner Gary Widmar, the Dean of Students at UMKC, and the University's Board of Curators.

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description of the student activities program, reprinted in *id.*, at 1312, n. 1).

~~Essentially for the reasons stated by the Court of Appeals,~~
we now affirm.

II

Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups.¹ Having done so, the University assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a public forum,² even

¹ This Court has recognized that the campus of a public university possesses many of the characteristics of a public forum. "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" *Healy v. James*, 408 U. S. 169, 180 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Id.*, at 181-182. We therefore have held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. *Id.*, at 181, 184.

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if it was not required to create the forum in the first place. See, e. g., *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U. S. 167, 175 and n. 8. (1976) (although a State may conduct business in private session, "where the State has opened a forum for direct citizen involvement," exclusions bear a heavy burden of justification); *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 555-559 (1975) (because municipal theater was a public forum, city could not exclude a production without satisfying constitutional safeguards applicable to prior restraints).

The University's institutional mission, which it describes as providing a "secular education" to its students, Brief for Petitioners 44, does not exempt its actions from constitutional scrutiny. Our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities. See, e. g., *Healy v. James*, 408 U. S. 169, 180 (1972); *Tinker v. Des Moines Independent School District*, 393 U. S. 503, 506 (1969); *Shelton v. Tucker*, 364 U. S. 479, 487 (1960).

Here the University of Missouri has discriminated against groups and speakers based on their desire to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. See, e. g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Saia v. New York*, 334 U. S. 558 (1948).

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In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. See *Carey v. Brown*, 447 U. S. 455, 461, 464-465 (1980).⁷

III

In this case the University claims a compelling interest in maintaining strict separation of church and State. It derives this interest from the "Establishment Clauses" of both the Federal and Missouri Constitutions.

A

The University first argues that it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause of the Constitution of the United States.⁸ ~~We agree that the University has a compelling interest in complying with its constitutional obligations. But we disagree with its conclusion that an "equal access" policy would be incompatible with this Court's Establishment Clause cases. Those cases hold that a policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [governmental policy]~~

We agree that the interest of the University in ~~complying with its~~ constitutional obligations may be characterized as compelling. It does not follow, however, that an "equal access" policy would be incompatible with this Court's Establishment Clause cases.

⁷ See also *Healy v. James*, 408 U. S. 169, 184 (1972):

"It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which . . . may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."

⁸ "Congress shall make no law respecting an establishment of religion. . . ." U. S. Const., Amdt. 1. The Establishment Clause has been made applicable to the States through the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940).

must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971). See *Committee for Public Education v. Regan*, 444 U. S. 646, 653 (1980); *Roemer v. Maryland Public Works Bd.*, 426 U. S. 736, 748 (1976).

In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose⁹ and would avoid entanglement with religion.¹⁰ But the District Court concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion.¹¹

⁹ It is the avowed purpose of UMKC to provide a forum in which students can exchange ideas. The University argues that use of the forum for religious speech would undermine this secular aim. But by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there. Undoubtedly many views are advocated in the forum with which the University desires no association.

Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but *not* by others. See, e. g., *McCullum v. Board of Education*, 333 U. S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

¹⁰ We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship and religious speech." See *Chess v. Widmar*, *supra*, at 1318. Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *O'Hair v. Andrus*, 613 F. 2d 931, 936 (CA-DC 1979) (footnote omitted); see L. Tribe, *American Constitutional Law* § 14-16 (1978). There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

¹¹ In finding that an "equal access" policy would have the primary effect

The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities to student groups, and the question is whether it can now exclude groups because of the content of their speech. See *Healy v. James*, 408 U. S. 169 (1972).¹² In this context we are unpersuaded that the pri-

of advancing religion, the District Court in this case relied primarily on *Tilton v. Richardson*, 403 U. S. 672 (1971). In *Tilton* this Court upheld the grant of federal financial assistance to sectarian colleges for secular purposes, but circumscribed the terms of the grant to ensure its constitutionality. Although Congress had provided that federally subsidized buildings could not be used for sectarian or religious worship for 20 years, the Court considered this restriction insufficient: "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests the original federal grant will in part have the [constitutionally impermissible] effect of advancing religion." *Id.*, at 683. From this statement the District Court derived the proposition that State funds may not be used to provide or maintain buildings used by religious organizations.

We do not believe that *Tilton* can be read so broadly. In *Tilton* the Court was concerned that a sectarian institution might convert federally funded buildings to religious uses or otherwise stamp them with the imprimatur of religion. But nothing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after *Tilton* have acknowledged the right of religious speakers to use public forums on equal terms with others. See, e.g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Saia v. New York*, 334 U. S. 558 (1948).

¹²This case is different from the cases in which religious groups claim that the denial of facilities not available to other groups deprives them of their rights under the Free Exercise Clause. See *Brandon v. Board of Educ.*, 635 F. 2d 971, 975-976 (CA2 1980), cert. pending, No. 80-1396; *Hunt v. Board of Education*, 321 F. Supp. 1263, 1266 (SD W. Va. 1971). Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not—as in *Brandon* or *Hunt*—rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case.

Accordingly, we need not inquire into the extent, if any, to which Free Exercise interests are infringed by the challenged University regulation. Neither do we reach the difficult questions that would arise if State accommodation of Free Exercise and Free Speech rights should, in a particular case, conflict with the prohibitions of the Establishment Clause.

mary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to the range of an open forum's likely effects. It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion. *Committee for Public Education v. Nyquist*, 413 U. S. 756, 771 (1973); see, e. g., *Roemer v. Board of Public Works*, 426 U. S. 736 (1976); *Hunt v. McNair*, 413 U. S. 734 (1972); *McGowan v. Maryland*, 366 U. S. 420, 422 (1961).

We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases. Two factors are especially relevant.

First, an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . 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. *Chess v. Widmar, supra*, at 1317.¹²

Second, the forum is available to a broad class of non-religious 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. See, e. g., *Wolman v. Walter*, 433 U. S. 229, 240-241 (1977); *Committee for Public Education v. Nyquist, supra*, 413 U. S., at 756, 781-782 and n. 38 (1973). If the Establishment Clause barred the extension of general bene-

¹² University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion. See *Tilton v. Richardson*, 403 U. S. 672, 685-686 (1971).

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fits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Roemer v. Maryland*, 426 U. S. 736, 747 (1976) (plurality opinion); quoted in *Committee for Public Education v. Regan*, 444 U. S. 646, 658, n. 6 (1980).¹⁴ At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's "primary effect."

B

Arguing that the State of Missouri has gone further than the Federal Constitution in proscribing indirect State support for religion,¹⁵ the University claims a compelling interest in complying with the applicable provisions of the Missouri Constitution.¹⁶

The Missouri courts have not ruled whether a general policy of accommodating student groups, applied equally to those wishing to gather to engage in religious and non-religious speech, would offend the State Constitution. We need not, however, determine how the Missouri courts would decide this issue. It is also unnecessary for us to decide whether, under the Supremacy Clause,¹⁷ a state interest, derived from its own constitution, could ever outweigh free

¹⁴ This Court has similarly rejected "the recurrent argument that all aid [to parochial schools] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Hunt v. McNair*, 413 U. S. 734, 743 (1973).

¹⁵ See, e. g., *American United v. Rogers*, 588 S.W. 2d 711, 720, (Mo.) (en banc), cert. denied, 429 U. S. 1029 (1976) (holding Missouri Constitution requires stricter separation of church and state than does Federal Constitution); *Harfst v. Hogen*, 163 S.W. 2d 609, 613-614 (Mo. 1947) (en banc) (same).

¹⁶ *Leutkemeyer v. Kaufman*, 364 F. Supp. 376 (ED Mo. 1973), aff'd, 419 U. S. 88 (1974), (finding State has compelling interest in compliance with its own constitution).

¹⁷ U. S. Const., Art. VI, § 2.

The District Court found Missouri had a compelling interest in compliance with its own constitution.

See Mo. Const. Art. 1, § 6; Art. 1, § 7; Art. 9, § 8.
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speech interests protected by the First Amendment. Even if a State's interest were compelling, its regulations would have to protect that interest without unnecessary abridgment of protected rights of speech and association. See, e. g., *Carey v. Brown*, 447 U. S. 455, 465 (1980); *Shelton v. Tucker*, 364 U. S. 479, 489 (1960). Measured against this standard, the University's policy of discrimination against religious speech and association fails on grounds of over-inclusiveness.

The University regulation challenged in this case applies to "religious teaching" as well as "religious worship." It is therefore substantially overbroad. We can imagine no compelling State interest—which would be cognizable under the Supremacy Clause—in banning all types of religious "teaching" in an otherwise-open forum, including, for example, informal conversational "instruction." As we have noted in the past, "[b]road prophylactic rules in an area of free expression are fatal. Precision of regulation must be the touchstone." *Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620, 637 (1980), quoting *NAACP v. Button*, 371 U. S. 415, 438 (1963) (omitting citations).

IV

Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations.¹² Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources—"to determine for itself on academic grounds who may teach what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New*

¹² See, e. g., *Grayned v. City of Rockford*, 408 U. S. 104, 116 (1972). ("The nature of a place, the pattern of its normal activities, dictate the kinds of regulations to time, place, and manner that are reasonable."). (quoting *Wright, The Constitution on the Campus*, 22 Vand. L. Rev. 1027, 1042 (1969)).

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Hampshire, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment); see *Regents of the Univ. of Cal. v. Bakke*, 438 U. S. 265, 312-313 (1978) (opinion of POWELL, J., announcing the decision of the Court). Finally, we also affirm the continuing validity of cases, *e. g.*, *Healy v. James*, 408 U. S. 169, 188-189 (1972), that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.

The basis for our decision is narrow. Having created a public forum, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.

For this reason, the decision of the Court of Appeals is,

Affirmed.

Insert (A) [Addition to Note 13, page 9].

The

University argues that the Cornerstone students themselves admitted in affidavits that "[s]tudents know that if something is on campus, then it is a student organization, and they are more likely to feel comfortable attending a meeting." ~~Similarly, the students claimed that meeting off campus "tends to make students think that there is something~~
2/ ~~wrong" with us.~~ Affidavit of Florian Frederick Chess, Joint Appendix, at 18, 19 (Sept. 29, 1977). In light of the large number of groups meeting on campus, however, we doubt students could draw any reasonable inference of University support ~~from the mere fact of a campus meeting place. And~~

~~In fact,~~ The University's student handbook already notes that the University's name will not "be identified in any way with the aims, policies, programs, products, or opinions of any organization or its members." 1980-1981 UMKC Student Handbook, at 25.

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10, 11, 12

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: NOV 6 1981

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-689

GARY E. WIDMAR, ET AL., PETITIONERS v. CLARK
VINCENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[October —, 1981]

JUSTICE POWELL delivered the opinion of the court.

This case presents the question whether a state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.

I

It is the stated policy of the University of Missouri at Kansas City¹ to encourage the activities of student organizations. The University officially recognizes over 100 student groups. It routinely provides University facilities for the meetings of registered organizations. Students pay an activity fee of \$41 per semester (1978-1979) to help defray the costs to the University.

From 1973 until 1977 a registered religious group named Cornerstone regularly sought and received permission to conduct its meetings in University facilities.² In 1977, how-

¹The University of Missouri at Kansas City (UMKC) is one of four campuses of the University of Missouri, an institution of the State of Missouri.

²Cornerstone is an organization of evangelical Christian students from various denominational backgrounds. According to an affidavit filed in 1977, "perhaps twenty students . . . participate actively in Cornerstone and form the backbone of the campus organization." Affidavit of Florian

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ever, the University informed the group that it could no longer meet in University buildings. The exclusion was based on a regulation, adopted by the Board of Curators in 1972, that prohibits the use of University buildings or grounds "for purposes of religious worship or religious teaching."³

Eleven University students, all members of Cornerstone, brought suit to challenge the regulation in Federal District Court for the Western District of Missouri.⁴ They alleged

Chess (Sept. 29, 1977), quoted in *Chess v. Widmar*, 480 F. Supp. 907, 911 (WD Mo. 1979). Cornerstone held its on-campus meetings in classrooms and in the student center. These meetings were open to the public and attracted up to 125 students. A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences.

³The pertinent regulations provide as follows:

"4.0314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. . . . The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. . . .

"4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for recurring services of any groups. Special rules and procedures shall be established for each chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group."

There is no chapel on the campus of the University of Missouri at Kansas City. The nearest University chapel is at the Columbia campus, approximately 125 miles east of UMKC.

Although the University had routinely approved Cornerstone meetings before 1977, the District Court found that University officials had never "authorized a student organization to utilize a University facility for a meeting when they had full knowledge that the purposes of the meeting include[d] religious worship or religious teaching." *Chess v. Widmar*, *supra*, at 910.

⁴Clark Vincent, the respondent, and Florian Chess, the named plaintiff

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that the University's discrimination against religious activity and discussion violated their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States.

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We now affirm.

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if it was not required to create the forum in the first place. See, e. g., *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U. S. 167, 175 and n. 8. (1976) (although a State may conduct business in private session, "where the State has opened a forum for direct citizen involvement," exclusions bear a heavy burden of justification); *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 555-559 (1975) (because municipal theater was a public forum, city could not exclude a production without satisfying constitutional safeguards applicable to prior restraints).

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¹ The dissent argues that "religious worship" is not speech generally |

public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a com-

protected by the "free speech" guarantee of the First Amendment and the "equal protection" guarantee of the Fourteenth Amendment. If "religious worship" were protected "speech," the dissent reasons, "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech." Dissenting opinion, *post*, at 4. This is a novel argument. The dissent does not deny that speech *about* religion is speech entitled to the general protections of the First Amendment. See *id.*, at 3 and n. 1. It does not argue that descriptions of religious experiences fail to qualify as "speech." Nor does it repudiate last Term's decision in *Krishna, supra*, which assumed that religious appeals to nonbelievers constituted protected "speech." Rather, the dissent seems to attempt a distinction between the kinds of religious speech explicitly protected by our cases and a new class of religious "speech act[s]," dissenting opinion, at 5, comprising "worship." There are at least three difficulties with this distinction.

First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," *id.*, at 2-3, cease to be "singing, teaching, and reading"—all apparently forms of "speech," despite their religious subject matter—and become unprotected "worship."

Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Cf. *Fowler v. Rhode Island*, 345 U. S. 67, 70 (1953). Merely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases. E. g., *Walz v. Tax Commission*, 397 U. S. 664, 668 (1970).

Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. The dissent apparently wishes to preserve the vitality of the Establishment Clause. See dissenting opinion, *post*, at 4. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, see *Krishna, supra*, than for religious worship by persons already converted. It is far from clear that

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elling state interest and that it is narrowly drawn to achieve that end. See *Carey v. Brown*, 447 U. S. 455, 461, 464-465 (1980).⁸

III

In this case the University claims a compelling interest in maintaining strict separation of church and State. It derives this interest from the "Establishment Clauses" of both the Federal and Missouri Constitutions.

A

The University first argues that it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause of the Constitution of the United States.⁹ We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. It does not follow, however, that an "equal access" policy would be incompatible with this Court's Establishment Clause cases. Those cases hold that a policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy]

the State gives greater support in the latter case than in the former.

⁸ See also *Healy v. James*, 408 U. S. 169, 184 (1972):

"It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which . . . may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."

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must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971). See *Committee for Public Education v. Regan*, 444 U. S. 646, 653 (1980); *Roemer v. Maryland Public Works Bd.*, 426 U. S. 736, 748 (1976).

In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose¹⁰ and would avoid entanglement with religion.¹¹ But the District Court concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion.¹²

¹⁰ It is the avowed purpose of UMKC to provide a forum in which students can exchange ideas. The University argues that use of the forum for religious speech would undermine this secular aim. But by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there. Undoubtedly many views are advocated in the forum with which the University desires no association.

Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but not by others. See, e. g., *McCullum v. Board of Education*, 333 U. S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

¹¹ We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship and religious speech." See *Chess v. Widmar*, *supra*, at 1318. Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *O'Hair v. Andrus*, 613 F. 2d 931, 936 (CA-DC 1979) (footnote omitted); see L. Tribe, *American Constitutional Law* § 14-16 (1978). There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

¹² In finding that an "equal access" policy would have the primary effect of advancing religion, the District Court in this case relied primarily on *Tilton v. Richardson*, 403 U. S. 672 (1971). In *Tilton* this Court upheld

The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities to student groups, and the question is whether it can now exclude groups because of the content of their speech. See *Healy v. James*, 408 U. S. 169 (1972).¹³ In this context we are unpersuaded that the pri-

the grant of federal financial assistance to sectarian colleges for secular purposes, but circumscribed the terms of the grant to ensure its constitutionality. Although Congress had provided that federally subsidized buildings could not be used for sectarian or religious worship for 20 years, the Court considered this restriction insufficient: "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests the original federal grant will in part have the [constitutionally impermissible] effect of advancing religion." *Id.*, at 683. From this statement the District Court derived the proposition that State funds may not be used to provide or maintain buildings used by religious organizations.

We do not believe that *Tilton* can be read so broadly. In *Tilton* the Court was concerned that a sectarian institution might convert federally funded buildings to religious uses or otherwise stamp them with the imprimatur of religion. But nothing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after *Tilton* have acknowledged the right of religious speakers to use public forums on equal terms with others. See, e.g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Sala v. New York*, 334 U. S. 558 (1948).

¹³This case is different from the cases in which religious groups claim that the denial of facilities not available to other groups deprives them of their rights under the Free Exercise Clause. See *Brandon v. Board of Educ.*, 635 F. 2d 971, 975-976 (CA2 1980), cert. pending, No. 80-1396; *Hunt v. Board of Education*, 321 F. Supp. 1263, 1266 (SD W. Va. 1971). Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not—as in *Brandon* or *Hunt*—rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case. Accordingly, we need not inquire into the extent, if any, to which Free Exercise interests are infringed by the challenged University regulation. Neither do we reach the difficult questions that would arise if State

mary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to the range of an open forum's likely effects. It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion. *Committee for Public Education v. Nyquist*, 413 U. S. 756, 771 (1973); see, e. g., *Roemer v. Board of Public Works*, 426 U. S. 736 (1976); *Hunt v. McNair*, 413 U. S. 734 (1972); *McGowan v. Maryland*, 366 U. S. 420, 422 (1961).

We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases. Two factors are especially relevant.

First, an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . 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. *Chess v. Widmar*, *supra*, at 1317.¹⁴

accommodation of Free Exercise and Free Speech rights should, in a particular case, conflict with the prohibition of the Establishment Clause.

¹⁴University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion. See *Tilton v. Richardson*, 403 U. S. 672, 685-686 (1971). The University argues that the Cornerstone students themselves admitted in affidavits that "[s]tudents know that if something is on campus, then it is a student organization, and they are more likely to feel comfortable attending a meeting." Affidavit of Florian Frederick Chess, Joint Appendix, at 18, 19 (Sept. 29, 1977). In light of the large number of groups meeting on campus, however, we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place. The University's student handbook already notes that the University's name will not "be identified in any way with the aims, policies, programs, products, or opin-

Second, the forum is available to a broad class of non-religious 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. See, e. g., *Wolman v. Walter*, 433 U. S. 229, 240-241 (1977); *Committee for Public Education v. Nyquist*, *supra*, 413 U. S., at 756, 781-782 and n. 38 (1973). If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Roemer v. Maryland*, 426 U. S. 736, 747 (1976) (plurality opinion); quoted in *Committee for Public Education v. Regan*, 444 U. S. 646, 658, n. 6 (1980).¹⁵ At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's "primary effect."

B

Arguing that the State of Missouri has gone further than the Federal Constitution in proscribing indirect State support for religion,¹⁶ the University claims a compelling interest in complying with the applicable provisions of the Missouri Constitution.¹⁷

ions of any organization of its members." 1980-1981 UMKC Student Handbook, at 25.

¹⁵ This Court has similarly rejected "the recurrent argument that all aid [to parochial schools] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Hunt v. McNair*, 413 U. S. 734, 743 (1973).

¹⁶ See, e. g., *American United v. Rogers*, 538 S.W. 2d 711, 720, (Mo.) (en banc), cert. denied, 429 U. S. 1029 (1976) (holding Missouri Constitution requires stricter separation of church and state than does Federal Constitution); *Harfst v. Hogen*, 163 S.W. 2d 609, 613-614 (Mo. 1947) (en banc) (same).

¹⁷ See Mo. Const. Art. 1, § 6; Art. 1, § 7; Art. 9, § 8. In *Leutkemeyer v. Kaufman*, 364 F. Supp. 376 (ED Mo. 1973), *aff'd*, 419 U. S. 88 (1974), the

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The Missouri courts have not ruled whether a general policy of accommodating student groups, applied equally to those wishing to gather to engage in religious and non-religious speech, would offend the State Constitution. We need not, however, determine how the Missouri courts would decide this issue. It is also unnecessary for us to decide whether, under the Supremacy Clause,³ a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment. Even if a State's interest were compelling, its regulations would have to protect that interest without unnecessary abridgment of protected rights of speech and association. See, e. g., *Carey v. Brown*, 447 U. S. 455, 465 (1980); *Shelton v. Tucker*, 364 U. S. 479, 489 (1960). Measured against this standard, the University's policy of discrimination against religious speech and association fails on grounds of over-inclusiveness.

