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## Viewpoint Discrimination by Public Universities: Student Religious Organizations and Violations of University Nondiscrimination Policies

Mark Andrew Snider

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# Viewpoint Discrimination by Public Universities: Student Religious Organizations and Violations of University Nondiscrimination Policies

Mark Andrew Snider\*

## Table of Contents

I. Introduction .....	842
II. Description of the Problem .....	846
III. Viewpoint and Content Discrimination by the Public University .....	850
A. Forum Analysis.....	850
B. Viewpoint and Content Discrimination Against Student Religious Organizations.....	853
IV. Freedom of Association and an Organization's Right to Self-Constitution.....	856
A. <i>Pre-Boy Scouts v. Dale</i> .....	857
B. <i>Boy Scouts v. Dale</i> .....	862
V. Analysis .....	865
A. Amalgamating Cases to Resolve the Problem.....	865
B. Freedom of Association Forbids Public University Derecognition of Student Religious Organizations.....	867
C. Public Policy Considerations Also Preclude the Derecognition of Student Religious Organizations.....	874
VI. Conclusion.....	882

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## I. Introduction

Alexis de Tocqueville was one of the first observers of American society to note that we are a people prone to organizing ourselves into groups for religious, political, business, moral, and social reasons.<sup>1</sup> De Tocqueville explained that neither society nor laws can compel us to be alike or equal,<sup>2</sup> and, as a result, we form small private circles in which we find comfort and companionship.<sup>3</sup> This principle is particularly true in the university context, especially at large public universities where students have formed hundreds of groups ranging from the American Fisheries Society to table tennis clubs.<sup>4</sup>

Academics, administrators, and students generally agree that student organizations provide an invaluable component of discourse and learning for both the campus community and for society at large.<sup>5</sup> At the same time, political activism within the academic community has led to increased scrutiny of many longstanding student organizations at public universities. It is no surprise that student organizations vigorously engage in campus activism; however, it is increasingly common that student organizations are the targets of activism when they resist pressures that try to force them to be fully inclusive of all segments of society.<sup>6</sup> In response to a political attitude at many universities that all discriminatory behavior—and in some cases even discriminatory speech—must end, most public universities have implemented nondiscrimination

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1. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 225 (New York, Colonial Press 1899) (describing American tendency to congregate in groups to achieve goals).

2. See *id.* ("No state of society or laws can render men so much alike.").

3. See *id.* ("The Americans, who mingle so readily in their political assemblies and courts of justice, are wont on the contrary carefully to separate into small distinct circles, in order to indulge by themselves in the enjoyments of private life.").

4. See, e.g., UB Student Involvement Directory 2002–2003, <http://www.student-affairs.buffalo.edu/directory> (last modified Nov. 13, 2003) (listing over 500 student associations at University of Buffalo) (on file with Washington and Lee Law Review); Registered Student Organizations, <http://utdirect.utexas.edu/dsorg> (last updated Aug. 5, 2002) (listing hundreds of student-led clubs at University of Texas) (on file with Washington and Lee Law Review); Index of Student Organizations, <http://www.clubs.psu.edu> (last updated Sept. 3, 2003) (listing hundreds of religious, social, and academic organizations at Penn State University) (on file with Washington and Lee Law Review).

5. See, e.g., Mai Tran, *On the Law*, L.A. TIMES, Dec. 14, 2001, at B2 (describing importance of student organizations to student development and campus life).

6. See Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369, 369–70 (1994) (describing prototypical case at University of Illinois involving conflict between student organization and public university policy prohibiting discrimination based on race, sex, religion, age, and sexual orientation).

policies.<sup>7</sup> Many of these universities have required all student organizations to agree to abide by the nondiscrimination policies as a precondition of recognition by the university.<sup>8</sup> Thus far, clashes with university nondiscrimination policies have occurred when student religious organizations have denied students leadership positions based on disagreements over core religious tenets.<sup>9</sup> These clashes at public universities have become more frequent and increasingly contentious,<sup>10</sup> and their legal significance forms the framework for this Note.

Through their nondiscrimination policies, a number of universities have derecognized student religious organizations over the past few years.<sup>11</sup> Well-publicized disputes have occurred at private schools such as Tufts University,<sup>12</sup> Middlebury College,<sup>13</sup> Grinnell College,<sup>14</sup> and Williams

7. See Lucy Hodges, *Alumni Launch P.C. Fightback*, THE TIMES HIGHER EDUCATION SUPPLEMENT, Apr. 21, 1995, at 7 (noting National Alumni Forum's claim that over 300 public universities have speech codes limiting student speech). In this Note, the term "nondiscrimination policy" refers to public university policies and regulations that prohibit student organizations from discriminating, not to public accommodation laws that some states have enacted.

8. Bainbridge, *supra* note 6, at 369–70.

9. See, e.g., Beth McMurtrie, *A Christian Fellowship's Ban on Gay Leaders Splits Two Campuses*, THE CHRONICLE OF HIGHER EDUCATION, May 12, 2000, at A51 (describing recent instances in which universities have derecognized student religious organizations for failing to abide by university nondiscrimination policies).

10. See *id.* (quoting student religious organization's supporter who fears these clashes are "the beginning of a trend to shut down religious groups that don't adhere to the current orthodoxy").

11. "Derecognition" describes the university's action that severs the ties between the group and the university and the resulting status of the then-defunct group. The derecognition of a student religious organization has a catastrophic and immediate effect on the targeted group. Derecognition normally prohibits the group from receiving university funding, prevents it from using the university's name, denies it access to university facilities, and bars it from advertising on campus. See Victor T. Hu, Note, *Nondiscrimination or Secular Orthodoxy? Religious Freedom and Breach of Contract at Tufts University*, 6 TEX. REV. L. & POL. 289, 295 (2001) (listing examples of rights and privileges lost when student activity organizations are derecognized). Derecognition, then, forces the group "underground," to meet off-campus, or to dissolve. *Id.*

12. See Andrea Billups, *Christian Group Fights Ouster at Tufts over Gay Student Flap*, THE WASH. TIMES, Apr. 20, 2000, at A3 (describing derecognition dispute at Tufts University); *Victory at Tufts, Evangelical Christian Group Regains Recognition*, <http://www.thefire.org/issues/tufts051600.php3> (last visited Jan. 18, 2004) [hereinafter *Victory at Tufts*] (same) (on file with Washington and Lee Law Review); Case Archive, <http://www.thefire.org/casearc.php> (last visited Jan. 18, 2004) (listing dozens of colleges and universities that have faced issue) (on file with Washington and Lee Law Review).

13. See *Victory at Tufts*, *supra* note 12 (noting that Middlebury College froze funds for evangelical student group) (on file with Washington and Lee Law Review).

14. See *id.* (describing Grinnell College's derecognition of evangelical student group

College.<sup>15</sup> Additionally, student religious organizations have encountered difficulty obtaining and maintaining recognition at public universities such as Ball State University,<sup>16</sup> Rutgers,<sup>17</sup> the University of North Carolina,<sup>18</sup> the University of Washington,<sup>19</sup> the University of Missouri,<sup>20</sup> and the University of Illinois.<sup>21</sup> In each case thus far, the university has retreated in response to public outcry<sup>22</sup> and, presumably, constitutional precedent.<sup>23</sup> Nevertheless, public universities continue to threaten student religious organizations with derecognition, two as recently as December 2002.<sup>24</sup> Are universities failing to learn from the previously unsuccessful showdowns that other universities have waged against student organizations? Or do the continued challenges reveal a justifiable mission by universities to expose the seriousness of discrimination?<sup>25</sup>

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because of its religious views).

15. See Cases, <http://www.thefire.org/cases.php> (last visited Jan. 18, 2004) (listing Ball State University as site of university encroachment on student religious liberties) (on file with Washington and Lee Law Review).

16. See Case Archive, *supra* note 12 ("In September 2002, Rutgers University denied the InterVarsity Multi-Ethnic Christian Fellowship, a student group, the right to take into account religious beliefs when selecting its leaders.") (on file with Washington and Lee Law Review).

17. See John Leo, *Playing the Bias Card*, U.S. NEWS & WORLD REP., Jan. 13, 2003, at 41 (describing cases of derecognition of student religious groups at Rutgers, Tufts, and the University of North Carolina).

18. *Id.*

19. See Richard M. Paul III & Derek Rose, *The Clash Between the First Amendment and Civil Rights: Public University Nondiscrimination Clauses*, 60 MO. L. REV. 889, 893 (1995) (discussing initial denial of recognition to Campus Crusade for Christ at University of Washington). The university finally recognized the organization in the face of a lawsuit. *Id.*

20. See *id.* at 894 (stating that student organizations that deny membership on basis of religious beliefs are denied recognition at University of Missouri).

21. See *id.* (describing University of Illinois' refusal to recognize Christian Legal Society because it would not sign statement agreeing not to discriminate on basis of sexual orientation). After extended negotiation and pressure from the national Christian Legal Society, the university recognized the organization. *Id.*

22. See Michael Paulson, *Tufts Lifts Its Ban on Christian Group*, THE BOSTON GLOBE, May 17, 2000, at B3 (describing intense public debate on issue and noting that "[m]ore than 150 academics from around the country sent a letter to Tufts protesting the decision to ban the evangelical student group"); Edward E. Plowman, *Brought to "Heel,"* WORLD MAGAZINE, Jan. 18, 2003, at 9 (noting that outside group threatened suit against University of North Carolina).

23. See Leo, *supra* note 17, at 41 (stating that the University of North Carolina backed off derecognition threat "to uphold the principles of freedom of expression"); Paulson, *supra* note 22 ("At public universities, lawyers say, constitutional protections would clearly protect the rights of religious groups such as the evangelical students to choose their own leaders and use student activity fees.").

24. See Leo, *supra* note 17, at 41 (discussing recent disputes at Rutgers and the University of North Carolina).

25. Or, perhaps, universities have attempted to *appear* concerned about discrimination.

A few university derecognition cases help to illuminate the issue. At the University of Missouri, a Mormon student organization, which was an officially recognized organization until the university added homosexuals to its list of protected groups, refused to promise not to discriminate on the basis of sexual orientation.<sup>26</sup> As a result, the university derecognized the group.<sup>27</sup> At the University of North Carolina-Chapel Hill (UNC), the administration threatened to stop funding a Christian organization and ban it from using campus facilities once the university discovered the group selected its leaders on the basis of their biblical beliefs and religious devoutness.<sup>28</sup> UNC has since backed away from its threat in order "to uphold the principles of freedom of expression."<sup>29</sup> In perhaps the best known case, Tufts University derecognized Tufts Christian Fellowship after the group denied a leadership position to a junior member because of her public decision to embrace a lesbian lifestyle.<sup>30</sup> The university later repealed its decision.<sup>31</sup>

While there is no record of any litigated cases, this Note examines how a court hearing such a case should reconcile the group's freedom of association<sup>32</sup> with the university's goal of complete nondiscrimination.<sup>33</sup> This Note explores the contours of the dilemma a court would face in choosing between the two values. It also discusses whether the presence of student religious organizations with self-selected members benefits or harms public universities. Part II describes the problem and highlights various alternative solutions. Part III begins by describing the constitutional context into which student organizations fall and goes on to describe the type of conduct the Supreme Court has found to be impermissible viewpoint and content-based discrimination<sup>34</sup> against student religious organizations. Through recent

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26. Deborah Haar, *SOGA Stands by Policy of Non-Discrimination: Mormons Oppose Sexual-Orientation Wording*, THE MANEATER, Nov. 22, 1994, at 1, 4.

27. *Id.*

28. Leo, *supra* note 17, at 41.

29. *See id.* (quoting president of university).

30. *See* Paulson, *supra* note 22 (describing Tufts derecognition case). The Tufts case provides a good example of the typical derecognition scenario, but, given that it occurred at a private school, it is technically outside of the scope of this Note.

31. *Id.*

32. *See infra* note 36 and accompanying text for constitutional basis and description of freedom of association.

33. This Note will examine the appropriateness of university derecognition, from both constitutional and public policy aspects.

34. Viewpoint discrimination is an impermissible subset of content discrimination. *See Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of

cases, Part IV explores a private organization's expressive associational right to choose its own membership and the extent to which nondiscrimination laws and policies restrict that freedom. Part V explains why student religious organizations are expressive organizations with broad associational freedoms. Part V further demonstrates how the constitutional prohibition on viewpoint discrimination melds with the line of cases that recognize the right of expressive organizations to self-constitution, leading to the conclusion that a public university may not use a nondiscrimination policy to restrict a student religious organization's right to select its membership on the basis of religious viewpoints. Finally, in light of the tension between freedom and equality that this Note highlights,<sup>35</sup> Part V discusses the public policy benefits of having a diverse group of student organizations, including student religious organizations, at a public university.

