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EXPRESSIVE ASSOCIATION—STUDENT ORGANIZATIONS' RIGHT TO DISCRIMINATE: A LOOK AT PUBLIC LAW SCHOOLS' NONDISCRIMINATION POLICIES AND THEIR APPLICATION TO CHRISTIAN LEGAL SOCIETY STUDENT CHAPTERS

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NOTES

EXPRESSIVE ASSOCIATION—STUDENT ORGANIZATIONS’ RIGHT TO DISCRIMINATE: A LOOK AT PUBLIC LAW SCHOOLS’ NONDISCRIMINATION POLICIES AND THEIR APPLICATION TO CHRISTIAN LEGAL SOCIETY STUDENT CHAPTERS

INTRODUCTION

The Christian Legal Society (CLS) is very serious about “filing ‘free speech’ lawsuits . . . across the country” in order to prevent law schools from applying their nondiscrimination¹ policies to its student chapters.² Applying the universities’ nondiscrimination policies would revoke the CLS’s status as a recognized student organization, unless the CLS allowed non-Christians and homosexuals to become members of the local student chapters.³ The loss of recognized status would divest the CLS chapters of particular benefits. The CLS argues that it should not have to open up its doors to people who do not share its members’ beliefs, and furthermore, that doing so would infringe upon, among other things, its freedom of expressive association.⁴

This Note focuses on current litigation between the CLS and public law schools and argues that applying antidiscrimination policies to the CLS student chapters and other student religious groups is justified notwithstanding the groups’ First Amendment expressive rights. Part I of this Note will discuss the background necessary to analyze the arguments advanced by both the CLS and the law schools. In particular, it introduces the basic concepts associated with First Amendment expressive protections; and it analyzes viewpoint discrimination, including a background discussion of associational speech and compelled speech jurisprudence. Part II of

1. These are also referred to as “antidiscrimination policies.”

2. E.J. Montini, *ASU Students Suing For ‘Right’ to Discriminate*, ARIZ. REPUBLIC, Jan. 2, 2005, at B10, available at LEXIS.

3. *Id.*

4. Mark Hansen, *Christians On Campus: Legal Society Says Universities Must Let It Choose Members, Officers Based on Beliefs*, A.B.A. J., Feb. 2005, at 12-13, available at 91-FEB ABA J. 12 (Westlaw).

this Note discusses both the essence of the CLS and the relevant public law schools' nondiscrimination policies. Part III analyzes arguments made by the CLS and those made by the law schools. It concludes that the CLS must comply with the schools' nondiscrimination policies if it desires official campus recognition.

I. BACKGROUND

A. *First Amendment Free Speech Protections*

The First Amendment provides citizens of the United States with the freedom of religion, freedom of speech and press, freedom to assemble, and freedom to petition the Government for a redress of grievances.⁵ The freedoms of speech and press, as enumerated in the First Amendment, are fundamental American ideals, "For it is a prized American privilege to speak one's mind, although not always with perfect good taste."⁶ Such freedoms may not be silenced or suppressed simply because they are unpopular, extreme, controversial, or in poor taste.⁷ Along with freedom of speech in the traditional sense, the First Amendment protects the freedoms of association.⁸ Specifically, the Supreme Court has recognized two protected associational freedoms under the First Amendment—intimate association⁹ and expressive association.¹⁰

5. U.S. CONST. amend. I.

6. *Bridges v. California*, 314 U.S. 252, 270 (1941).

7. 16A AM. JUR. 2D *Constitutional Law* § 497 (2005) (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Cohen v. California*, 403 U.S. 15 (1971); *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Street v. New York*, 394 U.S. 576 (1969); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)).

8. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984) (citing *U.S. Jaycees v. McClure*, 709 F.2d 1560, 1570 (1983)). Although the First Amendment does not articulate a freedom of association, the Court has recognized that the amendment embodies such freedoms. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). In *Democratic Party of United States v. Wisconsin*, the Court clearly reiterated this sentiment when it stated that the "First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State." *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 121 (1981).

9. Intimate association, not particularly relevant here, prohibits the government from impeding upon or interfering with an individual's right to choose to engage in relationships such as those centered on the idea of creating, maintaining, and developing a family, including marriage and the raising of children. *Sanitation & Recycling Indus., Inc. v. City of N.Y.*, 107 F.3d 985, 996 (2d Cir. 1997) (citing *Roberts*, 468 U.S. at 619).

10. *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 438 (3d Cir. 2000) (citing *Roberts*, 468 U.S. at 617-18).

1. Expressive Association

Expressive association protects an individual's right to associate in groups in order to engage in basic First Amendment freedoms of religion, speech, press, and assembly.¹¹ More, the protection of associational groups allows citizens to engage in freedoms such as the pursuit of political, educational, and religious means.¹² Protection of associational groups is necessary to prevent oppression by the majority.¹³ An expressive group's ability to select and exclude members is protected, but not unconditionally, by the freedom of expressive association.¹⁴ Although the constitutional protection is broad, freedom of expressive association does not protect all groups,¹⁵ for example, those that are only incidentally expressive.¹⁶

a. *Expressive Association and the Roberts Trilogy*

Until 2000, expressive association claims were analyzed under the framework articulated by the United States Supreme Court in *Roberts v. United States Jaycees*,¹⁷ *Board of Directors of Rotary International v. Rotary Club of Duarte*,¹⁸ and *New York State Club Ass'n v. City of New York*¹⁹ (hereinafter referred to as the *Roberts* trilogy).²⁰ Under the framework of the *Roberts* trilogy, an organi-

11. *Sanitation & Recycling Indus., Inc.*, 107 F.3d at 996.

12. *Roberts*, 468 U.S. at 622 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-09, 932-33 (1982); *Larson v. Valente*, 456 U.S. 228, 244-46 (1982); *In re Primus*, 436 U.S. 412, 426 (1978); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977)).

13. *Id.* at 622 (citing *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974); *Griswold v. Connecticut*, 381 U.S. 479, 482-85 (1965); *NAACP v. Button*, 371 U.S. 415, 431 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)).

14. *Roberts*, 468 U.S. at 617; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 13 (1988).

15. *Roberts*, 468 U.S. at 620.

16. *Dale*, 530 U.S. at 648. For example, in *City of Dallas v. Stanglin*, the Court found that patrons of a dancehall were not members of any organized association, and held that a mere "kernel of expression" found in everyday activity is not sufficient to bring the group or activity within the ambit of constitutional protection. *City of Dallas v. Stanglin*, 490 U.S. 19, 25-26 (1989). Conversely, the *Dale* Court found that the Scouts engaged in expressive activity worthy of associational protection because, in part, the Scouts mission was to "'instill values in young people.'" *Dale*, 530 U.S. at 649 (quoting the Boy Scouts' "Scout Oath").

17. *Roberts*, 468 U.S. 609.

18. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

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

20. Adrienne K. Zahner, Note, *A Comprehensive Approach to Conflicts Between Antidiscrimination Laws and Freedom of Expressive Association After Boy Scouts of America v. Dale*, 77 *CHI.-KENT L. REV.* 373, 375-77 (2001). *Roberts*, *Duarte*, and *New York State Club Ass'n* are referred to as the *Roberts* trilogy. Susan Frances, Note,

zation making an expressive association claim was required to show that the nondiscrimination policy, if applied to the organization, would have “significantly burden[ed] the organization’s expressive activities.”²¹ If the organization successfully met this burden, then the court balanced the organization’s interest in expressive association against the state’s interest in eliminating discrimination.²² Under the *Roberts* trilogy, the Court viewed the state’s interest in eliminating discrimination as compelling per se.²³

Essentially, *Roberts* and *Duarte* held that eradicating gender discrimination in places of public accommodation was a compelling state interest. State antidiscrimination laws, which accomplished their goals via the least restrictive means and were not motivated by the suppression of ideas, were therefore constitutional.²⁴ The Court reached the same result in *New York State Club Ass’n*.²⁵ More noteworthy, the Court seemed to back down from its holdings in the previous two cases. In *Roberts* and *Duarte*, the Court stated in dicta that an organization could potentially prove that a state accommodations statute violated its First Amendment rights.²⁶ The Court explained that a group that could show that it was organized for expressive purposes and would “not be able to advocate its desired viewpoints nearly as effectively if it [could not] confine its

Every Judgment is a Weapon if You Hold it Right: Right to Expressive Association in Boy Scouts of America v. Dale, 26 S. ILL. U. L.J. 361, 362 (2002).

21. Zahner, *supra* note 20, at 386.

22. *Id.* (citing *Roberts*, 468 U.S. at 623; *Duarte*, 481 U.S. at 549 n.19).

23. *Id.* at 387.

24. *Id.* In *Roberts*, the Court found that a Minnesota statute, which forced the United States Jaycees to accept women as members, would not infringe upon the organization’s ability to engage in constitutionally protected rights, or prevent the organization from expressing its ideas. *Roberts*, 468 U.S. at 627. Moreover, the Court stated that the forced inclusion of women would not seriously undermine the Jaycees’ message of “promoting the interests of young men.” *Id.* at 627. Similarly, the Court in *Duarte* found that a California statute that forced Rotary Clubs within the state to accept female members was constitutional. *Duarte*, 481 U.S. at 549. The Court held that admitting women would have no significant effect on the Club’s expressive activities evidenced by the Club’s refusal to take positions on political issues. *Id.* at 548.

25. *N.Y. State Club Ass’n*, 487 U.S. at 18. In *New York State Club Ass’n*, the Court rejected the Club’s First Amendment challenge of a New York statute which made it unlawful for any “institution, club or place of accommodation” to “withhold from or deny to such person any of the accommodations” because of “race, creed, color, national origin or sex of any person.” *Id.* at 4 n.1.

26. *See id.* at 1, 13.

membership,"²⁷ would have a strong expressive association claim in lieu of the state's antidiscrimination law.²⁸

b. Expressive Association After Dale

In *Dale*, the Court partially abandoned the framework it had used under the *Roberts* trilogy.²⁹ James Dale had sued the Boy Scouts of America after they discovered that he was an "avowed homosexual and gay rights activist"³⁰ and removed him from his position as an assistant scoutmaster. He claimed that by revoking his membership, the Scouts had violated New Jersey's public accommodations statute.³¹

The Court first found that the Boy Scouts were an organization that "engages in expressive activity."³² Next, the Court asked whether forcing the Scouts to accept Dale as a member would undermine or "significantly affect the Boy Scouts' ability to advocate public or private viewpoints."³³ The Court found that the Scouts sincerely held the view that homosexual behavior is inconsistent with its "Scout Oath" and conflicts with the Scouts' "core message."³⁴ The Court then opined that the forced inclusion of James Dale would "significantly burden the organization's right to oppose or disfavor homosexual conduct."³⁵ Thereafter, the Court wandered from the framework it had laid out in the *Roberts* tril-

27. *Id.* at 13. Specifically, the Court mentioned groups that wished to restrict membership on the basis of sex or religion. *Id.*

28. *Id.*

29. *See Dale*, 530 U.S. at 658-59; *see also Zahner*, *supra* note 20, at 386-88 ("The *Dale* analysis did not follow the analytical framework laid out in the *Roberts* trilogy. . . . [It] departed from the second part of the *Roberts* framework altogether.").

30. *Dale*, 530 U.S. at 643-44.

31. *Id.* at 644. The statute here at issue, New Jersey's public accommodations statute, states:

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons.

Id. at 663-64 n.1 (Stevens, J., dissenting) (quoting N.J. STAT. ANN. § 10:5-5 (West 2000)).

32. *Id.* at 649-50.

33. *Id.* at 650.

34. *Id.* at 652-53.

35. *Id.* at 658-59.

ogy³⁶ and abruptly concluded, “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.”³⁷ The Court provided no explanation as to why the state’s interests did not justify such an intrusion, nor did it address whether the state’s interests were compelling.³⁸ Moreover, the Court did not undertake a balancing test to determine whether the state’s interest, assuming that it was compelling and unrelated to the suppression of ideas, did or did not outweigh the Scouts’ interest in freedom of expressive association.³⁹

2. Expressive Association and Compelled Speech in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*⁴⁰

The First Amendment, in addition to restricting suppression of speech, prevents the state “from compelling individuals to express certain views”: that is, the state cannot force someone to say something that he or she does not want to say.⁴¹ Although compelled speech is conceptually different from restriction of speech by the state, they both interfere with the individual’s right to speak his or her mind and, therefore, the constitutional analysis for both is similar.⁴²

An important case, which addressed compelled speech of a parade organizer and that was heavily relied upon by the *Dale*

36. See *id.*; see also Zahner, *supra* note 20, at 386-88 (“The *Dale* analysis did not follow the analytical framework laid out in the *Roberts* trilogy. . . . [It] departed from the second part of the *Roberts* framework altogether.”).

