The Burger Court Opinion Writing Database

Widmar v. Vincent

454 U.S. 263 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

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 my view in order to hold your "troops." LP.

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,

Justice Powell

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,

WEB

Justice Powell

Copies to the Conference

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,

Bill

Justice Powell

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

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 recirculation of November 17? At page 12, fourth and third lines from the bottom, would you mind changing "inherently limited" to "limited here"?

Sincerely,

Bill

Justice Powell

Bill Brennan

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,

Justice Powell

Copies to the Conference

cpm

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

From: Justice White

Circulated: 11/5/81

Recirculated: _____

No. 80-689 - Widmar v. Vincent

Justice White, dissenting.

In affirming the decision of the Court of Appeals, the majority rejects petititoners' 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 J. White); 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 Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

0$0689D-5-NOV-81—DICK

From: Justice White

Circulated: _____

Printed

Recirculated: 11/6/81

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 petititoners' 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

Stylistic Changes throughout;
See pp. 3, 4, & 5

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

0$0689D rev. 11/11/81 spw

From: Justice White

Circulated: _____

Recirculated: _____ DEC 198

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

[November ——, 1981]

JUSTICE WHITE, dissenting.

In affirming the decision of the Court of Appeals, the majority rejects petititoners' 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 (1973) (WHITE, J., dissenting); *Lemon* v. *Kurtzman*, 403 U. S. 602, 661 (1971) (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 (1963) (Harlan, J., dissenting). The majority's posi-

Pp. 1,5; Stylistic Changes Throughout

0$0689D rev. 11/20/81 DICK (11/21/81 rev. Rheds. Wilma)

3d
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

[November ——, 1981]

JUSTICE WHITE, dissenting.

In affirming the decision of the Court of Appeals, the majority rejects petititoners' 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 (1973) (WHITE, J., dissenting); *Lemon* v. *Kurtzman*, 403 U. S. 602, 661 (1971) (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.[1] 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

[1] The majority misses the main issue in this case when it states that "our cases have never *required* the state to distinguish between religious and nonreligious speech by private speakers in a public forum." *Supra*, at 8, n. 10 (emphasis added). The issue here is not what the state is required to do, but what it may do.

0$0689D rev. 11/27/81 DICK

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

p.5

4th
~~3rd~~ DRAFT

From: Justice White

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: 30 NOV

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 petititoners' 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 (1973) (WHITE, J., dissenting); *Lemon* v. *Kurtzman*, 403 U. S. 602, 661 (1971) (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.[1] 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

[1] The majority misses the main issue in this case when it states that "our cases have never *required* the state to distinguish between religious and nonreligious speech by private speakers in a public forum." *Supra*, at 8, n. 10 (emphasis added). The issue here is not what the state is required to do, but what it may do.

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1

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

From: Justice White

Circulated: _____

Recirculated: 4 DEC 19

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 WHITE, dissenting.

In affirming the decision of the Court of Appeals, the majority rejects petititoners' 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 (1973) (WHITE, J., dissenting); *Lemon* v. *Kurtzman*, 403 U. S. 602, 661 (1971) (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 (1963) (Harlan, J., dissenting). The majority's posi- omission

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 THURGOOD MARSHALL

November 12, 1981

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

Dear Lewis:

Please join me.

Sincerely,

T.M.

Justice Powell

cc: The Conference

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,

Harry

Justice Powell

cc: The Conference

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.

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.

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,

Harry

Justice Powell

cc: Justice Brennan
Justice O'Connor

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 18, 198

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

Dear Lewis:

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

Sincerely,

Harry

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 18, 1981

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

Dear Lewis:

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

Sincerely,

Harry

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.

0$0689G, 10/31/81, rev. Wilma

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 City[1] 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

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 LEWIS F. POWELL, JR.

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."

Telephoned OK 11/5/81

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,

Lewis

Justice Brennan

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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,

Lewis

Justice O'Connor

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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,

Lewis

Justice Stevens

lfp/ss

cc: The Conference

2, 4, 5, 6, 7, 9,
10, 11, 12

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

Mem. Justice Powell

Circulated: NOV 6 1981

Recirculated:

0$0689G, 11/5/81, rev. DICK

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.

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It is the stated policy of the University of Missouri at Kansas City[1] 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

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

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,

L. Lewis

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 speeech 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 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

1, 4, C, 8, 9, 10, 12, 13

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

Circulated: NOV 17 1981

Recirculated: _____

0$0689G, 11-16-81, rev. Wilma

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.