The University regulation challenged in this case applies to "religious teaching" as well as "religious worship." It is therefore substantially overbroad. We can imagine no compelling State interest—which would be cognizable under the Supremacy Clause—in banning all types of religious "teaching" in an otherwise-open forum, including, for example, informal conversational "instruction." As we have noted in the past, "[b]road prophylactic rules in an area of free expression are fatal. Precision of regulation must be the touchstone." *Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620, 637 (1980), quoting *NAACP v. Button*, 371 U. S. 415, 438 (1963) (omitting citations).

IV

Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and

District Court found Missouri had a compelling interest in compliance with its own constitution.

³ U. S. Const., Art. VI, § 2.

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manner regulations.¹⁸ Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources—"to determine for itself on academic grounds who may teach what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment); see *Regents of the Univ. of Cal. v. Bakke*, 438 U. S. 265, 312-313 (1978) (opinion of POWELL, J., announcing the decision of the Court). Finally, we also affirm the continuing validity of cases, *e. g.*, *Healy v. James*, 408 U. S. 169, 188-189 (1972), that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.

The basis for our decision is narrow. Having created a public forum, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.

For this reason, the decision of the Court of Appeals is,

Affirmed.

¹⁸ See, *e. g.*, *Grayned v. City of Rockford*, 408 U. S. 104, 116 (1972). ("The nature of a place, the pattern of its normal activities, dictate the kinds of regulations to time, place, and manner that are reasonable."). (quoting *Wright, The Constitution on the Campus*, 22 Vand. L. Rev. 1027, 1042 (1969)).

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Dick Fallon

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SUPREME COURT OF THE UNITED STATES

No. 80-689

GARY E. WIDMAR, ET AL., PETITIONERS v. CLARK
VINCENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[October —, 1981]

✓ November

JUSTICE POWELL delivered the opinion of the court.

This case presents the question whether a state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.

I

It is the stated policy of the University of Missouri at Kansas City¹ to encourage the activities of student organizations. The University officially recognizes over 100 student groups. It routinely provides University facilities for the meetings of registered organizations. Students pay an activity fee of \$41 per semester (1978-1979) to help defray the costs to the University.

From 1973 until 1977 a registered religious group named Cornerstone regularly sought and received permission to conduct its meetings in University facilities.² In 1977, how-

¹The University of Missouri at Kansas City (UMKC) is one of four campuses of the University of Missouri, an institution of the State of Missouri.

²Cornerstone is an organization of evangelical Christian students from various denominational backgrounds. According to an affidavit filed in 1977, "perhaps twenty students . . . participate actively in Cornerstone and form the backbone of the campus organization." Affidavit of Florian

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ever, the University informed the group that it could no longer meet in University buildings. The exclusion was based on a regulation, adopted by the Board of Curators in 1972, that prohibits the use of University buildings or grounds "for purposes of religious worship or religious teaching."³

Eleven University students, all members of Cornerstone, brought suit to challenge the regulation in Federal District Court for the Western District of Missouri.⁴ They alleged

Chess (Sept. 29, 1977), quoted in *Chess v. Widmar*, 480 F. Supp. 907, 911 (WD Mo. 1979). Cornerstone held its on-campus meetings in classrooms and in the student center. These meetings were open to the public and attracted up to 125 students. A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences.

³The pertinent regulations provide as follows:

"4.0314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. . . . The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. . . .

"4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for recurring services of any groups. Special rules and procedures shall be established for each chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group."

There is no chapel on the campus of the University of Missouri at Kansas City. The nearest University chapel is at the Columbia campus, approximately 125 miles east of UMKC.

Although the University had routinely approved Cornerstone meetings before 1977, the District Court found that University officials had never "authorized a student organization to utilize a University facility for a meeting when they had full knowledge that the purposes of the meeting include[d] religious worship or religious teaching." *Chess v. Widmar*, *supra*, at 910.

⁴Clark Vincent, the respondent, and Florian Chess, the named plaintiff

that the University's discrimination against religious activity and discussion violated their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States.

Upon cross motions for summary judgment, the District Court upheld the challenged regulation. *Chess v. Widmar*, 480 F. Supp. 907 (WD Mo. 1979). It found the regulation not only justified, but required, by the Establishment Clause of the Federal Constitution. *Id.*, at 916. Under *Tilton v. Richardson*, 403 U. S. 672 (1971), the court reasoned, the State could not provide facilities for religious use without giving prohibited support to an institution of religion. *Id.*, at 915-916. The District Court rejected the argument that the University could not discriminate against religious speech on the basis of its content. It found religious speech entitled to less protection than other types of expression. *Id.*, at 918.

The Court of Appeals for the Eighth Circuit reversed. *Chess v. Widmar*, 635 F. 2d 1310 (CA8 1980). Rejecting the analysis of the District Court, it viewed the University regulation as a content-based discrimination against religious speech, for which it could find no compelling justification. *Id.*, at 1315-1320. The Court held that the Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kinds. *Id.*, at 1317. According to the Court of Appeals, the "primary effect" of such a policy would not be to advance religion, but rather to further the neutral purpose of developing students' "social and cultural awareness as well as [their] intellectual curiosity." *Id.*, at 1317 (quoting from the University bulletin's

in the action in the District Court, were among the students who initiated the action on October 13, 1977. Named as defendants were the petitioner Gary Widmar, the Dean of Students at UMKC, and the University's Board of Curators.

description of the student activities program, reprinted in *id.*, at 1312, n. 1).

We now affirm.

II

Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups.⁴ Having done so, the University ^{has} assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.⁵ The Constitution forbids a State to enforce certain exclusions from a public forum,⁶ even

generally
open to the
public

⁴This Court has recognized that the campus of a public university possesses many of the characteristics of a public forum. "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" *Healy v. James*, 408 U. S. 169, 180 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Id.*, at 181-182. We therefore have held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. *Id.*, at 181, 184.

⁵The concept of a "public forum" rests on the recognition, first expressed in *Hague v. CIO*, 307 U. S. 496, 515 (1939), that

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

See also *Police Dept. v. Mosley*, 408 U. S. 92 (1972); *Cox v. Louisiana*, 379 U. S. 536 (1965).

Although a university may create a forum with many of the characteristics of streets and public places, see n. 5, *supra*, our cases have recognized that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." *Tinker v. Des Moines Independent School District*, 393 U. S. 503, 506 (1969). We continue to adhere

if it was not required to create the forum in the first place. See, e. g., *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U. S. 167, 175 and n. 8. (1976) (although a State may conduct business in private session, "where the State has opened a forum for direct citizen involvement," exclusions bear a heavy burden of justification); *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 555-559 (1975) (because municipal theater was a public forum, city could not exclude a production without satisfying constitutional safeguards applicable to prior restraints).

The University's institutional mission, which it describes as providing a "secular education" to its students, Brief for Petitioners 44, does not exempt its actions from constitutional scrutiny. Our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities. See, e. g., *Healy v. James*, 408 U. S. 169, 180 (1972); *Tinker v. Des Moines Independent School District*, 393 U. S. 503, 506 (1969); *Shelton v. Tucker*, 364 U. S. 479, 487 (1960).

Here the University of Missouri has discriminated against groups and speakers based on their desire to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. See, e. g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Saia v. New York*, 334 U. S. 558 (1948).⁷ In order to justify discriminatory exclusion from a

to that view. A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied its authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and non-students alike, or that a university must grant free access to all of its grounds or buildings.

⁷The dissent argues that "religious worship" is not speech generally

public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a com-

(2-3) protected by the "free speech" guarantee of the First Amendment and the "equal protection" guarantee of the Fourteenth Amendment. If "religious worship" were protected "speech," the dissent reasons, "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech." Dissenting opinion, *post*, at 4. This is a novel argument. The dissent does not deny that speech about religion is speech entitled to the general protections of the First Amendment. See *id.*, at 3 and n. 1. It does not argue that descriptions of religious experiences fail to qualify as "speech." Nor does it repudiate last Term's decision in *Krishna, supra*, which assumed that religious appeals to nonbelievers constituted protected "speech." Rather, the dissent seems to attempt a distinction between the kinds of religious speech explicitly protected by our cases and a new class of religious "speech act(s)," dissenting opinion, at 4, comprising "worship." There are at least three difficulties with this distinction.

(4) First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," *id.*, at 2, cease to be "singing, teaching, and reading"—all apparently forms of "speech," despite their religious subject matter—and become unprotected "worship."

Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Cf. *Fowler v. Rhode Island*, 345 U. S. 67, 70 (1953). Merely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases. E. g., *Waltz v. Tax Commission*, 397 U. S. 664, 668 (1970).

Finally, the dissent fails to establish the relevance of the distinction on which it seeks to rely. The dissent apparently wishes to preserve the vitality of the Establishment Clause. See dissenting opinion, *post*, at 4. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, see *Krishna, supra*, than for religious worship by persons already converted. It is far from clear that

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III

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"It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which . . . may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."

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In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy including nondiscrimination against religious speech, would have a secular purpose¹⁰ and would avoid entanglement with religion.¹¹ But the District Court concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion.¹²

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¹² In finding that an "equal access" policy would have the primary effect of advancing religion, the District Court in this case relied primarily on *Tilton v. Richardson*, 403 U. S. 672 (1971). In *Tilton* this Court upheld

FN (Attached Rider)
9A

FN 9A. As the dissent argues, it is sometimes necessary to distinguish between "religious" and "nonreligious" speech. See, e.g., *Stone v. Graham*, ____ U.S. ____ (November 17, 1980). But our cases have never required the State to distinguish between religious and nonreligious speech by private speakers in a public forum. The dissent's hypotheticals of classes entitled "Sunday Mass" and "The History of the Catholic Church" are irrelevant to this case. By relying on them, the dissent blurs the critical distinction between a state university itself acting to further a religion or its establishment, and the case before us, in which the university has created a public forum for use by private speakers.

The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities to student groups, and the question is whether it can now exclude groups because of the content of their speech. See *Healy v. James*, 408 U. S. 169 (1972).¹² In this context we are unpersuaded that the pri-

for use by

the grant of federal financial assistance to sectarian colleges for secular purposes, but circumscribed the terms of the grant to ensure its constitutionality. Although Congress had provided that federally subsidized buildings could not be used for sectarian or religious worship for 20 years, the Court considered this restriction insufficient: "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests the original federal grant will in part have the [constitutionally impermissible] effect of advancing religion." *Id.*, at 683. From this statement the District Court derived the proposition that State funds may not be used to provide or maintain buildings used by religious organizations.

We do not believe that *Tilton* can be read so broadly. In *Tilton* the Court was concerned that a sectarian institution might convert federally funded buildings to religious uses or otherwise stamp them with the imprimatur of religion. But nothing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after *Tilton* have acknowledged the right of religious speakers to use public forums on equal terms with others. See, e.g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Sala v. New York*, 334 U. S. 558 (1948).

[#] This case is different from the cases in which religious groups claim that the denial of facilities not available to other groups deprives them of their rights under the Free Exercise Clause. See *Brandon v. Board of Educ.*, 635 F. 2d 971, 975-976 (CA2 1980), cert. pending, No. 80-1396; *Hunt v. Board of Education*, 321 F. Supp. 1263, 1266 (SD W. Va. 1971). Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not—as in *Brandon* or *Hunt*—rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case. Accordingly, we need not inquire into the extent, if any, to which Free Exercise interests are infringed by the challenged University regulation. Neither do we reach the difficult questions that would arise if State

mary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to the range of an open forum's likely effects. It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion. *Committee for Public Education v. Nyquist*, 413 U. S. 756, 771 (1973); see, e. g., *Roemer v. Board of Public Works*, 426 U. S. 736 (1976); *Hunt v. McNair*, 413 U. S. 734 (1972); *McGowan v. Maryland*, 366 U. S. 420, 422 (1961).

We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases. Two factors are especially relevant.

First, an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . 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. *Chess v. Widmar*, *supra*, at 1317.¹⁴

accommodation of Free Exercise and Free Speech rights should, in a particular case, conflict with the prohibition of the Establishment Clause.

¹⁴ University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion. See *Tilton v. Richardson*, 403 U. S. 672, 685-686 (1971). The University argues that the Cornerstone students themselves admitted in affidavits that "[s]tudents know that if something is on campus, then it is a student organization, and they are more likely to feel comfortable attending a meeting." Affidavit of Florian Frederick Chess, Joint Appendix, at 18, 19 (Sept. 29, 1977). In light of the large number of groups meeting on campus, however, we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place. The University's student handbook already notes that the University's name will not "be identified in any way with the aims, policies, programs, products, or opin-

Second, the forum is available to a broad class of non-religious 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. See, e. g., *Wolman v. Walter*, 433 U. S. 229, 240-241 (1977); *Committee for Public Education v. Nyquist*, *supra*, 413 U. S., at 756, 781-782 and n. 38 (1973). If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Roemer v. Maryland*, 426 U. S. 736, 747 (1976) (plurality opinion); quoted in *Committee for Public Education v. Regan*, 444 U. S. 646, 658, n. 6 (1980).¹⁶ At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's "primary effect."

B

Arguing that the State of Missouri has gone further than the Federal Constitution in proscribing indirect State support for religion,¹⁸ the University claims a compelling interest in complying with the applicable provisions of the Missouri Constitution.¹⁷

ions of any organization of its members." 1980-1981 UMKC Student Handbook, at 25.

¹⁸This Court has similarly rejected "the recurrent argument that all aid [to parochial schools] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Hunt v. McNair*, 413 U. S. 734, 743 (1973).

¹⁶See, e. g., *American United v. Rogers*, 588 S.W. 2d 711, 720, (Mo.) (en banc), cert. denied, 429 U. S. 1029 (1976) (holding Missouri Constitution requires stricter separation of church and state than does Federal Constitution); *Harfst v. Hogen*, 163 S.W. 2d 609, 613-614 (Mo. 1947) (en banc) (same).

¹⁷See Mo. Const. Art. 1, § 6; Art. 1, § 7; Art. 9, § 8. In *Leutkemeyer v. Kaufman*, 364 F. Supp. 376 (ED Mo. 1973), *aff'd*, 419 U. S. 88 (1974), the

The Missouri courts have not ruled whether a general policy of accommodating student groups, applied equally to those wishing to gather to engage in religious and non-religious speech, would offend the State Constitution. We need not, however, determine how the Missouri courts would decide this issue. It is also unnecessary for us to decide whether, under the Supremacy Clause,¹⁸ a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment. ~~Even if a State's interest were compelling, its regulations would have to protect that interest without unnecessary abridgment of protected rights of speech and association. See, e.g., *Carey v. Brown*, 447 U. S. 455, 465 (1980); *Shelton v. Tucker*, 364 U. S. 479, 489 (1960). Measured against this standard, the University's policy of discrimination against religious speech and association fails on grounds of over-inclusiveness.~~

We limit our holding to the case before us.

The University regulation challenged in this case applies to "religious teaching" as well as "religious worship." It is therefore substantially overbroad. We can imagine no compelling State interest—which would be cognizable under the Supremacy Clause—in banning all types of religious "teaching" in an otherwise-open forum, including, for example, informal conversational "instruction." As we have noted in the past, "[b]road prophylactic rules in an area of free expression are fatal. Precision of regulation must be the touchstone." *Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620, 637 (1980), quoting *NAACP v. Button*, 371 U. S. 415, 438 (1963) (omitting citations).

IV

Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and

District Court found Missouri had a compelling interest in compliance with its own constitution.

¹⁸U. S. Const., Art. VI, § 2.

On one hand, respondents' First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content. See, e.g., *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dept. v. Mosley*, 408 U.S. 92 (1972). On the other hand, the State interest asserted here -- in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution -- is inherently limited by the Free Exercise Clause. In this constitutional context, we are unable to recognize that interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech.

the state's

I would hope that this change would be acceptable to the Chief and to Bill Rehnquist. If it is, you have a substantial Court.

Sincerely,

Justice Powell

cc: Justice Brennan
Justice O'Connor

and in this case by the Free Speech Clause

manner regulations.¹⁹ Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources—"to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment); see *Regents of the Univ. of Cal. v. Bakke*, 438 U. S. 265, 312-313 (1978) (opinion of POWELL, J., announcing the decision of the Court). Finally, we also affirm the continuing validity of cases, e. g., *Healy v. James*, 408 U. S. 169, 188-189 (1972), that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.

The basis for our decision is narrow. Having created a public forum, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.

For this reason, the decision of the Court of Appeals is,

Affirmed.

¹⁹ See, e. g., *Grayned v. City of Rockford*, 408 U. S. 104, 116 (1972). ("The nature of a place, the pattern of its normal activities, dictate the kinds of regulations to time, place, and manner that are reasonable."). (quoting *Wright*, *The Constitution on the Campus*, 22 Vand. L. Rev. 1027, 1042 (1969)).

generally open
to student
groups

1, 4, 6, 8, 9, 10, 12, 13

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

0\$0689G, 11-16-81, rev. Wilma

From: Justice Powell

Circulated: _____

Recirculated: **NOV 17 1981**

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-689

GARY E. WIDMAR, ET AL., PETITIONERS v. CLARK
VINCENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[November —, 1981]

JUSTICE POWELL delivered the opinion of the court.

This case presents the question whether a state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.

I

It is the stated policy of the University of Missouri at Kansas City¹ to encourage the activities of student organizations. The University officially recognizes over 100 student groups. It routinely provides University facilities for the meetings of registered organizations. Students pay an activity fee of \$41 per semester (1978-1979) to help defray the costs to the University.

From 1973 until 1977 a registered religious group named Cornerstone regularly sought and received permission to conduct its meetings in University facilities.² In 1977, how-

¹The University of Missouri at Kansas City (UMKC) is one of four campuses of the University of Missouri, an institution of the State of Missouri.

²Cornerstone is an organization of evangelical Christian students from various denominational backgrounds. According to an affidavit filed in 1977, "perhaps twenty students . . . participate actively in Cornerstone and form the backbone of the campus organization." Affidavit of Florian

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ever, the University informed the group that it could no longer meet in University buildings. The exclusion was based on a regulation, adopted by the Board of Curators in 1972, that prohibits the use of University buildings or grounds "for purposes of religious worship or religious teaching."³

Eleven University students, all members of Cornerstone, brought suit to challenge the regulation in Federal District Court for the Western District of Missouri.⁴ They alleged

Chess (Sept. 29, 1977), quoted in *Chess v. Widmar*, 480 F. Supp. 907, 911 (WD Mo. 1979). Cornerstone held its on-campus meetings in classrooms and in the student center. These meetings were open to the public and attracted up to 125 students. A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences.

³The pertinent regulations provide as follows:

"4.0314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. . . . The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. . . .

"4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for recurring services of any groups. Special rules and procedures shall be established for each chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group."

There is no chapel on the campus of the University of Missouri at Kansas City. The nearest University chapel is at the Columbia campus, approximately 125 miles east of UMKC.

Although the University had routinely approved Cornerstone meetings before 1977, the District Court found that University officials had never "authorized a student organization to utilize a University facility for a meeting when they had full knowledge that the purposes of the meeting include[d] religious worship or religious teaching." *Chess v. Widmar*, *supra*, at 910.

⁴Clark Vincent, the respondent, and Florian Chess, the named plaintiff

that the University's discrimination against religious activity and discussion violated their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States.

Upon cross motions for summary judgment, the District Court upheld the challenged regulation. *Chess v. Widmar*, 480 F. Supp. 907 (WD Mo. 1979). It found the regulation not only justified, but required, by the Establishment Clause of the Federal Constitution. *Id.*, at 916. Under *Tilton v. Richardson*, 403 U. S. 672 (1971), the court reasoned, the State could not provide facilities for religious use without giving prohibited support to an institution of religion. *Id.*, at 915-916. The District Court rejected the argument that the University could not discriminate against religious speech on the basis of its content. It found religious speech entitled to less protection than other types of expression. *Id.*, at 918.

The Court of Appeals for the Eighth Circuit reversed. *Chess v. Widmar*, 635 F. 2d 1310 (CA8 1980). Rejecting the analysis of the District Court, it viewed the University regulation as a content-based discrimination against religious speech, for which it could find no compelling justification. *Id.*, at 1315-1320. The Court held that the Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kinds. *Id.*, at 1317. According to the Court of Appeals, the "primary effect" of such a policy would not be to advance religion, but rather to further the neutral purpose of developing students' "social and cultural awareness as well as [their] intellectual curiosity." *Id.*, at 1317 (quoting from the University bulletin's

in the action in the District Court, were among the students who initiated the action on October 13, 1977. Named as defendants were the petitioner Gary Widmar, the Dean of Students at UMKC, and the University's Board of Curators.

description of the student activities program, reprinted in *id.*, at 1312, n. 1).

We now affirm.

II

Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.³ The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public,⁴ even if it was not required to

³This Court has recognized that the campus of a public university possesses many of the characteristics of a public forum. "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" *Healy v. James*, 408 U. S. 169, 180 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Id.*, at 181-182. We therefore have held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. *Id.*, at 181, 184.

⁴The concept of a "public forum" rests on the recognition, first expressed in *Hague v. CIO*, 307 U. S. 496, 515 (1939), that

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

See also *Police Dept. v. Mosley*, 408 U. S. 92 (1972); *Cox v. Louisiana*, 379 U. S. 536 (1965).

Although a university may create a forum with many of the characteristics of streets and public places, see n. 5, *supra*, our cases have recognized that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." *Tinker v. Des Moines Inde-*

create the forum in the first place. See, e. g., *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U. S. 167, 175 and n. 8. (1976) (although a State may conduct business in private session, "where the State has opened a forum for direct citizen involvement," exclusions bear a heavy burden of justification); *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 555-559 (1975) (because municipal theater was a public forum, city could not exclude a production without satisfying constitutional safeguards applicable to prior restraints).