## *II. Description of the Problem*

The most obvious resolutions of the problem of student religious organization derecognition adopt two extreme positions. First, a court facing such a situation could decide that the constitutional right to freedom of association trumps the university's desire to promote total nondiscrimination on campus. According to this position, because associational rights stem from the freedoms of speech and assembly found in the First Amendment,<sup>36</sup> the great weight of constitutional jurisprudence guaranteeing broad First Amendment liberties requires that a public university respect an organization's right to self-constitution.<sup>37</sup> As a result, any state interest in

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the speaker is the rationale for the restriction." ). Confusingly, the Court is not always consistent in its usage of the two terms. *Compare* *Widmar v. Vincent*, 454 U.S. 263, 270 (1981) (classifying university's prohibition of all religious speech as content-based discrimination), with *Rosenberger*, 515 U.S. at 831 (viewing ban of all student religious speech as viewpoint discrimination).

35. See *infra* notes 224–26 and accompanying text (discussing conflict between freedom and equality).

36. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000) (finding right to associate with others in First Amendment); *Roberts v. United States 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, education, religious, and cultural ends."). Thus, freedom of association describes not simply a right to congregate together for camaraderie and fellowship, but the right to congregate for the purpose of expressing particular viewpoints.

37. The law generally regards public universities as "state actors" for constitutional analysis. See, e.g., *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 199 (1988) (White, J., dissenting) (noting well-established principle that public university is state actor and

eliminating discrimination is not sufficient to overcome the rights of the religious group.<sup>38</sup>

The contrary position holds that strict nondiscrimination policies should be applied to all facets of campus life, even if that means universities must ban some exclusionary groups from campus, because ensuring nondiscrimination is a more important objective than protecting a group's right to choose its own membership.<sup>39</sup> According to this view, discriminatory behavior has no place at public universities, even if conducted not by the university directly, but by a student religious organization. This position asserts that even if there is a constitutional presumption in favor of freedom of association, the state, through its public universities, has a compelling interest in ensuring inclusion that supersedes unimpeded freedom of association.<sup>40</sup> Moreover, some argue that student religious organizations should abide by all university regulations if they wish to accept the university subsidies that usually extend from university recognition.<sup>41</sup>

An intermediate position contends that university nondiscrimination policies may be beneficial in general, but that universities should give religious organizations an exemption from the general proscription against discrimination based on religion and homosexuality.<sup>42</sup> At least one university

public university actions are state actions); *see also* Paul & Rose, *supra* note 19, at 896 ("First Amendment guarantees attach due to the university's status as a state actor."). Therefore, constitutional limitations on state action also apply to actions taken by public universities. The question presented in this Note relates to actions by public universities. The application of "state action" constitutional jurisprudence to actions by private universities is more complex. For an examination of the issue of derecognition of a student religious organization at a private university, *see generally* Hu, *supra* note 11.

38. *See* Shelley K. Wessels, Note, *The Collision of Religious Exercise and Governmental Nondiscrimination Policies*, 41 STAN L. REV. 1201, 1219 (1989) ("The state's interest in preventing discrimination should not be permitted to infringe upon religious freedom where the group looks 'inward' to itself as a religious community.").

39. *See* Paul & Rose, *supra* note 19, at 908–09 (noting that protecting all students from discrimination is compelling state interest overriding groups' associational rights).

40. *See id.* at 909 (noting dispute among some commentators as to "whether protecting homosexuals from discrimination is a compelling state interest, and whether forcing student religious groups to sign nondiscrimination clauses constitutes the suppression of ideas"); *cf.* Matthew J. Parlow, Note, *Revisiting Gay Rights Coalition of Georgetown Law Center v. Georgetown University A Decade Later: Free Exercise Challenges and the Nondiscrimination Laws Protecting Homosexuals*, 9 TEX. J. WOMEN & L. 219, 238 (2000) (arguing that homosexual group has right to exist at religiously affiliated private school because of compelling state interest in preventing all forms of discrimination).

41. *See* *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 822–23 (1995) (noting that university's rationale for denying religious group funds was that it did not meet all university regulations for receipt of funding because it promoted religious beliefs).

42. *See, e.g.*, Justin Giles, *Group Might Lose Organization Status: Latter Day Saints*



that refused to recognize a student religious organization later adopted this middle position.<sup>43</sup> Such a policy would recognize the special characteristics of student religious organizations and protect the groups' freedom of association, while at the same time furthering nondiscrimination objectives.

While the derecognition of a student religious organization involves the group's freedom of association generally, it more specifically implicates the group's freedom of *expressive* association. The Supreme Court has divided the concept of freedom of association into two parallel concepts: the freedom of intimate association and the freedom of expressive association.<sup>44</sup> The Court has defined intimate association as stemming from a right to privacy<sup>45</sup> and, thus, has limited its application to matters involving marriage,<sup>46</sup> childbearing,<sup>47</sup> and child rearing,<sup>48</sup> though the concept might also apply to small groups that function like surrogate families.<sup>49</sup> The typical student religious organization

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*Refuse to Sign Non-discrimination Clause*, THE MANEATER, May 3, 1994, at 3 (explaining that religious groups might receive exceptions, but noting that other nonreligious groups might not be able to obtain same exceptions); see also *infra* note 57 (discussing possible exemptions for student religious organizations).

It is important to note that some student religious organizations may desire to include students who possess a homosexual orientation but exclude students who engage in homosexual sexual activities.

43. See Bainbridge, *supra* note 6, at 404 (noting action by University of Illinois granting religious groups exemptions from nondiscrimination policies).

44. See *Roberts v. United States Jaycees*, 468 U.S. 609, 617–18 (1984) (marking distinction within concept of freedom of association between intimate association and expressive association); see also Ann H. Jameson, Note, *Roberts v. United States Jaycees: Discriminatory Membership Policy of a National Organization Held Not Protected by First Amendment Freedom of Association*, 34 CATH. U. L. REV. 1055, 1074–75 (1985) (summarizing Justice Brennan's narrow focus of intimate association in *Jaycees* with broader overlay of freedom of expressive association); Shawn M. Larsen, Note, *For Blacks Only: The Associational Freedoms of Private Minority Clubs*, 49 CASE W. RES. L. REV. 359, 367–70 (1999) (describing freedom of intimate association as stemming from both free speech and right to privacy, with freedom of expression arising from full slate of First Amendment freedoms to advocate, practice religion, petition, and assemble).

45. See *Griswold v. Connecticut*, 381 U.S. 479, 483–84 (1965) (finding right to privacy in penumbra of right to free association in First Amendment).

46. See *Zablocki v. Redhail*, 434 U.S. 374, 384–86 (1978) (associating decision to marry with intimate association and privacy rights).

47. See *Carey v. Population Serv. Int'l*, 431 U.S. 678, 685 (1977) (describing child-bearing decisions as distinctly intimate).

48. See *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (describing choice of education for Amish children as affecting children's integration into faith community).

49. See *Roberts*, 468 U.S. at 619–20 (stating that freedom of association rights are strongest among those with whom one shares most highly personal aspects of life). Although a student religious organization might argue that it functions like an extended family for university students, it is unlikely that a court would evaluate a derecognition case on the

would likely have a difficult time arguing for constitutional protection under intimate association precedents.<sup>50</sup> Therefore, given the speech-based advocacy character of student religious organizations, a case involving such a group probably is analyzed more appropriately under the concept of expressive association.<sup>51</sup>

Some have also argued that because freedom of religion might give rise to a constitutional right to discriminate,<sup>52</sup> the application of nondiscrimination policies to student religious organizations is improper.<sup>53</sup> However, this Note does not explore that argument in depth for two reasons. First, the Supreme Court precedents involving viewpoint discrimination against student religious organizations never have rested on freedom of religion principles,<sup>54</sup> so a student religious organization that is refused recognition is less likely to use a religion-based defense than a speech-based or association-based defense.<sup>55</sup> Second, because the Supreme Court has held that religious practices can be outlawed under generally applicable criminal laws, so long as legislators did not intentionally design the laws to affect a specific religion,<sup>56</sup> a free exercise

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grounds of intimate association.

50. See Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 395 (1999) ("It is unlikely . . . that a recognized student group could establish a right to intimate association."); Paul & Rose, *supra* note 19, at 905–06 (explaining why expressive association and not intimate association arguments work better for student religious groups trying to avoid university nondiscrimination policies).

51. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (using expressive association framework for evaluating Boy Scouts' associational rights); *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995) (using expressive association framework for evaluation of constitutional rights of parade group); see also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) (holding that association's claim of immunity from state scrutiny of membership list came within scope of constitutional protection because nonproduction of list was sufficiently related to rights to pursue lawful private interests and to freely association with others).

52. See generally *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987); *Pines v. Tamson*, 206 Cal. Rptr. 866 (Cal. Ct. App. 1984).

53. See Battaglia, *supra* note 50, at 393–94 (noting view of another scholar that nondiscrimination policies burden free exercise of religion).

54. See *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (looking to freedom of speech as issue underlying case); *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (finding discrimination based on freedoms of speech and association).

55. See Battaglia, *supra* note 50, at 394–95 (noting that cases of derecognized student religious organizations are better analyzed under freedom of association rather than freedom of religion).

56. See *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or proscribes).") (internal quotations omitted).

challenge to a generally applicable nondiscrimination policy is more difficult to support.<sup>57</sup>

### III. Viewpoint and Content Discrimination by the Public University

#### A. Forum Analysis

The analysis of freedom of association cases often involves classifying the type of forum in which the restrictions on speech and association occur. The Supreme Court has identified three forums within which public speech occurs: the traditional public forum, the designated public forum, and the limited public forum.<sup>58</sup> In the handful of cases in which the Court has considered the question, it has treated student organizations as existing within either a designated public forum<sup>59</sup> or a limited public forum.<sup>60</sup> Either way, when the Court has found that something less than a traditional public forum exists—that is, a designated public forum or a limited public forum—the Court has allowed the governmental entity controlling the forum the latitude to enact some reasonable "time, place, and manner" restrictions<sup>61</sup> upon access to the forum, so

57. However, at least one aspect of a religion-based argument is nevertheless important. Many public accommodations laws have explicitly excluded religious organizations from their coverage. *See, e.g.*, N.J. STAT. ANN. § 10:5-5(f), (n) (2002) (excluding religious organizations from public accommodations laws); MINN. STAT. ANN. § 363.02(b)(2) (1991) (same). The Supreme Court has upheld the constitutionality of such exemptions. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (determining that it is permissible for public accommodations law to exclude religious groups, thereby "alleviat[ing] significant governmental interference with the ability of religious organizations to define and carry out their religious missions"). It is likely that the adoption of similar exclusions to nondiscrimination policies for student religious organizations might eventually settle the disputes described in this Note.

58. *See* Doni Gewirtzman, "Make Your Own Kind of Music": *Queer Student Groups and the First Amendment*, 86 CAL. L. REV. 1131, 1141–42 (1998) (describing constitutional application of three different forum standards to speech); Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1369–70 (2001) (discussing distinction between public and nonpublic forums).

59. *See* *Healy v. James*, 408 U.S. 169, 183–84 (1972) (using standard similar to designated public forum standard).

60. *See* *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (using limited public forum standard).

61. Courts have used the "time, place, and manner" standard extensively since the 1960s. *See, e.g.*, *Cox v. Louisiana*, 379 U.S. 536, 558 (1965) (stating that limited discretion concerning time, place, duration, or manner of use of public streets may be vested in administrative officials). While time, place, and manner restrictions may also be used in traditional public forums as well, *id.*, the emphasis here is that they may be used in the designated public forums or limited public forums of public universities.

long as the restrictions are viewpoint neutral.<sup>62</sup> Once a public university establishes a forum for student organizations' speech, the university's status as a state actor triggers constitutional guarantees against viewpoint and content-based discrimination by the university.<sup>63</sup>

The Supreme Court has frowned upon attempts by public universities to deny recognition of student organizations based on the organizations' viewpoint. In *Healy v. James*,<sup>64</sup> the Court found that nonrecognition of a student organization stifled students' First Amendment rights to speech and association.<sup>65</sup> The Court rejected the university's claim that because the group could still congregate off-campus, nonrecognition did not deny freedom of association; the Court noted that nonrecognition denied the group access to campus facilities and assets and prevented it from recruiting and advertising on

62. See, e.g., *Good News Club v. Milford Cent. Sch.* 533 U.S. 98, 112 (2001) (concluding that school's refusal to grant access to limited public forum to club because of club's religious viewpoint was unconstitutional); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) ("[T]he total ban on using District property for religious purposes could survive First Amendment challenge only if excluding this category of speech was reasonable and viewpoint neutral . . . . We cannot agree [that it is]."); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 684–85 (1992) (permitting viewpoint-neutral restrictions on solicitation of funds within airport); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983) (permitting viewpoint-neutral restricted access to public school teachers' mailboxes by teachers' union because mailboxes are not traditional public forum).

