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Personnel Is Policy: Schools, Student Groups, and the Right to Discriminate

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Personnel Is Policy: Schools, Student Groups, and the Right to Discriminate

George B. Davis*

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I. Introduction

You work at a small, nonprofit organization dedicated to protecting civil and constitutional rights. One morning, your secretary introduces you to two young adults, Charles and Maddie, who need some legal advice. Only a few years out of high school, they are both part-time students at Diablo Hills Community College (DHCC), trying to earn enough credits to transfer out. Last year, after reading a number of books by Christopher Hitchens¹ and watching the film *Jesus Camp*,² Maddie and Charles grew concerned over the dangers posed by religious fundamentalism. Therefore, they decided to form a student group on campus, the Huxley Club. The mission of the club is to provide a place for students to celebrate the progress of human reason and to expose the intellectually bankrupt claims of primitive religious belief systems. The club would hold bi-weekly meetings that were open to all, students and nonstudents alike. DHCC encourages all student groups to apply for official recognition from the Student Governing Board (SGB). Benefits of recognition include access to classrooms for meetings, permission to advertise on campus bulletin boards and the school List-Serv, a faculty advisor, space on the college website, and money from the student activities fund. Prospective student clubs are required to submit a proposed constitution to the SGB.

After careful thought and discussion, Charles and Maddie meet with some friends and draft a constitution for the Huxley Club. It outlines the goals of the club, creates several leadership positions within the club, and lists the only requirement for membership—enrollment at DHCC. The only additional requirement for officers is that they cannot be active members of any religious community that professes a belief in a supreme deity. Charles and Maddie feel very strongly that this requirement is vital to help ensure that the goals of the club are carried out faithfully. They submit the proposed constitution to the SGB, expecting a quick approval.

Two weeks later they receive a notice from the SGB requesting that they re-draft the Huxley constitution to align with the requirements of Article 5 of the college's Equal Educational Opportunity Policy (EEOP), which states that the school must provide equal educational opportunities to all students without regard to race, color, sexual identity, age, disability, marital status, or religion. The SGB claims that the Huxley Club improperly discriminates on the basis of religious belief. The students appeal the decision, arguing that the club's

1. See generally CHRISTOPHER HITCHENS, *GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING* (2007) (describing the detrimental impacts of organized religion).

2. *JESUS CAMP* (Magnolia Pictures 2006).

meetings and events would be open to anyone, and that the officer requirement is essential to preserving the club's message. The SGB considers the appeal, but ultimately rejects it, denying the Huxley Club official school recognition so long as the constitution's officer requirements remain unchanged. Of course, the students are still free to form the club, but they will have to meet in public parts of the campus, such as the quad or the cafeteria. Charles and Maddie do not want to have to change the nature of the club. They wonder, "Don't we have some First Amendment rights or something like that?"

This hypothetical scenario is proving to be the reality for a number of student groups around the country.³ This Note focuses on two cases in particular that have already been litigated at the federal appellate level. In 2006, the Seventh Circuit ruled in favor of a Christian Legal Society (CLS) chapter at Southern Illinois University Law School (SIU).⁴ CLS had challenged an SIU decision denying official recognition to the local chapter because the club violated school antidiscrimination policy by refusing to allow practicing homosexuals to become members.⁵ CLS claimed that the university action violated its First Amendment rights of free speech and expressive association.⁶ The Seventh Circuit found that CLS had demonstrated a likelihood of success on the merits for each claim and reinstated a preliminary injunction against SIU.⁷ At the high school level, in 2008, the Ninth Circuit ruled in favor of a Washington school district, affirming the school district's decision to deny official recognition to a religious student group Truth.⁸ The school district based its decision on the fact that the student group limited voting membership to professing Christians, violating the school district's nondiscrimination policy.⁹ Truth claimed that the school district's action violated its First Amendment rights to free speech and expressive association.¹⁰

3. See, e.g., Paul Davenport, *Christian Group Sues for Right to Discriminate*, ASSOCIATED PRESS, Nov. 17, 2004 (describing lawsuits filed against Arizona State University and Hastings College of Law in the University of California system by student chapters of the Christian Legal Society).

4. See *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 857 (7th Cir. 2006) (reinstating a preliminary injunction against a university that denied official recognition to CLS chapter).

5. *Id.* at 858.

6. *Id.*

7. *Id.* at 859.

8. See *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 637 (9th Cir. 2008) (rejecting high school club's claim that school district had violated rights of free speech and expressive association in denying official recognition to group).

9. *Id.* at 637-41.

10. *Id.* at 637.

The Ninth Circuit rejected both claims.¹¹ Similar facts, different result—what is the explanation?

The Seventh Circuit analyzed the expressive association and free speech claims independently, using a different framework for each claim.¹² By contrast, the Ninth Circuit's opinion collapsed the claims together and analyzed the case based on the type of forum the school had created.¹³ Can these two differing opinions be reconciled in some way? Does the right of expressive association—and the corollary right of nonassociation—receive less protection on the public campus? Is there a way to safeguard this right while respecting the confines of the limited public forum of the public school and university? This Note attempts to answer these questions.

Part II details the Supreme Court's recent jurisprudence regarding the right of expressive association, specifically as it relates to the clash between antidiscrimination laws and group autonomy. Part III briefly reviews the Court's jurisprudence on free speech and the public forum doctrine, with a focus on the potentially conflicting ways the Court has applied the doctrine in the university context. Part IV reviews the opinions from the Seventh and Ninth Circuits, the underlying facts, and the reason for the differing outcomes.

Part V proposes a third way to approach the issue, one that protects the associational rights of student groups within the confines of the limited public forum. When a student group's message depends on the ability to select the messengers—via membership criteria—then arguably the group's membership criteria *are a part of the message*. This principle is well-illustrated by a case from the Second Circuit, *Hsu v. Roslyn School District*.¹⁴ This case provides the foundation for how the expressive association rights of student groups can be protected under a strict scrutiny standard in the limited public forum of a university. Additionally, Part V addresses the Court's inconsistent application of the "limited public forum" doctrine, arguing that the strong speech protections of *Widmar v. Vincent*¹⁵ should apply to the content-based limits

11. *Id.*

12. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853, 858 (7th Cir. 2006) (separately addressing expressive association claim and free speech claim).

13. *Truth*, 542 F.3d at 652 (Fisher, J., concurring) ("Expressive Association is simply another way of speaking, only the group communicates its message through the *act of associating*. . .").

14. *See Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 848 (2d Cir. 1996) (holding that a religious club should have been granted access to school forum under the terms of the Equal Access Act).

15. *See Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (holding that a University which created a forum generally open to student groups could not exclude a group based on the religious content of its speech).

imposed by schools and universities in their nondiscrimination policies. Finally, Part V argues that the distinction between compelled association and conditioned benefits is illusory, both constitutionally and practically.

II. Expressive Association

A. General Background

The Supreme Court first articulated expressive association—the ability to associate with others for the purpose of conveying a message—in *NAACP v. Alabama*.¹⁶ Writing for the Court, Justice Harlan recognized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking on the close nexus between the freedoms of speech and assembly."¹⁷ This fundamental right was long understood to be an implicit guarantee within the First Amendment's protections of speech and assembly.¹⁸ The ability to associate freely played a key role in the formation of this country.¹⁹ Nearly 200 years ago, Alexis de Tocqueville observed that "Americans form associations for the smallest undertakings. It is evident that the [English] consider association as a powerful means of action, but the [Americans] seem[] to regard it as the only means they have of acting."²⁰ Associations serve as a powerful shield, protecting individuals from the tyranny of the state.²¹ The right of expressive association is necessary to give force to

16. See *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) (finding the right to expressive association).

17. *Id.*

18. See *id.* (noting that the freedom to engage in association for the advancement of beliefs is "an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech"); see also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

19. See *Citizens Against Rent Control/Coalition for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981) ("[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. The 18th-century Committees of Correspondence and the pamphleteers were early examples of this phenomena and the Federalist Papers were perhaps the most significant and lasting example.").

20. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 130 (Francis Bowen ed., Henry Reeve trans., Cambridge 3d ed. 1863).

21. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1297 (2d ed. 1988) ("[A] plurality of associations interposed between the individual and the state is vital both as an

enumerated rights, such as speech, worship, and the freedom to petition the government.²²

Inherent in the right to associate is a correlative right of nonassociation.²³ An association that forms to voice a message cannot accomplish its purpose if it is unable to determine who will compose that voice.²⁴ In effect, the freedom not to associate is the freedom to discriminate. Inevitably, this freedom to discriminate will conflict with society's interests in ending invidious discrimination.²⁵ The Supreme Court has struggled to define the limits of the right of expressive association, specifically as applied to groups that discriminate in their membership policies.²⁶

B. *Compelled Association*

The tension between the rights of an expressive association to choose its members and the equality concerns of historically marginalized groups came to a head in the 1980s in a series of Supreme Court cases pitting private organizations against state antidiscrimination policies. One such case was *Roberts v. United States Jaycees*.²⁷ The *Roberts* case arose out of a conflict between a private civic organization—the Jaycees—and the state of Minnesota, which had passed a law banning gender-based discrimination in places of

expression of the need to congregate and as a buffer against all-powerful central authority . . .").

22. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

23. See *id.* at 623 ("Freedom of association . . . plainly presupposes a freedom not to associate.").

24. See *id.* at 633 (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.").

25. See 2 RODNEY S. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 17:42 (2008) ("[T]he whole point of the freedom of association line of First Amendment cases is that freedom of association includes a correlative First Amendment freedom of nonassociation, and freedom of nonassociation is in inherent tension with antidiscrimination policies, which force association."); see also William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U.L. REV. 68, 69 (1986) ("The right to choose one's associates (freedom) is pitted against the right to equal treatment (equality), a most fundamental conflict.").

26. See *infra* Part II.B (discussing the line of cases dealing with the conflict between state antidiscrimination policies and the right of expressive association).

27. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 612 (1984) (upholding Minnesota law which forced all-male private organization to admit women as full voting members).

public accommodation.²⁸ The Minnesota chapter of the Jaycees barred women from obtaining voting membership or holding positions as officers in the group.²⁹ While recognizing the Jaycees' right of expressive association, the Court noted that this right is not absolute.³⁰ Minnesota had a compelling interest in eradicating discrimination on the basis of gender,³¹ and, importantly, the goals of the state antidiscrimination law were unrelated to the suppression of ideas.³² Important to the result was the fact that, as applied to the Jaycees, there was no basis in the record for concluding that admitting women as voting members would impede the group's ability to engage in protected activities or to disseminate its preferred views.³³ In several cases following *Roberts*, state antidiscrimination laws were challenged on similar grounds, with similar results.³⁴ However, writing for the majority in *New York State Club Ass'n v. City of New York*, Justice Powell left open the possibility that a different outcome could be reached if a group could persuade the Court that compelled association would force a change in its message:

It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion. In the case before us, however, it seems sensible enough to believe that many of the large clubs covered by the Law are not of this kind.³⁵

28. *Id.*

29. *Id.* at 613.

30. *See id.* at 623 ("Infringements . . . may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.").

31. *See id.* ("We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms.").

32. *See id.* at 624 ("[T]he Act reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services. . . . That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order.").

33. *See id.* at 627 ("[A]ny claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best.").

34. *See, e.g.,* *N.Y. State Club Ass'n, Inc., v. City of New York*, 487 U.S. 1, 18 (1988) (upholding a state antidiscrimination law against First Amendment challenge by private club); *Bd. of Dirs. of Rotary Club Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (same).

35. *N.Y. State Club*, 487 U.S. at 13.

The next major case was *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*³⁶ In *Hurley*, the petitioners—organizers of a yearly St. Patrick’s Day parade in Boston—sought to exclude a group of homosexual individuals who wanted to march in the parade as a unit to demonstrate their solidarity with other gay individuals of Irish descent.³⁷ The Massachusetts Supreme Court had ordered the parade organizers to include the group based on a state public accommodations law that prohibited discrimination based on sexual orientation.³⁸ In a unanimous decision, the Supreme Court reversed the order of the Massachusetts Supreme Court on the grounds that it was constitutionally impermissible for the state to compel the parade organizers to promote a certain message they would choose to exclude.³⁹ Furthermore, the right to exclude a certain message did not mean the parade organizers had to identify the message they intended to promote.⁴⁰ The parade organizers did not intend to exclude homosexual individuals *per se*, but only the specific group that sought to march in the parade as a unit in support of homosexual rights.⁴¹ The Court found that forcing the organizers to include the group would alter the expressive message of the parade.⁴²

In 2001, the Court finally laid down a framework to evaluate a claimed violation of expressive association in *Boy Scouts of America v. Dale*.⁴³ James Dale was an Eagle Scout who held adult membership in the Boy Scouts while attending college.⁴⁴ During his time at college, Dale openly identified himself as a homosexual and joined several campus groups advocating homosexual

36. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 581 (1995) (overturning state court order that would have forced parade organizers to include marchers advocating homosexual rights).

37. *Id.* at 561–62.

38. *Id.* at 563–64 (citing *Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc. v. Boston*, 636 N.E.2d 1293, 1295–98 (Mass. 1994)).

39. See *id.* at 573 (“[T]his use of the State’s power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”).

40. See *id.* at 569 (“[A] narrow, succinctly articulable message is not a condition of constitutional protection . . .”).

41. See *id.* at 572 (“Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of [the gay rights group] claims to have been excluded from parading as a member of any group that the Council has approved to march.”).

42. See *id.* at 572–73 (“Since every participating unit affects the message conveyed by the private organizers, the state courts’ application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade.”).

43. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000) (overturning state court decision requiring Boy Scout organization to admit openly gay scoutmaster).

44. *Id.*

rights.⁴⁵ The Boy Scouts subsequently revoked Dale's adult membership on the grounds that his homosexual lifestyle violated the Boy Scout oath, which required all members to be "morally straight."⁴⁶ Dale challenged this decision in state court on the grounds that the Boy Scouts were violating a state law prohibiting discrimination on the basis of sexual orientation in places of public accommodation.⁴⁷ The case made its way to the New Jersey Supreme Court, which ruled in favor of Dale's claim and rejected the Boy Scouts' contention that readmitting Dale would violate the group's right to expressive association.⁴⁸

Writing for the majority, Justice Rehnquist evaluated the Boy Scouts' claim based on a three-part framework: first, whether the Boy Scouts could be classified as an expressive association;⁴⁹ second, whether the forced inclusion of Dale would force the Boy Scouts to express a message they would choose not to express;⁵⁰ and finally, given these First Amendment interests, whether the State of New Jersey had a compelling interest in eliminating discrimination against homosexuals.⁵¹ While recognizing that this type of inquiry is necessarily fact-specific,⁵² the Court found that the Boy Scouts engaged in expressive activity by attempting to transmit a system of values to its members.⁵³ Moving on to the second prong, the Court recognized the importance of membership criteria by stating that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive

45. *Id.* at 645.

46. *Id.*

47. *Id.* (citing *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 271 (N.J. Super. Ct. App. Div. 1998)).

48. *See Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1226 (N.J. 1999) (holding that the Boy Scouts violated state public accommodations law prohibiting discrimination on the basis of sexual orientation).

49. *See Dale*, 530 U.S. at 648 ("The First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.").

50. *See id.* at 653 ("We must then determine whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not 'promote homosexual conduct as a legitimate form of behavior.'" (quoting Reply Brief for Petitioners at 5, *Boy Scouts of Am. v. Dale*, No. 99-699 (U.S. Apr. 17, 2000))).

51. *See id.* at 658-59 ("So in these cases, the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other.").

52. *See id.* at 648-49 ("Because this is a First Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact, we are obligated to independently review the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression.").

53. *Id.* at 649.

association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."⁵⁴ The Boy Scout leadership interpreted the command to be "morally straight" as prohibiting homosexual conduct,⁵⁵ and the Court deferred to this interpretation,⁵⁶ despite any apparent inconsistencies with other rules that the Boy Scouts followed.⁵⁷ This does not mean that "an expressive association can[] erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."⁵⁸ However, because of Dale's open participation in various student groups advocating homosexual rights, Dale's presence in the Boy Scouts would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."⁵⁹ Therefore, this application of the New Jersey public accommodations law to the Boy Scouts violated the group's right of expressive association.⁶⁰ With regard to the last prong, the Court did not address the question of whether the state's interest was compelling but simply ruled that it did not justify the burden it imposed on the Boy Scouts.⁶¹ However, Justice Rehnquist hinted at the fact that even a compelling state interest could be insufficient to justify the burden imposed by the antidiscrimination law on a group's right to expressive association.⁶²

These cases clearly establish a right of expressive association protected by the Constitution, even when that right conflicts with state nondiscrimination policies. How is this right affected when a student group asserts its right of

54. *Id.* at 648.

55. *Id.* at 651–52.

56. *See id.* at 653 ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.").

57. *See id.* at 651 ("[I]t is not the role of the courts to reject a group's expressed values because they . . . find them internally inconsistent."); *id.* at 655 ("[T]he First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.'").

58. *Id.* at 653.

59. *Id.*

60. *See id.* at 656 (concluding that state court decision forcing the Boy Scouts to accept a gay scoutmaster violated its right of expressive association).

61. *See id.* at 659 ("The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association.").

62. *See id.* at 657 ("We recognized in . . . *Roberts and Duarte* that States have a compelling interest in eliminating discrimination against women in public accommodations. But in each of these cases we went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express.").

expressive association on a public campus? The last major Supreme Court case to address this question was *Healy v. James*⁶³ in 1971.

C. Student Groups at a Public University: Healy v. James

In *Healy*, the Supreme Court resolved a dispute between the administration of Central Connecticut State College (CCSC) and a group of students seeking official recognition for a local chapter of the Students for a Democratic Society (SDS).⁶⁴ The president of CCSC denied recognition to the student chapter of SDS because of violent activities advocated by the national chapter of the SDS.⁶⁵ Consequences of the denial were fairly severe: "members [of SDS] were deprived of the opportunity to place announcements regarding meetings, rallies, or other activities in the student newspaper; they were precluded from using various campus bulletin boards; and—most importantly—nonrecognition barred them from using campus facilities for holding meetings."⁶⁶ Several student members of SDS sued the college on the grounds that the school had violated their First Amendment rights to expression and association.⁶⁷ The case eventually made its way to the Supreme Court, where the Court initially rejected the view that "First Amendment protections should apply with less force on college campuses than in the community at large."⁶⁸ Writing for the majority, Justice Powell found that the denial of official recognition abridged the students' associational rights.⁶⁹ Furthermore, "the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action."⁷⁰ The Court rejected a number of justifications offered by the college, including the fact that the president of the college found the views of the national chapter

63. See *Healy v. James*, 408 U.S. 169, 194 (1971) (striking down a state court decision that allowed state college to bar a student group from conducting meetings on campus).

64. *Id.* at 169–70.

65. *Id.* at 174–75. The President's decision was based partly on transcripts of hearings before the U.S. House of Representatives Internal Security Committee, detailing the violent activities associated with the national chapter of the SDS. *Id.* at 178.

66. *Id.* at 176.

67. *Id.* at 177.

68. *Id.* at 180.

69. See *id.* at 181 ("The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes.").

70. *Id.* at 183.

to be "abhorrent."⁷¹ However, the Court did leave room for the college to impose requirements directed at an organization's activities.⁷² The Court reasoned that "[a]ssociational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."⁷³ The Court never defined what it meant by a "reasonable campus rule."⁷⁴ Nevertheless, *Healy* has served as the groundwork for rulings protecting the associational rights of unpopular groups at public universities.⁷⁵ The case did not deal with compelled association.⁷⁶

Of course, the relative strength of many First Amendment rights depends on where a person is exercising them; for example, a group's associational rights do not carry the same weight in a prison that they would on a city sidewalk. The next Part shifts gears by examining how free speech rights differ depending on the type of forum in which that speech is occurring. Because both the Seventh Circuit in *Walker* and the Ninth Circuit in *Truth* employed the public forum doctrine to evaluate their respective cases,⁷⁷ it is worth briefly

71. See *id.* at 187–88 ("The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.").

72. See *id.* at 188 ("The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.'" (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969))).

