WHY *ERZINGER* COULD BE REVIVED: ARE MANDATORY PAYMENTS FOR UNIVERSITY INSURANCE PLANS CONSTITUTIONAL?

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I. THE ERZINGER CASE

A. What was Erzinger?

In 1982, plaintiffs, a group of students/plaintiffs at the University of California, appealed an adverse decision from the Superior Court of San Diego County to the Court of Appeal of California, Fourth Appellate District.[1] According to the appellate decision, the University of California collected a registration fee from all students,[2] and then used that fee to provide them with a number of services, including health services.[3] These health services included, *inter alia*, abortion counseling, abortion referral, and abortion.[4] The plaintiffs refused to pay a portion of the registration fee that supported abortion and related services.[5] However, the University did not accept partial payments for mandatory fees and cancelled the plaintiffs' enrollments.[6] The plaintiffs asserted that the University's policy of collecting mandatory registration fees that funded abortion required them to violate their religious beliefs.[7] They asked the Superior Court to find this University policy unconstitutional under the First and Fourteenth Amendments to the United States Constitution and Article I, section 4 and Article IX, section 9 of the California Constitution.[8]

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1 Erzinger v. Regents of the Univ. of Cal., 137 Cal. App. 3d 389, 391 (Cal. Ct. App. 1982).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Erzinger*, 137 Cal. App. 3d at 391.

7 *Id.*

8 *Id. See* USCS Const. amend. 1, 14. *See* Cal. Const., Art. I § 4; Art. IX § 9 (2006).

Unfortunately for the plaintiffs, the Court of Appeal affirmed the Superior Court and agreed with their reasoning.[9] Both courts applied the tests outlined in the United States Supreme Court's decisions in *Abington School District v. Schempp* and *Cantwell v. Connecticut* in which the Court stated that the plaintiffs needed to prove that they had been coerced in their religious beliefs,[10] or that the government had unreasonably interfered with their practice of religion in order to establish that the University violated their constitutional rights.[11]

With regard to the *Abington* test, both courts held that the plaintiffs failed to establish that the University coerced their religious beliefs.[12] According to the court, the University did not prevent the plaintiffs from expressing their views against abortion,[13] nor did it force them to advocate a position on abortion that was contrary to their religious views.[14] Furthermore, the University did not require its students to use the student health service programs, receive abortion or pregnancy counseling, or perform abortions.[15] Finally, in response to the plaintiffs' argument that the cancellation of their enrollments was tantamount to coercion, the University stated that the plaintiffs' enrollments were cancelled not because of their religious beliefs, but because they refused to pay the mandatory student fees in full.[16]

With regard to the *Cantwell* test, the courts held that the University's policy of requiring payment from all students to support health services was not an unreasonable interference with the plaintiffs' religious rights.[17] To justify their position, the courts relied primarily on tax cases such as *Autenrieth v. Cullen*.[18] *Autenrieth* held that "nothing in the Constitution prohibits the Congress from levying a tax upon all persons, regardless of religion, for support of the general government,"[19] and asserted that "the fact that some persons may object, on religious grounds, to some of the things that the government does is not a basis upon which they can claim a constitutional right not to pay a part of the tax."[20] The courts analogized *Autenrieth* to *Erzinger* and concluded that the University, like a government, could require all students to pay fees to fund general student support services without violating the Constitution.[21]

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9 *Id.* at 395.

10 *See* Sch. Dist. of Abington, Pa. v. Schempp, 374 U.S. 203, 223-224 (1963).

11 *See* Cantwell v. Connecticut, 310 U.S. 296, 303-304 (1940).

12 *Erzinger*, 137 Cal. App. 3d at 392-393.

13 *Id.* at 393.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Erzinger*, 137 Cal. App. 3d at 394.

18 *Id.* at 393.

19 *Id.*

20 *Id.*

21 *Id.*

Furthermore, the University established that, under Article IX, section 9, subdivision (f) of the California Constitution, the Regents of the University are "vested with legal title and the management and disposition of University property."[22] More specifically, once the University collects the mandatory fees from the students, the funds become University property and can be used in any way the Regents deem appropriate.[23] The courts also accepted the University's argument that "providing comprehensive, student health services is a proper University function."[24] By providing health services to all students, the University was "minimizing the detrimental effects of students' health conditions on their academic performance."[25] The plaintiffs offered no evidence to the contrary.[26] Thus, the courts ruled in favor of the University.

B. After Erzinger

After the appellate court announced its ruling, and after several rejections for further review in the California Supreme Court and United States Supreme Court,[27] the plaintiffs were forced to choose between violating their religious beliefs by paying the registration fees in full at the University of California, and remaining true to their beliefs by attending another university. Susan Erzinger, for her part, chose to attend another university.[28]

Fourteen years after *Erzinger*, another group of students brought a similar suit against their university.[29] Though the students brought this suit under the Religious Freedom Restoration Act, which called for strict scrutiny analysis,[30] the Ninth Circuit Court of Appeals used and relied on *Erzinger* to rule in favor of the University of California at Davis.[31]

Since 1996, when *Goehring v. Brophy* was decided, no other group of students at any university in the nation has brought a similar claim in state or federal court. However, this does not mean that universities across America have ended the policy of requiring all students to pay for insurance plans that support

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[22] *Erzinger*, 137 Cal. App. 3d at 393.

[23] *Id.*

[24] *Id.* at 394.

[25] *Erzinger*, 137 Cal. App. 3d at 394; *See also* Goehring v. Brophy, 94 F.3d 1294, 1300 (9th Cir. 1996) (stating that some other governmental interests included providing affordable healthcare to students who might not be able to have insurance otherwise, preventing the spread of communicable diseases, and preventing students from being distracted from their studies by health related issues.).

[26] *Erzinger*, 137 Cal. App. 3d at 394.

[27] Erzinger v. Regents of University of California, 462 U.S. 1133 (1983).

[28] *See* http://www.sandiegohistory.org/journal/81summer/br-cornerstone.htm (last visited Sept. 10, 2006) (offering a brief description of Susan B. Erzinger's academic background).

[29] *Goehring*, 94 F.3d at 1297 (stating that the suit at issue was in Davis, California against the University of California at Davis).

[30] *Id.* at 1298; *see also* 42 U.S.C. §§ 2000bb-1, 2 (2005). Note, however, that 42 U.S.C. § 2000bb (2005) was ruled unconstitutional in City of Boerne v. Flores, 521 U.S. 507 (1997).

[31] *Goehring*, 94 F.3d at 1302.

abortion. Nor does this mean that students have suddenly become indifferent to, or have accepted, the policy.

Two examples are worthy of explanation. According to Health Services brochures provided to incoming students, Columbia University charges all students a "health service fee" that "cannot be waived."[32] This health service fee, in addition to providing students with traditional medical services such as medication and counseling, provides special insurance coverage for "elective termination of pregnancy."[33] Unlike Columbia, Yale University does not charge its students a flat fee for enrollment in a basic health insurance plan.[34] However, under a program similar to that described in *Erzinger*, basic student health services are funded, at least in part, by Yale students' general tuition and fee payments.[35] Once admitted students submit the appropriate tuition and fee payments to the University it automatically enrolls them in the Yale Basic Health Plan.[36] This health plan provides students with a number of medical services, including gynecological services.[37] Though the text of the insurance plan reveals little more than this, the director of Yale Health Services has stated that abortion services are provided and covered under this basic health plan.[38]

Furthermore, Catholics comprise a significant percentage of the population in the United States.[39] Since the Catholic Church's position on abortion has remained constant throughout its history,[40] if one assumes that even a small

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[32] COLUMBIA UNIVERSITY HEALTH INSURANCE BROCHURE, § 4, 15 (2005-2006); *see also* COLUMBIA UNIVERSITY HEALTH INSURANCE BROCHURE, ADDENDUM (2005-2006); *see also* COLUMBIA UNIVERSITY HEALTH SERVICES BROCHURE, "HEALTH SERVICE PROGRAM," 16 (2005-2006).

[33] COLUMBIA UNIVERSITY HEALTH SERVICES BROCHURE, "HEALTH SERVICE PROGRAM,"15 (2005-2006).

[34] *Yale University Health Services, Enrollment and Eligibility*, http://www.yale.edu/uhs/menu/fs/enrollment.html (last visited Nov. 15, 2005).

[35] John E. Pepper, *Electronic Mail to Adrian Martinez*, CONN. INS. L.J. (2005).

[36] *See supra* note 34.

[37] *Id.*

[38] *See* Makda Asrat, *Abortions at Yale:Free and Controversial*, YALE DAILY NEWS, January 27, 2006, http://www.yaledailynews.com/article.asp?AID=31501 ("Women covered by the Yale Health Plan— which includes all undergraduates, even those who have waived Yale medical insurance—are eligible for as many abortions as they need, free of charge and without parental notification required."); *see also* Hillary August, *Abortions are Covered by Plan, but Still Rare*, YALE DAILY NEWS, Nov. 11, 2004, http://www.yaledailynews.com/article.asp?AID=27278 (Yale University Health Services Director Paul Genecin states that abortion is provided in basic coverage); *see also infra* note 46 (discussing easy access to RU-486 drug).

[39] *See* United States Census Bureau, *Self-Described Religious Identification of Adult Population, No 67*, (2001), http://www.census.gov/prod/2004pubs/04statab/pop.pdf (last visited Nov. 15, 2005) (the percentage of Catholics to the total US population in 2001 was about 24.46%, and the percentage of Catholics to the total Christian population in the US was about 31.89%).

