STRIKING THE BALANCE BETWEEN ANTI-DISCRIMINATION LAWS AND FIRST AMENDMENT FREEDOMS: AN ALTERNATIVE PROPOSAL TO PRESERVE DIVERSITY

A distinctive feature of America's tradition has been respect for diversity. This has been characteristic of the peoples from numerous lands who have built our country. It is the essence of our democratic system.[1]

INTRODUCTION

The need to protect First Amendment rights of individuals and the need to protect minorities from discrimination are two values deeply rooted in the foundation and history of our society. Inevitably, however, it seems society has found itself in a situation where these two values are at odds with each other. Over the past several years, the conflicting interests of student religious groups' First Amendment freedoms and public universities' non-discrimination policies have finally come to a head.[2] The primary claims have been brought by Christian student groups that have been derecognized as official student organizations because their membership criteria violate universities' anti-discrimination policies.[3] The main reason the universities are deciding to derecognize these groups is because their bylaws state that anyone who engages in "unrepentant homosexual conduct" cannot be a voting member or obtain a position of leadership in the organization.[4]

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[1] Bob Jones Univ. v. United States, 461 U.S. 574, 610 n.4 (1983) (Powell, J., concurring) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 745 (1982) (Powell, J., dissenting)).

[2] Christian Legal Soc'y v. Walker, 453 F.3d 853 (7th Cir. 2006) (ruling in favor of the Christian Legal Society (hereinafter CLS) in its request for a preliminary injunction requiring Southern Illinois University (hereinafter SIU) to reinstate them as a registered student organization); Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *1 (N.D. Cal. May 19, 2006) (ruling in favor of University of California at Hastings (hereinafter Hastings) on cross-motions for summary judgment in a suit brought by CLS when Hastings derecognized the group after receiving its new bylaws that denied homosexuals the right to be voting members); *see also* Mark Andrew Snider, *Viewpoint Discrimination by Public Universities: Student Religious Organizations and Violations of University Nondiscrimination Policies*, 61 WASH. & LEE L. REV. 841, 845 (2004) (acknowledging that at the time his article was published there was "no record of any litigated cases [on this issue]").

[3] *Kane*, 2006 WL 997217; *see also Walker*, 453 F.3d 853.

[4] *Kane*, 2006 WL 997217 at *3; *see also Walker*, 453 F.3d at 858.

Two major policy and legal concerns are at issue in these disputes. The first is the responsibility of the State and the University to protect the student body from discrimination.[5] Courts must balance these anti-discrimination concerns against the second set of concerns, the First Amendment freedoms of student groups as established in the United States Constitution.[6] The specific First Amendment rights at issue are the freedom of speech, freedom of association, and the Free Exercise Clause.[7]

Part I of this Note discusses two cases chosen to frame the issue, as well as the First Amendment rights and the tests used to establish unconstitutional government infringement of those rights. Part I will also lay out the anti-discrimination laws at play. Part II argues that non-recognition of these discriminating student groups will not necessarily infringe on their First Amendment rights and, therefore, universities are justified in enforcing their anti-discrimination policies. Finally, Part III proposes a regulatory measure intended to assure discriminating groups maintain their First Amendment freedoms, while still allowing the universities to deny such groups recognized status.

I. RELEVANT LEGAL DOCTRINE

The legal background necessary to understand this Note falls into three basic categories. First, this Note centers around two Circuit Court decisions, from the Seventh and Ninth Circuits,

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[5] *See* Grutter v. Bollinger, 539 U.S. 306, 331-32 (2003) ("'[E]nsuring that public institutions are open and available to all segments of American society . . . represents a paramount government objective.' . . . '[N]owhere is the importance of such openness more acute than in the context of higher education.'" (quoting Brief for United States as Amicus Curiae supporting petitioner, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 176635, at *13)). Since this Note deals specifically with state-run colleges and universities, the actions taken by the schools are subject to all state and federal laws that address education and public funding. *See Kane*, 2006 WL 997217, at *9. In order to maintain relative focus, the discussion of state and university regulations will be limited to Illinois, Southern Illinois University (SIU), California, and the University of California at Hastings (Hastings) because these are the locations of the two cases that have laid the groundwork for this Note. *Walk*er, 453 F.3d 853; *Kane*, 2006 WL 997217.

[6] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise therof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[7] *See infra* Part I.B.

that have come to opposite conclusions on this issue. Second, it is necessary to understand the First Amendment freedoms at play and the tests used to determine whether these rights have been infringed. And, finally, one must be aware of the applicable anti-discrimination laws at the university, state, and federal levels.

A. Christian Legal Society Cases that Frame the Issue

The first decision comes out of the Seventh Circuit in the case entitled *Christian Legal Society v. Walker* (hereinafter *Walker*).[8] The Christian Legal Society ("CLS") chapter at Southern Illinois University ("SIU") brought a claim against the university after SIU derecognized CLS based on its decision to exclude homosexuals from becoming members or leaders of the student organization in violation of SIU's anti-discrimination policy.[9] CLS filed a motion for a preliminary injunction requesting that SIU be required to reinstate them as a recognized student organization, pending the outcome of the litigation.[10] The district court denied the request.[11] The court of appeals, however, reversed the decision and granted the preliminary injunction.[12] The court stated that CLS will likely succeed on the merits because, among other reasons, the group is denying membership to individuals based on their sexual conduct outside of a marital relationship rather than their status as homosexuals.[13] Therefore, the court believed that CLS is not discriminating against them based on their sexual orientation.[14]

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[8] *Walker*, 453 F.3d 853.
[9] *Id.* at 858.
[10] *Id*. at 857.
[11] *Id*.
[12] *Id.*
[13] *Id.* at 860.
[14] *Id*. at 860, 867. The court also pointed out that SIU failed to identify exactly what rule CLS was violating, and that CLS would likely succeed on the merits in its freedom of association and free speech claims. *Id*. If this is truly the basis for CLS's denial of homosexuals as members, then the group may not be in violation of the anti-discrimination policy. However, according to Justice O'Conner's concurring opinion in *Lawrence v. Texas*, discriminating against homosexual conduct is the equivalent of discriminating against homosexuals as a class. 539 U.S. 558, 583 (2003) (O'Conner, J., concurring). While the Southern Illinois chapter of CLS may establish this as the basis for its exclusion, the National CLS organization has included a "Word of Caution" in its affiliation materials advising student groups not to sign any university anti-discrimination policy that forbids discrimination

