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## Comment

# The Clash Between the First Amendment and Civil Rights: Public University Nondiscrimination Clauses

### I. INTRODUCTION

Individual rights have become increasingly important in this country in the past few decades. Beginning with the 1960s Civil Rights movement, protests and activism have been the impetus for enacting laws which allow the government to coerce private persons to respect, in some instances passively accept, the rights, viewpoints, and actions of those around us. University campuses across the country form part of the current bedrock of this movement.

Therefore, it should come as no surprise that public universities,<sup>1</sup> the closest representative of the government to college students, are the subject of much of the pressure to enact rules protecting the rights, viewpoints, and actions of minority members of society. The addition of the nondiscrimination agreement as a precondition to recognition as a university student group is part of the outgrowth of this pressure.<sup>2</sup>

Universities originally intended that nondiscrimination clauses ensure student groups recognized by the university did not exercise improper prejudices based on gender, nationality, or religious belief. Recently, however, the gay rights movement has placed intense pressure on universities to include sexual orientation on the list of protected classes. Minority student groups composed of homosexuals and bisexuals have sought protection on

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1. "University" is used to denote any publicly funded institution of higher education which could be classified as a state actor for constitutional analysis.

2. *E.g.*, every registered student organization must agree "to provide equal opportunity regardless of race, sex, handicap, sexual orientation or other irrelevant criteria when determining its membership, or who may hold offices within the RSO." See Memorandum from Central Michigan University at 1 (Nov. 17, 1993) (on file with authors). The University of Missouri requires a nondiscrimination clause to be inserted in a group's constitution and bylaws, as well as a statement that the group will not discriminate on the basis of sexual orientation in regards to membership and voting rights. See Organization Registration Papers for University of Missouri-Columbia (on file with authors).

university campuses (and in society as a whole)<sup>3</sup> from discrimination based on sexual orientation.

While many universities have added sexual orientation to the list of protected classes covered by the nondiscrimination clause, many student groups have felt that the amended nondiscrimination clause violates their constitutional rights.<sup>4</sup> The constitutional issues invoked in this debate are especially contentious to student religious organizations and other organizations with religious, moral or ethical beliefs against homosexual conduct.<sup>5</sup> The ultimate question is which of the conflicting civil liberties existing in this context will trump the other.

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3. See, e.g., Arthur H. Matthews, *They Still Don't Get It*, WORLD, April 23, 1994, at 24 (concerning high school religious organization required to permit nonbelievers to lead the group in order to exist) and the resulting lawsuit, *Hsu v. Roslyn Union Free Sch. Dist.*, 876 F. Supp. 445 (E.D.N.Y. 1995) (denying preliminary injunction prohibiting school from forbidding religious group to exist at school without signing nondiscrimination policy); R. Lamont Jones Jr., *Fired Dorm Assistant, CMU Settle Rights Suit*, PITTSBURGH POST-GAZETTE, June 10, 1994, at C4 (Carnegie Mellon University student fired from job for refusing to wear gay rights button which violated his religious beliefs).

4. The constitutionality of adding sexual orientation to the list of protected classes has been questioned on numerous university campuses by student religious groups, see *infra* note 17, and Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994).

5. As an example, Christian organizations rely on eighteen Bible verses condemning homosexual conduct, see, e.g., *Romans* 1:25-27:

They exchanged the truth of God for a lie, and worshipped and served created things rather than the Creator—who is forever praised. Amen. Because of this, God gave them over to shameful lusts. Even their women exchanged natural relations for unnatural ones. In the same way the men also abandoned natural relations with women and were inflamed with lust for one another. Men committed indecent acts with other men, and received in themselves the due penalty for their perversion.

Other groups might not have a moral objection to sexual orientation becoming a protected class, but instead feel that such an addition would be overly intrusive and result in excessive regulation by the state.

A muslim student also found homosexuality objectionable to his religious beliefs and accordingly refused to pay the part of his tuition bill which was allotted to homosexual groups. *Muslim Calls Student Levy for Gays A Sin*, CHICAGO TRIBUNE, Nov. 27, 1994 at C15.

## II. FRAMING THE ISSUE

No federal law presently bans discrimination based on homosexuality, gender preference, or sexual orientation. A growing number of states<sup>6</sup> and municipalities, however, do ban discrimination on these grounds. Religious organizations may be specifically exempted from these laws, or exemptions may be limited to clergy. When there are no exemptions, reported cases have upheld the First Amendment right of churches to discriminate on these grounds.<sup>7</sup> The full scope of a religious organization's right to discriminate on the basis of homosexuality remains to be explored.<sup>8</sup>

The purpose of this comment will be to explore the right of university religious organizations to discriminate on the basis of sexual orientation. Or, more to the point, to not be compelled by the university, as a prerequisite for university recognition, to promise not to discriminate on the basis of sexual orientation.

### *A. Federal and State Nondiscrimination Clauses*

No federal laws currently preclude discrimination on the basis of sexual orientation.<sup>9</sup> The Civil Rights Act of 1964 typifies Congress' approach to nondiscrimination clauses. It states in part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>10</sup> The Civil Rights Act exempts religious organizations from its anti-discrimination statute as applied to a staff member who occupies a leadership role.<sup>11</sup>

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6. (footnote omitted). See *infra* note 12 for a list of state laws banning discrimination on the basis of sexual orientation.

7. *Madsen v. Erwin*, 481 N.E.2d 1160 (Mass. 1985) (upheld discharge of lesbian employee from the *Christian Science Monitor*, which is treated as part of the Christian Science church); *Walker v. First Presbyterian Church*, 22 Lab. Rel. Rep. (BNA) 762 (1980) (dismissal of unrepentant homosexual organist upheld despite San Francisco ordinance); *Murphy v. Buchanan*, 21 Lab. Rel. Rep. (BNA) 696 (1979) (pastor's withdrawal of employment offer after learning applicant was homosexual upheld despite St. Paul, Minnesota, ordinance).

8. RICHARD B. COUSER, *MINISTRY AND THE AMERICAN LEGAL SYSTEM* 114 (1993).

9. *Id.*

10. 42 U.S.C. § 2000d (1988).

11. § 702 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988 & Supp. V 1993). This exemption was upheld by the Supreme Court in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 329 (1987). The Elliott—Larsen Civil

However, states are increasingly enacting laws prohibiting discrimination on the basis of sexual orientation.<sup>12</sup>

### B. Recognition for University Student Organizations

For student organizations desiring to be active on university campuses, gaining the status of a "Recognized Student Organization"<sup>13</sup> is a vital first step. In the past, this has typically involved signing an agreement not to discriminate on the usual suspect classifications: race; national origin; sex; handicap; and religion.

Gaining official recognition is vital for several reasons. First, only recognized student organizations may compete for funds allocated to student groups from a tax imposed on all students.<sup>14</sup> Second, and far more important than money, recognition confers the right to meet on campus, reserve meeting rooms, use the university's computers, purchase goods through the university purchasing office, and advertise the group and/or its message in designated areas.<sup>15</sup> Furthermore, without recognition, a group may not sponsor fundraisers on campus without paying for its use of student facilities and classrooms. The group is also unable to obtain free office space on campus.<sup>16</sup>

In essence, the university holds the tickets to the "marketplace of ideas" on university campuses. Without a ticket, access to the market is barred. In

Rights Act provides the same exemption for religious organizations. MICH. COMP. LAWS §§ 31.2101 - .2804 (West Supp. 1995). These exemptions seem to be required by the First Amendment. *See King's Garden, Inc. v. FCC*, 498 F.2d 51, 56 (D.C. Cir. 1974).

12. *See* CAL. CIV. CODE § 51.7 (West Supp. 1995); CAL. LABOR CODE § 1102.1 (West Supp. 1995); CONN. GEN. STAT. ANN. § 46a-81r (West Supp. 1995); HAW. REV. STAT. §§ 378-1, 378-3 (Supp. 1992); MASS. GEN. LAWS ANN. ch. 151B §§ 3, 4 (West Supp. 1995); MINN. STAT. ANN. § 363 (West Supp. 1995); N.J. STAT. ANN. §§ 10:5-5, 10:5-12 (West 1993); VT. STAT. ANN. tit. 1, § 143 (Supp. 1994) and tit. 9, §§ 4503-4504 (1993) and tit. 21, § 495 (Supp. 1995); WIS. STAT. ANN. §§ 101.22, 111.32 (West 1988). *See also* D.C. CODE ANN. §§ 1-2502, 1-2503 (1992).

