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STUDENTS' RIGHTS TO ORGANIZE AND MEET FOR RELIGIOUS PURPOSES IN THE UNIVERSITY CONTEXT

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INTRODUCTION

Within the past few years, students on college campuses have on numerous occasions been faced with an administrative policy that significantly restricted or completely eliminated their rights to associate and meet on the campus to engage in religious discussion and fellowship for which the respective groups were formed.[1] The admin-

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1. At a community college in California, students recently decided to form a group at the college to engage in Christian fellowship, prayer, and Bible study. With the assistance of a Christian faculty member and a local staff worker for Inter-Varsity Christian Fellowship, the students undertook to complete the requirements for official recognition established by the Board of Trustees and administrators of the college, including: (1) finding a volunteer faculty member to act as the group's advisor; (2) drafting and presenting a written statement of purpose and club constitution to the appropriate student/faculty committee for official approval; and, (3) submitting a petition for recognition to that committee.

The students set forth plainly in their statement of purpose that the club was to be a "non-denominational Christian group, with membership and meetings open to all students at the College, for the purpose of glorifying God, sharing [their] faith in Christ as Lord and Savior of [their] lives, and helping others to learn about Christ and become more mature in their faith through Bible Study, prayer, sharing, and Christian Fellowship." Although the open declaration that the group was formed for a manifestly religious purpose created some concern among committee members, the petition was approved, and Campus Christian Fellowship (CCF) became an officially recognized student association at the college.

Official recognition normally entitles a club to several benefits not otherwise available, including: (1) the right to obtain student body funding generated by an activities fee charged to all student body members; (2) the right to participate as a group in various campus wide functions; (3) the right to publicize club activities on campus bulletin boards and grounds; and, (4) the right to conduct club meetings and activities in campus facilities, both during regular, semi-weekly periods set aside by the college for club activities and at other times, subject to availability and to various time, place, and manner restrictions.

In the case of CCF, however, the college administration informed the students that, despite the club's status as an officially recognized association, CCF members would not be permitted to meet on campus grounds for the purpose of Bible study, prayer, singing of hymns, or other "religious" expression or conduct. In short, although the students were assured that meeting for "social purposes" was permissible, the college expressly and absolutely denied use of campus facilities for the religious activities

istration typically seeks to justify the policy as being compelled by state law or regulation, the state constitution, or the United States Constitution. The affected groups normally attempt, both on their own and with the aid of counsel, to obtain a change of the policy through informal means. In some cases, the informal resolution process has ended in a workable compromise. In others, the situtation has resulted in the filing of litigation by the affected groups to challenge the prohibitory regulation. Nevertheless, where informal efforts have failed, it is likely, given the nature of the organizations, that many affected groups have chosen not to litigate, but merely to

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for which the students expressly formed CCF. When the students inquired as to the reason for this policy, the Dean of Student Affairs informed them that allowing the group to use campus facilities for those activities would amount to an "establishment of religion" by the college and was, therefore, prohibited by the Constitutions of the United States and of California.

Following informal and unsuccessful efforts to have this policy changed, the students sought a suitable off-campus location for their weekly Bible studies. However, the time pressure and inconvenience of having to travel off campus during the designated club meeting time, as well as the lack of a regularly available place to meet, soon led many of the students to stop participating in club activities and meetings. In addition, the club lost visibility on campus, and new members virtually disappeared. In short, as a result of the college's policy, the club effectively ceased to function as a student organization.

The students continued to make efforts to resolve the matter through meetings with the appropriate administrators and then with the Office of the County Counsel, which represented the college. These meetings did not prove fruitful, however, as the administrators and county attorneys continued to insist that various state laws and regulations, as well as the establishment clause of the first amendment, prohibited the club from meeting on campus for religious purposes, even if those meetings were voluntary, student-initiated, extracurricular, and conducted in a non-disruptive manner similar to that of all other campus groups. The students ultimately decided to file suit against the college as the only effective means of protecting their constitutional rights. Subsequent to the filing of the suit, an amicable settlement was reached, and the suit was dismissed. Campus Christian Fellowship v. Santa Monica College, No. CV-80-04419-AAH (C.D. Cal., filed Oct. 3, 1980).

See also, Dittman v. Western Wash. Univ. No. C-79-1189V (D. Wash., Feb. 27, 1980), *appeal docketed*, No. 80-3120 (9th Cir., Apr. 7, 1980), discussed in text accompanying notes 118-24 *infra*.

Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980), *cert. granted sub nom* Widmar v. Vincent, ___ U.S. ___, 101 S. Ct. 1345 (1980), discussed in text accompanying notes 125-31 *infra*. Briefs and other materials relating to *Dittman* and to *Chess* may be obtained from the Center for Law and Religious Freedom, 1776 Massachusetts Ave. NW, Suite # 700, Washington, D.C. 20036.

See also Keegan v. University of Del., 349 A.2d 14 (Del. 1975), *cert. denied sub nom* University of Del. v. Keegan, 424 U.S. 934, *reh. denied*, 425 U.S. 945 (1976). The authors have been informed by various staff members with Inter-Varsity Christian Fellowship and other organizations that similar situations are being encountered on state campuses in several states.

attempt to live with the policy despite the many significant burdens imposed by it. In the end, the groups may even cease to be viable organizations.

Such a burden on the students' right to associate on campus for religious purposes is not only extremely unfortunate, it is also contrary to the relevant constitutional principles. These principles are currently under review by the United States Supreme Court, which has recently heard arguments on the appeal of the decision of the Court of Appeals for the Eighth Circuit in *Chess v. Widmar*. In that decision, the Court of Appeals upheld the right of a student group to meet on campus for religious purposes and struck down the policy relied upon by the University of Missouri-Kansas City.[2] The Court's decision promises to be one of the most significant students' rights decisions in several years. Accordingly, it is appropriate to analyze the background against which that decision will be made.

There are a wide variety of factual and constitutional issues that must be addressed in determining the extent to which student groups must be allowed to organize and meet on a given campus for religious expression and activities. The topic raises such factual issues as policies and procedures for official recognition of student groups by the college, general accessibility of the college facilities for student use, ability of students to publicize group activities and distribute literature on the campus, disbursement and accounting of student activities funding, and university policies regarding non-student speakers and other individuals on the campus.

These factual issues in turn go to the heart of the first and fourteenth amendments. Both of the "religion clauses" of the first amendment—the prohibitions against laws "respecting an establishment of religion" and against laws "prohibiting the free exercise thereof"—are implicated, as are the guarantees of freedom of speech and association. In addition, the equal protection clause of the fourteenth amendment is clearly relevant to policies that appear to single out the affected groups and deny them recognition, use of facilities, or other generally-granted benefits solely because of the religious subject matter of their expression, activities, or goals. Thus, it is clear that consideration of this topic cannot be confined to a single, discreet area of first amendment jurisprudence. Instead, a complete examination must attempt to reconcile at least four broad first amendment doctrines that have developed under markedly different circumstances.

2. *Cert. granted sub nom* Widmar v. Vincent, ___ U.S. ___, 101 S. Ct. 1345.

Before commencing a review of these doctrines, however, one threshold limitation on the discussion must be noted. This limitation is based upon the distinction between private universities and state colleges. It is well-settled that some level of state action (or a suitable substitute therefore) by an entity is necessary for its policies and regulations to be directly subject to the provisions of the first and fourteenth amendments. This discussion is intended to deal solely with the *constitutional* rights of students in educational institutions, so it is assumed throughout that the requisite state action exists. As a result, the question of what circumstances may suffice to transform the activities of an ostensibly private university into state action, although very important, is not considered here.[3]

The following discussion briefly traces the development of each of the most relevant constitutional doctrines and then applies these doctrines concurrently to the various factual issues presented. Part I provides a brief background discussion of the historical development of students' constitutional rights in the academic context. Part II focuses on general protections of, and limitations on, religious speech and association in the context of the "public forum." Part III reviews the case law dealing with religious exercises in the public schools. Part IV examines the mode of analysis that the Court has developed to deal with establishment clause questions, particularly in the context of financial aid to religious schools. Finally, drawing together these four lines of constitutional law, Part V first examines the few directly relevant decisions and then discusses individually several of the specific issues likely to be confronted by student religious groups seeking to be active on the public campus.

I. HISTORICAL DEVELOPMENT OF CONSTITUTIONAL RIGHTS IN THE UNIVERSITY CONTEXT

A. *Early Treatment: The "Privilege" Doctrine and Federal Judicial Abstention*

The extensive consideration of students' rights cases in the federal courts during the past decade belies the fact that recognition of such rights under the Constitution is a relatively recent phenomenon, especially at the college level.[4] Indeed, although the applicabil-

3. *See "Freedom of Political Association on the Campus" The Right to Official Recognition,"* 46 N.Y.U.L. REV. 1149, 1151 N.15 (1971); Hendrickson, *'State Action' and Private Higher Education*, 2 J. OF L. & EDUC. 58 (1973); *Developments in the Law—Academic Freedom*, 81 HARV L. REV. 1045, 1056-65 (1968).

4. *See, Beyond* Tinker *and* Healy *Applying the First Amendment to Student Activities*, 78 COLUM. L. REV. 1700 (1978) [hereinafter *Beyond* Tinker]; *Students'*

ity of the first amendment in public schools was clearly recognized by the Supreme Court in 1943,[5] the view that education at a public college was a "privilege," governed by state law and not entitled to full constitutional review and protection at the federal level, was expressed by at least one federal court as late as 1959.[6]

The premiere affirmation of the "privilege" doctrine occurred in 1934 when the Supreme Court ruled that religious conscientious objectors had no federal cause of action to challenge a state university admissions policy requiring every student to participate in an ROTC program.[7] The plaintiffs challenged the policy on the grounds that the mandatory nature of the program violated their first amendment right to free exercise of religion since it forced them to act in conflict with the pacifistic belief of their religious faith. The Court, however, found that the state had merely granted the students the "privilege" of attending the university and that the students were free to refuse that "privilege," thus removing any problem of coercion and, with it, any claim under the free exercise clause.[8]

The federal judicial abstention that resulted from application of this doctrine in the students' rights area was further buttressed by traditional acceptance of the view that the state's exercise of control over student conduct was justified *in loco parentis*.[9] Under this view, states were perceived as possessing broad delegated power necessary to maintain order among the students in their parents' absence. Deferring to this view, the courts allowed administrations wide discretion in the exercise of regulations seen as necessary to protect social, physical, and moral welfare on campus.