37. *Dale*, 530 U.S. at 659.

38. See *id.* at 658-59; see also Zahner, *supra* note 20, at 386-88.

39. Zahner, *supra* note 20, at 387-88.

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

41. *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

42. See *Dale*, 530 U.S. at 659. The Court has articulated three types of compelled speech that are prohibited by the First Amendment. *FAIR v. Rumsfeld*, 390 F.3d 219, 235-36 (3d Cir. 2004). The first is “government action that forces a private speaker to propagate a particular message.” *Id.* at 236 (citing *Barnette*, 319 U.S. at 642; *Wooley*, 430 U.S. at 717). The second is when the state forces a private individual to accept another private individual’s viewpoint via a government regulation or statute. *Id.* (citing *Hurley*, 515 U.S. at 581; *Pacific Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 12-16 (1986)). Government action that coerces an individual to subsidize or fund an organization that engages in speech that the individual disagrees with makes up the third category. *Id.* (citing *United Foods, Inc.*, 533 U.S. at 413).

opinion, is *Hurley*.⁴³ The Court in *Dale* noted that the *Hurley* opinion did not explicitly deem the parade an expressive association; nevertheless, the Court found the analysis used in *Hurley* to be applicable in *Dale*.⁴⁴ In *Hurley*, the state's public accommodations law forced organizers of Boston's Saint Patrick's Day Parade to allow the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) to march in the parade behind a banner that openly identified the group.⁴⁵ The parade organizers argued that forcing them to include GLIB would violate their First Amendment rights.⁴⁶ The *Hurley* Court found that parades are forms of expression, and noted that the "Constitution looks beyond written or spoken words as mediums of expression."⁴⁷ The Court held that the state antidiscrimination law cannot force organizers of the parade to include members who communicate a message that the organizers do not desire to express.⁴⁸ The Court acknowledged that the state is allowed to promulgate a law that promotes beneficial *conduct* in order to displace "harmful behavior," but it may not "interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one."⁴⁹

3. Expressive Association of Student Groups in *Healy v. James*

In *Healy v. James*,⁵⁰ a group of students attending Central Connecticut State College (CCSC), a state-supported institution, sought to form a local chapter of Students for a Democratic Society (SDS).⁵¹ CCSC's president denied the students' request, and did not afford the SDS official campus recognition.⁵² The president justified his decision on the premise that the local SDS chapter had, at a minimum, a loose affiliation with the national SDS organization, and therefore, based on the published philosophy of the SDS,⁵³ the

43. *Hurley*, 515 U.S. 557.

44. *Dale*, 530 U.S. at 659.

45. *Zahner*, *supra* note 20, at 378 (citing *Hurley*, 515 U.S. at 561-66).

46. *Hurley*, 515 U.S. at 563.

47. *Id.* at 568-69.

48. *Zahner*, *supra* note 20, at 378 (citing *Hurley*, 515 U.S. at 559).

49. *Hurley*, 515 U.S. at 579.

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

51. *Id.* at 170-71.

52. *Id.* at 174-76.

53. During the early part of the 1970s a climate of unrest and civil disobedience was prevalent among many college campuses. *Id.* at 170-71 (citing REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST (1970); REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON CAMPUS GOVERNMENT AND STUDENT DISSENT

local chapter would be in violation of CCSC's approved conduct policy,⁵⁴ which governed student groups and condemned disruptive behavior.⁵⁵

In response, the local SDS, consisting of CCSC students, filed suit in federal district court seeking declaratory and injunctive relief; its primary complaint alleged that CCSC infringed on its First Amendment right of association by denying it recognition.⁵⁶ In its holding in favor of the student group, the Supreme Court noted, "There can be no doubt that the denial of official recognition, without justification, to college organizations burdens or abridges that associational right."⁵⁷ The Court stated that there is a potentially acceptable ground for denying the SDS official campus recognition regardless of its First Amendment associational rights.⁵⁸ The Court explained that a disagreement with a group's philosophy is not enough by itself to deny a student group recognition;⁵⁹ however, "[a]ssociational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."⁶⁰

The Court concluded that, in the case at bar, there was insubstantial evidence to show that CCSC-SDS posed a threat of "material disruption," but if there was such evidence, the refusal to recognize the group, notwithstanding its associational claim, would be valid.⁶¹ Thus, under *Healy*, a school cannot bar a group from associating as a recognized student group as long as the group fol-

(1970)). SDS played a part in creating this atmosphere, and may have played a role in the "seizure of buildings, vandalism, and arson." *Id.* at 171.

54. The policy, approved by the students and faculty, states:

Students do not have the right to invade the privacy of others, to damage the property of others, to disrupt the regular and essential operation of the college, or to interfere with the rights of others. . . .

. . . .

Freedom of speech, academic freedom on the campus . . . [a]re all precious freedoms that that we cherish and are freedom on which we stand. To approve any organization or individual who joins with an organization which openly repudiates those principles is contrary to those freedoms and to the approved "Statement on the Rights, Freedoms, and Responsibilities of Students" at Central.

Healy, 408 U.S. at 174-75 n.4 (citing Brief of Appellant 15-16, *Healy*, 408 U.S. 169 (No. 71-452)).

55. *Id.* at 174-76.

56. *Id.* at 177.

57. *Id.* at 181.

58. *Id.* at 185.

59. *Id.* at 187.

60. *Id.* at 189.

61. *Id.*

lows the formalities of recognition, does not pose a threat of material interruption to the campus, and no other compelling state interest warrants non-recognition.⁶²

4. Expressive Association and *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*⁶³

In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Forum for Academic and Institutional Rights, Inc. (FAIR), an association of law schools,⁶⁴ challenged the constitutionality of the Solomon Amendment⁶⁵ on First Amendment free speech and association grounds.⁶⁶ Law schools that are members of FAIR have nondiscrimination policies, and therefore wish to restrict military recruiting on their campuses because of the military's policy prohibiting homosexuals from joining the Armed Forces.⁶⁷ The Solomon Amendment requires law schools to provide military recruiters access equal to that of other recruiters.⁶⁸ If the schools want to continue to receive federal funding, they must provide military recruiters access to the law school campus if other recruiters are allowed on law school grounds.⁶⁹ According to FAIR, the Solomon Amendment was unconstitutional because it forced schools to choose between exercising their First Amendment expressive rights or accommodating the military's message and thereby ensuring federal funding.⁷⁰

62. See Mark Andrew Snider, Note, *Viewpoint Discrimination By Public Universities: Student Religious Organizations and Violations of University Nondiscrimination Policies*, 61 WASH. & LEE L. REV. 841, 852 (2004).

63. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297 (2006) [hereinafter "Rumsfeld v. FAIR" or FAIR].

64. FAIR's purpose is to "promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education." *Id.* at 1302.

65. 10 U.S.C. § 983 (2000). In 1994, New York Representative Gerald Solomon sponsored an amendment to the National Defense Authorization Act for Fiscal Year 1995. Pub. L. No. 103-337 § 558, 108 Stat. 2663, 2776 (1994). The Amendment was thereafter dubbed the "Solomon Amendment." Deborah F. Buckman, *Validity, Construction, and Application of the Solomon Amendment, Which Denies Federal Funding to Institutions of Higher Education that Prohibit Military Representatives Access to and Assistance for Recruiting Purposes*, 5 A.L.R. Fed. 2d 551, 558 & n.4 (2005).

66. FAIR, 126 S. Ct. at 1303.

67. *Id.* at 1302 & n.1. The military's policy, adopted by Congress, generally prevents a person from joining the Armed Forces if he or she has "engaged in homosexual acts, stated that he [or she] is a homosexual, or married a person of the same sex." *Id.* at 1302 n.1.

68. *Id.* at 1302.

69. *Id.* at 1303.

70. *Id.*

The Third Circuit held that conditioning the funds was unconstitutional for essentially three reasons.⁷¹ First, under the Amendment, in order to accommodate military recruiters as they do other recruiters, the law schools would need to send out e-mails and distribute flyers in order to announce that the military recruiters were on campus to conduct interviews.⁷² The Third Circuit viewed this as in effect compelling the schools to convey the government's message.⁷³ Second, requiring law schools to host military recruiters on campus unconstitutionally forced law schools to accommodate the military's anti-homosexual message.⁷⁴ Third, the Solomon Amendment, even if read only to regulate conduct, would nonetheless violate the schools' right to engage in expressive conduct.⁷⁵

The Supreme Court rejected all three of these positions. First, the Court agreed that freedom of speech prevents the government from compelling groups to say something that they do not wish to say.⁷⁶ The Court gave examples like forcing schoolchildren to recite the Pledge of Allegiance and forcing New Hampshire motorists to display "Live Free or Die" on their license plates.⁷⁷ However, with regard to the law schools, the Court viewed the allegedly forced recruiting assistance (sending out informational e-mails and flyers regarding military recruiters) as "a far cry from the compelled speech" present in the aforementioned examples.⁷⁸ Moreover, the Court described the compelled speech present in *FAIR* as merely incidental to the regulation of conduct.⁷⁹

Next, the Court acknowledged that it has limited the government's ability to "force one speaker to host or accommodate another speaker's message."⁸⁰ However, in this case, the Court opined that accommodating the military's message would not affect the schools' speech because hosting interviews and allowing recruiters on campus is not speech per se.⁸¹ The Court stated that, considering that high school students can "appreciate the difference

71. *Id.* at 1307.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1308.

77. *Id.* at 1307 (citing *Wooley v. Maynard*, 430 U.S. 705, 717 (1977); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

78. *Id.* at 1308.

79. *Id.*

80. *Id.* at 1309 (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995)).

81. *Id.* at 1309-10.

between speech a school sponsors and speech the school permits because [they are] legally required to do so, pursuant to an equal access policy," then "[s]urely students have not lost that ability by the time they get to law school."⁸²

The Court then examined the schools' expressive association claims. FAIR argued that the law schools' ability to express their message—that discrimination on the basis of sexual orientation is wrong—was substantially affected by forcing them to allow and assist military recruiters on campus.⁸³ FAIR relied heavily on *Dale* in making this argument.⁸⁴ The Court disagreed with FAIR's reasoning, stating that the critical distinction between this case and *Dale* was that the Solomon Amendment did not force the school to accept members, because recruiters were not part of the law school; they were outsiders who use the campus for a limited time and for a limited purpose.⁸⁵ Moreover, the Court rejected the idea that FAIR was engaging in symbolic speech by selecting which recruiters the school allowed on campus.⁸⁶ In addition, the Court said that, if they wished, the law school and its faculty and students, under the Amendment, were free to "voice their disapproval of the military's message" in a number of alternative ways.⁸⁷

The Court summed up its review of FAIR's free speech claims by opining that the law schools plainly overstated the expressive nature of their activity, and that the Solomon Amendment's impact on their expressive activity was not substantial.⁸⁸ Thus, the Court rejected the Third Circuit's conclusion that the Solomon Amendment violated the schools' freedom of speech.⁸⁹ In the end, the Court suggested that Congress could have forced the schools to

82. *Id.* at 1310 (citing *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)).

83. *Id.* at 1312.

84. *Id.* at 1308.

85. *Id.* at 1312.

86. *Id.*

87. *Id.* at 1313.

88. *Id.*

89. *Id.* The Court stated that "[a]lthough Congress has broad authority to legislate on matters of military recruiting, it nonetheless chose to secure campus access for military recruiters indirectly, through its Spending Clause power." *Id.* at 1306. The Court went on to state that because "Congress could require law schools to provide equal access to military recruiters without violating the schools' freedoms of speech or association," the lower court erred in holding that the Solomon Amendment violated the First Amendment. *Id.* at 1313. The thrust of the opinion was that Congress could have used more pervasive means to force open the schools' doors to military recruiters, but chose instead to condition funding upon granting access. *Id.* In light of this, the schools' First Amendment claims were not persuasive. *See id.*

open their doors to recruiters unconditionally instead of using the spending power to condition funding upon schools opening their doors.⁹⁰

B. *Viewpoint Discrimination*

Government regulation of speech based on the viewpoint or content of that speech is unconstitutional.⁹¹ However, depending on the speech's forum,⁹² the government may in some circumstances restrict speech and expressive activities.⁹³ Expressive activity may be banned because the activity is itself harmful, but not because of the idea it portrays.⁹⁴ For example, assaulting a person

90. *Id.* at 1306, 1313 (stating that "Congress has broad authority to legislate on matters of military recruiting," and "[b]ecause Congress could require law schools to provide equal access to military recruiters without violating the schools' freedoms of speech or association, the Court of Appeals erred in holding that the Solomon Amendment likely violates the First Amendment").

