AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 10: The Reagan Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

**Widmar v. Vincent, 454 U.S. 263** (1981)

*The University of Missouri at Kansas City maintains a list of recognized student groups who are provided with access to university facilities and benefit from a fund generated by a student activity fee. Cornerstone was a registered religious group on campus, but in 1977 it was told that that could no longer use university buildings. That determination followed from a policy adopted by the board of curators in 1972 that prohibited the use of university grounds “for purposes of religious worship or religious teaching.”*

*A group of students who were members of Cornerstone filed suit in federal district court claiming that new policy infringed on their free exercise of religion. The district court found that the policy was not only valid but in fact required so as to avoid creating an unconstitutional establishment of religion. The circuit court reversed. The U.S. Supreme Court affirmed the circuit court in an 8-1 decision, holding that allowing religious groups equal access to facilities at a state college was consistent with the constitutional ban on the establishment of religion and compelled by the students’ right of association. The Court did not embrace the argument that the university had infringed of the students’ free exercise of religion, but instead accepted the view that religious speech could in some contexts be treated like other forms of constitutionally protected speech and that the state could not single out religious speech for disfavor.*

JUSTICE POWELL delivered the opinion of the Court.

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Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place. *Southeastern Promotions, Ltd. v. Conrad* (1975).

The University's institutional mission, which it describes as providing a "*secular* education" to its students, Brief for Petitioners 44, does not exempt its actions from constitutional scrutiny. With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities. *Healy v. James* (1972).

Here UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. *Heffron v. International Society for Krishna Consciousness, Inc*. (1981). In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

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The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content to their speech. In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to the range of an open forum's likely effects. It is possible — perhaps even foreseeable — that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion. *McGowan v. Maryland* (1961).

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On one hand, respondents' First Amendment rights are entitled to special constitutional solicitude. Our cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content. On the other hand, the state interest asserted here — in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution — is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech.

Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations. Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources or "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Finally, we affirm the continuing validity of cases that recognize a university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.

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

Affirmed.

JUSTICE STEVENS, concurring.

As the Court recognizes, every university must "make academic judgments as to how best to allocate scarce resources." The Court appears to hold, however, that those judgments must "serve a compelling state interest" wherever they are based, even in part, on the content of speech. . . . In my opinion, the use of the terms "compelling state interest" and "public forum" to analyze the question presented in this case may needlessly undermine the academic freedom of public universities.

Today most major colleges and universities are operated by public authority. Nevertheless, their facilities are not open to the public in the same way that streets and parks are. University facilities — private or public — are maintained primarily for the benefit of the student body and the faculty. In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials. They select books for inclusion in the library, they hire professors on the basis of their academic philosophies, they select courses for inclusion in the curriculum, and they reward scholars for what they have written. In addition, in encouraging students to participate in extracurricular activities, they necessarily make decisions concerning the content of those activities.

Because every university's resources are limited, an educational institution must routinely make decisions concerning the use of the time and space that is available for extracurricular activities. In my judgment, it is both necessary and appropriate for those decisions to evaluate the content of a proposed student activity. I should think it obvious, for example, that if two groups of 25 students requested the use of a room at a particular time — one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of Hamlet — the First Amendment would not require that the room he reserved for the group that submitted its application first. Nor do I see why a university should have to establish a "compelling state interest" to defend its decision to permit one group to use the facility and not the other. In my opinion, a university should be allowed to decide for itself whether a program that illuminates the genius of Walt Disney should be given precedence over one that may duplicate material adequately covered in the classroom. Judgments of this kind should be made by academicians, not by federal judges,[[2]](https://scholar.google.com/scholar_case?case=7188907281892258516&hl=en&as_sdt=6&as_vis=1&oi=scholarr" \l "[23]) and their standards for decision should not be encumbered with ambiguous phrases like "compelling state interest."

Thus, I do not subscribe to the view that a public university has no greater interest in the content of student activities than the police chief has in the content of a soapbox oration on Capitol Hill. A university legitimately may regard some subjects as more relevant to its educational mission than others. But the university, like the police officer, may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted. If a state university is to deny recognition to a student organization — or is to give it a lesser right to use school facilities than other student — it must have a valid reason for doing so.

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. . . . Quite obviously, however, the University could not allow a group of Republicans or Presbyterians to meet while denying Democrats or Mormons the same privilege. It seems apparent that the policy under attack would allow groups of young philosophers to meet to discuss their skepticism that a Supreme Being exists, or a group of political scientists to meet to debate the accuracy of the view that religion is the "opium of the people." If school facilities may be used to discuss anticlerical doctrine, it seems to me that comparable use by a group desiring to express a belief in God must also be permitted. The fact that their expression of faith includes ceremonial conduct is not, in my opinion, a sufficient reason for suppressing their discussion entirely.

JUSTICE WHITE, dissenting.

In affirming the decision of the Court of Appeals, the majority rejects petitioners' argument that the Establishment Clause of the Constitution prohibits the use of university buildings for religious purposes. A state university may permit its property to be used for purely religious services without violating the First and Fourteenth Amendments. With this I agree. The Establishment Clause, however, sets limits only on what the State may do with respect to religious organizations; it does not establish what the State is *required* to do. I have long argued that Establishment Clause limits on state action which incidentally aids religion are not as strict as the Court has held. The step from the permissible to the necessary, however, is a long one. In my view, just as there is room under the Religion Clauses for state policies that may have some beneficial effect on religion, there is also room for state policies that may incidentally burden religion. In other words, I believe the State to be a good deal freer to formulate policies that affect religion in divergent ways than does the majority. . . .

. . . . Although there may be instances in which it would be difficult to determine whether a religious group used university facilities for "worship" or "religious teaching," rather than for secular ends, this is not such a case. The regulation was applied to respondents' religious group, Cornerstone, only after the group explicitly informed the University that it sought access to the facilities for the purpose of offering prayer, singing hymns, reading scripture, and teaching biblical principles. . . .

A large part of respondents' argument, accepted by the court below and accepted by the majority, is founded on the proposition that because religious worship uses speech, it is protected by the Free Speech Clause of the First Amendment. Not only is it protected, they argue, but religious worship *qua* speech is not different from any other variety of protected speech as a matter of constitutional principle. I believe that this proposition is plainly wrong. Were it right, the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech.

. . . . Just last Term, the Court found it sufficiently obvious that the Establishment Clause prohibited a State from posting a copy of the Ten Commandments on the classroom wall that a statute requiring such a posting was summarily struck down. That case necessarily presumed that the State could not ignore the religious content of the written message, nor was it permitted to treat that content as it would, or must, treat other — secular — messages under the First Amendment's protection of speech. . . .

If the majority were right that no distinction may be drawn between verbal acts of worship and other verbal acts, all of these cases would have to be reconsidered. Although I agree that the line may be difficult to draw in many cases, surely the majority cannot seriously suggest that no line may ever be drawn. If that were the case, the majority would have to uphold the University's right to offer a class entitled "Sunday Mass." Under the majority's view, such a class would be — as a matter of constitutional principle — indistinguishable from a class entitled "The History of the Catholic Church.

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

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