The University's institutional mission, which it describes as providing a "secular education" to its students, Brief for Petitioners 44, does not exempt its actions from constitutional scrutiny. Our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities. See, e. g., *Healy v. James*, 408 U. S. 169, 180 (1972); *Tinker v. Des Moines Independent School District*, 393 U. S. 503, 506 (1969); *Shelton v. Tucker*, 364 U. S. 479, 487 (1960).

Here the University of Missouri has discriminated against groups and speakers based on their desire to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. See, e. g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Saia v. New York*, 334 U. S. 558 (1948).⁷ In order to justify discriminatory exclusion from a

pendent School District, 393 U. S. 503, 506 (1969). We continue to adhere to that view. A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied its authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and non-students alike, or that a university must grant free access to all of its grounds or buildings.

⁷The dissent argues that "religious worship" is not speech generally

public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a com-

protected by the "free speech" guarantee of the First Amendment and the "equal protection" guarantee of the Fourteenth Amendment. If "religious worship" were protected "speech," the dissent reasons, "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech." Dissenting opinion, *post*, at 4. This is a novel argument. The dissent does not deny that speech *about* religion is speech entitled to the general protections of the First Amendment. See *id.*, at 2-3 and n. 1. It does not argue that descriptions of religious experiences fail to qualify as "speech." Nor does it repudiate last Term's decision in *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, *supra*, which assumed that religious appeals to nonbelievers constituted protected "speech." Rather, the dissent seems to attempt a distinction between the kinds of religious speech explicitly protected by our cases and a new class of religious "speech act[s]," dissenting opinion, at 4, comprising "worship." There are at least three difficulties with this distinction.

First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," *id.*, at 2, cease to be "singing, teaching, and reading"—all apparently forms of "speech," despite their religious subject matter—and become unprotected "worship."

Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Cf. *Fowler v. Rhode Island*, 345 U. S. 67, 70 (1953). Merely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases. E. g., *Waltz v. Tax Commission*, 397 U. S. 664, 668 (1970).

Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. The dissent apparently wishes to preserve the vitality of the Establishment Clause. See dissenting opinion, *post*, at 4. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, see *Heffron*, *supra*, than for re-

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7

elling state interest and that it is narrowly drawn to achieve that end. See *Carey v. Brown*, 447 U. S. 455, 461, 464-465 (1980).⁸

III

In this case the University claims a compelling interest in maintaining strict separation of church and State. It derives this interest from the "Establishment Clauses" of both the Federal and Missouri Constitutions.

A

The University first argues that it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause of the Constitution of the United States.⁹ We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. It does not follow, however, that an "equal access" policy would be incompatible with this Court's Establishment Clause cases. Those cases hold that a policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that

ligious worship by persons already converted. It is far from clear that the State gives greater support in the latter case than in the former.

⁸ See also *Healy v. James*, 408 U. S. 169, 184 (1972):

"It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which . . . may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."

⁹ "Congress shall make no law respecting an establishment of religion. . . ." U. S. Const., Amdt. 1. The Establishment Clause has been made applicable to the States through the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940).

neither advances nor inhibits religion . . . ; finally, the [policy] must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971). See *Committee for Public Education v. Regan*, 444 U. S. 646, 653 (1980); *Roemer v. Maryland Public Works Bd.*, 426 U. S. 736, 748 (1976).

In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech,¹⁰ would have a secular purpose¹¹ and would avoid entanglement with religion.¹² But the District Court

¹⁰ As the dissent argues, it is sometimes necessary to distinguish between "religious" and "nonreligious" speech. See, e. g., *Stone v. Graham*, — U. S. — (November 17, 1980). But our cases have never required the State to distinguish between religious and nonreligious speech by private speakers in a public forum. The dissent's hypotheticals of classes entitled "Sunday Mass" and "The History of the Catholic Church" are irrelevant to this case. By relying on them, the dissent blurs the critical distinction between a state university itself acting to further a religion or its establishment, and the case before us, in which the university has created a public forum for use by private speakers.

¹¹ It is the avowed purpose of UMKC to provide a forum in which students can exchange ideas. The University argues that use of the forum for religious speech would undermine this secular aim. But by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there. Undoubtedly many views are advocated in the forum with which the University desires no association.

Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but not by others. See, e. g., *McCormack v. Board of Education*, 333 U. S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

¹² We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship and religious speech." See *Chess v. Widmar*, *supra*, at 1318. Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs

concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion.¹³

The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech. See *Healy v. James*, 408 U. S. 169 (1972).¹⁴ In this context we are unpersuaded that the

meet the constitutional definition of religion." *O'Hair v. Andrus*, 618 F. 2d 981, 986 (CA-DC 1979) (footnote omitted); see L. Tribe, *American Constitutional Law* § 14-16 (1978). There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

¹³ In finding that an "equal access" policy would have the primary effect of advancing religion, the District Court in this case relied primarily on *Tilton v. Richardson*, 403 U. S. 672 (1971). In *Tilton* this Court upheld the grant of federal financial assistance to sectarian colleges for secular purposes, but circumscribed the terms of the grant to ensure its constitutionality. Although Congress had provided that federally subsidized buildings could not be used for sectarian or religious worship for 20 years, the Court considered this restriction insufficient: "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests the original federal grant will in part have the [constitutionally impermissible] effect of advancing religion." *Id.*, at 688. From this statement the District Court derived the proposition that State funds may not be used to provide or maintain buildings used by religious organizations.

We do not believe that *Tilton* can be read so broadly. In *Tilton* the Court was concerned that a sectarian institution might convert federally funded buildings to religious uses or otherwise stamp them with the imprimatur of religion. But nothing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after *Tilton* have acknowledged the right of religious speakers to use public forums on equal terms with others. See, e. g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Sala v. New York*, 334 U. S. 558 (1948).

¹⁴ This case is different from the cases in which religious groups claim that the denial of facilities not available to other groups deprives them of

primary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to the range of an open forum's likely effects. It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion. *Committee for Public Education v. Nyquist*, 413 U. S. 756, 771 (1973); see, e. g., *Roemer v. Board of Public Works*, 426 U. S. 736 (1976); *Hunt v. McNair*, 413 U. S. 734 (1972); *McGowan v. Maryland*, 366 U. S. 420, 422 (1961).

We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases. Two factors are especially relevant.

First, an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . 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. *Chess v. Widmar*, *supra*, at 1817.¹⁵

their rights under the Free Exercise Clause. See *Brandon v. Board of Educ.*, 635 F. 2d 971, 975-976 (CA2 1980), cert. pending, No. 80-1396; *Hunt v. Board of Education*, 321 F. Supp. 1263, 1266 (SD W. Va. 1971). Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not—as in *Brandon* or *Hunt*—rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case. Accordingly, we need not inquire into the extent, if any, to which Free Exercise interests are infringed by the challenged University regulation. Neither do we reach the questions that would arise if State accommodation of Free Exercise and Free Speech rights should, in a particular case, conflict with the prohibition of the Establishment Clause.

¹⁵ University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that

Second, the forum is available to a broad class of non-religious 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. See, e. g., *Wolman v. Walter*, 433 U. S. 229, 240-241 (1977); *Committee for Public Education v. Nyquist*, *supra*, 413 U. S., at 756, 781-782 and n. 38 (1973). If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Roemer v. Maryland*, 426 U. S. 736, 747 (1976) (plurality opinion); quoted in *Committee for Public Education v. Regan*, 444 U. S. 646, 658, n. 6 (1980).¹⁴ At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's "primary effect."

B

Arguing that the State of Missouri has gone further than the Federal Constitution in proscribing indirect State sup-

the University's policy is one of neutrality toward religion. See *Tilton v. Richardson*, 403 U. S. 672, 685-686 (1971). The University argues that the Cornerstone students themselves admitted in affidavits that "[s]tudents know that if something is on campus, then it is a student organization, and they are more likely to feel comfortable attending a meeting." Affidavit of Florian Frederick Chess, Joint Appendix, at 18, 19 (Sept. 29, 1977). In light of the large number of groups meeting on campus, however, we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place. The University's student handbook already notes that the University's name will not "be identified in any way with the aims, policies, programs, products, or opinions of any organization of its members." 1980-1981 UMKC Student Handbook, at 25.

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port for religion,¹⁷ the University claims a compelling interest in complying with the applicable provisions of the Missouri Constitution.¹⁸

The Missouri courts have not ruled whether a general policy of accommodating student groups, applied equally to those wishing to gather to engage in religious and non-religious speech, would offend the State Constitution. We need not, however, determine how the Missouri courts would decide this issue. It is also unnecessary for us to decide whether, under the Supremacy Clause,¹⁹ a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment. We limit our holding to the case before us.

On one hand, respondents' First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content. See, e. g., *Carey v. Brown*, 447 U. S. 455 (1980); *Police Dept. v. Mosley*, 408 U. S. 92 (1972). On the other hand, the State interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is inherently limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently

¹⁷ See, e. g., *American United v. Rogers*, 538 S.W. 2d 711, 720, (Mo.) (en banc), cert. denied, 429 U. S. 1029 (1976) (holding Missouri Constitution requires stricter separation of church and state than does Federal Constitution); *Harfst v. Hogen*, 163 S.W. 2d 609, 613-614 (Mo. 1947) (en banc) (same).

¹⁸ See Mo. Const. Art. 1, § 6; Art. 1, § 7; Art. 9, § 8. In *Leutkemeyer v. Kaufman*, 364 F. Supp. 376 (E.D. Mo. 1973), aff'd, 419 U. S. 88 (1974), the District Court found Missouri had a compelling interest in compliance with its own constitution.

¹⁹ U. S. Const., Art. VI, § 2.

"compelling" to justify content-based discrimination against respondents' religious speech.

IV

Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations.²⁸ Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources—"to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment); see *Regents of the Univ. of Cal. v. Bakke*, 438 U. S. 265, 312-313 (1978) (opinion of POWELL, J., announcing the decision of the Court). Finally, we affirm the continuing validity of cases, *e. g.*, *Healy v. James*, 408 U. S. 169, 188-189 (1972), that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.

The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.

For this reason, the decision of the Court of Appeals is,

Affirmed.

²⁸ See, *e. g.*, *Grayned v. City of Rockford*, 408 U. S. 104, 116 (1972). ("The nature of a place, the pattern of its normal activities, dictate the kinds of regulations to time, place, and manner that are reasonable."). (quoting *Wright, The Constitution on the Campus*, 22 Vand. L. Rev. 1027, 1042 (1969)).

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-689

GARY E. WIDMAR, ET AL., PETITIONERS v.
CLARK VINCENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[November —, 1981]

JUSTICE POWELL delivered the opinion of the court.

This case presents the question whether a state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.

I

It is the stated policy of the University of Missouri at Kansas City¹ to encourage the activities of student organizations. The University officially recognizes over 100 student groups. It routinely provides University facilities for the meetings of registered organizations. Students pay an activity fee of \$41 per semester (1978-1979) to help defray the costs to the University.

From 1973 until 1977 a registered religious group named Cornerstone regularly sought and received permission to conduct its meetings in University facilities.² In 1977, how-

¹The University of Missouri at Kansas City (UMKC) is one of four campuses of the University of Missouri, an institution of the State of Missouri.

²Cornerstone is an organization of evangelical Christian students from various denominational backgrounds. According to an affidavit filed in 1977, "perhaps twenty students . . . participate actively in Cornerstone and form the backbone of the campus organization." Affidavit of Florian

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ever, the University informed the group that it could no longer meet in University buildings. The exclusion was based on a regulation, adopted by the Board of Curators in 1972, that prohibits the use of University buildings or grounds "for purposes of religious worship or religious teaching."³

Eleven University students, all members of Cornerstone, brought suit to challenge the regulation in Federal District Court for the Western District of Missouri.⁴ They alleged

Chess (Sept. 29, 1977), quoted in *Chess v. Widmar*, 480 F. Supp. 907, 911 (WD Mo. 1979). Cornerstone held its on-campus meetings in classrooms and in the student center. These meetings were open to the public and attracted up to 125 students. A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences.

³The pertinent regulations provide as follows:

"4.0314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. . . . The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. . . .

"4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for recurring services of any groups. Special rules and procedures shall be established for each chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group."

There is no chapel on the campus of the University of Missouri at Kansas City. The nearest University chapel is at the Columbia campus, approximately 125 miles east of UMKC.

Although the University had routinely approved Cornerstone meetings before 1977, the District Court found that University officials had never "authorized a student organization to utilize a University facility for a meeting when they had full knowledge that the purposes of the meeting include[d] religious worship or religious teaching." *Chess v. Widmar*, *supra*, at 910.

⁴Clark Vincent, the respondent, and Florian Chess, the named plaintiff

that the University's discrimination against religious activity and discussion violated their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States.

Upon cross motions for summary judgment, the District Court upheld the challenged regulation. *Chess v. Widmar*, 480 F. Supp. 907 (WD Mo. 1979). It found the regulation not only justified, but required, by the Establishment Clause of the Federal Constitution. *Id.*, at 916. Under *Tilton v. Richardson*, 403 U. S. 672 (1971), the court reasoned, the State could not provide facilities for religious use without giving prohibited support to an institution of religion. *Id.*, at 915-916. The District Court rejected the argument that the University could not discriminate against religious speech on the basis of its content. It found religious speech entitled to less protection than other types of expression. *Id.*, at 918.

The Court of Appeals for the Eighth Circuit reversed. *Chess v. Widmar*, 635 F. 2d 1310 (CA8 1980). Rejecting the analysis of the District Court, it viewed the University regulation as a content-based discrimination against religious speech, for which it could find no compelling justification. *Id.*, at 1315-1320. The Court held that the Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kinds. *Id.*, at 1317. According to the Court of Appeals, the "primary effect" of such a policy would not be to advance religion, but rather to further the neutral purpose of developing students' "social and cultural awareness as well as [their] intellectual curiosity." *Id.*, at 1317 (quoting from the University bulletin's description of the student activities program, reprinted in

in the action in the District Court, were among the students who initiated the action on October 13, 1977. Named as defendants were the petitioner Gary Widmar, the Dean of Students at UMKC, and the University's Board of Curators.

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id., at 1312, n. 1).

We now affirm.

II

Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.⁵ The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public,⁶ even if it was not required to

⁵This Court has recognized that the campus of a public university possesses many of the characteristics of a public forum. "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" *Healy v. James*, 408 U. S. 169, 180 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Id.*, at 181-182. We therefore have held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. *Id.*, at 181, 184.

⁶The concept of a "public forum" rests on the recognition, first expressed in *Hague v. CIO*, 307 U. S. 496, 515 (1939), that

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

See also *Police Dept. v. Mosley*, 408 U. S. 92 (1972); *Cox v. Louisiana*, 379 U. S. 536 (1965).

Although a university may create a forum with many of the characteristics of streets and public places, see n. 5, *supra*, our cases have recognized that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." *Tinker v. Des Moines Independent School District*, 393 U. S. 503, 506 (1969). We continue to adhere

create the forum in the first place. See, *e. g.*, *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U. S. 167, 175 and n. 8. (1976) (although a State may conduct business in private session, "where the State has opened a forum for direct citizen involvement," exclusions bear a heavy burden of justification); *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 555-559 (1975) (because municipal theater was a public forum, city could not exclude a production without satisfying constitutional safeguards applicable to prior restraints).

The University's institutional mission, which it describes as providing a "secular education" to its students, Brief for Petitioners 44, does not exempt its actions from constitutional scrutiny. With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities. See, *e. g.*, *Healy v. James*, 408 U. S. 169, 180 (1972); *Tinker v. Des Moines Independent School District*, 393 U. S. 503, 506 (1969); *Shelton v. Tucker*, 364 U. S. 479, 487 (1960).

Here the University of Missouri has discriminated against groups and speakers based on their desire to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. See, *e. g.*, *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Saia v. New York*, 334 U. S. 558 (1948).⁷ In order to justify discriminatory exclusion from a

to that view. A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied its authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and non-students alike, or that a university must grant free access to all of its grounds or buildings.

⁷The dissent argues that "religious worship" is not speech generally

public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a com-

protected by the "free speech" guarantee of the First Amendment and the "equal protection" guarantee of the Fourteenth Amendment. If "religious worship" were protected "speech," the dissent reasons, "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech." Dissenting opinion, *post*, at 4. This is a novel argument. The dissent does not deny that speech *about* religion is speech entitled to the general protections of the First Amendment. See *id.*, at 2-3 and n. 1. It does not argue that descriptions of religious experiences fail to qualify as "speech." Nor does it repudiate last Term's decision in *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, *supra*, which assumed that religious appeals to nonbelievers constituted protected "speech." Rather, the dissent seems to attempt a distinction between the kinds of religious speech explicitly protected by our cases and a new class of religious "speech act[s]," dissenting opinion, at 4, comprising "worship." There are at least three difficulties with this distinction.

First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," *id.*, at 2, cease to be "singing, teaching, and reading"—all apparently forms of "speech," despite their religious subject matter—and become unprotected "worship."

Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Cf. *Fowler v. Rhode Island*, 345 U. S. 67, 70 (1953). Merely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases. E. g., *Walz v. Tax Commission*, 397 U. S. 664, 668 (1970).

Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. The dissent apparently wishes to preserve the vitality of the Establishment Clause. See dissenting opinion, *post*, at 4. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, see *Heffron*, *supra*, than for re-

elling state interest and that it is narrowly drawn to achieve that end. See *Carey v. Brown*, 447 U. S. 455, 461, 464-465 (1980).⁸

III

In this case the University claims a compelling interest in maintaining strict separation of church and State. It derives this interest from the "Establishment Clauses" of both the Federal and Missouri Constitutions.

A

The University first argues that it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause of the Constitution of the United States.⁹ We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. It does not follow, however, that an "equal access" policy would be incompatible with this Court's Establishment Clause cases. Those cases hold that a policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that

ligious worship by persons already converted. It is far from clear that the State gives greater support in the latter case than in the former.

⁸ See also *Healy v. James*, 408 U. S. 169, 184 (1972):

"It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which . . . may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."

⁹ "Congress shall make no law respecting an establishment of religion. . . ." U. S. Const., Amdt. 1. The Establishment Clause has been made applicable to the States through the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940).

neither advances nor inhibits religion . . . ; finally, the [policy] must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971). See *Committee for Public Education v. Regan*, 444 U. S. 646, 653 (1980); *Roemer v. Maryland Public Works Bd.*, 426 U. S. 736, 748 (1976).

In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech,¹⁰ would have a secular purpose¹¹ and would avoid entanglement with religion.¹² But the District Court

¹⁰ As the dissent emphasizes, the Establishment Clause requires the State to distinguish between "religious" speech—speech, undertaken or approved by the State, the primary effect of which is to support an Establishment of Religion—and "nonreligious" speech—speech, undertaken or approved by the State, the primary effect of which is not to support an Establishment of Religion. This distinction is required by the plain text of the Constitution. It is followed in our cases. *E. g.*, *Stone v. Graham*, — U. S. — (November 17, 1980). The dissent attempts to equate this distinction with its view of an alleged constitutional difference between religious "speech" and religious "worship." See dissenting opinion, *post*, at 5 and n. 4. We think that the distinction advanced by the dissent lacks a foundation in either the Constitution or in our cases, and that it is judicially unmanageable.

¹¹ It is the avowed purpose of UMKC to provide a forum in which students can exchange ideas. The University argues that use of the forum for religious speech would undermine this secular aim. But by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there. Undoubtedly many views are advocated in the forum with which the University desires no association.

Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but not by others. See, *e. g.*, *McCullum v. Board of Education*, 333 U. S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

¹² We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship and religious speech." See *Chess v. Widmar*, *supra*, at 1318.

concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion.¹⁰

The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech. See *Healy v. James*, 408 U. S.

Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *O'Hair v. Andrus*, 613 F. 2d 931, 936 (CA DC 1979) (footnote omitted); see L. Tribe, *American Constitutional Law* § 14-16 (1978). There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

¹⁰ In finding that an "equal access" policy would have the primary effect of advancing religion, the District Court in this case relied primarily on *Tilton v. Richardson*, 403 U. S. 672 (1971). In *Tilton* this Court upheld the grant of federal financial assistance to sectarian colleges for secular purposes, but circumscribed the terms of the grant to ensure its constitutionality. Although Congress had provided that federally subsidized buildings could not be used for sectarian or religious worship for 20 years, the Court considered this restriction insufficient: "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests the original federal grant will in part have the [constitutionally impermissible] effect of advancing religion." *Id.*, at 683. From this statement the District Court derived the proposition that State funds may not be used to provide or maintain buildings used by religious organizations.

We do not believe that *Tilton* can be read so broadly. In *Tilton* the Court was concerned that a sectarian institution might convert federally funded buildings to religious uses or otherwise stamp them with the imprimatur of religion. But nothing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after *Tilton* have acknowledged the right of religious speakers to use public forums on equal terms with others. See, e. g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Saia v. New York*, 334 U. S. 558 (1948).

169 (1972).¹⁴ In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to the range of an open forum's likely effects. It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion. *Committee for Public Education v. Nyquist*, 413 U. S. 756, 771 (1973); see, e. g., *Roemer v. Board of Public Works*, 426 U. S. 736 (1976); *Hunt v. McNair*, 413 U. S. 734 (1972); *McGowan v. Maryland*, 366 U. S. 420, 422 (1961).