In the 1950's and 1960's, however, the privilege doctrine and its supporting views came under pressure from significant social, educational, political, and constitutional changes. In response to these pressures, the abstention of earlier decisions gave way to active

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Constitutional Rights on Public Campuses, 58 VA. L. REV. 552 (1972) [hereinafter *Students' Rights*].

5. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (First amendment prohibited state from compelling Jehovah's Witnesses to engage in flag salute ceremony during the school day).

6. *See* Steier v. New York Educ. Comm'r, 271 F.2d 13 (2d Cir. 1959), *cert. denied*, 361 U.S. 966 (1960).

7. Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 265 (1934).

8. In the subsequent decision of West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, the Court distinguished *Hamilton* on the ground that higher education is not compulsory.

9. *See Beyond* Tinker, *supra* note 4, at 1701.

recognition and protection by federal courts of student constitutional rights on campus. Indeed, federal courts at the district and circuit level began to protect constitutional rights in the academic context years before such protection was formally ratified by the Supreme Court in the late 1960's and early 1970's.

The primary social change was the development of the perception that higher education was no longer a privilege to be enjoyed by the few, but a fundamental educational opportunity to be made available at every level of society. Attendance at colleges and universities, especially those operated by the states, increased dramatically during the post-World War II years.[10]

The increased social significance of college education brought about a corresponding increase in government funding and regulatory involvement in higher education.[11] This fundamental educational development—significantly greater state participation in what was formerly a largely "private" field—necessarily led to greater judicial focus on the subject of students' rights. Where state action regulates activities in forums such as universities, whose primary function is to serve as "a marketplace of ideas,"[12] constitutional conflicts, with the resulting need to define and protect constitutional rights, are almost inevitable.

The third major force that provided repeated occasions for greater judicial involvement in the university context was the widespread campus unrest engendered by the civil rights and peace movements of the 1960's. Indeed, the general political unrest that characterized that decade was more apparent on college campuses than anywhere else. Courts were simply left with no alternative but to deal with the repeated conflicts that arose from college officials' efforts to maintain order on campus and students' challenges, both peaceful and violent, to these efforts. As a result, the foundation for the existing structure of the students' rights doctrine was constructed to a great extent within the context of the protest activities of the 1960's and 1970's.

Finally, developments in constitutional interpretation generally, such as the expanding application of the Bill of Rights to states' activities through the fourteenth amendment, set the constitutional stage for dismissal of the "privilege" concept in the specific context

10. *See Students' Rights*, *supra* note 4, at 554.
11. *Id.*
12. *See* Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting).

of the academic environment. In this sense, the widespread recognition of student constitutional rights merely reflected greater recognition and protection of similar rights in the community at large.

B. Tinker *and* Healy: *The Landmark Supreme Court Decisions*

Against this background of growing recognition by lower courts of students' rights in the academic environment,[13] the Supreme Court handed down two decisions, one in 1969 and one in 1972, that now serve as the starting point in virtually every students' rights case in the first amendment context: *Tinker v. Des Moines Independent Community School District*[14] and *Healy v. James*.[15]

In *Tinker*, three high school students were suspended for wearing armbands during school hours in protest of the Vietnam War. The students brought suit against the school administrators, alleging that the suspension constituted an infringement of their first amendment rights. Despite the absence of any evidence that the students' conduct resulted in substantial disruption of the school's functioning, the district court and court of appeals dismissed the complaint, holding that the suspension was a justifiable exercise of the school administrators' power to maintain order in the academic environment of the campus.[16]

The Supreme Court reversed, noting that the wearing of armbands amounted to "symbolic speech" and that such expression was clearly entitled to constitutional protection, even when engaged in on the school campus.[17] In an oft-quoted phrase, the Court noted:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[18]

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13. It is significant to note that, prior to these "landmark" Supreme Court decisions, many lower courts had already adopted substantially similar positions recognizing and protecting student's constitutional rights in the academic environment. *See, e.g.*, Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

14. 393 U.S. 503 (1969).

15. 408 U.S. 169 (1972).

16. 258 F. Supp. 971, 973 (S.D. Iowa 1966), *aff'd* 383 F.2d 988 (8th Cir. 1967).

17. 393 U.S. at 514.

18. *Id.* at 506.

Thus, the Court concluded, "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[19]

In defining what would pass muster as "constitutionally valid reasons," in light of the "special characteristics of the school environment," the Court set forth a fairly specific test. Under this test, restrictions on students' freedom of expression can only be justified by a showing that the prohibited activities or expressions: (1) "materially and substantially disrupt the work and discipline of the school," or (2) constitute an invasion of the rights of others.[20] The Court further held that any prior restraint on student expression cannot be justified by mere speculation, but requires a showing of "facts which might reasonably have led school authorities to forecast substantial disruption or of material interference with school activities. . . ."[21] An "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[22] Because the record in *Tinker* contained "no evidence whatever of petitioner's interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and to be let alone," the suspension was held to constitute an unconstitutional infringement of plaintiffs' first amendment rights.[23]

In *Healy v. James*, the Court affirmed the basic reasoning of *Tinker* and extended it in two significant respects. The plaintiffs in *Healy* were students at Central Connecticut State College who formed a local chapter of the Students for a Democratic Society (SDS) and sought official recognition of the chapter as a campus organization. Although the students complied with all of the established procedures for obtaining recognition and their petition was approved by the appropriate committee, the president of the college rejected the recommendation of the committee and ruled that the group "was not to be accorded the benefits of official recognition."[24] The president justified his decision on the grounds that: (1) the organization's philosophy was antithetical to school policies; and, (2) the students had failed to show that the proposed group was sufficiently independent of the national SDS organization, which advocated and had engaged in substantial disruption and violence in other parts of the

19. *Id.* at 511.
20. *Id.* at 513.
21. *Id.* at 514.
22. *Id.* at 508.
23. *Id.*
24. 408 U.S. at 174.

country, to allay the president's concern that the group would be likely to engage in disruptive activity itself.[25]

Citing *Tinker*, the Court noted at the outset "that state colleges and universities are not enclaves immune from the sweep of the First Amendment."[26] Thus, the Court specifically recognized that the level of protection set forth in *Tinker* for high schools also obtained at the university level.

More importantly, the Court extended the protections of *Tinker* beyond freedom of speech to freedom of association as well. The Court observed:

> Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicity set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right.[27]

The Court enunciated standards as to what would constitute sufficient "justification" to deny recognition and related benefits by observing that "[a]ssociational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."[28] Finding insufficient evidence in the record to show that recognition of the plaintiffs' group and granting of the normal benefits incidental to recognition would bring about such disruptive results in the instant case, the Court held that the denial of recognition on the existing record was unconstitutional.[29]

C. *Students' Rights Decisions in the Lower Court*

In the wake of the *Tinker* and *Healy* decisions, lower courts have been given numerous opportunities to apply the standards set forth in those decisions and have developed a substantial body of case law. For example, the Court of Appeals for the Tenth Circuit relied on *Healy* to reverse dismissal of a complaint for injunctive relief by students whose petition for recognition of an anti-war

25. *Id.* at 175.
26. *Id.* at 180.
27. *Id.* at 181 (citations omitted).
28. *Id.* at 189.
29. *Id.* at 194.

organization at a state college was denied.[30] The college president based the denial on the grounds that there was no "specific need" for such an organization. The court noted that the only constitutionally proper test was whether recognition of the organization "would substantially and materially interfere with the discipline necessary to operate the college."[31]

The Court of Appeals for the First Circuit enjoined University of New Hampshire officials from prohibiting the plaintiff group, an officially recognized gay students organization, from sponsoring various on-campus social activities and further enjoined the officials from treating the group differently from other recognized groups on campus.[32] Although noting that *Healy* specifically involved denial of recognition while the instant case involved a recognized group that was only being denied use of campus facilities for "gay dances," the court observed that the "analysis in *Healy* focused not on the technical point of recognition or non-recognition, *but on the practicalities of human interaction.*"[33] The court rejected the university's contention that, because some activities of the group were allowed on campus, it was permissible to restrict or prohibit others, notwithstanding the absence of a showing of material disruption.[34] Finally, the court rejected the theory that the "social" nature of the restricted conduct removed it from protection under the *Healy* rationale. The court recognized that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters."[35]

More recently, the Court of Appeals for the Fifth Circuit invalidated disciplinary action taken against Iranian student demonstrators at Jackson State University.[36] The plaintiffs had failed to comply with a university regulation that all demonstrations must be registered beforehand with the Director of Student Activities, who would then approve the holding of "activities of a wholesome nature." The court found insufficient evidence of disruption to meet

30. Hudson v. Harris, 478 F.2d 244 (10th Cir. 1973).

31. *Id.* at 246.

32. Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652 (1st Cir. 1974).

33. *Id.* at 658 (emphasis added).

34. *Id.* at 660.

35. *Id.*, quoting from NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958). For similar decisions holding denial of recognition of gay students organizations unconstitutional, *see* Gay Lib v. University of Mo., 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080, *reh. denied*, 435 U.S. 981 (1978). Student Coalition for Gay Rights v. Austin Peay State Univ., 477 F. Supp. 1267 (M.D. Tenn. 1979).