63. See *Rosenberger*, 515 U.S. at 829 (1995) ("Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech if its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." (internal quotations omitted)); see also Paul & Rose, *supra* note 19, at 896 ("[O]nce the university has dedicated the property for speech purposes, First Amendment guarantees attach due to the university's status as a state actor.").

64. *Healy v. James*, 408 U.S. 169 (1972). In *Healy*, a group of students who wished to form a local chapter of Students for a Democratic Society sued Central Connecticut State College, claiming that their rights of expressive association had been violated after the college's president refused to recognize the group. *Id.* at 177. The university claimed that recognition of the group would lead to a "disruptive influence" at the school. *Id.* at 179. The Court rejected a lower court's ruling that the university had met its burden in blocking recognition of the group. *Id.* at 185. The Court noted that intrusions on freedom of association occur not only from "heavy-handed frontal attacks," but also through subtle acts (such as university nonrecognition of student organizations). *Id.* at 183. Because the university had not shown that the group "posed a substantial threat of material disruption" to the campus, the Court found the university's basis for nonrecognition to be insufficient. *Id.* at 189–90; cf. *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973) (finding that university could not censor student organization's speech unless there was danger of physical violence arising from it).

65. See *id.* at 184–85 (concluding that public university had not met its "heavy burden" in proving legitimate state interest to justify not recognizing student organizations, but remanding case to determine if alternate, permissible reason for nonrecognition could be found).

campus.<sup>66</sup> It required that the university bear the burden of justifying nonrecognition, a "heavy burden" that it could meet only if it could show a compelling state interest.<sup>67</sup> The Court ruled against the university, concluding that the university did not demonstrate that nonrecognition reasonably related to the advancement of a compelling state interest and that no narrower measure would have accomplished that result.<sup>68</sup>

Under *Healy*, the legal presumption is that a public university should recognize a student religious organization so long as the group follows the procedural formalities of recognition and no compelling state interest otherwise justifies nonrecognition.<sup>69</sup> In the context of student religious organizations, the compelling state interest that a public university most likely would advance is its interest in protecting students from all forms of discrimination. Under some circumstances not involving student organizations, courts have found nondiscrimination to be a compelling state interest permitting the abridgement of associational rights.<sup>70</sup>

A public university, however, would likely have a difficult time showing that a compelling state interest requires it to force a student religious organization to admit or elevate to a leadership position a nonadherent or a practicing homosexual. First, with regard to a nonadherent, federal law bars discrimination on the basis of religion only in places of "public

66. See *Healy*, 408 U.S. at 181 (rejecting argument that nonrecognition did little to disturb freedom of association rights).

67. *Id.* at 184. The Court also noted:

It may not be sufficient merely to show the existence of a legitimate and substantial state interest. Where state action designed to regulate prohibitable action also restricts associational rights—as nonrecognition does—the State must demonstrate that the action taken is reasonably related to protection of the State's interest and that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

*Id.* at 189 n.20 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

68. See *id.* (permitting nonrecognition only if it furthered state interest and if no narrower regulation would further that interest).

69. A recognized student religious organization might not have an automatic right to receive subsidies from public universities for speech functions, even if the university must recognize the student group. See *id.* 182 n.8 ("It is unclear on this record whether recognition also carries with it a right to seek funds from the school budget. . . . [I]t appears that, at the least, recognition only entitles a group to *apply* for funds. . . ."); see also Paul & Rose, *supra* note 19, at 895 (stating that Supreme Court has held that states may decline to lend funds).

70. See, e.g., *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (holding that enforcement of antidiscrimination law did not violate expressive association rights of club members); *Roberts v. United States Jaycees*, 468 U.S. 609, 612 (1984) (reversing lower court's decision that requiring organization to admit women violated members' constitutional rights).

accommodation."<sup>71</sup> The law might not classify student organizations as places of "public accommodation" because membership is not open to the general population, but rather is limited to university students, and because a person need not be a member of a student organization to be permitted access to university grounds.<sup>72</sup> State statutes forbidding discrimination on the basis of religion are also unlikely to include student religious organizations within their scope.<sup>73</sup> Second—with regard to a practicing homosexual—while the Court has recently found a new and tenuous constitutional freedom to engage in homosexual sodomy,<sup>74</sup> it has never found the protection of homosexuals to be a compelling state interest.<sup>75</sup>

### *B. Viewpoint and Content Discrimination Against Student Religious Organizations*

In addition to the almost-absolute ban on viewpoint discrimination, public universities generally cannot engage in content-based discrimination against religious organizations.<sup>76</sup> The Court ruled in *Widmar v. Vincent*<sup>77</sup> that a

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71. 42 U.S.C. § 2000(a) (2000).

72. See, e.g., *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755–56 (9th Cir. 1994) (stating that organizations are not covered by 42 U.S.C. § 2000(a) unless access to public place is predicated on membership in organization).

73. See, e.g., MINN. STAT. ANN. § 363A.02 (2003) (prohibiting religious discrimination in employment and business organizations); 43 PA. CONS. STAT. ANN. § 953 (2003) (prohibiting religious discrimination in housing, employment, and public areas); N.J. STAT. ANN. § 10:5-5 (2002) (prohibiting discrimination in all organizations not protected by "freedom of association").

74. See *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 2484 (2003) (ruling that states may not outlaw homosexual sodomy because of individuals' personal liberty rights to engage in private sexual acts).

75. See *id.* (electing to forbid laws outlawing homosexual sodomy acts on liberty grounds rather than on grounds that homosexual persons are members of protected class based on their innate sexual orientation); see also *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) (declining to accept dissent's contention that increased societal acceptance of homosexuality suffices to mitigate Scouts' expressive rights in other direction); cf. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (finding that homosexuality not suspect or quasi-suspect class and, thus, decisions based on homosexual discrimination warrant only rational basis review, not strict scrutiny review). But see *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (ruling that Equal Protection Clause forbade state from enacting state constitutional amendment designed to preclude later legislative, executive, or judicial prohibition of discrimination based on sexual orientation); *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 33–36 (D.C. 1987) (finding sexual orientation to be suspect class worthy of strict scrutiny).

76. Cf. *supra* note 34 (discussing overlap between viewpoint discrimination and content-based discrimination).

77. *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, students at the University of

university may not derecognize a student religious organization by enacting a policy that discriminates against it based on the content of its speech.<sup>78</sup> Once the University of Missouri created a forum generally open for student use, it had to show that its policy excluding all religious speech from the forum served a compelling state interest.<sup>79</sup> The *Widmar* Court found that forbidding all religious speech, while permitting other forms of speech, amounted to unacceptable content-based discrimination.<sup>80</sup> After finding that allowing religious speech within university forums did not violate the Establishment Clause of the First Amendment,<sup>81</sup> the Court ruled that the State's desire to achieve a greater separation of church and state than the Constitution required was not a compelling state interest that justified discrimination against student religious groups.<sup>82</sup>

According to *Rosenberger v. Rectors and Visitors of the University of Virginia*,<sup>83</sup> a public university may not exercise viewpoint discrimination

Missouri at Kansas City sued the university for denying their First Amendment religion, speech, and association rights by forbidding a Christian student organization from using campus facilities. *Id.* at 266. The university claimed that its mission to provide a *secular* education as well as the laws of Missouri prevented it from allowing students to use university buildings for religious purposes. *Id.* at 268. The Court found that the university had "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion." *Id.* at 269. The Court required that the public university "show that its regulation [was] necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end." *Id.* at 270. The Court decided the university was unable to justify its violation of the organization's members' First Amendment rights under applicable constitutional standards. *Id.* at 277.

78. *See id.* at 269 (finding that university discriminated against group's protected speech and association rights).

79. *See id.* (finding that no sufficiently constitutional justification permitted state university to discriminate against religious group that sought to use school facility for religious worship and discussion).

80. *Id.* at 269 (noting that university would have to show compelling state interest and narrowly drawn remedy to justify content-based discrimination).

81. *See id.* at 271–75 (concluding that access to university facilities passed three-pronged *Lemon* test, in that giving access had secular purpose, did not have as primary or principal effect advancement or inhibition of religion, and did not result in excessive entanglement of government and religion).

82. *Id.* at 275–76.

83. *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). In *Rosenberger*, students taking part in a Christian newspaper at the University of Virginia brought suit against the university, claiming that the university's refusal to fund the newspaper was impermissible viewpoint discrimination against the newspaper's religious viewpoint. *Id.* at 827. The Court held that the university's policy against funding organizations with religious viewpoints violated the group's freedom of speech. *Id.* at 837. The Court said that a state actor may not engage in "viewpoint discrimination, even when the limited public forum is one of its own creation." *Id.* at 829.

against a student religious organization, even if the university created the forum it wishes to regulate.<sup>84</sup> In *Rosenberger*, the University of Virginia refused to subsidize the printing costs incurred in publishing a student newspaper with a Christian perspective, despite the school's willingness to pay such costs for all other student newspapers.<sup>85</sup> The Christian newspaper, *Wide Awake*, met all the criteria necessary to qualify for school funding<sup>86</sup> but, nevertheless, the school's student council denied the paper funding because it labeled the newspaper a "religious activity."<sup>87</sup> The Supreme Court found the university's actions to be impermissible viewpoint discrimination.<sup>88</sup>

The Court rejected the university's "insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech."<sup>89</sup> By stating this, the Court seemingly acknowledged that speech counter to a "Christian perspective" comes not only from expressly anti-Christian publications, which the university did not fund under its policy, but also from a myriad of other seemingly secular sources that the university policy supported. Therefore, the Court rejected the argument that viewpoint discrimination does not occur when a regulation silences multiple views on religious issues along with the Christian view. Instead, it recognized that the university supported many other views on those same issues from seemingly nonreligious sources.<sup>90</sup>

The Court refused to distinguish the payment of funds to a student religious organization in *Rosenberger*<sup>91</sup> from *Lamb's Chapel v. Center*

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84. See *id.* at 845–46 (reversing lower court decision and requiring public university to pay costs associated with printing student publication with Christian perspective).

85. See *id.* at 822–23 (noting that funds were withheld because student newspaper "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality").

86. See *id.* at 825 (explaining that Christian student newspaper had complied with university regulations that provided reimbursement for student newspapers).

87. See *id.* at 827 (reporting that student council denied funding based on its belief that newspaper was religious activity).

88. The Court classified the university's actions as viewpoint discrimination rather than content-based discrimination because the university did not exclude religion as a subject matter, but instead disfavored student journalism with a religious viewpoint. *Id.* at 831. *But cf.* *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981) (characterizing ban on all religious speech as being content-based discrimination but, nevertheless, finding such discrimination to be unconstitutional).

89. *Rosenberger*, 515 U.S. at 831. The Court stated that in this case discriminating against "an entire class" of religious viewpoints is no more permissible than discriminating against just one. *Id.*

90. See *id.* at 832 (rejecting dissent's position that claims of viewpoint discrimination may be overcome by showing that all religious speech is unfunded).

91. See *id.* at 832–33 (discussing university's argument that public universities must have substantial discretion in allocating scarce monetary resources).



*Moriches Union Free School District*,<sup>92</sup> in which the Court held that a public school must make its facilities available on a viewpoint-neutral basis.<sup>93</sup> The Court in *Rosenberger* stated that a university cannot justify viewpoint discrimination on the basis of "scarcity" of funds and that the decision in *Lamb's Chapel* would have been no different had meeting rooms been scarce in that case.<sup>94</sup> The Court found no controlling difference between using funds to build and operate a facility and using funds to pay for costs involved in running a student organization.<sup>95</sup> Finally, the Court found no violation of the Establishment Clause if the university funded the printing costs of the newspaper, noting that neutral policies that provide support to diverse, even if religious, viewpoints preserve neutrality toward religion.<sup>96</sup>

#### IV. Freedom of Association and an Organization's Right to Self-Constitution

While *Widmar* and *Rosenberger* indicate that public universities may not use viewpoint-discriminatory and content-discriminatory policies to encroach upon a group's speech rights,<sup>97</sup> they do not directly settle the issue of whether a

92. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). In *Lamb's Chapel*, the Court held that in a nonpublic or limited public forum, control over access to facilities can be based on subject matter and speaker identity only if such distinctions are "reasonable and viewpoint neutral." *Id.* at 392–93. A school district in New York permitted various community groups to use the school district's facilities but denied a church's request to show a film strip about parenting from a Christian perspective because the district claimed that state law forbade it from allowing religious groups from using public school facilities. *Id.* at 388–89. The Court stated that just because "all religions and all uses for religious purposes are treated alike . . . does not answer the critical question whether [the school district] discriminates on the basis of viewpoint." *Id.* at 393. Because the school district permitted the presentation of all views about child rearing (a subject matter distinction) except those from religious perspectives (a viewpoint distinction), the Court ruled that the school district had violated the First Amendment by engaging in viewpoint discrimination. *Id.*

93. *See id.* at 393–95 (providing access to school facilities for group wishing to show film regarding child rearing from Christian perspective because school's denial of access was improper viewpoint discrimination, as school allowed presentation of all views regarding child rearing except those from religious standpoint).