A similar case was recently decided in the Ninth Circuit, *Christian Legal Society v. Kane* (hereinafter *Kane*).[15] The CLS chapter at University of California-Hastings ("Hastings") brought its claim after Hastings derecognized the chapter for reasons very similar to those found in *Walker*. On cross-motions for summary judgment, the district court found in favor of Hastings because the State's, and therefore the University's, compelling interest in protecting students from discrimination substantially outweighed the hardship that fell upon CLS when it was denied status as a recognized organization.[16] One of the primary reasons the court stated that enforcement of the policy did not unduly burden CLS's rights is because the group was still permitted to meet on campus and express its views.[17]

B. Relevant Constitutional Law

In deciding cases of this type, a court must examine the First Amendment rights and anti-discrimination laws at issue. The First Amendment of the United States Constitution states, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech . . . or the right of the people peaceably to assemble."[18] Additionally, the Supreme Court has interpreted the First Amendment to embrace the freedom to believe and the freedom to act.[19] According to Justice Roberts, "The first [of

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based on "religion, creed or sexual orientation" and to immediately contact the agency if they are being required to sign the policy. CHRISTIAN LEGAL SOC'Y, STUDENT CHAPTER MANUAL: *Appendix 2 Affiliation Materials* 1 (2005), *available at* http://www.clsnet.org/lsmPages/lsm_manual/2005-2006AffilMatls.pdf. This warning seems to demonstrate the desire of the national CLS organization not to comply with these types of anti-discrimination policies. *Walker* was recently settled out of court and the charges were dismissed. Stipulation of Dismissal, Christian Legal Soc'y v. Walker, No. 05-4070-GPM (S. Dist. Ill. May 22, 2007).

[15] Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *1 (N.D. Cal. May 19, 2006).

[16] *Id*.

[17] *Id.* at *18.

[18] U.S. CONST. amend. I.

[19] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

these freedoms] is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[20]

1. Regulating Conduct

An individual's freedom to hold their own religious beliefs generally falls under the first of these two categories, making it an absolute right. When these beliefs trickle into the individual's conduct, however, the government can regulate that conduct – subject to a rigorous standard – regardless of the incidental infringement on the individual's First Amendment rights.[21] Accordingly, the purpose of anti-discrimination policies is to regulate conduct rather than speech.[22]

The infringement, by government regulation, of an individual's rights to engage in expressive conduct is appropriately analyzed under the standard set forth by the United States Supreme Court in *United States v. O'Brien.*[23] In *O'Brien,* the Court lays out four factors to determine whether a government regulation is "sufficiently justified" in its infringement on an individual's the constitutional rights.[24] First, the regulation "must be within the constitutional power of the government."[25] Second, it must "further an important or substantial government interest."[26] Third, "the government interest [must be] unrelated to the suppression of free expression."[27] And finally, "the incidental restriction of alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest."[28] The government is

[20] *Id.* at 303-04.
[21] *See* United States v. O'Brien, 391 U.S. 367, 376 (1968).
[22] *Kane,* 2006 WL 997217, at *8.
[23] *Id*.
[24] *O'Brien*, 391 U.S. at 377.
[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] *Id*.

justified in enforcing the regulation, regardless of its negative effect on an individual's First Amendment right, if the regulation satisfies these factors.

2. Speech Forums

The second issue in this context arises from universities' removing discriminating student groups from the limited public forum created by the universities as a place for expression of recognized student groups.[29] The Supreme Court has created three categories of forums to assess the government's power to regulate speech on government-owned property.[30] These three categories are the traditional public forum, the limited public forum, and the non-public forum.[31] The amount of content and viewpoint neutrality required further defines these categories. A regulation is content neutral when it does not discriminate against the subject-matter or viewpoint of the speech and only regulates the place, time, or manner of the speech.[32] A regulation is viewpoint neutral when it does not treat alternative perspectives within a certain subject-matter differently.[33]

The traditional public forum is largely limited to public streets, sidewalks, and parks.[34] Any content-based or viewpoint-based infringement of the speech that occurs in the traditional public forum is subject to strict scrutiny.[35] The limited public forum is a forum specifically opened by the government for expressive activity.[36] This forum allows the government to place general restrictions on the type of speech that occurs as long as it remains neutral to differing

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[29] *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).
[30] RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW – SUBSTANCE & PROCEDURE CURRENT THROUGH THE 2006 UPDATE § 20.47(c) (3rd ed. 2006) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n., 460 U.S. 37 (1983)).
[31] KEITH WERHAN, FREEDOM OF SPEECH: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 134-35 (Jack Stark ed., Praeger Publishers 2004).
[32] *Id.*
[33] *Id.*
[34] *Id*.
[35] *Id*. A regulation passes strict scrutiny if it is narrowly tailored to serve a compelling state interest. Widmar v. Vincent, 454 U.S. 263, 270 (1981)
[36] WERHAN, *supra* note 31, at 134-35.

viewpoints.[37] Finally, a non-public forum is any other government-owned property.[38] In a non-public forum, the government can deny access to anyone for expressive purposes as long as the decision is reasonable and viewpoint neutral.[39]

The forum created by universities for their student groups is usually categorized as a limited public forum because the university is not required to open the forum to all persons and it has authority to create general limits on the forum's use (e.g., limiting the forum to use by student groups).[40] Once the university establishes such limits, however, the university cannot discriminate against groups based on the specific content of their speech, if the groups otherwise fall within the established limits.[41]

Whether the university is within its regulatory authority depends on the content and viewpoint neutrality of the regulation.[42] In a limited public forum, the university, as an agent of the government, is not required to remain content neutral.[43] They can choose what subject-matter groups can address within that forum as long as the chosen matters conform to the purpose of the forum or the university can show that the limitation serves a "compelling state interest . . . [and] is narrowly drawn to achieve that end."[44] But, they must remain viewpoint neutral and allow individuals to present all perspectives within the acceptable subject-matter.[45]

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[37] *Id*.
[38] *Id.*
[39] *Id*.
[40] ROTUNDA & NOWAK, *supra* note 30, at § 20.47(c).
[41] Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995).
[42] WERHAN, *supra* note 31, at 73, 74.
[43] *See Rosenberger*, 515 U.S. at 830 (establishing that a university can choose the subject-matter of the forum).
[44] Widmar v. Vincent, 454 U.S. 263, 270 (1981) (citing Carey v. Brown, 447 U.S. 455, 461, 464-65 (1980)).
[45] *Rosenberger*, 515 U.S. at 830.