91. 16A AM. JUR. 2D *Constitutional Law* § 458 (1998) (citing *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530 (1980)).

92. The Court has recognized three types of fora to help determine whether restrictions on speech are permissible: the traditional public forum, the designated public forum, and the nonpublic forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

93. *See Widmar v. Vincent*, 454 U.S. 263, 276-77 (1981). In *Widmar*, the recognized student organization, Cornerstone, was informed that it could no longer use University buildings for meeting space. *Id.* at 265. Students, all members of the group, filed suit to challenge the restriction, claiming that the policy, which the University promulgated, "violated their rights to free exercise of religion, equal protection, and freedom of speech." *Id.* at 266. In its opinion, the Court first stated that the University, by accommodating student groups to engage in expression, created a public forum. *Id.* at 267. Next, the Court noted that in order for the University to exclude a group from such a public forum based on the content of the group's speech, it must show that the regulation was necessary to serve a compelling state interest and that it was narrowly drawn. *Id.* 269-70 (citing *Carey v. Brown*, 447 U.S. 455, 461, 464-65 (1980)). The University argued that it had a compelling interest in not violating the Establishment Clause, and that allowing religious student groups to use the University's facilities would violate the Establishment Clause. *Id.* at 270-71. The Court disagreed. *Id.* at 273. Thereafter, the Court refocused the issue to whether the University may "exclude groups because of the content of their speech." *Id.* (citing *Healy v. James*, 408 U.S. 169 (1972)). The Court answered the question in the negative, and found in favor of the student group, stating that the University's "exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral." *Id.* at 277. What is more, in dicta, the Court re-affirmed *Healy*, stating, "[W]e affirm the continuing validity of cases . . . that recognize a university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education." *Id.* (internal citation omitted) (citing *Healy v. James*, 408 U.S. 169 (1972)).

94. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992). In *R.A.V.*, the petitioner challenged a St. Paul ordinance that prohibited the use of "fighting words," which were considered particularly offensive, and showed "bias-motivated hatred." *Id.* at 380,

based on his or her race is not an act that is entitled to constitutional protection.⁹⁵ The government may regulate the harmful act, but it may not aim to suppress the racist idea underlying that act.⁹⁶ Therefore, if a group exercising its right of expressive association is suppressed by the state primarily because of its viewpoint, such action would be a violation of the First Amendment.

The Court has recognized three types of fora to help determine whether restrictions on speech are permissible.⁹⁷ The Court uses this "forum analysis" to determine whether "the Government's interest in limiting the use of its property to its intended purpose, [i.e., restrictions on speech] outweighs the interest[s] of those wishing to use the property for other purposes."⁹⁸ The three types of fora are the traditional public forum, the designated public forum, and the nonpublic forum.⁹⁹

The traditional public forum includes places that have been devoted to public "assembly and debate" by the government, or places that have traditionally been viewed as places of public "as-

392. A group of teenagers made a crude cross from pieces of a wooden chair and allegedly burned the cross on the yard of a black family before sunrise early one morning. *Id.* at 380. The conduct was prosecuted under a municipal ordinance. *Id.* at 379. In a later case, the Court struck down the St. Paul ordinance, because it was "explicitly directed at expression." *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993). In his opinion in *R.A.V.*, Justice Scalia stated that certain types of regulations fall within exceptions to the First Amendment prohibition against suppression of speech, and therefore should be tolerated. *R.A.V.*, 505 U.S. at 382, 393. Justice Scalia wrote, "[w]e have long held . . . that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses." *Id.* at 385. Moreover, a regulation that prohibited burning of the flag because it was a fire risk would not be repugnant to the First Amendment. *Id.* Conversely, such a regulation would infringe upon the First Amendment if the regulation prohibited burning the flag because it was viewed as dishonorable. *Id.* The Court acknowledged that "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 390.

95. *Mitchell*, 508 U.S. at 484 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982)). In *Mitchell*, the defendant was convicted for aggravated battery. *Id.* at 480. Since Mitchell (an African-American) intentionally selected his victim (a Caucasian boy) on account of his race, Mitchell's sentence was enhanced pursuant to Wisconsin's penalty-enhancement statute. *Id.* Mitchell challenged the sentencing enhancement on First Amendment grounds. *Id.* at 481. The Court struck down Mitchell's claim and asserted that not all conduct that is intended to express an idea can be labeled "speech." *Id.* at 484. The Court did not consider the assault expressive conduct protected by the First Amendment and noted, "potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." *Id.*

96. *Id.*

97. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

98. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

99. *Perry Educ. Ass'n*, 460 U.S. at 45-46.

sembly and debate.”¹⁰⁰ Examples of traditional public fora are streets, parks, and public squares.¹⁰¹ The second category—designated public forum—consists of places where the government grants the public access for expressive purposes, even though it has not done so traditionally, and it is not required to do so.¹⁰² Local elementary schools, university buildings, and municipal theatres are examples of designated public forums.¹⁰³ The third forum, which is of no consequence here, is the nonpublic forum, and it involves places not open for use by the general public.¹⁰⁴

In order for the state to regulate speech in the traditional public forum, the regulation must be “necessary to serve a compelling state interest,” and it must be “narrowly drawn to achieve that end.”¹⁰⁵ Restrictions on speech within the designated public forum, which include schools and universities, are subject to the same standards as the traditional public forum.¹⁰⁶ Once the state has opened the school or other forum to the public, the First Amendment prohibits the state from excluding certain individuals even though the state was not obliged to open the forum in the first place.¹⁰⁷ However, the government may constitutionally limit the forum from its inception, thus creating a designated public forum for a limited or

100. *Id.* at 45.

101. *Id.*

102. *Id.*

103. *See* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 108 (2001) (finding that the school district created a limited public forum by allowing access to public school buildings to the community); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (finding that granting access to university buildings for meetings created a public forum); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (finding a public forum in a state auditorium and theatre that were set aside for expressive activities).

104. *See* *Perry Educ. Ass'n*, 460 U.S. at 46-47. Examples of nonpublic forums include jails, military bases, advertising rental space on a city's transit system, and interschool message delivery systems for teachers at a public school. *Adderly v. Florida*, 385 U.S. 39, 41 (1966) (jail considered a nonpublic forum); *Perry Educ. Ass'n*, 460 U.S. at 46 (interschool mail system for teachers considered a nonpublic forum); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (military base not found to be a public forum); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 301-02 (1974) (city's public transit system not considered a public forum).

105. *Perry Educ. Ass'n*, 460 U.S. at 45. Moreover, the government may make “time, place and manner” restrictions that are “content-neutral” and “are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” *Id.* (citing *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 535-36 (1980); *Grayned v. City of Rockford*, 408 U.S. 104, 117-18 (1972); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939)).

106. *Id.* at 45-46.

107. *Id.* at 45 (citing *Widmar*, 454 U.S. 263).

exclusive purpose such as use by only certain groups, or for the discussion of particular subjects.¹⁰⁸

C. *Unconstitutional Conditions Doctrine*

The unconstitutional conditions doctrine, generally speaking, “prohibits conditions on allocations in which the government indirectly impinges on a protected activity or choice in a way that would be unconstitutional if the same result had been achieved through a direct governmental command.”¹⁰⁹ With regard to speech, the general rule is that the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.”¹¹⁰ To be sure, if the government could condition benefits in such a way, it would be tantamount to producing a result that the government could not demand directly.¹¹¹

This indirect interference with constitutional rights is rarely upheld.¹¹² Nevertheless, some restrictions on speech and association are permissible so long as the government does not “discriminate invidiously” by aiming “at the suppression of dangerous ideas.”¹¹³ The constitutionality of a benefit conditioned upon a constitutional right is usually determined case by case.¹¹⁴ Yet, broadly stated, conditioning of governmental benefits is constitutional if it is “viewpoint neutral” and “reasonable.”¹¹⁵ For example, the Supreme Court has recently restated that “Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that

108. *Perry Educ. Ass'n*, 460 U.S. at 46 n.7 (citing *Widmar*, 454 U.S. 263; *City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n*, 429 U.S. 167 (1976) (school board meeting)).

109. Jennifer Levi, *Probation Restrictions Impacting the Right to Procreate: The Oakley Error*, 26 W. NEW ENG. L. REV. 81, 104 (2004) (citing Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1193-94 (1990)).

110. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

111. *Id.* (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

112. *See id.*

113. *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 92 (2d Cir. 2003) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983)).

114. Deborah Kelly, Note, *The Legal Services Corporation's Solicitation Restriction and the Unconstitutional Conditions Doctrine: Has the Death Knell Sounded for Future Challenges to the Restriction?*, 29 SETON HALL LEGIS. J. 247, 275 n.191 (2004).

115. *Wyman*, 335 F.3d at 92 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (holding that restrictions on access to nonpublic forums must be viewpoint neutral and reasonable); *Regan*, 461 U.S. at 550).

educational institutions are not obligated to accept.”¹¹⁶ Also, “when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.”¹¹⁷

II. THE CHRISTIAN LEGAL SOCIETY AND UNIVERSITIES’ NONDISCRIMINATION POLICIES

A. *Christian Legal Society and its Student Chapters*

The CLS is “a nationwide association of Christian lawyers, law students, law professors, and judges.”¹¹⁸ Its purpose is to “promot[e] justice, religious liberty, and biblical conflict resolution; [to] encourag[e] disciplin[e] and aid[] Christian law students; and [to] encourag[e] Christian lawyers to [provide] legal services to the poor.”¹¹⁹ In order to gain admission, prospective members must sign a Statement of Faith¹²⁰ and adhere to and live their life in a manner consistent with orthodox Christian beliefs.¹²¹ In light of the CLS’s orthodox Christian viewpoints, the organization has interpreted its Statement of Faith as prohibiting homosexuals and non-Christians from becoming members or officers of the group.¹²² Moreover, the CLS will not allow heterosexual Christians to become members or serve as officers if they believe that homosexual conduct is not sinful.¹²³ On the other hand, a person who has en-

116. *Rumsfeld v. FAIR*, 126 S. Ct. 1297, 1306 (2006) (quoting *Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984)).

117. *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 211 (2003) (quoting *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

118. *Christian Legal Soc’y Chapter of Univ. of Calif. v. Kane*, No. C 04-4484 JSW, 2005 WL 850864, at *1 (N.D. Cal. Apr. 12, 2005) (citing Plaintiff’s Complaint, ¶ 3.1.).

119. *Id.*

120. The Statement of Faith states:

Trusting in Jesus Christ as my Savior, I believe in:

- One God, eternally existent in three persons, Father, Son and Holy Spirit.
- God the Father Almighty, Maker of heaven and earth.
- The Deity of our Lord, Jesus Christ, God’s only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
- The presence and power of the Holy Spirit in the work of regeneration.
- The Bible as the inspired Word of God.

Christian Legal Soc’y Ch. of Univ. of Cal. v. Kane, No. C 04-4484 JSW, 2006 WL 997217, at *3 (N.D. Cal. May 19, 2006) (citing the bylaws of the Christian Legal Society).

121. *Kane*, 2005 WL 850864, at *1 (citing Plaintiff’s Complaint, ¶¶ 3.7-3.8). The CLS construes orthodox Christian viewpoints as prohibiting sexual conduct between persons of the same sex. *Id.*

122. *Kane*, 2006 WL 997217, at *3.

123. *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 868 (7th Cir. 2006).

gaged in homosexual conduct but has repented for such conduct, or a person who may have homosexual tendencies, but does not engage in homosexual activity, may become a member and serve as an officer of the CLS.¹²⁴

The CLS has student chapters at most law schools across the country.¹²⁵ As a recognized student organization, CLS chapters enjoy particular benefits and privileges, such as access to storage space, bulletin boards, and meeting space; recognition on the law school's website; eligibility for funding; and use of the school's name.¹²⁶ In order for a student organization to enjoy recognized status, it must cooperate with the school's nondiscrimination policies.¹²⁷

Based on the CLS's Statement of Faith and the basic nature of the group, the CLS is a group that engages in expressive association.¹²⁸ Therefore, the freedoms of expressive association, religion, and speech, outlined above, are crucial to the CLS's survival.