94. *See Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) (rejecting argument distinguishing access to facilities from access to funds).

95. *Id.* at 843.

96. *See id.* at 839 (invoking neutrality standard of *Bd. of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994)).

97. *Rosenberger*, 515 U.S. at 829; *see Widmar v. Vincent*, 454 U.S. 263, 269 (1981) ("Here [the university] has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion.").

student religious organization's expressive association rights encompass the right to choose its membership in a manner forbidden by a public university's nondiscrimination code. Conflicts between private groups' rights to set their own membership guidelines and nondiscrimination regulations are not a new problem. Over time, the Court has fluctuated on whether a group's freedom of association permits it to self-constitute in violation of a nondiscrimination law or policy.<sup>98</sup> The Court's answer has depended upon its assessment of the amount of damage to the group's freedom of association that would result from a forced inclusion of unwelcome individuals.<sup>99</sup>

### A. *Pre-Boy Scouts v. Dale*

In the years before *Boy Scouts of America v. Dale*,<sup>100</sup> the Supreme Court resolved such conflicts by balancing the private group's right to freedom of association against the state's interest in prohibiting discrimination.<sup>101</sup> In the cases that preceded *Dale*, the Court usually found that the state had a compelling interest in eradicating discrimination that superseded the private group's right to self-constitution.<sup>102</sup> In most of the pre-*Dale* cases, the Court posed the question in the negative: Does the particular group's right to

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98. See *infra* Parts IV.A and IV.B (illustrating Court's inconsistent decisions in freedom of association cases).

99. See *infra* Parts IV.A and IV.B (describing Court's treatment of freedom of association cases).

100. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (holding that Boy Scouts may permissibly refuse adult membership to homosexual based on group's freedom of association despite New Jersey public accommodation statute prohibiting discrimination based on sexual orientation in places of public accommodation). James Dale, an adult gay man, sued the Boy Scouts of America for refusing to grant him a leadership position due to his homosexuality, claiming that New Jersey's public accommodations law forbade the Scouts from discriminating on the basis of sexual orientation in places of public accommodation. *Id.* at 645. Without actually deciding whether the Scouts are a "public accommodation," the Court ruled in favor of the Scouts, stating that its freedom of expressive association trumped Dale's right to protection under the public accommodations law. *Id.* at 656–59. The Court reasoned that the state interests in nondiscrimination asserted by Dale did not justify severely intruding upon the Scouts' freedom of expressive association by forcing the group to admit a homosexual who promoted a message antithetical to the Scouts' own message. *Id.* at 648–50.

101. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) (weighing the state's interest in nondiscrimination against the group's interest in freedom of association).

102. See *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 12–13 (1988) (stating that state interest in eliminating discrimination could outweigh groups' freedom of association); *Bd. of Dirs. of Rotary Club Int'l v. Rotary Club of Duarte* 481 U.S. 537, 549 (1987) (stating state interest in eliminating discrimination outweighed freedom of association); *Roberts v. United States Jaycees*, 468 U.S. 609, 628–29 (1984) (same).

freedom of association give it the freedom *not* to associate with specific groups of people despite the state's interest in eradicating discrimination in society?<sup>103</sup>

An important early case is *Roberts v. United States Jaycees*.<sup>104</sup> In *Jaycees*, the Court found that requiring a private, business-oriented club<sup>105</sup> to admit women did not significantly injure the group's associational activities.<sup>106</sup> Therefore, the Court concluded that enforcing a Minnesota statute against the club did not impermissibly restrict the group's freedom of association.<sup>107</sup> The Court found that Minnesota had a compelling interest in ensuring nondiscrimination that outweighed the organization's free association rights.<sup>108</sup> Nevertheless, in an important aside, the Court noted that freedom of association "presupposes a freedom not to associate."<sup>109</sup>

A similar case is *Board of Directors of Rotary International v. Rotary Club of Duarte*.<sup>110</sup> The most significant aspect of *Rotary* is that the Court

103. See *Rotary*, 481 U.S. at 549 (determining that group's freedom of association did not permit it to shut out women despite their position as unwanted members); *Jaycees*, 468 U.S. at 628–29 (same).

104. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). In *Jaycees*, the Supreme Court considered whether Minnesota's Human Rights Act, MINN. STAT. § 363.03 (1982), which the state claimed required the Jaycees to admit women as full members, violated the Jaycees' rights to freedom of association under the First and Fourteenth Amendments. *Id.* at 612. According to the Court, the right to free association is not absolute and a state can justify an infringement on that right if the state shows a compelling state interest that cannot be met through less restrictive measures. *Id.* at 623. The Court ruled that prohibiting gender discrimination in places of public accommodation (which the Court found the Jaycees to be because of its business-centered purpose) was a compelling state interest strong enough to justify the forced inclusion of women. *Id.* at 625–26. Finally, the Court found that the Jaycees did not demonstrate that the admittance of women would seriously injure the male members' freedom of association because of the nature of the group as primarily a business association. *Id.* at 626.

105. The Court placed heavy emphasis on its assessment of the Jaycees as a large, nonselective business group that already permitted women to engage in many aspects of the organization. *Id.* at 621.

106. See *id.* at 628 (finding any incidental abridgment of Jaycees' freedom of association to be limited and no greater than necessary to further compelling state interest).

107. *Id.* at 629.

108. See *id.* (stating that statute permissibly responds to societal problems that state perceived).

109. *Id.* at 623.

110. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987). In *Rotary*, the Court decided that the application of California's public accommodations statute to the Rotary Club did not unconstitutionally interfere with Rotary Club members' freedom of association. *Id.* at 549. The national Rotary Club argued that forced inclusion of women would violate the First and Fourteenth Amendments' protection of freedom of association. *Id.* at 540–41. The local chapter prevailed in its argument that the lack of selectivity and the business-oriented nature of the Rotary Club militated against constitutional protection of the group from

began to use a "core belief" test,<sup>111</sup> which became centrally important in later cases such as *Dale*.<sup>112</sup> The Court used the test to determine whether the forced inclusion of a person or group of people significantly damaged the group's freedom of association. This determination was made by assessing whether the forced inclusion would injure the group's expression of any of its core beliefs.<sup>113</sup> The Court noted that the inclusion of women did not undermine the Rotary Club's stance on any of the central issues that the group championed.<sup>114</sup> Therefore, under the Court's jurisprudence at that time, the enforcement of the statute against the Rotary Club did not effectively trample the group's freedom of association rights.<sup>115</sup>

The Court's dicta in *New York State Club Association v. City of New York*,<sup>116</sup> intimated that the right club or group could win a freedom of association challenge to a nondiscrimination statute or policy.<sup>117</sup> The Court said the group would have to "show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoint nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion."<sup>118</sup> Nevertheless, based on the facts in the immediate case, the Court, applying a balancing test, concluded that the state's

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a state statute that required the inclusion of women. *Id.* at 546–47.

111. *See id.* at 548 (noting that "Rotary clubs do not take positions on 'public questions'" such that inclusion of women would injure their expression).

112. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (giving deference to Scouts' assertion that sentiments on sexual orientation were bona fide belief); *id.* at 655 (stating that moral objection to homosexual practice need not be core or founding belief of Scouts for organization to receive First Amendment protection).

113. *See Rotary*, 481 U.S. at 548 (discussing Rotary's purposes and concluding that group did not take positions on political issues such that inclusion of women would alter those purposes).

114. *See id.* at 549 (expressing belief that inclusion of business and professional women in business organization would actually increase expressive force of group and not frustrate group's freedom of association).

115. *Id.*

116. *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1 (1988). In *New York State Club*, the Court heard a challenge by a consortium of social clubs to New York City's public accommodations law that prohibited discriminatory membership practices by large private clubs that the city deemed "sufficiently 'public.'" *Id.* at 6–8. The consortium argued that the law infringed the associational rights of members of clubs belonging to the consortium. *Id.* at 7. The Court rejected the consortium's challenge, stating that the clubs' regular meal service and employment of nonmembers made the clubs sufficiently public to fall under the law's provisions. *Id.* at 12.

117. *See id.* at 14 (rejecting argument that city ordinance forbidding discrimination at clubs with more than four hundred members or clubs that served meals violated freedom of association).

118. *Id.* at 13.

interest in advocating nondiscrimination outweighed the group's right to freedom of association.<sup>119</sup>

The Supreme Court's rulings in *Jaycees*, *Rotary*, and *New York State Club* might help predict a court's treatment of a derecognized student religious organization case. Under *Jaycees* and *Rotary*, a court could find that a particular student religious organization has the small size and selectivity requirements for strong freedom of association protection.<sup>120</sup> Alternatively, it might agree that many student religious groups are affiliates of large national organizations<sup>121</sup> or that they do not have strict selection guidelines,<sup>122</sup> both of which would arguably diminish the constitutional significance of their expressive activity. *New York State Club*'s dicta suggested that a student religious organization might successfully avoid derecognition if it could show that it organized for expressive purposes and that a forced membership inclusion would severely damage its ability to express its viewpoint.<sup>123</sup> The counterargument would be that a student religious organization does not organize for "specific expressive purposes"<sup>124</sup> but, rather, for general fellowship and camaraderie. Further, one could argue that *New York State Club*'s dicta applies only to private organizations<sup>125</sup> and that student religious organizations, as funded entities of a state university, are sufficiently public in nature that more exacting nondiscrimination rules apply to them.

In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*,<sup>126</sup> a unanimous Court held that the application of a public

119. See *id.* 14–16 (noting that such large organizations are quasi-public and that wider inclusion of members would not curtail clubs' already limited viewpoint expression on issues).

120. See *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1983) (describing criteria of organization as meriting strong associational protections).

121. See Colleen Carroll, *Majoring in Religion: The Revival of Belief Among Students Predates September 11*, WKLY. STANDARD, Dec. 3, 2001, at 19 (noting that Campus Crusade for Christ has 40,000 student members nationwide at hundreds of schools); McMurtrie, *supra* note 9 (stating InterVarsity's nationwide membership to be 34,000 students on 560 campuses).

122. See Carroll, *supra* note 121, at 19 (describing large prayer services in which many students participate). Of course, as this Note outlines, some student religious organizations do engage in selective practices based on religious belief and sexual preference.

123. *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988).

124. *Id.*

125. See *id.* at 8 (explaining that disputed law in case aimed to interfere with private clubs only to extent necessary to prevent invidious discrimination).

126. *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). In *Hurley*, a group of homosexuals brought suit against a veterans group that put on the annual St. Patrick's Day Parade, claiming that the veterans' refusal to grant a parade spot to the homosexuals violated a Massachusetts's statute prohibiting discrimination on the basis of sexual preference in public places. *Id.* at 561. The Court concluded that the parade group engaged in protected expression. *Id.* at 568–69. Therefore, it had the right to choose the message it

accommodation law to require a private parade organizer to include marchers advocating a homosexual message violated the organizer's freedom of association.<sup>127</sup> The *Hurley* Court described parades as a form of expression,<sup>128</sup> and stated that the veterans group that organized the parade was a private organization that could choose the speech it expressed.<sup>129</sup> The Court ruled that it was unconstitutional to force the parade organizer to include a group with a message antithetical to its own<sup>130</sup> because the group's "participation would likely be perceived as having resulted from the [organizer's] customary determination about a unit admitted to the parade, that its message was worthy of presentation . . . ."<sup>131</sup> The Court rejected the argument that a compelling state interest overcame the group's freedom of association right to choose its own membership.<sup>132</sup> Further, the Court suggested the state's objective might have been to "forbid[] acts of discrimination toward certain classes . . . to produce a society free of the corresponding biases."<sup>133</sup> The Court noted the potential constitutional infirmities of such a public policy:

The very idea that a noncommercial speech restriction [would] be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.<sup>134</sup>

Based on *Hurley*, a student religious organization could argue that a university's insistence that the group include participants with contrary religious beliefs and sexual preferences amounts to what the Court prohibited

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conveyed and those who conveyed that message. *Id.* at 575–76. Because application of the nondiscrimination law severely impacted the group's freedom of expressive association, the Court ruled that the state could not mandate who the parade organizers included in the parade. *Id.* at 559.