36. Shamloo v. Mississippi State Bd. of Trustees, 620 F.2d 516 (5th Cir. 1980).

the two-pronged *Tinker* test and also determined that the regulation governing approval of activities was impermissibly content-based as well as excessively vague and apparently overbroad.[37]

II. PROTECTION OF RELIGIOUS EXPRESSION IN THE PUBLIC FORUM

A. *Origins and Development of the Public Forum Doctrine*

In the early 1970's the concept of the public forum emerged as a guiding principle in the application of the interrelated first amendment rights of free speech and association and the fourteenth amendment right of equal protection of the laws. Although the origins of the doctrine can be traced back to the 1930's[38] and its subsequent development is readily apparent in a series of cases and commentaries[39] during the 1960's, the Supreme Court's decision in *Police Department of the City of Chicago v. Mosley*,[40] is generally cited as the decision which solidified the place of the public forum doctrine in constitutional jurisprudence.

Mosley involved a Chicago ordinance that prohibited picketing on a public way within 150 feet of any school building during school hours, but expressly exempted peaceful labor picketing from the prohibition. Citing both the first amendment and the equal protection clause of the fourteenth amendment, the Court struck down the ordinance on the grounds that it created an impermissible, "content-based" distinction between labor picketing and other peaceful

37. *Id.* at 522-23. For example of other situations in which lower courts have applied these standards, *see* Robinson v. Board of Regents of E. Ky. Univ., 475 F.2d 707, 709 (6th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974) ("the state, in operating a public system of higher education, cannot condition attendance at one of its schools on the student's renunciation of his constitutional rights"); Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974) (restraint on distribution of student literary magazine unconstitutional since no evidence of substantial disruption); Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973) (cut-off of state funding to student newspaper because of President's disagreement with view expressed was unconstitutional since no evidence that disruption or violence would result from dissemination of newspaper); Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973) (state requiring prior approval of student-distributed literature at public high school and prohibiting distribution of material that could "reasonably lead the principal to forecast substantial disruption of or material interference with school activities" too vague and overbroad); Lawrence Univ. Bicentennial Comm'n v. City of Appleton, 409 F. Supp. 1319 (E.D. Wis. 1976); Cintron v. State Bd. of Educ., 384 F. Supp. 674 (D.P.R. 1974) (three-judge court).

38. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 688-89 (1978).

39. *See e.g.*, Kalven, *The Concept of the Public Forum*: Cox *v.* Louisiana, 1965 SUP. CT. REV. 1 (1965).

40. 408 U.S. 92 (1972).

picketing.[41] Noting that picketing clearly involves expressive conduct protected by the first amendment, the Court stated:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . 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.[42]

Moreover, the Court noted that, while reasonable time, place and manner regulations may be permissible upon a proper showing, such regulations must be carefully scrutinized when a public forum is involved to ensure that they further only significant governmental interests.[43]

The questions of what constitutes a public forum and what are reasonable time, place, and manner restrictions have been frequently addressed by the courts. In a case decided concurrently with *Mosley*, the Supreme Court observed:

> The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable.'[44]

Essentially the same formula had been expressed a few years earlier by the Court of Appeals for the Second Circuit, which put forth the following test:

> Does the character of the place, the pattern of the usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance. The factors to be considered are essentially the same, be the forum selected for expression a street, park, shopping center, bus terminal, or office plaza.[45]

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41. *Id.* at 94.
42. *Id.* at 95-96.
43. *Id.* at 98-99.
44. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).
45. Wolin v. New York Port Auth., 392 F.2d 83, 89 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (citations omitted).

Locations such as public streets, sidewalks, and parklands have been held to be quintessential public forums because of their historic association with the broadest scope of first amendment activities.[46] Other public facilities have achieved the special status of public forums as a result of their specific adoption or designation by authorities as a place for exchange of views among members of the public.[47] Finally, public facilities that have been created for purposes closely linked to expression, although not for unrestricted public interchange of ideas, have been recognized as "semi-public forums."[48]

Several courts have indicated that public university campuses fall at least within the last category, and are, therefore, subject to the principle that only non-content-based, reasonable time, place, and manner restrictions may be placed on expression therein.[49]

B. *Religious Expression in the Public Forum*

Because public forums generally involve property owned or maintained by the government, a question often raised is whether permitting religious expression to take place on property recognized as a public forum is prohibited by the establishment clause. A negative response to the question is compelled by the fact that, since the earliest recognition of the doctrine, the Court has repeatedly held that religious expression is entitled to full protection in public forums. Thus, in one early decision the Court invalidated the convictions of a group of Jehovah's Witnesses for holding a Bible talk in a city park without a permit, because the prior denial of a permit to the group violated "the right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments. . . ."[50] As Justice Stewart has stated:

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46. *See, e.g.*, Hague v. CIO, 307 U.S. 496 (1939); O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979).

47. *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1976) (municipal theater and privately owned theater leased to city were public forums).

48. The term "semi-public forum" is utilized by Professor Tribe in his treatise to describe such facilities as schools and libraries, where the government has been recognized as retaining a power "to preserve such tranquility as the facilities' central purpose requires—a power that would be denied in a true public forum—but no power to exclude peaceful speech or assembly compatible with that purpose." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 690.

49. *See e.g.*, Chess v. Widmar, 635 F.2d 1310, 1315-16 (8th Cir. 1980); *see also*, O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979); Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973); Lawrence Univ. Bicentennial Comm'n v. City of Appleton, 409 F. Supp. 1319 (E.D. Wis. 1976).

50. Niemotko v. Maryland, 340 U.S. 268, 272 (1951). Similar protection for religious expression and meetings in public forums was also recognized in Kunz v. New

> [T]here is no constitutional bar to the use of government property for religious purposes. On the contrary, this Court has consistently held that the discriminatory barring of religious groups from public property is itself a violation of First and Fourteenth Amendment guarantees.[51]

The principle enunciated by Justice Stewart has been repeatedly affirmed in lower courts as well. Most recently, a considerable body of case law dealing with religious expression and conduct in a wide variety of public places has developed as a result of the litigative efforts of the International Society for Krishna Consciousness (ISKCON). In the majority of these cases, considering many different types of public forums, the courts have upheld the right of ISKCON members to perform their religious "sankirtan" ritual in public facilities. In addition, courts have not been hesitant to strike down all but the most limited time, place, and manner regulations.[52]

Perhaps the clearest affirmation of the principle that religious expression in a public forum is entitled to full first amendment protection and is not prohibited by the establishment clause can be found in the decision of the District of Columbia Circuit Court of Appeals in *O'Hair v. Andrus*.[53] Plaintiffs, widely known as champions of atheism, brought suit to enjoin the Secretary of the Interior and the National Park Service from allowing the scheduled use of the National Mall in Washington, D.C., for the celebration of a mass by Pope John Paul II during his visit to the United States. The plain-

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York, 340 U.S. 290 (1951), Fowler v. Rhode Island, 345 U.S. 67 (1953), and Poulos v. New Hampshire, 345 U.S. 395 (1953).

51. School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 314 (1963) (Stewart, J., dissenting).

52. *See, e.g.*, Jaffe v. Alexis, 659 F.2d 1018 (9th Cir. 1981) (performance of "sankirtan" ritual on State Department of Motor Vehicle grounds), International Soc'y for Krishna Consciousness, Inc. v. Rochford, 585 F.2d 263, 270 (7th Cir. 1978) (sale of religious literature in Chicago airports); International Soc'y for Krishna Consciousness, Inc. v. Englehardt, 425 F. Supp. 176 (W.D. Mo. 1977) (distribution of religious literature at Kansas City International Airport); Swearson v. Myers, 455 F. Supp. 88, 91 (D. Kan. 1978) (distribution of literature and solicitation of funds); International Soc'y for Krishna Consciousness, Inc. v. Bowen, 456 F. Supp. 437, 441 (S.D. Ind. 1978), *aff'd*, 600 F.2d 667 (1979), *cert. denied*, ___ U.S. ___, 101 S. Ct. 2563 (1981) (restriction to rental booth at state fair for proselytizing, distributing religious literature and soliciting donations); Hall v. McNamara, 456 F. Supp. 245, 246 (N.D. Cal. 1978) (city permit requirements for distribution of literature or solicitation of funds); International Soc'y for Krishna Consciousness, Inc. v. Walke, 453 F. Supp. 869 (E.D. Wisc. 1978) (distribution of literature in Milwaukee Airport).

53. 613 F.2d 931 (D.C. Cir. 1979), *cert. denied*, ___ U.S. ___, 101 S. Ct. 1433 (1981).

tiffs argued that such religious use of public property violated the establishment clause. In addition, the plaintiffs argued that the estimated expenses of more than $100,000 which the Department would incur for incidental services rendered in connection with the mass constituted impermissible direct financial aid to religion.[54]

The court of appeals rejected these arguments, holding that no constitutional problem existed because the use was granted under regulations that were neutral on their face and, according to the evidence presented, applied equally to religious and non-religious activities. In reaching this decision, the court noted that the case involved a special kind of government property—public parkland—which has been historically identified with communication among citizens.[55] Accordingly, the court observed that "the government may not allocate access to a public place available for communication among citizens on the basis of the religious content of the messages."[56]

Specifically addressing the plaintiffs' argument that allowing the Pope to conduct mass on the Mall would send an implied message of government approval of the church service to the rest of the world, thus constituting establishment of religion, the court observed:

> Religious and non-religious groups and events are treated alike. No 'preference' is present. This undercuts appellants' establishment claim. When the National Mall is, as a matter of established policy, openly available to the Pope, to the Reverend Moon, to Madalyn Murray O'Hair, and to *all* others (religionists and anti-religionists), there is no 'establishment of a religion,' and there cannot be a meaningful perception of one.[57]

III. JUDICIAL TREATMENT OF CURRICULAR AND EXTRACURRICULAR RELIGIOUS ACTIVITIES IN PUBLIC SCHOOLS

A. *The School Prayer and Bible Reading Cases*

Although there are numerous fundamental distinctions between the well-known "prayer in the public schools" decisions and the situations presented by extracurricular, student-initiated, volun-

54. *Id.* at 936.
55. *Id.* at 934.
56. *Id.* at 935.
57. *Id.* at 934.

tary religious activities on public campuses, an understanding of the former group of cases is basic to an examination of the latter. This is primarily due to the fact that the only Supreme Court decisions to date in this area fall into the former category, the Court having declined all opportunities, until very recently, to review the few lower court decisions in the latter category.[58] As a result, lower courts have relied on the "prayer in the school" decisions in evaluating voluntary religious activities on public campuses without always paying heed to constitutionally significant distinctions between the two situations. This, in turn, has led to the application of principles manifestly inappropriate to the circumstances. To illustrate this unfortunate development, it is first necessary to examine briefly the Supreme Court cases involved.