[40] *See* TERTULLIAN, APOLOGIA, Ch. IX. (One of the earliest church fathers, Tertullian wrote in the 2nd - 3rd Century A.D., "In our case, murder being once for all forbidden, *we may not destroy even the foetus in the womb*, while as yet the human being derives blood from other parts of the body for its sustenance. *To hinder a birth is merely a speedier man-killing*; nor does it matter whether you take away a life that is born, or destroy one that is coming to the birth. That is a man which is going to be one; you have the fruit already in its seed."); *see also* Pope John Paul II, *Evangelium Vitae*, § 62

percentage of students at each university in America are Catholic and conservative in their religious beliefs, then there is a chance that universities requiring students to pay for insurance plans that fund abortion risk being haled into court for violating their students' religious rights under the First Amendment.

C. Goals of the Article

This work has four purposes. First, because I think that the Superior Court of San Diego County and the California Court of Appeal applied the wrong constitutional test in *Erzinger*, I will analyze a hypothetical case, with facts similar to those described in *Erzinger* and the health plans at Yale and Columbia, using the constitutional test outlined in *Sherbert v. Verner*, which calls for strict scrutiny analysis,[41] and unlike *Abington* and *Cantwell*, is more representative of the Supreme Court's recent Free Exercise clause jurisprudence. Second, I will propose arguments for a hypothetical class of Catholic students who oppose supporting abortion through mandatory payments to a university. Specifically, I will establish that university policies similar to those described in *Erzinger* impose substantial burdens on Catholic students' religious rights and do not serve compelling government interests.[42] Third, I will address and refute counterarguments that universities can raise under *Employment Division v. Smith* and tax cases such as *United States v. Lee* and *Autenrieth v. Cullen*. Finally, by analyzing the arguments of both parties, I will demonstrate that the best solution to the problems that may arise when universities require students to pay for insurance plans that support, provide, or fund abortion is to allow Catholic students (or any other student with a religious based opposition to abortion) an exemption from paying the required fees in full. This policy is similar to the one utilized at one of the nation's most prestigious universities, and it should be adopted everywhere for the sake of both the schools and their students.[43]

II. A HYPOTHETICAL

Imagine a Catholic high school student sitting at home and watching

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(1995) (Pope John Paul II wrote in 1995: "I declare that direct abortion, that is, abortion willed as an end or as a means, *always constitutes a grave moral disorder, since it is the deliberate killing of an innocent human being*. This doctrine is based upon the natural law and upon the written Word of God, is transmitted by the Church's Tradition and taught by the ordinary and universal Magisterium."); *see also* JOSEPH CARDINAL RATZINGER (now Pope Benedict XVI), TRUTH AND TOLERANCE: CHRISTIAN BELIEF AND WORLD RELIGIONS 246 (Henry Taylor trans., Ignatius Press 2004) (2003) (The most recent pope wrote about abortion: "And thus we should ask: What kind of a freedom is this that numbers among its rights that of abolishing someone else's freedom right from the start?")

41 Sherbert v. Verner, 374 U.S.398, 403, 406-408 (1963).

42 *Id.* (Stating the three prongs of strict scrutiny analysis.)

43 *See* Harvard University Student Organization, *Harvard Right to Life*, http://hcs.harvard.edu/%7ehrl, (last visited Sept. 10, 2006) (Harvard University allows students a "rebate" of $1.00 if they oppose abortion.).

television on a Friday afternoon. She looks up at the wall clock. It is 3:55 P.M. She continues watching television, but then looks up at the clock again. This time, it is 3:57 P.M. She begins to perspire. She tries to watch more television, but cannot stand the agony of waiting. She opens the front door and watches the mailbox. Then it happens. The mailman arrives with a large folder for her. The student takes it into her house and tears it open. She smiles and sighs out of relief. She has been accepted to her first-choice university.

In the ensuing days and weeks, the student receives a number of additional packages from the University, including packages with information on housing, student organizations, billing information, and immunization and insurance requirements, to name a few. As she sifts through the mountain of pamphlets and brochures, she finds an obscure reference to a mandatory fee that the University charges. The fee cannot be waived;[44] it is collected from all students, and helps fund student health services, including a basic health insurance plan for all students.[45] This basic health plan provides students with numerous medical services, including immunizations, emergency care, psychological counseling, and access to some medications. However, it also provides students with easy access to abortion and abortion-related services. Surgical abortions are offered and performed at low prices by off-campus doctors who are compensated under the basic health plan. Students need not inform their parents, nor do they even need a doctor's referral to obtain a surgical abortion.[46] Medical abortions, in the form of mifepristone or RU-486 pills, are as available to students as aspirin or cold medicine.[47]

Now the student begins to feel pressure. As a devout Catholic,[48] she knows that it is against her faith to support abortion.[49] Her high school classmates, who

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[44] *See supra* note 32. This is Columbia University's policy.

[45] This is a hybrid of the mandatory health service fee (Columbia), and the "registration fee." (*Erzinger* and Yale).

[46] *See* COLUMBIA UNIVERSITY HEALTH SERVICES BROCHURE, "HEALTH SERVICE PROGRAM" 15 (2005-2006) (Not needing a referral seems to be peculiar to Columbia.).

[47] *See* Louise Story, *Yale to Offer Abortion Drug in Health Plan*, YALE DAILY NEWS, Jan. 8, 2001, http://www.yaledailynews.com/article.asp?AID=14004 (last visited Sept. 19, 2006); *see also* Beth Satkin, *Yale Health Service Includes RU-486 in Standard Health Plan*, http://www.campustimes.org/media/global_user_elements/printpage.cfm?storyid=64418 (last visited Oct. 5, 2005); *see also* The Park Ridge Center for Health, Faith, and Ethics, http://www.parkridgecenter.org/Page983.html (last visited Sept. 19, 2006) (stating that Yale offers RU-486).

[48] The "Catholic" specification is unique here. There is no indication that the students in *Erzinger* were Catholic. I use Catholicism in this article only because the Catholic Church has very clear rules about abortion. These rules emphasize the burden that arises when universities force Catholic students to choose between violating their faith and paying mandatory fees.

[49] CATECHISM OF THE CATHOLIC CHURCH ¶ 2272 ("Formal cooperation in an abortion constitutes a grave offense."); *see also* Congregation for the Doctrine of the Faith, Declaration on Procured Abortion (18 November 1974) (stating that "In the case of an intrinsically unjust law, such as a law permitting abortion or euthanasia, it is therefore never licit to obey it, or to "take part in a propaganda campaign in favour of such a law, or vote for it.").

were also admitted to this University and who are also devout Catholics, feel similarly about the mandatory fees. They remain hopeful that the University will allow them to withhold some money.

The group of Catholic students calls the University and voices their grievances to a University official. They begin by describing their religious and moral opposition to supporting abortion and then ask to be allowed an exemption equal to the amount of the fee that would apply to abortion coverage. The University official responds by saying that there is no way to determine with certainty how much of any fee applies to any specific service. In response, the students request that they be allowed some minimal, but admittedly arbitrary, price reduction. The amount of this price reduction, according to the students, does not have to be significant because their only concern is to remain true to their faith by refusing to pay fees that fund abortion.[50] The university official responds by stating that all of the required fees must be paid in full.[51]

Several months later, the students have not come to terms with the choice that confronts them. They can either violate the tenets of their religion by paying the fee in full, or they can choose to attend another university. Ultimately, they agree to withhold a mere $5.00 from their bills as a symbol of their protest and as an effort to adhere to their religious convictions. Several weeks after sending the University their payments, they receive notifications from the University stating that their enrollments have been cancelled because the bills were not paid in full.[52] They call the University and plead their cases to no avail. Following this rejection, the students bring a suit against the University for violating their Free Exercise of religion rights under the First Amendment.

III. CONSTITUTIONAL AND RELIGIOUS ISSUES

A. A Brief Outline of Recent Free Exercise Jurisprudence

The Supreme Court's decision in *Sherbert v. Verner* provides what is perhaps the most important analysis of challenges to laws, regulations, and other government programs under the Free Exercise clause. In that case, a member of the Seventh Day Adventist church was discharged by her employer because she would not work on Saturdays, in accordance with her religious beliefs.[53] She was then unable to obtain unemployment benefits because her refusal to work on Saturdays disqualified her from the compensation program.[54] The Supreme Court stated that

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[50] *See supra* note 43 (This reflects the Harvard Health services rebate. This rebate results in a $1.00 refund to students morally opposed to abortion.).

[51] *See* Erzinger v. Regents of the Univ. of Cal., 137 Cal. App. 3d 389, 393 (Cal. Ct. App. 1982).

[52] *Id.*

[53] Sherbert v. Verner, 374 U.S. 398, 399 (1963).