We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases. Two factors are especially relevant.

First, an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . to religious goals," than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or

¹⁴This case is different from the cases in which religious groups claim that the denial of facilities *not* available to other groups deprives them of their rights under the Free Exercise Clause. See *Brandon v. Board of Educ.*, 635 F. 2d 971, 975-976 (CA2 1980), cert. pending, No. 80-1396; *Hunt v. Board of Education*, 321 F. Supp. 1263, 1266 (SD W. Va. 1971). Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not—as in *Brandon* or *Hunt*—rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case. Accordingly, we need not inquire into the extent, if any, to which Free Exercise interests are infringed by the challenged University regulation. Neither do we reach the questions that would arise if State accommodation of Free Exercise and Free Speech rights should, in a particular case, conflict with the prohibition of the Establishment Clause.

any other group eligible to use its facilities. *Chess v. Widmar, supra*, at 1317.¹⁵

Second, the forum is available to a broad class of non-religious 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. See, e. g., *Wolman v. Walter*, 433 U. S. 229, 240-241 (1977); *Committee for Public Education v. Nyquist, supra*, 413 U. S., at 756, 781-782 and n. 38 (1973). If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Roemer v. Maryland*, 426 U. S. 736, 747 (1976) (plurality opinion); quoted in *Committee for Public Education v. Regan*, 444 U. S. 646, 658, n. 6 (1980).¹⁶ At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not

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¹⁶ This Court has similarly rejected "the recurrent argument that all aid [to parochial schools] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Hunt v. McNair*, 413 U. S. 734, 743 (1973).

be the forum's "primary effect."

B

Arguing that the State of Missouri has gone further than the Federal Constitution in proscribing indirect State support for religion,¹⁷ the University claims a compelling interest in complying with the applicable provisions of the Missouri Constitution.¹⁸

The Missouri courts have not ruled whether a general policy of accommodating student groups, applied equally to those wishing to gather to engage in religious and non-religious speech, would offend the State Constitution. We need not, however, determine how the Missouri courts would decide this issue. It is also unnecessary for us to decide whether, under the Supremacy Clause,¹⁹ a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment. We limit our holding to the case before us.

On one hand, respondents' First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content. See, e. g., *Carey v. Brown*, 447 U. S. 455 (1980); *Police Dept. v. Mosley*, 408 U. S. 92 (1972). On the other hand, the State interest asserted here—in achieving greater separation of

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¹⁸ See Mo. Const. Art. 1, § 6; Art. 1, § 7; Art. 9, § 8. In *Leutkemeyer v. Kaufman*, 364 F. Supp. 376 (ED Mo. 1973), aff'd, 419 U. S. 88 (1974), the District Court found Missouri had a compelling interest in compliance with its own constitution.

¹⁹ U. S. Const., Art. VI, § 2.

church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited here by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech.

IV

Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations.²⁰ Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources—"to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment); see *Regents of the Univ. of Cal. v. Bakke*, 438 U. S. 265, 312-313 (1978) (opinion of POWELL, J., announcing the judgment of the Court). Finally, we affirm the continuing validity of cases, *e. g.*, *Healy v. James*, 408 U. S. 169, 188-189 (1972), that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.

The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be *content-neutral*, and the

²⁰ See, *e. g.*, *Grayned v. City of Rockford*, 408 U. S. 104, 116 (1972). ("The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations to time, place, and manner that are reasonable.'"). (quoting *Wright*, *The Constitution on the Campus*, 22 Vand. L. Rev. 1027, 1042 (1969).

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WIDMAR *v.* VINCENT

University is unable to justify this violation under applicable constitutional standards.

For this reason, the decision of the Court of Appeals is,

Affirmed.

0\$0689G, 11-24-81, rev. Drb

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: **NOV 24 1981**

4th
~~3rd~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-689

GARY E. WIDMAR, ET AL., PETITIONERS v.
CLARK VINCENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[November —, 1981]

JUSTICE POWELL delivered the opinion of the court.

This case presents the question whether a state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.

I

It is the stated policy of the University of Missouri at Kansas City¹ to encourage the activities of student organizations. The University officially recognizes over 100 student groups. It routinely provides University facilities for the meetings of registered organizations. Students pay an activity fee of \$41 per semester (1978-1979) to help defray the costs to the University.

From 1973 until 1977 a registered religious group named Cornerstone regularly sought and received permission to conduct its meetings in University facilities.² In 1977, how-

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²Cornerstone is an organization of evangelical Christian students from various denominational backgrounds. According to an affidavit filed in 1977, "perhaps twenty students . . . participate actively in Cornerstone and form the backbone of the campus organization." Affidavit of Florian

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ever, the University informed the group that it could no longer meet in University buildings. The exclusion was based on a regulation, adopted by the Board of Curators in 1972, that prohibits the use of University buildings or grounds "for purposes of religious worship or religious teaching."³

Eleven University students, all members of Cornerstone, brought suit to challenge the regulation in Federal District Court for the Western District of Missouri.⁴ They alleged

Chess (Sept. 29, 1977), quoted in *Chess v. Widmar*, 480 F. Supp. 907, 911 (WD Mo. 1979). Cornerstone held its on-campus meetings in classrooms and in the student center. These meetings were open to the public and attracted up to 125 students. A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences.

³ The pertinent regulations provide as follows:

"4.0314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. . . . The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. . . .

"4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for recurring services of any groups. Special rules and procedures shall be established for each chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group."

There is no chapel on the campus of the University of Missouri at Kansas City. The nearest University chapel is at the Columbia campus, approximately 125 miles east of UMKC.

Although the University had routinely approved Cornerstone meetings before 1977, the District Court found that University officials had never "authorized a student organization to utilize a University facility for a meeting when they had full knowledge that the purposes of the meeting include[d] religious worship or religious teaching." *Chess v. Widmar*, *supra*, at 910.

⁴ Clark Vincent, the respondent, and Florian Chess, the named plaintiff

that the University's discrimination against religious activity and discussion violated their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States.

Upon cross motions for summary judgment, the District Court upheld the challenged regulation. *Chess v. Widmar*, 480 F. Supp. 907 (WD Mo. 1979). It found the regulation not only justified, but required, by the Establishment Clause of the Federal Constitution. *Id.*, at 916. Under *Tilton v. Richardson*, 403 U. S. 672 (1971), the court reasoned, the State could not provide facilities for religious use without giving prohibited support to an institution of religion. *Id.*, at 915-916. The District Court rejected the argument that the University could not discriminate against religious speech on the basis of its content. It found religious speech entitled to less protection than other types of expression. *Id.*, at 918.

The Court of Appeals for the Eighth Circuit reversed. *Chess v. Widmar*, 635 F. 2d 1310 (CA8 1980). Rejecting the analysis of the District Court, it viewed the University regulation as a content-based discrimination against religious speech, for which it could find no compelling justification. *Id.*, at 1315-1320. The Court held that the Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kinds. *Id.*, at 1317. According to the Court of Appeals, the "primary effect" of such a policy would not be to advance religion, but rather to further the neutral purpose of developing students' "social and cultural awareness as well as [their] intellectual curiosity." *Id.*, at 1317 (quoting from the University bulletin's description of the student activities program, reprinted in

in the action in the District Court, were among the students who initiated the action on October 13, 1977. Named as defendants were the petitioner Gary Widmar, the Dean of Students at UMKC, and the University's Board of Curators.

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id., at 1312, n. 1).

We now affirm.

II

Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.⁵ The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public,⁶ even if it was not required to

⁵ This Court has recognized that the campus of a public university possesses many of the characteristics of a public forum. "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" *Healy v. James*, 408 U. S. 169, 180 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Id.*, at 181-182. We therefore have held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. *Id.*, at 181, 184.

⁶ The concept of a "public forum" rests on the recognition, first expressed in *Hague v. CIO*, 307 U. S. 496, 515 (1939), that

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

See also *Police Dept. v. Mosley*, 408 U. S. 92 (1972); *Cox v. Louisiana*, 379 U. S. 536 (1965).

Although a university may create a forum with many of the characteristics of streets and public places, see n. 5, *supra*, our cases have recognized that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." *Tinker v. Des Moines Independent School District*, 393 U. S. 503, 506 (1969). We continue to adhere

create the forum in the first place. See, e. g., *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U. S. 167, 175 and n. 8. (1976) (although a State may conduct business in private session, "where the State has opened a forum for direct citizen involvement," exclusions bear a heavy burden of justification); *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 555-559 (1975) (because municipal theater was a public forum, city could not exclude a production without satisfying constitutional safeguards applicable to prior restraints).

The University's institutional mission, which it describes as providing a "secular education" to its students, Brief for Petitioners 44, does not exempt its actions from constitutional scrutiny. With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities. See, e. g., *Healy v. James*, 408 U. S. 169, 180 (1972); *Tinker v. Des Moines Independent School District*, 393 U. S. 503, 506 (1969); *Shelton v. Tucker*, 364 U. S. 479, 487 (1960).

Here the University of Missouri has discriminated against groups and speakers based on their desire to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. See, e. g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Saia v. New York*, 334 U. S. 558 (1948).⁷ In order to justify discriminatory exclusion from a

to that view. A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied its authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and non-students alike, or that a university must grant free access to all of its grounds or buildings.

⁷The dissent argues that "religious worship" is not speech generally

public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a com-

protected by the "free speech" guarantee of the First Amendment and the "equal protection" guarantee of the Fourteenth Amendment. If "religious worship" were protected "speech," the dissent reasons, "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech." Dissenting opinion, *post*, at 4. This is a novel argument. The dissent does not deny that speech *about* religion is speech entitled to the general protections of the First Amendment. See *id.*, at 2-3 and n. 1. It does not argue that descriptions of religious experiences fail to qualify as "speech." Nor does it repudiate last Term's decision in *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, *supra*, which assumed that religious appeals to nonbelievers constituted protected "speech." Rather, the dissent seems to attempt a distinction between the kinds of religious speech explicitly protected by our cases and a new class of religious "speech act[s]," dissenting opinion, at 4, comprising "worship." There are at least three difficulties with this distinction.

First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," *id.*, at 2, cease to be "singing, teaching, and reading"—all apparently forms of "speech," despite their religious subject matter—and become unprotected "worship."

Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Cf. *Fowler v. Rhode Island*, 345 U. S. 67, 70 (1953). Merely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases. *E. g.*, *Walz v. Tax Commission*, 397 U. S. 664, 668 (1970).

Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. The dissent apparently wishes to preserve the vitality of the Establishment Clause. See dissenting opinion, *post*, at 4. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, see *Heffron, supra*, than for re-

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elling state interest and that it is narrowly drawn to achieve that end. See *Carey v. Brown*, 447 U. S. 455, 461, 464-465 (1980).³

III

In this case the University claims a compelling interest in maintaining strict separation of church and State. It derives this interest from the "Establishment Clauses" of both the Federal and Missouri Constitutions.

A

The University first argues that it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause of the Constitution of the United States.⁴ We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. It does not follow, however, that an "equal access" policy would be incompatible with this Court's Establishment Clause cases. Those cases hold that a policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that

ligious worship by persons already converted. It is far from clear that the State gives greater support in the latter case than in the former.

³ See also *Healy v. James*, 408 U. S. 169, 184 (1972):

"It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which . . . may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."

⁴ "Congress shall make no law respecting an establishment of religion. . . ." U. S. Const., Amdt. 1. The Establishment Clause has been made applicable to the States through the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940).

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neither advances nor inhibits religion . . . ; finally, the [policy] must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971). See *Committee for Public Education v. Regan*, 444 U. S. 646, 653 (1980); *Roemer v. Maryland Public Works Bd.*, 426 U. S. 736, 748 (1976).

In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech,¹⁰ would have a secular purpose¹¹ and would avoid entanglement with religion.¹² But the District Court

¹⁰ As the dissent emphasizes, the Establishment Clause requires the State to distinguish between "religious" speech—speech, undertaken or approved by the State, the primary effect of which is to support an Establishment of Religion—and "nonreligious" speech—speech, undertaken or approved by the State, the primary effect of which is not to support an Establishment of Religion. This distinction is required by the plain text of the Constitution. It is followed in our cases. *E. g.*, *Stone v. Graham*, — U. S. — (November 17, 1980). The dissent attempts to equate this distinction with its view of an alleged constitutional difference between religious "speech" and religious "worship." See dissenting opinion, *post*, at 5 and n. 4. We think that the distinction advanced by the dissent lacks a foundation in either the Constitution or in our cases, and that it is judicially unmanageable.

¹¹ It is the avowed purpose of UMKC to provide a forum in which students can exchange ideas. The University argues that use of the forum for religious speech would undermine this secular aim. But by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there. Undoubtedly many views are advocated in the forum with which the University desires no association.

Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but not by others. See, *e. g.*, *McCullum v. Board of Education*, 333 U. S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

¹² We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship and religious speech." See *Chess v. Widmar*, *supra*, at 1318.

concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion.¹³

The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech. See *Healy v. James*, 408 U. S.

Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *O'Hair v. Andrus*, 613 F. 2d 931, 936 (CA-DC 1979) (footnote omitted); see L. Tribe, *American Constitutional Law* § 14-16 (1978). There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

"In finding that an 'equal access' policy would have the primary effect of advancing religion, the District Court in this case relied primarily on *Tilton v. Richardson*, 403 U. S. 672 (1971). In *Tilton* this Court upheld the grant of federal financial assistance to sectarian colleges for secular purposes, but circumscribed the terms of the grant to ensure its constitutionality. Although Congress had provided that federally subsidized buildings could not be used for sectarian or religious worship for 20 years, the Court considered this restriction insufficient: 'If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests the original federal grant will in part have the [constitutionally impermissible] effect of advancing religion.' *Id.*, at 688. From this statement the District Court derived the proposition that State funds may not be used to provide or maintain buildings used by religious organizations.

We do not believe that *Tilton* can be read so broadly. In *Tilton* the Court was concerned that a sectarian institution might convert federally funded buildings to religious uses or otherwise stamp them with the imprimatur of religion. But nothing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after *Tilton* have acknowledged the right of religious speakers to use public forums on equal terms with others. See, e. g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Saia v. New York*, 334 U. S. 558 (1948).

169 (1972).¹⁴ In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to the range of an open forum's likely effects. It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion. *Committee for Public Education v. Nyquist*, 413 U. S. 756, 771 (1973); see, e. g., *Roemer v. Board of Public Works*, 426 U. S. 736 (1976); *Hunt v. McNair*, 413 U. S. 734 (1972); *McGowan v. Maryland*, 366 U. S. 420, 422 (1961).

We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases. Two factors are especially relevant.

First, an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . to religious goals," than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or

¹⁴This case is different from the cases in which religious groups claim that the denial of facilities not available to other groups deprives them of their rights under the Free Exercise Clause. See *Brandon v. Board of Educ.*, 635 F. 2d 971, 975-976 (CA2 1980), cert. pending, No. 80-1396; *Hunt v. Board of Education*, 321 F. Supp. 1263, 1266 (SD W. Va. 1971). Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not—as in *Brandon* or *Hunt*—rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case. Accordingly, we need not inquire into the extent, if any, to which Free Exercise interests are infringed by the challenged University regulation. Neither do we reach the questions that would arise if State accommodation of Free Exercise and Free Speech rights should, in a particular case, conflict with the prohibition of the Establishment Clause.

any other group eligible to use its facilities. *Chess v. Widmar, supra*, at 1317.¹⁶

Second, the forum is available to a broad class of non-religious 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. See, e. g., *Wolman v. Walter*, 433 U. S. 229, 240-241 (1977); *Committee for Public Education v. Nyquist, supra*, 413 U. S., at 756, 781-782 and n. 38 (1973). If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Roemer v. Maryland*, 426 U. S. 736, 747 (1976) (plurality opinion); quoted in *Committee for Public Education v. Regan*, 444 U. S. 646, 658, n. 6 (1980).¹⁷ At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not

¹⁶ University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion. See *Tilton v. Richardson*, 403 U. S. 672, 685-686 (1971). The University argues that the Cornerstone students themselves admitted in affidavits that "[s]tudents know that if something is on campus, then it is a student organization, and they are more likely to feel comfortable attending a meeting." Affidavit of Florian Frederick Chess, Joint Appendix, at 18, 19 (Sept. 29, 1977). In light of the large number of groups meeting on campus, however, we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place. The University's student handbook already notes that the University's name will not "be identified in any way with the aims, policies, programs, products, or opinions of any organization of its members." 1980-1981 UMKC Student Handbook, at 25.

¹⁷ This Court has similarly rejected "the recurrent argument that all aid [to parochial schools] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Hunt v. McNair*, 413 U. S. 734, 743 (1973).

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be the forum's "primary effect."

B

Arguing that the State of Missouri has gone further than the Federal Constitution in proscribing indirect State support for religion,¹⁷ the University claims a compelling interest in complying with the applicable provisions of the Missouri Constitution.¹⁸

The Missouri courts have not ruled whether a general policy of accommodating student groups, applied equally to those wishing to gather to engage in religious and non-religious speech, would offend the State Constitution. We need not, however, determine how the Missouri courts would decide this issue. It is also unnecessary for us to decide whether, under the Supremacy Clause,¹⁹ a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment. We limit our holding to the case before us.

On one hand, respondents' First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content. See, e. g., *Carey v. Brown*, 447 U. S. 455 (1980); *Police Dept. v. Mosley*, 408 U. S. 92 (1972). On the other hand, the State interest asserted here—in achieving greater separation of

¹⁷ See, e. g., *American United v. Rogers*, 538 S.W. 2d 711, 720, (Mo.) (en banc), cert. denied, 429 U. S. 1029 (1976) (holding Missouri Constitution requires stricter separation of church and state than does Federal Constitution); *Harfst v. Hogen*, 163 S.W. 2d 609, 613-614 (Mo. 1947) (en banc) (same).

¹⁸ See Mo. Const. Art. 1, § 6; Art. 1, § 7; Art. 9, § 8. In *Leutkemeyer v. Kaufman*, 364 F. Supp. 376 (ED Mo. 1973), aff'd, 419 U. S. 88 (1974), the District Court found Missouri had a compelling interest in compliance with its own constitution.

¹⁹ U. S. Const., Art. VI, § 2.

church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited here by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech.

IV

Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations.²⁰ Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources—"to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment); see *Regents of the Univ. of Cal. v. Bakke*, 438 U. S. 265, 312-313 (1978) (opinion of POWELL, J., announcing the judgment of the Court). Finally, we affirm the continuing validity of cases, *e. g.*, *Healy v. James*, 408 U. S. 169, 188-189 (1972), that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.

The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the

²⁰ See, *e. g.*, *Grayned v. City of Rockford*, 408 U. S. 104, 116 (1972). ("The nature of a place, the pattern of its normal activities, dictate the kinds of regulations to time, place, and manner that are reasonable."). (quoting *Wright, The Constitution on the Campus*, 22 Vand. L. Rev. 1027, 1042 (1969)).

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14

WIDMAR *v.* VINCENT

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For this reason, the decision of the Court of Appeals is,

Affirmed.

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4, 5, 6, 7, 8, 13

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"4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for recurring services of any groups. Special rules and procedures shall be established for each chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group."

There is no chapel on the campus of the University of Missouri at Kansas City. The nearest University chapel is at the Columbia campus, approximately 125 miles east of UMKC.

Although the University had routinely approved Cornerstone meetings before 1977, the District Court found that University officials had never "authorized a student organization to utilize a University facility for a meeting when they had full knowledge that the purposes of the meeting include[d] religious worship or religious teaching." *Chess v. Widmar*, *supra*, at 910.

⁴Clark Vincent, the respondent, and Florian Chess, the named plaintiff

that the University's discrimination against religious activity and discussion violated their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States.

Upon cross motions for summary judgment, the District Court upheld the challenged regulation. *Chess v. Widmar*, 480 F. Supp. 907 (WD Mo. 1979). It found the regulation not only justified, but required, by the Establishment Clause of the Federal Constitution. *Id.*, at 916. Under *Tilton v. Richardson*, 403 U. S. 672 (1971), the court reasoned, the State could not provide facilities for religious use without giving prohibited support to an institution of religion. *Id.*, at 915-916. The District Court rejected the argument that the University could not discriminate against religious speech on the basis of its content. It found religious speech entitled to less protection than other types of expression. *Id.*, at 918.

The Court of Appeals for the Eighth Circuit reversed. *Chess v. Widmar*, 635 F. 2d 1310 (CA8 1980). Rejecting the analysis of the District Court, it viewed the University regulation as a content-based discrimination against religious speech, for which it could find no compelling justification. *Id.*, at 1315-1320. The Court held that the Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kinds. *Id.*, at 1317. According to the Court of Appeals, the "primary effect" of such a policy would not be to advance religion, but rather to further the neutral purpose of developing students' "social and cultural awareness as well as [their] intellectual curiosity." *Id.*, at 1317 (quoting from the University bulletin's description of the student activities program, reprinted in

in the action in the District Court, were among the students who initiated the action on October 13, 1977. Named as defendants were the petitioner Gary Widmar, the Dean of Students at UMKC, and the University's Board of Curators.

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id., at 1312, n. 1).

We now affirm.

II

Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.⁵ The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public,⁶ even if it was not required to

at least for its students,

See generally *Police Dept. v. Mosley*, 408 U.S. 92 (1972); *Cox v. Louisiana*, 379 U.S. 536 (1965).