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Pgs 5, 8, 13

0$0689G, 11-24-81, rev. Drb

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

Circulated: 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]

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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: DEC 2 1981

Recirculated: _____

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 City[1] 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

HAB

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 7, 1981

No. 80-1396, Brandon v. Bd. of Educ. of Guilderland Sch. Dist.

MEMORANDUM TO THE CONFERENCE:

This case was held for No. 80-689, Widmar v. Vincent. In the broadest terms, the issues in the two cases are similar. Both involve claims that a public educational institution must make its facilities available to student religious groups. On closer examination, however, the differences between the cases are substantial.

Widmar upholds the claims of the students, largely on the basis of their claim to exercise free speech rights in a public forum. This case rejects the students' claims, but in a context that is different in at least three respects.

First, the only strong argument advanced in this case involves a Free Exercise claim. Although the school here does of course accommodate some student activities, it has not created a forum generally available for student use. See 635 F.2d. at 978, 980.

Second, the student prayer meetings requested in this case would occur during school hours and therefore would need to be under school supervision under New York law. Id., at 979. This would heighten the appearance of State support or approbation.

Third, this case involves high school, rather than college, students. They are "adolescents," who are more likely to see "the imprimatur" of state approval in the school's provision of facilities. Id., at 978.

In view of these differences, the CA2 decision is not incompatible with Widmar. Moreover, the court reaches its decision--which seems reasonable on the facts--through a mode of analyis very similar to that followed in Widmar. It assumes that the school has a "compelling State interest" in complying with the Establishment Clause. Id., at 978.

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

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 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

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,

Justice Powell

Copies to the Conference

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

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

From: Justice Stevens

Circulated: NOV 25 '81

Recirculated: _____

80-689 - Widmar v. Vincent

JUSTICE STEVENS, concurring in the judgment.

As the Court recognizes, every university must "make academic judgments as to how best to allocate scarce resources," ante, at 13. The Court appears to hold, however, that those judgments must "serve a compelling state interest" whenever they are based, even in part, on the content of speech. Id., at 5-7. This conclusion appears to flow from the Court's suggestion that a student activities program--from which the public may be excluded, id., at n.6--must be managed as though it were a "public forum."[1] In my opinion, the use of the terms "compelling state interest" and "public forum" to analyze the question presented in this case may needlessly undermine the academic freedom of public universities.

Today most major colleges and universities are operated by

[1]As stated by the Court, "[i]n 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." Ante, at 5-6.

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

From: Justice Stevens

Circulated: _____

Recirculated: NOV [illegible]

1st PRINTED 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 STEVENS, concurring in the judgment.

As the Court recognizes, every university must "make academic judgments as to how best to allocate scarce resources," *ante*, at 13. The Court appears to hold, however, that those judgments must "serve a compelling state interest" whenever they are based, even in part, on the content of speech. *Id.*, at 57. This conclusion apparently flows from the Court's suggestion that a student activities program—from which the public may be excluded, *id.*, at n. 6—must be managed as though it were a "public forum."[1] In my opinion, the use of the terms "compelling state interest" and "public forum" to analyze the question presented in this case may needlessly undermine the academic freedom of public universities.

Today most major colleges and universities are operated by public authority. Nevertheless, their facilities are not open to the public in the same way that streets and parks are. University facilities—private or public—are maintained primarily for the benefit of the student body and the faculty. In performing their learning and teaching missions, the man-

[1] As stated by the Court, "[i]n 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." *Ante*, at 5–6.

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

[November ——, 1981]

JUSTICE STEVENS, concurring in the judgment.

As the Court recognizes, every university must "make academic judgments as to how best to allocate scarce resources," *ante*, at 13. The Court appears to hold, however, that those judgments must "serve a compelling state interest" whenever they are based, even in part, on the content of speech. *Id.*, at 5–6. This conclusion apparently flows from the Court's suggestion that a student activities program—from which the public may be excluded, *id.*, at n. 5—must be managed as though it were a "public forum."[1] In my opinion, the use of the terms "compelling state interest" and "public forum" to analyze the question presented in this case may needlessly undermine the academic freedom of public universities.

Today most major colleges and universities are operated by public authority. Nevertheless, their facilities are not open to the public in the same way that streets and parks are. University facilities—private or public—are maintained pri-

[1] As stated by the Court, "[i]n 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." *Ante*, at 5–6. See also *id.*, at n. 20 ("Our holding is limited to the context of a public forum created by the University itself.").

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 ... ."

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

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.

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.

Sincerely,

Sandra

Justice Powell

Copies to 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
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