3. Freedom of Association

The next First Amendment issue raised by this conflict is the freedom of association.[46] Although freedom of association is not explicitly contained within the Constitution, it is well established as an implicit constitutional right.[47] In 1958, the Supreme Court first recognized the freedom of association in *NAACP v. Alabama*, where Justice Harlan stated:

> Effective advocacy of both public and private points of view, particularly controversial ones is undeniably enhanced by group association. . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . [W]hether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.[48]

The Supreme Court established two categories of constitutionally protected association.[49] The first of these categories is intimate association, which largely centers on family-type relationships among small, highly selective, and relatively secluded groups.[50] In determining whether the association is intimate, courts consider the size, purpose, policies, and selectivity of the association.[51]

The second category, and the one most relevant in this context, is expressive association.[52] The right to expressive association is the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends."[53] Most

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[46] Christian Legal Soc'y v. Walker, 453 F.3d 853, 858 (7th Cir. 2006); Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *4 (N.D. Cal. May 19, 2006).
[47] ROBERT J. BRESLER, FREEDOM OF ASSOCIATION: RIGHTS AND LIBERTIES UNDER THE LAW 32 (Donald Grier Stephenson, Jr. ed., ABC Clio, Inc. 2004).
[48] NAACP v. Ala. *ex rel*. Patterson, 357 U.S. 449 460-61 (1958) (internal citations omitted); *see also* BRESLER, *supra* note 47, at 32.
[49] Roberts v. United States Jaycees, 468 U.S. 609, 620-23 (1984).
[50] *Id.* at 620.
[51] *Id*.
[52] *See* Christian Legal Soc'y v. Walker, 453 F.3d 853, 857 (7th Cir. 2006) (claiming that the university's nondiscrimination policy violated the plaintiffs' rights to expressive association); Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *4 (N.D.Cal. 2006) (same).
[53] *Roberts*, 468 U.S. at 623.

student groups would fall into this category because their membership is constantly changing as students move through school.[54] Further, these associations are not as highly selective and secluded as intimate associations.[55]

To determine whether state action infringes on a group's freedom of expressive association, one must determine whether the action would "significantly affect the [group's] ability to advocate public or private viewpoints."[56] Even if a court finds sufficient infringement, the freedom of expressive association is not absolute.[57] The government may justifiably infringe upon this right if the regulation is adopted to serve a compelling state interest, which is not related to the suppression of ideas, and there is no significantly less-restrictive method of regulation appropriate to serve that compelling state interest.[58]

4. Free Exercise Clause

The final constitutional freedom at issue is the Free Exercise Clause, which is expressly set forth in the First Amendment.[59] The Free Exercise Clause "forbids government interference in peoples' religious life."[60] In *Sherbert v. Verner*, the Supreme Court held that the government would have to show a "compelling government interest in order to enforce a regulation over a religious activity" without violating the Free Exercise Clause.[61] However, in *Employment Division v. Smith*, the Supreme Court limited its ruling in *Sherbert*, holding that a "valid and

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[54] *See Walker*, 453 F.3d at 861 (holding that student CLS chapters are groups of expressive association); *Kane* 2006 WL 997217 at *4 (same).
[55] *See Walker*, 453 F.3d at 861; *Kane* 2006 WL 997217, at *4.
[56] Boy Scouts of America v. Dale, 530 U.S. 640, 650 (2000); *see* discussion *infra* pp. 17-19.
[57] *See Dale*, 530 U.S. at 649.
[58] *Roberts*, 468 U.S. at 623.
[59] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").
[60] MELVIN I. UROFSKY, RELIGIOUS FREEDOM, RIGHTS AND LIBERTIES UNDER THE LAW 3 (Donald Grier Stephenson, Jr. ed., ABC Clio Inc. 2002).
[61] 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, 373 (1994) (citing Sherbert v. Verner, 374 U.S. 398, 406-07 (1963)).

[facially] neutral [state] law of general applicability" does not violate the Free Exercise Clause, regardless of any burden on religious activity, and is thus enforceable.[62]

C. Relevant Anti-Discrimination Law

The Supreme Court has acknowledged that many states in this country have extended their civil rights statutes to prohibit discrimination based on sexual orientation.[63] In particular, California law protects individuals against discrimination based on sexual orientation in "all business establishments of every kind whatsoever."[64] The State of Illinois, however, has not passed any amendments adding sexual orientation to the groups protected against discrimination in the context of public schooling. Nevertheless, Illinois has passed legislation protecting individuals from discrimination on the basis of sexual orientation in the context of "employment, real estate transactions, access to financial credit, and the availability of public accommodations."[65] This demonstrates that Illinois has a compelling interest in protecting individuals from discrimination on the basis of sexual orientation.

Similarly, the federal government has not amended the Civil Rights Act of 1964 to include sexual orientation.[66] However, on June 23, 2000, a federal regulation was published stating, "Through this Executive Order, discrimination on the basis of race, sex, color, national

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[62] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879, 896 (1990).. In the fall of 1993, Congress passed the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et. seq. (West 2006), in response to public outcry against the decision in *Smith* and to restore the law as it was under *Sherbert v. Verner*. Bainbridge, *supra* note 61, at 373-74. The RFRA reinstated the requirement that the government must show a "compelling governmental interest" and the law must be the "least restrictive means of furthering that . . . interest." 42 U.S.C § 2000bb-1 (West 2006). The far-reaching effect of this statute was short lived because, in 1997, the Supreme Court held in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that Congress had exceeded its power in enacting the RFRA and, therefore, the Act is unconstitutional. *Id*. at 537. After that decision, the ruling in *Smith* appears to be the prevailing standard for a Free Exercise claim. *See* Cutter v. Wilkinson, 544 U.S. 708, 714-15 (2005). Some Courts of Appeals have held that RFRA still applies to the Federal Government; the Supreme Court has not ruled on this issue. *Id.* at 715 n.2. However, the "state compelling interest" factor can still come into play for a Freedom of Association claim and an expressive conduct analysis; therefore, the issue is still relevant.

[63] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 571-72 (1995) (quoting Mass. Gen. Laws § 272:98 (1992)).

[64] Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 2006).

[65] Illinois Human Rights Act, 775 ILL. COMP. STAT. ANN. 5/1-102(A) (West 2006)

[66] 42 U.S.C. 2000 et.seq. (West 2007)

origin, disability, religion, age, *sexual orientation*, and status as a parent will be prohibited in Federally conducted education and training programs and activities."[67] Although this executive order applies only to federally conducted education, it demonstrates a federal interest in protecting individuals from discrimination on the basis of sexual orientation.[68]

Both SIU and Hastings have policies requiring recognized student groups to comply with the anti-discrimination policies of the school and the State.[69] These policies prohibit discrimination based on, among other things, sexual orientation.[70] In totality, these laws establish Federal, State, and public university interests in protecting individuals against discrimination on the basis of sexual orientation.

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[67] Exec. Order No. 13160, 65 Fed.Reg. 39775 (June 23, 2000) (emphasis added).