127. *See id.* at 566 (holding that parade organizers had freedom of expression right to choose participants in private parade despite public accommodation laws requiring nondiscrimination).

128. *Id.* at 569.

129. *See id.* at 569–70 (noting that organizers' inclusion of "multifarious voices" in parade did not forfeit constitutional right to express only speech that organizers advocated).

130. *See id.* at 576 (noting that "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised").

131. *Id.* at 575.

132. *See id.* at 578 (rejecting assertion that compelling state interest overcame principle of speaker autonomy).

133. *Id.* at 578.

134. *Id.* at 579.

Massachusetts from doing—requiring a group to include participants imparting a message that the group does not support. In both cases, a governing body conditions access to a designated or limited public forum on the private organization's compliance with state-imposed membership rules.<sup>135</sup> If dictating the composition of a parade's participants impermissibly alters the marchers' expression,<sup>136</sup> dictating the membership criteria of a student religious organization might also impermissibly interfere with that group's expressive rights. On the other hand, a university might convince a court that the unwanted person's inclusion would do little to affect the group's speech, on the theory that an observer of the group would be unlikely to view the unwanted person's inclusion as having resulted from the "customary determination . . . that [his] message was worthy of presentation and quite possibly of support as well."<sup>137</sup>

### B. Boy Scouts v. Dale

In *Boy Scouts of America v. Dale*, the Court preserved *Rotary's* "core purpose test" to determine whether a state nondiscrimination law abridged a group's freedom of association.<sup>138</sup> Nonetheless, the decision does mark a key shift in the Court's freedom of association jurisprudence because, for the first time since *Jaycees*, the Court refrained from weighing the group's freedom of association against the asserted state interests.<sup>139</sup> Instead, the Court deferred to the group's stated principles, finding them to be legitimate core beliefs that they did not need to prove.<sup>140</sup> In other words, the Court decided that it was not in a

135. *See id.* at 559 (describing issue in case as whether Massachusetts could require parade organizers to include unwanted group in parade).

136. *See id.* at 576 (stating that forced dissemination of views contrary to one's own robs speaker of control over his expression).

137. *Id.* at 575.

138. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654 (2000) ("Here, we have found that the Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members; it will not 'promote homosexual conduct as a legitimate form of behavior.'" (citations omitted)).

139. *See id.* at 659 (declining to apply intermediate standard of review and determining that State's interests did not warrant "such a severe intrusion" into Boy Scouts' freedom of association); *cf. Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987) (holding that State's interest in assuring women access to leadership skills and business relationships outweighed Rotary members' right to expressive association); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1983) (stating that "Minnesota's compelling state interest in eradicating discrimination . . . justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms").

140. *See Dale*, 530 U.S. at 653 ("[W]e must also give deference to an association's view of

position to determine the thoughts of people or the beliefs of private groups. As a result, the Boy Scouts did not have to prove that a primary purpose of its organization was to speak against homosexuality,<sup>141</sup> nor did it have to prove that all or even a large majority of its members agreed with the official Scout policy.<sup>142</sup>

The Court engaged in a three-step analysis in *Dale*. First, the Court found the Scouts' practice of inculcating values in boys to be an "expressive activity."<sup>143</sup> Second, the Court ruled that the forced inclusion of homosexuals would significantly injure the Boy Scouts' ability to advocate its viewpoint on the propriety of homosexuality.<sup>144</sup> Finally, the Court held that the mandated inclusion of practicing homosexuals would impermissibly force the Scouts to speak in favor of a view that it opposed.<sup>145</sup> In short, the Court ruled that the required inclusion of a gay scoutmaster would significantly and unconstitutionally interfere with the Scouts' freedom of association.<sup>146</sup>

*Dale* marks an important shift in Supreme Court jurisprudence surrounding the nexus between freedom of association and nondiscrimination laws. Before *Dale*, the Court put the burden on the organization to show that the nondiscrimination law would significantly encumber the group's expression.<sup>147</sup> Even if the group demonstrated this, the group then had to convince the Court that the group's interest in expressive association was so paramount—and the encumbrance so severe—that it trumped the state's interest in promoting nondiscrimination.<sup>148</sup> In *Dale*, the Court changed course, giving deference to the group's claim that inclusion would negatively affect its expression.<sup>149</sup> In effect, then, the Court accepted as true the Scouts' assertion

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what would impair its expression.").

141. *See id.* at 655 (stating there is no requirement that Boy Scouts be associated for purpose of advocating against homosexuality for First Amendment associational freedom to protect group).

142. *See id.* (noting that not every member must agree on every issue in order for group's policy to be "expressive association").

143. *See id.* at 649–50 (finding Scouts' system of inculcating values expressive activity).

144. *See id.* at 655–56 (deciding that forced inclusion of homosexual would hurt Scouts' freedom of expression).

145. *Id.* at 656.

146. *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. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.").

147. *Supra* notes 106 and 114 and accompanying text.

148. *Supra* notes 106 and 114 and accompanying text.

149. *Dale*, 530 U.S. at 653.



that the law hampered its associational rights simply because the Scouts claimed the law was burdensome upon its freedom of association.<sup>150</sup> Probably more important, however, was the Court's retreat from the second prong of the pre-*Dale* test. The Court in *Dale* did not even discuss the balancing test prong of the pre-*Dale* approach; instead, in one sentence, the Court succinctly dismissed the state's interest as too weak to counter the Scouts' associational freedom.<sup>151</sup>

Another important facet of *Dale* was that the Court did not distinguish between discrimination based on an unwanted person's status or his advocacy of a belief outside of the particular organization and discrimination based on his advocacy of a certain viewpoint within the organization.<sup>152</sup> The Court permitted the Boy Scouts to deny membership to Dale, who did not advocate homosexuality within the context of the Scouts, because he identified himself as a homosexual<sup>153</sup> in a visible, non-Scout context.<sup>154</sup> As a result, it is likely that in future conflicts, a court will not distinguish between a group's discrimination against a person based on his status or extra-organizational advocacy and its discrimination based on the unwanted person's advocacy of unwanted views within the context of the organization.

The *Dale* Court's decision to subordinate New Jersey's nondiscrimination law to the Scouts' freedom of association possibly anticipates the result of a case involving the derecognition of a student religious group. Following *Dale*, it is possible that a court would accept a Christian organization's contention that its core beliefs<sup>155</sup> teach that it should follow and profess the principles of

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150. It is not clear whether the Court implicitly accepted the Scouts' conclusion that its freedom of association was burdened, or whether the burden was so obvious as to require little elaboration. See *infra* text accompanying note 151 (stating that Court found interest too weak to interfere with Scouts' expressive association).

151. See *Dale*, 530 U.S. 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.").

152. See *id.* at 654–56 (failing to find controlling that Dale did not disseminate any view on sexual issues within Boy Scouts, because primary consideration was Dale's sexual orientation and message his inclusion in organization would send).

153. See *id.* at 653 (noting that Dale's inclusion would force Scouts to send unwanted message because of Dale's position as visible gay advocate).

154. Dale led gay marches and appeared in a newspaper photograph and story that identified him as a homosexual. *Id.* at 645.

155. As is normally the case in religious disputes, the Court hesitates to attempt to define what is and what is not a fundamental religious tenet. See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (noting that determining "what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question"); *United States v. Ballard*, 322 U.S. 78, 86–87 (1944) (explaining that submitting questions of "truth or verity" of person's religious beliefs to cases' fact-finders is improper, as "[m]en may believe what they cannot

Christianity, but not those of other religions or irreligion. The group could buttress this assumption, of course, by showing that definitive principles have guided the association's actions and speech in the past.<sup>156</sup> As explained below, however, *Dale* alone does ensure that a public university cannot derecognize a student religious organization for engaging in exclusionary membership practices.

## V. Analysis

### A. Amalgamating Cases to Resolve the Problem

The confluence of *Hurley*, *Dale*, *Widmar*, and *Rosenberger* brings into focus two overarching principles. First, state actors may not engage in viewpoint discrimination against an expressive group's associational freedom.<sup>157</sup> Second, associational freedom includes the right to select the membership composition of the group.<sup>158</sup> And, under *Rosenberger*, *Healy*, and *Widmar*, this principle continues to hold true when the state actor is a public university and the group is a student organization.<sup>159</sup>

Once a public university allows student organizations to form on campus, it has created a designated or limited public forum.<sup>160</sup> *Rosenberger* and *Widmar* show that a public university cannot engage in content or viewpoint discrimination against a student religious organization's *speech* because any

prove"); *cf.* *United States v. Seeger*, 380 U.S. 163, 185 (1965) (holding that courts may determine whether someone's religious beliefs are sincerely held but may not question whether beliefs are central to his religion).

156. *See Dale*, 530 U.S. at 651–52 (outlining history of teachings by Scouts that homosexuality within Scouts is not appropriate).

157. *See Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (concluding that university's refusal to fund religious newspaper is viewpoint discrimination); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (prohibiting university from barring access to group based on its religious speech).

158. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (ruling that group's expressive associational rights included right to refuse membership to homosexual); *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995) (holding that parade organizers had freedom of association right to choose participants in parade despite public accommodations law).

159. *See generally* *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217 (2000) (involving state actor public university and student organization); *Rosenberger*, 515 U.S. 819 (same); *Widmar*, 454 U.S. 263 (same); *Healy v. James*, 408 U.S. 169 (1972) (same).

160. *See Rosenberger*, 515 U.S. at 829 (describing student organization as existing in limited public forum). *But see Healy*, 408 U.S. at 183–84 (using standard similar to designated public forum standard).

restrictions on open use of the forum must be content and viewpoint neutral.<sup>161</sup> But, these cases dealt with either (a) a recognition policy that was facially content-biased (and arguably viewpoint-biased) rather than merely discriminatory in its impact,<sup>162</sup> or (b) a student religious organization's pure speech rather than its expressive association.<sup>163</sup>

Arguably, a student religious group's moral assessment of other religions and homosexuality *is* part of the group's speech. Under *Widmar*, then, a public university could not abridge that speech through a content-biased policy unless it showed a compelling state interest to do so. Because asserted compelling state interests advanced in other nondiscrimination cases<sup>164</sup> have failed to outweigh the groups' freedom of association in those cases, a court might similarly find no compelling state interests in nondiscrimination here.

However, *Widmar* presented a different fact scenario from those likely present in a derecognized student organization case. In *Widmar*, the Court ruled that the university could not enact a policy that singled out a religious organization for nonrecognition specifically because of the religious content of the group's *speech*.<sup>165</sup> Therefore, while *Widmar* showed that a university may not enact a content-biased policy restricting a group's speech,<sup>166</sup> it left open the question of whether a university nondiscrimination policy that is applied to all student organizations,<sup>167</sup> and that only incidentally affects a student religious

161. See *Rosenberger*, 515 U.S. at 829 (stating that government may not engage in viewpoint discrimination "even when the limited public forum is one of its own creation"); *Widmar*, 454 U.S. at 270 (stating that content-based regulations are acceptable only if state demonstrates regulation is narrowly tailored to serve compelling interest).

162. See *Rosenberger*, 515 U.S. at 829–30 (viewing university's objection to funding student organization as viewpoint discrimination); *Widmar*, 454 U.S. at 269 (noting discrimination was against group's "worship and discussion"); cf. *Employment Div., Dep't of Natural Res. v. Smith*, 494 U.S. 872, 882 (1990) (stating that law permissibly infringed upon conduct stemming from freedom of religion despite lack of compelling state interest).

163. See *Widmar v. Vincent*, 454 U.S. 263, 265 (1981) ("The exclusion . . . prohibits the use of University buildings or grounds 'for purposes of religious worship or religious teaching.'").

164. That is, in cases maintaining greater separation of church and state than required by the United States Constitution. *Id.*; see also *Dale*, 530 U.S. at 647 (noting lower court's assessment that "New Jersey has a compelling interest in eliminating the 'destructive consequences of discrimination from our society.'"). The Court reversed the judgment of the lower court. *Id.* at 661.

165. See *Widmar*, 454 U.S. at 269 (noting discrimination against group's "worship and discussion").

166. *Id.* at 277.

167. Most universities have designed their nondiscrimination policies to apply to everyone. As stated in *Smith*, 494 U.S. at 878, and reiterated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), if a state actor designed its policy with the goal of applying it "only against conduct with a religious motivation," the policy would likely fail.

organization's ability to obtain recognition, qualifies as the type of content-discrimination prohibited by *Widmar*.