13. "Recognized Student Organization" is the term used at the University of Missouri-Columbia and will be used throughout this comment. The University of Illinois also uses this terminology. *See Bainbridge, supra* note 4, at 370. Other schools may use different, though similar terminology. *See, e.g., Rosenberger v. Curators and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2514 (1995), where such groups are called "Contracted Independent Organizations."

14. *Rosenberger*, 115 S. Ct. at 2514-15.

15. *Id.* at 2518-20.

16. M-BOOK 1995-96, RULES AND REGULATIONS OF THE UNIVERSITY OF MISSOURI, *Student Organizations*, 16, 20 (1995) [hereinafter "M-BOOK"].

the past, ticket prices have been relatively low. The university has merely required the group to agree to a set of principles governing orderly conduct, established membership and leadership requirements, and a proviso that the group will not discriminate on the basis of suspect or quasi-suspect classes. Now, the university seeks to raise the admission price to its marketplace of ideas—essentially asking some groups to sell their souls—by adding sexual orientation to the list of protected classes. This addition results in moral, ethical and religious dilemmas for many student organizations, mostly religious groups, who believe either that the university has no right to dictate the validity of certain viewpoints, or find homosexual conduct contrary to the group's religious scruples.

### *C. Past and Current Disputes*

Religious groups from at least eleven universities (not including the University of Missouri) have experienced difficulty in gaining either recognition or funding based on nondiscrimination policies.<sup>17</sup> Possibly the first such dispute between a university and a religious student organization occurred at the University of Washington.<sup>18</sup> The University of Washington denied the application of Campus Crusade for Christ to obtain registered student organization status.<sup>19</sup> The dispute escalated as the university brought in the state attorney general's office and Campus Crusade retained a private law firm.<sup>20</sup> Fortunately, the two sides were able to agree that the United States Constitution mandated a religious exemption and the university granted Campus Crusade registered student organization status.

The University of Missouri—Columbia has established a Student Organizations, Governments and Activities (SOGA) committee to determine whether a student organization should receive official recognition.<sup>21</sup> SOGA has established a recognition report that every student organization must sign and a clause that the organization must insert into its constitution that states

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17. See Memorandum from Christian Legal Society (May 5, 1994) (on file with the authors) (identifying the University of Washington, Central Michigan University, Stetson University, University of Florida, University of Minnesota, University of North Carolina—Chapel Hill, University of New Mexico, SUNY—Buffalo, University of Illinois, University of West Virginia, and the University of Michigan as campuses where such disputes have arisen).

18. See Letter from Steven McFarland, Attorney for Campus Crusade for Christ, to Carol S. Niccolls, Assistant Attorney General of Washington (Nov. 5, 1991) (on file with the authors).

19. McFarland, *supra* note 18, at 1.

20. McFarland, *supra* note 18, at 1.

21. M-BOOK, *supra* note 16, at 17.

the group will not deny membership on the basis of "race, religion, color, age, sex, national origin, disability, Vietnam veteran era status and *sexual orientation*."<sup>22</sup> If a group refuses to sign this statement, the "organization does not officially exist on campus."<sup>23</sup>

A Mormon student organization at the University of Missouri, the National Latter—Day Saints Students Association, previously recognized before the university added sexual orientation to the list, refused to sign the amended statement which included sexual orientation.<sup>24</sup> As a result, the university denied official recognition to the organization.<sup>25</sup> A resolution of this dispute, if any, has not been made public.

At the University of Illinois in 1993, the Christian Legal Society sought university recognition but refused to sign a statement including sexual orientation as a protected class.<sup>26</sup> After the University denied recognition, they began discussions with the university administration.<sup>27</sup> After the exchange of several memorandums and letters and the intervention of the National Christian Legal Society, the University of Illinois granted religious groups an exemption.<sup>28</sup>

At Central Michigan University in 1993, Intersivity Christian Fellowship and other Christian organizations asked for a religious exemption from the addition of sexual orientation to the nondiscrimination clause.<sup>29</sup> The university initially denied this request and informed them that to be recognized, they must provide equal opportunity to homosexuals, despite the fact that this contravened the religious tenets of the local and national organization.<sup>30</sup> After several months of debate and research by the university and the Christian groups, the President of the university issued a statement,<sup>31</sup>

22. See, Deborah Haar, *SOGA Stands by Policy of Non-discrimination*, THE MANEATER, Nov. 22, 1994, at 1 (emphasis added).

23. Haar, *supra* note 22, at 4.

24. Haar, *supra* note 22, at 4. See also Justin Giles, *Group Might Lose Organization Status*, THE MANEATER, May 3, 1994, at 3.

25. Haar, *supra* note 22, at 4.

26. Bainbridge, *supra* note 4, at 369-70.

27. Bainbridge, *supra* note 4, at 369-70.

28. Bainbridge, *supra* note 4, at 404. A similar dispute arose at the University of Michigan and the law school chapter of Christian Legal Society. A similar exemption was granted. See Memorandum from the Center for Law and Religious Freedom to Deane Baker, Regent of the University of Michigan (Sept. 22, 1993) (on file with the authors).

29. See Memorandum of Central Michigan University, *supra* note 2, at 1-5 (describing the factual and legal contentions of both sides).

30. See Memorandum of Central Michigan University, *supra* note 2, at 2.

31. Leonard E. Plachta, President of Central Michigan University, *Statement on the Exemption of Christian Registered Student Organizations from the University's* <https://scholarship.law.missouri.edu/mlr/vol60/iss4/4>

concluding, based on legal advice from the university's attorneys, that the university could not constitutionally force Christian organizations to comply with the sexual orientation proviso in the selection of its membership or leadership.<sup>32</sup> However, the exemption did not extend to the right to attend the meetings.<sup>33</sup> If they had open meetings, sexual orientation could not be a basis for exclusion.<sup>34</sup> Presumably, the organizations accepted this limitation.

In every one of these disputes,<sup>35</sup> the university has retreated once it discovered the constitutional law encompassing this arena.<sup>36</sup> None of these cases have proceeded to court; thus no courts have ruled definitively on this sensitive issue.

### III. FREEDOM OF SPEECH

Nondiscrimination clauses implicate freedom of speech issues when persons must make a statement in order to receive the government benefit of student funds. These clauses force the student religious group to make an implicit (if not explicit) statement that no moral distinction exists between homosexual and religious lifestyles and activities. Although physical compulsion is absent, this comment will show that such university action constitutes a violation of the First Amendment rights of student religious groups.

The primary benefit of university recognition is access to facilities and funds. Student religious organizations have no right to subsidies from a public university for speech activities.<sup>37</sup> The Supreme Court has held that a state, like any private owner of property, may preserve its funds and facilities for their dedicated use and may decline to lend them for other purposes.<sup>38</sup>

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*Non-Discrimination Policy* (Nov. 18, 1993) (on file with the authors).

32. See Plachta, *supra* note 31, at 2.

33. See Plachta, *supra* note 31, at 2.

34. See Plachta, *supra* note 31, at 2.

35. With the possible exception of the University of Missouri dispute which appears to be at a mutual standstill.

36. See also NATIONAL & INTERNATIONAL RELIGION REPORT, Vol. 8, No. 16 at 7 (Catholic student at Carnegie-Mellon University settles lawsuit against university out of court after being fired from his job as a residential assistant for refusing to wear a button supporting the homosexual rights movement. The dean of student affairs commented that it was "not appropriate that anybody be asked to declare a belief he doesn't hold.").

37. Healy v. James, 408 U.S. 169, 182 n.8 (1972).

38. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2146 (1993).