1. The Major Supreme Court Decisions

The United States Supreme Court has rendered four major decisions involving religious exercises in the public schools.[59] In three of these decisions, the Court struck down the challenged practice as violative of the establishment clause.[60] In the fourth, how-

58. *See e.g.*, Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977); Keegan v. University of Del., 349 A.2d 14 (Del. 1975), *cert. denied*, 424 U.S. 934 (1976). *But see* Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980), *cert. granted sub nom* Widmar v. Vincent, No. 80-689 (Feb. 23, 1981).

59. A fifth case was recently added to this list with the Supreme Court's decision and *per curiam* opinion in Stone v. Graham, ____ U.S. ____, 101 S. Ct. 192 (1980). In a 5-4 ruling, the Court granted certiorari and simultaneously reversed the decision of the Kentucky Supreme Court upholding a state statute that required the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public classroom in the state. Notwithstanding the statutory requirement that each posted copy bear a notation expressly referring to the secular application of the Ten Commandments as the fundamental legal code of Western Civilization and common law, and the specific findings of the state trial court that the statute had an avowed secular purpose, the Court concluded that the law had no secular legislative purpose, and was therefore unconstitutional. *Id.* at 193. The Court summarily dismissed the legislature's avowed secular purpose, holding instead that the purpose for posting the Ten Commandments was "plainly religious in nature" and the requirement was therefore barred by the establishment clause of the Constitution. *Id.* at 194. The fact that private contributions financed the program was also dismissed as irrelevant, "for the mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government' that the Establishment Clause prohibits." *Id.*

The opinion provides only a brief analysis of the issues involved, and it is not clear what, if any, precedential value this decision, described by Justice Rehnquist in dissent as "a cavalier summary reversal," may have. *Id.* at 196.

60. Engle v. Vitale, 370 U.S. 421 (1962); School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

ever, the Court ruled that the practice constituted a permissible accommodation of religion in the public school context and did not stray from the "safe harbor" of neutrality carved out by the first amendment.[61]

In *Engel v. Vitale*,[62] the Court considered a New York Board of Regents program that called for the recitation of a prayer by students at the beginning of the school day. The prayer was nondenominational and had been composed by the Board of Regents. While the challenged program affirmatively required the daily exercise to take place, it provided that any student who did not wish to participate could be excused from the classroom while the prayer was being recited. Notwithstanding this excusal provision, the Court concluded that this exercise violated the prohibition against establishment of religion set forth in the first amendment. The Court stated that "it is no part of the business of government to compose official prayers for any group of the American people to recite as part of the religious program carried on by the government."[63]

The Court reached a similar conclusion one year later in *School District of Abington Township v. Schempp*.[64] The challenged practice in *Schempp* was a state-mandated program involving Bible reading and student recitation of the Lord's Prayer at the beginning of each school day. Despite the fact that individual participation in the exercise was voluntary, the Court struck down the program as violative of the establishment clause. In reaching this decision, the Court enunciated the following test:

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.[65]

Applying this test to the findings in *Schempp*, that the state-required reading of Bible verses and recitation of the Lord's Prayer were "prescribed as part of the curricular activities of students who are required by law to attend school" and that the exercises were held in the school buildings under the supervision and with the participation of teachers employed in those schools, the Court concluded that the purpose and effect of the program were the advancement of

61. Zorach v. Clausen, 343 U.S. 306 (1952).
62. 370 U.S. 421 (1962).
63. *Id.* at 425.
64. 374 U.S. 203 (1963).
65. *Id.* at 222.

religion.[66] In reaching this conclusion, however, the Court was careful to note that, just as the government could not advance religion, it was also prohibited from engaging in affirmative hostility toward religion.[67]

Over a decade before, in *Illinois ex rel. McCollum v. Board of Education*,[68] the Court invalidated a state program that required thirty-minute religious instruction periods to be held each week, during regular school hours, in the school classrooms. The instructors for these sessions were from outside groups, but they were under the control of the school superintendent. While participation in the program was voluntary, those who did not choose to participate were required to leave their classroom and go to another location for secular instruction during the period. The Court ruled that this state-sponsored program of religious instruction went beyond constitutionally permissible neutrality toward religion and violated the establishment clause.[69]

The lone Court decision to uphold a state program against an establishment clause challenge was *Zorach v. Clausen*.[70] The program in *Zorach* was similar in many ways to that struck down in *McCollum*, but the distinctions were found to be constitutionally significant. In *Zorach*, the state authorized a program that permitted the puplic schools to release students during the school day to attend religious instruction classes at locations off the school campus. Thus, unlike *McCollum*, the school classrooms were not turned over to religious instructors and the "force of the public school" was not used to promote the religious instruction.[71] Participation in the "released time" program was voluntary, but those who did not participate stayed in the classroom.

Justice Douglas, writing for the Court, concluded that the program in *Zorach*, because of the differences from *McCollum* noted above, constituted a permissible accommodation of religion in the public school context. Finding no evidence of coercion in the "released time" program, Justice Douglas summarily dismissed the plaintiffs' free exercise claims. Turning to the establishment question, he emphasized that it was the state's constitutional obligation to be

66. *Id.* at 223-24.
67. *Id.* at 225.
68. 333 U.S. 203 (1948).
69. *Id.* at 212.
70. 343 U.S. 306 (1952).
71. *Id.* at 315.

neutral, not hostile, to religion, and such neutral accommodation was all that was involved here.[72]

2. School Prayer and Bible Reading Cases in the Lower Courts

The lower courts have applied the principles of these four decisions to a variety of state-mandated or authorized religious exercises in the public school context.[73] The overriding principle that has emerged from those decisions, and that is clearly reflected in the contrast between *McCollum* and *Zorach*, is that religious exercises found to be actively sponsored by the state, or found to occur under circumstances that are likely to leave students with the impression of ideological sponsorship by the state are impermissible, whereas state involvement that involves no coercion and that cannot reasonably be perceived as amounting to state sponsorship does not violate the establishment clause.[74]

While strict limitations have been placed on religious exercises or observances in the classroom and as part of the school curriculum, similar exercises have been upheld as permissible accommodations when occuring in public school graduation ceremonies.[75] A

72. *Id.* at 314.

73. *See Accommodating Religion in the Public Schools*, 59 NEB. L. REV. 425 (1980); Toms & Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 EMORY L. J. 3 (1978) [hereinafter *The Religious Student*].

74. A brief sampling of the lower court decisions in this area shows how this principle has been applied to specific exercises. In Kent v. Commissioner of Educ., 402 N.E. 2d 1340, (Mass. 1980), the Massachusetts Supreme Judicial Court struck down a newly-enacted "school prayer" law that provided that, at the opening of each school day, the teacher would announce that a student volunteer could pray and that students not wishing to participate would be excused during the exercise. The court noted that the program clearly violated the standards set forth in *Schempp* since "it lent no small degree of official recognition and sanction to the religious enterprise and welded it into the school day." *Id.* at 1345. Thus, the court reaffirmed the principle that the touchstones for a finding of impermissible establishment in this context are official sponsorship and actual integration into the curriculum of the religious exercise. *See also*, DeSpain v. DeKalb County Community School Dist., 384 F.2d 836 (7th Cir. 1967), *cert. denied.*, 390 U.S. 906 (1968) (recital of verse by kindergarten class prior to morning snack held impermissible even though no explicit reference to God was contained in it); Stein v. Oshinsky, 348 F.2d 999 (2nd Cir.), *cert. denied*, 382 U.S. 957 (1965) (kindergarten teachers allowed to stop students from reciting verse in class even under the student's own initiative); Collins v. Chandler Unified School Dist., 470 F. Supp. 959 (D. Ariz. 1979), *modified*, 644 F.2d 759 (9th Cir. 1981) (volunteer student prayers at the beginning of assemblies during school hours enjoined); Ring v. Grand Forks Pub. School Dist. #1, 483 F. Supp. 272 (D.N.D. 1980) (statute requiring posting of Ten Commandments in every classroom held violative of establishment clause as having purpose and primary effect of advancing religion).

75. *See e.g.*, Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974); Wood v. Mt. Lebannon Twp. School Dist., 342 F. Supp. 1293 (W.D. Pa. 1972).

comparison between the graduation cases and the decisions invalidating various exercises reveals that the significant distinction is the compulsory, curricular nature of the exercises in the latter group that is absent in the former. Thus, the fact that the graduation prayers occured on school property was not considered a determinative factor. Instead, "the fact that the graduation ceremony is not compulsory strips the function of any semblance of governmental establishment or even condonation."[76]

B. *Voluntary Extracurricular Religious Meetings in Public Schools*

As noted above, the classical school prayer and Bible-reading cases differ in one basic respect from cases involving students voluntarily seeking to associate on campus for religious purposes. In the former cases, the state is sponsoring religion as a part of the educational curriculum. The latter situation, however, generally arises in the context of a request by a student group for permission to engage in voluntary religious activities in school facilities and a denial of that request by the school authorities. In recent years, a few courts have dealt with the latter situation at the high school level, and the resulting decisions show that the significance of this distinction has not always been appropriately recognized.