[54] *Id.* at 401.

to establish a violation of the Free Exercise clause, plaintiffs must demonstrate that the government action in question substantially burdens their freedom to practice their religion.[55] A substantial burden on religious practice can manifest itself in numerous ways. For example, as decided in *Sherbert*, government actions may pressure plaintiffs to commit acts that are forbidden by their religion,[56] or they may force plaintiffs to choose between "following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to accept [benefits], on the other hand."[57] Courts have also held that the burden must be more than an inconvenience; it must be an interference with a tenet that is central to the religion.[58]

If the plaintiff establishes that the government action substantially burdens their religious practices, they are not necessarily entitled to an exemption.[59] The government may justify an interference with religious practices if its action is the least restrictive means of achieving a compelling governmental interest.[60] Some past examples of compelling governmental interests include providing healthcare to the general public,[61] prohibiting use of peyote,[62] and providing the nation with a "comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees."[63] In *Sherbert*, on the contrary, the government's interest in preventing the filing of fraudulent unemployment compensation claims was not compelling enough to warrant its interference with the tenets of the Seventh Day Adventist religion.[64]

Later Supreme Court decisions strengthened plaintiffs' Free Exercise challenges. In *Wisconsin v. Yoder*, the respondents were members of the Amish religion who refused to send their children to school after they had completed the eighth grade.[65] This violated Wisconsin state law, which required parents to send their children to public or private school until they reached age sixteen.[66] They were convicted in the lower courts, but the state supreme court reversed this

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[55] *See id.*, at 403, 406-408; *see also* Graham v. Comm'r of Internal Revenue Service, 822 F.2d 844, 850-851 (9th Cir. 1987).

[56] *Sherbert*, 374 U.S. at 404; *Graham*, 822 F.2d at 850-851.

[57] *Sherbert*, 374 U.S. at 404; Hobbie v. Unemployment Appeals Comm'n of Fl., 480 U.S. 136, 141 (1987); *Graham*, 822 F.2d at 850-851. *See also* Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 449-451 (1988) (The modern Court seems to hold that unless there is some element of coercion on the government's part, there can be no substantial burden.).

[58] Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989); Goehring v. Brophy, 94 F.3d 1294, 1299 (9th Cir. 1996).

[59] Thomas v. Review Bd. of the Ind. Employment Security Div., 450 U.S. 707, 718 (1981).

[60] *Id.* at 718; *see also Sherbert*, 374 U.S. at 403, 406-407.

[61] *See* Hodel v. Va. Surface Mining and Reclamation Association, Inc., 452 U.S. 264, 300 (1981).

[62] *See* Employment Division, Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

[63] United States v. Lee, 455 U.S. 252, 258 (1982).

[64] *Sherbert*, 374 U.S. at 407.

[65] Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

[66] *Id.*

decision and the U.S. Supreme Court affirmed.[67] The Supreme Court based its decision, at least in part, on the fact that the Amish parents withdrew their children from public school after eighth grade to prepare them for a life in Amish communities, which included withdrawal from worldly influences, religious devotion, and agricultural labor.[68] Additionally, the Supreme Court found that the Amish alternative to formal education fulfilled the state's interests in preparing citizens for participation in the political system.[69] Most importantly, however, the Court considered the "minimal difference between what the State would require and what the Amish already accept," and held that "it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish."[70] The State could not meet this burden; thus, the convictions were deemed invalid.

Free Exercise jurisprudence then shifted in the government's favor twenty-eight years after *Yoder* when, in 1990, the Supreme Court limited the applicability of the holdings in both *Sherbert* and *Yoder*. In *Employment Division v. Smith*, it held that respondents' use of peyote in religious ceremonies was not entitled to exemption from Oregon's criminal laws.[71] Specifically, the Court stated that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"[72] If *Smith* is read broadly, it effectively limits *Sherbert* to unemployment compensation cases. Plaintiffs in this case could still bring a Free Exercise challenge, but their case would be weakened because it is not an unemployment compensation case and because it is not accompanied by an additional constitutional claim.[73] If *Smith* is read narrowly, however, it only holds that laws of general applicability, namely criminal laws, are not subject to scrutiny under *Sherbert*.[74] Under these circumstances, the plaintiffs could bring their Free Exercise claim and argue that courts could apply *Sherbert* because the University's mandatory fee is not a criminal law and, therefore, not "generally applicable." Alternatively, the University could argue that the mandatory fee is "generally applicable" because it is collected from all students, and the funds are used to

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67 *Id.*

68 *Id.* at 210.

69 *Id.* at 225.

70 *Yoder*, 406 U.S. at 236.

71 Employment Division, Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

72 *Id.* at 885.

73 *Id.* at 881 (In *Yoder*, for example, the Amish parents brought two constitutional claims: free exercise and the right of parents to raise their children as they see fit.).

74 *Id.* at 884 (The majority opinion acknowledges the possibility that post-*Sherbert* decisions may not restrict *Sherbert* exclusively to unemployment compensation cases. It then states that the post-*Sherbert* decisions have nothing to do with "across-the-board criminal prohibition[s] on a particular form of conduct.").

benefit the entire student population. If the court was to agree with this contention, the plaintiffs' case would once again be severely weakened.

B. Substantial Burden

Before proceeding to an in depth analysis of the substantial burden prong of the *Sherbert* test, it is important to briefly note the Supreme Court's historical reluctance to probe plaintiffs' religious beliefs to ascertain their sincerity and authenticity. In *Hernandez v. Commissioner of Internal Revenue*, for example, the Supreme Court stated, "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."[75] While the Supreme Court has seemed willing to presume the centrality and legitimacy of plaintiffs' religious beliefs, they have not held that this presumption entitles plaintiffs to exemptions under the Free Exercise clause.[76] Thus, the courts will inquire as to the extent of the alleged substantial burden on the religious beliefs and practices, even if the practices are consistent with the plaintiffs' faith.[77] For the purposes of this article, however, I will assume that the hypothetical plaintiffs must demonstrate that preserving and respecting life are central tenets of the Catholic faith, that supporting abortion and abortion related services violates these central tenets, and that the University's mandatory fees, because they support abortion, unreasonably force the plaintiffs to choose between violating their religion by attending the University and adhering to their religious beliefs by forgoing enrollment at the University.

C. Prohibition Against Murder and Caring for the Weak, Sick, and Children are Central Tenets of the Catholic Church

Any discussion of Catholic duties to preserve life and protect the weak must involve an understanding of both testaments of the Bible. For Catholics, however, additional emphasis must be afforded to the Gospels because they recount the life events of Jesus Christ;[78] the life of Jesus serves as a model of holiness, justice, and humanity for all Catholics.[79]

The Old Testament prohibits murder most famously and explicitly in the

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[75] Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989); *see also* Thomas v. Review Bd. of the Ind. Employment Security Div., 450 U.S. 707, 716 (1981); *see also Smith*, 494 U.S. at 887.

[76] *See Hernandez*, 490 U.S. at 699 (stating that the court had doubts as to the burden imposed on the Scientologists' religious practices).

[77] *But see Thomas*, 450 U.S. at 715; Frazee v. Illinois Department of Employment Security, 489 U.S. 829, 834 note 2 (1989) (both recognize that there are some "claim[s] so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause.")

[78] Mark, Matthew and Luke (the "Synoptic Gospels") recount the life events of Jesus Christ from birth through the Passion and resurrection. John focuses on Christ's adult life and ministry, and is much more mystical than the Synoptic Gospels.

[79] CATECHISM OF THE CATHOLIC CHURCH ¶ 459 (1995).

Book of Exodus. On Mount Zion, Moses received the Ten Commandments from God; the Fifth Commandment read, "You shall not murder."[80] The other books of the Old Testament reiterate this commandment, contain passages that describe the punishments that are handed down to humans who violate it, and explain that murder is offensive to God. For example, with regard to murder as an offense to God, the Book of Proverbs states, "[t]here are six things that the Lord hates, seven that are an abomination to him: haughty eyes, a lying tongue, *and hands that shed innocent blood...* "[81] With regard to punishments, the Book of Genesis states, "[w]hoever sheds the blood of a human, by a human shall that person's blood be shed."[82] The Book of Leviticus reiterates the same punishment: "[a]nyone who kills a human being shall be put to death."[83]

With regard to the prohibition against murder, the New Testament inculcates principles that are virtually identical to those in the Old Testament. For example, the Gospel of Matthew restates the Fifth Commandment. Here, a man asked Jesus what he needed to do to have eternal life. Jesus said, "If you wish to enter into life, keep the Commandments. You *shall not murder...* "[84] A later passage in the same Book echoes the punishment for murder stated in Leviticus. When Jesus is arrested, one of his disciples defends him and wounds a slave of the high priest.[85] Jesus immediately admonishes the disciple and says, "[p]ut your sword back in its place; for all who take the sword shall perish by the sword."[86] Unlike the Old Testament, however, the New Testament goes beyond a mere prohibition against murder[87] and calls for Catholics to love their neighbors as well as their enemies.[88] According to Christ, this is the model of holiness that Catholics should follow.[89]

Many of the passages and ideas discussed above have been codified into the *Catechism of the Catholic Church*. Paragraph 2258, for example, states that human life is sacred and that "no one can under any circumstance claim for himself the right directly to destroy an innocent human being."[90] From this general point about respecting life, the *Catechism* discusses more specific violations of the Fifth Commandment.[91] For example, paragraphs 2268 and 2269 discuss the prohibitions against intentional homicide; paragraphs 2270 through 2279 discuss the Catholic Church's position against abortion and euthanasia; and paragraphs

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80 *Exodus* 20:13 (NRSV 1989).

81 *Proverbs* 6:16-17 (NRSV 1989) (emphasis added).

82 *Genesis* 9:6 (NRSV 1989).

83 *Leviticus* 24:17 (NRSV 1989).

84 *Matthew* 19:17-18 (NRSV 1989) (emphasis added); *see also Romans* 13:9 (NSRV 1989).

85 *Matthew* 26:51 (NRSV 1989).

86 *Matthew* 26:52 (NRSV 1989).

