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NOTES

The Constitutional Rights of College Students to Use State-Owned University Buildings for Religious Services

Evangelical Christianity[1] is increasingly becoming a visible force in American society. It has exerted its influence most recently in the political arena through the lobbying of fundamentalist groups such as the Moral Majority.[2] However, Evangelical Christianity has also made its mark on the college campus through officially recognized, on-campus religious organizations.[3]

In recent years, university officials have questioned the constitutionality of conducting religious services in state-owned university buildings. Some universities have prohibited on-campus religious services, through school regulations. In response, students have challenged these regulations in court—often with success.[4] The campus cases[5] have turned on two issues: 1) Are the school regulations necessary to prevent an unconstitutional establishment of religion? 2) Do

1 "Evangelical" means "of, relating to, or being a religious group emphasizing salvation by faith in the atoning work of Jesus Christ through personal conversion, the authority of Scripture, and the importance of preaching as contrasted with ritual." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 786 (1976).

2 *See, e.g.*, Anderson, *To The Right, March!*, NEWSWEEK, Sept. 14, 1981, at 24-30; Mann & Peterson, *Preachers in Politics: Decisive Force in '80?*, U.S. NEWS & WORLD REP., Sept. 15, 1980, at 24; Mann, *As Religious Right Flexes its Muscles*, U.S. NEWS & WORLD REP., Dec. 29, 1980/Jan. 5, 1981, at 69; Mayer, *A Tide of Born-Again Politics*, NEWSWEEK, Sept. 15, 1980, at 28. In 1978, evangelical activists helped unseat at least two liberal U.S. senators (Dick Clark, Iowa, and Thomas McIntyre, New Hampshire), and helped elect one governor (Fob James, Alabama). Additionally they successfully battled the Equal Rights Amendment in fifteen states, "disrupted" a White House Conference on the Family, "impeded" the most recent Congressional reform of the criminal code, and forced the Federal Communications Commission and the Internal Revenue Service to "back down" on challenges to religious organizations. NEWSWEEK, Sept. 15, 1980, at 29.

3 Inter-Varsity Christian Fellowship, Campus Crusade for Christ, and Cornerstone are among the many religious organizations that meet regularly on college campuses.

4 Dittman v. Western Wash. Univ., No. 79-1189 (W.D. Wash. 1980) (holding for university), *appeal docketed*, No. 80-3120 (9th Cir. Apr. 7, 1980); Chess v. Widmar (*Chess I*), 480 F. Supp. 907 (W.D. Mo. 1979), *rev'd*, 635 F.2d 1310 (8th Cir. 1980) (holding for students), *cert. granted sub nom.* Widmar v. Vincent, 101 S. Ct. 1345 (1981); University of Del. v. Keegan (*Keegan I*), 318 A.2d 135 (Del. Ch. 1974), *rev'd*, 349 A.2d 14 (Del. 1975) (holding for students), *cert. denied*, 424 U.S. 934 (1976).

5 As used in this note, the term "campus cases" means the lower court decisions cited in note 4 *supra*.

the school regulations violate the students' constitutional right to the free exercise of their religion?[6]

The Supreme Court of the United States has not addressed the specific issues raised in the campus cases.[7] Without Supreme Court precedent, courts deciding the campus cases have often used a constitutional balancing test which weighs the students' interest in free exercise of religion against the university's interest in avoiding the establishment of religion.[8] This note analyzes whether that balancing test is appropriate even though both opposing interests have a constitutional basis. Part I reviews the campus cases; Part II analyzes the weaknesses of the balancing test applied in the campus cases; and Part III proposes a new model for determining whether a university has properly regulated religious services in state-owned university buildings.

I. The Campus Cases

Three jurisdictions have analyzed the right of students to use state-owned university buildings for religious services. The earliest decision, *University of Delaware v. Keegan*,[9] involved a lawsuit by the university to enjoin a group of Roman Catholic students and their priests from celebrating mass in a campus building. The university had prohibited religious services in campus buildings in 1971.[10] In

6 *See* note 4 *supra*. *Cf.* Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980) (denying high school students access to classrooms for voluntary communal prayer meetings).

7 School Dist. of Abington Township, 374 U.S. 203 (1963) (compulsory Bible reading in public school), and Engel v. Vitale, 370 U.S. 421 (1962) (compulsory prayer in public school), involved different issues. The challenged statutes in those cases mandated prayer or Bible reading in the schools. The religious activities involved in the campus cases, however, are wholly voluntary. Tilton v. Richardson, 403 U.S. 672 (1971), has been cited for the proposition that state-owned property may not be used for religious services. *See, e.g.*, Chess v. Widmar, 480 F. Supp. at 913-16. In *Tilton*, the Court upheld federal construction grants for private universities but invalidated that portion of the legislation that allowed religious use of the facilities after twenty years. The Court did not want a sectarian college to have exclusive control of a government-financed building. The campus cases, however, involve a temporary religious use of buildings which remain under the public university's control. Chess v. Widmar, 635 F.2d at 1319.

8 The court in *Chess I* stated the test slightly differently. The court weighed the students' free exercise interest against the state's interest in maintaining the separation of church and state. 480 F. Supp. at 917. The Second Circuit used this statement of the test in the high school context in Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), in which the court balanced students' free exercise rights against the school's concern for nonestablishment, denying students access to classrooms for voluntary communal prayer meetings.

9 318 A.2d 135 (Del. Ch. 1974), *rev'd*, 349 A.2d 14 (Del. 1975), *cert. denied*, 424 U.S. 934 (1976).