B. *The Law Schools' Nondiscrimination Policies*

Law schools have historically maintained formal nondiscrimination policies that prohibited discrimination based on race, gender, and religion.¹²⁹ During the 1970s, some schools began to include sexual orientation among the protected classes.¹³⁰ The Association of American Law Schools¹³¹ has adopted a policy that for-

124. *Id.*

125. Christian Legal Soc'y, Law Student Ministries Main Page, <http://www.clsnet.org/lsmPages/index.php> (last visited May 14, 2007).

126. *Walker*, 453 F.3d at 857-58; *Kane*, 2005 WL 850864, at *1; Joint Statement of Undisputed Facts ¶ 40, *Christian Legal Soc'y Chapter at Ariz. State Univ. Coll. of Law v. Crow*, No. CV-04-2572-PHX-NVW (D. Ariz., Nov. 17, 2004) [hereinafter *Crow, JSOF*].

127. *Walker*, 453 F.3d at 857-58; *Kane*, 2005 WL 850864, at *1; Pl.'s V. Compl., *Christian Legal Soc'y Chapter at Ariz. State Univ. Coll. of Law v. Crow*, No. CV-04-2572-PHX-NVW, ¶¶ 4.3, 4.5, 4.9 (D. Ariz. Nov. 17, 2004) [hereinafter *Crow, Pl.'s V. Compl.*].

128. *Walker*, 453 F.3d at 862 ("It would be hard to argue—and no one does—that CLS is not an expressive association."); see also Hansen, *supra* note 4, at 12.

129. *FAIR v. Rumsfeld*, 390 F.3d 219, 224 (3d Cir. 2004), *rev'd*, 547 U.S. 47 (2006).

130. *Id.* at 224-25.

131. The Association of American Law Schools (AALS), founded in 1900 with thirty-two charter members, is an association that includes one hundred sixty-six "Member Schools," and twenty-five non-member, fee-paid schools, and is based in Washington, D.C. Ass'n of Am. Law Sch., About the AALS: What is the AALS?, <http://www.aals.org/about.php> (last visited May 14, 2007); Ass'n of Am. Law Sch., AALS Member Schools, http://www.aals.org/about_memberschools.php (last visited May 14, 2007); Ass'n of Am. Law Sch., Bylaws of the Ass'n of Am. Law Sch., Inc., Art. 1, § 1-2

bids discrimination or segregation on the ground of, among other things, sexual orientation.¹³² The schools involved in the current litigation have nondiscrimination policies that are all similar; they essentially proscribe student organizations from discriminating on the basis of race, color, religion, sex, national origin, age, disability, status as a disabled veteran, sexual orientation, or marital status.¹³³

Recently, schools have been unwilling to recognize CLS student chapters based on the student chapters' interpretation of the statement of faith.¹³⁴ Arizona State University College of Law, Southern Illinois University School of Law at Carbondale, and Has-

(adopted Dec. 29, 1971; amended through Jan. 3, 2004) [hereinafter "Bylaws"], *available at* http://www.aals.org/about_handbook_bylaws.php. The AALS's purpose is to "improve[] the legal profession through legal education." Bylaws, *supra*.

132. Bylaws, *supra* note 131, Art. 6, § 6-3. Section 6-3 states:

A member school shall provide equality of opportunity in legal education for all persons, including faculty and employees with respect to hiring, continuation, promotion and tenure, applicants for admission, enrolled students, and graduates, without discrimination or segregation on the ground of race, color religion, national origin, sex, age, disability, or sexual orientation.

Id.

133. Southern Illinois University's Affirmative Action Policy states: "It is the policy of Southern Illinois University at Carbondale to provide equal employment and education opportunities for all qualified persons without regard to race, color, religion, sex, national origin, age, disability, status as a disabled veteran or a veteran of the Vietnam era, *sexual orientation*, or marital status." *Christian Legal Soc'y v. Walker*, No. Civ. 05-4070-GPM, 2005 WL 1606448, at *2 (S.D. Ill. July 5, 2005) (quoting the Joint Stipulation of Facts for Cross-Motions for Summary Judgment, ¶ 15). The University's Board of Trustees Policy states: "No 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." *Id.* (quoting the Southern Illinois University Board of Trustees Policy). Hastings College of Law's nondiscrimination policy provides:

The College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by this policy of nondiscrimination The University of California, Hastings College of the 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.

Order Granting in Part & Denying in Part Defendant's Motion to Dismiss, at 2-3, *Christian Legal Soc'y Chapter of Univ. of Calif. Hastings Coll. of Law v. Kane*, No. C 04-04484 JSW (N.D. Cal. Apr. 12, 2005) [hereinafter *Kane, Order*]. The Arizona State University College of Law University Student Code of Conduct, which applies to student organizations, prohibits "[e]ngaging in discriminatory activities, whether unlawful or whether prohibited by university policy, on the basis of age, ethnicity, gender, disability, color, national origin, race, religion, sexual orientation, or veteran status." *Crow, Pl.'s V. Compl.*, *supra* note 127, at 10.

134. Hansen, *supra* note 4, at 12; Montini, *supra* note 2.

tings College of Law have revoked or refused to recognize the CLS's student chapters' status as a recognized student organization.¹³⁵ The schools have refused to recognize the student organizations because the CLS's refusal to allow homosexuals and non-Christians to join as members or officers is a violation of the schools' nondiscrimination policies.¹³⁶ The schools claim that the nondiscrimination policies apply to all student organizations seeking recognized status regardless of their message.¹³⁷ Moreover, the law schools argue that they do not wish to reach out and enforce their laws or policies upon the CLS; rather, the CLS has come to the schools and asked for the schools' "imprimatur and certain benefits."¹³⁸ The schools' goal in promulgating nondiscrimination policies is to "help further its chosen values of inclusion and diversity."¹³⁹ The public law schools encourage a diversity of viewpoints and permit students to organize in groups and associations of common interest.¹⁴⁰

III. ANALYSIS

A. *The CLS's Expressive Association Claim*

None of the Court's expressive association decisions squarely address the issues present in the current CLS litigation.¹⁴¹ Nevertheless, an examination of relevant First Amendment cases, namely, *Boy Scouts of America v. Dale*,¹⁴² *Rumsfeld v. FAIR*,¹⁴³ and *Healy v. James*¹⁴⁴ are integral to a court's analysis of the pending CLS cases.

135. *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 858 (7th Cir. 2006); *Christian Legal Soc'y v. Kane*, No. C 04-4484 JSW, 2005 WL 850864, at *1 (N.D. Cal. Apr. 12, 2005); *Crow, Pl.'s V. Compl.*, *supra* note 127, ¶¶ 4.3, 4.5, 4.9.

136. *Walker*, 453 F.3d at 858; *Kane*, 2005 WL 850864, at *1; *Crow, Pl.'s V. Compl.*, *supra* note 127, ¶¶ 3.2, 4.3, 4.9.

137. See Def.'s Response to Pl.'s Motion for Summ. J. & for Declaratory & Permanent Injunctive Relief & Mem. of Points & Authorities; and Def.'s Cross Motion for Summ. J. on All Remaining Claims, *Christian Legal Soc'y Chapter at ASU v. Crow*, No. CV-04-2572-PHX-NVW, 3:1-8 (D. Ariz. filed Nov. 17, 2004) [hereinafter *Crow, Def.'s Response to Pl.'s Motion for Summ. J.*].

138. *Id.* at 1-2.

139. *Id.* at 3.

140. See *Crow, JSOF*, *supra* note 126, at 5:13-15.

141. See Note, *Leaving Religious Students Speechless: Public Universities Antidiscrimination Policies and Religious Student Organizations*, 118 HARV. L. REV. 2882, 2883 (2005).

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

143. *Rumsfeld v. FAIR*, 126 S. Ct. 1297 (2006).

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

1. *Boy Scouts of America v. Dale*

Under *Dale*, in order for the CLS's expressive association claim to succeed, the CLS must first show that it engages in expressive association.¹⁴⁵ Second, it must show that the law schools' non-discrimination policies significantly affect the CLS's ability to advocate its viewpoints.¹⁴⁶ Third, it must show that the law schools' interests do not outweigh the burden imposed on the CLS's right of expressive association.¹⁴⁷ The CLS claims are weak in light of the second and third prongs of the test employed in *Dale*.¹⁴⁸

As mentioned above, in order to qualify as an association worthy of constitutional protection, the "group must engage in some form of expression."¹⁴⁹ This standard protects more than just advocacy groups.¹⁵⁰ The *Healy* Court recognized that student groups deserve First Amendment protection as expressive associations.¹⁵¹ Therefore, the CLS, being a student group, satisfies the first condition.

The second factor under *Dale*'s expressive association analysis requires the CLS to show that forcing it to accept an unwanted member¹⁵² would undermine, or "significantly affect the [CLS's] ability to advocate public or private viewpoints."¹⁵³ In *Dale*, the Court needed to dig a little to ascertain the Boy Scouts' position on homosexuality.¹⁵⁴ In contrast, the CLS clearly denounces homosexuality.¹⁵⁵

145. *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 442 (3d Cir. 2000) (citing *Dale*, 530 U.S. at 648-49); *see also supra* text accompanying notes 17-39.

146. *Pi Lambda Phi Fraternity, Inc.*, 229 F.3d at 442 (citing *Dale*, 530 U.S. at 650); *see also supra* text accompanying notes 17-39.

147. *Pi Lambda Phi Fraternity, Inc.*, 229 F.3d at 442 (citing *Dale*, 530 U.S. at 656-58).

148. *See generally supra* text accompanying notes 17-39.

149. *Dale*, 530 U.S. at 648; *see supra* text accompanying notes 15-16.

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

151. *Healy v. James*, 408 U.S. 169, 180-81 (1972).

152. An unwanted member being, for example, one who is a homosexual, does not believe that homosexuality is a sin, or does not believe in Orthodox Christian views. *See generally* Christian Legal Soc'y Chapter at S. Ill. Univ. Sch. of Law v. Walker, No. Civ. 05-4070-GPM, 2005 WL 1606448, at *1 (S.D. Ill. July 5, 2005).

153. *Dale*, 530 U.S. at 650.

154. *See id.* at 653-55; *see also Walker*, 2005 WL 1606448, at *1 (stating that the CLS does not approve of homosexuality).

155. *See Hansen, supra* note 4 (stating that the CLS believes that sexual conduct between members of the same sex is sinful).

Although the Boy Scouts' position on the issue of homosexuality was not absolutely clear,¹⁵⁶ the *Dale* Court nonetheless stated that James Dale's presence in the organization "would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."¹⁵⁷ Because the Court found that including James Dale as a member would significantly affect the Scouts' ability to project its viewpoint, it seems logical that a court analyzing the CLS's claim would find that including a homosexual would similarly inhibit the CLS's ability to express its viewpoints. But, because the opinion in *Dale* is distinctly fact specific, the second factor in the current controversy, under the *Dale* analysis, is not necessarily satisfied.

In *Dale*, the Court dealt with the "forced inclusion of an unwanted person."¹⁵⁸ In the CLS litigation, the CLS is not complaining of a specific homosexual student seeking inclusion,¹⁵⁹ and, the law schools are not directly forcing the CLS to accept members it wishes to exclude.¹⁶⁰ In *Dale*, the Court was unwilling to apply New Jersey's public accommodations law, which would have forced the Boy Scouts to accept James Dale as a member.¹⁶¹ Much of the opinion's focus regarded whether the inclusion of an individual, James Dale, would significantly affect the Boy Scouts' message.¹⁶²

The Court emphasized that James Dale was active in the local gay rights movement and community.¹⁶³ While attending Rutgers University, Dale was co-president of the Rutgers University Lesbian/Gay Alliance.¹⁶⁴ The Court noted that he was a scout who was

156. See *Dale*, 530 U.S. at 649-53. The *Dale* Court examined the Boy Scouts' "Scout Oath" and found that the Scouts' general mission was to "instill values in young people." *Id.* at 649 (citing the Boy Scouts' "Scout Oath"). The Court looked beyond the Oath to determine the Scouts' position on homosexuality and found, via the Scouts' brief and a 1978 "position statement" signed by the president of the Boy Scouts, that the Scouts' position was and is that homosexual behavior and conduct is antithetical to the Scouts' teachings and, therefore, their expression. *Id.* at 650-52.

157. *Id.* at 653.

158. *Id.* at 648.

159. See generally *Walker*, 2005 WL 2840229, at *1. In *Walker*, the court noted, "The CLS . . . admits that an individual or individuals complained to SIU law school officials about the CLS's discriminatory policy and/or practices." *Id.* This is compared to the case in *Dale*, where an individual who was actively seeking membership in the group was denied because of his homosexuality.

160. Cf. *Dale*, 530 U.S. at 644.

161. *Id.* at 658-59.