⁵This Court has recognized that the campus of a public university possesses many of the characteristics of a public forum. "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Id.*, at 181-182. We therefore have held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. *Id.*, at 181, 184.

"The concept of a 'public forum' rests on the recognition, first expressed in *Hague v. CIO*, 307 U.S. 496, 515 (1939), that

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

See also *Police Dept. v. Mosley*, 408 U.S. 92 (1972); *Cox v. Louisiana*, 379 U.S. 536 (1965).

At the same time, however,

Although a university may create a forum with many of the characteristics of streets and public places, see n. 5, *supra*, our cases have recognized that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969). We continue to adhere

create the forum in the first place. See, e. g., *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U. S. 167, 175 and n. 8. (1976) (although a State may conduct business in private session, "where the State has opened a forum for direct citizen involvement," exclusions bear a heavy burden of justification); *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 555-559 (1975) (because municipal theater was a public forum, city could not exclude a production without satisfying constitutional safeguards applicable to prior restraints).

The University's institutional mission, which it describes as providing a "secular education" to its students, Brief for Petitioners 44, does not exempt its actions from constitutional scrutiny. With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities. See, e. g., *Healy v. James*, 408 U. S. 169, 180 (1972); *Tinker v. Des Moines Independent School District*, 393 U. S. 503, 506 (1969); *Shelton v. Tucker*, 364 U. S. 479, 487 (1960).

Here the University of Missouri has discriminated against groups and speakers based on their desire to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. See, e. g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Saia v. New York*, 334 U. S. 558 (1948). In order to justify discriminatory exclusion from a

to that view. A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied its authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and non-students alike, or that a university must grant free access to all of its grounds or buildings.

The dissent argues that "religious worship" is not speech generally

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student
use a generally
open forum to

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public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a com-

protected by the "free speech" guarantee of the First Amendment and the "equal protection" guarantee of the Fourteenth Amendment. If "religious worship" were protected "speech," the dissent reasons, "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech." Dissenting opinion, *post*, at 4. This is a novel argument. The dissent does not deny that speech about religion is speech entitled to the general protections of the First Amendment. See *id.*, at 2-3 and n. X. It does not argue that descriptions of religious experiences fail to qualify as "speech." Nor does it repudiate last Term's decision in *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, *supra*, which assumed that religious appeals to nonbelievers constituted protected "speech." Rather, the dissent seems to attempt a distinction between the kinds of religious speech explicitly protected by our cases and a new class of religious "speech act[s]," dissenting opinion, at 4, comprising "worship." There are at least three difficulties with this distinction.

First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," *id.*, at 2, cease to be "singing, teaching, and reading"—all apparently forms of "speech," despite their religious subject matter—and become unprotected "worship."

Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Cf. *Fowler v. Rhode Island*, 345 U. S. 67, 70 (1953). Merely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases. *E. g.*, *Walz v. Tax Commission*, 397 U. S. 664, 668 (1970).

Finally, the dissent fails to establish the relevance of the distinction on which it seeks to rely. The dissent apparently wishes to preserve the vitality of the Establishment Clause. See dissenting opinion, *post*, at 4. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, see *Heffron*, *supra*, than for re-

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pelling state interest and that it is narrowly drawn to achieve that end. See *Carey v. Brown*, 447 U. S. 455, 461, 464-465 (1980).³

III

In this case the University claims a compelling interest in maintaining strict separation of church and State. It derives this interest from the "Establishment Clauses" of both the Federal and Missouri Constitutions.

A

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The University first argues that it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause of the Constitution of the United States.⁴ We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. It does not follow, however, that an "equal access" policy would be incompatible with this Court's Establishment Clause cases. Those cases hold that a policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that

ligious worship by persons already converted. It is far from clear that the State gives greater support in the latter case than in the former.

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³See also *Healy v. James*, 408 U. S. 169, 184 (1972):

"It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which . . . may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."

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⁴"Congress shall make no law respecting an establishment of religion. . . ." U. S. Const., Amdt. 1. The Establishment Clause has been made applicable to the States through the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940).

neither advances nor inhibits religion . . . ; finally, the [policy] must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971). See *Committee for Public Education v. Regan*, 444 U. S. 646, 653 (1980); *Roemer v. Maryland Public Works Bd.*, 426 U. S. 736, 748 (1976).

In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech,* would have a secular purpose¹⁰ and would avoid entanglement with religion.¹¹ But the District Court

As the dissent emphasizes, the Establishment Clause requires the State to distinguish between "religious" speech—speech, undertaken or approved by the State, the primary effect of which is to support an Establishment of Religion—and "nonreligious" speech—speech, undertaken or approved by the State, the primary effect of which is not to support an Establishment of Religion. This distinction is required by the plain text of the Constitution. It is followed in our cases. *E. g.*, *Stone v. Graham*, — U. S. — (November 17, 1980). The dissent attempts to equate this distinction with its view of an alleged constitutional difference between religious "speech" and religious "worship." See dissenting opinion, *post*, at 5 and n. 4. We think that the distinction advanced by the dissent lacks a foundation in either the Constitution or in our cases, and that it is judicially unmanageable.

It is the avowed purpose of UMKC to provide a forum in which students can exchange ideas. The University argues that use of the forum for religious speech would undermine this secular aim. But by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there. Undoubtedly many views are advocated in the forum with which the University desires no association.

Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but not by others. See, *e. g.*, *McCollum v. Board of Education*, 333 U. S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship and religious speech." See *Chess v. Widmar*, *supra*, at 1318.

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concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion. ¹²

The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech. See *Healy v. James*, 408 U. S.

Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *O'Hair v. Andrus*, 618 F. 2d 931, 986 (CA DC 1979) (footnote omitted); see L. Tribe, *American Constitutional Law* § 14-16 (1978). There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

¹² In finding that an "equal access" policy would have the primary effect of advancing religion, the District Court in this case relied primarily on *Tilton v. Richardson*, 403 U. S. 672 (1971). In *Tilton* this Court upheld the grant of federal financial assistance to sectarian colleges for secular purposes, but circumscribed the terms of the grant to ensure its constitutionality. Although Congress had provided that federally subsidized buildings could not be used for sectarian or religious worship for 20 years, the Court considered this restriction insufficient: "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests the original federal grant will in part have the [constitutionally impermissible] effect of advancing religion." *Id.*, at 683. From this statement the District Court derived the proposition that State funds may not be used to provide or maintain buildings used by religious organizations.

We do not believe that *Tilton* can be read so broadly. In *Tilton* the Court was concerned that a sectarian institution might convert federally funded buildings to religious uses or otherwise stamp them with the imprimatur of religion. But nothing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after *Tilton* have acknowledged the right of religious speakers to use public forums on equal terms with others. See, e. g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Saia v. New York*, 334 U. S. 558 (1948).

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169 (1972).⁴ In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to the range of an open forum's likely effects. It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion. *Committee for Public Education v. Nyquist*, 413 U. S. 756, 771 (1973); see, e. g., *Roemer v. Board of Public Works*, 426 U. S. 736 (1976); *Hunt v. McNair*, 413 U. S. 734 (1972); *McGowan v. Maryland*, 366 U. S. 420, 422 (1961).

We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases. Two factors are especially relevant.

First, an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . to religious goals," than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or

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"This case is different from the cases in which religious groups claim that the denial of facilities not available to other groups deprives them of their rights under the Free Exercise Clause. See *Brandon v. Board of Educ.*, 635 F. 2d 971, 975-976 (CA2 1980), cert. pending, No. 80-1396; *Hunt v. Board of Education*, 321 F. Supp. 1263, 1266 (SD W. Va. 1971). Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not—as in *Brandon* or *Hunt*—rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case. Accordingly, we need not inquire into the extent, if any, to which Free Exercise interests are infringed by the challenged University regulation. Neither do we reach the questions that would arise if State accommodation of Free Exercise and Free Speech rights should, in a particular case, conflict with the prohibition of the Establishment Clause.

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any other group eligible to use its facilities. *Chess v. Widmar, supra*, at 1317.¹⁴

Second, the forum is available to a broad class of non-religious 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. See, e. g., *Wolman v. Walter*, 433 U. S. 229, 240-241 (1977); *Committee for Public Education v. Nyquist, supra*, 413 U. S., at 756, 781-782 and n. 38 (1973). If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Roemer v. Maryland*, 426 U. S. 736, 747 (1976) (plurality opinion); quoted in *Committee for Public Education v. Regan*, 444 U. S. 646, 658, n. 6 (1980).¹⁵ At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not

¹⁴University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion. See *Tilton v. Richardson*, 403 U. S. 672, 685-686 (1971). The University argues that the Cornerstone students themselves admitted in affidavits that "[s]tudents know that if something is on campus, then it is a student organization, and they are more likely to feel comfortable attending a meeting." Affidavit of Florian Frederick Chess, Joint Appendix, at 18, 19 (Sept. 29, 1977). In light of the large number of groups meeting on campus, however, we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place. The University's student handbook already notes that the University's name will not "be identified in any way with the aims, policies, programs, products, or opinions of any organization of its members." 1980-1981 UMKC Student Handbook, at 25.

¹⁵This Court has similarly rejected "the recurrent argument that all aid [to parochial schools] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Hunt v. McNair*, 413 U. S. 734, 743 (1973).

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be the forum's "primary effect."

B

Arguing that the State of Missouri has gone further than the Federal Constitution in proscribing indirect State support for religion,¹⁶ the University claims a compelling interest in complying with the applicable provisions of the Missouri Constitution.¹⁷

The Missouri courts have not ruled whether a general policy of accommodating student groups, applied equally to those wishing to gather to engage in religious and non-religious speech, would offend the State Constitution. We need not, however, determine how the Missouri courts would decide this issue. It is also unnecessary for us to decide whether, under the Supremacy Clause,¹⁸ a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment. We limit our holding to the case before us.

On one hand, respondents' First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content. See, e. g., *Carey v. Brown*, 447 U. S. 455 (1980); *Police Dept. v. Mosley*, 408 U. S. 92 (1972). On the other hand, the State interest asserted here—in achieving greater separation of

¹⁶See, e. g., *American United v. Rogers*, 538 S.W. 2d 711, 720, (Mo.) (en banc), cert. denied, 429 U. S. 1029 (1976) (holding Missouri Constitution requires stricter separation of church and state than does Federal Constitution); *Harfst v. Hogen*, 163 S.W. 2d 609, 613-614 (Mo. 1947) (en banc) (same).

¹⁷See Mo. Const. Art. 1, § 6; Art. 1, § 7; Art. 9, § 8. In *Leutkemeyer v. Kaufman*, 364 F. Supp. 376 (ED Mo. 1973), aff'd, 419 U. S. 88 (1974), the District Court found Missouri had a compelling interest in compliance with its own constitution.

¹⁸U. S. Const., Art. VI, § 2.

church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited ~~here~~ by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech. ✓

IV

Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations. Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources. "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment); see *Regents of the Univ. of Cal. v. Bakke*, 438 U. S. 265, 312-313 (1978) (opinion of POWELL, J., announcing the judgment of the Court). Finally, we affirm the continuing validity of cases, e. g., *Healy v. James*, 408 U. S. 169, 188-189 (1972), that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education. ✓

The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the

See, e. g., *Grayned v. City of Rockford*, 408 U. S. 104, 116 (1972). ("The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations to time, place, and manner that are reasonable.'") (quoting *Wright*, *The Constitution on the Campus*, 22 *Vand. L. Rev.* 1027, 1042 (1969)).

21. In his opinion concurring in the judgment, Justice Stevens expresses concern that use of the terms "compelling state interest" and "public forum" may "undermine the academic freedom of public universities". As the text above makes clear, this concern is unjustified. See also n. 5, ✓

Our holding is limited to the context ante, at p. 4. The use of term "compelling state interest" of a "public forum created by the University itself." (20) (21) (20) (post, at 13)

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University is unable to justify this violation under applicable constitutional standards.

For this reason, the decision of the Court of Appeals is,

Affirmed.

Proposed Substitute Language for the Text in

Widmar v. Vincent, No. 80-689, beginning at the top of page 12:

The Missouri courts have not ruled whether a general policy of accommodating student groups, applied equally to those wishing to gather to engage in religious and non-religious speech, would offend the State Constitution. We need not, however, determine how the Missouri courts would decide this issue. It is also unnecessary for us to decide whether, under the Supremacy Clause, a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment. We limit our holding to the case before us.

First Amendment rights are entitled to special constitutional solicitude. Our cases require the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content. See, e.g., Carey v. Brown, 447 U.S. 455 (1980); Police Dept. v. Mosley, 408 U.S. 92 (1972). In this constitutional context, we are unable to recognize the State interest asserted here--an interest in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution--as sufficiently "compelling" to justify content-based discrimination against religious speech.

4, 5, 12, 13

Footnotes renumbered
throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: DEC 2 1981

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-689

GARY E. WIDMAR, ET AL., PETITIONERS v.
CLARK VINCENT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[December —, 1981]

JUSTICE POWELL delivered the opinion of the court.

This case presents the question whether a state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.

I

It is the stated policy of the University of Missouri at Kansas City¹ to encourage the activities of student organizations. The University officially recognizes over 100 student groups. It routinely provides University facilities for the meetings of registered organizations. Students pay an activity fee of \$41 per semester (1978-1979) to help defray the costs to the University.

From 1973 until 1977 a registered religious group named Cornerstone regularly sought and received permission to conduct its meetings in University facilities.² In 1977, how-

¹ The University of Missouri at Kansas City (UMKC) is one of four campuses of the University of Missouri, an institution of the State of Missouri.

² Cornerstone is an organization of evangelical Christian students from various denominational backgrounds. According to an affidavit filed in 1977, "perhaps twenty students . . . participate actively in Cornerstone and form the backbone of the campus organization." Affidavit of Florian

ever, the University informed the group that it could no longer meet in University buildings. The exclusion was based on a regulation, adopted by the Board of Curators in 1972, that prohibits the use of University buildings or grounds "for purposes of religious worship or religious teaching."³

Eleven University students, all members of Cornerstone, brought suit to challenge the regulation in Federal District Court for the Western District of Missouri.⁴ They alleged

Chess (Sept. 29, 1977), quoted in *Chess v. Widmar*, 480 F. Supp. 907, 911 (WD Mo. 1979). Cornerstone held its on-campus meetings in classrooms and in the student center. These meetings were open to the public and attracted up to 125 students. A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences.

³The pertinent regulations provide as follows:

"4.0314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. . . . The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. . . .

"4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for recurring services of any groups. Special rules and procedures shall be established for each chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group."

There is no chapel on the campus of the University of Missouri at Kansas City. The nearest University chapel is at the Columbia campus, approximately 125 miles east of UMKC.

Although the University had routinely approved Cornerstone meetings before 1977, the District Court found that University officials had never "authorized a student organization to utilize a University facility for a meeting when they had full knowledge that the purposes of the meeting include[d] religious worship or religious teaching." *Chess v. Widmar*, *supra*, at 910.

⁴Clark Vincent, the respondent, and Florian Chess, the named plaintiff

that the University's discrimination against religious activity and discussion violated their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States.

Upon cross motions for summary judgment, the District Court upheld the challenged regulation. *Chess v. Widmar*, 480 F. Supp. 907 (WD Mo. 1979). It found the regulation not only justified, but required, by the Establishment Clause of the Federal Constitution. *Id.*, at 916. Under *Tilton v. Richardson*, 403 U. S. 672 (1971), the court reasoned, the State could not provide facilities for religious use without giving prohibited support to an institution of religion. *Id.*, at 915-916. The District Court rejected the argument that the University could not discriminate against religious speech on the basis of its content. It found religious speech entitled to less protection than other types of expression. *Id.*, at 918.

The Court of Appeals for the Eighth Circuit reversed. *Chess v. Widmar*, 635 F. 2d 1310 (CA8 1980). Rejecting the analysis of the District Court, it viewed the University regulation as a content-based discrimination against religious speech, for which it could find no compelling justification. *Id.*, at 1315-1320. The Court held that the Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kinds. *Id.*, at 1317. According to the Court of Appeals, the "primary effect" of such a policy would not be to advance religion, but rather to further the neutral purpose of developing students' "social and cultural awareness as well as [their] intellectual curiosity." *Id.*, at 1317 (quoting from the University bulletin's description of the student activities program, reprinted in

in the action in the District Court, were among the students who initiated the action on October 13, 1977. Named as defendants were the petitioner Gary Widmar, the Dean of Students at UMKC, and the University's Board of Curators.

id., at 1312, n. 1).

We now affirm.

II

Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.⁴ The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place. See, e. g., *City of Madison Joint School District v. Wisconsin Public Employment*

⁴This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum. See generally, *Police Dept. v. Mosley*, 408 U. S. 92 (1972); *Cox v. Louisiana*, 379 U. S. 536 (1965). "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" *Healy v. James*, 408 U. S. 169, 180 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Id.*, at 181-182. We therefore have held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. *Id.*, at 181, 184.

At the same time, however, our cases have recognized that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." *Tinker v. Des Moines Independent School District*, 398 U. S. 503, 506 (1969). We continue to adhere to that view. A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied its authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.

Omission

Relations Comm'n, 429 U. S. 167, 175 and n. 8. (1976) (although a State may conduct business in private session, "where the State has opened a forum for direct citizen involvement," exclusions bear a heavy burden of justification); *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 555-559 (1975) (because municipal theater was a public forum, city could not exclude a production without satisfying constitutional safeguards applicable to prior restraints).

The University's institutional mission, which it describes as providing a "secular education" to its students, Brief for Petitioners 44, does not exempt its actions from constitutional scrutiny. With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities. See, e. g., *Healy v. James*, 408 U. S. 169, 180 (1972); *Tinker v. Des Moines Independent School District*, 393 U. S. 503, 506 (1969); *Shelton v. Tucker*, 364 U. S. 479, 487 (1960).

Here the University of Missouri has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. See, e. g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Saia v. New York*, 334 U. S. 558 (1948).⁴ In order to justify

⁴The dissent argues that "religious worship" is not speech generally protected by the "free speech" guarantee of the First Amendment and the "equal protection" guarantee of the Fourteenth Amendment. If "religious worship" were protected "speech," the dissent reasons, "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech." Dissenting opinion, *post*, at 4. This is a novel argument. The dissent does not deny that speech about religion is speech entitled to the general protections of the First Amendment. See *id.*, at 2-3 and n. 2. It does not argue that descriptions of religious experiences fail to qualify as "speech." Nor does it

discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. See *Carey v. Brown*, 447 U. S. 455, 461, 464-465 (1980).⁷

repudiate last Term's decision in *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, *supra*, which assumed that religious appeals to nonbelievers constituted protected "speech." Rather, the dissent seems to attempt a distinction between the kinds of religious speech explicitly protected by our cases and a new class of religious "speech act[s]," dissenting opinion, at 4, comprising "worship." There are at least three difficulties with this distinction.

First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," *id.*, at 2, cease to be "singing, teaching, and reading"—all apparently forms of "speech," despite their religious subject matter—and become unprotected "worship."

Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Cf. *Fowler v. Rhode Island*, 345 U. S. 67, 70 (1953). Merely to draw the distinction would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases. *E. g.*, *Walt v. Tax Commission*, 397 U. S. 664, 668 (1970).

Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. The dissent apparently wishes to preserve the vitality of the Establishment Clause. See dissenting opinion, *post*, at 4. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, see *Heffron*, *supra*, than for religious worship by persons already converted. It is far from clear that the State gives greater support in the latter case than in the former.

⁷ See also *Healy v. James*, 408 U. S. 169, 184 (1972):

"It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range

III

In this case the University claims a compelling interest in maintaining strict separation of church and State. It derives this interest from the "Establishment Clauses" of both the Federal and Missouri Constitutions.

A

The University first argues that it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause of the Constitution of the United States.¹ We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. It does not follow, however, that an "equal access" policy would be incompatible with this Court's Establishment Clause cases. Those cases hold that a policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U. S. 602, 612-613 (1971). See *Committee for Public Education v. Regan*, 444 U. S. 646, 653 (1980); *Roemer v. Maryland Public Works Bd.*, 426 U. S. 736, 748 (1976).

In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an

of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which . . . may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."

¹"Congress shall make no law respecting an establishment of religion. . . ." U. S. Const., Amdt. 1. The Establishment Clause has been made applicable to the States through the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940).

open-forum policy, including nondiscrimination against religious speech,⁹ would have a secular purpose¹⁰ and would avoid entanglement with religion.¹¹ But the District Court concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion.¹²

⁹As the dissent emphasizes, the Establishment Clause requires the State to distinguish between "religious" speech—speech, undertaken or approved by the State, the primary effect of which is to support an Establishment of Religion—and "nonreligious" speech—speech, undertaken or approved by the State, the primary effect of which is not to support an Establishment of Religion. This distinction is required by the plain text of the Constitution. It is followed in our cases. *E. g.*, *Stone v. Graham*, — U. S. — (November 17, 1980). The dissent attempts to equate this distinction with its view of an alleged constitutional difference between religious "speech" and religious "worship." See dissenting opinion, *post*, at 5 and n. 6. We think that the distinction advanced by the dissent lacks a foundation in either the Constitution or in our cases, and that it is judicially unmanageable.

¹⁰It is the avowed purpose of UMKC to provide a forum in which students can exchange ideas. The University argues that use of the forum for religious speech would undermine this secular aim. But by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there. Undoubtedly many views are advocated in the forum with which the University desires no association.

Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but *not* by others. See, *e. g.*, *McCullum v. Board of Education*, 333 U. S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

¹¹We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship and religious speech." See *Chees v. Widmar*, *supra*, at 1318. Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *O'Hair v. Andrus*, 613 F. 2d 931, 936 (CA-DC 1979) (footnote omitted); see L. Tribe, *American Constitutional Law* § 14-16 (1978). There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

¹²In finding that an "equal access" policy would have the primary effect

The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech. See *Healy v. James*, 408 U. S. 169 (1972).¹² In this context we are unpersuaded that the

of advancing religion, the District Court in this case relied primarily on *Tilton v. Richardson*, 403 U. S. 672 (1971). In *Tilton* this Court upheld the grant of federal financial assistance to sectarian colleges for secular purposes, but circumscribed the terms of the grant to ensure its constitutionality. Although Congress had provided that federally subsidized buildings could not be used for sectarian or religious worship for 20 years, the Court considered this restriction insufficient: "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests the original federal grant will in part have the [constitutionally impermissible] effect of advancing religion." *Id.*, at 683. From this statement the District Court derived the proposition that State funds may not be used to provide or maintain buildings used by religious organizations.

We do not believe that *Tilton* can be read so broadly. In *Tilton* the Court was concerned that a sectarian institution might convert federally funded buildings to religious uses or otherwise stamp them with the imprimatur of religion. But nothing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after *Tilton* have acknowledged the right of religious speakers to use public forums on equal terms with others. See, e. g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Sala v. New York*, 334 U. S. 558 (1948).

"This case is different from the cases in which religious groups claim that the denial of facilities not available to other groups deprives them of their rights under the Free Exercise Clause. See *Brandon v. Board of Educ.*, 635 F. 2d 971, 975-976 (CA2 1980), cert. pending, No. 80-1396; *Hunt v. Board of Education*, 321 F. Supp. 1263, 1266 (SD W. Va. 1971). Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not—as in *Brandon* or *Hunt*—rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case. Accordingly, we need not inquire into the extent, if any, to which Free Exercise interests are infringed by the challenged University regula-

primary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to the range of an open forum's likely effects. It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion. *Committee for Public Education v. Nyquist*, 413 U. S. 756, 771 (1973); see, e. g., *Roemer v. Board of Public Works*, 426 U. S. 736 (1976); *Hunt v. McNair*, 413 U. S. 734 (1972); *McGowan v. Maryland*, 366 U. S. 420, 422 (1961).

We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases. Two factors are especially relevant.

First, an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . 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. *Chess v. Widmar*, *supra*, at 1317.¹⁴

Neither do we reach the questions that would arise if State accommodation of Free Exercise and Free Speech rights should, in a particular case, conflict with the prohibition of the Establishment Clause.

University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion. See *Tilton v. Richardson*, 403 U. S. 672, 685-686 (1971). The University argues that the Cornerstone students themselves admitted in affidavits that "[s]tudents know that if something is on campus, then it is a student organization, and they are more likely to feel comfortable attending a meeting." Affidavit of Florian Frederick Chess, Joint Appendix, at 18, 19 (Sept. 29, 1977). In light of the large number of groups meeting on campus, however, we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place. The University's student handbook already notes that the University's name will not "be

Second, the forum is available to a broad class of non-religious 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. See, e. g., *Wolman v. Walter*, 433 U. S. 229, 240-241 (1977); *Committee for Public Education v. Nyquist*, *supra*, 413 U. S., at 756, 781-782 and n. 38 (1973). If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Roemer v. Maryland*, 426 U. S. 736, 747 (1976) (plurality opinion); quoted in *Committee for Public Education v. Regan*, 444 U. S. 646, 658, n. 6 (1980).¹⁵ At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's "primary effect."

B

Arguing that the State of Missouri has gone further than the Federal Constitution in proscribing indirect State support for religion,¹⁶ the University claims a compelling interest in complying with the applicable provisions of the Missouri Constitution.¹⁷

identified in any way with the aims, policies, programs, products, or opinions of any organization of its members." 1980-1981 UMKC Student Handbook, at 25.

¹⁵ This Court has similarly rejected "the recurrent argument that all aid [to parochial schools] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Hunt v. McNair*, 413 U. S. 734, 743 (1973).

¹⁶ See, e. g., *American United v. Rogers*, 538 S.W. 2d 711, 720, (Mo.) (en banc), cert. denied, 429 U. S. 1029 (1976) (holding Missouri Constitution requires stricter separation of church and state than does Federal Constitution); *Harfst v. Hogen*, 183 S.W. 2d 609, 613-614 (Mo. 1947) (en banc) (same).

¹⁷ See Mo. Const. Art. 1, § 6; Art. 1, § 7; Art. 9, § 8. In *Leutkemeyer v. Kaufman*, 364 F. Supp. 376 (ED Mo. 1973), *aff'd*, 419 U. S. 88 (1974), the

The Missouri courts have not ruled whether a general policy of accommodating student groups, applied equally to those wishing to gather to engage in religious and non-religious speech, would offend the State Constitution. We need not, however, determine how the Missouri courts would decide this issue. It is also unnecessary for us to decide whether, under the Supremacy Clause,¹⁶ a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment. We limit our holding to the case before us.

On one hand, respondents' First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content. See, e. g., *Carey v. Brown*, 447 U. S. 455 (1980); *Police Dept. v. Mosley*, 408 U. S. 92 (1972). On the other hand, the State interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech.

omission

IV

Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations.¹⁷ Nor do we question the right of the

District Court found Missouri had a compelling interest in compliance with its own constitution.

¹⁶ U. S. Const., Art. VI, § 2.

¹⁷ See, e. g., *Grayned v. City of Rockford*, 408 U. S. 104, 116 (1972). ("The nature of a place, the pattern of its normal activities, dictate the kinds of regulations to time, place, and manner that are reasonable."). (quoting *Wright*, *The Constitution on the Campus*, 22 Vand. L. Rev. 1027,

University to make academic judgments as to how best to allocate scarce resources or "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment); see *Regents of the Univ. of Cal. v. Bakke*, 438 U. S. 265, 312-313 (1978) (opinion of POWELL, J., announcing the judgment of the Court).²⁰ Finally, we affirm the continuing validity of cases, *e. g.*, *Healy v. James*, 408 U. S. 169, 188-189 (1972), that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.

The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.

For this reason, the decision of the Court of Appeals is,

Affirmed.

1042 (1989).

²⁰ In his opinion concurring in the judgment, *post*, at 1, JUSTICE STEVENS expresses concern that use of the terms "compelling state interest" and "public forum" may "undermine the academic freedom of public universities". As the text above makes clear, this concern is unjustified. See also n. 5, *ante*, at p. 4. Our holding is limited to the context of a public forum created by the University itself.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WIDMAR ET AL. v. VINCENT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-689. Argued October 6, 1981—Decided December 8, 1981

The University of Missouri at Kansas City, a state university, makes its facilities generally available for the activities of registered student groups. A registered student religious group that had previously received permission to conduct its meetings in University facilities was informed that it could no longer do so because of a University regulation prohibiting the use of University buildings or grounds "for purposes of religious worship or religious teaching." Members of the group then brought suit in Federal District Court, alleging that the regulation violated, *inter alia*, their rights to free exercise of religion and freedom of speech under the First Amendment. The District Court upheld the regulation as being not only justified, but required, by the Establishment Clause of the First Amendment. The Court of Appeals reversed, viewing the regulation as a content-based discrimination against religious speech, for which it could find no compelling justification, and holding that the Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kind.

Held: The University's exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral. Pp. 4-13.

(a) Having created a forum generally open for use by student groups, the University, in order to justify discriminatory exclusion from such forum based on the religious content of a group's intended speech, must satisfy the standard of review appropriate to content-based exclusions; *i. e.*, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Pp. 4-7.

(b) Although the University's interest in complying with its constitutional obligations under the Establishment Clause may be characterized as compelling, an "equal access" policy would not be incompatible with that Clause. A policy will not offend the Establishment Clause if it can

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 80-689

GARY E. WIDMAR, ET AL., PETITIONERS v.
CLARK VINCENT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[December 8, 1981]

JUSTICE POWELL delivered the opinion of the court.

This case presents the question whether a state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.

I

It is the stated policy of the University of Missouri at Kansas City¹ to encourage the activities of student organizations. The University officially recognizes over 100 student groups. It routinely provides University facilities for the meetings of registered organizations. Students pay an activity fee of \$41 per semester (1978-1979) to help defray the costs to the University.

From 1973 until 1977 a registered religious group named Cornerstone regularly sought and received permission to conduct its meetings in University facilities.² In 1977, how-

¹The University of Missouri at Kansas City (UMKC) is one of four campuses of the University of Missouri, an institution of the State of Missouri.

²Cornerstone is an organization of evangelical Christian students from various denominational backgrounds. According to an affidavit filed in 1977, "perhaps twenty students . . . participate actively in Cornerstone and form the backbone of the campus organization." Affidavit of Florian

that the University's discrimination against religious activity and discussion violated their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States.

Upon cross motions for summary judgment, the District Court upheld the challenged regulation. *Chess v. Widmar*, 480 F. Supp. 907 (WD Mo. 1979). It found the regulation not only justified, but required, by the Establishment Clause of the Federal Constitution. *Id.*, at 916. Under *Tilton v. Richardson*, 403 U. S. 672 (1971), the court reasoned, the State could not provide facilities for religious use without giving prohibited support to an institution of religion. *Id.*, at 915-916. The District Court rejected the argument that the University could not discriminate against religious speech on the basis of its content. It found religious speech entitled to less protection than other types of expression. *Id.*, at 918.

The Court of Appeals for the Eighth Circuit reversed. *Chess v. Widmar*, 635 F. 2d 1310 (CA8 1980). Rejecting the analysis of the District Court, it viewed the University regulation as a content-based discrimination against religious speech, for which it could find no compelling justification. *Id.*, at 1315-1320. The Court held that the Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kinds. *Id.*, at 1317. According to the Court of Appeals, the "primary effect" of such a policy would not be to advance religion, but rather to further the neutral purpose of developing students' "social and cultural awareness as well as [their] intellectual curiosity." *Id.*, at 1317 (quoting from the University bulletin's

in the action in the District Court, were among the students who initiated the action on October 13, 1977. Named as defendants were the petitioner Gary Widmar, the Dean of Students at UMKC, and the University's Board of Curators.

son Joint School District v. Wisconsin Public Employment Relations Comm'n, 429 U. S. 167, 175 and n. 8. (1976) (although a State may conduct business in private session, "where the State has opened a forum for direct citizen involvement," exclusions bear a heavy burden of justification); *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 555-559 (1975) (because municipal theater was a public forum, city could not exclude a production without satisfying constitutional safeguards applicable to prior restraints).

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Here the University of Missouri has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. See, e. g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Saia v. New York*, 334 U. S. 558 (1948).⁴ In order to justify

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In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech,⁹ would have a secular purpose¹⁰ and would

mate interest in preventing disruption on the campus, which . . . may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."

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Tilton v. Richardson, 403 U. S. 672 (1971). In *Tilton* this Court upheld the grant of federal financial assistance to sectarian colleges for secular purposes, but circumscribed the terms of the grant to ensure its constitutionality. Although Congress had provided that federally subsidized buildings could not be used for sectarian or religious worship for 20 years, the Court considered this restriction insufficient: "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests the original federal grant will in part have the [constitutionally impermissible] effect of advancing religion." *Id.*, at 689. From this statement the District Court derived the proposition that State funds may not be used to provide or maintain buildings used by religious organizations.

We do not believe that *Tilton* can be read so broadly. In *Tilton* the Court was concerned that a sectarian institution might convert federally funded buildings to religious uses or otherwise stamp them with the imprimatur of religion. But nothing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after *Tilton* have acknowledged the right of religious speakers to use public forums on equal terms with others. See, e. g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981); *Sala v. New York*, 234 U. S. 558 (1948).

¹³ This case is different from the cases in which religious groups claim that the denial of facilities not available to other groups deprives them of their rights under the Free Exercise Clause. See *Brandon v. Board of Educ.*, 635 F. 2d 971, 975-976 (CA2 1980), cert. pending, No. 80-1396; *Hunt v. Board of Education*, 321 F. Supp. 1263, 1266 (SD W. Va. 1971). Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not—as in *Brandon* or *Hunt*—rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case. Accordingly, we need not inquire into the extent, if any, to which Free Exercise interests are infringed by the challenged University regula-

Second, the forum is available to a broad class of non-religious 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. See, e. g., *Wolman v. Walter*, 433 U. S. 229, 240-241 (1977); *Committee for Public Education v. Nyquist*, *supra*, 413 U. S., at 756, 781-782 and n. 38 (1973). If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Roemer v. Maryland*, 426 U. S. 736, 747 (1976) (plurality opinion); quoted in *Committee for Public Education v. Regan*, 444 U. S. 646, 658, n. 6 (1980).¹⁵ At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's "primary effect."

B

Arguing that the State of Missouri has gone further than the Federal Constitution in proscribing indirect State support for religion,¹⁶ the University claims a compelling interest in complying with the applicable provisions of the Missouri Constitution.¹⁷

identified in any way with the aims, policies, programs, products, or opinions of any organization of its members." 1980-1981 UMKC Student Handbook, at 25.

¹⁵ This Court has similarly rejected "the recurrent argument that all aid [to parochial schools] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Hunt v. McNair*, 413 U. S. 734, 743 (1973).

¹⁶ See, e. g., *American United v. Rogers*, 538 S.W. 2d 711, 720, (Mo.) (en banc), cert. denied, 429 U. S. 1029 (1976) (holding Missouri Constitution requires stricter separation of church and state than does Federal Constitution); *Harfst v. Hogen*, 163 S.W. 2d 609, 613-614 (Mo. 1947) (en banc) (same).

¹⁷ See Mo. Const. Art. 1, § 6; Art. 1, § 7; Art. 9, § 8. In *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (ED Mo. 1973), *aff'd*, 419 U. S. 888 (1974),

University to make academic judgments as to how best to allocate scarce resources or "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment); see *Regents of the Univ. of Cal. v. Bakke*, 438 U. S. 265, 312-313 (1978) (opinion of POWELL, J., announcing the judgment of the Court).²⁰ Finally, we affirm the continuing validity of cases, *e. g.*, *Healy v. James*, 408 U. S. 169, 188-189 (1972), that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.

The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.

For this reason, the decision of the Court of Appeals is,

Affirmed.

1042 (1969).

²⁰ In his opinion concurring in the judgment, *post*, at 1, JUSTICE STEVENS expresses concern that use of the terms "compelling state interest" and "public forum" may "undermine the academic freedom of public universities". As the text above makes clear, this concern is unjustified. See also n. 5, *ante*, at p. 4. Our holding is limited to the context of a public forum created by the University itself.

Dick - I have read this hurriedly (Sunday AM) and "fly-specked" you lightly. My reaction is quite affirmative. I do want the footnotes less elaborate in quotation. They are rather dominating.

A few of strongest quotes now in footnotes could be elevated to text in emphasizing 1st amendment demands (Part II).

rhf 10/17/81

Try adding an IV, a summary paragraph or two making explicit that State (University) has not meet its heavy burden.

Do you think a note is desirable making clear that this case doesn't involve invitations to non - student groups, speakers or those who seek a forum or or demands from outsiders?

DRAFT: NO. 1

This case presents the question whether a state university, which makes its facilities available for the activities of all other registered student groups, may close its facilities to a registered student group based desiring to use the facilities for ~~on its desire to engage in~~ religious worship and religious discussion.

I.

It is the stated policy of the University of Missouri at Kansas City¹ to encourage the activities of student organizations. The University officially recognizes over 90 student groups. It routinely provides University

¹The University of Missouri at Kansas City (UMKC) is one of four campuses of the University of Missouri, an institution of the State of Missouri.

Dick -
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facilities for the meetings of registered organizations. Students pay an activity fee of \$41 per semester (1978-1979) to help defray the costs to the University.

From 1973 until 1977 a registered religious group named Cornerstone regularly sought and received permission to conduct its meetings in University facilities.² In 1977, however, the University informed the group that it could no longer meet in University buildings. The exclusion was based on a regulation, adopted by the Board of Curators in 1972, that prohibits the use of University buildings or grounds "for purposes of religious worship or religious teaching."³

²Cornerstone is an organization of evangelical Christian students from different denominational backgrounds. According to an affidavit filed in 1977, "perhaps twenty students ... participate actively in Cornerstone and form the backbone of the campus organization." Affidavit of Florian Frederick Chess, Sept. 29., 1977, quoted in Chess v. Widmar, 480 F. Supp. 907, 911 (W.D. Mo. 1979). Prior to their termination by the University, on-campus meetings were held in classrooms and in the Student Center. Open to the public, they sometimes attracted up to 125 students. It is not disputed that a typical Cornerstone meeting in University facilities would include the offering of prayer, the singing of hymns, the sharing of personal religious views, and commentary on the Bible.

³The pertinent regulations provide as follows:

4.0314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups The general prohibition against use of

Footnote continued on next page.

Eleven students at the University, all members of

Cornerstone, brought suit to challenge the regulation in

the ~~federal~~ ^{Federal} District Court⁴ for the Western District of Missouri. They alleged that the

University's discrimination against religious activity and

discussion violated their rights to free exercise of

religion, to equal protection, and to freedom of speech

under the First and Fourteenth Amendments to the

University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities....

4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for recurring services of any groups. Special rules and procedures shall be established for each chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group."

In spite of the regulation's reference to chapels, there is no chapel on the campus of the University of Missouri at Kansas City. The nearest University chapel is at the Columbia campus, approximately 125 miles east of UMKC.

Before 1977 University officials had not been aware of the religious character of the activities at Cornerstone meetings. The District Court found that University officials had never "authorized a student organization to utilize a University facility for a meeting when they had full knowledge that the purposes of the meeting include[d] religious worship or religious teaching." *Chess v. Widner*, *supra*, 480 F. Supp. at 910.

Clark Vincent, the respondent, and Florian Chess, the name plaintiff in the action in the district court, were among the students who initiated the action on October 13, 1977. Named as defendants were the petitioner Gary Widner, the Dean of Students at UMKC, and the University's Board of Curators.

Constitution of the United States.

✓ Upon cross motions for summary judgment, the District Court upheld the challenged regulation. Chess v. Widmar, 480 F. Supp. 907 (W.D. Mo. 1979). It found the regulation not only justified, but required, by the Establishment Clause of the federal constitution. Id. at 916. Under Tilton v. Richardson, 403 U.S. 672 (1972), the Court reasoned, the State could not provide facilities for religious use without giving prohibited support to an institution of religion. The District Court rejected the argument that the University could not discriminate against religious speech on the basis of its content. It found religious speech entitled to less protection than other types of expression. Id. at 918.

for the Eighth Circuit

The Court of Appeals reversed. Chess v. Widmar, 635

✓ F.2d 1310 (CA 8 1980). Rejecting the analysis of the

✓ District Court, it viewed the University regulation as a

content-based discrimination against religious speech, for which it could find no compelling justification. Id. at 1313-1316. The Establishment Clause did not bar a policy of equal access, in which facilities were opened to groups

and speakers of all kinds. According to the Court of Appeals, the "primary effect" of such a policy would not be to advance religion, but rather to further the neutral purpose of developing students' "social and cultural awareness as well as [their] intellectual curiosity." Id. at 1317.

Essentially for the reasons stated by the court of appeals, we now affirm.

II.

Through its policy of accommodating the meetings of registered student groups, the University has created for its students a quasi-public forum. See Police Dept. v. Moseley, 408 U.S. 92 (1972); Cox v. Louisiana, 379 U.S. 536 (1965); see also Hague v. CIO, 307 U.S. 496 (1939).⁵

⁵The concept of a "public forum" rests on the recognition, first expressed in Hague v. CIO, 307 U.S. 496, 515 (1939), that

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient

times, been a part of the privileges, immunities, rights, and liberties of citizens.

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Dick - 9
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Our cases have recognized that the

The University may have assumed voluntarily the function of providing rooms for student meetings.⁶ But, by doing

7/ Such centers for discourse are obviously affected with First Amendment concerns of the highest order. Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a public forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth debating in public facilities." Police Department v. Mosley, 408 U.S. 92, 96 (1972). It is characteristic of a "pure" public forum that it is equally open to all members of the public. "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they have to say." Id.

The campus of a public university possesses many of the characteristic elements of a public forum. "The college classroom, with its surrounding environs, is peculiarly 'the marketplace of ideas.'" Healy v. James, 408 U.S. 169, 180 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate ... [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." Id. at 181-182. We have therefore held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. Id. at 181, 184; cf. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975). Denial of access to municipal theater, maintained "as a public forum, constitutes "prior restraint" and therefore bears "heavy presumption against its constitutional validity" (citations omitted).

On the other hand, our cases have never denied a university's capacity to impose regulations required to preserve the tranquility that its mission requires. We have not held, for example, that a campus must make all of its facilities equally available to students and non-students alike, or that a university must grant free access to all of its grounds or all of its buildings. First Amendment rights must always be applied "in light of the special characteristics of the ... environment in the particular place." Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969).