10 A university directive issued October 1, 1971, "University-Campus Ministry Position Paper," stated: "Recognized [religious] groups may upon proper registration use space in the

1973, at the request of certain students, Fr. William F. Keegan began celebrating masses in the common room of a university dormitory without obtaining university authorization. After several unsuccessful attempts to halt these masses, the university sought to enjoin them.[11] The defendants counter-claimed, seeking an injunction against any interference with their religious services. The chancery court held for the students, temporarily enjoining the university from further interference.[12] At a later hearing for a permanent injunction, the chancery court dissolved its prior order and enjoined the students from continuing the religious services.[13] The court reasoned that although use of the common room for nondiscriminatory religious services did not establish religion, the students had failed to demonstrate a substantial infringement on their free exercise rights.[14]

On appeal, the Supreme Court of Delaware held for the students and remanded the case to the chancery court.[15] The state supreme court agreed with the chancery court that allowing equal access to university buildings for student religious services did not necessarily establish religion.[16] The court stated that a permissive policy regarding the use of university buildings for religious services would: 1) fulfill the secular purpose of allowing students an opportunity to discuss ideas, 2) result in neither advancing nor inhibiting religion, and 3) avoid excessive entanglement of government and religion.[17] The court stated further that any benefit to religion was purely incidental, thus reflecting a neutral accomodation of religion. Next, the court determined that the students' free exercise rights were burdened by the university's religious services ban. The court found that directly limiting the students' right to worship on campus violated the constitution.[18] The court remanded the case, however, to resolve whether the burden on the students was justified by a compel-

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Student Center and other buildings for business meetings and social programs but not for worship services." *Id.* at 136.

11 *Id.* at 137.

12 *Id.*

13 *Id.* at 142.

14 *Id.* at 140-42.

15 349 A.2d at 19.

16 *Id.* at 16.

17 *Id.* The court applied the three-part test laid out by the United States Supreme Court in Lemon v. Kurtzman, 403 U.S. 602 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. . . .; finally, the statute must not foster 'an excessive government entanglement with religion.' " *Id.* at 612-13 (citation omitted).

18 349 A.2d at 17-19.

ling state interest.[19]

The United States District Court for the Western District of Missouri faced a fact situation similar to *Keegan*'s in *Chess v. Widmar*.[20] In *Chess*, eleven University of Missouri-Kansas City students, members of a recognized student religious organization, challenged university regulations prohibiting religious services in the student union.[21] The court, finding for the university, rejected the *Keegan* reasoning and held that the religious services ban was required by the establishment clause.[22] In addressing the students' free exercise argument, the court stated that the university regulations did not infringe upon a "deep religious conviction" of the students.[23] The court stated further that even if there was such a burden the state's interest in maintaining the separation of church and state should be balanced against the students' claims to the free exercise of religion. The court found that the university's interest "overbalanced" the students' interest.[24] The court then rejected the students' argument that when free exercise rights and establishment concerns directly conflict, the free exercise rights should prevail.[25] The court said that the clauses should be read together, with neither clause being subordinate to the other.[26] Finally, the court rejected the students' arguments that the regulations were a prior restraint on religious speech,[27] that the regulations denied the plaintiffs equal protection of the law,[28] and that the regulations were vague.[29]

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19 *Id.* at 19. The state had not attempted to show during the trial a compelling state interest because the trial court had not addressed that issue. There have been no further reported proceedings following the remand.

20 480 F. Supp. 907 (W.D. Mo. 1979), *rev'd*, 635 F.2d 1310 (8th Cir. 1980), *cert. granted sub nom.* Widmar v. Vincent, 101 S. Ct. 1345 (1981).

21 The regulations provided in 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, commonly referred to as the student union or center or commons 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.

480 F. Supp. at 909.

22 *Id.* at 916. The court found that Tilton v. Richardson, 403 U.S. 672 (1972), required the worship ban. *See* note 7 *supra*.

23 480 F. Supp. at 917.

24 *Id.*

25 *Id.*

26 *Id.* at 917-18.

27 *Id.* at 918.

28 *Id.* at 919.

The United States Court of Appeals for the Eighth Circuit reversed the *Chess* district court in August 1980.[30] After acknowledging the students' constitutional rights of freedom of religious expression and equal access to a public forum, the court held that an equal access policy would not establish religion[31] and that the university regulations inhibited religion in contravention of the establishment clause.[32] Relying on *O'Hair v. Andrus*,[33] the court found that allowing the use of buildings was a neutral accomodation of religion.[34] The court invalidated the university regulations because they burdened the students' free exercise rights, and because the neutral accomodation resulting from the regulations' invalidation would not constitute an establishment of religion.[35]

Dittman v. Western Washington University[36] was the third campus case to be tried. In *Dittman*, students challenged a university regulation restricting, but not prohibiting, the use of campus buildings by student groups for religious services.[37] Relying on the Washington state constitution and the district court's opinion in *Chess*, the United States District Court for the Western District of Washington held that an equal access policy would violate the establishment clause.[38] In evaluating the students' free exercise claims, the court weighed the state's interest in avoiding the establishment of religion against the minimal restraints on the students' rights, and found that the state's interest should be protected.[39]

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29 *Id.* at 919-20.

30 635 F.2d 1310. This is the most recent opinion on the use of campus buildings for religious services.

31 *Id.* at 1317.

32 *Id.* at 1320.

33 613 F.2d 931 (D.C. Cir. 1979) (rejecting a challenge to the scheduled use of the National Mall for the celebration of Mass by Pope John Paul II).

34 635 F.2d at 1317.