However, once the university has dedicated the property for speech purposes, First Amendment guarantees attach due to the university's status as a state actor.<sup>39</sup> This rule applies whether the State has provided access to facilities or monetary funds.<sup>40</sup> Although some courts attempted to draw a distinction between funds and facilities,<sup>41</sup> clearly no distinction exists for First Amendment purposes. In *Rosenberger v. Rector and Visitors of University of Virginia*, the Supreme Court held that this distinction is clearly wrong.<sup>42</sup> The government cannot discriminate among private speakers on the economic basis of scarcity of resources.<sup>43</sup> Because "[t]here is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf,"<sup>44</sup> a university may not engage in impermissible discrimination against speech based on a distinction between facilities and funding.<sup>45</sup>

First Amendment analysis is predicated on so-called forum analysis.<sup>46</sup> The three types of fora are traditional public fora, designated public fora, and limited public fora.<sup>47</sup> In traditional public fora (for example, sidewalks and public parks), the government may make exclusions through regulations based on subject matter or speaker identity only when required by a compelling state interest and the regulations are narrowly drawn to achieve that end.<sup>48</sup> Designated public fora (for example, school buildings after school hours) occur where the government opens up property not traditionally dedicated to speech activity for a wide variety of speech purposes which subjects the property to the same constitutional limitations as traditional public fora.<sup>49</sup> Finally, limited public fora occur where the government allows its property to remain "non-public except as to specified uses."<sup>50</sup> With respect to limited

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39. *Rosenberger v. Rector and Visitors of University of Virginia*, 115 S. Ct. 2510, 2516-17 (1995).

40. *Id.* at 2519.

41. *See Rosenberger v. Rector and Visitor's of the University of Virginia*, 18 F.3d 269, 285 (4th Cir. 1994) for the Fourth Circuit's treatment of this issue. *See also infra* notes 115-19 and accompanying text.

42. *Rosenberger*, 115 S. Ct. at 2519.

43. *Id.*

44. *Id.* at 2523.

45. *Id.* at 2524.

46. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

47. *Lamb's Chapel*, 113 S. Ct. at 2142.

48. *Id.* at 2146.

49. *Id.*

50. *Id.* at 2145.

public forum, control over access can be based on subject matter and speaker identity "so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."<sup>51</sup>

There has been considerable litigation between student organizations and universities to determine whether to designate student funds as public fora or limited public fora. Student organizations attempt to show that the university has made funds available for broad communicative purposes while universities try to show other purposes behind the availability of funds for student organizations. Courts have decided this issue both ways.

In *Healy v. James*,<sup>52</sup> the United States Supreme Court held that a public university's refusal to recognize a student chapter of Students for a Democratic Society ("SDS")<sup>53</sup> violated the students' First Amendment rights to contribute to the "intellectual give and take of campus debate."<sup>54</sup> The Court noted that the "practical realities" of the situation could not be ignored in evaluating the group's constitutional rights.<sup>55</sup> Thus, the Court ruled the university must support SDS speech according to the same guidelines which provided other organizations support for expressive activities.<sup>56</sup>

*Joyner v. Whiting*<sup>57</sup> reached the same decision with regard to a university newspaper at North Carolina Central University, a predominantly black school. The editorial staff printed several articles adamantly proposing that whites not be allowed to enroll to preserve the "university's mission" of educating young blacks.<sup>58</sup> The university president withdrew financial support as a result of these editorials.<sup>59</sup> Even though the comments "advocated racial segregation contrary to the Fourteenth Amendment and the Civil Rights Act of 1964," the Fourth Circuit, citing *Healy*, held that the university could not censor the student publication by any means<sup>60</sup> unless the

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51. *Id.* at 2147.

52. 408 U.S. 169 (1972).

53. According to the university, SDS promoted violence as an acceptable means of social change. *Id.* at 176.

54. *Id.* at 181.

55. *Id.* at 183.

56. *Id.* at 183-84.

57. 477 F.2d 456 (4th Cir. 1973).

58. *Id.* at 458.

59. *Id.* at 459.

60. These included "suspending the editors, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support," or "any other form of censorial oversight based on the institution's power of the purse." *Id.* at 460 nn.2-8.

student speech was forbidden due to a danger of physical violence<sup>61</sup> or disruption at the university.<sup>62</sup>

Conversely, *Tipton v. University of Hawaii*<sup>63</sup> held that the availability of funds to student organizations did not constitute the designation of a public forum.<sup>64</sup> *Tipton* relied heavily on *Rust v. Sullivan*<sup>65</sup> which states, "[t]he 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 alternate program which seeks to deal with the problem in another way."<sup>66</sup> *Tipton* accepted the university's denial of funding to student groups "which would use the funds to promote a particular religious point of view, even if in a secular context" because the availability of funds was designed to "encourage student participation in co-curricular activities."<sup>67</sup> The court added that simply because the university could have selected different funding criteria did not invalidate the actual funding program the university adopted.<sup>68</sup>

The *Tipton* opinion addressed several other issues in dicta. First, once a university adopts a funding policy for extracurricular activities, it must apply the policy uniformly to all qualified applicants.<sup>69</sup> Decisions denying funding for an expressive purpose based on the nature of an applicant rather than the policy are subjected to the heightened scrutiny test.<sup>70</sup> Second, because *Tipton* dealt with a facial challenge to the policy, the court expressly declined to decide whether a university could refuse to fund all student religious organizations while funding the activities of other groups.<sup>71</sup> Of course, this is the issue presented in specific instances where universities coerce student religious groups into making statements in university "nondiscrimination" clauses.

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61. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (forbidding advocacy which "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

62. See *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503 (1969) (limiting free and unrestricted expression in schools to instances where it does not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school").

63. 15 F.3d 922 (9th Cir. 1994).

64. *Id.* at 926.

65. 500 U.S. 173 (1991).

66. *Id.* at 193.

67. *Tipton*, 15 F.3d at 924, 926.

68. *Id.*

69. *Id.* at 927.

70. *Id.*

71. *Id.*

Despite the torrent of litigation in classifying school policy as a designated public forum or limited public forum, religious student groups need not rely on forum analysis to prevail before the courts. Religious groups prevailed before the Supreme Court in *Lamb's Chapel v. Center Moriches Union Free School District* where the Court stated that even if the regulations constituted a limited forum, the group was entitled to use school facilities.<sup>72</sup>

In *Lamb's Chapel*, a religious group attempted to use school facilities to show a series of films discussing traditional Christian family values.<sup>73</sup> The New York school district permitted use of facilities by public groups for social or civic purposes so long as they followed promulgated regulations from the state.<sup>74</sup> Rule 7 of the school district's rules explicitly proscribed using school facilities for religious purposes, and on this basis the school district denied use to *Lamb's Chapel*.<sup>75</sup> Both the District Court and the Court of Appeals upheld the denial of benefits to *Lamb's Chapel* on the basis that the state had created a limited public forum which it had not opened to religious uses.<sup>76</sup>

The Supreme Court unanimously rejected this reasoning.<sup>77</sup> Justice White reiterated that control, even over a nonpublic forum, may only be based on subject matter and speaker identity so long as the distinctions are reasonable in light of the forum's purpose and are viewpoint neutral.<sup>78</sup> The critical question is not whether the school treats all religious groups alike; rather the question is whether Rule 7 discriminates on the basis of viewpoint to "permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the matter from a religious standpoint."<sup>79</sup> Clearly, films or lectures about child-rearing and family values would have been allowed as a social or civic purpose under the regulations, and the school denied the film's exhibition solely because it dealt with the issue from a religious standpoint.<sup>80</sup> Justice White stated this was a clear example of a forbidden government regulation of speech that favors some viewpoints or ideas at the expense of others.<sup>81</sup> The principle applies to all such cases, "provided that the defendants have no defense based on the establishment clause."<sup>82</sup>

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72. *Lamb's Chapel*, 113 S. Ct. at 2147.

73. *Id.* at 2144-45.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 2147.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 2147-48.

82. *Id.* at 2148 (quoting Judge Posner in *May v. Evansville-Vanderbaugh Sch.*

Justice White acknowledged that *Widmar v. Vincent*<sup>83</sup> declared that a state's interest in avoiding an Establishment Clause violation "may be [a] compelling" one justifying otherwise protected free speech under the First Amendment.<sup>84</sup> However, in *Widmar*, the Court held that permitting use of university property for religious purposes under an open access policy was not incompatible with the Establishment Clause.<sup>85</sup>

The Court reached the same conclusion when addressing Establishment Clause concerns in *Lamb's Chapel*.<sup>86</sup> Under the factual circumstances, "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental."<sup>87</sup> Justice White expressly endorsed use of the three-prong *Lemon*<sup>88</sup> test in deciding Establishment Clause cases.<sup>89</sup> The regulation did not violate the Establishment Clause because (1) the governmental action had a secular purpose; (2) it did not have the principal or primary effect of advancing or inhibiting religion; and (3) it did not foster an excessive entanglement with religion.<sup>90</sup> Therefore, the state had no constitutional basis to abridge speech and the Court reversed the decision of the Court of Appeals.<sup>91</sup>

The *Lamb's Chapel* holding can be analogized to university nondiscrimination clauses. Even if the university has created only a limited public forum by making funds available to student organizations, it allows discussion of issues pertaining to homosexuality by providing facilities and funds to avowed homosexual groups. The university may control access (which under *Rosenberger* includes funding) to this limited forum only if its regulations are content neutral. If a university denies access to a group solely because it discusses a topic discussed by secular groups from a religious perspective, its regulations are not content neutral. Therefore, the abridgement of free speech imposed by university nondiscrimination clauses violates the First Amendment.