⁶The University's obligations may well be different for its grounds and its buildings. "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations to time, place, and manner that are reasonable.'" Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). It is settled, however, that the Constitution may bar the State from enforcing exclusions from a public

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so, it undertook an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Univeristy's institutional mission, which it describes as providing a "secular education" to its students, Brief at 44, does not exempt its actions from constitutional scrutiny. Our cases leave no doubt that the First Amendment rights of speech and association reach ~~onto~~ ^{to} university campuses with undiminished force. Healy v. James, 408 U.S. 169, 180 (1972); see Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969); Shelton v. Tucker, 364 U.S. 479, 487 (1960).

Here the Univeristy of Missouri has sought to discriminate against groups and speakers based on their desire to engage in religious worship and discussion.

forum that it has created, even though it was not required to create the forum in the first place. See City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n, 429 U.S. 167, 175 & n.8. (1976) (although State could conduct business in private session, "where the State has opened a forum for direct citizen involvement," exclusions bear a heavy burden of justification); cf. Southeastern Promotions, Ltd. v. Conrad, supra (having established municipal theater as a public forum, city could not exclude production of "Hair" without satisfying constitutional safeguards applicable to prior restraints).

These are forms of speech and association protected by the First Amendment. See, e.g., Saia v. New York, 334 U.S. 558 (1948); Niemotko v. Maryland, 340 U.S. 268 (1951); NAACP v. Alabama, 357 U.S. 449, 460-461 (1958); Heffron v. International Soc'y for Krishna Consciousness, Inc., 101 S. Ct. 2559, 2563 (1981). Thus, in order to justify discrimination²⁷⁴ exclusion from a public forum based on the religious content of a group's intended speech, the University would ~~need to~~^{must} satisfy the ~~the~~⁶ standard of review appropriate to content-based exclusions. It would need to show that its regulation was necessary to serve a compelling State interest and that it was narrowly ~~drawn~~^{drawn} tailored to achieve that end. See Carey v. Brown, 447 U.S. 455, 465 (1980); see also Schenck v. United States, 249 U.S. 47 (1919).⁷

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⁷cf. Healy v. James, supra, 408 U.S. at 184.

It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organizations the range of associational activity described above. While a college has a legitimate interest in preventing disruption on the campus, which may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action.

In this case the University claims a compelling interest in maintaining strict separation of church and State. It ~~purports to~~⁵ derive this interest from the "Establishment Clauses" of both the Federal and Missouri Constitutions.

A.

The University argues that it could not open its facilities to religious groups and speakers, on the same terms ~~that~~ they are open to all other registered student groups, without violating the Establishment Clause of the Constitution of the United States.⁸ We ~~assume~~^{agree} that the University does have a compelling interest in complying with its constitutional obligations. But we disagree with its conclusion that an "equal access" policy could not satisfy the standard developed in this Court's Establishment Clause cases. See, e.g., Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970); Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971); Committee for Public Education

⁸"Congress shall make no law respecting an establishment of religion..." U. S. Const., Amdt. 1. The Establishment Clause ~~has~~^{has} been made applicable to the States through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

district court concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion.¹¹

✓¹⁰We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce an exclusion of "religious worship and religious speech." See Chess v. Widmar, supra, 635 F.2d at 1318. In order to exclude religious speech and religious worship, the University would first need to determine which words and activities fall within the proscription. At least one Court of Appeals has concluded that this would be "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." O'hair v. Andrus, 613 F.2d 931, 937 (1979) (footnote omitted); see L. Tribe, American Constitutional Law § 14-6 (1978); cf. Fowler v. Rhode Island, 345 U.S. 67, 70 (1953). (~~"[i]t is no business of the courts to say that what is a religious practice or activity for one group is not religion under the First Amendment. Nor is it in the competence of court under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meeting."~~) Even if it could define religion, see Note, Toward a Constitutional Definition of Religion, 91 Harv. L. Rev. 1056 (1978), the University would then need to monitor group meetings in order to enforce adherence to its stated policy. It has been argued powerfully that the attempt to administer "such a test would impermissibly entangle government and religion." O'hair v. Andrus, Supra, 613 F.2d at 937. See Walz v. Tax Comm'n, 397 U.S. 664, 674-676 (1970) (tax exemption for churches permissible in part because elimination of exemption would require more extensive government entanglement).

✓¹¹In finding that an "equal access" policy would have the primary effect of advancing religion, the District Court relied primarily on the decision of this Court in Tilton v. Richardson, 403 U.S. 672 (1971). In Tilton this Court upheld the provision of federal financial assistance to sectarian colleges. But it emphasized that the funds must be used for secular purposes. Congress had provided that federally subsidized buildings must not be used for sectarian or religious worship for a period of 20 years. This Court found this restriction to be insufficient. We held that "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious uses, the original federal grant will in part have the [constitutionally impermissible] effect of advancing religion." ✓
Footnote continued on next page.

kinds, and must therefore justify its content-based exclusion of certain forms of religious speech. As held by the court of appeals, an "equal access"

policy would [not] have the primary effect of advancing religion. Rather, it would have the primary effect of advancing the University's admitted secular purpose--to develop students' 'social and cultural awareness as well as their intellectual curiosity.' It would simply permit students to put their religious ideas and practices in competition with the ideas and practices of other groups, religious or secular.

635 F.2d at 1317. ⁹ It is possible--perhaps even foreseeable--that religious groups would benefit from an open forum policy. But this Court has held that a religious organization's enjoyment of merely incidental benefits will not violate the prohibition against the "primary advancement" of religion. See Roemer v. Board of Public Works, 426 U.S. 736 (1976) (~~state funding of private colleges permissible because it does not directly support "specifically religious activity"~~); Hunt v. McNair, 413 U.S. 734 (1972) (~~state may give construction grants to religious colleges, so long as buildings are not used for religious worship~~); ^{cf.} McGowan v. Maryland, 366 U.S. 420, 422 (1961) (~~upholding the validity of Sunday closing laws,~~

because "the present purpose and effect of most of [these laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects,

does not bar the state from achieving its secular goals."

In all of these cases religious institutions appear to have benefited indirectly from the State policies upheld by this Court. But indirect benefits did not

constitute "primary effects," weighed in comparison with the legitimate objectives that the challenged policies were enacted to achieve. Perhaps equally important,

nothing in the policies stamped the imprimatur of state approval on a religious sect or its beliefs. In this case petitioners argue that the effect of permitting religious

groups to share a public forum would be to imply state approval of religious activity. This is unpersuasive.

Again we agree with the conclusion of the court of appeals. Such a policy "would no more commit the University to religious goals," id. at 1317, than it is now committed to the goals of the Students for a Democratic

[to religious schools] aid is forbidden because of an aspect of an institution's free spendall its resources on religious ends. *Hunt v. McNair* 413 U.S. at 743, *supra*

see *quoted in* Committee for Public & Religious Liberty v. Regan 444 U.S. 646, 658 (1980) New York v. Catholic Academy 434 U.S. 125, 134 (1977)

The Court has seriously disavowed any "implication" acceptance of the Church by the state. *Roemer v. Maryland Public Works Bd.*, 426 U.S. at 426, *supra*. *Plurality opinion* in *Regan v. M.C.A.* Yes!

By the same token

Similarly, the Court neither has declined to accept

Society, the Young Socialist Alliance, or any other group eligible to use its forum.¹³

B.

Arguing that ^{the State of} Missouri has gone further than the federal constitution in proscribing indirect State support for religion, the University also claims a compelling interest in complying with the applicable provision of the State constitution.¹⁴ See Leutkemeyer v. Kaufman, 364 F.

¹³It should not be overlooked that University students are young adults. They may be less impressionable than students in primary school and even in high school, and better able to comprehend that State neutrality to religion is precisely that. See Brandon v. Board of Education, supra, 635 F.2d at 978, 980; Note, The Rights of Student Religious Groups Under the First Amendment to Hold Religious Meetings on the Public University Campus, 33 Rutgers L. Rev. 1008, 1052 (1981)

¹⁴The Constitution of the State of Missouri provides in pertinent part:

That no person can be compelled to erect, support, or attend any place of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion....

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any priest, preacher, minister, or teacher thereof....

Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose...; nor shall any grant or donation of personal property or real property ever be made by the state, or any county, city, town, or wother municipal corporation, for any religious creed, church, or

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Hunt v. ~~McNair~~, supra, 403 U.S.,
at 687; Giannella, Religious Liberty,
Nonestablishment and Doctrinal Development, pt II,
The Nonestablishment Principle, 81 Harv. L. Rev. 513,
574 (1968).

Supp. 376 (E.D. Mo. 1973), aff'd, 419 U.S. 88 (1974).

The Missouri courts have apparently not ruled whether a general policy of accommodating student groups, applied equally to those wishing to gather to engage in religious and non-religious speech, would offend the State Constitution. Nonetheless, we find it unnecessary to our decision to make any determination of Missouri law. Nor do we find it necessary to decide whether a State interest, derived from its own constitution, could ever, under the Supremacy Clause¹⁵, outweigh free speech interests protected by the First Amendment. Even if the State's interest were compelling, its regulations would ~~need to be carefully tailored both~~ ^{have} to protect that interest ~~and to avoid unnecessary abridgment of~~ ^{without unnecessarily abridging} protected rights of speech and association. See, e.g., Carey, supra, 447 U.S. at 465; Buckley v. Valeo, 424 U.S. 1, 25

sectarian purpose whatever.

MO. CONST. Art. I, §4; Art. I, § 2; Art. 9 § 8.

The Missouri courts have interpreted these provisions to be more restrictive than the First Amendment of the United States Constitution in prohibiting expenditures of public funds in a way inuring to the benefit of religious institutions. American United v. Rogers, 528 S.W.2d 711, 120, cert. denied, 429 U.S. 1029 (1976); Hacker v. Board, 163 S.W.2d 825, 813-814 (Mo. 1947) (en banc).

15. U.S. Const., Art. VI.

(1976); Shelton v. Tucker, supra, 364 U.S. at 489.

Measured against this standard, the University's policy of discrimination against religious speech and association fails on grounds of ~~overbroad~~ ^{and} inclusiveness.

The University regulation challenged in this case applies to "religious teaching" as well as "religious worship." It is therefore substantially overbroad. We can imagine no compelling state interest, cognizable under the Supremacy Clause, in excluding all types of religious "teaching"--including, for example, informal conversational "instruction" in a public forum or analytical exposition in a classroom. "Broad prophylactic rules in the area of free expression are fatal. Precision of regulation must be the touchstone." NAACP v. Button, 371 U.S. 415, 438 (1963) (citations omitted), quoted in Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980).¹⁶

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¹⁶The University has not invoked other possible interests that might be compelling in an appropriate case. We have previously recognized a university's right to restrict even First Amendment activities that are disruptive of reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education. Isaly v. Jones, supra, 408 U.S. at 183; see Tinker v. Des Moines Independent School District, supra, footnote continued on next page.

IV.

The decision of the court of appeals is, accordingly,

Affirmed.

Reviewed 10/22

rhf 10/22/81

Dick. subject to my
light editing, then looks
good to me.

After your Editor
has reviewed this, I'd
like to see any change
that arguably is
substance.

DRAFT: NO. 2

Then go for a
Chamber draft. Primary
responsibility remains
with you & me. But I
like for all five of us
to review my Court opinion

This case presents the question whether a state
university, which makes its facilities available for the
activities of all other registered student groups, may

close its facilities to a registered student group
desiring to use the facilities for religious worship and
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In spite of the regulation's reference to chapels, there is no chapel on the campus of the University of Missouri at Kansas City. The nearest University chapel is at the Columbia campus, approximately 125 miles east of UMKC.

Before 1977 University officials had not been aware of the religious character of the activities at Cornerstone meetings. The District Court found that University officials had never "authorized a student organization to utilize a University facility for a meeting when they had full knowledge that the purposes of the meeting include[d] religious worship or religious teaching." Chess v. Widmar, supra, 480 F. Supp. at 910.

⁴Clark Vincent, the respondent, and Florian Chess, the name plaintiff in the action in the district court, were among the students who initiated the action on October 13, 1977. Named as defendants were the petitioner Gary Widmar, the Dean of Students at UMKC, and the University's Board of Curators.

and Fourteenth Amendments to the Constitution of the United States.

Upon cross motions for summary judgment, the District Court upheld the challenged regulation. Chess v. Widmar, 480 F. Supp. 907 (W.D. Mo. 1979). It found the regulation not only justified, but required, by the Establishment Clause of the Federal Constitution. Id. at 916. Under Tilton v. Richardson, 403 U.S. 672 (1972), the Court reasoned, the State could not provide facilities for religious use without giving prohibited support to an institution of religion. The District Court rejected the argument that the University could not discriminate against religious speech on the basis of its content. It found religious speech entitled to less protection than other types of expression. Id. at 918.

The Court of Appeals for the Eighth Circuit reversed. Chess v. Widmar, 635 F.2d 1310 (CA8 1980). Rejecting the analysis of the District Court, it viewed the University regulation as a content-based discrimination against religious speech, for which it could find no compelling justification. Id. at 1313-1316. The Establishment Clause

did not bar a policy of equal access, in which facilities were opened to groups and speakers of all kinds. According to the Court of Appeals, the "primary effect" of such a policy would not be to advance religion, but rather to further the neutral purpose of developing students' "social and cultural awareness as well as [their] intellectual curiosity." Id. at 1317.

Essentially for the reasons stated by the court of appeals, we now affirm.

II.

Through its policy of accommodating the meetings of registered student groups, the University has created for its students a quasi-public forum. See Police Dept. v. Moseley, 408 U.S. 92 (1972); Cox v. Louisiana, 379 U.S. 536 (1965); see also Hague v. CIO, 307 U.S. 496 (1939).⁵

⁵The concept of a "public forum" rests on the recognition, first expressed in Hague v. CIO, 307 U.S. 496, 515 (1939), that

Wherever the title of streets and parks may read, they have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.
Footnote continued on next page.

The University may have assumed voluntarily the function of providing rooms for student meetings.⁶ But the Constitution forbids the ^a state to enforce certain 2 exclusions from a public forum that it has created, even though it was not required to create the forum in the first place. See City of Madison Joint School District

This Court has recognized that the campus of a public university possesses many of the salient characteristics of a public forum. "The college classroom, with its surrounding environs, is peculiarly 'the marketplace of ideas.'" Healy v. James, 408 U.S. 169, 180 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate ... [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." Id. at 181-182. We have therefore held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. Id. at 181, 184; cf. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975) (denial of access to municipal theater, maintained as a public forum, constitutes "prior restraint" and therefore bears "heavy presumption against its constitutional validity") (citations omitted).

On the other hand, our cases have never denied a university's capacity to impose regulations required to preserve the tranquility that its mission requires. We have not held, for example, that a campus must make all of its facilities equally available to students and non-students alike, or that a university must grant free access to all of its grounds or all of its buildings. First Amendment rights must always be applied "in light of the special characteristics of the ... environment in the particular place." Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969).

⁶The University's obligations to constitute its grounds and buildings as public forums may well be different. Cf. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). ("The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations to time, place, and manner that are reasonable.'").

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v. Wisconsin Public Employment Relations Comm'n, 429 U.S.

167, 175 & n.8. (1976) (although ^a State ^{may} ~~could~~ conduct

business in private session, "where the ~~State~~ has opened a [?]

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discriminations and exclusions under applicable

constitutional norms. The Univer^fisty's institutional

mission, which it describes as providing a "secular

education" to its students, Brief at 44, does not exempt

its actions from constitutional scrutiny. Our cases leave

no doubt that the First Amendment rights of speech and

association reach university campuses with undiminished

force. Healy v. James, 408 U.S. 169, 180 (1972); see

Tinker v. Des Moines Independent School District, 393 U.S.

503, 506 (1969); Shelton v. Tucker, 364 U.S. 479, 487 (1960).

Here the Univeristy of Missouri has sought to discriminate against groups and speakers based on their desire to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. See, e.g., Saia v. New York, 334 U.S. 558 (1948); Niemotko v. Maryland, 340 U.S. 268 (1951); NAACP v. Alabama, 357 U.S. 449, 460-461 (1958); Heffron v. International Soc'y for Krishna Consciousness, Inc., 101 S. Ct. 2559, 2563 (1981). In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It ~~would need to~~ ^{must} show that its regulation was necessary to serve a compelling ~~State~~ interest and that it was narrowly drawn to achieve that end. See Carey v. Brown, 447 U.S. 455, 465 (1980); see also Schenck v. United States, 249 U.S. 47

(1919).⁷

III.

In this case the University claims a compelling interest in maintaining strict separation of church and ~~State~~. It derives this interest from the "Establishment Clauses" of both the Federal and Missouri Constitutions.

A.

The University first argues that it could not open its facilities to religious groups and speakers, on the same terms they are open to all other registered student groups, without violating the Establishment Clause of the Constitution of the United States.⁸ We agree that the University has a compelling interest in complying with its

⁷Cf. Healy v. James, supra, 408 U.S. at 184:

It is to be rememebered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organizations the range of associational activity described above. While a college has a legitimate interest in preventing disruption on the campus, which may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action.

⁸"Congress shall make no law respecting an establishment of religion...." U. S. Const., Amdt. 1. The Establishment Clause has been made applicable to the States through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

constitutional obligations. But we disagree with its conclusion that an "equal access" policy ~~could not satisfy~~ ^{would be} ~~the standard developed~~ ^{incompatible with} in this Court's Establishment Clause cases. See, e.g., Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970); Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971); Committee for Public Education v. Nyquist, 413 U.S. 756, 773 (1973). Those cases make clear that a policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ***; finally, the [policy] must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, supra, 403 at 612-613.

In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech, would have

a secular purpose⁹ and would avoid entanglement with religion.¹⁰ But the District Court concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary

⁹The secular purpose would be to provide ^{would} a forum in which its students would benefit ^{an} from a lively exchange of ideas. It does not undermine the State's essentially secular purpose that some groups might use its forum to engage in religious speech. We do not understand petitioners to argue that the State could--much less that it must--exclude religious speech from the streets or from the parks that it maintains as public forums. Yet the State's purpose is as secular when the public forum has been created in a public hall, see City of Madison Joint School District v. Wisconsin Employment Relations Comm'n, supra; Southeastern Promotions, Ltd. v. Conrad, supra, as when it involves the streets or the parks, see Mosely v. Police Department, supra; Hague v. CIO, supra. This case is therefore very different from those in which this Court has struck down statutes permitting school facilities to be used for instruction by religious, but not by other, groups. See McCollum v. Board of Education, 333 U.S. 203 (1948). It is settled that the Establishment Clause does not require, but actually forbids, State hostility toward religion. Zorach v. Clauson, 343 U.S. 306 (1952).

¹⁰We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce an exclusion of "religious worship and religious speech." See Chess v. Widmar, supra, 635 F.2d at 1318. In order to exclude religious speech and religious worship, the University ^{it would be necessary for} would first need to determine which words and activities fall within the proscription. This could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." O'hair v. Andrus, 613 F.2d 931, 937 (1979) (footnote omitted); see L. Tribe, American Constitutional Law § 14-6 (1978); cf. Fowler v. Rhode Island, 345 U.S. ". Even if it could define religion, see Note, Toward a Constitutional Definition of Religion, 91 Harv. L. Rev. 1056 (1978), the University would then need to monitor group meetings in order to enforce adherence to its stated policy. It has been argued powerfully that the attempt to administer "such a test would impermissibly entangle government and religion." O'hair v. Andrus, Supra, 613 F.2d at 937. See Walz v. Tax Comm'n, 397 U.S. 664, 674-676 (1970) (tax exemption for churches permissible in part because elimination of exemption would require more extensive government entanglement).

There would be a continuing

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effect" of advancing religion.¹¹

The University's argument misconceives the nature of this case. The question is not whether it would violate the Establishment Clause for the State to create a religious forum.¹² Once the University opens its

¹¹In finding that an "equal access" policy would have the primary effect of advancing religion, the District Court relied primarily on the decision of this Court in Tilton v. Richardson, 403 U.S. 672 (1971). In Tilton this Court upheld the provision of federal financial assistance to sectarian colleges. But it emphasized that the funds must be used for secular purposes. Congress had provided that federally subsidized buildings must not be used for sectarian or religious worship for a period of 20 years. This Court found this restriction to be insufficient. We held that "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious uses, the original federal grant will in part have the [constitutionally impermissible] effect of advancing religion." From this statement the District Court derived the proposition that State funds may not be used to provide buildings for use by religious organizations.

We do not believe that Tilton can be read so broadly. In Tilton the Court had worried that a sectarian institution might actually convert federally funded buildings or otherwise stamp them with the imprimatur of religion. But nothing in Tilton suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussion. It cannot be held to

reverse longstanding decisions holding that religious speakers are constitutionally entitled to equal access to parks and other facilities that have "immemorially been held in trust for use by the public and have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Heffron v. International Soc'y for Krishna Consciousness, Inc., 101 S. Ct. 2559, 2565 (1981), quoting Hague v. CIO, 307 U.S. 496, 515 (1939). There may sometimes be differences between the exclusionary regulations permissible in a building and those permitted in a park. But restrictions based on the nature of the public forum have traditionally rested on "the State's interest in protecting the safety and convenience of persons using a public forum," Heffron, supra, 101 S. Ct. at 2565, not on any interest in censoring the content of what is said, see Carey, supra, 447 U.S. at 470.

Footnote(s) 12 will appear on following pages.