35 *Id.* at 1320.

36 No. 79-1189 (W.D. Wash. 1980), *appeal docketed*, No. 80-3120 (9th Cir. Apr. 7, 1980).

37 The regulation stated:

> The policy to which plaintiff's object restricts the use of university classrooms and auditoriums for religious worship, exercise, or instruction to two times per academic quarter. It requires further that fair rental value be paid for each such use. Students and student groups of the University are allowed to use the facilities of the University for non-religious activities on a 'first-come, first-served' basis with no restrictions upon the number of times that the facilities are used for those purposes. No fee is charged for the use of University facilities for non-religious purposes.

Id., slip op. at 1.

38 *Id.* at 5.

39 *Id.* at 5-6.

II. The Religion Clause Analysis

When courts use the religion clauses to analyze the validity of student use of university buildings for religious services, they focus on either the establishment clause or the free exercise clause. Most of the courts have tended to examine the campus cases primarily from the establishment of religion standpoint. By considering first whether the students' activities established religion, the courts appear to have reached their ultimate conclusions before analyzing the students' allegations of free exercise violations. In *Keegan I*,[40] *Chess I*,[41] and *Dittman*,[42] the courts discussed the establishment clause concerns extensively before addressing the violation of free exercise rights, which was the gravaman of the students' complaints. Instead, the courts should have focused on the students' free exercise rights and burdens, and discussed the establishment questions only as they related to the free exercise claims.[43]

A. *Free Exercise is the Key Issue*

The campus cases center on challenges of university regulations in which the challengers have the initial burden of establishing an unconstitutional infringement on their rights.[44] The regulation's proponents must then counter with a sufficient justification for the regulation.[45] The logical starting point, therefore, is to analyze the regulation and to determine the extent to which it unconstitutionally burdens the challengers.

The university regulations disputed in the campus cases stated that: "No worship services are allowed in campus buildings."[46] On

40 318 A.2d at 138-40.

41 480 F. Supp. at 914-17.

42 Slip op. at 3-6.

43 The court in *Keegan II* recognized the significance of phrasing the issue from the university's viewpoint (no establishment) or from the individual student's viewpoint (free exercise). The court viewed the issue as one of religious liberty and selected the students' formulation of the issue. 349 A.2d at 17. Professor Kurland has also noted the significance of labeling a case either "free exercise" or "nonestablishment." He claims that the exemption granted on free exercise grounds in Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish children exempted from state public education law), would fail the three-part nonestablishment test of Lemon v. Kurtzman, 403 U.S. 602 (1971). Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 17 (1978).

44 *See, e.g.*, Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946) (rejecting due process challenge to New York Multiple Dwelling Law); Detroit Int'l Bridge Co. v. Corporation Tax Appeal Bd., 287 U.S. 295 (1932) (rejecting commerce clause challenge to state franchise tax).

45 *See, e.g.*, Louis K. Ligget Co. v. Lee, 288 U.S. 517 (1933) (upholding state license taxes against equal protection and commerce clause attacks).

46 *But see* note 37 *supra*. The regulation in the *Dittman* case restricts, but does not pro-

their face, the regulations directly burden the practice of religion on campus by prohibiting crucial religious conduct, the communal worship of God. The university regulations imposed a more direct burden on religion than that created by the statutes declared unconstitutional in *Sherbert v. Verner*[47] and *Wisconsin v. Yoder*,[48] two major free exercise cases. The statute in *Sherbert* stated that in order to be eligible to collect unemployment compensation, all members of the work force, including the petitioner, a Seventh-Day Adventist, had to be willing to accept "suitable work," including work on Saturdays.[49] The Court held that since the petitioner's religion forbade her from working on Saturday, the unemployment compensation statute as applied to her indirectly violated her right to exercise her religion.[50] In *Yoder*, an Amish man challenged his state's compulsory education statute,[51] claiming that it indirectly burdened his right to free exercise by requiring him to send his children to school for more years than his religion allowed. Despite the statute's legitimate goals, the Court held that it violated Yoder's right to practice his religion.[52] In the campus cases, by contrast, the university regulations are aimed directly at the religious conduct. Since the regulation's unconstitutional burden is not merely incidental to the pursuit of some other governmental interest, the campus cases present much stronger facts for a free exercise violation.

The students' goal in conducting religious services adds support to the contention that their suit should be viewed primarily as a free exercise case and not as an establishment case. The students are not requesting "special" treatment on account of their religion; certainly

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hibit, on-campus group worship. Such a regulation still burdens the students' free exercise rights, as that court noted. Slip op. at 6.

47 374 U.S. 398 (1963).

48 406 U.S. 205 (1972).

49 To be eligible for benefits a claimant must be "able to work" and "available for work" and a claimant is ineligible for benefits "[i]f . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer . . . ." S.C. CODE §§ 68-1 to -404 (1952).

50 374 U.S. at 403-06.

51 The statute provided:

> Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age.

WIS. STAT. § 118.15 (1969).