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Corp., 787 F.2d 1105, 1114 (7th Cir. 1986)). The implicit assumption underlying this principle is that a violation of the establishment clause is the only possible compelling governmental interest in cases that are factually similar to *May*.

83. 454 U.S. 263, 271 (1981)

84. *Id.*

85. *Id.*

86. *Lamb's Chapel*, 113 S. Ct. at 2148.

87. *Id.*

88. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

89. *Lamb's Chapel*, 113 S. Ct. at 2148.

90. *Id.*

91. *Id.* at 2148-49.

Despite the clear result mandated by *Lamb's Chapel*, lower courts have continued to deny student religious organizations funding despite First Amendment allegations by the groups. *Rosenberger v. Rectors and Visitors of University of Virginia*<sup>92</sup> affirmed university action denying student funds to Wide Awake Productions, a student magazine addressing issues from a Christian viewpoint.<sup>93</sup> The denial was based on a guideline promulgated by the Rector and Visitors forbidding expenditures on "religious activities."<sup>94</sup> The university defined "religious activities" in the guidelines as "an activity which primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality."<sup>95</sup> Rosenberger and other students associated with Wide Awake sued after the university refused to reimburse the group for the first two issues of the magazine claiming a violation of their First Amendment free speech rights.<sup>96</sup>

The court initially noted that denial of the benefit of a university-funded grant contravened the First Amendment because it implicitly condemned the content and viewpoint of Wide Awake's speech.<sup>97</sup> The result was that the university created an uneven playing field which tilted towards student groups engaged in wholly secular modes of expression.<sup>98</sup> Thus, the court held that the Rector and Visitors conditioned Wide Awake's receipt of government benefits upon foregoing constitutionally protected rights of expression.<sup>99</sup>

Nonetheless, the Court of Appeals upheld the university's action by finding a compelling governmental interest in not violating the Establishment Clause.<sup>100</sup> Notwithstanding the holding in *Lamb's Chapel* that access by religious groups to school facilities did not violate the Establishment Clause, the Fourth Circuit's application of the *Lemon* test led to its decision that university funding would constitute such a violation.<sup>101</sup>

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92. 18 F.3d 269 (4th Cir.), *cert. granted*, 115 S. Ct. 417 (1994), *rev'd*, 115 S. Ct. 2510 (1995).

93. *Id.* at 271-72. The stated purposes of Wide Awake were (1) "publishing a magazine of philosophical and religious expression"; (2) "facilitating discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints"; and (3) "providing a unifying focus for Christians of multicultural backgrounds." *Id.*

94. *Id.* at 271.

95. *Id.* at 271 n.2.

96. *Id.* at 273-74.

97. *Id.* at 279.

98. *Id.* at 281.

99. *Id.*

100. *Id.* at 287.

101. This decision was made despite the *Rosenberger* court's familiarity with *Lamb's Chapel*. In fact, *Lamb's Chapel* was cited in *Rosenberger* for the proposition that the *Lemon* test remained viable in determining Establishment Clause challenges. Presumably, the court only felt itself bound by the test itself rather than by the

The Fourth Circuit's *Lemon* analysis directly conflicted with that of the Supreme Court in *Widmar v. Vincent*.<sup>102</sup> In *Widmar*, members of a student religious group brought an action challenging exclusion from university facilities generally available to other student groups.<sup>103</sup> The Supreme Court held the exclusion violated the group's First Amendment rights to free speech and rejected the university's defense that it had a compelling interest in avoiding an Establishment Clause violation.<sup>104</sup>

Justice Powell, writing for the majority in *Widmar*, discussed at great length the second prong, whether the primary effect of the governmental action will serve to inhibit or advance religion.<sup>105</sup> He noted religious groups would benefit from use of university facilities.<sup>106</sup> However, he stated the Court previously explained that a religious organization's enjoyment of merely "incidental" benefits did not violate the "primary advancement" of religion prong.<sup>107</sup> The group's benefit was incidental based predominately on two factors. First, a university does not confer any imprimatur of state approval on religious sects or practices by allowing access to university property.<sup>108</sup> "Such a policy 'would no more commit the University . . . to religious goals' than it is 'now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance, or any other group eligible to use its facilities.'"<sup>109</sup> Second, the university made the forum available to a broad class of nonreligious as well as religious speakers.<sup>110</sup> In the absence of empirical evidence that religious groups would dominate the forum, advancement of religion would not be the forum's "primary effect."<sup>111</sup>

Justice Powell addressed *Lemon's* third prong, whether the regulation would foster "excessive entanglement with religion," summarily by stating that this prong had been "clearly met."<sup>112</sup> In a footnote, he stated that the university would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech."<sup>113</sup>

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application thereof given by the unanimous Supreme Court.

102. 454 U.S. 263 (1981).

103. *Id.* at 264-66.

104. *Id.*

105. *Id.* at 271-75.

106. *Id.* at 273.

107. *Id.* (citing *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973)).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 275.

112. *Id.* at 271.

113. *Id.* at 272 n.11.

The Fourth Circuit's analysis directly contravened *Widmar*. In finding that a university policy allowing Wide Awake access to student funds constitutes state action advancing religion, the court stated that it would be difficult to view such an award "as anything but state sponsorship" of religious belief.<sup>114</sup> Incredibly, despite the clear language in *Widmar*,<sup>115</sup> the court made this statement without citing any authority.<sup>116</sup> Again, when evaluating the third prong, the court ignored Justice Powell's analysis in *Widmar*.<sup>117</sup> Although the court acknowledged that *Widmar* upheld direct nonmonetary benefits to religious groups, the court stated (again without supporting authority) that "[d]irect monetary subsidization of religious organizations and projects . . . is a beast of an entirely different color."<sup>118</sup>

Predictably, the Supreme Court reversed the Fourth Circuit in *Rosenberger*.<sup>119</sup> Justice Kennedy, writing for the Court, noted viewpoint discrimination is the most egregious form of speech discrimination.<sup>120</sup> The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.<sup>121</sup> By the very terms of the prohibition, the University did not exclude religion as a subject matter, but selected for disfavored treatment those student journalistic efforts with religious editorial viewpoints.<sup>122</sup> Thus, for the University to prevail, it must meet the compelling governmental interest/least restrictive means test.

In addressing the Establishment Clause concerns connected to the funding, Justice Kennedy flatly stated, "[t]he governmental program here is neutral toward religion."<sup>123</sup> The object of the Student Activity Fund, from which the funding was to be derived, was to open a forum for speech.<sup>124</sup>

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114. *Rosenberger*, 18 F.3d at 285.

115. *See supra* notes 103-06 and accompanying text.

116. *Rosenberger*, 18 F.3d at 285. This omission is more incredible in view of Chief Judge Ervin's apparent admiration for Justice Powell. In the same paragraph, Justice Powell is quoted in *Hunt v. McNair*, 413 U.S. 734 (1973), a case deciding an Establishment Clause challenge based on a South Carolina bond issue excluding sectarian colleges from state revenues. In fact, Justice Powell is quoted three times in the opinion. *Id.* at 282, 285 and 286. Ironically, *Widmar* was not one of the opinions Judge Ervin quoted.

117. *See supra* notes 105-113 and accompanying text.

118. *Rosenberger*, 18 F.3d at 286.

119. 115 S. Ct. 2510, 2525 (1995).

120. *Id.* at 2516.

121. *Id.* at 2516.

122. *Id.* at 2517.

123. *Id.* at 2522.