73. *Id.* at 189.

74. The Court did, however, list several of the restrictions that the college imposed on its students, including requirements that students could not "deprive others of the right to speak or be heard, . . . invade the privacy of others, . . . damage the property of others, . . . [or] disrupt the regular and essential operation of the college." *Id.*; see also *Papish v. Bd. of Curators of Univ. of Minn.*, 410 U.S. 667, 668–71 (1973) (upholding a student's right to distribute newspaper with an offensive heading on campus despite university policy that students must abide by "generally acceptable standards of conduct.").

75. See, e.g., *Gay Student Servs. v. Tex. A&M Univ.*, 737 F.2d 1317, 1319 (5th Cir. 1984) (overturning decision by public university denying official recognition to homosexual rights student group); *Aman v. Handler*, 653 F.2d 41, 41 (1st Cir. 1981) (overturning decision by public university denying official recognition to student group from the Unification Church and directing lower court to decide the case in accordance with the standards from *Healy*); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 164–67 (4th Cir. 1976) (overturning decision by public university denying official recognition to homosexual rights student group).

76. See 2 SMOLLA, *supra* note 25, § 17:42 ("The delicate balance struck by Justice Powell's opinion in *Healy* does little to clearly resolve the question of whether a student group may be denied recognition for discriminating in its rules governing eligibility for membership.").

77. See *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 648–50 (9th Cir. 2008) (employing the public forum doctrine to evaluate the free speech claim of the petitioners); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 865–67 (7th Cir. 2006) (same).

reviewing the various forum classifications and the contours of each forum, specifically as applied in the university setting.

III. Public Forum Doctrine

A. The Three Classifications

The public forum doctrine arose from the fact that not all public forums are created equal.⁷⁸ When it comes to free speech and the First Amendment, a city sidewalk is not like a college classroom, which is not like a government office building.⁷⁹ To help simplify the issue, the Supreme Court has outlined three major types of public forums.⁸⁰ When an individual or a group raises a First Amendment speech claim against a government actor, a court first must determine what type of forum is at issue and then must apply the appropriate test to determine whether the speech restriction is constitutional.

First is the traditional public forum: "At one end of the spectrum are streets and parks which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"⁸¹ In a traditional public forum, government may impose reasonable time, place, and manner restrictions on speech activity,⁸² but viewpoint-based regulation of

78. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799–800 (1985) ("Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.").

79. See KEITH WERHAN, *FREEDOM OF SPEECH* 136 (2004) ("The Court's categorization of public property into three discrete levels of forum status resembles the justices' categorization of speech into three levels of First Amendment Protection. . . . They . . . reflect the commonsense judgment that the nature and degree of free speech protections should vary for . . . different kinds of public property.").

80. See, e.g., *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 396 (1993) (overturning lower court decision permitting school district to deny religious group access to facilities after normal school hours).

81. *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)); see also *Hudgens v. NLRB*, 424 U.S. 507, 515 (1975) ("[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." (quoting *Amalg. Food Empire Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 315 (1968))).

82. *Perry*, 460 U.S. at 45.

speech is always impermissible and any content-based regulation will be subject to strict scrutiny.⁸³

The second type of forum is the designated public forum.⁸⁴ This type of forum is created when the government "intentionally open[s] a nontraditional forum for public discourse."⁸⁵ A court will evaluate any content-based speech regulations using strict scrutiny, just as it would for a traditional public forum.⁸⁶ While the creation of a designated public forum is necessarily case-specific, examples include a senior center,⁸⁷ a city-leased theater,⁸⁸ and advertising space in city transit vehicles.⁸⁹

The last type of forum is the nonpublic forum.⁹⁰ In a nonpublic forum, content-based restrictions on speech must be reasonable and not used as a way to keep out disfavored viewpoints.⁹¹ Examples of nonpublic forums include jailhouses⁹² and internal school mail systems.⁹³

83. *See id.* ("In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").

84. *See id.* ("A second category consists of public property which the State has opened for use by the public as a place for expressive activity. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.").

85. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

86. *See Perry*, 460 U.S. at 46 ("Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.").

87. *See Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1278 (10th Cir. 1996) (noting that the Bear Canyon Senior Center was a designated public forum because the city had opened it up to the public for "discussive purposes").

88. *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (finding that city-leased theater was dedicated to expressive activities and was therefore a designated public forum).

89. *See Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 248 (3d Cir. 1998) ("We accordingly look to the authority's intent with regard to the forum in question and ask whether [the authority] clearly and deliberately opened its advertising space to the public.").

90. *See Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) ("Public property which is not by tradition or designation a forum for public communication is governed by different standards.").

91. *See id.* ("In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.").

92. *See Adderley v. Florida*, 385 U.S. 39, 48 (1966) (noting that the State does not have to open up its own property for expressive purposes).

93. *See Perry*, 460 U.S. at 48 ("Because the school mail system is not a public forum, the

B. Universities and the Limited Public Forum

When a public university creates a forum for student groups to obtain recognition, where does that forum fall on the aforementioned spectrum? The Court's answer has not always been clear. In the case of *Widmar v. Vincent*,⁹⁴ a registered religious student group at the University of Missouri at Kansas City (UMKC) brought a First Amendment claim against the school after they were told they could no longer meet in university buildings.⁹⁵ The expulsion occurred after the UMKC administration adopted a regulation that prohibited the use of university facilities for religious worship or religious teachings.⁹⁶ The forum at issue was one "generally open for use by student groups."⁹⁷ The Court recognized the unique nature of the educational environment, noting that "decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that [educational] mission upon the use of its campus and facilities."⁹⁸ At the same time, Supreme Court "cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."⁹⁹ The majority noted that "[h]ere the UMKC has discriminated against student groups and speakers based on their desire to use a *generally open forum* to engage in religious worship and discussion."¹⁰⁰ The Court implicitly equated the forum with a designated public forum:

In order to justify discriminatory exclusion from a public forum based on the religious *content* of a group's intended speech, the University must therefore satisfy the standard of review appropriate to *content*-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.¹⁰¹

School District had no 'constitutional obligation *per se* to let any organization use the school mail boxes.'" (quoting *Conn. State Fed'n of Teachers v. Bd. of Educ. Members*, 538 F.2d 471, 481 (2d Cir. 1976)).

94. See *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (holding that a University which created a forum generally open to student groups could not exclude a group based on the religious content of its speech).

95. *Id.* at 265.

96. *Id.*

97. *Id.* at 267.

98. *Id.* at 268 n.5.

99. *Id.* at 268-69.

100. *Id.* at 269 (emphasis added).

101. *Id.* at 269-70 (emphasis added). The Court emphasized the fact that the basis for its decision was the fact that the university had created a forum "generally open to student groups."

The Court held that UMKC did not have a compelling justification for excluding the student group based on the religious content of its speech.¹⁰²

Another case, decided more than a decade later, involved a student publication at the University of Virginia (UVA).¹⁰³ The UVA administration had created a Student Activities Fund (SAF) that was available to help fund the activities of various student groups, including student publications.¹⁰⁴ However, university guidelines excluded certain student activities from SAF eligibility—specifically, religious activities.¹⁰⁵ A student publication—Wide Awake Publications (WAP)—published a magazine that examined contemporary issues from a Christian perspective.¹⁰⁶ WAP applied for funds from the SAF to pay for printing costs but was denied on the grounds that WAP was a "religious activity."¹⁰⁷ In evaluating the case, the Court first classified the SAF as a "limited public forum,"¹⁰⁸ where "[the Court has] observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."¹⁰⁹ While the distinction between content and viewpoint is "not a precise one,"¹¹⁰ the majority refused to characterize UVA's action as content-based discrimination, stating that "[b]y the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."¹¹¹ Even if funding were scarce, this would not justify viewpoint-based discrimination,¹¹²

Id. at 277.

102. *See id.* at 270–76 (holding that allowing a religious group to access university facilities would not violate the Establishment Clause under the *Lemon* test).

103. *See Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 841 (1995) (holding that the University could not deny funding to student publication simply because of the religious viewpoints of that publication).

104. *Id.* at 824.

105. *Id.* at 825. The University Guidelines defined a "religious activity" as any activity that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." *Id.*

106. *See id.* at 826 ("[WAP] offers a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia.").

107. *Id.* at 827.

108. *Id.* at 830.

109. *Id.* at 829–30.

110. *Id.* at 831.

111. *Id.*

112. *See id.* at 835 ("The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity.").

particularly in a place where intellectual freedom should be allowed to flourish.¹¹³ Just as in *Widmar*, the university justified its actions based on a fear of violating the Establishment Clause,¹¹⁴ but the Court did not accept this argument as a compelling justification for viewpoint discrimination.¹¹⁵

The next Part explores the two cases wherein student groups seeking official school recognition asserted both speech and expressive association claims.

IV. *The Seventh Circuit vs. The Ninth Circuit*

A. *Christian Legal Society v. Walker*

Like most universities, Southern Illinois University at Carbondale and its School of Law (SIU)—a public university—encourage students to form on-campus groups and apply for official recognition from SIU.¹¹⁶ The benefits of recognition for law student organizations include access to the law school list-serve, permission to post information on law school bulletin boards, an appearance on lists of official student organizations in law school publications and on its website, the ability to reserve conference rooms and meeting space, a faculty advisor, and law school money.¹¹⁷ The Christian Legal Society, a nationwide association of law students and legal professionals who share a commitment to the Christian faith, had a student-run chapter at SIU in 2005 that was one of seventeen student organizations officially recognized by the law school.¹¹⁸ The student chapter of CLS at SIU opened its meetings to anyone,

113. See *id.* at 836 ("For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.").

114. See *id.* at 838 ("The Court of Appeals ruled that withholding SAF support from Wide Awake contravened the Speech Clause of the First Amendment, but proceeded to hold that the University's action was justified by the necessity of avoiding a violation of the Establishment Clause . . .").