52 406 U.S. at 218.

that would raise establishment questions.[53] Instead, the students request only that they be given the same access to campus buildings enjoyed by other student groups. In this respect, their complaint raises less establishment issues than did the complaints in *Sherbert* and *Yoder*. In the latter two cases, the individuals asked to be exempted from the duties imposed generally by the statute because of their religion. In granting religious exemptions in those cases, the Court conferred benefits based solely on religion—a clear establishment of religion. In the campus cases, however, the students' free exercise claim presents less of an establishment problem. If the students are allowed to have religious services on campus, they receive nothing more than access to campus facilities equal to that which other student groups receive.[54]

When viewed as requests not to be excluded because of religion, the campus cases are quite similar to *McDaniel v. Paty*,[55] a Supreme Court free exercise decision. The petitioner, an ordained minister, challenged a Tennessee statute forbidding clergy from being delegates to the state constitutional convention.[56] The essence of the petitioner's claim was that he should be treated equally and not be burdened solely because he practiced his religion as a clergyman. A plurality of the Court[57] agreed that Tennessee's discriminatory treatment based on religious practice violated the free exercise clause.[58] The implication of *McDaniel*, that a person cannot be selected for

53 When religious groups have sought "special" treatment under the law, their requests have been denied under the establishment clause. In McCollum v. Board of Educ., 333 U.S. 203 (1948), the Court found unconstitutional a program in which clergy came into public schools to teach religion to interested students. In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Court found unconstitutional state statutes providing salary supplements to non-public school teachers, the great majority of whom taught at Catholic schools.

54 This statement implies that the university should not distinguish students' access rights based on the content of students' activities. *See* text accompanying notes 102 to 114 *infra*.

55 435 U.S. 618 (1978).

56 In its first Constitution, in 1796, Tennessee disqualified ministers from serving as legislators. That disqualifying provision has continued unchanged since its adoption; it is now Art. 9, § 1 of the State Constitution. The state legislature applied this provision to candidates for delegate to the State's 1977 limited constitutional convention when it enacted ch. 848, § 4, of 1976 Tenn. Publ. Acts: "Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention."

435 U.S. at 621.

57 Chief Justice Burger delivered the opinion in which Justices Powell, Rehnquist, and Stevens joined. Justice Brennan filed an opinion concurring in judgment, in which Justice Marshall joined. Justices Stewart and White filed opinions concurring in the judgment. Justice Blackmun did not participate in the decision.

58 435 U.S. at 629.

unfavorable treatment based on his religious practices, is also the core of the students' complaints in the campus cases.

B. *Failure of the Free Exercise Balancing Test*

When the courts hearing the campus cases reached the students' free exercise claims, they often proceeded to a constitutional balancing test. After the court determined that the students had a constitutional right to the free exercise of their religion and that the university's regulations burdened that right, the court inquired whether the state university had a compelling interest justifying that burden.[59] The courts balanced free exercise against nonestablishment in *Chess I*[60] and *Dittman*,[61] and in those cases, the courts held that the state's interest in avoiding an establishment of religion outweighed the students' interest in the free exercise of religion.[62]

Although the balancing test is appropriate in many free exercise cases, it is not viable in cases such as the campus cases, in which the final balancing is between the coordinate constitutional guarantees of free exercise and nonestablishment, neither of which can be subordinated to the other.[63] A review of the more appropriate uses of the balancing test indicates that the test does not satisfactorily resolve the issues when the asserted state interest is in the nonestablishment of religion.

The Court has balanced state's interests against individuals' interests since the turn of the century. In *Jacobson v. Massachusetts*,[64] the Court found that the state's interest in public health and safety was sufficient to overcome a claim of religious liberty, and it upheld a compulsory vaccination statute. Later state cases[65] have cited *Jacobson* for the constitutionality of health and safety measures. In *Cantwell v. Connecticut*,[66] the Court stated that the state's concern for public peace and order would justify restraints on religiously-moti-

59 *See Keegan II*, 349 A.2d at 16, for the clearest statement of the test.

60 480 F. Supp. at 917. *See* text accompanying note 24 *supra*.

61 *See* text accompanying note 41 *supra*.

62 *Accord*, Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980) (application of the balancing test showed that the state's interest in nonestablishment of religion outweighed the students' free exercise rights in having a voluntary group prayer meeting at a public high school).

63 *See* text accompanying notes 95 to 100 *infra*.

64 197 U.S. 11 (1905) (decided before the religion clauses were applied to the states).

65 *E.g.*, Cude v. State, 237 Ark. 927, 377 S.W.2d 816 (1964) (compulsory vaccination of school children); Kirk v. Commonwealth, 186 Va. 839, 44 S.E.2d 409 (1947) (snake handling by religious group not permitted).

66 310 U.S. 296 (1940).

vated breaches of the peace. Similarly, in *Reynolds v. United States*,[67] the Court held that the state's interest in enforcing public morality took priority over the religiously-motivated practice of polygamy. More recently, in *Johnson v. Robison*,[68] the Court rejected a conscientious objector's challenge of a statute denying veteran benefits to civilian conscientious objectors, while granting them to active veterans. The Court held that the state's interest in enhancing military service and aiding the active-duty veterans' readjustment to civilian life through veterans' educational benefits justified the burden on the conscientious objector's free exercise rights.[69]

A variety of state interests have been weighed against religious liberty, and in these cases the Court has subordinated the individual interests to those of the state. Not until the 1963 case of *Sherbert v. Verner*,[70] and later with *Wisconsin v. Yoder*[71] in 1972, did the individual's free exercise right receive the recognition it now receives.

In *Sherbert*, the Court used the balancing test in evaluating Ms. Sherbert's free exercise claim. The Court found that the denial of benefits burdened Ms. Sherbert's constitutional religious liberty. The Court also found that Ms. Sherbert's religious rights were significantly burdened because the statute forced her to choose between her religious beliefs and government benefits.[72] The Court stated that "if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[73]

Finally the Court weighed the state's interest in not granting a religious exemption against Ms. Sherbert's constitutional right.[74] From the outset, the state's interest had to meet a stringent test: "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice [to justify a substantial infringe-

67 98 U.S. 145 (1878).