87 *See Matthew* 5:21 (NRSV 1989).

88 *Matthew* 5:43-48 (NRSV 1989).

89 *See Matthew* 5:48 (NRSV 1989).

90 CATECHISM OF THE CATHOLIC CHURCH ¶ 2258 (1995).

91 The Fifth Commandment is Thou Shall Not Kill. *Exodus* 20:13 (NRSV 1989).

2280 through 2283 discuss the Church's opposition to suicide. All of these teachings emphasize the importance the Catholic Church places on preserving life, and reinforce Christ's central principle that people should strive to love their neighbors as themselves.[92]

Several passages of the Old Testament encourage Catholics to protect the weak, the sick, and children. For example, the Book of Psalms states that one should, "[g]ive justice to the weak and the orphan; maintain the right of the lowly and the destitute. Rescue the weak and the needy; deliver them from the hand of the wicked."[93] The Book of Proverbs contains a similar call to defend and protect the less-fortunate. There, it is written, "[s]peak out for those who cannot speak, for the rights of all the destitute. Speak out, judge righteously, defend the rights of the poor and the needy."[94] With regard to protecting children, parental figures in many of the books of the Old Testament cherish their children as gifts from God.[95] The Book of Exodus contains what may be the most popular narrative that suggests there is a duty to protect children from harm. In Exodus, to further oppress the Hebrews, the Pharaoh decreed that the Hebrew midwives should kill all male Hebrew children but save female Hebrew children.[96] However, because the midwives "feared God,"[97] they allowed all Hebrew children to live, and lied to the Pharaoh to protect both themselves and the other Hebrews from reprisal.[98] As a reward for their courage and their decision to save the children's lives, God gave the midwives families and allowed the Hebrew people to grow and prosper.[99] The most relevant component of this story to the situation confronting the hypothetical plaintiffs is God's decision to reward the midwives' defiance of an immoral law.[100] For the plaintiffs, this story can be used to demonstrate that abortion, defined as the killing of innocent children, is an affront to God, while striving to preserve life, even in the face of an omnipotent government, pleases God. Violating the rule of preserving life by helping a university fund abortion related services, so their argument would go, causes the plaintiffs to violate a central tenet of their religion.

Like the Old Testament, the New Testament is replete with passages suggesting that Catholics should protect the weak, the sick, and children from

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92 CATECHISM OF THE CATHOLIC CHURCH ¶ 2196 (1995).

93 *Psalms* 82:3-4 (NRSV 1989).

94 *Proverbs* 31:8-9 (NRSV 1989).

95 *See Genesis* 4:25, 30:6, 33:5 (NRSV 1989); *Ruth* 4:13-14 (NRSV 1989); *Psalms* 127:3 (NRSV 1989).

96 *Genesis* 1:16 (NRSV 1989).

97 *Genesis* 1:17 (NRSV 1989).

98 *Genesis* 1:19 (NRSV 1989).

99 *Genesis* 1:20-21 (NRSV 1989).

100 *See* John Paul II, *Evangelium Vitae*, §73 (1995) (In this encyclical, Pope John Paul II wrote: "In the case of an intrinsically unjust law, such as a law permitting abortion or euthanasia, it is therefore never licit to obey it, or to 'take part in a propaganda campaign in favour of such a law, or vote or it.'").

harm. The most fundamental teaching of Christ found in the Gospels and the Pauline Epistles is that Catholics should strive to love all of their neighbors as they love themselves.[101] With regard to the sick, the weak, and the lame, this teaching manifests itself in several passages in the New Testament. For example, in the Gospel of Luke, Jesus tells the hosts of a banquet that they should not merely invite their friends, brothers, relatives, or rich neighbors with the expectation of being repaid; rather, they should also invite the poor, the crippled, and the lame into their homes.[102] Christ said that though the poor would not be able to repay the hosts, their generosity would be "repaid at the resurrection of the righteous."[103] The New Testament also contains several passages that demonstrate Jesus' willingness to console and associate with social pariahs, namely tax collectors and sinners,[104] adulteresses,[105] the handicapped,[106] and the diseased.[107] The obvious message is that Catholics, in attempting to follow Christ's model of living should love all of their neighbors and protect the weak and the sick. The hypothetical plaintiffs would argue that their refusal to help fund university sponsored abortion is consistent with their duty to protect "the least of their neighbors"[108] and that paying for the University's insurance plan violates a central tenet of their faith.

The Gospels are equally clear about the duty to protect children as they are about the duty to protect the weak and the sick. For example, while speaking about the virtues of humility, in the Gospel of Matthew, Jesus said, "[l]et the little children come to me, and do not stop them; for it is to such as these that the kingdom of heaven belongs."[109] To further illustrate the importance of welcoming and protecting children, Jesus also said, "[w]hoever welcomes one such child in my name welcomes me. If any of you put a stumbling block before one of these little ones who believe in me, it would be better for you if a great millstone were fastened around your neck and you were drowned in the depth of the sea."[110] As with the weak and sick, Jesus showed his compassion toward children by performing miracles on their behalf. For example, in the Gospel of Mark, Jesus cures a child possessed by a demon[111] and in the Gospel of Luke he raises a girl

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101 *Matthew* 22:39-40 (NRSV 1989); *Romans* 13:8, 10 (NRSV 1989).

102 *Luke* 14:12-14 (NRSV 1989).

103 *Luke* 14:14 (NRSV 1989).

104 *Matthew* 9:10-13 (NRSV 1989).

105 *John* 8:10-11 (NRSV 1989).

106 *Matthew* 12:9-13 (NRSV 1989); *Matthew* 20:29-34 (NRSV 1989); *Matthew* 9:2-8 (NRSV 1989).

107 *Matthew* 8:1-4 (NRSV 1989); *see also Mark* 1:40-44 (NRSV 1989); *Luke* 5:12-14 (NRSV 1989).

108 *Matthew* 25:40 (NRSV 1989).

109 *Matthew* 19:14-15 (NRSV 1989).

110 *Matthew* 18: 5-6 (NRSV 1989).

111 *Mark* 9:25-27 (NRSV 1989).

from the dead.[112] The message here is evident: Catholics must be humble and must also make every effort to protect their children from harm. The plaintiffs would argue that paying for abortion services violates these tenets of the faith as established by the life and teachings of Christ and as found in the Gospels.

As with the prohibitions against murder, the Catholic duties to protect the weak, the sick, and children are codified in the *Catechism of the Catholic Church*. Article 5 of Chapter Two: "The Sacraments of Healing," for example, deals exclusively with the sacrament of anointing the sick. In addition, paragraph 1509 states that the Church strives to heal the sick by taking care of the sick as well as by accompanying them with the prayer of intercession.[113] In Article 4 entitled "The Fourth Commandment," paragraphs 2221 through 2231 deal exclusively with the duties of parents. According to the *Catechism*, among the most important of these duties are providing their children with moral education,[114] creating a home where tenderness, forgiveness, respect, fidelity, and disinterested service are the rule,[115] and providing for their children's physical and spiritual needs.[116] These teachings demonstrate the importance of the parent-child relationship in Catholicism, and reiterate Christ's teachings about caring for and protecting children.

D. Abortion Violates the Prohibition Against Murder and the Duties to Care for the Weak, the Sick, and Children; Abortion is Contrary to the Central Tenets of the Catholic Church

Over the centuries, and particularly in the last forty years, the Catholic Church has been outspoken about its opposition to abortion as an "unspeakable crime" that is contrary to the tenets of the faith. For example, during the Second Vatican Council, Pope Paul VI wrote, "[f]or God, the Lord of life, has conferred on men the surpassing ministry of safeguarding life in a manner which is worthy of man. Therefore, "*[f]rom the moment of its conception life must be guarded with the greatest care while abortion and infanticide are unspeakable crimes.*"[117] A generation later, Pope Benedict XVI (then Joseph Cardinal Ratzinger and acting as the Prefect for the Congregation for the Doctrine of the Faith) reiterated the Church's position on abortion in *Donum Vitae,*[118] and added that, "[t]he human

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[112] *Luke* 8:52-56 (NRSV 1989).

[113] CATECHISM OF THE CATHOLIC CHURCH ¶ 1509 (1995).

[114] *Id.* at ¶ 2221.

[115] *Id.* at ¶ 2223.

[116] *Id.* at ¶ 2228.

[117] Pope Paul VI, *Gaudiam et Spes*, Chapter 51 § 3 (1965) (emphasis added).

[118] *See* Congregation for the Doctrine of the Faith, *Donum Vitae* (1987). "At the Second Vatican Council, the Church for her part presented once again to modern man her constant and certain doctrine according to which: "Life once conceived, must be protected with the utmost care; abortion and infanticide are abominable crimes."

being is to be respected and treated as a person from the moment of conception; and therefore from that same moment his rights as a person must be recognized, among which in the first place is *the inviolable right of every innocent human being to life.*"[119] Perhaps the most emphatic condemnation of abortion came from Pope John Paul II in his 1995 encyclical *Evangelium Vitae*:

> Therefore, by the authority which Christ conferred upon Peter and his Successors, in communion with the Bishops—who on various occasions have condemned abortion and who in the aforementioned consultation, albeit dispersed throughout the world, have shown unanimous agreement concerning this doctrine—I declare that *direct abortion, that is, abortion willed as an end or as a means, always constitutes a grave moral disorder, since it is the deliberate killing of an innocent human being.*[120]

Using these papal documents the hypothetical plaintiffs would be able to demonstrate all aspects of abortion – performance, supporting, or procuring – are contrary to the tenets of the Catholic faith. Thus, a university program that requires students to pay for insurance plans that fund abortion is a substantial burden on their practice of religion.