162. See *id.* at 653.

163. *Id.* at 643-44.

164. *Id.* at 645.

openly gay and a leader in the local gay community.¹⁶⁵ Moreover, the Court noted that James Dale was interviewed by a local newspaper about his “advocacy of homosexual teenagers’ need for gay role models.”¹⁶⁶ Therefore, the Court’s assertion that the mere presence of James Dale would send a message to the world that the Boy Scouts accept homosexual behavior as legitimate¹⁶⁷ was based not simply on Dale’s identity as a homosexual, but significantly, on his status as an active gay rights leader.¹⁶⁸

The emphasis on James Dale’s status as a gay rights activist suggests that if Dale was not engaged in activism, the Court would not necessarily have found that Dale’s presence would affect the “group’s ability to advocate public or private viewpoints.”¹⁶⁹ This is corroborated by the Court’s distinction between someone who is opposed to discrimination against homosexuals, and someone who is a homosexual and a gay rights activist.¹⁷⁰ The Court stated that “[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.”¹⁷¹

Another problem with the applicability of *Dale* is that the breadth of the holding is unclear. In fact, debate exists amongst courts as to how *Dale* should be interpreted.¹⁷² Specifically, two issues arise.¹⁷³ The first is whether *Dale* should be read to allow groups to exclude “all avowed homosexuals, or only homosexuals who publicly voice a viewpoint” that is adverse to the groups’ intended message or position.¹⁷⁴ The second issue is whether *Dale* should be read to allow associations to exclude homosexuals (regardless of their public openness) from all positions within the group, or only leadership positions.¹⁷⁵ At least two decisions have opined that a homosexual’s public activism is pertinent to whether

165. *Id.* at 653.

166. *Id.* at 645.

167. *Id.* at 653.

168. See *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 88 (2d Cir. 2003) (citing *Dale*, 530 U.S. 640).

169. *Dale*, 530 U.S. at 648 (citing *N.Y. State Club Ass’n, Inc. v. City of N.Y.*, 487 U.S. 1, 13 (1988)); see also *id.* at 653-56.

170. *Id.* at 655-56.

171. *Id.*

172. *Wyman*, 335 F.3d at 88 n.2.

173. *Id.*

174. *Id.*

175. *Id.*

an association may exclude him or her.¹⁷⁶ Given the emphasis in the *Dale* opinion about James Dale's role in the gay community, it is likely that the inclusion of a homosexual who is not as public about his or her sexual orientation as James Dale was, would not significantly burden the group's ability to express its viewpoints. Therefore, in the current controversy, the lack of a tangible "James Dale" student to some extent undercuts *Dale*'s application to the CLS cases.

The CLS interprets its statement of faith to prohibit a student who does not believe that homosexual conduct is sinful from becoming a member of the CLS.¹⁷⁷ However, it is not necessarily true that a student, especially one who is heterosexual, who does not believe that homosexuality is sinful, would "force the [CLS] to send a message" that it did not want to send simply because of his or her status as a member of the CLS.¹⁷⁸ In fact, *Dale* warns that although the court must give deference to what the association thinks would impair its expression, "[t]hat is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."¹⁷⁹ For example, if a homosexual was interested in joining the CLS, admission of that person would not change the CLS's ability to preach its message, via group meetings and events, publications, and the like, that it views homosexuality as unacceptable.¹⁸⁰ Taking into account the overall circumstances involved in the dispute between the CLS and the law schools, the second factor is not wholly satisfied as it was in *Dale*.

Even if the CLS can satisfy the second factor under *Dale*, it must then show that the law schools' interests in preventing discrimination on campus does not justify the burden placed upon the CLS's expressive activities.¹⁸¹ In *Dale*, New Jersey's interest was

176. *Id.* (citing *Boy Scouts of Am. v. D.C. Comm'n on Human Rights*, 809 A.2d 1192, 1201-03 (D.C. 2002) (noting that the *Dale* Court found it legally significant that the terms "avowed homosexual" and "gay activist" were paired together); *Chi. Area Council of Boy Scouts of Am. v. City of Chi. Comm'n on Human Relations*, 748 N.E.2d 759, 767 (Ill. App. Ct. 2001) (the court emphasized that the complainant, as in *Dale*, was a gay rights advocate)).

177. *Crow, Pl.'s V. Compl.*, *supra* note 127, ¶ 3.8.

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

179. *Id.*

180. If the law schools attempted to prohibit the CLS from disseminating its view that homosexuality is unacceptable, it would then be engaging in viewpoint discrimination, which would be an unconstitutional suppression of speech. *See supra* Part I.B.

181. *Dale*, 530 U.S. at 657-59.

ending discrimination.¹⁸² *Dale* applied strict scrutiny to the New Jersey law.¹⁸³ Chief Justice Rehnquist concluded that “[t]he 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.”¹⁸⁴

One could imagine a court on auto-pilot coming to a similar conclusion in the CLS litigation, holding that the schools’ nondiscrimination policies do not justify an intrusion upon the CLS’s associational freedoms. However, the *Dale* opinion is conclusory, conducts a hasty balancing test, and is ultimately not a great help to the CLS litigation.¹⁸⁵ It is true that New Jersey’s interest in ending discrimination in the *Dale* case is comparable to the law schools’ interests in the current dispute.¹⁸⁶ But the state’s public accommodations law and the schools’ nondiscrimination policies operate much differently.¹⁸⁷ As a result, a court adjudicating the CLS’s claim should not automatically come to the same conclusion as in *Dale* because the nondiscrimination policies’ level of intrusion is less severe.

In *Dale* and the *Roberts*’ trilogy, individuals sought enforcement of state public accommodations laws, which unconditionally required groups to accept individuals that they did not want as

182. *Id.* at 647.

183. Patrick J. Smith, Note, *Solomon’s Mines: The Explosion Over On-Campus Military Recruiting and Why the Solomon Amendment Trumps Law School Non-Discrimination Policies*, 79 ST. JOHN’S L. REV. 689, 728 (2005). The Supreme Court has articulated three levels of analysis in expressional jurisprudence. See *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 445 (3d Cir. 2000) (describing the three levels of review as employed by the Supreme Court). The first level, applied in *Dale*, *Roberts*, and *Duarte*, is strict scrutiny. *Id.* at 445-46. Strict scrutiny, the most rigorous standard, applies “when the state action directly burdens expressive rights.” *Id.* at 446. In those cases, “because the state action directly affected the groups’ associational abilities,” the Court required that the state “show a compelling interest that justified the burden on the groups’ expression” in order for the state action to survive an expressive association claim. *Id.* (citing *Dale*, 530 U.S. at 657-58; *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 638 (1984)).

184. *Dale*, 530 U.S. at 659.

185. See Zahner, *supra* note 20, at 386-88.

186. “State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodations,” and subsequently have been expanded. *Dale*, 530 U.S. at 656 (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 571-72 (1995); *Romer v. Evans*, 517 U.S. 620, 627-29 (1996)).

187. See *Christian Legal Soc’y Chapter of Univ. of S. Ill. v. Walker*, No. Civ. 05-4070-GPM, 2005 WL 1606448, at *2 (S.D. Ill. July 5, 2005) (stating that the issue in *Dale* was not the same as the issue in that case, which concerned access to benefits).

members.¹⁸⁸ A similar forced inclusion was present in *Hurley*.¹⁸⁹ However, in the current dispute, the CLS is seeking to invalidate the nondiscrimination policies in order to receive benefits. In other words, the CLS is not being forced to accept members directly; rather, it is being forced to refrain from discrimination as a condition of receiving recognized status from the law schools, along with the benefits that come with that status.¹⁹⁰ Therefore, *Dale* and *Hurley*, which dealt with the unconditional forced inclusion of an individual or group of individuals, are minimally helpful and certainly not dispositive in this context, because forced inclusion is a significantly greater burden than conditioning benefits upon the relinquishment of certain rights.¹⁹¹

A closer look at *Dale* shows that the Supreme Court was uncomfortable with applying a public accommodations law to the Boy Scouts, a private group.¹⁹² The Court's uneasiness was apparent in its opinion, when it described New Jersey's definition of a public accommodation as "extremely broad."¹⁹³ The Court stated:

[New Jersey's public accommodations] statute includes as places of public accommodation taverns, restaurants, retail shops, and public libraries. But the statute also includes places that often may not carry with them open invitations to the public like summer camps and roof gardens. In this case, the New Jersey Supreme Court went a step further and applied its public accommodations law to a private entity without even attempting to tie the term "place" to a physical location. As the definition of "public accommodation" has expanded from clearly commercial entities, such as restaurants, bars and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.¹⁹⁴

188. See *Dale*, 530 U.S. 640; *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1 (1988); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

189. See *supra* Part I.A.2; see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 561-66 (1995).

190. See generally *Walker*, 2005 WL 1606448, at *1.

191. See *infra* notes 197 & 205 and accompanying text.

192. See *Dale*, 530 U.S. at 656-67 (the Court described that states designed public accommodation laws to prevent discrimination in traditionally public settings and recently has extended places of public accommodations beyond the original intent of the laws).

193. *Id.* at 657.

194. *Id.* (citations omitted).

Although it may seem, because of the aforementioned language, that a court would be unwilling to apply the schools' nondiscrimination policies to a "membership organization," the law schools' nondiscrimination policies are distinguishable from the public accommodations laws in *Dale*.¹⁹⁵ The important difference operationally between the two regulations is that the public accommodations laws force inclusion directly upon private entities, whereas the nondiscrimination policies simply place conditions upon sought-after benefits.¹⁹⁶

The nondiscrimination policies do not seek out and force their way into the inner workings of the group as New Jersey's public accommodations law did in *Dale*.¹⁹⁷ This operational difference is critical. For example, the Second Circuit in *Boy Scouts of America v. Wyman*¹⁹⁸ found that removing the Scouts from the state's workplace charitable campaign, which provides the Scouts with an opportunity to raise funds, was not a direct burden because conditioning benefits upon compliance with nondiscriminatory practices is not tantamount to compulsion.¹⁹⁹ Thus, the Court's apprehension in *Dale*, which stemmed from applying a broad and intrusive public accommodations law to a private group, would be unwarranted in the CLS litigation because the schools' nondiscrimination policies apply only to groups seeking benefits associated

195. Southern Illinois University's affirmative action policy, *supra* note 133; Hastings College of Law's nondiscrimination policy, *supra* note 133; Arizona State University College of Law University Student Code of Conduct, *supra* note 133.

196. Compare *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 4-6 (1988) (quoting N.Y.C. ADMIN. CODE § 8-107(2) (1986)) (New York City's Human Rights Law in *N.Y. State Club Ass'n*, which forbade discrimination based on race and creed, among other things, in places of public accommodation), with *Crow, Def.'s Response to Pl.'s Motion for Summ. J.*, *supra* note 137, at 6 (stating that "unregistered student groups 'may, in their decisions or policies relating to membership [and officer positions] . . . engage in lawful discrimination without discipline or investigation by ASU'"); compare also *Dale*, 530 U.S. at 658-59 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)) (holding that the forced inclusion of *Dale* "directly and immediately affects" the Boy Scouts' associational rights and places a "serious burden" upon them), with *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 91 (2d Cir. 2003) (removing the Boy Scouts from the state's workplace charitable campaign, which provides the Boy Scouts with an opportunity for raising charitable funds, was "neither direct nor immediate, since its conditioned exclusion does not rise to the level of compulsion").

197. Compare *Dale*, 530 U.S. at 659 (where the application of the public accommodations statute was found to be severely intrusive), with *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983) (where the Court held a tax statute constitutional, which conditioned benefits upon the compliance of certain nondiscriminatory practices, in spite of the substantial impact it would have on the University).

198. *Wyman*, 335 F.3d 80.

199. *Id.* at 91; see also *supra* note 194.

with recognized status within the university system. A court should be willing to apply such conditions upon groups seeking benefits, even under a *Dale* analysis.

If New Jersey's public accommodations law had operated like the schools' nondiscrimination policies in the CLS litigation, the Boy Scouts would not have been directly forced to accept James Dale as a member. However, they may have been unable to receive special benefits, possibly tax exempt status and so forth, if they refused to accept him as a member.²⁰⁰ If the New Jersey public accommodations law had operated in such a fashion, the Court's opinion, no doubt, would have been materially altered.