68 415 U.S. 361 (1974).

69 *Id.* at 385.

70 374 U.S. 398 (1963). The departure from a free exercise-free speech standard first occurred with Torcaso v. Watkins, 367 U.S. 488 (1961), in which the Court invalidated a state constitutional provision requiring a declaration of belief in God as a requirement for taking public office. This discussion begins with *Sherbert*, however, because it was the first to use the balancing test.

71 406 U.S. 205 (1972).

72 374 U.S. at 406.

73 *Id.* at 404 (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

74 The Court appropriately distinguished the state's interest in not granting an exemption to the statute from the state's interest in passing the statute in the first place. Only the interest in not granting the exemption is relevant in the balancing test used here.

ment of religious liberty]; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' "[75] At trial, the state had introduced no evidence of any "strong countervailing interest."[76] Nevertheless, on appeal, the Court dismissed the goal of preventing fraudulent claims based on feigned objections to Saturday work as a possible state interest. The resulting administrative efficiency, the Court reasoned, was not substantial enough to justify the burden on free exercise.[77]

In *Yoder*,[78] the Court balanced a more compelling governmental interest against free exercise. An Amish parent, who believed a high school education conflicted with the Amish religion and lifestyle, wanted his children exempted on religious grounds from formal education to age sixteen. The Court once again applied the balancing test in its free exercise analysis:

> [I]n order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate belief, it must appear that the State does not deny the free exercise of religious belief by its request or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.[79]

The state argued that compulsory education developed intelligent and self-sufficient members of society. However, the Court held that this state interest was not sufficiently compelling when weighed against the resulting interference with religious freedom. The Court required a "more particularized showing" to justify such interference.[80]

The language from *Sherbert* and *Yoder* illustrates how the Court balances the burden on free exercise of religion against any compelling state interest. As shown by these cases, the modern trend has been to use this test to find that the individual interest in religious exercise is greater than the asserted state interest.

The problems inherent in applying the balancing test to the campus cases also become more apparent when that test's results are compared with those of its theoretical predecessor, the equal protec-

75 374 U.S. at 406 (citation omitted) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

76 *Id.* at 407.

77 *Id.*

78 406 U.S 205 (1972).

79 *Id.* at 214.

80 *Id.* at 227.

tion strict scrutiny test. The equal protection doctrine was developed in cases challenging legislative classifications.[81] In most statutory classification cases, the Court determines whether the group subject to the statute is a rationally selected group in light of the statute's purposes.[82] However, in cases involving a statute which singles out classes that have been historically subject to unfair treatment or where the statute infringes upon "fundamental interests," the Court has applied the more rigid strict scrutiny test.[83] The Court has required the states to show a "compelling state interest" to justify any statute subject to the strict scrutiny test.

The strict scrutiny test presumes a statute's unconstitutionality.[84] Few statutes survive the test because few state interests are great enough to outweigh the significant individual constitutional rights at stake.[85] Chief Justice Warren Burger has noted the formidable barrier imposed by the strict scrutiny test: "So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection."[86] While the Chief Justice's statement has not proven completely accurate,[87] the test operates more as a conclusion than as a test of constitutionality. The issue in the strict scrutiny equal protection cases is whether a fundamental interest is involved. If such interest is involved, the state invariably loses.

In the campus cases, application of the balancing test resulted in the state invariably winning,[88] a result opposite to that which the equal protection strict scrutiny analysis would indicate.[89] Also, the presumption of unconstitutionality present in the equal protection cases is not found in the campus cases.[90]

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81 *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

82 *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1000-02 (1978).

83 Justice Stone first stated the strict scrutiny test in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

84 *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (striking statute denying aliens welfare benefits); Loving v. Virginia, 388 U.S. 1 (1967) (striking race miscegenation statute).

85 There are few cases which have strictly scrutinized and upheld statutes impairing fundamental rights. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (upholding federal ceiling on contributions to politics); Burns v. Fortson, 410 U.S. 686 (1973) (per curiam) (upholding state's judgment that 50-day durational voter requirement was necessary to promote state's interest in accurate voter lists).

86 Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (standard applied to durational residence requirements for voting).

87 *See* note 85 *supra*.

88 *See* the lower court opinions in note 4 *supra*.

89 *See* text accompanying notes 84-86 *supra*.

90 *See* text accompanying note 84 *supra*.

The explanation for this anomaly lies in the unique character of the state's interest asserted in the campus cases. In those cases, the state asserted a countervailing constitutional interest in avoiding an establishment of religion. In certain similar cases,[91] states had claimed interests in the public welfare or in efficient administration, but the state's interest had not previously risen to a constitutional stature.[92] The campus cases thus presented a face-to-face confrontation between two apparently coordinate constitutional rights: free exercise and nonestablishment.

In weighing these two interests against one another, either they must be treated as coordinate interests, or one must be treated as subordinate to the other. Unfortunately, neither of these alternatives is acceptable. Under the first, the conflict between the students' rights and the university's rights remains unresolved. Although the second alternative may have greater appeal, it too presents a specious solution. Some commentators have argued for the second alternative by interpreting Supreme Court decisions to hold that nonestablishment is subordinate to free exercise.[93] The Court, however, has not explicitly ruled on the point.[94] Language in *Wisconsin v. Yoder* comes close to suggesting this order of priority,[95] but *Yoder* did not involve a direct confrontation between the two religion clauses. The asserted state interest was the furthering of public education, a nonconstitutional and secular state interest.[96]

McDaniel v. Paty[97] addresses the issue of priority more directly. In *McDaniel*, a clergyman challenged a Tennessee statute forbidding the election of "Ministers of the Gospel" as delegates to the state's constitutional convention. Although Tennessee asserted some interest in preventing the establishment of religion, a plurality of the

91 *See* text accompanying notes 81 to 83 *supra*.