115. See *id.* at 842 ("It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises.").

116. See generally SOUTHERN ILLINOIS UNIVERSITY AT CARBONDALE, REGISTERED STUDENT ORGANIZATION HANDBOOK (July 2007), available at http://www.law.siu.edu/studentlife/student_handbookPDF.pdf (describing the program for student organizations seeking official university recognition).

117. See *id.* at 12–13 (listing twenty benefits and privileges that come with being a Registered Student Organization).

118. *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 857 (7th Cir. 2006).

but required that all voting members and officers subscribe to a statement of faith and refrain from engaging in certain behaviors that CLS considers immoral—including homosexual conduct.¹¹⁹ "In February 2005 someone complained to SIU about CLS's membership . . . requirements," which precluded practicing homosexuals "from becoming voting members or officers."¹²⁰ After CLS re-affirmed its membership policies, the law school dean revoked CLS's registered student organization status because the membership requirements violated university policy.¹²¹ As a result, the student chapter of CLS was stripped of all the benefits of being an official student organization.¹²² CLS brought suit against school officials and moved for a preliminary injunction,¹²³ claiming that SIU violated CLS's right of expressive association, free speech, and free exercise of religion.¹²⁴ In ruling on the motion for a preliminary injunction, the district court found that CLS failed to demonstrate a reasonable likelihood of success on the merits.¹²⁵ The district court focused on the fact that the school was not forcing the student chapter of CLS to accept anyone as a member and was permitting the group to meet on campus.¹²⁶ CLS appealed and moved for preliminary injunction pending

119. *Id.* at 858; see also Christian Legal Society, Membership Statement of Faith and Sexual Morality Standards, Mar. 25, 2004, available at <http://www.clsnet.org/clsPages/bod/moralityStds.php> (last visited Sept. 15, 2009) (stating that CLS members must agree to refrain from participating in or advocating "sexually immoral" conduct, which includes "fornication, adultery, and homosexual conduct").

120. *Christian Legal Soc'y*, 453 F.3d at 858.

121. *Id.* Specifically, the dean noted that SIU had an Affirmative Action/Equal Employment Opportunity Policy, which mandated that SIU must provide "equal . . . education opportunities for all qualified persons without regard to race, color, religion . . . [or] sexual orientation . . ." *Id.* at 869 (quoting Brief of Defendant-Appellee at 4, *Christian Legal Soc'y v. Walker*, No. 05-3239 (7th Cir. Sept. 27, 2005)). The SIU Board of Trustees also adopted a policy providing that "[n]o . . . recognized student organization shall be authorized unless it adheres to all appropriate federal or state laws concerning nondiscrimination and equal opportunity." *Id.* at 858 (quoting Brief of Defendant-Appellee at 5, *Christian Legal Soc'y v. Walker*, No. 05-3239 (7th Cir. Sept. 27, 2005)).

122. See *Walker*, 453 F.3d at 858 (noting that CLS was no longer able to reserve classrooms for private meetings, use the bulletin board for club postings, avail itself of a faculty representative, or access student funds).

123. See Verified Complaint for Declaratory and Injunctive Relief at 5, *Christian Legal Soc'y Chapter at S. Ill. Univ. Sch. of Law v. Walker*, No. 05-4070 (S.D. Ill. Apr. 5, 2005) (requesting preliminary and permanent injunction against SIU to prevent de-recognition of student chapter of CLS).

124. *Id.* ¶¶ 5.1–8.2.

125. See *Christian Legal Soc'y Chapter at S. Ill. Univ. v. Walker*, 2005 WL 1606448, *3 (S.D. Ill. July 5, 2005) ("It is not clear that Plaintiff ultimately will prevail on the merits—at best it is a close question."), *rev'd*, 453 F.3d 853, 857 (7th Cir. 2006).

126. See *id.* ("There is no showing of irreparable harm SIU's withholding of

appeal.¹²⁷ The Seventh Circuit reversed the decision of the district court and granted the preliminary injunction for three reasons.¹²⁸ This Note will address the court's last two factors.

Addressing the expressive association claim,¹²⁹ the court began by noting that "[g]overnment action may impermissibly burden the freedom to associate in a variety of ways; two of them are 'impos[ing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group' and 'interfer[ing] with the internal organization or affairs of the group.'"¹³⁰ A critical part of the right of expressive association is the right to exclude members from the group.¹³¹ The majority characterized this case as a "forced inclusion" case and employed the three-part framework of *Dale* to evaluate the expressive association claim of CLS.¹³² The court did not spend much time on the first question, because "[i]t would be hard to argue—and no one does—that CLS is not an expressive association."¹³³ On the second question, according to the majority, the answer was clear: To accept active homosexual members,

recognized student organization status only means that Plaintiff will have to use other meeting areas and other ways to communicate with members and potential members.").

127. *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 858 (7th Cir. 2006).

128. *See id.* (reviewing the three reasons for granting the plaintiff's motion for a preliminary injunction). The court stated:

First, it is not clear CLS actually violated any SIU policy, which was the justification offered for revoking its recognized student organization status. Second, CLS has shown a likelihood that SIU impermissibly infringed on CLS's right of expressive association. Finally, CLS has shown a likelihood that SIU violated CLS's free speech rights by ejecting it from a speech forum in which it had a right to remain.

Id. at 859–60.

129. *See id.* at 861–64 (evaluating the plaintiff's claim that SIU had impermissibly infringed its right of expressive association).

130. *Id.* at 861 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

131. *See id.* ("When the government forces a group to accept for membership someone the group does not welcome and the presence of the unwelcome person 'affects in a significant way the group's ability to advocate' its viewpoint, the government has infringed on the group's freedom of expressive association." (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000))).

132. *See id.* at 862 (describing the three-part framework from *Dale*). The court stated:

The likelihood of success on [the expressive association] claim turns on three questions: (1) Is CLS an expressive association? (2) Would the forced inclusion of active homosexuals significantly affect CLS's ability to express its disapproval of homosexual activity? and (3) Does CLS's interest in expressive association outweigh the university's interest in eradicating discrimination against homosexuals?

Id.

133. *Id.*

CLS would have to change its expressive message.¹³⁴ The court reasoned that "CLS's beliefs about sexual morality are among its defining values; forcing it to accept as members those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to cease to exist."¹³⁵ On the final question from the *Dale* framework, the court weighed CLS's right to expressive association against SIU's interest in preventing discrimination against homosexuals.¹³⁶ SIU was unable to identify any legitimate motivation for applying its nondiscrimination policy to CLS.¹³⁷ The court balanced this against CLS's interest in exercising its First Amendment freedoms, an interest which was found to be "unquestionably substantial."¹³⁸

SIU's principal argument against this rationale was that the situation was not one of "forced inclusion," since the university was not forcing CLS to do anything or accept anyone.¹³⁹ But the majority rejected this argument, based on its finding that "[t]his case is legally indistinguishable from *Healy*."¹⁴⁰ The fact

134. *See id.* at 863 ("SIU's enforcement of its antidiscrimination policy upon penalty of derecognition can only be understood as intended to induce CLS to alter its membership standards—not merely allow attendance by nonmembers—in order to maintain recognition."). The court went on to state:

CLS is a faith-based organization. One of its beliefs is that sexual conduct outside of a traditional marriage is immoral. It would be difficult for CLS to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct.

Id.

135. *Id.*

136. *See id.* ("In order to justify interfering with CLS's freedom of expressive association, SIU's policy must serve a compelling state interest that is not related to the suppression of ideas and that cannot be achieved through a less restrictive means.").

137. *See id.* ("[T]he Supreme Court has made it clear that antidiscrimination regulations may not be applied to expressive conduct with the purpose of either suppressing or promoting a particular viewpoint."). The court went on to state:

What interest does SIU have in forcing CLS to accept members whose activities violate its creed other than eradicating or neutralizing particular beliefs contained in that creed? SIU has identified none. The only apparent point of applying the policy to an organization like CLS is to induce CLS to modify the content of its expression or suffer the penalty of derecognition.

Id.

138. *Id.*

139. *Id.* at 864.

140. *Id.* The court elaborated with the following statement:

CLS was deprived of the same benefits as the student group in *Healy*. Both were frozen out of channels of communication offered by their universities; both were denied university money and access to private university facilities for meetings. SDS in *Healy*, like CLS here, could turn to alternative modes of communication

was that "SIU may not do indirectly what it is constitutionally prohibited from doing directly."¹⁴¹ *Healy* did allow universities to enforce reasonable campus rules,¹⁴² but only when those rules were directed at an organization's conduct and not its philosophy.¹⁴³

The court also addressed the free speech claim advanced by CLS.¹⁴⁴ It agreed that the recognized student organization status was a type of forum,¹⁴⁵ but declined to be more specific.¹⁴⁶ Because SIU was applying its policy in a viewpoint-discriminatory way,¹⁴⁷ it did not matter what type of forum the school had created—viewpoint discrimination is always impermissible.¹⁴⁸ Because CLS had demonstrated a likelihood of success on both its expressive association claim and its free speech claim, the Seventh Circuit granted the preliminary injunction pending a full hearing by the district court.¹⁴⁹

and alternative meeting places, but the Supreme Court held that the student group's "possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by" nonrecognition.

Id. (quoting *Healy v. James*, 408 U.S. 169, 183 (1972)).

141. *Id.*

142. *Id.*

143. *See id.* (noting that there is a distinction between "rules directed at a student organization's actions and rules directed at its advocacy or philosophy; the former might provide a justification for nonrecognition, but the latter do not[>").

144. *See id.* at 865–67 (concluding that CLS demonstrated a likelihood of success on its claim that SIU ejected it from a speech forum that it was otherwise entitled to occupy).

145. *See id.* at 866 ("Though recognized student organization status is a forum of the theoretical rather than the physical kind—a street corner or public square is the physical kind—the same rules apply.").

146. *See id.* ("Whether SIU's student organization forum is a public, designated public, or nonpublic forum is an inquiry that will require further factual development, and that is a task properly left for the district court.").