The plaintiffs may use other documents demonstrating the gravity of abortion to Catholics to buttress their arguments. For example, the *Catechism of the Catholic Church* reiterates that "formal cooperation in abortion constitutes a *grave offense.*"[121] Furthermore, it quotes the canon of the Church that states, "[a] person who procures a completed abortion incurs excommunication *latae sententiae* by the very commission of the offense."[122] For the Catholic, this means that once a person procures an abortion they are effectively expelled from the Church. Since Catholics believe that salvation comes only from God[123] and that faith in God comes only through the Church,[124] excommunication is essentially a kind of spiritual death sentence to the believer.[125] More specifically, rephrase this sentence if they are "outside the Church" — which is what excommunication is — they cannot be saved. Though the Catholic Church makes it clear that people may repent this sin and regain salvation,[126] the penalty of excommunication, *latae sententiae,* is meant to "make clear the gravity of the crime committed, the irreparable harm done to the innocent who is put to death, as well as to the parents

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119 Congregation for the Doctrine of the Faith, *Donum Vitae,* Part I Question 1 (1987) (emphasis added).

120 Pope John Paul II, *Evangelium Vitae*, §62 (1995) (emphasis added).

121 CATECHISM OF THE CATHOLIC CHURCH ¶ 2272 (1995) (emphasis added).

122 CATECHISM OF THE CATHOLIC CHURCH ¶ 2272 (1995) (quoting 1983 *Codex Iuris Canonici* c.1398).

123 CATECHISM OF THE CATHOLIC CHURCH ¶ 168 (1995).

124 *Id.* at ¶ 169.

125 *See id.*

126 Pope John Paul II, *Evangelium Vitae* §62 (1995); *see also* Id. at ¶ 2272.

and the whole of society."[127] By using these documents as well as those cited earlier, the plaintiffs would be able to establish that participating in funding abortion substantially burdens their practice of religion.

Given the Supreme Court's willingness to presume the validity of a plaintiff's religious beliefs,[128] it may be futile for the defense to attempt to characterize one's beliefs as anything less than valid or central to the faith. However, for the purposes of this article, at least two broad counterarguments will be considered. First, the University could argue that prohibitions against abortion are not "central tenets" of the Catholic faith. The University would, of course, have to construct a very narrow definition of "central tenets." However, they are not without options. For example, the University could refer to the creeds and prayers recited in the Catholic mass[129] — none of which mention abortion or the duties to protect life. Furthermore, the mass itself focuses primarily on the liturgy of the Eucharist, which celebrates the death and resurrection of Jesus Christ. Most masses never directly mention abortion or Catholics' duties to oppose it. Finally, the major Catholic Holy Days and periods such as Christmas, Easter, and Lent have no direct relation to abortion.[130] The University could argue that these prayers, holy days, and religious ceremonies are the "true" central tenets of the Catholic faith and that the prohibitions against abortion are merely social commentaries of the Church that, while important to many Catholics, are peripheral rather than central to the faith.

This view of the Church's central tenets however, ignores the concept that Jesus Christ served as the model of holiness for all humanity.[131] While the mass does concentrate on his death and resurrection, it also recounts the teachings of Jesus through the Liturgy of the Word, which is the reading of passages from the New Testament, the Gospel, and through the priest's homily, which is typically an exposition on the Gospel. It is through the liturgy of the word that Catholics may learn about values such as preserving life, love of neighbors, and protecting the weak, the sick, and children from harm — all of which are central to Catholic life. The narrow definition of central tenets also disregards other sources of authority, namely the papal encyclicals and the *Catechism of the Catholic Church*. The authority of the Pope flows from Jesus' statement to Peter in the Gospel of Matthew. Jesus said, "I will give you the keys of the kingdom of heaven, and whatever you bind on earth will be bound in heaven, and whatever you loose on earth will be loosed in heaven."[132] For Catholics, this passage ensures that papal

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[127] CATECHISM OF THE CATHOLIC CHURCH ¶ 2272 (1995).

[128] *See* Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989).

[129] The Nicean and Apostles' Creeds do not mention abortion, nor does the Our Father or Gloria. None of the seven sacraments directly refers to the duty to protect and preserve life.

[130] Lent, for example, commemorates Jesus' trials in the desert for forty days and forty nights.

[131] CATECHISM OF THE CATHOLIC CHURCH ¶ 459 (1995).

[132] *Matthew* 16:19 (NRSV 1989).

decrees are entitled to considerable deference. Although Catholics disagree as to how much deference to afford papal decrees, there seems to be little doubt that papal encyclicals like Pope John Paul II's condemnation of abortion in *Evangelium Vitae* and *Humanae Vitae* remain highly influential.[133]

The University could also argue that even if procuring abortions violates central tenets of the Catholic faith, the mandatory fees finance only a very small percentage of the overall student health plan and students need not avail themselves of all the services made available in the health plan. More specifically, the University would allege that since Catholics do not procure abortions for themselves, they do not reap any benefit from the insurance plan in this regard. As with the previous counterargument, however, this ignores the Vatican's proclamations that Catholics may not even provide indirect support for abortion or abortion related services. For instance, in 1974, the Congregation for the Doctrine of the Faith stated, "[i]n the case of an intrinsically unjust law, such as a law permitting abortion or euthanasia, it is therefore never licit to obey it, *or to take part in a propaganda campaign in favour of such a law, or vote for it.*"[134] Pope John Paul II echoed this sentiment twenty-one years later in his encyclical *Evangelium Vitae.*[135] The plaintiffs would assert that if the Catholic Church prohibits Catholics from even voting for laws or politicians that support abortion, the Church must also prohibit Catholics from funding abortion — however insignificant that funding may be. Thus, the University's mandatory fee causes them to violate the central tenets of their faith and substantially burdens their practice of religion.

E. Requiring Students to Fund Abortion Through Payment of Mandatory Fees Coerces Them to Violate Their Religion in Order to Obtain Government Benefits

The plaintiffs may argue that the University's mandatory fees and health insurance systems are unconstitutional because they violate the basic tenets of the plaintiffs' faith and also force the students to choose between remaining true to their faith or violating it in order to receive government benefits.

It must be recalled that in the hypothetical, the students have a choice to make. They may pay the fees in full, violate their religious beliefs by supporting abortion and related services, and receive an education at the University, or students can also opt to pay a reduced amount. However, if students pay a reduced amount

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[133] *Humanae Vitae* was written by Pope Paul VI and outlines the Catholic Church's position against contraception. *See generally*, Pope Paul VI, *Humanae Vitae*, (1968); *see also* Pope John Paul II, *Evangelium Vitae*, § 73 (1995)

[134] Congregation for the Doctrine of the Faith, *Declaration on Procured Abortion* (1974) (emphasis added).

[135] Pope John Paul II, *Evangelium Vitae*, § 73 (1995) ("Abortion and euthanasia are thus crimes which no human law can claim to legitimize. There is no obligation in conscience to obey such laws; instead, there is a *grave and clear obligation to oppose them by conscientious objection.*").

the University will cancel their enrollments and deny them admission. Therefore, this choice is coercive and violates the Free Exercise clause.

The University will argue that this is the case and it may use some of the arguments from *Erzinger* to bolster its position. For example, the University can assert that, while paying the mandatory fees might have some indirect impact on religious rights, the University does not directly require students to abandon their beliefs to attend the university; it does not require that students advocate abortion and it does not require students to participate directly in abortion. Abortions are not forced on unwilling women, nor are they required as a condition of attendance. Furthermore, the University does not directly prevent students from practicing the religion of their choice. While Catholics may incur some "theoretical punishment" by indirectly supporting abortion[136] and the University may hinder their practice in this way, the University does not require students to worship in the local Presbyterian Church, nor does it prevent Jews from attending Friday night services. Students are free to worship as they please in the churches or synagogues of their choice, and among populations most suitable to their tastes and preferences.

If a court accepts the University's argument that there is no coercion in the mandatory fees system, the University would be able to use *Lyng v. Northwest Indian Cemetery Protective Association* to argue that the case should be dismissed.[137] In *Lyng*, the Supreme Court held that the government could build a road through land used by American Indians in their rituals even though the governmental interest in the road was marginal.[138] More importantly, the Supreme Court stated that "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, do not require government to bring forward a compelling justification for its otherwise lawful actions."[139] Thus, if there is no coercion and if the government action is not intended to burden any specific religious group, the government action will most likely be upheld, even if the action burdens an individual's religious rights. Thus, relying on *Lyng*, the University may argue that since there is no direct coercion of the students by the University by means of mandatory fees, the students' lawsuit must fail.

While the University may not be directly coercing students to abandon their religious beliefs by requiring them to pay the mandatory fees in full, its' potential students argue that the University's system is unconstitutional. This argument, supported by Supreme Court precedent, contends that the university system forces them to choose between obtaining government benefits and adhering to their religious beliefs. In *Sherbert*, for example, the Supreme Court held that it was

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136 The "indirect punishment" is excommunication *latae sententiae*.