In an early decision considering voluntary activities, the court upheld voluntary on-campus prayer meetings, subject to certain stated guidelines, as an appropriate accommodation of religion.[77] These guidelines dealt with the time the meeting could occur, the extent to which the supervisor/teacher could be involved, the location of the meetings and related issues. They were designed to ensure that the permitted accommodations would not be perceived as state sponsorship.[78] In short, the court sought to establish an appropriate balancing of the interests involved.

Arrayed against this decision, however, is a collection of both federal and state rulings that have denied students' requests to permit voluntary prayer or Bible meetings in high school classrooms or on the school grounds. In each case the stated rationale for the

76. Wood v. Mt. Lebanon Twp. School Dist., 342 F. Supp. at 1295. A similar conclusion was reached in *Deusebio*, notwithstanding the court's recognition that "indirect pressures to attend" the ceremonies existed. In the court's view, those pressures did not amount to the level of compulsoriness necessary to violate the establishment clause. 380 F. Supp. at 290.

77. Reed v. VanHoven, 237 F. Supp. 48 (W.D. Mich. 1965).

78. *Id.* at 54.

court's decision has been that the grant of such a request would constitute a violation of the establishment clause.

Thus, in *Hunt v. Board of Education*,[79] the court denied students the right to meet on high school premises prior to the commencement of the school day to hold group prayer meetings. Upholding school board regulations and a state law that prohibited use of school buildings for religious purposes, the court declined to consider the students' arguments on free speech, association, and free exercise grounds, instead remarking that the regulations were "consistent with the well-established constitutional principle of the separation of Church and State."[80]

A similar ruling was handed down by a California Court of Appeals in *Johnson v. Huntington Beach Union High School District*.[81] The court ruled (2-1) that allowing a student Bible study club to meet in a high school classroom during the lunch hour would constitute an impermissible establishment of religion.[82] The high school in *Johnson* had a long-standing policy of recognizing student clubs and permitting them, once recognized, to use classrooms for club meetings. The school also had a policy denying recognition and use of facilities to student religious clubs. Students at the high school petitioned for recognition of a club whose express purpose was "to enable those participating to know God better . . . by prayerfully studying the Bible." When recognition was denied, the students sought injunctive relief against enforcement of the school's non-recognition policy to allow them to be recognized and meet on campus as requested. The trial court denied the students' claim, and this judgment was upheld by the appellate court on two major grounds.

First, focusing on the religious nature of the club's mission, the court determined that allowing the club to meet in a public classroom would provide direct state financial support to the club in the form of rent-free classroom space, heat, light, and supervision by a paid faculty sponsor. Furthermore, the court stated that recognition would place the imprimatur of the state on the club's religious activity, since the club would "become an entity 'sponsored by the school.' "[83] Based on this finding of impermissible aid and sponsor-

79. 321 F. Supp. 1263 (S.D. W. Va. 1971).
80. *Id.* at 1267.
81. 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977).
82. *Id.* at 16, 137 Cal. Rptr. at 51.
83. *Id.* at 14, 137 Cal. Rptr. at 50.

ship, the court held that the primary effect of recognizing the club would be the advancement of religion.[84]

In addition, the court ruled that granting the students' request for recognition would result in excessive entanglement. To support this contention, the court observed that the school would be required by law to supply a faculty sponsor to supervise the group's activities, and would further be required to audit the club's financial accounts and review membership procedures to ensure compliance with state law.[85]

The court summarily dismissed the free exercise and free speech claims of the students holding that there was no real infringement of those rights since "[e]ach club member remains free to believe and express his religious beliefs on an individual basis and the students' Bible study club is free to meet as such off-campus outside of school hours."[86]

More recently, in *Brandon v. Board of Education*[87] a group of high school students organized a group called "Students for Voluntary Prayer" and sought permission from the principal to conduct communal prayer meetings in a classroom immediately prior to the commencement of the school day. The school official denied the students' request. The students filed suit for injunctive and declaratory relief and monetary damages claiming that the refusal violated their first and fourteenth amendment rights.

The trial court dismissed the complaint on the ground that the establishment clause barred student prayer meetings in the public classrooms. The court further observed that the school's refusal did not violate any of the rights asserted by the students, but that, even if it had, the "compelling state interest in maintaining the separation between Church and State" justified such infringement.[88]

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84. *Id.*

85. *Id.* at 15, 137 Cal. Rptr. at 50.

86. *Id.* at 18, 137 Cal. Rptr. at 52. The same rationale was employed by a New York state appellate court in Trietley v. Board of Educ., 65 A.D.2d 1, 409 N.Y.S. 2d 912 (1978), to deny a request by six high school students who requested permission from the school board to use a classroom for Bible club meetings. Despite the fact that the request included proposed guidelines consistent with those approved in *Reed v. Van Hoven*, *see* text accompanying notes 77-78 *supra*, the New York court ruled that the proposed activities would "go beyond merely accommodating" religion and would impermissibly aid the religious goals of the club. 65 A.D.2d at 8, 409 N.Y.S. at 917. Conversely, the court found no violation of the plaintiffs' free exercise rights since no state coercion was found to be involved. *Id.*

87. 635 F.2d 971 (2d Cir. 1980), *cert. filed*, Feb. 17, 1981, No. 80-1396.

88. Brandon v. Board of Educ., 487 F. Supp. 1219, 1231 (1980).

The court of appeal affirmed the dismissal. It recognized the distinction between the school prayer and financial assistance cases, involving state statutes supporting religious activity, and the instant case, involving a state agency refusing to sponsor religious activity in a public school.[89] Nevertheless, having expressly noted the distinction, the court then ignored it completely in the substantive analysis of the establishment clause issues.

According to the court, the major issue in *Brandon* was whether the school's refusal violated the students' free exercise rights and "exhibited a degree of hostility towards a particular religious organization sufficient to transgress the principle of government neutrality, . . . "[90] The court held that no constitutionally cognizable limitation was placed on the students' free exercise rights by the school's policy.[91] Distinguishing the "absolute" dilemmas presented in free exercise cases where the individuals were forced to choose between neglecting their religious obligations and rendering themselves ineligible for state benefits or liable for criminal sanctions,[92] the court stated that the students' choice in the instant case was much less difficult, since they "are free to worship together as they please before and after the school day and on weekends in a church or any other suitable place."[93]

Having concluded that no free exercise rights were infringed, the court nevertheless went on to opine that, even if some infringement did exist, it would be justified by the compelling state interest of avoiding the violation of the establishment clause that would arise from the "authorization of student-initiated voluntary prayer" in these circumstances.[94] Adopting the standard tripartite test[95] for analyzing establishment clause cases, the court conceded that a neutral policy granting all student groups access to school facilities reflected a permissible secular purpose of encouraging extracurricular activities. With respect to the primary effect test, however, the court declared that:

> To an impressionable student, even the mere appearance of secular involvement in religious activities

89. 635 F.2d at 975.

90. *Id.*

91. *Id.* at 977.

92. *E.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

93. 635 F.2d at 977.

94. *Id.* at 978.

95. Lemon v. Kurtzman, 403 U.S. 602, *reh. denied*, 404 U.S. 876 (1971), discussed in text accompanying notes 108-14 *infra*.

> might indicate that the state has placed its imprimatur on the particular religious creed. This symbolic inference is too dangerous to permit . . . . An adolescent may perceive "voluntary" school prayer in a different light if he were to see the captain of the school's football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the "captive audience" setting of a school.[96]

Based on this speculation, for which no basis in the record appears to have been supplied, the court concluded that the meetings would create an "improper appearance of official support," thus impermissibly advancing religion.[97] The validity of the court's conclusions is dubious, given the questionable characterization of the voluntary, extracurricular, before-school meetings as a 'captive audience' setting. Presumably, any student at the meeting would have voluntarily made an affirmative effort to attend, rather than having been forced to make an affirmative effort to excuse himself, as was the case in *Engel* and *Schempp*. Furthermore, the characterization of the voluntary activities of the football captain, student body president, and leading actress in a school play as likely to give the impression of official support is equally questionable.

To buttress its decision on the establishment issue, the court also determined that granting the students' request would have resulted in excessive entanglement of the school in religion, thus violating the third element of the establishment test.[98] This holding was based on the fact that the school officials were under a statutory duty to provide adequate supervision of students, and this monitoring, as well as necessary "surveillance . . . to guarantee that participation in the prayer meetings would always remain voluntary" would, in the court's view, inevitably result in excessive entanglement.[99] Again, however, the court's argument strains credibility when it suggests that the faculty member's monitoring will necessarily consist of intrusive "surveillance" rather than largely perfunctory supervision.

Having devoted the bulk of its analysis to the free exercise and establishment clause arguments, the court summarily dismissed the

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96. *Id.* at 978.

97. *Id.* at 979.

98. *Id.*

99. *Id. See also*, Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977). discussed in text accompanying notes 81-86 *supra*.

free speech, free association and equal protection claims of the students. First, the court ruled that "a high school is not a 'public forum' where religious views can be freely aired."[100] Significantly, the court distinguished the high school context from that of a public university, "where religious speech and association cannot be prohibited."[101] In addition, noting "the explicit Establishment Clause proscription against prayer in the public schools," the court concluded that the free speech rights of the students, cognizable in a public forum, "are severely circumscribed by the Establishment Clause in the public school setting."[102]

C. *Distinctions Between Secondary and College Levels*

The last point discussed in *Brandon* is very significant. In determining the precedential value, if any, that the foregoing cases might have in a discussion of student rights at the college level, some critical factual distinctions must be borne in mine. The most obvious of these distinctions involves the relative ages of the students. As one commentator has observed:

> Engel, Schempp, and such other church-state-education cases . . . involved children in elementary or secondary schools, i.e., at a different age level than students in public higher education. Students in elementary and secondary schools come under compulsory school attendance laws whereas these laws do not apply to students in public higher education. Furthermore, there is an obvious difference in maturity level between a student in the eighth or ninth grade, for example, and a college or university student. Such factors as differences in age and maturity level could be of considerable importance in determining the constitutionality of some practices at the higher education level.[103]

Courts have repeatedly emphasized the constitutionally significant distinction between elementary and secondary levels of education, on the one hand, and college level education on the other.[104] As the Court of Appeals observed in *O'Hair v. Andrus*:

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100. 635 F.2d at 980.