147. *See id.* ("CLS is the only student group that has been stripped of its recognized status on the basis that it discriminates on a ground prohibited by SIU's Affirmative Action/EEO policy. CLS presented evidence that other recognized student organizations discriminate in their membership requirements on grounds prohibited by SIU's policy.").

148. *See id.* at 865 (noting that even in a nonpublic forum, speech restrictions "must not discriminate on the basis of viewpoint"). The majority did note that "[t]here can be little doubt that SIU's [policy] is viewpoint neutral on its face." *Id.* at 866.

149. *Id.* at 867. The parties eventually reached a settlement allowing CLS to continue as a recognized student organization at SIU School of Law. *See Memorandum of Understanding at 3* (May 17, 2007), available at <http://www.telladf.org/UserDocs/CLS-SIUsettlement.pdf> (restoring registered student organization status to CLS at SIU while allowing CLS to maintain its membership requirements).

B. Truth v. Kent School District

The facts of *Truth* are similar to those of *Walker*, the only difference being that the setting was a high school and not a university. The case arose out of the attempts of a group of high school students at Kentridge High School to obtain official school recognition for their Bible club (Truth).¹⁵⁰ In order to obtain recognition, the group's charter had to be approved by the Associated Student Body (ASB) Council.¹⁵¹ Official recognition bestowed such benefits as the ability to meet on-campus during school hours, access to ASB funding, access to a faculty advisor, and use of the public address system.¹⁵² Non-ASB recognized clubs could still use school facilities for meetings, but only during noninstructional hours.¹⁵³ Student leaders of Truth submitted several iterations of the club's charter to the ASB over the years, without any success.¹⁵⁴ After the third rejection, the students filed suit against the school in federal district court, alleging that the school had violated their First Amendment rights of free speech and expressive association.¹⁵⁵ At issue was the conflict between the school district's nondiscrimination policy and Truth's charter.¹⁵⁶ The school also relied on state nondiscrimination law to justify the denial.¹⁵⁷ The district

150. *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 637 (9th Cir. 2008).

151. *Id.*

152. *Id.* at 640.

153. *Id.*

154. *Id.* at 637–40.

155. *Id.* at 638. The complaint also alleged that the school had violated the Equal Access Act, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. *Id.* The court dealt with some of these claims, but they are not the focus of this Note.

156. *See id.* at 639 (describing Truth's charter and the reasons for ASB's refusal officially to recognize the club). Specifically, while club meetings were open to all, the club's charter listed several of the following criteria for voting members:

In order to be a voting member or officer, students are required to sign a "statement of faith." The statement of faith requires the person to affirm that he or she believes "the Bible to be the inspired, the only infallible, authoritative Word of God." A voting member must also pledge that he or she believes "that salvation is an undeserved gift from God," and that only by "acceptance of Jesus Christ as my personal Savior, through His death on the cross for my sins, is my faith made real."

Id. (quoting Truth Club Charter, Membership Criteria). The primary impediment to official recognition was Policy 3210, which states that "[t]he district will provide equal educational opportunity and treatment for all students in all aspects of the academic and activities program. Equal opportunity and treatment is provided without regard to race, creed, [or] color." Kent School District Policy 3210. The district court held that inclusion of "creed" indicates that discrimination based on religion is prohibited. *Id.*

157. *See id.* at 640 (noting that Kent School District relied on Washington Revised Code § 49.60.215).

court entered summary judgment against Truth and held that the school district had an adequate basis for denying official recognition to Truth.¹⁵⁸ The case went to the Ninth Circuit, which conducted a *de novo* review.¹⁵⁹

In the initial brief, counsel for Truth focused heavily on the claim that the school district had violated the students' right of expressive association.¹⁶⁰ But the court's unanimous opinion did not address this issue. Instead, the panel focused on the type of forum that the school district had created and the permissible speech restrictions within that forum.¹⁶¹ Adopting the *Rosenberger* standard,¹⁶² the court determined first that "[a]ccess to ASB recognition qualifies as a limited public forum."¹⁶³ Based on this determination, the next step was to determine whether the school district's nondiscrimination policies were "viewpoint neutral and reasonable in light of the purposes of the forum."¹⁶⁴ One important part of a school's mission is to instill the value of nondiscrimination.¹⁶⁵ Accordingly, the panel concluded that the decision to deny access to official ASB recognition based on Truth's unwillingness to adhere to the school's nondiscrimination policy was "reasonable in light of the purposes of the forum."¹⁶⁶ Furthermore, the school was not denying Truth access to the ASB program on the basis of any viewpoint, but because Truth refused to comply with school policy.¹⁶⁷ According to the court, "the District no more engaged in viewpoint discrimination by excluding Truth for refusing

158. *See id.* at 641 ("The district court ruled on the merits of . . . some of the First Amendment claims It held that the restrictions on general membership in the [club] charter constituted a legitimate basis for denying the third charter").

159. *See id.* ("As to each issue, we review *de novo*. . . . In determining whether summary judgment was appropriate, we view the evidence in the light most favorable to Truth, the non-moving party.").

160. *See* Brief of Appellant-Plaintiff at 17–25, *Truth v. Kent Sch. Dist.*, No. 04-35876 (9th Cir. Feb. 18, 2005) (detailing Truth's contention that Kent School District had violated its right of expressive association).

161. *See* *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 648 (9th Cir. 2008) ("[W]e must evaluate the District's denial of ASB recognition as a restriction on a 'limited public forum.'" (quoting *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 829 (1995))).

162. *See id.* at 649 (reviewing *Rosenberger's* facts and analysis).

163. *Id.*

164. *Id.*

165. *See id.* ("The Supreme Court has emphasized that part of a school's mission is to instill in students the 'shared values of a civilized social order,' which includes instilling the value of non-discrimination." (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988))).

166. *Id.*

167. *See id.* at 650 ("[T]he 'perspective of the speaker' was not the 'rationale' for denying Truth access to the limited public forum." (quoting *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 829 (1995))).

to comply with its nondiscrimination policy than it would have engaged in viewpoint discrimination by refusing to . . . [recognize] a Student Pro-Drug Club that refused to obey the school's anti-drug policy."¹⁶⁸ In other words, there was nothing inherently viewpoint discriminatory about the school's antidiscrimination policy as applied to student groups. Therefore, the court held that the school district did not violate Truth's First Amendment rights.¹⁶⁹ The case was remanded on other grounds.¹⁷⁰ A petition for rehearing en banc was denied in December 2008.¹⁷¹

In a separate concurrence, joined by a second of the three panelists, Judge Raymond Fisher focused on the expressive association claim raised by Truth.¹⁷² But like the majority opinion, Judge Fisher framed the issue in terms of the type of forum that the school had created.¹⁷³ He characterized expressive association as "simply another way of speaking, only the group communicates its message through the *act of associating*."¹⁷⁴ Therefore, in a limited public forum, any restriction on the right of expressive association is legitimate so long as it is viewpoint neutral and reasonable in light of the purposes of the forum.¹⁷⁵ Judge Fisher noted that any approach that analyzed expressive association claims apart from this framework would "accord an act of 'pure speech' such as

168. *Id.*

169. *See id.* at 651 ("We hold only that the District did not violate . . . Truth's First Amendment rights by applying its non-discrimination policy to require Truth to remove its general membership provision.").

170. *See id.* at 650 (discussing the possibility that the school district applied its nondiscrimination policy in a viewpoint discriminatory way).

171. *See Truth v. Kent Sch. Dist.*, 551 F.3d 850, 850 (9th Cir. 2008) (denying petition for rehearing en banc).

172. *See Truth v. Kent Sch. Dist.*, 542 F.3d 634, 651 (9th Cir. 2008) (Fisher, J., concurring) ("We write separately to amplify on one issue discussed in our main opinion. Truth argued that it must be granted access to the ASB forum because conditioning its access . . . would infringe its right to engage in speech through 'expressive association.'"); *id.* (Fisher, J., concurring) ("Expressive association may be burdened when the state requires a group to change its membership criteria . . . or when the state conditions access to a traditional public forum upon such changes . . .").

173. *See id.* (Fisher, J., concurring) ("As our opinion explains, when the state creates a *limited* public forum, like the ASB program at issue here, it may restrict access to that forum . . . even if these rules have the effect of limiting a group's ability to engage in protected speech . . .").

174. *Id.* at 652 (Fisher, J., concurring).

175. *See id.* (Fisher, J., concurring) ("When the state *restricts access to a limited public forum* in a way that interferes with a group's speech or expressive association . . . we apply the lesser standard of scrutiny, even if the same burden on the group's rights *outside* a limited public forum would be subject to strict scrutiny.").

publishing a newspaper—the core of what the First Amendment protects—less protection than an act of expressive association."¹⁷⁶

Interestingly, Judge Fisher briefly discussed the *Walker* case in a footnote.¹⁷⁷ He attempted to distinguish *Walker* by pointing out that the Seventh Circuit never determined what type of forum the university had created.¹⁷⁸ The judge noted that "*Walker* did not say that strict scrutiny would be appropriate in *all* cases, even if the university had created something less than an open forum."¹⁷⁹ But this statement completely mischaracterizes the approach taken by the Seventh Circuit, ignoring the fact that the Seventh Circuit treated the free speech claim and the expressive association claim *separately*.¹⁸⁰ The *Walker* court did not consider it necessary to characterize the type of forum at issue when analyzing the expressive association claim made by CLS.¹⁸¹ The *Truth* opinion clearly departs from the *Walker* opinion on this point.¹⁸² Because the concurrence represented a majority of the panel, it carries precedential weight that would not otherwise be afforded to a standard concurrence.¹⁸³

176. *Id.* (Fisher, J., concurring).

177. *See id.* at 652 n.1 (Fisher, J., concurring) (mentioning the Seventh Circuit *Walker* case).

178. *See id.* (Fisher, J., concurring) ("Although the Seventh Circuit applied strict scrutiny in addressing this claim, it notably stated that it could not even determine, on the limited record before it, whether the university had created an open, limited, or nonpublic forum.").

179. *Id.* (Fisher, J., concurring).