137 *See generally* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

138 *Id.*

139 *Id.* at 450-451.

unconstitutional for the government to require Seventh Day Adventists to choose between violating their religious beliefs by working on Saturday in order to receive unemployment compensation and forgoing government benefits by adhering to their religious beliefs.[140]

In *Yoder*, the Supreme Court also held that the government's action was unconstitutional. Here, the government required parents to enroll their children in public school through age sixteen, but the Amish faith required that children work with their parents on family farms at age fourteen.[141] The choice that the Amish parents had to make was a difficult one: they could either adhere to their religious beliefs and suffer the consequences, or they could abandon their faith, send their children to school through age sixteen, and remain free from legal consequences. These parents could use both *Sherbert* and *Yoder* to demonstrate that, in the past, the Supreme Court has held that choices that require people to violate the central tenets of their faith are unconstitutional. Therefore, in this case, the Catholic students could argue that they should be entitled to a partial exemption from the University's mandatory fees.

IV. STRICT SCRUTINY ANALYSIS

A. Is Providing Abortions for Students a Compelling State Interest?

Establishing that providing abortions for students is a compelling state interest will be difficult for the plaintiffs to establish. As in previous cases that questioned the significance of governmental interests in the health care context, the University will likely define its services broadly to amplify the importance of its services to the student population. More specifically, the University will assert that it does not merely provide abortions through the insurance plan, it also provides comprehensive health coverage that gives students access to a variety of services. Past holdings of the Supreme Court and Courts of Appeal suggest that there is a strong presumption in favor of the government when it is acting to protect the health and well-being of the population.[142]

The University will also list other benefits of its comprehensive insurance plans to the student population. For example, the University may argue that its insurance plans, subsidized with money obtained from the mandatory fees, are a cost-efficient alternative for students who may not be able to purchase insurance through private companies. The University's system prevents students from worrying about raising exorbitant amounts of money to pay for insurance coverage. As a result, they can concentrate on their academic pursuits without fear of missing

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[140] *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963).

[141] Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

[142] *See* Hodel v. Va Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264, 300 (1981).

classes due to illness or dropping out of school due to debt arising from medical care costs.[143] The University could also argue that its system protects the student population, even those who purchase insurance through private channels. One justification for this is because disease can spread easily in a student population, where thousands of people live, eat, and sleep in close quarters. The University's insurance plan makes certain that all students have full medical coverage and, therefore, helps promote the health of the entire university. Finally, in response to the plaintiff's argument that abortions are dangerous to women, the University can argue that many of its services are potentially "dangerous." For example, some medications that a university hospital may distribute to its students have harmful side effects, or are addictive, or may cause dangerous, or deadly, allergic reactions. Still, university hospitals take precautions to minimize these risks and regularly distribute a variety of medications to students. Similarly, the University would also argue that while a small number of students may experience complications from abortions, it has taken steps to minimize any possible negative effects of abortion. For example, many universities provide emergency care coverage under their insurance plans. If any serious complications arise as a result of abortion, the University health plan would likely provide coverage for the student. Additionally, many universities provide women with psychological counseling to cope with any complications that may arise from an abortion.[144] In this way, the University could argue that it has taken necessary steps to minimize the risks of abortion.

The University's interest in promoting the health and well-being of its student population is supported by a number of cases in the Supreme Court and U.S. Courts of Appeals. In *Hodel v. Virginia Surface Mining & Reclamation*, the Supreme Court held that "protection of the health and safety of the public is a paramount governmental interest."[145] This rationale justifies administrative action to prevent mining disasters.[146] In a more recent decision, *Rubin v. Coors* the Supreme Court held that the government could prevent brewers from competing on the basis of alcohol strength.[147] Competition of this sort, the government argued, could lead to increased alcoholism and related health problems among the population.[148] Finally, in *Goehring v. Brophy*, the Ninth Circuit Court of Appeals held that "the University [of California at Davis] interest in the health and well-being of its students, advanced by its mandatory fee policy, is compelling."[149] As a result, the University's mandatory fee system that helped fund abortions was

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143 *See also* Goehring v. Brophy, 94 F. 3d 1294 (1996).

144 *See e.g.*, COLUMBIA UNIVERSITY, COLUMBIA UNIVERSITY HEALTH SERVICES BROCHURE (2005-2006).

145 *Hodel*, 452 U.S. at 300.

146 *See id.*

147 Rubin v. Coors, 514 U.S. 476, 485 (1995).

148 *Id.*

149 *Brophy*, 94 F.3d at 1300.

deemed constitutional.

The students could, of course, argue that the University's "compelling interest" is much more limited. They would argue that the real interest the University is attempting to serve is providing students with easy access to abortions through their health insurance plans. Thus, it could be argued that providing abortions to students is not a "compelling interest" in light of the risks of abortion and safer alternatives to abortion.

To support their proposition that the University's real interest is providing students with easy access to abortions, the students can inform the court that abortion seems to be the only elective surgery that is covered under some universities' basic insurance plans. At Columbia University, for example, a woman can get an abortion under the basic health services program funded by mandatory fees, but she could not get her teeth cleaned without purchasing additional coverage.[150] If the University's system is at all similar to Columbia's system (which it is assumed to be), the students could argue with considerable force that the University is not as committed to providing "health care" as it is to providing abortions.

Furthermore, there are many risks and dangers associated with abortion that would be avoided if the University's real interest is assisting their students in realizing their academic goals by providing them with good health. For example, some patients experience placental, uteral, and cervical infection or rupture after an abortion. In fact, according to an article written by the Physicians for Life, approximately 2,500 women experience uterine tears each year; this condition, according to the article, increases women's risk of death one hundred fold.[151] Furthermore, uterine tears can also negatively affect future pregnancies and place the expectant mother at greater risk. The tears or scarring from old tears can result in premature delivery, stillbirth, hemorrhage, or other complications that could result in maternal death.[152] The Physicians for Life have also argued that abortion may cause long-term psychological problems for women. According to the article, "no less than 90 percent of aborted women experience moderate to severe emotional and psychiatric stress following an abortion."[153] In addition, the article states that women who have had abortions are nine times more likely to commit suicide than women who have not had abortions.[154]

Women cannot eliminate the risks of abortion if they use chemical as opposed to surgical methods. RU-486, the so-called abortion pill,[155] is evidently

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150 COLUMBIA UNIVERSITY, COLUMBIA UNIVERSITY HEALTH SERVICES BROCHURE (2005-2006).

151 Physicians for Life, *Fact or Fraud: Is Abortion Safer Than Childbirth?*, http://www.physiciansforlife.org. (last visited October 11, 2005).

152 *Id.*

153 *Id.*

154 *Id.*

155 *See* RU-486 Facts, http://www.ru486facts.org. (last visited Sept. 29, 2006).

just as dangerous for women as surgical abortions are. According to an article in *Contraception*, 88.8 percent of women who had taken RU-486 experienced uterine bleeding that lasted anywhere from two to fifty-five days.[156] Additionally, 47.4 percent of the women tested said that they experienced heavy bleeding after taking RU-486.[157] One woman experienced such terrible uterine bleeding that she required blood transfusions to compensate for her excessive loss of blood.[158]

In light of these risks, the students may argue that providing abortions is not a compelling state interest. Furthermore, they could assert that if the University was genuinely interested in promoting the health of their students, it would consider alternatives to abortion and help students carry the child to term without hindering their academic pursuits. However, as noted above, the plaintiffs would find themselves in an untenable position because courts will most likely accept the assertion that providing health care is a sufficient compelling state interest.

B. Plaintiffs' Suggestion that the University Should Give Catholics a de minimis Exemption from the Mandatory Fees is the Least Restrictive Way to Serve Both the University's and the Students' Best Interests

Even if one were to assume that the University's health plan serves a compelling interest, the plaintiffs would still be entitled to relief if they could establish that the University did not implement the health plan in the least restrictive fashion.[159] The plaintiffs would argue that the least restrictive way to implement the health plan and serve everyone's needs would be to allow Catholics, as well as any other students who have a religious objection to abortion, a *de minimis* exemption from the mandatory fees. As noted earlier, at least one major university has already allowed students who object to abortion to receive a small refund of their mandatory fees.[160] While Harvard's system is not perfect,[161] its ideals should be exported to other major universities.

A *de minimis* exemption from the mandatory fees would serve the plaintiffs' interests in several ways. First, and perhaps most important to devout Catholics, the plaintiffs would be able to practice their religion without violating the tenets of their faith. If Catholic students do not have to pay a portion of their fees to support

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156 Dr. Wu Shangchun, *Clinical Trial on Termination of Early Pregnancy with RU-486 in Combination with Prostaglandin*, 46 CONTRACEPTION 203, 207 (1992).

157 *Id.* at 207.

158 *Id.* at 207-208.

159 *See* Sherbert v. Verner, 374 U.S. 398, 407 (1963).

160 *See* Harvard Right to Life, Harvard University, Student Organization, http://hcs.harvard.edu/%7ehrl, (last visited Sept. 10, 2006) (Harvard University allows students a "rebate" of $1.00 if they oppose abortion.).

161 A more "perfect" system would be to allow students to withhold a small amount of money *before* paying the University's fees. Harvard's system allows for a rebate, which means that students must still pay all of the University's fees before enrolling. At the end of the year, Harvard refunds about $1.00 to students morally opposed to abortion.

abortion and abortion related services, they will not violate the canons of the Catholic Church, the papal decrees, or the implied Biblical rules discussed above. They will also not incur the punishment for supporting abortion: excommunication.[162] Second, and perhaps most important to the Catholic student, the plaintiffs would be able to attend the university of their choice. The *de minimis* exemption will help ensure that universities cannot force students to choose between violating their religious beliefs and attending another university. In doing so, the exemption will also help ensure that universities do not trample the religious rights of their students.