On its face, *Rosenberger*'s central theme that a public university may not discriminate against a religious organization based on the viewpoint of its speech<sup>168</sup> also supports the argument that a public university may not dictate the membership criteria of a student religious organization simply because it disagrees with the group's viewpoint of how its membership should be chosen. This argument presumes, however, that a group's protected speech includes the right to choose the identity of the group's leaders and participants. This presumption highlights a potentially significant distinction between the facts of *Rosenberger* and a student organization derecognition case. In the former, the student religious group was engaged in pure speech,<sup>169</sup> which the Constitution accords the highest protection and to which the Court has applied the forum analysis consistently, whereas the latter involves freedom of expressive association, a similar but more tenuous First Amendment freedom.<sup>170</sup> This shift raises the question of whether the constitutional designated forum doctrine from the campus group *speech* cases applies to a campus group's *membership selection* process. That is, do the viewpoint- and content-neutrality requirements for regulations on a campus organization's speech extend to an organization's right to self-constitution, which is not purely speech but, rather, *expressive association*? The following Part explores this question.

### *B. Freedom of Association Forbids Public University Derecognition of Student Religious Organizations*

As discussed above, if a student organization convinces a court that its protected *speech* includes the viewpoint that is expressed by not elevating nonadherents and practicing homosexuals to leadership positions, then the student religious organization should easily win a challenge on freedom of speech grounds against a public university seeking to derecognize the group.<sup>171</sup> Even if the group does not convince a court that the selection of its members is

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168. See *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (2000) (noting state actor may not engage in viewpoint discrimination against group).

169. *Id.*

170. See *supra* note 36 and accompanying text (describing root of freedom of expressive association as one of enumerated First Amendment freedoms).

171. See *Rosenberger*, 515 U.S. at 828 ("Discrimination against speech because of its message is presumed to be unconstitutional."); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (stating that university may not invoke policy that discriminates against student religious organizations on basis of viewpoint of speech).

itself speech, the Supreme Court's decisions in *Hurley* and *Dale* show that an expressive group's freedom of association nonetheless gives it the right to choose its own membership despite the existence of nondiscrimination regulations.<sup>172</sup> Because freedom of expressive association is not a second-rate freedom, but rather a means by which the other First Amendment freedoms may be enjoyed, the self-constitution component of freedom of association must be given the same constitutional protection that the speech component receives.<sup>173</sup> In effect, the Supreme Court has stated that an expressive group's freedom of association includes not only the freedom to speak a particular message, but also the equally important right to choose who will deliver that message.<sup>174</sup>

But, are student religious organizations expressive groups? *Dale* and the line of cases preceding it<sup>175</sup> lead to the conclusion that student religious organizations are, in fact, expressive groups. In *Jaycees* and *New York State Club*, the Court established a continuum upon which organizations fall, with

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172. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655–56 (2000) (concluding that because Boys Scouts is expressive group, forced inclusion of homosexual would hamper group's freedom of association, as "[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with the Boy Scouts' policy"); *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 575–77 (1995) (observing that forced participation of homosexual group in parade would damage freedom of association of expressive parade group because overall message of group is distilled from combining each individual's expression).

173. See Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 1–2 (1964) (arguing that Supreme Court in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) "elevated [the] freedom of association to an independent right, possessing an equal status with the other rights specifically enumerated in the first amendment").

174. *Supra* note 172 and accompanying text. This conclusion follows because *Dale* and *Hurley* show that the selection of a group's membership is a coequal component—along with the actual words of their speech—of the freedom of expressive association. See *Dale*, 530 U.S. at 656 (stating that "the Boy Scouts has a First Amendment right to choose to send one message but not another" and stating that inclusion of homosexual would be "sending [a] different message"); *Hurley*, 515 U.S. at 569 ("The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression."); *id.* at 577 (noting that group's overall message is distilled from what each individual in group expresses).

175. These cases include: *Jaycees*, *Rotary*, and *New York Club*. Because *Dale* does not explicitly overrule these cases, aspects of these cases might still carry precedential value in determining the proper treatment of a derecognized student religious organization. This might be especially true considering the different character of the discriminating organization in the *Jaycees-Rotary* situation (business organizations) and the *Dale* situation (an expressive organization). Regardless, the Court's older holdings in the *Jaycees-Rotary* line of cases do not disturb the conclusion that public universities cannot derecognize student religious organizations for choosing their membership under their own criteria.

the highest constitutional protection of association afforded to families and the least to unselective business enterprises.<sup>176</sup> While not as intimate as families, most, if not all, student religious organizations assemble, at least in part, for the expressive purpose of espousing deeply held religious views to each other and to the campus in general. These groups are often self-selective, emotionally tight units with a common worldview, and they therefore appear to fit the standards of an expressive group deserving the strong membership self-selection rights outlined in *New York State Club*.<sup>177</sup> Because student religious organizations congregate for specific expressive purposes and rarely engage in commercial enterprises,<sup>178</sup> most student religious organizations meet the *Jaycees* criteria—small size, selectivity, defined purpose, and clear policies<sup>179</sup>—for strong constitutional protection. The Court has noted that "constitutional shelter" is proper for such associations because individuals "draw much of their emotional enrichment from close ties with others."<sup>180</sup>

A campus group such as a Christian student organization, then, is an expressive association that should not have to advocate both pro-Christian and anti-Christian stances in order to maintain university recognition. So long as it can show that the forced inclusion of outsiders would frustrate its expression, the group's freedom of association covers the right to self-select its membership.<sup>181</sup> If a university tried to derecognize a Christian organization for refusing to select a non-Christian as a leader, the organization could contend that, under *Dale*, the forced inclusion of the nonbeliever would injure the group's ability to advocate a Christian viewpoint.<sup>182</sup> If the charge against the

176. See *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1987) (describing aspects of group receiving strong expressive association rights); *Roberts v. United States Jaycees*, 468 U.S. 609, 619–20 (1983) (describing range of associational relationship and strength of constitutional protection afforded each).

177. See *supra* note 118 and accompanying text (discussing type of group that receives strong freedom of expression protections).

178. See *Jaycees*, 468 U.S. at 626 (emphasizing that discrimination policies by private groups are especially suspect if they affect business and employment).

179. See *id.* at 620–21 (noting that *Jaycees* is large, unselective, and business-oriented organization).

180. *Id.* at 619. The rationale of *Dale* also supports the conclusion that student religious organizations are expressive groups, by defining an expressive group as one that "engage[s] in some form of expression, whether it be public or private." *Boy Scouts of Am. V. Dale*, 530 U.S. 640, 648 (2000).

181. The Court's analysis in *Dale* suggests that a public university cannot force the student organization to speak in favor of a value that it does not possess and that forcing the inclusion of people with contrary values is tantamount to forcing speech against the group's actual beliefs. See *id.* at 648 (stating that forced inclusion of unwanted person may infringe group's freedom of association).

182. See *id.* at 648 ("The forced inclusion of an unwanted person in a group infringes the

Christian organization was that it had discriminated against a student based on his sexual preference, *Dale* shows that a court should give deference to the group's assertion that having an openly gay leader would also disrupt its expressive freedoms.<sup>183</sup>

Moreover, *Dale* obligates a court to respect a group's determination that forced inclusion would impair its ability to engage in free speech.<sup>184</sup> The *Dale* Court noted, "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."<sup>185</sup> Therefore, a student religious organization should have little trouble showing that the forced inclusion of particular students impairs the group's ability to express the values and ideas that originally caused the members to associate with one another in the first place. Such an erosion of the control and direction of the organization wreaks havoc on the student group's freedom of association by diluting the strength of the members' voices, changing the group's message, and muddying the organization's purpose.<sup>186</sup>

*Hurley* also supports the conclusion that public universities may not derecognize student religious organizations for failing to follow campus nondiscrimination policies. Though not normally engaged in parades, student religious organizations routinely participate in rallies, proselytize, host public speakers with definitive and controversial points of view, and engage in other expressive activities intended for public consumption.<sup>187</sup> Thus, the private citizens who congregate in student religious groups engage in expressive behaviors that universities frustrate by forcing the groups to express certain

group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.").

183. 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."). *Dale* also indicates that not all current members of the organization would have to agree on every value for a specific stance to be a "core value" that deserves constitutional protection. *Id.* at 655.

184. See *id.* at 653 (giving deference to group to determine for itself what impairs its expression).

185. *Id.*

186. See Meredith R. Miller, Note, *Southworth v. Grebe: The Conservative Utilization of "Negative" First Amendment Rights to Attack Diversity of Thought at Public Universities*, 65 BROOK. L. REV. 529, 531 (1999) (discussing damage to vibrant campus debate caused by forced inclusion of unwanted students).

187. See Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 700 (2002) (noting that Supreme Court doctrine supports use of public school funds and facilities for use by religious organization).

beliefs or refrain from expressing other beliefs.<sup>188</sup> Because the forced inclusion of people into a group changes the group's message<sup>189</sup> and a governmental entity "may not compel affirmance of a belief with which the speaker disagrees,"<sup>190</sup> public universities lack the authority to control a student religious organization's membership.

*Dale, Hurley, and Rosenberger* also show that student religious organizations do not lose the freedom to choose their own members by availing themselves of some state resources. A university might argue that in *Dale*, the Boy Scouts was found to be a private organization<sup>191</sup> and that a derecognized student religious organization is arguably at least quasi-public because the state-supported public university partly finances the group. Or, it might argue that it may regulate the membership requirements of one of its groups because the student group is financially dependent upon it while Massachusetts did not

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188. See *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (noting that "all speech inherently involves choices of what to say and what to leave unsaid" and that "one who chooses to speak may also decide 'what not to say'" (citing *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 11 (1986))). The argument that the selection of a group's membership is religious *conduct* that can be prohibited is infirm. Although the university may cite *Smith* for the proposition that it may ban the group's religiously-motivated action through its neutral, generally applicable policy, *Smith* goes on to point out that First Amendment protections may bar application of neutral, generally applicable criminal regulations if, as a defense, a groups implicates freedom of religion "in conjunction with other constitutional protections such as *freedom of speech* and of the press." *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 881 (1990). Student religious organizations meet that threshold by bundling together the freedoms of speech, association, and religion for the basis of their right to disobey the nondiscrimination policy. See Leo, *supra* note 17, at 41 (noting that freedoms of religion, association, and speech are tied together in student religious organization derecognition cases). While some courts have determined that nondiscrimination laws are neutral and generally applicable, other courts and scholars have disagreed. *E.g.*, compare *Smith v. Fair Employment & Hous. Comm'n*, 913 P.2d 909, 919 (Cal. 1996) (stating that nondiscrimination law was neutral and generally applicable), *cert. denied*, 521 U.S. 1128 (1997), and *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 279 (Alaska 1994) (same), with Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 426–27 (1994) (arguing that nondiscrimination laws are not neutral, generally applicable laws because they contain exemptions for some employers, landlords, religious groups, and have other privacy-based exceptions). Moreover, university nondiscrimination policies are not *criminal* and are not *laws*. Additionally, of course, *Hurley* and *Dale* show that generally applicable public accommodation laws must sometimes yield to a group's freedom of association right to select its own members.

189. See *Hurley*, 515 U.S. at 574–75 (explaining how identity of participants affects overall message of whole).

190. *Id.* at 573.

191. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000) ("The Boy Scouts is a private . . . organization.").



fund the private marchers in *Hurley*.<sup>192</sup> Of course, the dichotomy between the Boy Scouts or the marchers and a student religious organization is not sharp. The Boy Scouts receives a great deal of direct and indirect financial support from all levels of the government,<sup>193</sup> yet the law does not permit New Jersey to control the Scouts' membership requirements.<sup>194</sup> Likewise, the veterans group in *Hurley* was not susceptible to Massachusetts' desire to force the inclusion of outsiders despite the fact that tax dollars partially underwrote the parade and it used government-owned roads and sidewalks.<sup>195</sup> Further, in *Rosenberger*, the Court concluded that a student group, which used university-owned buildings and funding, nevertheless engaged in private, not public, speech.<sup>196</sup>

One final case also supports the premise that a public university must recognize unpopular student religious organizations. In *Board of Regents of the University of Wisconsin v. Southworth*,<sup>197</sup> the Court decided the legality of the fee public universities charge to fund their campus groups.<sup>198</sup> While the Court concluded that the university's goal of facilitating "the free and open exchange of ideas by, and among, its students"<sup>199</sup> justified charging students a mandatory student activity fee,<sup>200</sup> the decision also required that the university

192. See *Hurley*, 515 U.S. at 572 (describing parade organizers as "private" group).

193. See Barbara Dority, *The Bigoted Scouts of America*, THE HUMANIST, July-Aug. 1998, at 35 (noting that government employees provide educational services to Scouts and local governments and police departments sponsor troops); Stuart Taylor Jr., *Boy Scouts vs. Gays: The System is Working Just Fine*, 32 NAT'L J. 2769 (2000) (noting Boy Scouts' use of federal land and sponsorship by schools and governments). But see Joe Laconte, *The Boy Scouts' Day in Court*, WKLY. STANDARD, May 1, 2000, at 30, 31 (stating that Scouting organizations take in no actual funding from governments).