[68] *See Id*. Exec. Order No. 13160. The 110th United States Congress is currently voting on legislation that would include sexual orientation as a basis for protecting individuals from hate crimes. Local Law Enforcement Hate Crimes Act of 2007, H.R. 1592, 110th Cong. (2007). The bill has passed in the House of Representatives and is currently awaiting vote in the Senate. GovtTrack.us, *H.R. 1592: Local Law Enforcement Hate Crimes Prevention Act of 2007*, *available at* http://www.govtrack.us/congress/bill.xpd?bill=h110-1592 (last visited July 5, 2007).

[69] Christian Legal Socy' Chapter of Univ. of Cal. v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *2 (N.D. Cal. May 19, 2006) ("As a condition of becoming a 'registered student organization,' . . . Hastings . . . require[s] a student organization to comply with the Law School's Policies and Regulations Applying to College Activities, Organizations and Students, . . . which [includes] . . . abid[ing] by the Policy on Nondiscrimination." (internal citation omitted)); *see also* Christian Legal Soc'y v. Walker, 453 F.3d 853, 860 (7th Cir. 2006) (describing the SIU Board of Trustees' policy as stating, "[n]o student constituency body or recognized student organization shall be authorized unless it adheres to all appropriate federal or state laws concerning nondiscrimination and equal opportunity."). *But see Walker*, 453 F.3d at 860 (stating that the university failed to identify a policy that directly forbids student groups from discriminating on the basis of sexual orientation).

[70] *Kane*, 2006 WL 997217, at *2 (quoting the school's policy: "'Hastings College of Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.'"); *Walker*, 453 F.3d at 860 (quoting the school's policy: "SIU will 'provide equal employment and education opportunities for all qualified persons without regard to[, among other things,] sexual orientation.'" While SIU's policy is not as obvious as Hastings' policy, it arguably covers the same ground.). While the author of this Note does not intend to limit the discussion and suggestions to the gay, lesbian and bisexual community, the author believes that sexual orientation is one of the most contested protected groups in today's world. Therefore, an argument to protect such a group under anti-discrimination laws should carry over to others who also suffer from discrimination.

II. ANTI-DISCRIMINATION RULES DO NOT UNDULY BURDEN THE GROUPS' FIRST AMENDMENT RIGHTS

Under the appropriate First Amendment tests it is apparent that the universities' de-recognition of discriminating student groups does not necessarily infringe on the groups' First Amendment freedoms.

A. Freedom of Speech

The potential violations of the student groups' freedom of speech rights are two-fold and can be analyzed under two different constitutional tests. First, the universities may be infringing on the groups' rights to expressive conduct by denying them the option to discriminatorily choose their members and leaders while maintaining status as recognized student organizations.[71] Second, the universities potentially infringe on the groups' freedom of speech by denying them access to the university-created forum that allows recognized student groups to present their opinions and ideas to the rest of the student body.[72] An analysis of these possible violations reveals that enforcement of the universities' non-discrimination policies do not necessarily violate the groups' rights to free speech. [73]

1. Regulating Expressive Conduct: University Anti-Discrimination Policies

U.S. v. O'Brien outlines four factors that the court must consider when deciding whether a government (or public university) regulation unconstitutionally infringes on a group's ability to conduct itself expressively in furtherance of its constitutional right to free speech. [74] The first two factors are whether the conduct is within the government's constitutional power to regulate

[71] *Kane*, 2006 WL 997217 at *8.
[72] *Walker*, 453 F.3d at 859.
[73] The author uses the word "necessarily" because universities are capable of overzealously enforcing a regulation to the extent that they may abridge a group's First Amendment rights. *See* Healy v. James , 408 U.S. 169 (1972) (demonstrating that the University went too far by disbanding the group that met at the campus coffee shop).
[74] United States v. O'Brien, 391 U.S. 367, 377 (1968); s*ee also supra* text accompanying notes 24-28.

and whether it "furthers a substantial government interest."[75] In *Kane*, the court points to extensive authority that both of these *O'Brien* factors support the university's decision to derecognize the school-supported student group in order to prevent school-sponsored sexual orientation discrimination.[76] The court noted that "[s]tates have the constitutional authority and a substantial, indeed compelling, interest in prohibiting discrimination on the basis of . . . sexual orientation."[77] It follows that a public university, as an agent of the state, has the same power to protect its students from discrimination.[78] Therefore, a state and its public universities have the authority *and* a compelling interest to regulate discriminatory conduct.

The third *O'Brien* factor requires that the government regulation be "unrelated to the suppression of speech."[79] The Supreme Court has held that the state goal to eliminate discrimination does not relate to the suppression of speech.[80] Rather, the goal of anti-discrimination laws is to protect minority groups from economic and social harms that come from their membership in disfavored groups.[81] This goal relates to the regulation of discriminatory conduct, not speech.[82]

The final factor in the *O'Brien* test is whether the First Amendment infringement is limited to that which is necessary to further the state, and therefore the university's, interest in protecting its citizens, and students, from discrimination.[83] "[C]ourts have found that the

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[75] *Id*.
[76] Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *9 (N.D. Cal. May 19, 2006).
[77] *Id.* (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984); Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of N.Y., Inc., 968 F.2d 286, 295 (2d Cir. 1992); Presbytery of N. J. of the Orthodox Presbyterian Church v. Florio, 902 F. Supp. 492, 521 (D. N.J. 1995); Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 38 (D.C. Cir. 1987).
[78] *Kane*, 2006 WL 997217, at *9.
[79] *O'Brien*, 391 U.S. at 377.
[80] *Roberts*, 468 U.S. at 624; *see also Kane*, 2006 WL 997217, at *9; Evans v. Berkeley, 129 P.3d 394, 400 (Cal. 2006); Boy Scouts of America v. Dale, 530 U.S. 640, 680 (2000) (discussing *Roberts*, 468 U.S. at 624).
[81] Boy Scouts of America v. Wyman, 335 F.3d 80, 94 (2d Cir. 2003).
[82] *Kane*, 2006 WL 997217, at *8.
[83] *O'Brien*, 391 U.S. at 377; *see also Kane*, 2006 WL 997217, at *9 (applying the rule in the university context).

incidental restrictions on free speech rights when a government enforces an anti-discrimination statute against an organization seeking to exclude individuals were no greater than essential to the furtherance of the state's interest in prohibiting discrimination."[84] The CLS cases entail even less infringement, if any infringement at all, than many of the cases cited for this fourth element. The schools are neither forcing CLS groups to include unwanted individuals or to be a voice for those individuals with whose message they disagree; nor are the schools denying them the right to say what they believe.[85] The schools are simply denying them the "perks" associated with being a recognized student group.[86] Based on this analysis, university non-discrimination policies do not violate the groups' constitutional rights to expressively conduct themselves when enforced by derecognizing a discriminatory group. Moreover, any minimal incidental infringement that *may* result is necessary in order for the schools to protect individuals from discrimination.