Applying *Dale* as controlling and dispositive seems logical; however, doing so is flawed for several reasons. First, the opinion conducts a hasty and conclusory balancing (if one is conducted at all) of the state's interest against the group's interest.²⁰¹ Second, unlike in *Dale*, the current controversy does not present the issue of whether a specific avowed gay rights activist will affect the CLS's ability to express its viewpoints.²⁰² Moreover, it is unclear whether the *Dale* opinion only applies to leadership positions or all positions within the group.²⁰³ Third, New Jersey's public accommodations law and the schools' nondiscrimination policies operate and apply differently in the two circumstances.²⁰⁴ The law schools' refusal to recognize the CLS is not a direct and immediate compulsion as the public accommodations law was in *Dale*.²⁰⁵ Consequently, under *Dale*, the CLS's claim is not necessarily valid.²⁰⁶

200. See *Bob Jones Univ.*, 461 U.S. 574, 575 (holding that the IRS's revocation of the University's tax exempt status based on its racially discriminatory practices did not violate the Free Exercise Clause of the First Amendment).

201. See *supra* text accompanying notes 36-39.

202. See *generally supra* text accompanying notes 169-199.

203. See *supra* text accompanying notes 172-176.

204. See *supra* text accompanying notes 188-199.

205. Compare *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658-59 (2000) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)) (holding that the forced inclusion of Dale "directly and immediately affects" the Boy Scouts' associational rights and places a "serious burden" upon them), with *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 91 (2d Cir. 2003) (holding that removing the Boy Scouts from the state's workplace charitable campaign, which provided the Boy Scouts with an opportunity to raise charitable funds, was "neither direct nor immediate, since its conditioned exclusion does not rise to the level of compulsion").

206. Like *Dale*, the application of the Court's reasoning in *Hurley* to the current controversies is not very helpful. In *Hurley*, a member of GLIB wanted to march behind a banner identifying the group in Boston's annual St. Patrick's Day Parade. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572 (1995). In *Dale*, Chief Justice Rehnquist observed that in the *Hurley* case "the parade organizers

2. *Rumsfeld v. FAIR*

Expressive association, although not the driving force behind the Court's opinion in *FAIR*,²⁰⁷ was nevertheless considered in detail.²⁰⁸ This recent analysis of expressive association is quite helpful in understanding the merit of the claims in the CLS litigation. In the section of the opinion addressing expressive association, the Court found that the controversy in *FAIR* was distinct from that in *Dale*, and therefore, *FAIR*'s expressive association rights were not violated by the Solomon Amendment.²⁰⁹ The Court opined that forcing the schools to give access to military recruiters or face losing funds was not the same as unconditionally forcing the Boy Scouts to accept James Dale, a member it did not want.²¹⁰ Moreover, the Court was not convinced that selectively granting access to recruiters based on the recruiters' conformance with the schools' nondiscrimination policies was substantially expressive in nature.²¹¹ The Court then briefly mentioned some of its prior expressive association cases, stating that groups have the right to associate for

did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner." *Dale*, 530 U.S. at 653. In the *Hurley* opinion, Justice Souter wrote that marching behind the banner

would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest [the organizers'] view that [homosexuals] . . . have as much claim to unqualified social acceptance as heterosexuals The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians

Hurley, 515 U.S. at 574-75. *Hurley*'s focus on GLIB's banner suggests that simply including a homosexual in a group does not mean that the group therefore must also favor unqualified social acceptance of homosexuals. *See id.* As a result, the forced inclusion of a homosexual would not necessarily alter the message of the parade organizer. *Id.* However, the forced inclusion of a group, such as GLIB, with an identifying banner, or something similar, would likely be perceived by onlookers as acceptance of the unintended message. In the controversy between the CLS and the law schools there exists no "identifying banner." In other words, the CLS is not being asked to accept homosexuals, or gay rights advocates, in order to demonstrate that they accept the homosexual lifestyle. Rather, the CLS is being asked to accept all students regardless of, among other things, sexual orientation. Consequently, the *Hurley* opinion, although noteworthy, is distinguishable on its facts, and therefore, is not controlling.

207. *Rumsfeld v. FAIR*, 126 S. Ct. 1297 (2006).

208. *Id.* at 1311-13.

209. *Id.* at 1312 (making the distinction that the law schools are not being forced to accept military recruiters as members of the group as was the case in *Dale*).

210. *See id.* (stating a critical distinction between the forced inclusion in *FAIR* compared with that in *Dale*).

211. *Id.* (the Court stated that the schools are not granted First Amendment protection simply by stating that they are engaging in expressive activity and that mere association would alter the schools' message).

speech reasons, and speech is often done most effectively in groups.²¹²

It is apparent that the Court was not concerned with the appearance that the law schools agree with or at least condone the military's policy with respect to its treatment of homosexuals.²¹³ The Court noted that the Solomon Amendment neither required the law schools to express a particular message, nor prevented them from expressing a particular message.²¹⁴ Therefore, the students and faculty could proactively voice their disapproval of the military's policy. The Court suggested that the students and faculty could post signs, flyers, e-mails, and the like, asserting that they disapprove of discrimination based on sexual orientation.²¹⁵ The Court even suggested that faculty could organize protests expressing discontent with the military's policy.²¹⁶

The law schools' nondiscrimination policies operate in a similar manner to the Solomon Amendment. True, in the eyes of the Supreme Court, the inclusion of the military as part of a group of recruiters allowed on campus is less of an associational activity than the inclusion of a member in a student group.²¹⁷ Nevertheless, the law schools' nondiscrimination policies prohibit the CLS from discriminating on the basis of sexual orientation, but do not prevent the CLS from disseminating its belief that homosexuality is wrong.²¹⁸ Therefore, as the Court mentioned in *FAIR*, the CLS could post signs, send e-mails, distribute flyers, and at meetings express their disapproval with homosexuality and the law schools' nondiscrimination policies.²¹⁹ This would counter any suggestion that the CLS, by complying with the nondiscrimination policies,

212. *Id.* (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). The Court also stated that the government may not require disclosure of membership group lists, or impose penalties upon groups disfavored by the government. *Id.* (citing *Brown v. Socialist Workers*, 74 Campaign Comm. (Ohio), 459 U.S. 87, 101-02 (1982); *Healy v. James*, 408 U.S. 169, 180-84 (1972)).

213. *See id.* at 1312-13.

214. *Id.* at 1307.

215. *Id.* at 1307, 1313.

216. *Id.* at 1307 (the Court cited the Solicitor General's acknowledgement that schools "could put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests").

217. *Id.* at 1312 (stating that the forced inclusion of members, as in *Dale*, is critically distinct from forcing the schools to grant access to recruiters).

218. *See supra* note 133.

219. *FAIR*, 126 S. Ct. at 1313 (discussing this right to express disapproval: "Students and faculty are free to associate to voice their disapproval of the military's message").

condones homosexuality—and the law schools could do nothing about it. If high school students can appreciate the difference between speech that a group sponsors and speech associated with not discriminating because legally required to do so, then “[s]urely students have not lost that ability by the time they get to law school.”²²⁰

No doubt, the *FAIR* case is not directly analogous to the CLS litigation. But there are some very important similarities. For example, in *FAIR*, the law schools had the choice to comply with the Solomon Amendment and accept military recruiters or lose funding.²²¹ Similarly, the CLS has the choice to comply with the nondiscrimination policies and not discriminate against homosexuals or lose recognized status.²²² Although the CLS litigation deals with a more expressive activity, the CLS is nonetheless placed in a similar position as the law schools were in the *FAIR* case. Both are faced with the same uncomfortable choice—comply with the policy or lose benefits. However, both have other, more direct means of communicating their message, which should relieve a court’s concern that the group will be perceived as expressing a message that it wishes not to express.

Consequently, because the Supreme Court was willing to uphold the Solomon Amendment over *FAIR*’s expressive association claims, a trial or appellate court should uphold law schools’ nondiscrimination policies notwithstanding the CLS’s expressive association claims. This is so because, first, law students understand that the CLS, along with all student groups, is required to be nondiscriminatory. Second, clear alternative means of communication exist for the CLS to express its message. Third, the CLS ultimately has the choice not to comply with the nondiscrimination policies, as did the law schools in *FAIR*.²²³

220. *Id.* at 1310 (citing *Bd. of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995)).

221. *Id.* at 1302.

222. In contrast, the Boy Scouts in *Dale* had no similar choice. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). New Jersey’s public accommodation laws unconditionally forced the group to accept homosexuals. *Id.*; see *supra* Part III.A.1.

223. In *FAIR*, the law schools had the choice not to comply with the Solomon Amendment, but would lose certain federal funds if they did so. *FAIR*, 126 S. Ct. at 1302. Similarly, the CLS has the choice not to comply with the nondiscrimination policy, in which case it will not be a recognized student group, and will not enjoy the benefits of that recognition.

3. *Healy v. James*

In a similar context to the current controversies, the Court opined that there exists an acceptable ground for denying a student association official campus recognition notwithstanding its First Amendment associational rights.²²⁴ In *Healy v. James*, Justice Powell wrote, “[a]ssociational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.”²²⁵

Accordingly, if there exists evidence suggesting that a group would violate a reasonable regulation, and thus cause “material interruption,” the school would not infringe upon the group’s First Amendment rights by denying it recognized status.²²⁶ This sentiment was reiterated in *Widmar v. Vincent*, where the Court stated “we affirm the continuing validity of cases . . . that recognize a university’s right to exclude even First Amendment activities that violate reasonable rules or substantially interfere with the opportunity of other students to obtain an education.”²²⁷ Although the *Healy* Court ruled that the school violated the students’ association rights, it held so because there was insufficient evidence to support the conclusion that the student group (SDS) would violate campus rules.²²⁸ The college actually denied the SDS recognition because of the local chapter’s affiliation with the national organization, which had a reputation for being disruptive.²²⁹

In the CLS cases, the student chapters are not being denied recognition because of their affiliation with the national organization, but rather because they are asking for an exemption from a university regulation. Therefore, the local CLS chapters are violating a valid campus rule (unless they are granted an exception).²³⁰ This is a markedly different situation than was present in *Healy*.

In *Healy*, the student group did not violate a reasonable campus rule, nor did it cause a material interruption. However, here, the CLS has violated a reasonable campus rule by not complying

224. *Healy v. James*, 408 U.S. 169, 185 (1972).

225. *Id.* at 189.

226. *Id.*

227. *Widmar v. Vincent*, 454 U.S. 263, 277 (1981).

228. *See Healy*, 408 U.S. at 184-85.

229. *Id.* at 174-76.

230. *See Christian Legal Soc’y Chapter at S. Ill. Univ. Sch. of Law v. Walker*, No. Civ. 05-4070-GPM, 2005 WL 1606448, at *2 (S.D. Ill. July 5, 2005), *rev’d*, 453 F.3d 853 (7th Cir. 2006) (referring to the nondiscrimination policy as neutral and valid).

with the schools' nondiscrimination policies.²³¹ Consequently, the denial of official recognition of CLS chapters is consistent with *Healy*.²³²

B. *The Schools' Nondiscrimination Policies Do Not Violate the Unconstitutional Conditions Doctrine*

Conditioning of governmental benefits is constitutional so long as it is "viewpoint neutral" and "reasonable."²³³ Therefore, because the schools' policies are viewpoint neutral (and applied neutrally), and reasonable, they do not violate the unconstitutional conditions doctrine.²³⁴ The law schools' nondiscrimination policies are facially neutral.²³⁵ The policies do not aim to replace the CLS's viewpoint.²³⁶ The policies only aim to regulate the conduct (discriminatory membership practices against certain classes of people), and not the expression that those acts contain.²³⁷ In addition, the policies are reasonable. Their goals are to prohibit discriminatory membership policies because of the social and economic harms that discrimination based on race, color, religion, sex, national origin, age, disability, status as a disabled veteran, sexual orientation, or marital status places on the affected groups.²³⁸ There is no indication that such policies are unreasonable.²³⁹

With regard to the ambiguity of the nondiscrimination policies, there is some confusion as to their application to student groups. For example, the Southern Illinois University School of Law's pol-

231. In this case, as in *Healy*, there is no obvious material disruption present.

232. In *Christian Legal Society v. Walker*, Judge Sykes opined that *Healy* is legally indistinguishable from the controversy involving Southern Illinois University and its local CLS chapter and that "no principled factual distinction appears in the present record that would justify a contrary conclusion." *Christian Legal Soc'y Chapter at S. Ill. Univ. Sch. of Law v. Walker*, 453 F.3d 853, 864 (7th Cir. 2006). This author disagrees for the abovementioned reasons.