124. *Id.*



Rosenberger did not seek a subsidy because of his editorial viewpoint; he sought funding as a student journal for its speech activities.<sup>125</sup>

Before addressing the final prong, Justice Kennedy noted the State's neutrality was important in another respect. He said permitting the funding respected the critical difference "between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."<sup>126</sup> The University had taken pains to dissociate itself from Rosenberger's private speech so there was no real likelihood that the state either endorsed or coerced the speech.<sup>127</sup>

Finally, in addressing the separation of church and state principle, Justice Kennedy ridiculed the dissent's suggestion that the university scrutinize the content of student speech, lest the expression in question contain too great a religious content.<sup>128</sup> Quite correctly, he noted that such scrutiny raises the specter of governmental censorship—which is far more inconsistent with the dictates of the Establishment Clause than is governmental provision of secular printing services on a religion-blind basis.<sup>129</sup>

Therefore, the Court held that the University had engaged in impermissible viewpoint discrimination without a compelling governmental interest and reversed the Fourth Circuit.<sup>130</sup> Although it took a Supreme Court determination, freedom of speech triumphed in the end in this First Amendment battle.

The irony of the First Amendment battles fought between religious groups and homosexual groups regarding nondiscrimination clauses is that homosexual groups have so recently been on the other side of the issue. The Eighth Circuit accepted this proposition in *Gay and Lesbian Students Association v. Gohn*.<sup>131</sup> In this case, the court held that the University of Arkansas must provide funds to a registered student homosexual organization in addition to access to university facilities when the university made funding available to other organizations.<sup>132</sup> The court stated that the university could not deny funding for reasons which violated the group's First Amendment Free Speech rights:

[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in

125. *Id.*

126. *Id.* at 2522-23 (quoting *Mergens*, 110 S. Ct. at 2372).

127. *Id.* at 2523.

128. *Id.* at 2524.

129. *Id.*

130. *Id.* at 2525.

131. 850 F.2d 361 (8th Cir. 1988).

132. *Id.*

freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."<sup>133</sup>

Freedom of speech is not "owned" by any social group; it belongs to every American. Society must hear all viewpoints, religious and secular, in order to progress. By permitting religious student organizations access to the marketplace of ideas without forcing the groups to sell their identity, the courts will help all Americans by promoting a free society where all opinions are entitled to expression.

#### IV. FREEDOM OF ASSOCIATION

Substantially related to the issue of freedom of speech is the issue of freedom of association. Freedom of association is violated where the government, by withholding rights or privileges, infringes upon the communicative rights of a group.<sup>134</sup> Although the Constitution does not explicitly mention freedom of association, the Supreme Court has always protected this right because "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."<sup>135</sup>

Some confusion exists regarding the extent of freedom of association. In fact, freedom of association is constitutionally protected in two senses. First, in one line of decisions, the Court has protected the right of individuals to choose to enter into and maintain intimate human relationships and has secured these rights against undue interference from the State because these relationships play a large role in safeguarding the individual freedom that is central to our constitutional scheme.<sup>136</sup> In the other line of decisions, the Court recognized a right to associate for the purpose of engaging in First Amendment protected activities.<sup>137</sup> The Constitution guarantees this type of freedom of association as an indispensable means of preserving individual liberties.<sup>138</sup>

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133. *Id.* at 366 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

134. *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

135. *Id.* at 622.

136. *Id.* at 617-618.

137. *Id.* at 618.

138. *Id.*

Student religious groups, as well as student groups generally, will have an extremely difficult time using the first type of freedom of association to avoid university nondiscrimination clauses. This type of freedom of association ordinarily relates to the creation and sustenance of a family/marriage.<sup>139</sup> Among other things, they are distinguished from other relationships by relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationships.<sup>140</sup>

Campus groups do not share these attributes. Successful groups are not small; in fact, one of the main goals of campus groups is to increase the size of the group in order to increase the group's power. Notwithstanding the fact that student religious groups will ordinarily require its members to accept the basic tenets of its religion, they are not highly selective in their membership; virtually anyone can join. Finally, campus groups do not shield the critical aspects of the group relationship from others. Thus, student religious groups cannot shield themselves from university nondiscrimination clauses under this type of freedom of association.

However, student religious groups should be able to take advantage of the "expressive" type of freedom of association. In fact, the Court has recognized that according protection to a collective effort to pursue shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the minority.<sup>141</sup>

The state infringes upon the expressive right of freedom of association in three ways. First, the government may seek to impose penalties or withhold benefits from individuals due to their membership in a disfavored group; second, it may attempt to require disclosure of membership in a group whose members seek anonymity; and third it may try to interfere with the internal organization or affairs of the group.<sup>142</sup> Although it appears that no state actor has attempted to require disclosure of membership in student religious groups, the use of university nondiscrimination clause can infringe upon the expressive right of freedom of association. Such regulations impose penalties on individuals holding certain viewpoints and interferes with the group's internal organization.

This infringement occurred in *Healy v. James*<sup>143</sup> where the State denied benefits to individuals based on group membership. In this case student group sought funding as a local chapter of Students for a Democratic Society (SDS)

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139. *Id.* at 619.

140. *Id.* at 620.

141. *Id.* at 622.

142. *Id.* at 622-623.

143. 408 U.S. 169 (1972).

at Central Connecticut State College (CCSC).<sup>144</sup> Pursuant to procedures designed by the school, the students filed a request for official recognition as a campus organization and the Student Affairs Committee recommended it be granted.<sup>145</sup> However, the president of the college denied the students official recognition and forbade them from using campus facilities to hold meetings.<sup>146</sup> The Court held "[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges [the] constitutional right" of expressive freedom of association.<sup>147</sup> The Constitution's protection extends to indirect interference with fundamental rights.<sup>148</sup> Thus, the possible ability of the group to exist outside the campus community failed to ameliorate the impediment put in place by the President's actions.<sup>149</sup> In the words of Justice Brennan, "[w]e are not free to disregard the practical realities."<sup>150</sup>

Additionally, the Court held that once a student group had filed an application in conformity with the school's requirements, the school bears the burden to justify its denial of official recognition.<sup>151</sup> Further, the effect of the denial constitutes a form of prior restraint; this requires the school to meet a "heavy burden" in demonstrating the appropriateness of its action.<sup>152</sup>

*Healy* is a highly significant case for student groups of all kinds attempting to avoid university nondiscrimination clauses. It explicitly states that denial of recognition abridges the constitutional rights of the membership.<sup>153</sup> It shifts the burden to the school to show why it imposed a prior restraint such as a denial of recognition on the basis of refusal to sign a standard nondiscrimination clause.<sup>154</sup>

Nondiscrimination clauses are also problematic because they encroach upon expressive freedom of association rights through interference with the internal organization of a group. The Supreme Court dealt with this issue in

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144. *Id.* at 171-72.

145. *Id.* at 172-74.

146. *Id.* at 174-76. In fact, a meeting held at a coffee shop on campus was broken up on an order from the President. Additionally, nonrecognition deprived the students from the opportunity to place announcements regarding meetings, rallies, or other activities in the student newspaper. *Id.* at 176.

147. *Id.* at 181.

148. *Id.* at 183.

149. *Id.*

150. *Id.*

151. *Id.* at 184.

152. *Id.*

153. *Id.* at 181.

154. *Id.*

*Roberts v. United States Jaycees*.<sup>155</sup> In *Roberts*, the Minnesota Department of Human Rights attempted to force the United States Jaycees to admit women into the organization.<sup>156</sup> Prior to the lawsuit, regular membership was limited to men between the ages of 18 and 35.<sup>157</sup> The Court stated that the Minnesota Act worked as an infringement upon the Jaycees' right to expressive freedom of association by requiring the Jaycees to admit women as full voting members.<sup>158</sup> According to Justice Powell (writing for the majority),

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together.<sup>159</sup>

Therefore, freedom of association plainly presupposes a freedom not to associate.<sup>160</sup>

Student religious groups can use *Roberts* in aiding their decision not to sign university nondiscrimination clauses. Many religious groups fear that admitting homosexuals will necessarily dilute the message portrayed by these groups. Although religious groups ordinarily do not inquire into the sexuality of their members, their fear that open homosexuality will impair the ability of the original members to express their original views is a real one.<sup>161</sup> For this reason, *Roberts* is an important case for those seeking to preserve the viewpoint of student religious groups.