92 In McDaniel v. Paty, 435 U.S. 618 (1978), the state's interest nearly reached constitutional stature, but the state never succeeded in demonstrating the establishment clause dangers of clergy participation in the political process. *Id.* at 628.

93 *See, e.g.*, Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part One: The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381 (1967); Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115 (1973).

94 The Supreme Court has granted certiorari on the *Chess* case, 49 U.S.L.W. 3596 (1981). One issue the Court may consider is whether free exercise takes precedence over the establishment clause. *Id.*

95 406 U.S. 205 (1972). In dissent Justice Douglas wrote: "What we do today . . . opens the way to give organized religion a broader base than it has ever enjoyed." 406 U.S. at 247 (Douglas, J., dissenting in part). He refused to concur in what he viewed as the elevation of free exercise above other first amendment freedoms.

96 *Id.* at 221-25.

97 *See* note 92 *supra*.

Court refused to use this interest in any balancing test: "[t]here is no occasion to inquire whether promoting such an interest is a permissible legislative goal . . . for Tennessee has failed to demonstrate that its views of the dangers of clergy participation in the political process have not lost whatever validity they may once have enjoyed."[98] Thus, the Court refused this opportunity to clarify the relationship between free exercise and nonestablishment. Courts should read the silence of the Court as a reluctance to subordinate one clause to the other and should similarly refrain from subordinating one clause to the other.

III. The Broader Analysis of Constitutional Rights

Concluding that no balancing can occur between the two religion clauses does not settle the dispute in the campus cases. The inability to reconcile this dispute stems from too narrow an understanding of the issues. The campus cases are more than religion clause cases. Unlike more common free exercise cases, the campus cases also involve constitutional rights other than free exercise that should be considered in any test of constitutional validity.

While the religion clause analysis focuses on the religious content of the student's speech, the campus cases can be analyzed more clearly in terms of the students' acts of speech and association, irrespective of any religious content.[99] Although religion cases are not commonly analyzed in terms of free speech and the freedom to associate, it may be necessary to do so in cases such as the campus cases, where a religion clause analysis culminates in a dead lock between the two religion clauses.

A. *Freedom of Speech*

1. Nature of the Right

The first amendment prohibits the government from passing any law abridging the freedom of speech.[100] The government can violate this prohibition in two distinct ways.[101] First, the government

98 435 U.S. at 628.

99 This type of analysis was prevalent during the 1940s and 1950s, when the Court struck statutes limiting religious expression on free speech grounds. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940) (reversing convictions of several Jehovah's Witnesses for soliciting funds without a license because they were engaged in the distribution of religious materials); Kunz v. New York, 340 U.S. 290 (1951) (invalidating discretionary public meeting licensing).

100 "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I.

101 *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 580-82 (1978).

may affect the speech's content directly by penalizing a speaker because of what he has said. This form of abridgment occurs must commonly in cases where a speaker has criticized the government.[102] Second, the government may indirectly abridge the right to speak freely while regulating some other function. An ordinance restricting the distribution of leaflets in order to prevent litter is an example of the second abridgement form.[103] While it is appropriate for the government to control litter, it must avoid any undue burdens on speech caused by such regulation.

Distinguishing regulations aimed at content from those aimed at other governmental ends has constitutional significance in evaluating the regulations. If a regulation's prohibition is unrelated to the communication's content, then reasonable time, place, and manner restrictions may be constitutional.[104] These restrictions are weighed against the burden on free speech in a balancing process.[105] The content of the speech being restricted is never evaluated in the balancing process.[106] Thus, when the free expression burden resulting from a ban on noisy demonstrations near a school during school hours was weighed against the legitimate state interest in having students taught in relative quiet, the demonstrators' message was never examined.[107]

If a regulation is aimed at a communication's content, however, the regulation is presumed unconstitutional. This principle was established in *Police Department of Chicago v. Mosley*,[108] where the Court said that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . ."[109] Any regulation of speech content is unconstitutional except when the speech is directed to "inciting or producing imminent lawless action and is likely to incite or produce such action,"[110] when the expression is a defamatory falsehood,[111] or when the message is obscene.[112] Un-

102 *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967) (state cannot bar individuals from employment in schools merely because the individual is a member of a "subversive" organization).

103 *See, e.g.*, Schneider v. State, 308 U.S. 147 (1939).

104 Poutos v. New Hampshire, 345 U.S. 395, 398 (1953); Kunz v. New York, 340 U.S. 290, 293-94 (1951); Kovacs v. Cooper, 336 U.S. 77 (1949).

105 *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 682-83 (1978).

106 Exceptions to this rule are discussed in text accompanying notes 110-12.

107 Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding ordinance).

108 408 U.S. 92 (1972).

109 *Id.* at 95.

110 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

111 Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

less the regulated speech falls into one of these three categories, the government has unconstitutionally abridged free speech by regulating its content. No balancing of interests is necessary, since the government can have no legitimate justification for abridging speech content.

2. The Doctrine of Prior Restraint

When the campus cases are viewed as free speech cases, the university regulations are unconstitutionally aimed at the content of religiously worshipful communications.[113] The regulations function as prior restraints on speech by prohibiting all worshipful communication from ever occurring.