2. Denial of Access to the Public Forum Created by the University for Recognized Student Groups

The method for discerning whether the university exceeded its power to the point of violating the group's First Amendment rights is a standard forum analysis.[87] When the university derecognizes a student group, it essentially ejects that group from the limited public forum it has created for student groups to communicate with the student body.[88] Any benefits

[84] *Kane*, 2006 WL 997217, at *9 (citing Jews for Jesus v. Jewish Cmty. Relations Council of N.Y., Inc., 968 F.2d 286, 296 (2d Cir. 1992); *Evans*, 129 P.3d at 217; Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 126 S. Ct. 1297, 1311 (2006)). *But see Dale*, 530 U.S. at 656 (holding that it is a violation of Boy Scouts of America's Freedom of Association to require them to accept a homosexual scout leader in order to comply with the New Jersey anti-discrimination law).
[85] *See Roberts*, 468 U.S. 609 (requiring the group to allow women); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) (holding organization had the right to refuse a group who wished to march behind a gay rights sign in their parade); Widmar v. Vincent, 454 U.S. 263 (1981) (refusing to allow the student group to use the available forum for religious speech).
[86] Christian Legal Soc'y v. Walker, 453 F.3d 853, 873 (7th Cir. 2006) (Wood, J., dissenting); *Kane*, 2006 WL 997217, at *1.
[87] *Walker*, 453 F.3d at 865.
[88] *Id*. at 857; *Kane*, 2006 WL 997217, at *1.

which the derecognized group is still able to take advantage of are purely at the discretion of the university.[89] Since the university can constitutionally regulate *content* in the limited public forum it creates, the issue is whether the school's decision to eject the student group from the forum based on their discriminatory conduct constitutes *viewpoint* discrimination, making it unconstitutional.[90]

The act of derecognizing discriminatory student groups is not unconstitutional viewpoint discrimination for two reasons. First, the university does not enforce the anti-discrimination policy based upon the group's speech, as discussed above, but rather upon its discriminatory conduct.[91] Therefore, the group is able to express any opinion it likes within the forum as long as it does not discriminate in choosing its members and leaders. Second, the non-discrimination policy, on its face, applies equally to all student groups.[92] Thus, the university will derecognize, and deny access to the limited public forum, any student group that acts discriminatorily regardless of the viewpoint they wish to express.[93]

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[89] *Walker*, 453 F.3d at 858 (allowing CLS to use unoccupied law school classrooms to meet); *Kane*, 2006 WL 997217 at *17 (allowing CLS to use campus facilities to meet).
[90] Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).
[91] Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984).
[92] *See Walker*, 453 F.3d at 860 ("[N]o student constituency body or recognized student organization shall be authorized unless it adheres to all appropriate federal or state laws concerning nondiscrimination and equal opportunity." (internal citation omitted)); *Kane*, 2006 WL 997217 at *2 (requiring "registered student organizations to abide by the Policy on Nondiscrimination." (internal citation omitted)). It is also important to note that Hastings had recognized the predecessor to CLS for ten years and only derecognized CLS when they submitted new bylaws that were in violation of the nondiscrimination policy. *Id.* at *3, 9.
[93] If the student group agreed not to discriminate, there are still two ways that the group can assure that their members and leaders are supportive of the goals of the group. First, in *Kane*, CLS submitted into evidence the bylaws of other organizations that they believed to be in violation of the anti-discrimination code. *Kane*, 2006 WL 997217, at *25. The bylaws of the Vietnamese American Law Society contained the following clause, "'any full-time student at Hastings may become a member . . . so long as they do not exhibit a consistent disregard and lack of respect for the objective of the organization,'" and "'[m]embership rules shall not violate the Nondiscrimination Compliance Code of Hastings.'" *Id.* Although this may not technically be a legal solution, the author believes a clause of this type should adequately function to prevent members who wish to be a counterproductive force in the group from being able to maintain membership status. Second, student officers are often elected by members of the organization; therefore, any individual who wishes to be an officer for disruptive reasons will likely not be elected.

B. Freedom of Expressive Association

After determining that student religious groups are expressive associations, the next issue in a freedom of association analysis is whether enforcement of the anti-discrimination law would significantly burden the discriminating group's ability to advocate a specific point of view.[94] In *Roberts v. United States Jaycees*, the Court identified three ways the government's conduct might unlawfully infringe on one's freedom of association: (1) "the impos[ing] of penalties or withhold[ing] of benefits from individuals because of their membership in a disfavored group;" (2) requiring a group to disclose their membership when they seek to keep that information private; and (3) interfering with the group's internal affairs.[95] Critics may argue that the university is infringing on the associational rights of the discriminating student group in the first and third categories but, the facts of the CLS cases are clearly distinguishable from the specific cases that create the first and third categories.

First, removal from the university's limited public forum, which often includes loss of financial support, faculty advisors, office or storage space, among many other advantages, arguably is "withholding benefits."[96] However, the *Roberts* opinion relied upon *Healy v. James*[97] for this assertion,[98] and *Healy* is easily distinguished from this situation. In *Healy*, university staff not only denied the student group recognition but also prevented it from meeting on campus.[99] The Court in *Healy* also expressly limited its decision to the denial of access to communication channels and refused to consider the denial of funding by the university.[100] This

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[94] Boy Scouts of America v. Dale, 530 U.S. 640, 650 (2000). *See Walker*, 453 F.3d at 861 (holding that student CLS chapters are groups of expressive association); *Kane*, 2006 WL 997217, at *4 (same); s*ee also supra* text accompanying note 54 (determining that a student religious group is a group of expressive association).
[95] *Roberts*, 468 U.S. at 622-23.
[96] *See Walker*, 453 F.3d at 858; *Kane*, 2006 WL 997217, at *1.
[97] Healy v. James, 408 U.S. 169 (1972).
[98] *Roberts*, 468 U.S. at 623.
[99] *Healy*, 408 U.S. at 176.
[100] *Id*. at 181-82, n. 8.

is distinguishable from the simple derecognition that will and has occurred in CLS cases.[101] Denying student groups recognized status does not give the university the right to disband the group when they attempt to meet in areas that are generally open to the student body. In fact, in both of the sample cases, *Walker* and *Kane*, the universities offered the student groups' access to university facilities for the purposes of holding meetings.[102] Therefore, when a university simply refuses to recognize a student group, without making further efforts to prevent them from meeting on campus, it does not burden the group's ability to advocate its views sufficiently to constitute infringement on the group's associational rights.