Freedom of association, like all other First Amendment rights, is not absolute. Just as one may not shout, "fire" in a crowded theater,<sup>162</sup> one may not use expressive freedom of association as a trump against all other rights. Notwithstanding that, freedom of association is a well-protected constitutional right. Infringements on that right may only be justified by regulations "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of

155. 468 U.S. 609 (1984).

156. *Id.* at 614-16.

157. *Id.* at 613.

158. *Id.* at 623.

159. *Id.*

160. *Id.*

161. See, e.g., Haar, *supra* note 22, at 4 (comments of student Martin Baker that accepting the amended nondiscrimination clause would be tantamount to declaring his religious beliefs wrong).

162. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

associational freedoms."<sup>163</sup> Thus, the real issues are whether protecting homosexuals from discrimination is a compelling state interest, and whether forcing student religious groups to sign nondiscrimination clauses constitutes the suppression of ideas.

At this date, the Supreme Court has not addressed whether protection of homosexuals is a compelling state interest sufficient to justify state action in substantially burdening the expressive right of freedom of association. However, examining the relevant precedents clearly shows that protection of homosexuals through the use of university nondiscrimination clauses is not a compelling state interest.

The starting point for analysis is *Bob Jones University v. United States*.<sup>164</sup> Bob Jones University denied admission to anyone involved in an interracial marriage or anyone known to advocate interracial dating or marriage.<sup>165</sup> In this case, the Supreme Court stated that the compelling state interest in eradicating racial discrimination outweighed the right of the university to free religious exercise.<sup>166</sup> In particular, the federal government denied the university its tax exempt status due to its racially discriminatory policies.<sup>167</sup>

The Court relied on two principal factors.<sup>168</sup> First, the Court looked at its own decisions concerning the constitutional status of racial discrimination that "establish[es] beyond doubt th[e] Court's view that racial discrimination in education violates a most fundamental national public policy, as well as the rights of individuals."<sup>169</sup> Second, the Court looked at legislative statements which also spoke to the public policy against racial discrimination.<sup>170</sup> Based upon these findings, as well as the invidiousness of racial discrimination, the Court held the state interest sufficiently compelling to outweigh the burden imposed by denial of tax benefits upon the university's right to free exercise.<sup>171</sup>

Similarly, in *Roberts*, the Court held that Minnesota had a compelling interest in eradicating discrimination against women to justify the impact that application of its statute might have on the Jaycees' right to freedom of

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163. *Id.*

164. 461 U.S. 574 (1983).

165. *Id.* at 580-81.

166. *Id.* at 604.

167. *Id.* These policies included a rule forbidding interracial dating by students at the university with members of the community at large. *Id.* at 600.

168. *Id.*

169. *Id.* at 593.

170. *Id.* at 594.

171. *Id.* at 604.

association.<sup>172</sup> On its face, the Minnesota Act did not aim at the suppression of speech and did not distinguish between prohibited and permitted activity on the basis of viewpoint.<sup>173</sup> Instead, the Act reflects the State's commitment to protecting the citizenry from serious social and personal harms resulting from gender discrimination.<sup>174</sup> The Court upheld the Minnesota Act due to the compelling state interest in eliminating gender discrimination, as well as the minimal effect allowing women into the Jaycees would have upon the organization's message.<sup>175</sup>

Despite these precedents, the Court is unlikely to find a compelling state interest in prohibiting discrimination against homosexuals. The most important case in the area is *Bowers v. Hardwick*,<sup>176</sup> which upheld a state sodomy statute that criminalized private consensual homosexual intercourse.<sup>177</sup> The Court found no fundamental right in the Constitution for homosexuals to engage in consensual sodomy.<sup>178</sup> This decision was based at least partly on the fact that until 1961, all 50 states outlawed sodomy.<sup>179</sup> Against this background, the Court held that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."<sup>180</sup>

Similarly, the Court refused to invalidate the statute on the ground that no other rational basis for the law exists other than the presumed belief of the majority that sodomy is immoral and unacceptable.<sup>181</sup> However, Justice White stated that law is constantly based on notions of morality, and if all laws representing essentially moral choices were invalidated, the courts would

172. *Id.* at 623.

173. *Id.*

174. *Id.* at 624-25. Discrimination on this basis requires members of both sexes to labor under stereotypical notions that often bear no relationship to their actual abilities. *Id.* at 625.

175. *Id.* at 627-28. The Jaycees claimed that women might have a different attitude about such issues as the federal budget, school prayer, voting rights, foreign relations, etc, or that the organization's public positions would have a different effect if the group were not a purely young men's association." The Court stated the Jaycees were relying solely upon "unsupported" generalizations about the relative interests and perspectives of men and women. Even if the generalizations were based on statistical bases, the Court said this sort of analysis should be condemned when it comes to legal decision-making.

176. 478 U.S. 186 (1986).

177. *Id.* at 196.

178. *Id.* at 190-91.

179. *Id.* at 193.

180. *Id.* at 194.

181. *Id.* at 196.

be exceedingly busy.<sup>182</sup> Thus, the Court did not invalidate Georgia's criminalization of homosexual sodomy.<sup>183</sup>

Many commentators have evaluated *Bowers* for a variety of reasons. What can be taken from this decision with regard to student religious organizations and university nondiscrimination clauses? One commentator says two interrelated lessons can be drawn from this case as it relates to this issue. First, the state may criminalize homosexual conduct.<sup>184</sup> If criminal sanctions are in place, there is no justification for claiming a compelling interest in ending private discrimination against those who engage in criminal conduct. Therefore, the state's argument that it has a compelling interest in eradicating private discrimination on the basis of sexual orientation is much more strained than it is with respect to discrimination based on race or gender.<sup>185</sup>

There is an additional reason to believe that eradicating private discrimination against homosexuals is not a compelling state interest. As stated previously, there is no general federal proscription of discrimination on the basis of sexual orientation.<sup>186</sup> Despite concentrated efforts by many homosexual rights activists, only a handful of states have prohibited private discrimination on the basis of sexual orientation, often by statute rather than through state constitutions.<sup>187</sup> However, every state as well as the federal government has made general proscriptions of private discrimination on other bases including race, gender, and creed.<sup>188</sup> Excluding sexual orientation from the list of prohibited private discrimination surely weighs against finding prohibition of discrimination against homosexuals a compelling governmental interest.

Finally, the use of university nondiscrimination clauses differs from all the aforementioned precedents in that these clauses are not "unrelated to the

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182. *Id.*

183. *Id.*

184. Bainbridge, *supra* note 4, at 389.

185. Bainbridge, *supra* note 4, at 389.

186. Bainbridge, *supra* note 4, at 392. In fact, after concluding that prospects for federal legislation remain dim, homosexual rights advocates are concentrating on state and local issues. *Id.* at 392 n.8.

187. The distinction between statutory and constitutional proscription is important because the lack of constitutional protection has been held to indicate a correspondingly lower level of state interest in eradicating the private discrimination; while conversely, state constitutional guarantees of First Amendment freedoms have been held to reflect a strong public policy in favor of these freedoms that outweighs the state's statutorily created interest in eradicating private discrimination. Bainbridge, *supra* note 4, at 392 n.109 (citing *Smith v. Fair Empl. and Hous. Comm'n*, 30 Cal. Rptr. 2d 395, 409 (Cal. Ct. App. 1994)).

188. *See supra* notes 9-12.



suppression of ideas." These clauses serve to suppress the idea held by student religious groups, as well as other members of society, that homosexuality is immoral. The aforementioned precedents dealt with governmental rules indirectly infringing upon First Amendment rights; nondiscrimination clauses do so directly. Even if the courts can somehow find a compelling governmental interest, the infringement of rights would still be unconstitutional because of the direct relation to the suppression of ideas.

To summarize, student religious groups' right to expressive freedom of association is substantially burdened when universities deny official recognition to the groups because they refuse to sign nondiscrimination clauses. To justify this burden, the university must show a compelling governmental interest, unrelated to the suppression of ideas, to prevail. The only possible state interest, eradication of private discrimination against homosexuals, almost certainly does not rise to the level of a compelling interest, such as eradication of private racial or gender discrimination. Even if the university can show a compelling interest, the means used by the university relate to the suppression of the idea of moral equivalence between homosexuality and heterosexuality. Therefore, the denial of official recognition to student religious groups due to their failure to sign a nondiscrimination clause is unconstitutional.