Certain litigants[114] and commentators[115] have focused on the prior restraint of speech inherent in the university regulations in arguing that the regulations should be invalidated. This argument misconstrues the proper use of the prior restraint doctrine. When a party complains of a prior restraint, the issue is one of form, not of substance.[116] The prior restraint objection challenges the manner of the restraint, but does not address the propriety of the restrained speech. When a prior restraint is invalidated, the court nullifies the procedure used to restrain speech; it does not foreclose the possibility that some other means of restraint might be constitutional.[117] The prior restraint doctrine reflects a preference for punishing those who abuse the right of speech after they break the law, rather than restraining their speech in anticipation of such a violation.[118]

The prior restraint doctrine is applied when the restrained

112 Miller v. California, 413 U.S. 1 (1973); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476, 485 (1957).

113 The regulations do not prohibit communication about religious topics; however, they do forbid religious communications in the context of worship. Thus the regulation unconstitutionally singles out the worshipful content of the religious communication.

114 Dittman v. Western Wash. Univ., No. 79-1189, slip op. at 8 (W.D. Wash. filed Feb. 27, 1980), *appeal docketed*, No. 80-3120 (9th Cir. Apr. 7, 1980); Chess v. Widmar, 480 F. Supp. 907, 918 (W.D. Mo. 1979), *rev'd*, 635 F.2d 1310 (8th Cir. 1980), *cert. granted sub nom.* Widmar v. Vincent, 101 S. Ct. 1345 (1981).

115 Rice, *Conscientious Objection to Public Education: The Grievance and the Remedies*, 1978 BRIG. YOUNG L. REV. 847; Toms & Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 EMORY L.J. 3, 31-34 (1978).

116 Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955).

117 Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation*, 51 NOTRE DAME LAW. 898, 900 (1976).

118 "[A] free society prefers to punish the few who abuse rights of speech *after* they break the law rather than to throttle them and all others beforehand." Southeastern Promoters, Ltd. v. Conrad, 420 U.S. 546, 559 (1975).

speech is, at least arguably, within the protection of the first amendment.[119] The prior restraint doctrine is most useful when it is uncertain whether the restrained speech is protected. When clearly protected speech is restrained, the prior restraint doctrine is unnecessary; the better strategy in such a case is to attack directly the unconstitutional infringement.[120] Since the restraint on the students in the campus cases clearly burdens protected speech, the doctrine of prior restraint is unnecessary. The students' most promising line of attack is to assert their right to express themselves free from religious content regulations.

3. The Public Forum Doctrine

It is ironic that the thrust of the campus cases is the regulation of student worship in the college campus, the place traditionally described as a "marketplace of ideas."[121] The college campus is a place for thought, a forum for the free exchange of ideas. The student union building, in particular, is a public forum, open to all student groups.[122] Although sketched in earlier cases,[123] the Supreme Court expressed the public forum doctrine most concisely in *Police Department v. Mosely*.[124] In invalidating an ordinance that distinguished expressive activity based on content, the Court wrote:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. 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.[125]

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119 Murphy, *supra* note 117, at 900.

120 *Id.*

121 Chess v. Widmar, 635 F.2d 1310, 1318-19 (8th Cir. 1980); Healy v. James, 408 U.S. 169, 180 (1972).

122 Chess v. Widmar, 635 F.2d at 1318.

123 Cox v. Louisiana, 379 U.S. 559 (1965); Niemotko v. Maryland, 340 U.S. 268 (1951); Fowler v. Rhode Island, 345 U.S. 67 (1953). *See also* Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 29-30.

124 408 U.S. 92 (1972).

125 *Id.* at 96 (citation omitted).

Just as the public streets and sidewalks have historically been treated as a forum for the exchange of ideas by all, so too, public university campuses have gained a similar reputation as a forum for free expression.[126] Thus expression on the campus should be afforded the same protection as expression on public streets.

B. *Freedom of Association*

1. Nature of the Right

In addition to their express constitutional right to freedom of speech, students also have a constitutional right to freedom of association implicit in the first amendment.[127] One commentator has described the freedom of association right as shorthand for the rights of free speech and petition as exercised by individuals in groups.[128] Political expression and the right of assembly are at the center of the freedom of association right.[129] In the first case to present the doctrine clearly, *NAACP v. Alabama ex rel. Patterson*,[130] a political action group was found to have the right of freedom of association. The Court cited the freedom of association to bar state officials from obtaining a list of NAACP members in an investigation of communist influence. The Court stated:

> It is beyond dispute that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of "liberty" assured by the Due Process Clause of the Fifth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, *religious* or cultural matters. . . .[131]

The Court recognized that a compelled disclosure of an individual's affiliation with a group abridged that individual's freedom of association.[132]

Although the freedom of association right developed in the context of political speech, it has been more broadly applied.[133] The key

126 *See* text accompanying notes 123-124 *supra*.

127 *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 701-03 (1978).

128 Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1 (1977).

129 The first amendment to the United States Constitution provides in part: "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

130 357 U.S. 449 (1958).

131 *Id.* at 460-61 (citations omitted) (emphasis added).

132 *Id.* at 462.