180. *See Truth v. Kent Sch. Dist.*, 551 F.3d 850, 855–56 (9th Cir. 2008) (Bea, J., dissenting from the denial of a petition for rehearing en banc) ("The [*Walker*] court analyzed the two claims separately, applying strict scrutiny to the expressive association claim and the limited public forum analysis to the free speech claim.").

181. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853, 861–64 (7th Cir. 2006) (analyzing expressive association claim in light of *Dale* and *Healy*).

182. *See Truth v. Kent Sch. Dist.*, 551 F.3d 850, 855 (9th Cir. 2008) (Bea, J., dissenting from the denial of a petition for rehearing en banc) ("Furthermore, the majority concurrence's opinion causes an inter-circuit split with the Seventh Circuit's decision in [*Walker*]."); *see also* 1 SMOLLA, *supra* note 25, § 13:14 (noting that the court in *Truth* reached a "different conclusion" from the court in *Walker*).

183. *See Truth v. Kent Sch. Dist.*, 551 F.3d 850, 851 n.1 (9th Cir. 2008) (Bea, J., dissenting from the denial of a petition for rehearing en banc) ("This [*Truth* concurrence] is no standard concurrence . . . because two of the three members of the panel concur in it. Thus, it is the opinion of the panel on this issue and creates binding precedent.").

V. Analysis

It is important to be clear about what is at stake. DHCC¹⁸⁴ has created an avenue for student groups to obtain official recognition—with all the attendant benefits. However, in accordance with university policy, official recognition is available only to groups which do not discriminate in their membership/officer requirements on the basis of certain characteristics such as religious belief or sexual orientation. If DHCC's nondiscrimination policy is viewed as a speech limitation on the limited public forum the school has created, then, according to the *Truth* court, that limitation must be viewpoint neutral and reasonable in light of the purposes of the forum.¹⁸⁵ If, on the other hand, this policy is viewed as inherently conflicting with a student group's expressive association rights—by forcing the group to accept members it would rather not accept—then, according to the *Walker* court, the policy must be justified by a compelling state interest that outweighs the associational interests of the student group.¹⁸⁶

As an aside, accepting the *Walker* approach does not necessarily mean that DHCC could not demonstrate a compelling interest in eliminating discrimination based on religion or sexual orientation.¹⁸⁷ This would be difficult, however, given the fact that the Supreme Court has only recognized a handful of characteristics—including race and gender—as classes meriting special protection.¹⁸⁸ The Court has never recognized sexual orientation as a suspect class,¹⁸⁹ and has indicated that certain forms of religious discrimination

184. See *supra* Part I (describing a hypothetical situation involving a discriminatory college club).

185. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) ("When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. . . . The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint. . . .").

186. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.").

187. See *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 38 (D.C. 1987) (finding that eliminating discrimination on the basis of sexual orientation is a compelling state interest).

188. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (finding race is a suspect class); *Craig v. Boren*, 429 U.S. 190, 204 (1976) (applying intermediate scrutiny to gender-based classification).

189. See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (applying rational basis scrutiny to a state law permitting sexual-orientation based discrimination).

are necessary for the vitality of a religious organization.¹⁹⁰ Furthermore, given the diversity of student groups that exists at most public universities and high schools, it is doubtful that a student would be severely disadvantaged by being excluded from membership in one particular group.¹⁹¹ Regardless, the level of scrutiny a court will apply to the nondiscrimination policy depends on which framework the court applies—speech or expressive association: "Government action that infringes on the right of expressive association is subject to strict scrutiny By contrast, government action that infringes on the right of free speech in a limited public forum such as a school, is subject to a lower level of scrutiny."¹⁹² Commenting on the *Truth* decision, one First Amendment scholar noted the following:

It is simply not enough to say that the First Amendment rights of a student group are not violated when it is forced to accept members it does not wish to accept, because the student group is violating a general school policy, akin to an anti-drug use policy. For the whole point of the freedom of association line of First Amendment cases is that freedom of association includes a correlative First Amendment freedom of nonassociation, and freedom of nonassociation is in inherent tension with anti-discrimination policies, which force association. Thus, anti-discrimination policies are not like anti-drug use policies in that anti-discrimination policies by their intrinsic nature render certain forms of freedom of nonassociation null.¹⁹³

The *Walker* court treated the expressive association claim as completely separate from the speech claim, while the *Truth* court ignored the expressive association interests and focused solely on speech in the limited public forum. But is there a third way? Can a group's First Amendment interest in speech *and* association survive even in the "limited public forum" of the public school or university? The following Part provides a possible way to resolve this issue.

190. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342–43 (1987) (Brennan, J., concurring) ("We are willing to countenance the imposition of . . . [discrimination in employment based on religion] because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities.").

191. See Eugene Volokh, *Freedom of Expressive Association*, 58 STAN. L. REV. 1919, 1964–65 (2006) (arguing that "[t]here is nothing here like the massive and often economically crippling race discrimination in employment and education that triggered the Civil Rights Act and triggered the rejection of demands for religious exemptions from that Act").

192. *Truth v. Kent Sch. Dist.*, 551 F.3d 850, 853 (9th Cir. 2008) (Bea, J., dissenting from the denial of a petition for rehearing en banc).

193. 2 SMOLLA, *supra* note 25, § 17:42.

A. *The Message and the Messenger*

1. *Personnel Is Policy: In Theory*

It is clear that the right of expressive association is necessary to protect a collective message—especially if that message is an unpopular one.¹⁹⁴ When a group of people come together around a common set of beliefs for the purpose of expressing a message, the First Amendment interests of the group go beyond the protection of the message itself.¹⁹⁵ The Court's line of expressive-association cases—from *Roberts* to *Dale*—makes it clear that just as a group's message deserves strong First Amendment protections, so does that group's ability to shape the message.¹⁹⁶ It is a "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."¹⁹⁷ In the context of group advocacy, choosing the content of the message *inevitably* involves choosing the members who express that message: "[A]n association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members. Protection of the message itself is judged by the same standards as protection of speech by an individual."¹⁹⁸ How else can a group ensure that its message is conveyed than by selecting the members to convey it? How can a club that wants to provide an opportunity for students "interested in growing in

194. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000) ("This right is crucial in preventing the majority from imposing its views on groups that would express other, perhaps unpopular, ideas."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1983) ("Accordinging protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.").

195. See Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 4 (1964) ("[A]s a general principle, the right of individuals to associate or to refrain from association ought to be protected to the same extent, and for the same reasons, as individual liberty is protected. Thus, as a starting point, an association should be entitled to do whatever an individual can do . . .").

196. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("Government actions that may unconstitutionally burden this freedom may take many forms, one of which is 'intrusion into the internal structure or affairs of an association' . . ." (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984))).

197. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995).

198. *Roberts v. United States Jaycees*, 468 U.S. 609, 633 (1983) (O'Connor, J., concurring).

their relationship with Jesus Christ"¹⁹⁹ effectively accomplish this if its own members and officers cannot be required to profess any religious belief at all, let alone a belief in Christian teachings?²⁰⁰ When a state actor wants to change an expressive group's membership criteria by applying a nondiscrimination law to that group, it must have a compelling reason for doing so precisely because "[f]orcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express."²⁰¹ The means that a group uses to express its message—the membership criteria—are a part of that message.²⁰²

This principle can be illustrated by thinking of the group's message as a chair, and the membership policy—the freedom of nonassociation—as one of the legs of the chair. The leg provides vital support for the chair, to the extent that the chair could not function without it. Cut out the leg and, for all intents and purposes, the chair is useless. In the same way, a group's message is supported by its membership policies. When the two are that interconnected, eliminating one effectively cripples the other. The case of *Hsu v. Roslyn Union Free School District*²⁰³ illustrates this principle.

2. Personnel Is Policy: In Practice

The basic facts of *Hsu* are very similar to those in *Truth*: A religious student group was denied recognition by the high school board because the students refused to alter the club's charter to allow nonbelievers to hold leadership positions.²⁰⁴ This provision violated the district's nondiscrimination policy.²⁰⁵ The students sued the school district under the Equal Access Act²⁰⁶ based on the following provision:

199. *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 638 (9th Cir. 2008).

200. *See Truth v. Kent Sch. Dist.*, 551 F.3d 850, 854 (9th Cir. 2008) (Bea, J., dissenting from the denial of a petition for rehearing en banc) ("[T]he school district here 'at the very least' forces the Christian Bible study group to send a message that its agenda, discussions, and meetings can be framed, and their content determined, by non-Christians.").

201. *Dale*, 530 U.S. at 648.

202. *See Marshall*, *supra* note 25, at 79–80 (arguing that a group's right to discriminate is strongest when "the organizations discriminatory criteria relate directly to its advocacy").

203. *See Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 848 (2d Cir. 1996) (holding that religious club should have been granted access to school forum under the terms of the Equal Access Act).

204. *Id.* at 851.

205. *See id.* at 850 (providing that every student should have equal access to extracurricular activities without regards to religious beliefs).

206. 20 U.S.C. §§ 4071–4074 (1997).

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious . . . content of the speech at such meetings.²⁰⁷

One of the key issues considered by the three-judge panel was whether the discriminatory leadership requirements of the club constituted the "content" of the club's speech.²⁰⁸ The school argued that its decision to deny official recognition to the student club was not based on the club's speech, but on the "act" of excluding nonbelievers from leadership positions.²⁰⁹ But the majority rejected this notion, noting that in this case there was "an integral connection between the exclusionary leadership policy and the 'religious speech' at [the club's] meetings."²¹⁰ The majority drew on the principles from the Supreme Court's decision in *Hurley*,²¹¹ because as in that case involving parade organizers, the student group's decision to limit its leadership positions to religious believers was based on its desire "to preserve the content of its message."²¹² The fact was that the exclusive membership policy was for "purely expressive purposes . . . rather than for the sake of the exclusion itself."²¹³ This principle applies to all clubs with an expressive message:

[O]ne of the principal ways in which many extracurricular clubs typically define themselves [is] by requiring that their leaders show a firm commitment to the club's cause. [For example] . . . it would be sensible—and unremarkable in light of the club's particular purposes—for the Students Protecting the Environment Against Contamination Club to require that officers have a demonstrated commitment to conservation or

207. *Id.* § 4071(a).