Additionally, since some religious groups embrace the belief that homosexuality is immoral,[103] forcing them to accept homosexual members may, arguably, hinder their ability to express those views and would, therefore, be an "interference with the group's internal affairs."[104] The primary examples of this form of infringement come from *Roberts*[105] and *Boy Scouts of America v. Dale* (hereinafter *Dale*).[106] Both of these cases involved state laws that required the private organizations, Jaycees and Boy Scouts of America (hereinafter "Boy Scouts") respectively, to accept members of a specific gender or sexual orientation.[107] The groups claimed these laws hindered their ability to express important viewpoints of their organization.[108] In *Roberts*, the Court determined that the Jaycees did not present sufficient evidence to demonstrate that allowing women to be members would seriously burden the views

[101] *Walker*, 453 F.3d at 858; *Kane*, 2006 WL 997217, at *18.
[102] *Walker*, 453 F.3d at 858; *Kane*, 2006 WL 997217, at *18.
[103] *Walker*, 453 F.3d at 863.
[104] *Id.* at 858; *Kane*, 2006 WL 997217, at *3; *Healy*, 408 U.S. at 176.
[105] *Roberts*, 468 U.S. at 609.
[106] Boy Scouts of America v. Dale, 530 U.S. 640 (2000).
[107] *Roberts*, 468 U.S. at 614-15; *Dale*, 530 U.S. at 644
[108] *Roberts*, 468 U.S. at 617; *Dale*, 530 U.S. at 644.

the Jaycees intended to express.[109] The Court found that the few contentions of infringement made by the group were grounded in sexual stereotyping, which it refused to indulge.[110]

In *Dale,* the Court gave deference to the Boy Scouts' assertion that they had a genuine interest in refusing to portray a message that homosexuality is a legitimate form of behavior.[111] The Court further deferred to the Boy Scouts assertion that forcing them to accept an openly gay activist as a troop leader would impair that interest.[112] Rendering this decision, the Court cautioned that groups should not use freedom of expressive association as a shield against anti-discrimination laws and that "mere acceptance of a member from a particular group" would not necessarily impair their message.[113] The Court relied heavily on the fact that Dale was a gay rights activist and not simply that he was a homosexual.[114] In support of this reasoning, the Court analogized the case to *Hurley v. Irish-American Gay, Lesbian and Bisexual Group* where the Court found a free speech violation in requiring a parade commission to allow a gay rights group to march in the parade behind a banner that expressed their sexual orientation.[115] In essence, the *Dale* Court viewed Dale's activism in the gay community as comparable to a gay rights banner and requiring the Boy Scouts to reinstate Dale would be the equivalent of allowing Dale to display a gay rights banner at Boy Scout events.[116]

In contrast to *Roberts* and *Dale,* the universities in the CLS cases are not forcing the discriminating groups to accept certain undesirable members, but simply denying the groups

[109] *Roberts*, 468 U.S. at 626.
[110] *Roberts*, 468 U.S. at 628.
[111] *Dale*, 530 U.S. at 654.
[112] *Id*.
[113] *See Id*.
[114] *Id*.
[115] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995).
[116] *Cf. Dale*, 530 U.S. at 696 (Stevens, J., dissenting) (quoting the Boy Scouts argument that Dale virtually hung a banner around his neck when he was quoted in the newspaper).

affirmative university support if they continue to discriminate against these individuals.[117] If, however, the student group did not have the option of maintaining its organization outside of the universities' recognition, then the *Dale* precedent establishes an infringement of freedom of association *only* if the group is required to accept homosexuals who are gay rights activists that make their sexual orientation well known to the public.[118] Denying a student group recognized status, therefore, is not a sufficient invasion into the group's internal affairs to constitute a freedom of association violation because derecognition does not force the group to accept certain members. And, even if the group feels pressure to accept the undesired members, they are not required to accept an individual who openly, actively, and publicly espouses views contrary to the goals of the organization.[119]

In sum, a university's decision to derecognize a student group that discriminates in violation of the anti-discrimination policy does not violate a group's implicit First Amendment freedom of expressive association.

C. Facially Neutral Free Exercise Test[120]

The current rule for assessing whether the government regulation is justified in the infringement of an individual's First Amendment right to freely exercise his or her religious

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[117] *See supra* notes 85-86 and accompanying text.

[118] *See supra* notes 113-116 and accompanying text. As a side note, it is likely that a student religious group could refuse a gay rights activist membership based on his or her desire to convince others to support and accept a lifestyle that is contrary to the religious tenants of the group.

[119] *Cf.* Darren Lenard Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 91 (1998) (arguing that "outness is intertwined with sexual identity" and that discrimination limited to openly gay activists is an attempt to silence them).

[120] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990). Some states have passed legislation adopting the *Sherbert* standard to govern free exercise claims. Jack S. Vaitayanonta, Note, *In State Legislature We Trust?: The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 COLUM. L. REV. 886, 902 (2001). Under the current state of the law, however, the Court is likely to find a compelling state interest in protecting individuals from discrimination on the basis of sexual orientation. *See supra* notes 63-67 and accompanying text. Therefore, a court would likely uphold the law under the *Sherbert* test as well. *See supra* notes 61-62 and accompanying text.

beliefs is whether the regulation is neutral on its face and generally applicable.[121] Anti-discrimination laws serve to protect individuals from the harms inherent in discriminatory conduct, such as the loss of social and economic opportunities and benefits.[122] Their purpose is not to hinder the beliefs expressed by specific groups, but rather the *conduct* of any individual who chooses to treat people in a way that furthers the harms of discrimination.[123] Generally, therefore, anti-discrimination laws are facially neutral.[124] Because the anti-discrimination laws at issue here apply to all student groups,[125] the entire university,[126] all businesses[127] or places of public accommodation,[128] and do not identify groups of specific substantive thought in prohibiting discriminatory conduct, these laws are generally applicable.