133 *See* Wilson & Shannon, *Homosexual Organizations and The Right of Association*, 30 HASTINGS L.J. 1029 (1979).

concept remains, however, that of expressing ideas—of whatever sort—through a group. In *Griswold v. Connecticut*,[134] Justice Douglas wrote:

> The right of "association," like the right of belief, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion. . . .[135]

The kinds of philosophies protected, Justice Douglas wrote, include "forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members."[136]

2. Applied to Student College Groups

Freedom of association has been a determinative right in a number of cases involving student groups on university campuses. In *Healy v. James*,[137] the Supreme Court overturned a university's ban on the formation of a campus chapter of Students for a Democratic Society. Nonrecognition of the group had prevented them from using campus facilities for their meetings. The lack of meeting facilities, coupled with the lack of access to the school newspaper and bulletin boards, burdened their freedom of association rights.[138]

The university president had denied recognition to the SDS chapter because he feared a close philosophical alliance with the national SDS organization.[139] He sought to abridge freedom of association rights because of the content of the SDS's ideas. The Court rejected the university's argument, noting that no evidence of "imminent lawless acts" had been presented.[140] *Healy* stands for the proposition that no abridgement of freedom of association rights will be tolerated if the only competing state interest is the state's opposition to the content of the speech.

Two federal appellate courts have recognized freedom of association rights on university campuses for members of homosexual orga-

134 381 U.S. 479 (1965) (holding unconstitutional a state statute prohibiting the sale of birth control devices).

135 *Id.* at 483.

136 *Id.*

137 408 U.S. 169 (1972).

138 *Id.* at 181.

139 *Id.* at 174 n.4.

140 *Id.* at 188-89.

nizations. *Gay Students Organization v. Bonner*[141] involved a university's refusal to let the Gay Students Organization have social functions on campus. The First Circuit recognized the importance of social events in promoting discussion and held the university had substantially abridged the students' associational rights.[142] In *Gay Lib v. University of Missouri*,[143] the Eighth Circuit reversed a decision upholding the university's denial of a meeting place for a homosexual discussion group; the decision was predicated on the group's freedom of association right.[144]

3. Freedom of Association for Worshiping on Campus

Recent case law thus supports a finding that college students have a constitutional right to freedom of association. A university can violate this associational right through a ban on on-campus worship. A chief purpose of the religious services is to allow students to share their religious beliefs and ideas.[145] The university regulations seek to stop this central activity.[146] By interfering with the group's central activity, the university significantly frustrates the group's purposes and infringes upon its members' freedom of association rights.

IV. Conclusion: A New Model for the Balancing Test

The balancing test cannot resolve the tension between free exercise and non-establishment in the campus cases; it requires modification. The courts should view the issues presented in the campus cases from a broader perspective by considering all of the students' relevant constitutional rights. Those rights include freedom of speech and freedom of association, in addition to the freedom of religious exercise.

The university's interest in prohibiting on-campus worship is based on the possible establishment of religion which may result.

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141 509 F.2d 652 (1st Cir. 1974).

142 *Id.* at 659-60.

143 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978).

144 558 F.2d 848, 853-56.

145 One group, Cornerstone, listed its activities as:

> 1. The offering of prayer; 2. The singing of hymns in praise and thanksgiving; 3. The public reading of scripture; 4. The sharing of personal views and experiencs (in relation to God) by various persons; 5. An exposition of, and commentary on, passages of the Bible by one or more persons for the purpose of teaching practical biblical principles; and 6. An invitation to the interested to meet for a personal discussion.

Chess v. Widmar, 480 F. Supp. 907, 910 (W.D. Mo. 1979).

146 *See* notes 10, 21 & 37 *supra*.

The *Chess II* decision resolved this claimed state interest by arguing that a policy allowing worship does not establish religion, but only neutrally accomodates religion.[147] If the *Chess II* conclusion is justified, the university is left with nothing on its side of the balance.

Other courts, however, may not be convinced by the *Chess II* court's reasoning.[148] Thus, if there is basis for the university's claimed interest, the students' interests will still outweigh the university's. This result follows from the assumption that all first amendment constitutional rights are coordinate;[149] no one of them is to be subordinate to any other one. This principle presents the chief objection to the application of the balancing test to the campus cases. When, however, one side to the controversy can legitimately assert three separate constitutional rights vis-a-vis the other side's one, that group of constitutional rights may appropriately be given primacy over the single constitutional right. The students' rights of free speech, freedom of association, and the free exercise of religion outweigh the university's interest in non-establishment. For that reason, student religious groups should be allowed to worship in their campus buildings.[150]

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147 635 F.2d 1310, 1317.

148 The lower court opinions in the campus cases did not find a neutral accommodation. *See* text accompanying note 22 *supra*.

149 *See* text accompanying notes 90 to 100 *supra*.

150 The United States Supreme Court has recently decided the *Chess* case, *supra* note 4. Widmar v. Vincent, 50 U.S.L.W. 4062 (U.S. Dec. 8, 1981). The Court affirmed the Court of Appeals decision for the student religious group. Basing its decision on the students' speech and association rights, the Court held that the University's exclusionary policy violated the fundamental principle that a state regulation of speech should be content-neutral. 50 U.S.L.W. at 4066. The Court found the University's alleged justification for its violation—maintaining strict separation of church and state—insufficient to justify the exclusionary policy. The Court reasoned that the University's "equal access" policy did not conflict with the establishment clause. 50 U.S.L.W. at 4064.

As for the students' free exercise rights, the Court expressly avoided inquiring into "the extent, if any, to which Free Exercise interests are infringed by the challenged University regulation." In addition, the Court explicitly avoided reaching "the questions that would arise if state accomodation of Free Exercise and Free Speech rights should, in a particular case, conflict with the prohibitions of the Establishment Clause." 50 U.S.L.W. at 4065 n.13. Thus, the Court has left unresolved the question of how to settle a direct conflict between free exercise and nonestablishment. For a discussion of this question, see text accompanying notes 91-96 *supra*.