208. *See Hsu*, 85 F.3d at 856 ("Did the School refuse to recognize the Hsus' club 'on the basis of the religious . . . content of the speech at [the Club's] meetings?'" (quoting Equal Access Act, 20 U.S.C. § 4071(a) (1997))). While the ruling in *Hsu* was based on the provisions of the Equal Access Act, the Second Circuit noted that "since the Act creates an analog to the First Amendment's default rule banning content-based speech discrimination, cases discussing the meaning of 'speech' in First Amendment jurisprudence are also interpretive tools for understanding the Act." *Id.* at 856–57.

209. *See id.* ("One might argue that there is no 'speech' at issue here. . . . The School has demonstrated that it would recognize [the club] . . . without regard to the content of the club's prayers or discussions, so long as no religious exclusions were made.").

210. *Id.* at 857.

211. *See id.* at 856 ("The lesson we draw from *Hurley* is that the principle of 'speaker's autonomy' gives a speaker the right, in some circumstances, to prevent certain groups from contributing to the speaker's speech, if the groups' contribution would alter the speaker's message.").

212. *Id.*

213. *Id.* at 859.

recycling; [or] for Students Against Drunk Driving to require that officers have taken the pledge; or for Students for Social Responsibility to require that officers have a social conscience. . . . All of these "tests" of an officer's commitment to the group's cause allow the group to ensure that its agenda will be advanced at its meetings.²¹⁴

When the message and the membership criteria are so closely intertwined, if one is destroyed, the other risks destruction. The Second Circuit concluded that nondiscrimination policies *do* regulate the content of a group's speech when they conflict with the group's membership criteria.²¹⁵ Regulating a group's membership decisions is effectively the same as regulating a group's message: "[B]y permitting the school to regulate the *membership* which controls the group's expression, it ineluctably controls the group's viewpoint—'personnel is policy.'²¹⁶

3. *Putting the Pieces Together*

This principle, that the membership criteria *is* part of the group's message, provides the framework for how an expressive association claim can merge with the public forum doctrine as it applies to public schools and universities. When a school creates a limited public forum open to student groups, any regulation that limits access to that forum based on the message of the group is subject to strict scrutiny.²¹⁷ If the message and the membership criteria are so closely related, then arguably, as in *Hsu*, the group's membership criteria deserve the same protection as the message itself. In other words, a regulation that targets the membership criteria of a group—for example, a nondiscrimination policy—should be subject to the same scrutiny that to which a regulation targeting the message would be subject.

This connection between message and membership is exactly what the second part of the *Dale* framework addresses: Does the presence of an unwanted individual "significantly burden"²¹⁸ a group's ability to express its

214. *Id.* at 860.

215. *See id.* at 859 ("We can conclude . . . that when an after-school religious club excludes people of other religions from conducting its meetings, and when that choice is made to protect the expressive content of the meetings, a school's decision to deny recognition to the club because of the exclusion is a decision based on the [content of the speech] . . .").

216. *Truth v. Kent Sch. Dist.*, 551 F.3d 850, 856 (9th Cir. 2008) (Bea, J., dissenting from the denial of a petition for rehearing en banc).

217. *See Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981) (applying strict scrutiny to a content-based speech restriction on a limited public forum at a public university).

218. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

message? This is the exact framework that the *Walker* court applied to the Christian Legal Society's claim.²¹⁹ Members of CLS had to affirm the moral principles contained in the statement of faith—including the principle that sexual conduct outside of traditional marriage is morally wrong.²²⁰ It would be very difficult for CLS to effectively convey this message if it also must accept members who are practicing homosexuals, and this is exactly what the *Walker* court found.²²¹ Of course, not every student group could justify discriminatory membership policies.²²² It would not make sense for the Chess Club to exclude women, or for the Forensics Group to be open only to Catholics. But if the presence of an unwanted member would significantly burden the group's ability to express its message, and if the membership policies reflect this, then a regulation that targets those membership policies also targets the message.

Therefore, when a university creates a limited public forum for student groups, on the condition that the groups must have nondiscriminatory membership policies, a court would have to determine whether forcing a group to make this change would significantly affect the group's ability to convey its message—the *Dale* standard.²²³ If the answer is yes, then, just like in *Hsu*, the court could—and should—conclude that the group's membership policies are a part of the group's message, and therefore any regulation that targets the policies targets the message. And in the university's limited public forum, a restriction that targets a group's message must survive strict scrutiny²²⁴—the same standard the Court consistently has applied to laws violating a group's right of expressive association.²²⁵ The bottom line is that if the membership

219. See *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 862 (7th Cir. 2006) (applying the three-part test from *Dale* to determine if petitioner's right of expressive association was violated).

220. See *id.* (listing the principles contained in CLS's statement of beliefs).

221. See *id.* at 863 ("It would be difficult for CLS to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct.")

222. See *Marshall*, *supra* note 25, at 77 ("Not every association promotes ideas, however. Tom and Fred walking down the street is, in no meaningful sense, expression. Similarly, there is little or no expression inherent in the membership criteria of a Friday night bridge club or an all-white country club.")

223. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (requiring an expressive group to show that the presence of an unwanted member would significantly burden that group's ability to express its message).

224. See *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981) (applying strict scrutiny to a content-based speech restriction on a limited public forum at a public university).

225. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("Infringements on . . . [the right of expressive association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.")

policies and the message are so closely intertwined, then the expressive association analysis from *Dale* applies the same standard that the limited public forum analysis from *Widmar* applies: Strict scrutiny.

By contrast, the Ninth Circuit's reasoning in *Truth* would give universities an end run around constitutional proscriptions against content- and viewpoint-based discrimination in a limited public forum. The school cannot exclude a student group because of the religious content of its message, yet the school can exclude the club for failure to comply with a nondiscrimination policy that effectively guts the club's ability to convey its message. A university could not exclude a student group like CLS based on that group's expressed disapproval of the homosexual lifestyle, but forcing that group to adopt a "reasonable" nondiscrimination policy effectively accomplishes the same result.²²⁶ And under the *Truth* approach, as long as the nondiscrimination policy is reasonable and applied evenhandedly, the affected student group has no recourse.²²⁷ The powerful First Amendment interests of student associations deserve more protection than a mere "reasonableness" standard would provide.

B. Problem with the Limited Public Forum Standard

The Ninth Circuit's opinion in *Truth* took its cues from the Supreme Court's limited public forum discussion in the *Rosenberger* case.²²⁸ The problem with this is that it completely ignored the way the Supreme Court applied the public forum doctrine to the university context in *Widmar v. Vincent*.²²⁹ *Widmar* stands for the proposition that when a university creates a

226. See Wojciech Sadurski, *Does the Subject Matter? Viewpoint Neutrality and Freedom of Speech*, 15 CARDOZO ARTS & ENT. L.J. 315, 359 (1997) ("A regulation may be viewpoint discriminatory . . . even if it picks up content-neutral characteristics of speech, such as the status of speakers or the manner of communication. If a regulation is viewpoint discriminatory in its effect, then all the reasons that justify hostility to open viewpoint discrimination apply."). It should be noted that many schools' nondiscrimination policies are motivated by a hostility to contrary viewpoints on homosexuality. See *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006) ("According to FAIR, law schools' ability to express their message that discrimination on the basis of sexual orientation is wrong is significantly affected by the presence of military recruiters on campus and the schools' obligation to assist them.").

227. See *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649–50 (9th Cir. 2008) (concluding that the high school district's nondiscrimination policy was reasonable in light of the purposes of the forum and viewpoint neutral).

228. See *id.* at 649 (citing *Rosenberger* for the proposition that speech restrictions in a limited public forum need only be reasonable and viewpoint neutral).

229. *Widmar*, 454 U.S. at 277. See *supra* Part III.B for a discussion of two Supreme Court cases with different conceptions of the limited public forum in the university context.

forum that is "generally open to student groups,"²³⁰ any content-based speech restrictions must be supported by a compelling state interest.²³¹ The public forum in the *Widmar* case, school recognition, gave student groups access to school facilities for meetings.²³² In *Rosenberger* the forum in question was a student activities fund,²³³ available for activities that were in line with the educational goals of the University.²³⁴ The *Rosenberger* Court characterized the fund as a limited public forum where there was a distinction between, "on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."²³⁵ In both *Widmar* and *Rosenberger*, the Court characterized the university program as a limited public forum, but the levels of scrutiny it applied to the restrictions on the respective fora were very different.²³⁶ Attempts by lower courts to resolve the confusion have met with little success.²³⁷

230. *Widmar*, 454 U.S. at 277.

231. *See id.* at 269–70 ("In order to justify discriminatory exclusion from a public forum based on the . . . content of a group's intended speech, the University . . . must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.") (emphasis added).

232. *See Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n.7 (1983) ("A [designated] public forum may be created for a limited purpose such as use by certain groups, e.g., [*Widmar*] . . .").

233. *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 824 (1995).

234. *Id.*

235. *Id.* at 830.

236. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (applying the same analysis to a limited public forum that the Court would apply to a nonpublic forum); *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 830 (1995) (same). *But see Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 796 (1984) ("The [lower court] did not decide whether the [forum] was a limited public forum or a nonpublic forum . . ."). Writing for the Seventh Circuit in the *Walker* case, Judge Sykes noted that this confusion over the term "limited public forum" had "infected the litigation." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 865 n.2 (7th Cir. 2006); *see also* Matthew D. McGill, Note, *Unleashing the Limited Public Forum: A Modest Revision of a Dysfunctional Doctrine*, 52 STAN. L. REV. 929, 931 (2000) (arguing that the current version of the limited public forum doctrine is "totally unworkable").

237. *See Child Evangelism Fellowship v. Montgomery Sch.*, 457 F.3d 376, 382 (4th Cir. 2006) ("Although the Court has never squarely addressed the difference between a designated public forum and a limited public forum, its most recent opinions suggest that there indeed is a distinction."). The court went on to state:

In a limited public forum, the government creates a channel for a specific or limited type of expression where one did not previously exist. In such a forum, "the State may be justified in reserving [its forum] for certain groups or for the discussion of certain topics," subject only to the limitation that its actions must be viewpoint neutral and reasonable.