The plaintiffs can also argue that the exemption serves the University's interests. For example, if the University's primary interest is to provide health care for the student population, the plaintiffs would argue that the exemption does not prevent the University from fulfilling this goal. Students who do not oppose abortion would pay the full amount of the mandatory fees and would have full access to the health services provided at the University hospital. Likewise, students in the plaintiffs' position would withhold a small amount of money from the University and would not be able obtain abortion related services, but they would still have full access to the other services provided by the University such as access to antibiotics for illnesses, emergency services, and even some gynecological services.

If, on the other hand, the University's primary goal is to provide its female students with easy access to abortions and abortion-related services, the University will still be able to achieve its goal in spite of the *de minimis* exemption. Women who pay the mandatory fees in full and choose to terminate their pregnancies will still have access to the abortion services at the University hospital. Furthermore, since the abortion will be provided under the University's insurance plan, students will have access to the operation at a relatively low price. Under either system — one with or the other without the exemption — Catholic students would presumably avoid using the abortion services because it violates the tenets of their religion. Therefore, even if the University grants the exemption to Catholic students, the population of students who would use and benefit from the abortion services would be the same population of students that would have used and benefited from the abortion services under the system that did not grant the exemption. If no sector of the population is worse off as a result of the exemption, the plaintiffs could argue that the University should consider granting it.

Much of the previous discussion about compelling governmental interests being pursued in the least restrictive fashion in the Free Exercise context is taken from two famous Supreme Court decisions: *Sherbert v. Verner* (1963) and

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[162] CATECHISM OF THE CATHOLIC CHURCH ¶ 2272 (1995) (quoting 1983 *Codex Iuris Canonici* c. 1314).

Wisconsin v. Yoder (1972).[163] While these precedents are important for the plaintiffs' case, the University can use the Supreme Court's decision in *Employment Division v. Smith* (1990)[164] to counter the plaintiffs' arguments. In *Smith*, the issue was whether the state of Oregon could prohibit the use of peyote and deny exemptions from the criminal law to Native Americans who used the drug in their religious rituals without violating their Free Exercise rights.[165] The majority of the Supreme Court broke away from the traditional analysis outlined in *Sherbert* and *Yoder* and held that Oregon could indeed pass legislation banning peyote use, deny exemptions from the criminal law, and burden the plaintiff's religious rights without having to survive strict scrutiny.[166] More specifically, the Court ruled that criminal prohibitions are constitutional and enforceable as long as the laws are generally applicable and have only indirect effects on religious rights.[167]

Furthermore, the majority in *Smith* severely limited the scope of *Sherbert* in two ways. First, the Court concluded that Free Exercise challenges needed to be brought in conjunction with other First Amendment claims, such as violations of Free Speech or Free Assembly,[168] presumably because the Free Exercise claims could not stand on their own.[169] Second, the Court intimated that *Sherbert* and its progeny should be limited to the narrow field of unemployment compensation cases because these cases lend themselves to "individualized government assessment of... conduct."[170] As a result of the availability of this kind of information, it is much easier for the government to balance its interests against those of the plaintiffs in the unemployment compensation context than it is to balance interests in the context of generally applicable criminal laws.

The University in the hypothetical case could use *Smith* against the student plaintiffs in at least three ways. First, as noted above, the University could remind the court that *Smith* limits *Sherbert* and *Yoder* to unemployment compensation cases. Since the students' claim involves opposition to mandatory fees that are used to fund abortion services, and has nothing to do with unemployment compensation, the University could argue that the students should not be able to avail themselves of the tests or standards of review outlined in either *Sherbert* or *Yoder*. Second, the University could remind the Court that *Smith* calls for a hybrid complaint consisting of a Free Exercise challenge and some other First Amendment

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163 *See generally,* Sherbert v. Verner, 374 U.S. 398, 407 (1963); Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

164 Employment Division, Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

165 *Id.*

166 *See generally id.* at 883-885.

167 *Id.* at 885.

168 *Id.* at 881-882.

169 *See* Employment Division, Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

170 *Id.* at 884.

claim. Although this would probably not be enough to dismiss the case or win the trial for the University, this factor, if taken seriously by the judge, would at the very least weaken the plaintiffs' case since they have not alleged an additional First Amendment violation. Finally, and most significantly, the University could argue that their mandatory fees are similar to the criminal prohibitions in *Smith* in that the mandatory fees are "generally applicable" — all students who attend the University must pay the fees in full. Under *Smith*, the State may enforce generally applicable laws that do not directly burden religious rights.[171] Therefore, the University would argue that the students' suit should be dismissed because the fees are generally applicable and because the fees only indirectly burden students' religious rights, discrimination in the mandatory fees or health services program was not the intention of the University. With *Smith* in mind, it is possible that a court would rule that the University's mandatory fees are constitutional.

In spite of *Smith* and the arguments in favor of the mandatory fees, the plaintiffs would still be able to raise a number of significant counterarguments. The plaintiffs' strongest counter to *Smith* would be to use *Wisconsin v. Yoder* to justify to the court that they are entitled to a partial exemption from the mandatory fees. In *Yoder*, the issue was whether members of the Amish religion could be exempt from state law requiring children to attend public schools through age sixteen.[172] The defendants in the case were Amish people who withdrew their children from public school at age fourteen to work on their family farms, in accordance with the tenets of their religion.[173] Although they were convicted in the lower courts for violating the state's school attendance law,[174] the Supreme Court held that the Amish alternative to formal education fulfilled the State's interests in preparing citizens for participation in the political system and granted the defendants' exemption from the state law.[175] Most importantly however, the Court considered the "minimal difference between what the State would require and what the Amish already accept," and held that "it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish."[176] This suggests that if the gap between what the government requires and the extent to which peoples' religious beliefs allow them to comply with government edicts is small, the government should grant the people an exemption from the law.

The students could use this portion of *Yoder* to suggest that they should be granted a partial exemption from the mandatory fees because the difference between

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171 *See Smith*, 494 U.S. at 885.

172 Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

173 *Id.*

174 *Id.*

175 *Id.* at 225.

176 *Id.* at 236.

what the University requires and what they are willing to pay is minimal. It must be remembered that the plaintiffs are only requesting a *de minimis* exemption from the mandatory fees. Specifically, they have requested a mere $5.00 exemption, although a lesser amount would suffice because they are more interested in the symbolism of the exemption rather than its monetary benefit. Furthermore, as previously discussed, students who do not oppose abortions would presumably be willing to pay the full amount of the mandatory fees. These students' insurance plans would still be fully funded and abortions would be available to these students should they desire them. Therefore, nothing would change: students who want abortions could have them at low prices and students who do not want them would not have to pay for them.

Yoder also suggested that laws of general applicability are not necessarily beyond the protection of the Free Exercise clause.[177] In *Yoder*, the State argued that while religious beliefs are undoubtedly protected under the Free Exercise clause, the defendants' actions were not.[178] Thus, according to the state, the defendants' violation of the criminal law, even though it was done in accordance with their religious beliefs, was punishable and not entitled to exemption under the First Amendment. The Supreme Court however, stated that its previous decisions did not hold that actions were beyond the protections of the First Amendment,[179] and that "there are areas of conduct protected by the Free Exercise clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability."[180] The students could use this to counter the University's argument that because the mandatory fees apply to everyone, they are "generally applicable" and beyond the reach of the Free Exercise clause.

Finally, the plaintiffs could use the facts of *Smith* against the University. It is important to note that the law at issue in *Smith* was a criminal prohibition against peyote use. The students could argue that there is a significant difference between the State's interest in combating drug use among the population by enforcing its criminal laws and the University's interest in requiring all students to pay the full amount of a health services fee to ensure that students have full and easy access to abortions. While the former interest might be less flexible, the latter interest should be much more pliable, especially in light of the likelihood that a partial exemption for Catholic students would not change who benefits from an abortion-friendly insurance plan.

To respond to the plaintiff's arguments, the University can use the Supreme Court's "tax cases" to argue that every student's participation in the payment of the mandatory fees is not only necessary but also constitutional. The University

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[177] *Id.* at 219-220.
[178] Yoder, 406 U.S. 205 at 219.
[179] *Id.* at 219-220.
[180] *Id.* at 220.

could argue that without each student's participation in the system, the price of insurance might increase and become too expensive for some students to purchase. This could mean that some students would be unable to attend the University because they could not purchase satisfactory health insurance. Those students who could afford the insurance might find that the higher price of their health plans has reduced the range of services provided under their insurance plans. Instead of having easy access to abortions and emergency care, for example, they may only have basic coverage for immunizations, allergic reactions, and basic gynecological care.

Some of these arguments parallel those accepted by the Supreme Court and Courts of Appeal in *United States v. Lee* and *Autenrieth v. Cullen*, respectively. In *Lee*, the issue was whether the government would grant Amish employers an exemption from paying social security taxes.[181] According to the Amish faith, it is sinful not to provide for their own elderly and needy and, therefore, they are religiously opposed to the national social security system.[182] Nevertheless, the Supreme Court held that "the tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."[183] As a result, the Supreme Court decided to uphold the interests of the government and the "broad public interest in maintaining a sound tax system" over the religious interests of the Amish employers.[184] The University would argue that just as the Amish were required to pay taxes in order to support a greater public interest, so too should the Catholic students be required to pay the mandatory fees to help provide for the public interest in health care in spite of their religious beliefs.