101. *Id.*

102. *Id.*

103. Michaelson, *The Supreme Court and Religion in Public Higher Education*, 13 J. PUB. L. 343, 345 (1964).

104. *See, e.g.*, Roemer v. Board of Pub. Works of Md., 426 U.S. 736, 750, 764 (1976) (opinion of Blackmun, J.); Chess v. Widmar, 635 F.2d at 1319.

> Appellants' reliance on cases treating elementary and secondary schools is inappropriate. Because of their central and delicate role in American life, and because of the unique susceptibility of their captive audience, children, to coercion, the public schools have a special insulation from religious ceremony. Different considerations apply to colleges and universities, where the likelihood of coercion is less. . . .[105]

The *O'Hair* passage notes another distinction between the school prayer cases and the situation that exists when college students seek to meet on campus for religious activities. Students in the first group are compelled to be in attendance at the school, while students in the second group are not. Thus, at the college level the notion of a "captive audience" is much less, if at all, tenable. Indeed, the difference in holdings between the graduation prayer cases and the opening school prayer cases reflects an understanding that, in the absence of compulsory attendance, even at the same educational level, the danger of establishment is significantly diminished.

Finally, a significant distinction that will often present itself is the residential nature of colleges that is not normally found at the elementary or secondary public education level. Thus, where the college student lives in the campus community on a full-time basis, there is a much greater need for accommodation of on-campus opportunities for all types of interaction—including those of a religious nature—than exists where the student is living at home, in the community at large.[106]

IV. THE THREE-PRONGED TEST OF THE ESTABLISHMENT CLAUSE

The first amendment concurrently prohibits laws "respecting an establishment of religion, or prohibiting the free exercise thereof." Judicial interpretation of these clauses reflects the strong and constant tension between them that can only be resolved, in a given factual situation, by the government's benevolent neutrality toward religion.[107] As the influence of government has increased dramatically in all spheres of society, and especially in the area of education, benevolent neutrality has become increasingly difficult to achieve.

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105. 613 F.2d at 936.

106. *See* Keegan v. University of Del., 349 A.2d 14 (Del. 1975), discussed in text accompanying notes 115-17 *infra*.

107. *E.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Walz v. Tax Comm'n, 397 U.S. 664 (1970).

The Supreme Court set forth a fairly simple test in *Lemon v. Kurtzman*,[108] that has subsequently been invoked to determine whether laws apparently aiding religion violate the establishment clause. This three-pronged test states:

> 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.'[109]

Although applied since its inception in virtually every situation in which the establishment clause is implicated, this tripartite test has received its greatest refinement in the area of financial aid to religiously-affiliated private schools and colleges. In this context, the test has been used both to uphold some forms of aid[110] and to invalidate others.[111]

In reviewing these and other establishment cases, it appears that the standard of secular purpose is the easiest to apply and to satisfy.[112] The primary effect test has proved more problematic. Nevertheless, it is clear "that not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid."[113] Rather, a law must have a *primary* effect of advancing *or inhibiting* religion to violate the second part of the test.

Finally, the mechanism by which the aid is granted cannot result in excessive entanglement of the government agency administering the program with the religious institution receiving the aid. In applying this third prong of the test, the court must deter-

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108. 403 U.S. 602 (1971).

109. Id. at 612-13 (citations omitted).

110. *See, e.g.*, Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (noncategorical grants that could not be used for sectarian purposes); Meek v. Pittenger, 421 U.S. 349, *reh. denied*, 422 U.S. 1049 (1975) (state program for lending textbooks to private school students upheld, although other aspects of program invalidated).

111. *See, e.g.*, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (state tuition grants and building funds for private schools had impermissible primary effect of advancing religion); Lemon v. Kurtzman, 403 U.S. 602 (1971).

112. *But see*, Stone v. Graham, ___ U.S. ___, 101 S. Ct. 192 (1980) (Kentucky statute requiring posting of Ten Commandments in public classrooms invalidated because, *inter alia*, the Court rejected the legislature's statement and the state court's finding of the avowed secular purpose of exposing students to the fundamental legal code of Western Civilization).

113. Committee for Pub. Educ. v. Nyquist, 413 U.S. at 771.

mine whether a significant amount of government surveillance is necessary to ensure that the benefit granted is not being diverted to impermissible ends. If such surveillance is found to be required, so that an "intimate and continuing relationship between church and state" is created, the third prong of the test will not be satisfied.[114]

V. SPECIFIC ISSUES LIKELY TO BE CONFRONTED BY STUDENT RELIGIOUS GROUPS SEEKING TO BE ACTIVE ON THE COLLEGE CAMPUS

A. *Religious Activities At the College Level*

The major areas of constitutional development set forth in the previous sections—increasing recognition of student constitutional rights, long-standing protection of religious expression in the public forum, the search for permissible accommodation of religion in the context of student religious activities in public schools, and the development of the tripartite establishment test primarily in the context of public aid to religious schools—have recently converged in three cases that have directly confronted the question of college students' rights to organize and meet for religious purposes on public campuses. Not surprisingly, given the wide variety of interests that must be reconciled in attempting to apply simultaneously the doctrines set forth in the previous sections, the decisions reflect widely divergent viewpoints and conclusions.

In *Keegan v. University of Delaware*,[115] the university sought to prohibit students' use of a dormitory commons room on campus for worship services. The university contended that the ban was required by the establishment clause. The Delaware Supreme Court rejected this argument and reversed the lower court injunction upholding the ban. The court stated that "[t]o allow religious worship groups the same rights and privileges attendant with the use of the commons room of the dormitory as are accorded other group activities could reflect lawful accommodation."[116]

The court concluded that:

> The University [could not] support its absolute ban of all religious worship on the theory that, without such a

114. For an excellent discussion of the history of the excessive entanglement test, *see* Ripple, *The Entanglement Test of the Religion Clauses - A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195 (1980).

115. 349 A.2d 14 (Del. 1975), *cert. denied*, 424 U.S. 934, *reh. denied*, 425 U.S. 945 (1976).

116. 349 A.2d at 16.

> ban, University policy allowing all student groups, including religious groups, free access to dormitory common areas would necessarily violate the Establishment Clause.[117]

Thus, although not specifically mentioned, the concept of equal access for religious expression to public facilities was clearly applied by the court.

The opinion of the district court in *Dittman v. Western Washington Univeristy*,[118] presents a distinct contrast to the *Keegan* decision. In *Dittman*, plaintiff students and recognized student associations sought to enjoin the enforcement of the university's policy which: (1) restricted the use of university classrooms and auditoriums by groups for religious worship, exercise, or instruction to two times per quarter, and (2) required payment of full rental value for each such use. Noting that other recognized student groups were allowed to use the facilities rent-free on a first-come, first-served basis for non-religious activities, the plaintiffs argued that the policy, *inter alia*, violated their rights to free speech, free association, and free exercise of religion, as well as their right to equal protection of the laws. In addition, the students challenged a related university policy that any monies collected on campus by the respective groups were deemed to be state funds that had to be turned over to the university and could not be used for religious activities. The university contended in response that both of these policies represented the most liberal accommodation of student religious activities on campus that the establishment clause permits.

The district court dismissed the students' action, adopting the position asserted by the university "that it would be a violation of the Establishment Clause . . . for the University to make its facilities available on a regular basis to religious groups for religious purposes," because to do so "would constitute an advancement of religion by the state."[119] The court acknowledged that first amendment rights are fully applicable in the university setting, that content-based restrictions on expression may not be imposed by the government, and that religious speech is generally to be afforded the same protection as other forms of expression. Furthermore, the court summarily conceded, in applying the tripartite establishment test,

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117. *Id.*

118. No. C79-1189V (W.D. Wash., Feb. 27, 1980), *appeal docketed*, No. 80-3120 (9th Cir., Apr. 7, 1980).

119. *Id.*, slip op. at 5.

that "a policy which permitted free access to University facilities without regard to the purpose of the assembly would clearly not be violative of the [excessive entanglement] criteria, and a secular purpose might be found in the exchanging of ideas and the sharing of interests by those in attendance."[120] The court nevertheless concluded that failure to adhere to the challenged policy would have a *primary effect* of advancing religion by "placing the imprimatur of government upon the religious activities being conducted in [the] facilities."[121]

The free exercise claims of the plaintiffs were not considered sufficient to counterbalance the perceived compelling state interest of avoiding the establishment of religion. Noting that the policy affected only practices and not beliefs, that the ban was not absolute in view of the two times per quarter rule, and that off-campus facilities were available for plaintiffs' religious exercises, the court determined that the unquestionable interference with the exercise of plaintiffs' sincerely-held religious beliefs was not sufficiently severe to outweigh the perceived establishment problems that an opposite policy would create. In one sentence, the court noted that this determination "also resolves the plaintiffs' claim as to free speech and associational rights.[122]

The court also ruled that the university could not supply any funds—for religious or non-religious purposes—to the religious groups. This ruling was based on the state constitution and on the establishment clause, since the court found that "the continuing supervision, justification, and debate, accompanying the use of state funds by religious groups, unavoidably entangles the state in matters of religion."[123] Accordingly, the court modified the university funding policy that had previously allowed the groups to obtain state funds for non-religious activities. Under the court's decision, all state funding was terminated, but the groups were given the right to collect and retain all funds raised, whether obtained on or off campus.[124]

In *Chess v. Widmar*,[125] the Eighth Circuit Court of Appeals rejected the reasoning of *Dittman* and reached the same result as in

120. *Id.*, slip op. at 4.
121. *Id.*
122. *Id.*, slip op. at 7.
123. *Id.*, slip op. at 11.
124. *Id.*
125. 635 F.2d 1310 (8th Cir. 1980), *cert. granted sub nom* Widmar v. Vincent, No. 80-689 (Feb. 23, 1981).