## V. THE ESTABLISHMENT CLAUSE

### A. *Would an Exemption Violate the Establishment Clause?*

Religious student organizations contesting the amended nondiscrimination clause seek at least an exemption from the university's general policy barring discrimination against homosexual conduct if not the abolishment of the policy altogether.<sup>189</sup> The constitutional lines drawn by the Establishment Clause on public university campuses with respect to student groups was the issue in *Rosenberger v. Rector and Visitors of University of Virginia*.<sup>190</sup> While *Rosenberger* did not involve nondiscrimination regulations, the conclusions reached by the Court make it clear that an exemption for religious groups (or other groups with moral scruples against homosexual conduct) would not violate the Establishment Clause.

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189. See, e.g., Giles, *supra* note 24, at 3. This result would be the minimum desired by student religious organizations. As stated in the beginning of this comment, all groups, not just religious groups, have a claim under the Free Speech Clause that their First Amendment rights are being violated. In that case, however, there were no Establishment Clause concerns.

190. 115 S. Ct. 2510 (1995).  
<https://scholarship.law.missouri.edu/mlr/vol60/iss4/4>

In *Rosenberger*, the Court declared that the Establishment Clause mandates an inquiry into "the purpose and object of the governmental action in question and then into the practical details of the program's operation."<sup>191</sup> The overarching principle is that the government must be neutral toward religion.<sup>192</sup> Although the Court did not label these inquiries as the test per se, they do seem to be the criteria which, at least for now, have replaced the much-criticized tripartite test of *Lemon v. Kurtzman*.<sup>193</sup> It is hard to imagine an argument claiming that a religious exemption establishes religion in a First Amendment sense using these criteria. A religious exemption would give religious groups equal access to the campus marketplace of ideas. The object or purpose behind such an exemption would be to comply with the religious liberties provided by the First Amendment and various legislative acts.<sup>194</sup> As far as the practical details of the programs operation, an exemption would further the separation of church and state by limiting university regulation of religious groups.

*Hobbie v. Unemployment Appeals Commission*,<sup>195</sup> stated that "[t]his Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."<sup>196</sup> The Supreme Court previously held that granting a religious group an exemption from a religious antidiscrimination law does not violate the Establishment Clause in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter—Day Saints v. Amos*.<sup>197</sup> The Court also held that an exemption from generally applicable tax laws did not violate the Establishment Clause in *Walz v. Tax Commission*.<sup>198</sup>

191. *Id.* at 2521.

192. *Id.*

193. 403 U.S. 602 (1971). The total absence of any mention of the *Lemon* test in *Rosenberger* is surely a sign that it has been rejected by a majority of the Court and they have agreed for the time being to permit these criteria to be used instead of another explicit test.

194. It might also "reflect the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission." *Rosenberger*, 115 S. Ct. at 2522.

195. 480 U.S. 136 (1987).

196. *Id.* at 144-45 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)).

197. 483 U.S. 327, 329 (1987) (exemption of religious group from religious discrimination laws does not violate the Establishment Clause).

198. 397 U.S. 664, 676-79 (1970). "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Id.* at 673.

Regardless of whether an exemption is granted, the actions of a university religious organization may not be imputed to the university itself nor is the government's imprimatur placed on the organization because the university has chosen to confer recognized status to the group.<sup>199</sup> Thus, there is no issue of government speech which might violate the Establishment Clause in this manner.<sup>200</sup> On the contrary, "official censorship" of politically incorrect speech runs a far greater risk of violating the Establishment Clause and would actually decrease the level of separation between church and state.<sup>201</sup> Clearly, the Establishment Clause would not forbid a religious exemption from regulations concerning discrimination on the basis of sexual orientation.

### *B. Does the Establishment Clause Mandate an Exemption?*

At first it seems counterintuitive that refusing to grant an exemption to religious groups would violate a constitutional provision protecting against the establishment of religion. However, several key Establishment Clause principles may arise in this context. First, a public university may not demonstrate hostility to a religious organization and its beliefs and practices.<sup>202</sup> The Establishment Clause of the First Amendment requires a "benevolent neutrality" towards religion and religious organizations.<sup>203</sup> Second, government may not establish a religion of secularism.<sup>204</sup> Third, government may not prefer one religion over another.<sup>205</sup>

199. As in *Rosenberger*, the "concern that [a religious organization's speech] would be attributed to the University is not a plausible fear, and there is no real likelihood that the speech in question is being either endorsed or coerced by the State." *Rosenberger*, 115 S. Ct. at 2523. See also *Widmar v. Vincent*, 454 U.S. 263, 274 (1980) ("an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices").

200. "It is no answer to say that the Establishment Clause tempers religious speech. By its terms that Clause applies only to the words and acts of government. It was never meant, and has never been read by this Court, to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum." *Capitol Square Rev. and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2449 (1995) (plurality opinion).

201. *Rosenberger*, 115 S. Ct. at 2547.

202. *Everson v. Board of Educ.*, 330 U.S. 1, 15-16, 18 (1947); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (government cannot prefer those who do not believe over those who do).

203. *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) (citing *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987)).

204. *Abington Township Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

205. *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947).

This prescribes and proscribes certain behavior for public universities. The separation of church and state protected by the Establishment Clause cuts both ways. In this context, it prevents public universities from favoring one religious group over another, such as by recognizing religious groups which do not object to homosexual conduct and rejecting those who do. But, it also prevents public universities from showing hostility to religious groups and meddling in their affairs.<sup>206</sup> As stated in *Everson v. Board of Education*,<sup>207</sup> the Establishment Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them."<sup>208</sup>

Maintaining neutrality towards religion sometimes requires the government to accommodate a religious organization.<sup>209</sup> Accommodation may include an exemption for religious groups to a generally applicable law or regulation. The strongest argument that the Establishment Clause mandates an exemption is that the university is preferring one religious belief over another.

## VI. THE FREE EXERCISE CLAUSE

### A. Background

"Congress shall make no law . . . prohibiting the free exercise [of religion]."<sup>210</sup> These words provide all Americans the right to worship as their particular religion requires. The question in this context is whether the free exercise rights of a university religious organization seeking official recognition are infringed in a First Amendment sense when forced to agree to a principle at odds with its religious beliefs.<sup>211</sup>

Free exercise analysis is currently in a state of uncertainty. The Supreme Court has historically applied a strict scrutiny analysis to any alleged

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206. *Id.* at 15-16 (government may not "openly or secretly, participate in the affairs of any religious organizations or groups"; a person may not be excluded from receiving public welfare benefits because of their faith).

207. *Id.* at 17 (holding that inclusion of parochial school students in transportation reimbursement program did not violate the Establishment Clause).

208. *Id.* at 18.

209. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987).

210. Free Exercise Clause, U.S. CONST. amend. I.

211. This comment will label the Free Exercise rights as those belonging to the organization as a whole. Whether the free exercise claim properly belongs to the group or to the individuals is only a semantic difference for the purposes of this article.

governmental infringement on one's exercise of religion.<sup>212</sup> The historical test used to determine whether the government violated the Free Exercise Clause was premised on three prerequisites: 1) is a religion involved; 2) is it a sincere religious belief; and 3) has the belief been substantially burdened?<sup>213</sup> Once this prima facie case was met, the burden of proof shifted to the governmental body to show a "compelling interest" in regulating the conduct in question and to use the "least restrictive means" possible to satisfy that compelling interest.<sup>214</sup> The government rarely overcame this barrier.

Strict scrutiny replaced rational basis review, however, in the 1990 case of *Employment Division of Oregon v. Smith*.<sup>215</sup> *Smith* held that a facially neutral law of general applicability which incidentally effects one's exercise of religion does not violate the Free Exercise Clause as long as it bears a rational relationship to a legitimate governmental interest.<sup>216</sup>

### B. Analysis

The "compelling interest" test established by the Supreme Court to govern free exercise claims stood for almost thirty years before being overturned in *Smith*. In *Sherbert v. Verner*, a member of the Seventh-day Adventist Church challenged a state law which denied unemployment benefits to her after she was fired from her job for refusing to work on Saturdays, her Sabbath.<sup>217</sup> She refused several other jobs offers because they also required her to work on Saturdays.<sup>218</sup> Because she turned down job offers, the law declared her ineligible for unemployment benefits.<sup>219</sup>

The Court found that this law clearly infringed upon her right to exercise her religious beliefs.<sup>220</sup> It stated that even an indirect impact on religion, whether purposeful or not, violates the Free Exercise Clause.<sup>221</sup> The Court applied the highest level of scrutiny in order to protect religious freedoms.<sup>222</sup> For a law transgressing one's religious beliefs to pass constitutional muster,

212. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

213. *Sherbert*, 374 U.S. at 402.