Based on the above analysis, it is clear that derecognizing student groups, in and of itself, does not violate the First Amendment rights of the students. Derecognition of the CLS groups by the universities did not constitute an impermissible infringement of the groups' free exercise of religion rights. There is a legitimate concern, however, that such a blanket authorization for the universities would leave the door open for university officials to go beyond simply denying

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[121] *Smith*, 494 U.S. at 872.
[122] Boy Scouts of America v. Wyman, 335 F.3d 80, 93 (2d Cir. 2003).
[123] *Id.*
[124] *Id.*
[125] Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *2 (N.D. Cal. May 19, 2006) ("As a condition of becoming a 'registered student organization,' . . . Hastings . . . require[s] a student organization to comply with the Law School's Policies and Regulations Applying to College Activities, Organizations and Students, . . . which [includes] . . . abid[ing] by the Policy on Nondiscrimination." (internal citation omitted)); *see also* Christian Legal Soc'y v. Walker, 453 F.3d 853, 860 (7th Cir. 2006) (describing the SIU Board of Trustees' policy as stating, "[n]o student constituency body or recognized student organization shall be authorized unless it adheres to all appropriate federal or state laws concerning nondiscrimination and equal opportunity."). *But see Walker*, 453 F.3d at 860 (stating that the university failed to identify a policy that directly forbids student groups from discriminating on the basis of sexual orientation).
[126] The Hastings Nondiscrimination policy states, "Hastings College of Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities." *Kane*, 2006 WL 997217, at *2. SIU's policy is not so obvious, but arguably covers the same ground as Hastings policy. SIU's policy states, "SIU will 'provide equal employment and education opportunities for all qualified persons without regard to[, among other things,] sexual orientation.'" *Walker*, 453 F.3d at 860.
[127] Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 2006).
[128] Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/1-102-03 (2006).

the discriminating groups status as recognized organizations. With this authorization, the universities may deny groups the opportunity to gather as like-minded students and to express their views, which would be a constitutional violation.[129]

III. REQUIRING A SUB-LEVEL FORUM TO FOSTER DIVERSITY WITHOUT DIRECTLY SUPPORTING DISCRIMINATORY CONDUCT

Protecting those who have suffered from discrimination throughout history and maintaining an active dialogue of diverse thought, by protecting First Amendment rights, are two very important components to a free, democratic society. These values are especially important in a public university setting. For this reason, neither of these government interests should take a back seat to the other.[130] Although universities should derecognize student groups that choose to discriminate, they should also provide adequate opportunities for those groups to present their beliefs and to associate with others who share common thoughts. In essence, the university must provide an alternative forum with minimal university involvement and sufficient opportunity for First Amendment expression.

Three lines of decisions lend themselves to the construction of this sub-level forum. The first line of cases articulates that the government need not, and indeed should not, subsidize discriminatory conduct.[131] The second line of cases state that the university must not take affirmative steps to completely disband student groups from campus facilities and speech forums

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[129] *See generally* Healy v. James , 408 U.S. 169 (1972) (holding the university went too far by denying the group of students access to the university coffee shop for the purpose of meeting).

[130] *But see* Snider, *supra* note 2 at 841 (arguing that First Amendment rights should prevail over anti-discrimination law regarding sexual orientation); Richard M. Paul, III & Derek Rose, Comment, *The Clash Between the First Amendment and Civil Rights: Public University Nondiscrimination Clauses*, 60 MO. L. REV. 889 (1995) (same); Bainbridge, *supra* note 61 (same). It is important to note, however, that the law regarding protection from discrimination based on sexual orientation has changed a great deal since the latter two of these articles were written. More specifically, the RFRA has been held unconstitutional, *see supra* note 62, and the Supreme Court had not yet decided *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), which held that laws criminalizing consensual sodomy between adults of the same sex are unconstitutional.

[131] Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Boy Scouts of America v. Wyman, 335 F.3d 80 (2d Cir. 2003).

based on the content or viewpoint of their speech.[132] And, finally, an influential Supreme Court case stands for the proposition that private groups may discriminate if it is fundamental to their beliefs.[133]

A. Government Need Not Subsidize Discriminatory Conduct

Professor Eugene Volokh recently discussed at length the idea that the government does not have a duty to subsidize a group simply because they are exercising a constitutional right.[134] Within his discussion, he quoted President Kennedy as saying, "[P]ublic funds, to which all taxpayers of all races contribute, [should] not be spent in any fashion which . . . subsidizes . . . racial discrimination."[135] It is logical to apply this statement to all types of protected groups, since people of every religion, gender, and sexual orientation pay taxes.

Bob Jones Univ. v. United States is one of the leading decisions on this issue.[136] Bob Jones University ("BJU") asserted the religious belief that the Bible forbids interracial dating and marriage.[137] In furtherance of this belief, BJU did not accept applications from any African-American students unless they were already married within their race.[138] The Internal Revenue Service denied the University tax-exempt status based on its discriminatory selection of students.[139] When BJU challenged this decision, the Court stated that the government need not

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[132] *Healy*, 408 U.S. 169; Widmar v. Vincent , 454 U.S. 263 (1981); *see also* Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 126 S.Ct. 1297, 1307 (2006) (requiring law schools to allow military recruiters the same access it allows other employers does not force the school to condone the military stance on sexual orientation).
[133] Boy Scouts of America v. Dale, 530 U.S. 640 (2000).
[134] Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1924 (2006).
[135] *Id*. at 1928 (quoting Special Message to the Congress on Civil Rights and Job Opportunities, 1 Pub. Papers 483, 492 (June 19, 1963)).
[136] *Bob Jones Univ.*, 461 U.S. 574.
[137] *Id* at 584.
[138] *Id.* at 580.
[139] *Id*.

confer a benefit on an organization that chooses to discriminate because such discriminatory conduct is contrary to public policy.[140]

Similarly, in *Boy Scouts of America v. Wyman*, a state-run charitable campaign denied the Boy Scouts the opportunity to participate in the campaign because the Boy Scouts discriminated against individuals on the basis of sexual orientation which violated the state's gay rights law.[141] The Court held that the State was justified in this action because it furthered the State's compelling interest in protecting individuals from discrimination based on sexual orientation.[142] Chief Justice Burger succinctly phrased this concept in *Norwood v. Harrison* when he stated, "That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination."[143]

B. Universities may not take Affirmative Steps to Disband the Student Groups from Campus Facilities and Speaking Forums

The most poignant example of the principle that universities may not take affirmative steps to disband student groups from campus facilities or speaking forums comes from the Supreme Court case, *Healy v. James*.[144] In *Healy*, a university denied a student political group status as a recognized student group because the President of the University was fearful of their radical views and the possibility of civil disobedience.[145] However, the President went beyond just refusing them status as a recognized student organization. When the group of students attempted to gather at the university's coffee shop, the President had two college deans present the students with a memorandum explaining that they could not use the university facilities and

[140] *Id.* at 592.
[141] Boy Scouts of America v. Wyman, 335 F.3d 80, 83 (2d Cir. 2003).
[142] *Id.* at 99.
[143] Norwood v. Harrison, 413 U.S. 455, 463 (1973).
[144] Healy v. James, 408 U.S. 169 (1972).
[145] *Id.* at 171-75.

that they must leave.[146] The Court reasoned that, while the school has a right to insist that student groups comply with the university rules, refusing to recognize the group who has complied with the rules is a violation of the group's First Amendment associational right.[147] The Court further held that the primary constitutional violation resulted from the school's denial of campus facilities for "meetings and other appropriate purposes."[148]

In *Widmar v. Vincent*, the university told a registered student group that they could no longer use the university facilities because they were using them for purposes of worship and religious teachings.[149] The Court held that allowing the group to use the facilities for worship was not a violation of the Establishment Clause, and in fact, denying them access to the limited public forum that the university had created for student groups would be considered discriminatory and in violation of their freedom of speech.[150] These two cases illustrate that public universities cannot deny student groups access to school facilities for purposes of meeting and expressing their views.