194. See Dority, *supra* note 193, at 35 (noting government funding of Scouts); Taylor, *supra* note 193, at 2769 (same).

195. See *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 561 (1995) ("Through 1992, the city allowed the Council to use the city's official seal, and provided printing services as well as direct funding.").

196. *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 834-35 (1995).

197. *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217 (2000). In *Southworth*, students at the University of Wisconsin challenged the constitutionality of a university program that charged each student a fee to fund organizations engaged in political and ideological speech that they found offensive. *Id.* The students charged that their First Amendment freedom of speech included the right *not to speak*. *Id.* at 227. The Court ultimately concluded that a mandatory student activity fee is permissible because of the university's interest in maintaining a dynamic campus dialogue. *Id.* at 223. It held, however, that the university's program was unconstitutional because it was not administered in a viewpoint-neutral manner. *Id.* at 221.

198. See *id.* at 221 (determining that public universities may charge all students student activity fees so long as they fund student speech in viewpoint-neutral manner).

199. *Id.* at 229.

200. See *id.* at 221 (upholding constitutionality of mandatory fee if properly administered).

ensure that student activity funds are available to diverse student groups, including religious ones,<sup>201</sup> in a viewpoint-neutral manner.<sup>202</sup>

*Southworth* protects religious expression on campus by implicitly approving the practice of passing students' dollars through an arm of the state and back to quasi-private extracurricular student organizations.<sup>203</sup> It also suggests that a public university must impartially fund organizations if it wants to charge an activity fee.<sup>204</sup> A student religious organization that the university refuses to recognize could argue that the university has not comported with *Southworth* because, when nonrecognition or derecognition occurs, the university has based its funding decision on the group's viewpoint on religion and homosexuality. Once a public university stops funding student religious organizations (under a claim that they have violated the university's nondiscrimination policy), the university has violated the spirit of *Southworth*,<sup>205</sup> by continuing to charge students the fee, yet failing to fund a wide range of organizations on a viewpoint-neutral basis.

Finally, it warrants noting that attacks on student religious organizations have not been based on state or federal law, but on independent university policy.<sup>206</sup> It is unlikely that a court would find that a university policy trumps the constitutionally guaranteed freedom of expressive association. Constitutional protections of freedom of association carry more weight vis-à-vis administrative policies than they would against legislatively-enacted laws, because public universities are not a coequal legislative branch of government.<sup>207</sup> Because Massachusetts and New Jersey failed to show

201. See *id.* at 233 (naming "philosophical, religious, scientific, social, and political" as areas of discussion that are to be funded in viewpoint-neutral manner).

202. See *id.* (analyzing case in terms of viewpoint neutrality). Instead of the viewpoint-biased approach that the university had been using, the Court mandated a system that funded minority views, which would necessarily include those of unpopular religious groups, in a viewpoint-neutral way. See *id.* at 235 (determining majority-rule system as inimical to viewpoint neutrality).

203. See *id.* at 221 (holding student activity fee design constitutional).

204. See *id.* at 233 (permitting mandatory activity fee if used to fund diverse groups in viewpoint-neutral manner).

205. The Court permitted an intrusion on the students' rights *not to speak* only so long as the fee funded a wide range of student organizations in a viewpoint neutral manner. See *id.* at 233–35 (requiring viewpoint-neutral funding of diverse group of organizations).

206. See *supra* notes 12, 17, and 19 and accompanying text (noting that universities have derecognized student religious organizations for violating university policies).

207. As compared to a state law, a university policy that abridges students' constitutional freedoms (such as a nondiscrimination policy that abridges students' freedom of association) receives less deference when challenged by a constitutional freedom. Cf. *Regents of the University of California v. Bakke*, 438 U.S. 265, 309–10 (1978), in which Justice Powell, in his

compelling interests in nondiscrimination through their legislatively-enacted laws,<sup>208</sup> it is even more remote that a university could show that its mere *policy* goals constitute a compelling state interest in the face of an expressive organization's associational freedoms.<sup>209</sup>

### C. Public Policy Considerations Also Preclude the Derecognition of Student Religious Organizations

What public policy benefits come from having student religious organizations at public universities? Like all people, students have a fundamental need for belonging and community involvement.<sup>210</sup> While organizations in general help to satisfy this need, student organizations serve an especially important function for young adults away from home who seek to connect with groups of people with familiar values and beliefs.<sup>211</sup> When students leave their families for their new lives at school, they often want to re-establish the sense of community that they enjoyed while at home.<sup>212</sup> Religious

plurality opinion, stated that one of the many reasons the University of California's affirmative action policy was invalid was that the university, whose proper role is "education," adopted it, rather than the state legislature, whose mission includes making policy decisions. "[I]solated segments of our vast governmental structures are not competent to make [legislative policy], at least in the absence of legislative mandates and legislatively determined criteria." *Id.* at 309. As a result, the policy did not withstand constitutional assault as well as a law passed by a governmental body responding to identified discrimination. *Id.* at 309-10.

208. See *supra* notes 126-34 and 138-51 and accompanying text (discussing nondiscrimination laws as basis for *Hurley* and *Dale* cases).

209. See Norman J. Fry, Note, *Lamprecht v. FCC: A Looking-Glass into the Future of Affirmative Action*, 61 GEO. WASH. L. REV. 1895, 1917-18 (1993) (noting that constitutionality of regulations *qua* laws and regulations *qua* policies sometimes depend upon group that establishes regulation, with higher probability for constitutionality for legislatively-enacted laws than administratively-enacted policies); see also Stephen M. Rich, Note, *Ruling by Numbers: Political Restructuring and the Reconsideration of Democratic Commitments After Romer v. Evans*, 109 YALE L.J. 587, 607 n.104 (1999) ("Formalists . . . tend to grant less discretion to decisions made by governmental institutions that are neither representative in nature nor maintain some direct connection to the electorate."). Public universities are such governmental institutions.

210. ELLIOTT MCGINNIES, *SOCIAL PSYCHOLOGY: A FUNCTIONAL ANALYSIS* 179 (1970).

211. Cf. Christian Chadd Taylor & R. David Donoghue, *Brief Amicus Curiae of the Black Law Students' Alliance in Support of Defendant-Appellants*, 8 MICH. J. GENDER & L. 105, 107 (2002) (explaining how black student organization fosters community among African-American students and eases transition from home life to academic community).

212. For many people, religious belief and church life are a central aspect of their sense of community. See George W. Dent Jr., *Secularism and the Supreme Court*, 1999 BYUL. REV. 1, 38 (discussing how religion plays large role in developing "sense of community"); William P. Marshall, *Truth and the Religion Clause*, 43 DEPAUL L. REV. 243, 245 (1994) (stating that

groups provide some students with that basis for personal and community identity.<sup>213</sup>

Proponents of the existence of groups selected by sex, race, or religion on campus believe that, while discrimination may play an evil role in the larger life of the nation, the existence of select social groups at universities does little to engrain discriminatory beliefs into students' minds.<sup>214</sup> Students widely interact with different groups of people in the classroom, dormitories, and dining room, they argue, so occasional exposure to small exclusive groups does not breed a segregated campus community.<sup>215</sup> They also point out that while adherents to fervent religious beliefs may be majorities in some American communities, that is often not the case at large public universities where left-leaning thought is commonplace and only a small minority of students hold traditional religious beliefs.<sup>216</sup> These groups encourage students to discuss viewpoints and issues with a core group of people who face the same problems and challenges from the same point of view, thereby building a sense of security and camaraderie.<sup>217</sup> Proponents argue that the inclusion of outsiders would prevent the group's members from speaking openly about their problems and reaching beneficial solutions.

Others, however, believe that exclusive student religious organizations perpetuate discriminatory attitudes and engender intolerance in impressionable young adults. These people argue that universities shape the moral fabric of the emerging generation and instill in students the mores that they pass on to society in general.<sup>218</sup> If universities allow groups to discriminate, those

religion "imbues a sense of community obligation and virtue into the mind of the citizen-believer that is necessary to maintain a system of self-government").

213. See Karen T. White, Note, *The Court-Created Conflict of the First Amendment: Marginalizing Religion and Undermining the Law*, 6 U. FLA. J.L. & PUB. POL'Y 181, 210 (1994) (describing how marginalizing religion injures personal and group identity).

214. See, e.g., I. Lucretia Hollingsworth, Note, *Sex Discrimination in Private Clubs*, 29 HASTINGS L.J. 417, 434-37 (1977) (noting that Congress found no good reason to prohibit discrimination in private social organizations); Note, *Discrimination in Private Social Clubs: Freedom of Association and Right to Privacy*, 1970 DUKE L.J. 1181, 1181-82 (1970) (stating that private clubs are generally exempted from federal nondiscrimination law).

215. See Steven M. Colloton, Comment, *Freedom of Association: The Attack on Single-Sex College Social Organizations*, 4 YALE L. & POL'Y REV. 426, 442 (1986) (noting positive aspects of many college groups).

216. See White, *supra* note 213, at 210 (arguing that traditional religious groups can provide sense of community even if dominant culture values individualism and relativism).

217. See 120 CONG. REC. 39,992 (1974) (statement of Sen. Bayh) (stating that social organizations provide source of stability to college students).

218. See, e.g., *Frank v. Ivy Club*, 548 A.2d 1142, 1148 (N.J. Super. Ct. App. Div. 1988) (finding that permitting discrimination at university causes negative beliefs to be transmitted to society), *rev'd on other grounds*, 576 A.2d 241 (N.J. 1990).

excluded may be permanently handicapped by receiving fewer political and social advantages.<sup>219</sup> Supporters of nondiscrimination regulations argue that the policies protect historically disadvantaged groups from the barriers erected by others.<sup>220</sup> They argue that everyone suffers when society prevents large segments of the population from contributing to the group because it stifles the outsiders' talents.<sup>221</sup> Further, these proponents argue that the artificial division of people fosters stereotypes about what goals, abilities, and interests certain types of people hold.<sup>222</sup> Finally, they argue that university policies do not actually restrict the way that these religious groups practice their faith.<sup>223</sup>

The collision of nondiscrimination policies and associational freedoms illustrates what Lawrence Tribe has called "the ancient paradox of liberalism."<sup>224</sup> Freedom inherently conflicts with equality.<sup>225</sup> While

219. See Michael M. Burns, *The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 HARV. C.R.-C.L. L. REV. 321, 328 (1983) (arguing that membership in right organizations, even early in life, can develop connections for social and professional success and community leadership).

220. See *Roberts v. United States Jaycees*, 468 U.S. 609, 624–26 (1983) (championing removal of "barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups"). Opponents argue that when people originally founded exclusive groups, they barred members of other religious groups and sexual orientations in order to entrench the bigotry they sponsored. See, e.g., Lawrence Lessig, *Fidelity in Constraint*, 65 FORDHAM L. REV. 1365, 1428 (1997) (discussing perpetuation of bigoted attitudes by claiming "tradition"). But see Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 325–26 (1986) (stating that formation of insular religious groups first began in America for protection). Members today justify the continued discrimination, opponents argue, by claiming that tradition mandates continuing the practice. See, e.g., Lessig, *supra*, at 1428 ("Unless we have a tradition of ignoring tradition . . . 'tradition' as a reason should be a *non sequitur* in equal protection arguments.").

221. See *Jaycees*, 468 U.S. at 625 (noting that discrimination based on "archaic and overbroad assumptions" denies people chances to contribute to society).

222. *Id.* In reality, they contend, people of different religions often share many beliefs, such as the preservation of the family unit, the promotion of social justice, and the dignity of all people. See Douglas Laycock, *Freedom of Speech That is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 808 (1996) (noting expression of similar values in different religions and in secular thought); Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT'L L. 527, 558 (2001) (noting similar emphasis on natural law, divine law, and human rights in Christianity, Judaism, Islam and Asian religions).

223. See Battaglia, *supra* note 50, at 394 (stating that student groups are probably not religious organizations for purposes of the ministerial exemption); McMurtrie, *supra* note 9 (contending that some believe nondiscrimination policies do not "involve[] the way in which the groups practice their faiths").

224. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15–18, at 974 (1978) (discussing conflict between freedom and equality).

225. See David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 243 ("As anyone who has had a dinner party

contemporary constitutional jurisprudence views eliminating discrimination as an important goal, constitutional protections of associational rights are also clearly important.<sup>226</sup> Thus, permitting student religious groups to engage in self-constitution furthers several important societal goals.