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facilities to student groups of all other kinds, it has
 already created a [?]quasi-public forum, and the burden lies
 on it to justify any exclusion. See Healy v. James,
supra. In this context we are unpersuaded that the
 primary effect of the public forum, if religious speech
 were treated equally with other protected discourse, would
 be to advance religion. ^{at least} In the absence of empirical
 evidence to the contrary, we agree with the judgment of
 the Court of Appeals. An "equal access"

policy would [not] have the primary effect of
 advancing religion. Rather, it would have the
 primary effect of advancing the University's
 admitted secular purpose--to develop students'
 'social and cultural awareness as well as their
 intellectual curiosity.' It would simply permit
 students to put their religious ideas and
 practices in competition with the ideas and
 practices of other groups, religious or secular.

635 F.2d at 1317.

¹²Cf. Brandon v. Board of Educ., 635 F.2d 971 (CA2
 1980); Hunt v. Board of Education, 321 F. Supp. 1263 (SD
 W. Va. 1971). It is because this case presents no such
 issue that we have not couched our discussion in terms of
 respondents' rights under the "Free Exercise" clause. We
 agree with the petitioners' argument that the policies of
 the "Free Exercise" clause and the "Establishment Clause"
 may sometimes be in tension, see, e.g., Committee for
 Public Education v. Nyquist, 413 U.S. 756, 770 (1973),
Abington School District v. Schempp, 373 U.S. 203, 222,
 and that resolution of the tension requires sensitivity to
 the interests that both are aimed to protect. But we do
 not view this as such a case.

We are not oblivious to the range of an open forum's likely effects. It is possible--perhaps even foreseeable--that religious groups would benefit from access to University facilities. But this Court has settled that a religious organization's enjoyment of merely "incidental" benefits will not violate the prohibition against the "primary advancement" of religion. Committee for Public Education v. Nyquist, 413 U.S. 756, 771 (1973); see, e.g., Roemer v. Board of Public Works, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1972); McGowan v. Maryland, 366 U.S. 420, 422 (1961).

We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases. Two factors are especially relevant.

First, the benefits of an open forum would extend to a broad class of non-religious as well as religious speakers. *There are 90 officially recognized student groups at UMKC.* The provision of benefits to so broad a *spectrum of* groups

Stat ~~is an important index of~~ secular effect. See, e.g.,

Wolman v. Walter, 433 U.S. 229, 240-251 (1977); Committee for Public Education v. Nyquist, supra, 413 U.S., at 782

n.38. Otherwise "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." Roemer v. Maryland, supra, 426 U.S., at 736 (plurality opinion); quoted in Committee for Religious Liberty v. Regan, 444 U.S. 646, 658 (1980).¹³

Second, an open forum policy in a public university would not confer the imprimatur of State approval on any religious sect or practice. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University to religious goals," 635 F.2d, at 1317, 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.¹⁴

¹³This Court has similarly rejected "the recurrent argument that all aid [to parochial schools] is forbidden because aid to one aspect of an institution frees it to spend all its resources on religious ends." Hunt v. McNair, supra, 413 U.S., at 743; see New York v. Cathedral Academy, 434 U.S. 125, 134 (1977).

¹⁴It should not be overlooked that University students are young adults. They may be less impressionable than students in primary school and even in high school, and better able to comprehend that state neutrality to religion is precisely that. See Wilton v. Richardson, supra, 403 U.S., at 887; Brandson v. Board of Education, supra, 635 F.2d at 978, 980; Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, pt. II, The Nonestablishment Principle, 51 Harv. L. Rev. 513, 576 (1968); Note, The Rights of Student Religious Groups Under the First Amendment to Hold Religious Meetings on the Public University Campus, 33 Rutgers L. Rev. 1009, 1052 (1981).

B.

Arguing that the State of Missouri has gone further than the Federal Constitution in proscribing indirect State support for religion, the University also claims a compelling interest in complying with the applicable provision of the State Constitution.¹⁵ See Leutkemeyer v. Kaufman, 364 F. Supp. 376 (E.D. Mo. 1973), aff'd, 419 U.S. 88 (1974).

¹⁵The Constitution of the State of Missouri provides in pertinent part:

That no person can be compelled to erect, support, or attend any place of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion....

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any priest, preacher, minister, or teacher thereof....

Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose...; nor shall any grant or donation of personal property or real property ever be made by the state, or any county, city, town, or wother municipal corporation, for any religious creed, church, or sectarian purpose whatever.

MO. CONST. Art. 1, §6; Art. 2 § 7; Art. 9 § 8.

The Missouri courts have interpreted these provisions to be more restrictive than the First Amendment of the United States Constitution in prohibiting expenditures of public funds in a way inuring to the benefit of religious institutions. American United v. Rogers, 338 S.W.2d 711, 720, cert. denied, 379 U.S. 1029 (1974); Barfel v. Rogers, 163 S.W.2d 809, 813-814 (Mo. 1947) (en banc).

The Missouri courts have apparently not ruled whether a general policy of accommodating student groups, applied equally to those wishing to gather to engage in religious and non-religious speech, would offend the State Constitution. Nonetheless, we find it unnecessary to our decision to make any determination of Missouri law. Nor do we find it necessary to decide whether a State interest, derived from its own constitution, could ever, under the Supremacy Clause¹⁶, outweigh free speech interests protected by the First Amendment. Even if the State's interest were compelling, its regulations would have to protect that interest without unnecessary abridgment of protected rights of speech and association. See, e.g., Carey, supra, 447 U.S. at 465; Buckley v. Valeo, 424 U.S. 1, 25 (1976); Shelton v. Tucker, supra, 364 U.S. at 489. Measured against this standard, the University's policy of discrimination against religious speech and association fails on grounds of overinclusiveness.

¹⁶U. S. Const., Art. 6.

The University regulation challenged in this case applies to "religious teaching" as well as "religious worship." It is therefore substantially overbroad. We can imagine no compelling State interest, cognizable under the Supremacy Clause, in banning all types of religious "teaching"--including, for example, informal conversational "instruction" in a public forum or analytical exposition in a classroom. "Broad prophylactic rules in an area of free expression are fatal. Precision of regulation must be the touchstone." NAACP v. Button, 371 U.S. 415, 438 (1963) (citations omitted), quoted in Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980).

IV.

Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations. Cf. Heffron v. International Society for Krishna Consciousness, supra. We also recognize the continuing validity of cases establishing a University's right to exclude even First Amendment activities that violate reasonable campus rules

or substantially interfere with the opportunity of other students to obtain an education. Healy v. James, supra, 408 U.S. at 189; see Tinker v. Des Moines Independent School District, supra, 393 U.S., at 513.

The basis for our decision is narrow. Having created a public forum, the University sought to enforce a content-based exclusion of religious speech. Its exclusionary policy violated a fundamental principle of content neutrality, and the University was unable to justify this violation under applicable constitutional standards.

For this reason, the decision of the Court of Appeals is,

Affirmed.

lfp/ss 10/22/81

Rider A, p. 6 (Widmar)

WID6 SALLY-POW

On the other hand, a university ^{respects} ~~is different~~ ^{differs in significant} from a public street or park or even a municipal theater. A university's mission is education, and decisions of this Court have never denied its authority to impose reasonable regulations upon the use of its campus and facilities compatible with its educational mission. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or all of its buildings.

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Chambers Draft

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Justice Powell delivered the opinion of the court.

This case presents the question whether a state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.

I

It is the stated policy of the University of Missouri at Kansas City¹ to encourage the activities of student organizations. The University officially recognizes over 100 student groups. It routinely provides University

¹The University of Missouri at Kansas City (UMKC) is one of four campuses of the University of Missouri, an institution of the State of Missouri.

facilities for the meetings of registered organizations. Students pay an activity fee of \$41 per semester (1978-1979) to help defray the costs to the University.

From 1973 until 1977 a registered religious group named Cornerstone regularly sought and received permission to conduct its meetings in University facilities.² In 1977, however, the University informed the group that it could no longer meet in University buildings. The exclusion was based on a regulation, adopted by the Board of Curators in 1972, that prohibits the use of University buildings or grounds "for purposes of religious worship or religious teaching."³

²Cornerstone is an organization of evangelical Christian students from various denominational backgrounds. According to an affidavit filed in 1977, "perhaps twenty students . . . participate actively in Cornerstone and form the backbone of the campus organization." Affidavit of Florian Chess (Sept. 29, 1977), quoted in Chess v. Widmar, 480 F. Supp. 907, 911 (W.D. Mo. 1979). Cornerstone held its on-campus meetings in classrooms and in the student center. These meetings were open to the public and attracted up to 125 students. A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences.

³The pertinent regulations provide as follows:

"4.2314.0107 No University buildings or grounds (except chapels as herein provided) may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. . . . The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy . . . continued on next page.

Eleven University students, all members of Cornerstone, brought suit to challenge the regulation in Federal District Court for the Western District of Missouri.⁴ They alleged that the University's discrimination against religious activity and discussion violated their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United

required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction. No regulations shall be interpreted to forbid the offering of prayer or other appropriate recognition of religion at public functions held in University facilities. . . .

4.0314.0108 Regular chapels established on University grounds may be used for religious services but not for recurring services of any groups. Special rules and procedures shall be established for each chapel by the Chancellor. It is specifically directed that no advantage shall be given to any religious group."

There is no chapel on the campus of the University of Missouri at Kansas City. The nearest University chapel is at the Columbia campus, approximately 125 miles east of UMKC.

Before 1977 University officials were unaware of the religious character of Cornerstone's meetings. The District Court found that University officials had never "authorized a student organization to utilize a University facility for a meeting when they had full knowledge that the purposes of the meeting include[d] religious worship or religious teaching." *Chess v. Widmer*, *supra*, at 920.

⁴Clark Vincent, the respondent, and Florian Chess, the named plaintiff in the action in the District Court, were among the students who initiated the action on October 13, 1977. Named as defendants were the petitioner Gary Widmer, the Dean of Students at UMKC, and the University's Board of Curators.

States.

Upon cross motions for summary judgment, the District Court upheld the challenged regulation. Chess v. Widmar, 480 F. Supp. 907 (W.D. Mo. 1979). It found the regulation not only justified, but required, by the Establishment Clause of the Federal Constitution. Id., at 916. Under Tilton v. Richardson, 403 U. S. 672 (1971), the court reasoned, the State could not provide facilities for religious use without giving prohibited support to an institution of religion. Id., at 915-916. The District Court rejected the argument that the University could not discriminate against religious speech on the basis of its content. It found religious speech entitled to less protection than other types of expression. Id., at 918.

The Court of Appeals for the Eighth Circuit reversed. Chess v. Widmar, 635 F.2d 1310 (CA8 1980). Rejecting the analysis of the District Court, it viewed the University regulation as a content-based discrimination against religious speech, for which it could find no compelling justification. Id., at 1315-1320. The Establishment Clause does not bar a policy of equal access, in which

facilities are open to groups and speakers of all kinds. According to the Court of Appeals, the "primary effect" of such a policy would not be to advance religion, but rather to further the neutral purpose of developing students' "'social and cultural awareness as well as [their] intellectual curiosity.'" Id., at 1317 (quoting from the University bulletin's description of the student activities program, reprinted in id., at 1312 n.1).

Essentially for the reasons stated by the Court of Appeals, we now affirm.

II

Through its policy of accommodating the meetings of registered student groups, the University has created for its students a quasi-public forum.⁵ Having done so, the

⁵The concept of a "public forum" rests on the recognition, first expressed in Hague v. CIO, 307 U. S. 496, 515 (1939), that

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

See also Police Dept. v. Mosley, 408 U. S. 92 (1972); Cox v. Louisiana, 379 U. S. 559 (1965).

University assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a public forum, even if it was not required to create the forum in the first place. See, e.g., City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n, 429 U. S. 167, 175 & n.8. (1976) (although a State may conduct business in private session, "where the State has opened a forum for direct citizen involvement," exclusions bear a heavy burden of justification); Southeastern Promotions, Ltd. v. Conrad, 420 U. S. 546, 555-559 (1975) (because municipal theater was a public forum, city could not exclude a production without satisfying constitutional safeguards applicable to prior restraints).

The University's institutional mission, which it describes as providing a "secular education" to its students, Brief for Petitioners 44, does not exempt its actions from constitutional scrutiny.⁶ Our cases leave no

⁶This Court has recognized that the campus of a public university possesses many of the characteristics of
Footnote continued on next page.

doubt that the First Amendment rights of speech and association reach state university campuses with undiminished force. See, e.g., Healy v. James, 408 U. S. 169, 180 (1972); Tinker v. Des Moines Independent School District, 393 U. S. 503, 506 (1969); Shelton v. Tucker, 364 U. S. 479, 487 (1960).

Here the University of Missouri has discriminated against groups and speakers based on their desire to engage in religious worship and discussion. These are forms of speech and association protected by the First

a public forum. "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.'" Healy v. James, 408 U. S. 169, 180 (1972). Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate ... [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." Id., at 181-182. We have therefore held that students enjoy First Amendment rights of speech and association on the campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint. Id., at 181, 184.

On the other hand, First Amendment rights must of course be analyzed "in light of the special characteristics of the school environment." Tinker v. Des Moines Independent School District, 393 U. S. 503, 506 (1969). A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied its authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.

Amendment. See, e.g., Heffron v. International Soc'y for Krishna Consciousness, Inc., 101 S. Ct. 2559 (1981); Niemotko v. Maryland, 340 U. S. 268 (1951); Saia v. New York, 334 U. S. 558 (1948). In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. See Carey v. Brown, 447 U. S. 455, 461, 464-465 (1980).⁷

III

In this case the University claims a compelling

⁷See also Healy v. James, 408 U. S. 169, 184 (1972):

"It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which . . . may justify such restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."

interest in maintaining strict separation of church and State. It derives this interest from the "Establishment Clauses" of both the Federal and Missouri Constitutions.

A

The University first argues that it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause of the Constitution of the United States.⁸ We agree that the University has a compelling interest in complying with its constitutional obligations. But we disagree with its conclusion that an "equal access" policy would be incompatible with this Court's Establishment Clause cases. Those cases hold that a policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the

⁸ Congress shall make no law respecting an establishment of religion . . . U. S. Const., Amend. 1. The Establishment Clause has been made applicable to the States through the Fourteenth Amendment. See Cantwell v. Connecticut, 310 U. S. 296, 303 (1940).

[policy] must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U. S. 602, 612-613 (1971). See also Committee for Public Education v. Nyquist, 413 U. S. 756, 773 (1973).

In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose⁹ and would avoid entanglement with religion.¹⁰ But the District

⁹The University's secular purpose is to provide a forum in which students can exchange ideas. It does not undermine this purpose that some groups will use the forum to engage in religious speech. We do not understand petitioners to argue that a State could--much less that it must--exclude religious speech from the streets or from the parks that it maintains as public forums. Yet the State's purpose remains as secular when the forum is a room within a government building, see City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n, 429 U. S. 167 (1976) (meeting room); Southeastern Promotions, Ltd. v. Conrad, 420 U. S. 546 (1975) (municipal theatre), as when it involves the streets or the parks, see Police Department v. Mosley, 408 U. S. 92 (1972) (outdoor picketing); Hague v. CIO, 307 U. S. 496 (1939) (streets and other public places).

This case is therefore quite different from those in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but not by others. See McCullum v. Board of Education, 333 U. S. 203 (1948). The Establishment Clause does not require, but actually forbids, State hostility toward religion. See Zorach v. Clauson, 343 U. S. 306, 312 (1952).

¹⁰We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship and religious speech." See Chess v. Widmar, *supra*, at 1318. Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an

Footnote continued on next page.

Court concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion.¹¹

The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause.¹²

impossible task in an age where many and various beliefs meet the constitutional definition of religion." O'hair v. Andrus, 613 F.2d 931, 936 (CA DC 1979) (footnote omitted); see L. Tribe, American Constitutional Law §14-6 (1978). There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

¹¹In finding that an "equal access" policy would have the primary effect of advancing religion, the District Court relied primarily on the decision of this Court in Tilton v. Richardson, 403 U. S. 672 (1971). In Tilton this Court upheld the grant of federal financial assistance to sectarian colleges for secular purposes. Although Congress had provided that federally subsidized buildings could not be used for sectarian or religious worship for 20 years, the Court considered this restriction insufficient: "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests the original federal grant will in part have the [constitutionally impermissible] effect of advancing religion." Id., at 683. From this statement the District Court derived the proposition that State funds may not be used to provide or maintain buildings used by religious organizations.

We do not believe that Tilton can be read so broadly. In Tilton the Court was concerned that a sectarian institution might convert federally funded buildings to religious uses or otherwise stamp them with the imprimatur of religion. But nothing in Tilton suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after Tilton have acknowledged the right of religious speakers to use public forums on equal terms with others. See, e.g., Heffron v. International Soc'y for Krishna Consciousness, Inc., 101 S. Ct. 2559 (1981); Saia v. New York, 334 U.S. 558 (1948).

Footnote(s) 12 will appear on following pages.

The University has opened its facilities to student groups, and the question is whether it can now exclude groups because of the content of their speech. See Healy v. James, 408 U. S. 169 (1972). In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to the range of an open forum's likely effects. It is possible--perhaps even foreseeable--that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion. Committee

¹²This case is different from the cases in which religious groups claim that the denial of facilities not available to other groups deprives them of their rights under the Free Exercise Clause. See Brandon v. Board of Educ., 635 F. 2d 971, 975-976 (CA2 1980), cert. pending, No. 80-1396; Sund v. Board of Education, 521 F. Supp. 1263, 1266 (SD N. Y. 1979). Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not--as in Brandon or Sund--rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case. It is for this reason that we have declined petitioners' invitation to couch our discussion in terms of respondents' rights under the Free Exercise Clause.

for Public Education v. Nyquist, 413 U. S. 756, 771 (1973); see, e.g., Roemer v. Board of Public Works, 426 U. S. 736 (1976); Hunt v. McNair, 413 U. S. 734 (1972); McGowan v. Maryland, 366 U. S. 420, 422 (1961).

We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases. Two factors are especially relevant.

First, an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . 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. Chess v. Widmar, supra, at 1317.¹³

Second, the forum is available to a broad class of non-religious as well as religious speakers; there are

¹³University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion. See Tilton v. Richardson, 403 U. S. 672, 685-686 (1971).

over 100 recognized student groups UMKC. The provision of benefits to so broad a spectrum of groups is an important index of secular effect. See, c.g., Wolman v. Walter, 433 U. S. 229, 240-241 (1977); Committee for Public Education v. Nyquist, supra, 413 U. S., at 756, 781-782 & n.38 (1973). If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." Roemer v. Maryland, 426 U. S. 736, 747 (1976) (plurality opinion); quoted in Committee for Public Education v. Regan, 444 U. S. 646, 658 n.6 (1980).¹⁴ At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we therefore agree with the Court of Appeals that the advancement of religion would not be the forum's "primary effect."

B

Arguing that the State of Missouri has gone further

¹⁴This Court has similarly rejected "the recurrent argument that all aid [to parochial schools] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." Hunt v. McNair, 413 U. S. 734, 743 (1973).

than the Federal Constitution in proscribing indirect State support for religion,¹⁵ the University claims a compelling interest in complying with the applicable provisions of the Missouri Constitution.¹⁶

The Missouri courts have not ruled whether a general policy of accommodating student groups, applied equally to those wishing to gather to engage in religious and non-religious speech, would offend the State Constitution. We need not, however, determine how the Missouri courts would decide this issue. It is also unnecessary for us to decide whether, under the Supremacy Clause,¹⁷ a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment. Even if a State's interest were compelling, its regulations would have to protect that interest

¹⁵See, e.g., American United v. Rogers, 538 S.W.2d 711, 720, (Mo.) (en banc), cert. denied, 429 U.S. 1029 (1975) (holding Missouri Constitution requires stricter separation of church and state than does Federal Constitution); Garley v. Board, 163 S.W.2d 608, 613-614 (Mo. 1947) (en banc) (same).

¹⁶See Leubuscher v. Leubuscher, 764 F. Supp. 376 (E.D. Mo. 1973), aff'd, 415 U.S. 88 (1974) (finding State has compelling interest in compliance with its own constitution).

¹⁷U. S. Const., Art. VI, §2.

without unnecessary abridgment of protected rights of speech and association. See, e.g., Carey v. Brown, 447 U. S. 455, 465 (1980); Shelton v. Tucker, 364 U. S. 479, 489 (1960). Measured against this standard, the University's policy of discrimination against religious speech and association fails on grounds of overinclusiveness.

The University regulation challenged in this case applies to "religious teaching" as well as "religious worship." It is therefore substantially overbroad. We can imagine no compelling State interest--which would be cognizable under the Supremacy Clause--in banning all types of religious "teaching" in an otherwise-open forum, including, for example, informal conversational "instruction." As we have noted in the past, "[b]road prophylactic rules in an area of free expression are fatal. Precision of regulation must be the touchstone." Schaumburg v. Citizens for a Better Environment, 444 U. S. 620, 637 (1980), quoting NAACP v. Button, 371 U. S. 415, 438 (1963) (omitting citations).

IV

Our holding in this case in no way undermines the

capacity of the University to establish reasonable time, place, and manner regulations.¹⁸ We also affirm the continuing validity of cases, e.g., Healy v. James, 408 U. S. 169, 188-189 (1972), that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.

The basis for our decision is narrow. Having created a public forum, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that the State should be content-neutrality, and the University is unable to justify this violation under applicable constitutional standards.

For this reason, the decision of the Court of Appeals is,

Affirmed.

¹⁸See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). ("The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations to time, place, and manner that are reasonable.'").