233. Kelly, *supra* note 114, at 268-69.

234. See *supra* text accompanying notes 109-117.

235. *Walker*, 453 F.3d at 866 ("There can be little doubt that SIU's Affirmative Action/EEO policy is viewpoint neutral on its face."); see *infra* text accompanying notes 289-294. To be sure, in order to withstand constitutional attack, the schools must neutrally apply facially valid nondiscrimination policies. This author assumes that this is so. Of course, a selective or discriminatory application of a facially neutral nondiscrimination policy undermines its constitutional validity. See *Walker*, 453 F.3d at 866.

236. *Walker*, 453 F.3d at 866.

237. *Id.* at 21.

238. *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 93 (1st Cir. 2003).

239. Cf. *id.* at 97 (holding that the removal of the Boy Scouts from a charitable campaign because of their failure to comply with Connecticut's Gay Rights Law was reasonable).

icy states that it will “provide equal employment and education opportunities for all qualified persons without regard to [among other things] sexual orientation.”²⁴⁰ Judge Sykes of the Seventh Circuit recently criticized SIU’s application of the policy stating that it is “skeptical that CLS violated SIU’s Affirmative Action/EEO policy” because “CLS does not employ anyone” and it is unclear whether CLS should be considered an “educational opportunity.”²⁴¹ She admitted, however, that an argument exists that the purpose of student organizations at the law school is to provide educational opportunities for law students.²⁴² Student groups within the university context are most likely educational opportunities. The cases of *Board of Regents of University of Wisconsin v. Southworth*²⁴³ and *Rosenberger v. Rector and Visitors of University of Virginia*²⁴⁴ support the view that student organizations play an important role in the university educational experience.²⁴⁵ A reasonable interpretation of the schools’ nondiscrimination policies suggests that the nondiscrimination policies apply to the CLS and student groups because student groups are educational opportunities.²⁴⁶ In sum, the unconstitutional conditions doctrine does not prevent the law schools from conditioning recognized status upon only those groups that abide by their nondiscrimination policies.

1. *Evans v. City of Berkeley*

The California Supreme Court recently upheld the constitutionality of nondiscrimination policies within the unconstitutional conditions context.²⁴⁷ In *Evans*, California’s highest court upheld the application of the city’s nondiscrimination policy²⁴⁸ to an organ-

240. *Walker*, 453 F.3d at 860.

241. *Id.* at 860-61.

242. *Id.* at 873.

243. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

244. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

245. *Walker*, 453 F.3d at 872-73 (Wood, J., dissenting) (noting that both *Southworth* and *Rosenberger* involved student groups in the university context and both recognized student groups as educational opportunities).

246. Nonetheless, in order to avoid being struck down due to ambiguity, a school’s nondiscrimination policy should explicitly state that it applies to its recognized student groups.

247. *Evans v. City of Berkeley*, 129 P.3d 394, 403-04 (Cal. 2006), *cert. denied*, 127 S. Ct. 434 (2006).

248. The nondiscrimination policy at issue, resolution No. 58,859-N.S., was adopted by the Berkeley City Council in March 1997 in response to nonprofit organizations requesting free marina berths. *Id.* at 396.

ization affiliated with the Boy Scouts.²⁴⁹ In 1997, the City of Berkeley promulgated a policy for granting free marina berths to nonprofit community-oriented organizations.²⁵⁰ Pertinent to the issue at hand, the city's nondiscrimination policy prevents discrimination based on "race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition."²⁵¹ The city requested that the Berkeley Sea Scouts provide a "local policy statement" in order to ensure that the Sea Scouts would not discriminate on the basis of sexual orientation.²⁵² The Sea Scouts responded by letter stating that they would not discriminate on the basis of sex, race, color, national origin, political affiliation, religious preference, marital status, physical handicap, or medical condition, but did not affirm that they would not, nor do not, discriminate on the basis of sexual orientation.²⁵³ Although the city was aware that the Sea Scouts had not historically discriminated against homosexuals, the city decided to discontinue providing free marina berths to the group in light of the group's unwillingness to affirmatively comply with the requirements of the nondiscrimination policy.²⁵⁴ Consequently, the Sea Scouts filed suit, alleging violations of their freedom of speech (including association), due process, and equal protection.²⁵⁵

The court held that the application of the nondiscrimination policies did not infringe upon the Sea Scouts' associational freedom.²⁵⁶ The court first stated that the city could demand sufficient guarantees of nondiscrimination.²⁵⁷ Furthermore, the court noted that the United States Supreme Court has generally upheld against First Amendment challenges programs of governmental assistance that the limit expressive activities for which the funds may be

249. *Id.* at 395, 407-08.

250. *Id.* at 396.

251. *Id.*

252. *Id.* at 397.

253. *Id.* The Sea Scouts stated that they believe that "sexual orientation is a private matter, and we do not ask either adults or youths to divulge this information at any time." *Id.* The Sea Scouts were unwilling to firmly state that they do not discriminate on the basis of sexual orientation in part because they were concerned about losing their charter from the Boy Scouts. *Id.*

254. *Id.* at 398.

255. *Id.*

256. *Id.* at 408.

257. *Id.* at 400.

used.²⁵⁸ The California court quoted the Supreme Court's decision in *Rust v. Sullivan*:²⁵⁹

"The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. '[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.'"²⁶⁰

The California court, relying on *Grove City College v. Bell*,²⁶¹ acknowledged that the Supreme Court has upheld laws that limit eligibility for benefits to those organizations that agree in advance not to discriminate, notwithstanding First Amendment challenges to such policies.²⁶² In *Grove City College*, the Court held that it was constitutional for the state to require that the college comply with Title IX's prohibition against discrimination in order to receive certain federal funding.²⁶³ The California court opined that in *Evans*, the city engaged in similar, permissible behavior when it conditioned free marina berths upon compliance with the city's nondiscrimination policy.²⁶⁴ In the court's eyes, the City of Berkeley did not attempt to prohibit the Sea Scouts from acting in a discriminatory manner, but rather refused to fund such activity.²⁶⁵

The similarities between *Evans* and the CLS litigation are obvious. Both deal with groups requesting state-provided recognition and benefits. Both involve nondiscrimination policies that condition those benefits on the group's willingness to comply with a uniformly applied nondiscrimination policy. Accordingly, the *Evans* case supports the notion that the law schools cannot actively force the CLS to operate in a nondiscriminatory way, however, it can refuse to support such a group through the student fisc.²⁶⁶

258. *Id.* at 401.

259. *Rust v. Sullivan*, 500 U.S. 173 (1991).

260. *Evans*, 129 P.3d at 400 (quoting *Rust*, 500 U.S. at 193).

261. *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

262. *Evans*, 129 P.3d at 401 (citing *Grove City Coll.*, 465 U.S. at 557-61).

263. *Grove City Coll.*, 465 U.S. at 557-63.

264. *Evans*, 129 P.3d at 402.

265. *Id.* (quoting *Rust v. Sullivan*, 500 U.S. 173, 198 (1991)).

266. *See id.*

2. *Bob Jones University v. United States*

In *Bob Jones University*, another case that dealt with unconstitutional conditions, the federal government revoked the University's tax exempt status based on its discriminatory practices.²⁶⁷ Although *Bob Jones University* dealt with the Free Exercise Clause,²⁶⁸ instead of freedom of speech, the actors in the case were situated similarly to those in the CLS litigation.²⁶⁹ In other words, both controversies deal with conditioning benefits upon the relinquishment of protected First Amendment rights. Consequently, the analysis used in *Bob Jones University* is useful in determining the outcome of the current dispute.

In *Bob Jones University*,²⁷⁰ the University argued that the application of a tax regulation, which revoked the University's tax exempt status based on its racially discriminatory practices,²⁷¹ violated the University's free exercise rights under the First Amendment.²⁷² Essentially, the University sought state benefits while refusing to conform to the conditions for such benefits. The University con-

267. *Bob Jones Univ. v. United States*, 461 U.S. 574, 580-82 (1983).

268. The First Amendment protects freedom of religion. U.S. CONST. amend. I. The Free Exercise Clause of the First Amendment protects the "right to believe and profess whatever religious doctrine one desires." *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990). Generally speaking, the First and Fourteenth Amendments prevent the government from aiding or encumbering religion. *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) (citing U.S. CONST. amend. I). However, the Free Exercise Clause does not protect all behavior based on sincerely held religious beliefs. *See Smith*, 494 U.S. at 872. Moreover, the Free Exercise Clause does not grant religious groups special benefits. *See Prater v. City of Burnside, Ky.*, 289 F.3d 417, 427-28 (6th Cir. 2002).

269. *See Bob Jones Univ.*, 461 U.S. at 602-05 (holding that the government can condition tax-exempt status on the requirement that the University not discriminate based on race, notwithstanding that such discrimination is religiously motivated).

270. *Id.* at 574.

271. *Bob Jones University* is a nonprofit corporation not affiliated with any religious denomination, but it adheres to and teaches fundamentalist Christian religious beliefs. *Id.* at 579-80. The University's discriminatory admissions policy was based on the interpretation of the Bible that "race is determined by descent from one of Noah's three sons—Ham, Shem, and Japheth. Based on this interpretation, Orientals and Negroes are Hamitic, Hebrews are Shemitic, and Caucasians are Japhethitic. Cultural or biological mixing of the races is regarded as a violation of God's command." *Id.* at 583 n.6. Until 1971, African American students were excluded from the University; from 1971 to 1975 the University accepted no applications from "unmarried Negroes, but did accept applications for Negroes married within their race." *Id.* at 580 (citation omitted). At the time of this case, the University continued to "deny admission to applicants engaged in an interracial marriage or known to advocate interracial marriage or dating." *Id.* at 581.

272. *Id.* at 602-03.

tended that it was not racially discriminatory;²⁷³ however, the Court quickly and firmly rejected the University's argument, stating that it is "firmly established that discrimination on the basis of racial affiliation and association is a form of racial discrimination."²⁷⁴ In its holding, the Court stated that "not all burdens on religion are unconstitutional. . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."²⁷⁵

Thus, a state interest may be so compelling that state regulations may limit religious conduct.²⁷⁶ The Court confirmed that the denial of tax benefits will no doubt have a substantial impact on the University, but would not prohibit them altogether from practicing their religious beliefs.²⁷⁷ The Court stated that "the Free Exercise Clause provides substantial protection for lawful conduct grounded in religious belief."²⁷⁸ However, the government may burden the exercise of religion if the state has a compelling interest and "the law is the least restrictive means of furthering [that] interest."²⁷⁹ The Court found that the compelling state interest of eliminating racial discrimination in education outweighed the burden placed upon the University by derecognizing its tax-exempt status.²⁸⁰

Likewise, the CLS will be substantially affected if it adheres to the nondiscrimination policies, but it would not be prevented from existing. Those student groups that do not wish to abide by the nondiscrimination policies may still use the schools' facilities and engage in lawful discrimination without impediment from the schools.²⁸¹ They just will not receive the benefits of University recognition. For example, during the 2004-2005 academic year, the

273. *Id.* at 605. The University argued that it simply restricted conduct of students (prohibiting the association of men and women and interracial marriage), and that such restrictions on conduct apply to all races. *Id.*

274. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

275. *Id.* at 603 (quoting *United States v. Lee*, 455 U.S. 252, 257-58 (1982)).

276. *Id.* (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944), which held that neutral child labor laws could prevent children from dispensing religious pamphlets on public streets without infringing on the free exercise rights of religious groups).

277. *Id.* at 603-04.

278. *Id.* at 603 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972); *Thomas v. Review Bd. of Indus. Employment Sec. Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963)).

279. *City of Boerne v. Flores*, 521 U.S. 507, 533-34 (1997).

280. *Bob Jones Univ.*, 461 U.S. at 604.

281. *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) (for example, despite not being a recognized student group, during the 2004-2005 academic year, the CLS held multiple meetings both on and off the University's campus).

Hastings chapter of the CLS, although not a recognized student organization, “held weekly Bible-study meetings, and hosted a beach barbeque, a Thanksgiving dinner, a campus lecture on the Christian faith and legal practice, several fellowship dinners, an end-of-year banquet, and several informal social activities.”²⁸²

In *Bob Jones University*, the Court asserted that the State’s compelling interest in dissolving discrimination in educational institutions “substantially outweighs whatever burden denial of tax benefits places on [the University’s] exercise of [its] religious beliefs.”²⁸³ Similarly, a court should find that the schools’ interests of eradicating discrimination outweigh the burden placed upon the CLS by denying it any benefits associated with recognized status.²⁸⁴ Since both cases deal with a partial or selective sacrifice of First Amendment rights, the *Bob Jones University* case should persuade courts to uphold the nondiscrimination policies involved in the CLS litigation.