The existence of student religious groups with policies and methodologies that differ from the university's "official" viewpoint leads to the furtherance of democracy. While a single student is unlikely to contribute significantly to the political process on a large campus, joining with others to engage in a common mission helps to ensure that other students, faculty, and administrators on campus will hear and take into consideration the unorthodox viewpoints.<sup>227</sup> The forced inclusion of dissonant voices in the group dilutes the group's message and weakens the group's force.<sup>228</sup> Commonality, on the other hand, produces solidarity,<sup>229</sup> ensures that only those who will effectively communicate the group's viewpoint are included, and makes the group and its purpose more identifiable to others.<sup>230</sup>

A student religious group that does not agree with a politically correct, campus-wide nondiscrimination policy communicates to observers its disagreement with the university's official policy, thereby contributing to the ideal of self-government.<sup>231</sup> The protection of associational freedoms serves "as a buffer against all-powerful central authority" and preserves the private sphere in the person rather than in the government.<sup>232</sup> The group's members are able

knows, the act of association is an act of discrimination . . . . The right of association would mean little if the right to choose one's associates could be overridden every time the state decides that a set of criteria are discriminatory.").

226. See *id.* (noting difficulties of balancing nondiscrimination laws with freedom of association).

227. See Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 686, 713 n.149 (1991) (noting greater political power exhibited by minority groups when they congregate for specific political purposes because of their "discreteness and insularity").

228. See Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 434 (1987) ("[A]ny addition to the group would threaten its expressive freedom as well, because changes in membership would be highly likely to alter both the content and the mode of expression.").

229. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 725 (1985).

230. See *id.* at 730-31 (explaining that discrete groups are more likely to have common voice than blended groups).

231. See Eileen Finan, Note, *The Fact-Opinion Determination in Defamation*, 88 COLUM. L. REV. 809, 834 (1988) (discussing criticism of public officials and policies as essential component of self-government).

232. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-16, at 1297 (2d ed. 1988) (using associational freedom as element of self-realization and means of preventing government trampling of freedoms). Professor Tribe has argued that breaking down

to create a realm in which the governing university dogma does not control their attitudes and beliefs, much in the way that First Amendment rights ensure that extra-governmental perspectives can be legally disseminated.<sup>233</sup> The unrestricted expression of a student religious group's sentiments contributes to the political process by informing the public of the variety of viewpoints that exist on religion and sexual morality.<sup>234</sup> This lack of restriction permits observers to critically evaluate the efficacy of the organization's viewpoints on these issues and to re-examine their own beliefs, which, in turn, may lead to a change in the university's policy if enough observers agree with the student religious group's position.<sup>235</sup>

The existence of diverse, robust, and uninfiltated student groups is critical to ensuring vibrant campus debate.<sup>236</sup> Some groups will emerge that advocate a change from the campus status quo on given issues, while others, in turn, will champion the current policies as worthy of continued support.<sup>237</sup> 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. Viewpoint pluralism "allows the development and advancement of diverse perspectives and thereby enhances the national debate."<sup>238</sup> The existence of a variety of viewpoints on societal conditions nurtures minority perspectives of

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discriminatory groups so that society's members may be free from domination "destroys the only buffer between the individual and the state, and risks enslaving the individual to the state's potential tyranny." *TRIBE, supra* note 224, at 898.

233. See Kimberly A. Dietl, *Shadow on the Spotlight: The Right to Newsgather Versus the Right to Privacy*, 33 *SUFFOLK U. L. REV.* 131, 134–35 (1999) (noting that historical purpose of First Amendment rights was to protect against proscription of government criticism in order to further self-government).

234. See Carrie Miller, Comment, *Recent Development: Abortion, Protest, and Constitutional Protection—Bering v. Shaw*, 62 *WASH. L. REV.* 311, 311–12 (1987) (stating that the First Amendment "embraces essential constitutional values, including one that posits a 'market place of ideas,' where the truth of an idea is tested by its acceptance or rejection after public debate").

235. See *id.* at 312 (arguing that wide variety of viewpoints informs electorate).

236. See Monte Arthur Mills, Note, *The Student, the First Amendment, and the Mandatory Fee*, 85 *IOWA L. REV.* 387, 392 (1999) (noting that diverse student groups expose students to diverse viewpoints).

237. See Carolyn Wiggins, *A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees To Support Political Speech at Public Universities*, 103 *YALE L. REV.* 2009, 2036 (1994) ("Campus debate often takes the form of opposition between groups that oppose the status quo and are therefore 'political,' and those that support the status quo . . .").

238. William P. Marshall, *Discrimination and the Right of Association*, 81 *Nw. U. L. REV.* 66, 88 (1986).

solutions to university problems and societal issues in general.<sup>239</sup> This existence guarantees that issues are not viewed through a single lens chosen by the public university's administration, but, instead, are evaluated by groups of people who do not all share an identical set of values, morals, and ideals.<sup>240</sup>

*Hurley* indicated that the appropriate use of nondiscriminatory statutes and policies in the realm of expressive speech is very narrow.<sup>241</sup> Using such regulations for the broader purpose of correcting perceived societal beliefs is misplaced legislative activism. The Court noted that nondiscrimination rules are not proper if used as a means to "produce a society free of . . . biases"<sup>242</sup> or for mandating speech "neutral toward the particular classes."<sup>243</sup> Therefore, it is inappropriate for a public university, as an arm of the state, to enact nondiscrimination policies as a means of cleansing the biased minds of religious students in order to produce orthodox believers of the university's ethos. If such aims pervade a university's motivation of nondiscrimination policies, diversity of skin tone, sexuality, gender, and age are encouraged, but diversity of thought surely is not.<sup>244</sup>

The efforts by the "intelligent left"<sup>245</sup> to purge religious expression from campuses highlight how many public universities' campaigns for political correctness have run aground: Attempts to rid campuses of discriminatory groups in order to promote diversity and tolerance ironically have had the opposite effect. Rather than increasing diversity on campus, the elimination of religious groups has resulted in a narrowing of the bandwidth of ideas and

239. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971) ("Majority tyranny occurs if legislation invades the areas properly left to individual freedom.").

240. The political motivations that lead to the derecognition of religious groups also rob students of the chance to learn about the beliefs of different religions. One university chaplain has said, "I'm more concerned about educating the student body as to why religious organizations are unique," than concentrating on calling deeply held religious beliefs "bigotry." See McMurtrie, *supra* note 9 (quoting Laurel M. Jordan, Middlebury College chaplain).

241. The Court noted that Massachusetts designed its nondiscrimination code to prevent denial of access to public accommodations. See *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 578 (1995) (analogizing nondiscrimination statutes' purpose with common law rule ensuring access to all at roadside inns).

242. *Id.*

243. *Id.* at 579.

244. See McMurtrie, *supra* note 9 ("[Universities are] saying, 'As long as you look different and have different sexual orientations, that is diversity. But you must all think alike.'" (quoting David A. French, Cornell Law School lecturer)).

245. See Nicholas D. Kristof, *The Left Dumbs Down*, N.Y. TIMES, Nov. 5, 2002, at A27 (naming elite intelligentsia and its liberal beliefs as "intelligent left").



thoughts allowed on campus.<sup>246</sup> The university essentially silences those groups that diverge too drastically from its diversity-at-all-costs orthodoxy. This discrimination by the university in turn demonstrates that it is tolerant of diverse beliefs only so far as such beliefs reasonably agree with its own.<sup>247</sup>

Universities should not decide which religious beliefs are good and which are bad. Students' theology stems not from prejudice or bigotry, but from legitimate religious beliefs which universities should protect.<sup>248</sup> Along the same lines, universities also should not determine what a particular religion teaches about a particular issue; for example, a university should not determine whether biblical Christianity in fact condemns homosexual orientation or homosexual relationships as immoral. As such, religious organizations should not be forced to embrace contrary religious beliefs based on an outsider's assessment that their beliefs *could* or *should* accommodate alternative viewpoints.

Allowing student religious organizations to set their own membership and leadership policies also permits members of the group to gain self-identity. Hannah Arendt has explained that unfettered speech is eminently central to self-realization because it is the means by which individuals determine the substance of their own thoughts.<sup>249</sup> Just as an association of gays and lesbians at a public university might play an important role in the exploration and development of a homosexual's identity,<sup>250</sup> religious associations composed of believers of the same faith allow religious students to develop their own individual identity.<sup>251</sup>

246. See Miller, *supra* note 186, at 531 ("Without sufficient funding, the student organizations which foster the 'diverse debate' that is critical to the university's educational mission will largely cease to exist, leaving only a more uniform and colorless educational institution.").

247. See, e.g., LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 139–40 (1986) (arguing that protecting both tolerant and intolerant speech is important First Amendment goal).

248. See STEPHEN V. MONSMA, *WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY* 188–89 (1996) (arguing that long-held religious tradition and sincere religious beliefs mandate accommodating some discrimination based on religion, gender, and sexual orientation for religious organizations).

249. See HANNAH ARENDT, *THE HUMAN CONDITION* 24–26 (1958) (describing how Greeks believed thought and identity came from speech and action).

250. See WILLIAM N. ESKRIDGE JR., *GAYLAW* 181 (1999) (explaining that interaction among gays and lesbians helps individuals come to self-realization).

251. Finding others who agree on important issues such as ultimate destiny and the existence of God empowers individuals to further understand themselves. See David B. Salmons, Note, *Toward a Fuller Understanding of Religious Exercise: Recognizing the Identity-Generative and Expressive Nature of Religious Devotion*, 62 U. CHI. L. REV. 1243, 1244–45 (1995) (stating that religious beliefs play an essential role "in defining and, more importantly, expressing individual and group conceptions of identity"). Permitting individuals

Consistency and good sense also prohibit public universities from derecognizing student religious groups. First, just as university fraternities and sororities exist for the purpose of joining together people of the same sex, the *raison d'être* for religious groups is uniting people of the same religion around their common religious beliefs.<sup>252</sup> To decree that the group formed around Judaism or evangelicalism must uphold all other religious beliefs as equal or expedient is absurd. Second, while public universities have been quick to derecognize some student religious groups for discriminating on the basis of religion or sexual preference,<sup>253</sup> the same universities have not derecognized men's glee clubs<sup>254</sup> or women's intramural rugby teams for discriminating on the basis of sex<sup>255</sup> and have not derecognized nonevangelical religious groups for discriminating on the basis of religion or sex.<sup>256</sup> Such disparate treatment of groups, all of which violate some component of the archetypical nondiscrimination policy, raises questions about the real motivation for derecognizing conservative student religious groups.<sup>257</sup>

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to voice their beliefs and opinions in organizations composed of like-minded individuals creates a climate in which individuals are more personally and socially fulfilled. See Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 318 (1977) ("It seems reasonable to assume that a society in which citizens voice their beliefs and opinions on a wide range of issues is more likely to be a society in which individuals are in fact able to fulfill themselves.").

252. See Dent, *supra* note 212, at 38 (discussing sense of community as an outgrowth of religious organizations).

253. See *supra* notes 9–31 and accompanying text (describing cases of student religious organizations' derecognitions).

254. See, e.g., Varsity Men's Glee Club, <http://www.thedesignworkshop.net/ChoralMusic/MensGlee/> (last visited Jan. 18, 2004) (listing UNC's men's glee club as recognized student organization) (on file with Washington and Lee Law Review).

255. See, e.g., Women's Rugby at the University of Washington, <http://students.washington.edu/wrugbyfc> (last updated Jan. 6, 2004) (listing women's rugby club at University of Washington as recognized student organization) (on file with Washington and Lee Law Review).

256. See, e.g., Catholic Center at Rutgers, <http://www.catholic-center.rutgers.edu> (last visited Jan. 18, 2004) (giving information about on-campus Roman Catholic Eucharist, which is celebrated exclusively by male priests and is to be received only by Catholics) (on file with Washington and Lee Law Review); see also McMurtrie, *supra* note 9 (stating that "the question for Tufts and other institutions is whether they apply their nondiscrimination policies consistently and fairly").

257. See Leo, *supra* note 17, at 41 ("'Political and religious affiliation' is not really the sticking point at [the universities] . . . . The real intention is to break or banish religious groups with biblically based opposition to homosexuality.").

### *VI. Conclusion*

Although the Court has not yet heard a case in which a public university has derecognized a student religious organization, its jurisprudence on several other closely related cases shows that a public university may not use its nondiscrimination policy to derecognize a student religious organization that chooses its members based on its religious beliefs. The Court has repeatedly held that public universities may not engage in viewpoint discrimination against student religious organizations based on the group's religious viewpoints. Student religious organizations are expressive organizations with broad associational freedoms to select their own membership. Together, these principles demonstrate that the Constitution does not permit public universities to refuse to recognize religious organizations that diverge from the campus orthodoxy. Further, this result ensures that a broad array of student organizations, including religious ones with politically unpopular viewpoints, continue to serve the important role of maintaining the vitality of diverse thought and robust debate at public universities.