Keegan—upholding the students' right to use campus facilities for voluntary religious worship meetings—although relying on somewhat different grounds.[126] *Chess* involved regulations established by the University of Missouri-Kansas City that prohibited "religious worship or religious teaching" in any university buildings or on the campus grounds. Appellants were members of an officially recognized religious student organization who were denied permission, under the regulation, to use a lecture hall on campus for Bible study, prayer, singing of hymns, and other religious activity. The general policy of the university was to permit recognized student associations to use various university facilities for lectures, discussion groups, meetings, symposia, and similar programs.

The university denied appellants the use of the facilities on the grounds that such a policy was required to preserve the separation of church and state under the establishment clause. The district court granted the summary judgment motion of the defendant university administrators on these grounds.[127]

The Court of Appeals reversed, finding that none of the three elements of the establishment clause framework would be violated by allowing the students to hold their religious meetings on campus.[128] The district court in *Chess* had noted that the first and third parts of the test—secular purpose and avoidance of entanglement—did not support the prohibitory policy, and the Court of Appeals agreed.

> The district court . . . recognized that 'A [neutral] university policy that permitted *any* student group to meet in university-owned buildings for *any* purpose would aid all student groups, regardless of religious affiliation and would, therefore, reflect a clear secular purpose. In addition, since such a policy would make no distinction between groups or their purposes, entanglement with religion would be completely avoided.' . . .
>
> We agree with the district court that a neutral policy would have a secular purpose and would avoid an entanglement with religion.[129]

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126. 635 F.2d at 1317.

127. Chess v. Widmar, 480 F. Supp. 907 (W.D. Mo. 1979). The court relied primarily on Tilton v. Richardson, 403 U.S. 672, *reh. denied*, 404 U.S. 874 (1971).

128. 635 F.2d at 1320.

129. *Id.* at 1317 (emphasis in original).

The district court rested its ultimate decision on the view that a neutral policy (i.e., permitting religious as well as other groups to meet on campus) would have the primary effect of advancing religion. This view the Court of Appeals soundly rejected:

> We cannot agree, however, that such a policy would have the primary effect of advancing religion. Rather, it would have the primary effect of advancing the University's admittedly secular purpose—to develop students' "social and cultural awareness as well as [their] intellectual curiosity." It would simply permit students to put their religious ideas and practices in competition with the ideas and practices of other groups, religious or secular. It would no more commit the University, its administration or its faculty to religious goals than they are now committed to the goals of the Students for Democratic Society, the Young Socialist Alliance, the Young Democrats or the Women's Union.
>
> Furthermore, a neutral policy would not be an "establishment" as that term was understood by the framers of the First Amendment.
>
> . . .
>
> Under a neutral policy, the University would not sponsor religious worship or teaching; sponsorship would lie with the recognized student groups. Financial support would be minimal. Finally, there would be no active involvement of the sovereign because the University's role would be limited to determining the time, place and manner of the event and would not extend to approval or disapproval of content.[130]

The Court of Appeal thus concluded:

> UMKC has the right, as do all public universities, to recognize student groups that seek to associate for the advancement of any and all ideas. It has exercised this right and has opened certain of its facilities to recognized student groups for lectures, discussions, symposiums, meetings, events and programs. But UMKC has denied access to these facilities to one such recognized student group based solely on its conclusion that the group's meetings include either religious worship or religious teaching. This

130. *Id.*

> denial clearly burdens the constitutional rights of the group's members and is not justified by a compelling state interest in avoiding an establishment of religion. A neutral accommodation of the many student groups active at UMKC would not constitute an establishment of religion even though some student groups may use the University's facilities for religious worship or religious teaching. Therefore, UMKC's regulation No. 4.0314.0107, which prohibits religious worship and religious teaching in the University's buildings or on its grounds, is not required by the Establishment Clause. Because of the burden it imposes on the rights guaranteed to the appellants by the First and Fourteenth Amendments of the federal Constitution, the regulation is invalid.[131]

B. *Official Recognition*

Virtually every system of state colleges and universities provides for official recognition of student organizations. The general rationale for promoting student association in this manner is to encourage students to join together, within the academic community, for the purpose of pursuing common interests beyond the scope of the formal curriculum.[132] In addition to fostering a beneficial atmosphere for student association, however, the standard procedures involved with official recognition also give the institution control over what activities will be permitted on campus. This control arises both from the requirements that are imposed by the university on students seeking recognition and from the grant of benefits to groups who meet the requirements and attain recognized status.

It is this latter aspect—which generally involves the ability to use campus facilities, publicize activities, invite speakers—that makes official recognition so crucial. As the Court observed in *Healy v. James*:

> Denial of official recognition posed serious problems for the organization's existence and growth. Its members

131. *Id.* at 1320. The university filed a petition for certiorari in the United States Supreme Court, and, as indicated above, that petition was granted on February 23, 1981. The decision to grant a review of the decision is somewhat surprising, in light of the fact that no conflict among the courts of appeal existed, this being the first decision at that level. It should be noted that the appeal of the *Dittman* case in the Ninth Circuit has been argued and is now under submission. Oral arguments were heard by the Court in *Widmar* on Oct. 6, 1981, and the case is now under submission.

132. *See, e.g.*, Chess v. Widmar, 635 F.2d at 1312 n.1 (UMKC recognition policy statement).

> were deprived of the opportunity to place announcements regarding meetings, rallies, or other activities in the student newspaper; they were precluded from using various campus bulletin boards; and—most importantly—nonrecognition barred them from using campus facilities for holding meetings.[133]

The implications of granting or withholding each of these incidental benefits are examined separately below. However, it is important to consider whether mere official recognition of a student religious group, without more, might be perceived as raising a problem under the establishment clause and thus be raised as grounds for denying such recognition.

Indeed, several universities have attempted to justify refusal to grant recognition to various groups on the grounds that it would constitute implied approval by the university of activities or beliefs with which the university did not necessarily agree.[134] With respect to religious groups, the argument relies on decisions holding that state sponsorship of religion is clearly impermissible and asserts that mere official recognition by the school is enough to constitute such sponsorship.

Assuming that recognition is granted to religious and non-religious groups alike, this argument should be rejected. In *Student Coalition for Gay Rights v. Austin Peay State University*,[135] the university asserted the defense of avoiding implicit approval of the group's views to justify the denial of recognition for a gay students' organization. Rejecting this defense, the court observed:

> Recognition by APSU of an organization is neither explicit nor implicit approval of the organization, its goals, or purposes. To insist otherwise would involve the University in impossible contradictions. Would not the University "recognize" both the Student Christian Association and the Jewish Student Organization, or even the Student Atheist Society? Would it grant recognition to the Jewish Defense League but deny it to the Palestinian Student Association? Would it recognize the American Nazi Party but deny recognition to the NAACP? What about Young Republicans versus Young Democrats? Ap-

133. Healy v. James, 408 U.S. at 176.
134. *See, e.g.*, Gay Lib. v. Univ. of Mo., 558 F.2d 848.
135. 477 F. Supp. 1267 (M.D. Tenn. 1979).

> proval or disapproval based upon explicit or implicit agreement with the content of the advocacy is contrary to the very core of a University's goal of eclectic examination, but more importantly to this dispute, cannot pass constitutional muster.[136]

Thus, where the university maintains a policy of officially recognizing student groups of all social, political, and other interests and viewpoints, and allows a religious group the same opportunity as other groups to gain recognized status, "there is no 'establishment of a religion,' and there cannot be a meaningful perception of one."[137]

C. *Use of Campus Facilities*

Beyond the threshold issue of recognition, the most critical issue is whether a group will be permitted to meet on campus to further its religious purposes. The right to utilize campus facilities, although technically only an incident of recognition at most universities, is generally at the heart of students' rights conflicts. Moreover, this right is the most fundamental of the associational rights that a university must provide.[138]

The Supreme Court has clearly sanctioned some restrictions on the use of public campus facilities by students, in view of the "special characteristics of the school environment."[139] The permissible extent of those restrictions, however, is strictly limited to time, place, and manner considerations that go no further than is necessary to ensure that the use will not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school or will not invade or collide with the rights of other students. Only a showing that a real threat of disruption exists will suffice to establish the existence of the necessary compelling state interest.[140]

Moreover, it is equally clear that, even if more restrictive time, place, and manner limitations are allowed on school grounds than in more open public forums, such as parks, universities still may not constitutionally restrict the use of campus facilities by student

136. *Id.* at 1273.

137. O'Hair v. Andrus, 613 F.2d at 934. *See also*, Jaffe v. Alexis, 659 F.2d 1018, 1022.

138. Healy v. James, 408 U.S. at 181.

139. *See*, Tinker v. Des Moines Independent School Dist., 393 U.S. 503.

140. *See* text accompanying notes 13-29 *supra*.

organizations solely on the basis of the content of expression that will take place therein.[141] Notwithstanding this clear prohibition on content-based restrictions, however, several universities and some courts have asserted that such restrictions are justified where the content of the speech is religious. The compelling state interest asserted is not the avoidance of disruption, however, but the alleged need to avoid an impermissible establishment of religion by the university. According to this argument, establishment results largely from the indirect financial aid that the religious group receives in the form of rent-free space, heating, and lighting, for example.[142] Providing this aid, it is contended, has the primary effect of advancing religion.

The Constitution, however, has never been held to require that no government aid whatsoever may benefit religious groups.[143] If the aid is extended in the context of a program whose purpose and primary effect are secular, the aid is permissible. That is precisely the situation that exists when student religious groups are permitted to use campus facilities in the context of a general policy making such facilities available to all student groups alike.[144]

It is often argued that even if denial of campus facilities to religious groups does create some infringement on those groups' rights of free exercise, free speech or free association, the infringement and resulting burden are not substantial, since students may utilize off-campus facilities to conduct their meetings. As a factual matter, this argument may be simply untenable in many situations, since many universities provide the whole community for resident students, making off-campus alternatives substantially less accessible or desireable.[145] However, even if such alternatives are available at a given campus, this argument is directly contrary to the Court's observation that "the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed" by the prohibition.[146] In short, the correct view is that the

141. *See* text accompanying notes 50-57 *supra*.