The University would also be able to use the Ninth Circuit's holding in *Autenrieth* to bolster its argument. In *Autenrieth*, the plaintiffs claimed to have a religious objection to war and wanted a partial exemption from the income tax because the funds raised from the tax were used to support the Vietnam War.[185] The Ninth Circuit held that because the income tax was neutral with regard to religion and assessed on all citizens who had taxable income, there was no Free Exercise problem, even though the tax might have had some indirect, negative impact on the plaintiffs' religious rights.[186] Furthermore, the Court noted that allowing citizens to refuse to pay a part of the income tax because of religious objections to the government's use of the funds would impair or destroy the ability of the government to function.[187] If this precedent would have been established, so

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181 United States v. Lee, 455 U.S. 252, 254 (1982).

182 *Id.* at 255.

183 *Id.* at 260.

184 *Id.* at 260.

185 Autenrieth v. Cullen, 418 F.2d 586, 587 (9th Cir. 1969).

186 *Id.* at 588.

187 *Id.* at 588-589.

the Court intimated, virtually all government activities would be questioned or objected to on religious grounds.[188] The University would use *Autenrieth* to support the proposition that the Catholic students should not even be entitled to a partial or *de minimis* exemption from the mandatory fees. Furthermore, just as the government's assessment of the income tax was general, neutral to religion, and necessary for the functioning of the government, so too is the collection of the mandatory fees from the University's students necessary to the function of the University. After all, without the student's payments, the University would assert that its insurance plans might become unduly expensive for students to purchase.

The students would have to distinguish the "tax cases" from their current situation. *Lee* would be relatively easy to distinguish from the students' case against the University. In *Lee*, the Amish employers were asking for a complete exemption from the social security tax system. However, the students are only asking for a partial exemption from the mandatory fees. The University would still collect a considerable amount of money from its students, and would be able to finance most of its programs. It would just have less money to use to help support abortion services if the exemption were granted to Catholic students. *Autenrieth* presents a more difficult problem for the students. The plaintiffs in *Autenrieth* wanted only a partial exemption from the income tax because of their religious opposition to war. However, the Court of Appeals denied their Free Exercise claim because the income tax was generally assessed and neutral to religion. Here, the students are also requesting a partial exemption from a generally assessed fee that was not intended to undermine the tenets of any single religion. The only argument that the plaintiffs can make with regard to *Autenrieth* is that the income tax provides a broader range of benefits to the general public. More specifically, the dispute in *Autenrieth* was over funding for warfare and national security. The students could argue that while national security is provided for the benefit of all citizens, abortion—to the extent that it "benefits" anyone—benefits only the woman who chooses to have one. Therefore, the student body should not have to violate their religious beliefs or compromise their religious rights to enable a small population of women to terminate their pregnancies. The argument is not a strong one, but it is conceivable that it, or another like it, could be raised at trial to counter *Autenrieth*.

As a final additional counter to the plaintiff's request for a partial exemption from the mandatory fees, the University could list the additional and unnecessary administrative burdens it would incur if it would allow Catholics to avoid paying the fees in full. For example, the University could argue that it is impractical and impossible for their offices to inquire into the religious preferences of each student to determine who should benefit from the partial exemption. Some universities

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188 *Id.*

such as the University of Texas at Austin, Texas A&M University, and Ohio State University, to name a few, have student populations approaching or exceeding 50,000.[189] With populations of this size comes the burden of keeping records for all of the students and their varying insurance plans. Such an effort could require considerable additional expense and may require the University to hire additional staff; these might be expenses that the University is incapable of making.

Another concern for the University would be the possibility of additional constitutional or religious-based objections to other aspects of the insurance plans and/or other university services. For example, while Catholics may object to funding abortion related services, Jehovah's Witnesses may object to funding blood transfusion services and members of other religious denominations may object to funding inoculations and immunizations. Jews and Muslims may object to cafeterias serving pork products, and Hindus would demand vegetarian cafeterias to uphold their religious beliefs. If the University accommodates its Catholic students by granting them partial exemptions from the mandatory fees, would the University then have to accommodate every religious faith to avoid liability?

Finally, the University could argue that if a large sector of the student population is exempt from paying the mandatory fees in full, the availability and quality of insurance coverage for students could be diminished. More specifically, under the current payment system, all of the students pay the mandatory fees in full. Therefore, the insurance plans are more affordable because they are subsidized by each student. If a sector of the student population is exempt from payment and their money is not available to help fund abortion related services, the complete insurance plan — the one that provides abortion related services to students who desire them — may be more expensive for the students who prefer this plan to the partial exemption. This additional expense could be construed as an undue burden on women's abortion rights, although this argument is beyond the scope of this article.

As before, the plaintiffs have numerous counterarguments available to them. First, the students could point to the University admissions process as an example of its willingness to scrutinize each individual's academic record and assess each applicant's potential as a university student. If universities are willing and able to participate in this process year after year, then they should be capable of determining whether some students would prefer a partial exemption from mandatory fees for religious purposes. In fact, the inquiry could be made a question on the application for admission to make the assessment more efficient for the University.

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[189] *See* http://encarta.msn.com/encnet/departments/elearning/?article=Top10BiggestColleges (last visited Oct. 9, 2006; *see also* http://www.osu.edu/osutoday/stuinfo.php#enroll (last visited Oct. 9, 2006; *see also* http://www.tamu.edu/home/aboutam/amfacts/tamufacts.html (last visited Oct. 9, 2006; *see also* http://www.utexas.edu/welcome/ (last visited Oct. 9, 2006).

Second, universities provide other forms of accommodation for student preferences, most notably in cafeterias. Many universities, for example, provide vegetarian or kosher meal plan alternatives for its students. In fact, one residential college at Yale University even provides its students with an organic food cafeteria.[190] The plaintiffs would argue that if universities can accommodate students' dietary preferences, they should be able to accommodate their religious and constitutional rights.

Third, the plaintiffs could point to examples of the government's willingness to determine an individual's eligibility for exemptions in contexts other than universities. For example, under *Sherbert*, the government must ensure that it does not deny a person's unemployment benefits because the person's religious beliefs prevent him from fulfilling the requirements of the unemployment compensation laws.[191] In addition to the unemployment compensation context, the government also has a thorough screening process to determine the veracity of a person's alleged status as a conscientious objector. Along with completing the necessary paperwork to be classified as a conscientious objector, the Selective Service System should also ensure that the applicant fulfills the three part test outlined in *Clay v. United States*.[192] The plaintiffs' argument would be that if the government can undertake these individualized inquiries, the University should be able to determine students' eligibility for partial exemptions from the mandatory fees.

Fourth, the plaintiffs can point to some exaggerations in the University's arguments to undermine its case. The students can argue that the difference between the amount of money the University would have received had all the students paid the mandatory fees in full and the amount of money that it would receive if the exemptions were allowed to Catholic students is insignificant in the aggregate. For example, a small private university might charge its students close to $30,000 per year for tuition and fees alone. In a population of 5,000 students, this would mean that the university would receive about $150 million for the year.[193] A state school might charge students close to $10,000 per year for tuition and fees alone.[194] In a population of 30,000 students, this would mean that a state school would receive close to $300 million for the year.[195] The exemption that the plaintiffs are requesting ranges from as low as $1 to as high as $5. If there are 1,000 Catholics at the private school, the University would be denied just $5,000. If there are 6,000 Catholics at the state school, the University would be denied just

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190 *See* http://www.yale.edu/sustainablefood/Berkeley.html (last visited Sept. 10, 2006).

191 *See generally,* Sherbert v. Verner, 374 U.S. 398 (1963).

192 Clay v. United States, 403 U.S. 698, 700-701 (1971).

193 $30,000 * 5,000 = $150,000,000. I also assume that there are no scholarships.

194 I averaged in-state and out of state tuition rates.

195 Again, I am ignoring the effect of scholarships.

$30,000. In light of the sums of money that universities – both private and public – are able to generate, the argument that the exemption would devastate the University's insurance plan seems less credible.

Finally, the plaintiffs may argue that the University's fear that allowing this exemption to Catholic students will bring a flood of petitions for other exemptions from other students is an insufficient basis for denying the exemption. In *Sherbert v. Verner*, for example, the government asserted that preferential treatment for Seventh Day Adventists would lead to "fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work [that] might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work."[196] However, the Supreme Court intimated that this contention was too speculative to be a basis for denying protection under the Free Exercise clause.[197] If such speculation did not benefit the government's case in *Sherbert*, the plaintiffs would argue that similar speculation by the University should be equally unavailing.

V. CONCLUSION

If there is one certainty one learns in law school, it is that legal questions rarely have one perfect answer. Cases with similar facts can be decided identically or they can have radically different holdings. Trying to predict how a court will rule on a particular issue is often a crapshoot. This case is no different.

Both sides have strong cases and both sides can make compelling arguments to support their positions. Both have the weight of the Constitution on their side, but both also act or suggest action that may violate the Constitution. Although I have tried to address both parties' positions as fairly and as accurately as possible, I cannot deny that I would prefer one decision over another. My only hope is that one day a case like this one will be brought to trial in some court somewhere in America, and that it will eventually find its way into the Supreme Court. Perhaps then there will be a definitive answer to the questions I have posed in this article. And perhaps then there will be additional answers to some of the more perplexing and lingering questions in Constitutional Law.

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196 Sherbert, 374 U.S. at 407.

197 *Id.*