C. Private Groups may Discriminate if Requiring Them to Act Otherwise would Significantly Burden the Groups' Desired Message

In the landmark case of *Boy Scouts of America v. Dale*, discussed above, the Boy Scouts removed Dale from his leadership position within the organization when they discovered that he was a homosexual and that he was the Co-President of the Rutgers University Lesbian/Gay Alliance.[151] The Boy Scouts stated that Dale's presence as a Boy Scout leader would hinder their ability to instill values in young people, especially the idea that homosexuality is

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[146] *Id.* at 176.
[147] *Id.* at 181, 192.
[148] *Id.* at 181. It should also be noted that the court refused to consider the receipt of funds as an "associational aspect of nonrecognition." *Id*. at 182.
[149] Widmar v. Vincent, 454 U.S. 263, 264 (1981).
[150] *Id*. at 271-73, 278.
[151] Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000).

immoral.[152] The Supreme Court held that as a private organization, the Boy Scouts have a right to choose the views they wish to express and that requiring them to retain a leader that is a gay rights activist is a substantial burden on their ability to express their opposing views on sexual orientation.[153] This requirement would, therefore, be a violation of their freedom of expressive association.[154]

Finally, based on the decisions in the above cases, it appears that a university need not and should not provide financial support or otherwise subsidize groups that choose to discriminate in their selection of members.[155] On the other hand, a university cannot deny those groups access to the school facilities for purposes of holding meetings.[156] Also, as private organizations, unrecognized student groups are justified in discriminating if such conduct is fundamental to their message.[157] The public university should, therefore, be required to allow student groups access to university facilities regardless of their status as recognized student organizations. This access will, in effect, create a second limited public forum to which the university will be required to remain content and viewpoint neutral, only placing restrictions with regard to time, place, and manner of the students' speech.[158] The student group will be allowed, however, to choose its members as it sees fit, without forcing the university to condone and support such discriminatory conduct.

D. The Equal Access Act[159]

Fortunately, Congress has already enacted legislation that, with minor alterations, can adequately structure this suggested forum.[160] The Equal Access Act, enacted in 1984, states:

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[152] *Id*. at 649-50.
[153] *Id*. at 644, 656.
[154] *Id.*
[155] *See supra* text accompanying notes 134-143.
[156] *See supra* text accompanying notes 144-150.
[157] *See supra* text accompanying notes 151-154.
[158] *See supra* text accompanying notes 40-45.
[159] Equal Access Act, 20 U.S.C. §§ 4071-74 (2000).

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.[161]

This statute discusses several key aspects necessary to ensure the forum functions properly and in accordance with the law.[162] First, the statute defines a "limited open forum" as a forum that allows one or more groups of students to use school facilities during non-instructional times for a purpose unrelated to school curriculum.[163] Second, it identifies a "fair opportunity" as one that requires the meeting to be voluntary and initiated by students without sponsorship by the school or government (these entities may only be present in a non-participatory fashion).[164] The meetings cannot substantially interfere with the school's ability to orderly conduct its educational activities; and they cannot be directed, controlled, or regularly attended by individuals who are not students or employees of the school.[165]

The statute also lists important restrictions on school and government involvement.[166] These restrictions establish that neither the government nor any political subdivision shall: influence the form or content or require anyone to participate in any religious activity, spend financial funds in support beyond those incidental to providing the space, require any school employees to attend, sanction unlawful meetings, limit the rights of the group based on their size, or abridge any constitutional rights of the individuals involved.[167] Finally, the statute states that this Act should not limit the schools authority to "maintain order and discipline on school

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[160] *Id.*
[161] *Id*. § 4071(a).
[162] *Id.* § 4071(b)-(c).
[163] *Id.* § 4071(b).
[164] *Id.* § 4071(c).
[165] *Id*.
[166] *Id*. § 4071(d).
[167] *Id.*

premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary."[168]

The obvious problem with this statute, as far as its applicability to the issue at hand, is that it applies to secondary schools as opposed to higher education.[169] There are two ways to remedy this dilemma at the university level, (1) a virtually identical statute could be enacted as applied to public institutes of higher education simply by replacing the words "public secondary school"[170] with "public institute of higher education," or (2) the Equal Access Act could be amended to include the words "or public institute of higher education" immediately following the words "public secondary school" in section 4071(a).[171] Following either of these paths of regulatory action would allow diverse thought to flourish on the university campus while still permitting the university to further its compelling interest in prohibiting discrimination in school-sponsored programs.

CONCLUSION

Universities should not allow discriminatory student groups to maintain their status as a recognized student organization as long as they maintain non-compliance with the universities' anti-discrimination policies. Derecognition by the university does not necessarily infringe on the student group's First Amendment rights; however, infringement may occur depending on the university's subsequent treatment of the group. To prevent any possible infringement, the universities should be required to provide for a sub-level forum that allows the unrecognized student groups or individual students to congregate and express their views within the campus

[168] *Id.* § 4071(f).
[169] *Id*.
[170] *Id.* § 4071(a).
[171] *Id.*

facilities. A federal statute modeled after the Equal Access Act,[172] or an amendment to the Equal Access Act, can adequately define this required sub-level forum. The Equal Access Act does an excellent job of drawing guidelines for the level of school involvement.[173] These guidelines can easily be adapted and applied to the university context. The existence of this statutorily-required forum will give university officials much needed guidance in enforcing anti-discrimination laws while still protecting the students, First Amendment rights.

Legislation structured in this manner is imperative to protect the values that are so dear to American tradition: the fundamental rights espoused in the First Amendment of the Constitution[174] and the State interest in insuring that everyone has the same opportunities in life, free from discrimination. Finding this balance, where neither interest is determined to be more important that the other, is also vital to encourage the American people to be tolerant of the values, perspectives, and lifestyles of others.

[172] 20 U.S.C. §§ 4071-74 (2000).
[173] *See supra* notes 162-168 and accompanying text.
[174] U.S. CONST. amend. I.