142. *See, e.g.*, Chess v. Widmar, 635 F.2d 1310; Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43.

143. *See, e.g.*, Walz v. Tax Comm'n, 97 U.S. 664 (1970).

144. Chess v. Widmar, 635 F.2d at 1317. *See also*, O'Hair v. Andrus, 613 F.2d at 937.

145. *See, e.g.*, Keegan v. Univ. of Del., 349 A.3d at 16.

146. Healy v. James, 408 U.S. at 183. *See also*, Gay Students Org. of the Univ. of N.H. v. Bonner, 509 F.2d at 660 (court rejected argument "that, so long as an association is allowed to meet, restrictions on some of its activities are permissible—i.e., that it is enough that the glass is half full.") *Accord*, Southeastern Promotions Ltd.

availability of alternative forums is constitutionally irrelevant when considering the right of student groups to meet on campus.

It might be argued that a university that prohibits religious groups from meeting on campus need not show that permitting such meetings would necessarily result in impermissible establishment, but merely that such a prohibitory policy fulfills a "compelling state interest" by allowing the university to stay far away from any perception of sponsorship or involvement with religion. This argument, however, not only ignores the standards set forth in *Tinker* and *Healy*, but it also begs the fundamental issue. If it cannot be shown that permitting such meetings would, in fact, violate the establishment clause, then a "compelling state interest" in avoiding the perception of establishment simply cannot exist.

Finally, the practical application of regulations prohibiting only religious meetings while permitting all other types of student meetings must ultimately result in the very "excessive entanglement" that the establishment clause prohibits. In many instances, recognized student religious organizations are informed that on-campus meetings for social or business purposes are permissible as long as religious expression and activities are not involved. In order to determine how such a restriction applies to a given meeting or activity, however, an administrative official must determine, often before the meeting or activity takes place, whether it will be "religious" or not. Given the difficulty which courts have faced in trying to resolve this issue, it is inconceivable that a university administrator should be put in the position of having to make such determinations. For example, if a meeting is held to discuss the views of the Moral Majority and their impact on society, how should such a meeting be classified? As the court observed in *Chess v. Widmar*, a "neutral policy" avoids the "excessive entanglement" problems necessarily raised by any attempt to answer this question.[147]

D. *Right to Publicity and Distribution of Literature on Campus*

As the Supreme Court has observed, the ability of student groups to publicize their activities or views to other students by posting materials and distributing literature on campus is another

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v. Conrad, 420 U.S. 546, 556 (1975) (availability of alternative private forum does not justify otherwise impermissible prior restraint, since "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

147. 635 F.2d 1310, 1317.

vital aspect of student associational rights.[148] Accordingly, limitations on the ability to publicize are subject to the same strict first amendment standards. This view is expressed in a series of lower court decisions striking down school regulations that imposed prior approval requirements on the distribution of materials by students. While these decisions recognize the right of university officials to establish a prior review procedure, they hold that such procedures must be narrowly drafted so that they can only be used to prohibit distribution of materials in "situations where school functioning is materially disrupted or the rights of students substantially infringed."[149]

It seems clear that any administration policy that singles out and prohibits free religious literature distribution or posting of materials publicizing activities of religious student groups will run afoul of the constitutional requirements. Whether constitutional protection extends to the operation of a booktable by a religious student group where religious literature is sold in return for donations to the group is a closer question. Nevertheless, if other groups are permitted to distribute or sell literature or sponsor events in return for monetary donations, the same principle of non-discrimination should apply.

E. *Right to Invite Outside Speakers on Campus*

A further benefit that is often granted to recognized student groups is the right to invite non-student speakers to come onto the campus for the purpose of addressing club meetings, general student body gatherings and similar functions. The circumstances under which individual speakers may be denied this right was a question faced by several courts during the 1960's.[150] The willingness of courts to strike down such bans is clearly rooted in the constitu-

148. Healy v. James, 408 U.S. at 181.

149. Cintron v. State Bd. of Educ., 384 F. Supp. 674, 679 (D.P.R. 1974). In Jones v. Board of Regents of Univ. of Ariz., 436 F.2d 618 (9th Cir. 1970), the court considered a university regulation that prohibited handbilling anywhere on campus grounds, "even the portions thereof which . . . are open to the public generally," with the exception that handbills authorized by the university could be handed out in classrooms during authorized group meetings. *Id.* at 619-20, 622. The court struck down the regulation, noting that it was too broad to be justified as necessary to prevent disruption. *Id.* at 622. *See also*, Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975); Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973).

150. Significantly, as one court pointed out several years later, speaker bans fared extremely poorly in the federal courts during that decade. Pickings v. Bruce, 430 F.2d 595, 599 (8th Cir. 1970) (unable to find a single case decided in 1960's in which speaker ban upheld by federal court).

tional aversion to prior restraints in general and in the careful protection of first amendment rights in public forums.

These principles have been specifically applied to strike down a regulation aimed at religious speakers. In *Stacy v. Williams*,[151] a three-judge court struck down as unconstitutionally discriminatory a regulation governing state universities in Mississippi that provided that university facilities "shall not be made available for public religious meetings or gatherings to off campus persons or groups of persons."[152] In striking down this regulation, the Court concluded:

> [A]s this regulation can reasonably be construed to mean that no student religious group may invite outside speakers on religious topics, which prohibition would conflict with the Equal Protection Clause, it must be rejected, and, if revised, must specifically be confined to forbidding only religious services conducted on the campus by persons having no connection with the university.[153]

The court in *Stacy* thus implicitly recognized the right of religious student groups to meet on state university campuses and explicitly held that the differential treatment of such groups with respect to the presentation of outside speakers on campus constituted an impermissible classification in violation of the equal protection clause.[154]

F. *Right to Funding*

The ability to obtain university funding for club activities is often another concomitant of official recognition. Whether there is an absolute constitutional right to such funding, however, is unclear. Furthermore, in the case of student religious groups, the issue of direct financial aid obviously raises serious establishment issues.

If the university makes funding available to some groups but denies it to others on the basis of the ideas they express, a group so denied would appear to have a claim for relief under the equal protection clause. Similarly, if the university withdraws previously granted funding solely based on disagreement with some non-disruptive act or expression of the group, a constitutional violation is likely to be found.[155]

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151. 306 F. Supp. 963 (N.D. Miss. 1969).

152. *Id.* at 975 n.28.

153. *Id.* at 975-76.

154. *Id.*

155. *See, e.g.*, Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973); Brooks v. Auburn Univ., 296 F. Supp. 188 (M.D. Ala.), 412 F.2d 1171 (5th Cir. 1969).

However, if the university merely chooses to adopt a non-discriminatory policy of not providing student clubs with funds for their activities, it is not settled whether a constitutional violation exists. In other words, the question is whether funding, like use of campus facilities, is a necessary element of the right of association in the university context.[156]

The Court expressly left this question open in *Healy*.[157] As a result, at least one commentator has concluded that direct funding is *not* an associational right the university must grant.[158] This position was implicitly confirmed by the Fourth Circuit Court of Appeals in *Maryland Public Interest Research Group v. Elkins*.[159] In that case the group was granted university funds, but the grant was subject to a stipulation that none of the money received would be used to pay litigation expenses. The Court upheld the stipulation, noting that "there is no affirmative commandment upon the University to activate [the group's] exercise of First Amendment guarantees. . . ."[160]

Even if it is assumed, however, that a funding requirement does exist, or if it is shown that funding is provided generally by a university, there is a serious question whether the giving of such funds to a religious student group is prohibited by the establishment clause. That such aid is prohibited was clearly the opinion of the district court in *Dittman*.

> Such funding is also a violation of the Establishment Clause, for when state funds are provided to a religious group, there is no means of ensuring that those funds are not spent for religious purposes. The continuing supervision, justification, and debate, accompanying the use of state funds by religious groups, unavoidably entangles the state in matters of religion.[161]

As is clearly reflected in the court's brief explanation in *Dittman*, the prospect of permitting religious student groups to receive student activity funds under any circumstances would appear to create substantial, if not insurmountable, establishment clause problems. As a practical matter, therefore, a student religious group seeking to convince a university administrator that it is entitled to

156. *See* Healy v. James, 408 U.S. 169.
157. *Id.* at 182 n.8.
158. *See Beyond* Tinker, *supra* note 4, at 1710-11.
159. 565 F.2d 864 (4th Cir. 1977), *cert. denied*, 435 U.S. 1008 (1978).
160. *Id.* at 866.
161. Slip op. at 11.

associational rights on campus equal to those of other student groups might be well-advised to forego a claim to student funding, even if such funding is granted to non-religious groups.

CONCLUSION

As the foregoing analysis indicates, the issues facing the Supreme Court as it takes up the case of *Widmar v. Vincent* are complex. It has been almost twenty years since the Court's last major decision on prayer in the public schools and a decade since the cornerstone students' rights decisions of *Tinker v. Des Moines Independent Community School District* and *Healy v. James*. It remains to be seen to which of these lines of decisions the *Widmar* case will be added. In the authors' opinion, the principles underlying both the relevant clauses of the Constitution and the relevant decisions of the Court clearly mandate an affirmation of the students' right to meet. Nevertheless, whether that result or the opposite is reached, one thing is certain: the decision in *Widmar*[162] will have a highly significant impact on college life for years to come.

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162. While this issue was in press, Widmar v. Vincent was decided. The Court held that the exclusionary policy of the University of Missouri at Kansas City violated the fundamental principle that state regulation of speech should be content-neutral. 50 U.S.L.W. 4062 (U.S. Dec. 8. 1981), *aff'g*, 635 F.2d 1310 (8th Cir. 1980).