One way to distinguish the two is that *Widmar* involved access to school facilities, while *Rosenberger* involved access to funding. This distinction was rejected by the Court in *Rosenberger*.²³⁸ When the university itself is the speaker, it has significant discretion to shape its message.²³⁹ A different situation occurs when the university creates a forum for private speakers.²⁴⁰

The reality is that official recognition at many schools and universities includes access to both facilities *and* funding—*Walker* being one example.²⁴¹ The benefits also often include permission to post advertisements on school bulletin boards and access to a faculty advisor.²⁴² When all of these benefits come with official recognition, what type of forum has the school created? When the consequences of nonrecognition include loss of classroom space for meetings, loss of bulletin board access, loss of the ability to reserve conference rooms free of charge, *and* loss of funding, the limited public forum created by the school resembles the forum in *Widmar* much more than the one in *Rosenberger*,²⁴³ and therefore the stronger speech protections apply: In a forum

Id. (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001)); *see also* *Sumnum v. Callaghan*, 130 F.3d 906, 916 n.14 (10th Cir. 1997) ("We recognize that the boundary between a designated public forum for a limited purpose (e.g., *Widmar*) and a limited public forum (e.g., *Rosenberger* . . .) is far from clear. . . . We simply note that a designated public forum for a limited purpose and a limited public forum are not interchangeable terms.").

238. *See Rosenberger*, 515 U.S. at 832 (rejecting the university's attempt to distinguish access to facilities from access to funding).

239. *See id.* at 833 ("When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.").

240. *See id.* at 834 ("It does not follow, however, . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.").

241. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853, 858 (7th Cir. 2006) (listing benefits of official recognition, including ability to reserve classrooms for meetings, free access to school auditorium, and access to university funds).

242. *See Truth v. Kent Sch. Dist.*, 542 F.3d 634, 640 (9th Cir. 2008) (listing benefits of official recognition, including advertising in school, use of the public address system, and a faculty advisor).

243. *See, e.g., ORGANIZATION MANUAL 4, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL*, available at <http://carolinaunion.unc.edu/index.php?&gid=77&Itemid=40> (listing benefits of Official University Recognition, including access to school facilities, access to bulletin boards, and funding opportunities); *STUDENT ORGANIZATION SOURCE BOOK 15, UNIVERSITY OF CALIFORNIA AT DAVIS*, available at <http://spac.ucdavis.edu/sos/SOSGuide.cfm> (same). *But see REGISTRATION GUIDELINES FOR STUDENT ORGANIZATIONS AT OHIO STATE 6, OHIO STATE UNIVERSITY*, available at http://ohiounion.osu.edu/posts/documents/OSUStudentOrgRegistrationGuidelines_07-08.pdf (granting benefits to unregistered student organizations, including access to university facilities and bulletin boards).

for student groups, content-based speech restrictions are subject to strict scrutiny.

C. Forced Inclusion or Conditioned Benefits?

Of course, an underlying premise of this discussion is that when a school or university creates a limited public forum for student groups that do not discriminate, any student group that wishes to retain its membership policies is being "forced" to do otherwise. Some would argue that, in both *Truth* and *Walker*, schools were not forcing the student clubs to accept anyone.²⁴⁴ Nonrecognition is not the same as forced inclusion.²⁴⁵ A group such as *Truth* theoretically could exist outside the ASB forum, maintaining control over its own membership policies while promoting whatever message it pleases.²⁴⁶

This argument is constitutionally suspect, though, because student groups have rights of speech *and* association on school grounds.²⁴⁷ As the Court stated in *Healy*, "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."²⁴⁸ Of course, some Court cases have advanced the notion that free speech protections at high schools are more malleable,²⁴⁹ but this notion has never been extended to nondiscrimination policies.²⁵⁰ At both universities and high schools, a

244. See *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 648 (9th Cir. 2008) ("As an initial matter, it is important to emphasize that the members of *Truth* are not seeking merely to associate as a group; they are seeking to associate as a *school-sponsored* group."); see also *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 873 (7th Cir. 2006) (Wood, J., dissenting) ("[The University] has in no way tried to compel CLS to admit members or to elect officers that offend its precepts. It has said only that CLS must content itself with the benefits and support given to non-recognized student organizations . . .").

245. See Case Comment, *Constitutional Law—First Amendment—Seventh Circuit Holds that Public University Cannot Refuse to Recognize Student Group Based on Group's Violation of School Nondiscrimination Policy—Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), 120 HARV. L. REV. 1112, 1116 (2007) (criticizing the Seventh Circuit for incorrectly characterizing "SIU's derecognition of CLS as forced inclusion when the evidence does not support such an interpretation").

246. See *Truth*, 542 F.3d at 639–40 (noting that the Kent School District allowed nonrecognized student groups to meet on school grounds before or after normal school hours).

247. See *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

248. *Healy v. James*, 408 U.S. 169, 180 (1972).

249. See, e.g., *Morse v. Frederick*, 127 S.Ct. 2618, 2629 (2007) (holding that a high school may censor student speech that occurs on school grounds that school administrators "reasonably regard as promoting illegal drug use").

250. See 2 SMOLLA, *supra* note 25, § 17:42 ("The Supreme Court, however, has not

diversity of student groups adds to the "quality and creative power of student intellectual life,"²⁵¹ which is "a vital measure of a school's influence and attainment."²⁵²

Furthermore, the argument completely ignores the potentially crippling effects that nonrecognition can—and often does—have on student groups. For example, accepting the Ninth Circuit's opinion in *Truth*, a student group's ability to form and meet on campus would be effectively at the mercy of the administration and the nondiscrimination policies it implements. What would stop the Kent School District administration from saying that school classroom access at *any time* is only open to groups that comply with the school's nondiscrimination policy? If school classrooms constitute a limited public forum (in the *Rosenberger* sense), as long as the nondiscrimination policy was reasonable and viewpoint neutral—a question that the Ninth Circuit has already decided in *Truth*²⁵³—nothing would prevent Kent High School (or any other school) from taking this action. Student groups could go "underground" or meet off campus, but how realistic is that when the school is effectively closing off the one place that unites the student community?²⁵⁴ Many student groups are faced with a difficult choice as they must choose between having access to the school community and accepting unwanted members—and consequently altering their expressive message.²⁵⁵ As the Court stated in *Healy*, "[w]e are not free to disregard the practical realities."²⁵⁶ To say that nonrecognition is a small price to pay is little comfort to a group that cannot post on school bulletin boards, cannot get a faculty advisor, cannot reserve classrooms for meetings or speakers, and cannot access funding available to other student groups. A

extended this notion of diminished First Amendment protection for students to the free association rights of high school student groups.").

251. *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 836 (1995).

252. *Id.*

253. *See Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649–50 (9th Cir. 2008) (concluding that the nondiscrimination policy of the ASB was reasonable and viewpoint neutral).

254. *See* Richard M. Paul III & Derek Rose, Comment, *The Clash Between the First Amendment and Civil Rights: Public University Nondiscrimination Clauses*, 60 MO. L. REV. 889, 892 ("In essence, the University holds the tickets to the 'marketplace of ideas' on university campuses. Without a ticket, access to the market is barred.").

255. *See, e.g.*, Richard N. Ostling, *Christian Group, Some Colleges at Odds*, CHICAGO TRIBUNE, Jan. 17, 2003, at 6 (describing conflict between InterVarsity Fellowship (IVF) and Rutgers University after university officials threatened to ban IVF from campus if the group failed to change its membership policies that discriminated on the basis of religion and sexual orientation); John Leo, *Playing the Bias Card*, U.S. NEWS & WORLD REP., Jan. 13, 2003, at 41 (describing same conflict at University of North Carolina at Chapel Hill).

256. *Healy v. James*, 408 U.S. 169, 183 (1972).

group's ability to exist outside the campus forum does not lessen the debilitating impact that nonrecognition can have.²⁵⁷

VI. Conclusion

What does this mean for Charles and Maddie? Diablo Hills has created a forum for student groups to obtain access to campus facilities and resources, but that access comes at a price—no discrimination on the basis of religious belief. Yet the whole point of the Huxley Club is to provide a counterweight to religious belief systems. If the Huxley Club is an expressive association—and it most certainly is—then *Dale*'s test applies: Would the presence of religious believers significantly affect the Club's ability to convey its message that religious belief is irrational and dangerous? In the words of the *Walker* court, "[t]o ask this question is very nearly to answer it."²⁵⁸ The membership requirements provide a foundation for the message—remove the former and the latter has very little to stand on.²⁵⁹ Like in *Hsu*, because the leadership requirements are designed to ensure that a certain message is conveyed, those requirements are a part of the message, and any restriction that targets those requirements targets the message itself. And based on the Court's decision in *Widmar*, even in the "limited public forum" created by DHCC, content-based speech restrictions must survive strict scrutiny—the same outcome *Dale* requires. By coming together to form a common voice, Charles and Maddie are exercising a right that deserves the strongest of safeguards²⁶⁰—safeguards which apply with equal force on and off the school campus. A university may put a high value on tolerance, but when that value conflicts with vital associational freedoms, it must be put to the test. The First Amendment demands nothing less.

257. See *id.* at 183 ("Likewise, in this case, the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the [university's] action.").

258. *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 862 (7th Cir. 2006).

259. See Mark Andrew Snider, Note, *Viewpoint Discrimination by Public Universities: Student Religious Organizations and Violations of University Nondiscrimination Policies*, 61 WASH. & LEE L. REV. 841, 878 (2004) ("Without protection of each group's associational rights, a Zionist group is not insulated from the demands of a Neo-Nazi to be made a leader, an atheist group cannot ensure that fundamentalist Christians will not infiltrate it, and a small Hindu group cannot protect itself from 'take over' by a larger group of Muslims.").

260. See Marshall, *supra* note 25, at 70 ("[T]here is no question that [the right of association] is at the core of our nation's philosophical and social foundation.").