C. Regulation of Conduct Versus Expression

1. Viewpoint Neutrality

A state regulation that aims to suppress expression because of its viewpoint is unconstitutional.²⁸⁵ A state regulation is viewpoint discriminatory, and thus, is unconstitutional “if its purpose is to impose a differential adverse impact upon a viewpoint.”²⁸⁶ Viewpoint discrimination is a subset of content discrimination,²⁸⁷ and is espe-

282. *Id.* at *4.

283. *Bob Jones Univ.*, 461 U.S. at 604.

284. Also in *Bob Jones University*, the Court found that denying the University tax exempt status did not violate the Establishment Clause. *Id.* at 604 n.30. The Court opined that the tax policy was neutral and secular, and the mere fact that it happened to burden the religious tenets of the University did not constitute a violation of the Establishment Clause. *Id.* The Court mentioned that the fact that the policy is applied to all religious schools “avoids the necessity for a[n] . . . inquiry into whether a racially restrictive practice is the result of sincere religious belief.” *Id.* at 604-05 (emphasis omitted) (citing *Bob Jones Univ. v. United States*, 639 F.2d 147, 155 (4th Cir. 1980); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979)). Similarly, the public law schools apply their nondiscrimination policy to any student organization that wishes to receive recognized status. *Crow, JSOF, supra* note 126, ¶¶ 34-36. Consequently, the school policies also do not violate the Free Exercise Clause.

285. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

286. *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 94 (2d Cir. 2003) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992)).

287. “Viewpoint discrimination is a subset of content discrimination;” content based regulation regulates speech based on the substance of the message, whereas viewpoint regulation goes beyond the substance and takes aim at the position the speaker

cially repugnant to the First Amendment because it targets the speech based on the government's agreement or disagreement with the position that the speaker wishes to promote.²⁸⁸ In the CLS litigation, the schools' nondiscrimination policies are viewpoint neutral.²⁸⁹ They are facially neutral because the policies prohibit discriminatory membership practices of all recognized student groups not because of the viewpoints the student groups wish to express, but because of the social harms that discriminatory practices cause homosexuals.²⁹⁰

Nevertheless, a facially viewpoint neutral law may be viewpoint discriminatory if its purpose is to impose an adverse impact upon a particular viewpoint.²⁹¹ Justice Scalia acknowledged in *R.A.V. v. City of St. Paul* that, "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."²⁹² However, the purpose of the universities' nondiscrimination policies is not to impose an adverse impact upon the CLS's view that homosexuality is wrong; rather, the intent of these policies is to prevent the act of discrimination. For example, the nondiscrimination policies require that a group dedicated to helping African American students admit all male and female students.²⁹³ Moreover, the nondiscrimination policies apply to all student organizations seeking recognized status and they apply without regard to their message. Consequently, the nondiscrimination policies are "content-neutral."²⁹⁴

takes. Rodney A. Smolla, *Content-Neutral Versus Content-Based Distinction*, 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 3:9, 3-11 (2006) (citing *Ward*, 491 U.S. 781).

288. *Id.*

289. *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 866 (2006) (emphasis added) (regarding the nondiscrimination policy in that case, Judge Sykes stated "[t]here can be little doubt that SIU's Affirmative Action/EEO policy is viewpoint neutral on its face, but as the record stands, there is strong evidence that the policy has not been applied in a viewpoint neutral way").

290. *See, e.g., Wyman*, 335 F.3d at 93.

291. *Id.* at 94.

292. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992).

293. *Id.* at 6.

294. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citing *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981); *Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 535-36 (1980); *Grayned v. City of Rockford*, 408 U.S. 104, 117-18 (1972); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939)).

2. Regulation of Conduct Versus Expression

Notwithstanding the forum where speech occurs, states may restrict or even ban an expressive *activity*, not because of the idea that it expresses, but because of “the action it entails.”²⁹⁵ In other words, state regulations must focus on conduct, not the expression therein; otherwise the regulation runs the risk of being viewpoint discriminatory, which is unconstitutional.²⁹⁶

This expression/conduct dichotomy was discussed in *United States v. O'Brien*.²⁹⁷ In *O'Brien*, the Court held that a statute that prohibited the burning of draft cards was not on its face in violation of the First Amendment because the burning of a draft card is not inherently expressive.²⁹⁸ The Court went on to state that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”²⁹⁹

This dichotomy was also present in *Boy Scouts of America v. Wyman*.³⁰⁰ There, the court examined whether the removal of the Boy Scouts from Connecticut’s workplace charitable campaign on the basis of its discriminatory practices violated the Scouts’ First Amendment rights.³⁰¹ In *Wyman*, the State Employee Campaign Committee, which governed the state’s annual campaign to raise funds from state employees for various charitable purposes, revoked the Scouts’ eligibility to receive donations³⁰² in accordance with a ruling by the Connecticut Commission on Human Rights and Opportunities (CHRO).³⁰³ The CHRO’s ruling was based on its

295. *R.A.V.*, 505 U.S. at 385 (emphasis added).

296. *See id.* at 390.

297. *United States v. O'Brien*, 391 U.S. 367 (1968). The Court developed an intermediate scrutiny test for state regulatory action that has an incidental effect on expression. *Id.* at 376-77. However, *Dale* requires application of strict scrutiny. *See supra* text accompanying note 183. Nonetheless, *O'Brien*’s discussion of the distinction between regulating conduct and expression is instructive.

298. *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 446 (3d Cir. 2000) (citing *O'Brien*, 391 U.S. at 375).

299. *O'Brien*, 391 U.S. at 376.

300. *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003).

301. *Id.*

302. *Id.* at 86.

303. *Id.* at 85. “The Connecticut Commission on Human Rights and Opportunities . . . is the independent state agency that is ‘charged with the primary responsibility of determining whether discriminatory practices have occurred and what the appropriate remedy for such discrimination must be.’” *Id.* (quoting *Dep’t of Health Servs. v. Comm’n on Human Rights & Opportunities ex rel. Mason*, 503 A.2d 1151, 1156 (Conn. 1986)).

opinion that if the Scouts were allowed to participate in the charitable campaign, then it would be a violation of Connecticut's Gay Rights Law.³⁰⁴

The court focused on the permissible regulation of conduct by the state versus the constitutionally impermissible regulation of expression.³⁰⁵ The court noted that, on its face, the Connecticut Gay Rights Law prohibited "discriminatory membership and employment policies not because of the viewpoints such policies express, but because of the immediate harms—like the denial of concrete economic and social benefits—that such discrimination causes homosexuals."³⁰⁶ Thus, the court opined, the law regulated "employment policies as conduct, not expression, and as such, is not obviously viewpoint discriminatory."³⁰⁷

Similarly, the law schools' policies regulate CLS membership as conduct, not as expression. The law schools' policies do not seek to regulate groups based on their religious viewpoint or message, but instead aim to prohibit the act of discrimination. In fact, the nondiscrimination policies prohibit the act of discrimination by any student organization seeking recognition, whether it is an African American student group, a religious group, or a gay rights group.³⁰⁸ Accordingly, the law schools' nondiscrimination policies regulate conduct. In addition, they are viewpoint neutral. Thus, the act of discrimination (preventing non-Christian students and homosexuals from becoming members) is subject to regulation, in spite of its effect on the student groups' expressive association.

3. The Designated Public Forum

The law schools have created a limited public forum by encouraging and accommodating student associations and groups.³⁰⁹ Therefore, in light of this forum and the conduct/expression dichotomy, the remaining constitutional question is whether the view-

304. *Id.* at 93.

305. *Id.*

306. *Id.*

307. *Id.*

308. *See Crow, Def.'s Response to Pl.'s Motion for Summ. J.*, *supra* note 137.

309. *See Rosenberger v. Rector*, 515 U.S. 819 (1995) (finding that the University of Virginia created a limited public forum when it created an extracurricular program for student groups); *Widmar v. Vincent*, 454 U.S. 263, 267, 276, 277 (1981) (finding that the University created an open forum when it created an extracurricular program encouraging the organization of student groups and granting such groups recognized status).

point neutral policies are “necessary to serve a compelling state interest” and are “narrowly drawn to achieve that end.”³¹⁰

The nondiscrimination policies apply to every student organization seeking recognized status.³¹¹ Also, the policies regulate student groups’ membership selection, but they do not regulate what student groups have to say.³¹² The next question is whether the schools have a compelling interest that the policies promote. The schools wish to exclude the CLS from receiving benefits unless they are willing to abide by the schools’ nondiscrimination policy.³¹³ The law schools’ interests are to promote discourse, honesty, openness, and respect for the rights of individuals, inclusion, and diversity.³¹⁴ Generally, nondiscrimination statutes and regulations are promulgated to prevent the social and economic harms that discrimination causes.³¹⁵ The Supreme Court has held such interests to be compelling in the university context.³¹⁶ The law schools’ interests in the CLS litigation are similar to those in *Grutter v. Bollinger*, and those generally accepted as articulated in *Wyman*, and the law schools have a compelling interest in eradicating the social harms of discrimination and facilitating an inclusive and diverse student body amongst its recognized student groups.

The last question is whether the nondiscrimination policies are narrowly tailored.³¹⁷ In this case, the nondiscrimination policies prohibit discrimination not amongst all student groups, but only

310. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

311. *See Crow, Def.’s Response to Pl.’s Motion for Summ. J.*, *supra* note 137, at 4.

312. *Cf. Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 175 (2002). Holding an ordinance, which Watchtower argued restricted speech, to be constitutional, stating “[t]he ordinance is content neutral and does not bar anyone from going door-to-door in Stratton. It merely regulates the manner in which one must canvass: A canvasser must first obtain a permit.” *Id.*

313. *Christian Legal Soc’y Chapter at S. Ill. Univ. Sch. of Law v. Walker*, No. Civ. 05-4070-GPM, 2005 WL 1606448, at *1 (S.D. Ill. July 5, 2005); *Christian Legal Soc’y Chapter of Univ. of Cal. v. Kane*, No. C 04-4484 JSW, 2005 WL 850864, at *1 (N.D. Cal. Apr. 12, 2005); *Pl.’s V. Compl., Christian Legal Soc’y Chapter at Ariz. State Univ. Coll. of Law v. Crow*, No. CV-04-2572-PHX-NVW, ¶¶ 4.3, 4.5, 4.9 (D. Ariz. Nov. 17, 2004).

314. *See Crow, Def.’s Response to Pl.’s Motion for Summ. J.*, *supra* note 137, 3:1-8.

315. *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 93 (2d Cir. 2003).

316. *Grutter v. Bollinger*, 539 U.S. 306, 328-30 (2003) (concluding that U.S. law schools have a “compelling interest in attaining a diverse student body” and that “attaining a diverse student body is at the heart of the Law School’s proper institutional mission, and that ‘good faith’ on the part of a university is ‘presumed’ absent ‘a showing to the contrary’”).

317. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (citing *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 132 (1981); *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 535-36 (1980); *Grayned*

those groups seeking university recognition.³¹⁸ They apply to discriminatory membership practices, but do not in any other way restrict student groups' speech.³¹⁹ Therefore, such policies are narrowly tailored. Consequently, under the designated public forum analysis, a court should find the nondiscrimination policies, which prevent discrimination, to be constitutional.

CONCLUSION

The outcome of this litigation will influence public universities and the way they educate students. If the CLS is granted an exemption from the law schools' nondiscrimination policies, a university would thus need to consider whether any group could discriminate against individuals based on a sincerely held religious belief or consider whether it is justified in granting an exception to a religious group like the CLS, while denying another religious group the ability to discriminate based on a sincerely held religious belief, for example, based on race.³²⁰ In sum, the CLS should not be granted an exemption from nondiscrimination policies, just as other student organizations are not. In conditioning recognized status upon the promise not to discriminate, the law schools are not violating the CLS's freedom of speech.

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v. City of Rockford, 408 U.S. 104, 117-18 (1972); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939)).

318. *Crow, Def.'s Response to Pl.'s Motion for Summ. J.*, *supra* note 137, at 6. Student groups that do not wish to abide by the nondiscrimination policies may use the schools' facilities and engage in lawful discrimination without impediment from the schools. *Id.* at 10 n.4.

319. *See supra* text accompanying notes 217-220.

320. *See Bob Jones Univ. v. United States*, 461 U.S. 575, 583 n.6 (1983) (the Court noted the University's interpretation of the Bible that "race is determined by descendance from one of Noah's three sons—Ham, Shem, and Japheth. Based on this interpretation, Orientals and Negroes are Hamitic, Hebrews are Shemitic, and Caucasians are Japhethitic. Cultural or biological mixing of the races is regarded as a violation of God's command").