214. *Id.*; *Yoder*, 406 U.S. at 213.

215. 494 U.S. 872 (1990).

216. *Id.* at 886 n.3.

217. *Sherbert*, 374 U.S. at 398-400.

218. *Id.* at 399-400.

219. *Id.* at 401.

220. *Id.* at 403.

221. *Id.* at 404.

222. *Id.* at 406.

there must exist a compelling governmental interest which outweighs the right invaded.<sup>223</sup> Employing this balancing test, it is possible for the government to regulate a person's exercise of religion if society's interest in the law is found to justify such an infringement.<sup>224</sup>

*Wisconsin v. Yoder* reinforced the holding in *Sherbert*.<sup>225</sup> In *Yoder*, members of the Amish faith challenged a state statute requiring mandatory school attendance until the age of sixteen.<sup>226</sup> The Amish religion forbids parents from sending their children to public or private schools beyond the eighth grade.<sup>227</sup> Several Amish parents were convicted of violating the statute.<sup>228</sup> Consequently, they sought to enjoin the enforcement of this statute claiming the law violated the Free Exercise Clause.<sup>229</sup>

The Court held that only "those interests of the highest order and those not otherwise served" sufficiently outweigh the competing interests of the Free Exercise Clause.<sup>230</sup> The Court easily saw the conflict between the compulsory-education law and the religious tenets of the Amish religion.<sup>231</sup> The law left Amish parents with the choice of breaking the law, violating their religious beliefs, or moving to a more tolerant state.<sup>232</sup>

The Court stated that while beliefs can never be regulated by law, religious practices can sometimes be subject to an overriding regulation by the state in pursuance of the health, safety, and general welfare of the state or in the exercise of the delegated powers of the federal government.<sup>233</sup> The Court admitted this distinction but rejected the distinction between generally applicable laws and those aimed directly at a religious practice.<sup>234</sup> Education is a primary part of the government's role in preparing citizens to function in a democratic society and be self-sufficient in life.<sup>235</sup> However, the state's interest in formal education beyond the eighth grade, the Court held, was insufficient to justify the intrusion into the religious beliefs of the

223. *Id.*

224. *Id.* "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215.

225. *Yoder*, 406 U.S. at 235-36.

226. *Id.* at 207.

227. *Id.*

228. *Id.* at 208.

229. *Id.* at 205-09.

230. *Id.* at 215.

231. *Id.* at 218.

232. *Id.*

233. *Id.*

234. *Id.* at 220-21. *Contra Smith*, 494 U.S. at 872.

235. *Yoder*, 406 U.S. at 221.

Amish.<sup>236</sup> The state did not satisfactorily establish that granting the Amish an exemption would interfere with its interest in educating the children within its borders.<sup>237</sup>

What appeared to be a well-entrenched rule of constitutional law was suddenly overturned in the monumental case of *Employment Division of Oregon v. Smith*.<sup>238</sup> *Smith* radically changed the standard of review used to evaluate free exercise claims.<sup>239</sup> Justice Scalia, writing for the majority, set forth the new test requiring any regulation, neutral on its face, incidentally infringing on a person's religious practices, to be rationally related to a legitimate government interest.<sup>240</sup>

*Smith* involved two native American Indians who worked at a private drug rehabilitation program in the state of Oregon.<sup>241</sup> As members of the Native American Church, they ingested peyote as part of a religious ceremony.<sup>242</sup> Peyote is an hallucinogenic drug classified as a controlled substance under Oregon law.<sup>243</sup> Oregon law provides that the use of peyote is a felony.<sup>244</sup> Both men were fired from their jobs because of their felonious use of the drug.<sup>245</sup> They were then denied unemployment compensation by the state of Oregon because they had been "discharged for work-related 'misconduct.'"<sup>246</sup>

The *Smith* Court distinguished between laws directed at a religious practice and laws with an incidental effect on a religious practice, though otherwise valid.<sup>247</sup> The Court held that the former class clearly violated the Free Exercise Clause, but placed prohibition of peyote in the latter class of laws.<sup>248</sup> The Court declared that the government may apply an otherwise valid law against a person with conflicting religious beliefs.<sup>249</sup> The Court

236. *Id.* at 225.

237. *Id.* at 236.

238. 494 U.S. 872 (1990).

239. S. REP. NO. 111, 103d Cong., 1st Sess., pt. V, § A (1993).

240. *Smith*, 494 U.S. at 878.

241. *Id.* at 874.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 877-78.

248. *Id.*

249. *Id.* at 878-79. See *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594-95 (1940) overruled by *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) and *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879). Exceptions to this principle involve hybrid cases, for example, see *Smith*, 494 U.S. at <https://scholarship.law.missouri.edu/mlr/vol60/iss4/4>

quoted *United States v. Lee*<sup>250</sup> to support its holding that the Free Exercise Clause is not violated by a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes) . . . ."<sup>251</sup>

The Court should apply the balancing test from *Sherbert* only when the case is a "hybrid," that is, a free exercise claim brought in conjunction with another constitutionally protected right, such as speech.<sup>252</sup> While a "hybrid" case allows the courts to apply the compelling interest test to free exercise claims,<sup>253</sup> the majority of the laws challenged in such cases would be struck down anyway due to the strict scrutiny applied to the other constitutional right infringed upon.<sup>254</sup> As a result, *Smith* essentially renders the free exercise clause a nullity—if it is combined with another claim, the Free Exercise Clause analysis is likely unnecessary, and if it is not a hybrid case, rational basis review is applied. As noted by the concurrence, an Equal Protection Clause analysis would provide this level of review, regardless of the issue of free exercise of religion.<sup>255</sup>

### C. Application to University Religious Groups

It is best to analyze the free exercise claims of a university religious group under the *Sherbert/Yoder* test and the *Smith* test. Applying *Smith* literally to the university regulations would render the *Sherbert/Yoder* analysis applicable and not the rational basis test of *Smith* because of Justice Scalia's "hybrid" exception and the presence of speech in this scenario. The presence of speech, and not just religion, justifies strict scrutiny analysis.<sup>256</sup> However, the lesser scrutiny of *Smith* should be analyzed as well, due to the uncertainty in the Court's free exercise jurisprudence.

University religious organizations being refused recognition due to their refusal to sign the amended nondiscrimination clause should be able to take advantage of the hybrid exception to obtain strict scrutiny review of the university's regulation. As enunciated by Justice Scalia in *Smith*,

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881-82.

250. 455 U.S. 252 (1982).

251. *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (Stevens, J., concurring)).

252. *Smith*, 494 U.S. at 881-82.

253. *Id.*

254. *Id.* at 894 (O'Connor, J., concurring).

255. *Id.*

256. *Id.* at 881-82.



"[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech . . . [a]nd it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns."<sup>257</sup>

As discussed in this comment, university religious groups may claim more than a violation of their free exercise rights—their free speech and association rights are also infringed. If the hybrid exception is ever applicable, this is the scenario. The *Smith* decision also left open the possibility a court would apply *Sherbert* in some situations.<sup>258</sup>

If *Sherbert* applied, the religious organization would have to show that it is indeed a religious group and that its belief that homosexual conduct is immoral or sinful is a sincerely held belief. Both of these requirements will be met in almost every case involving a truly religious organization.<sup>259</sup> The third prong, requiring a showing that the religious exercise has been burdened, could be more difficult to meet. However, most religious organizations should be able to show that being denied recognition on the basis of a university's disagreement with one of its religious tenets constitutes a significant religious burden. The university's denial of recognition is a denial of the right to reserve university classrooms in which to hold meetings and the right to seek student organization funds.<sup>260</sup> In *Sherbert*, the Court held that conditioning

257. *Id.* (citing *Cantwell v. Connecticut*, 310 U.S. 296, 304-07) (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious). *See also* *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); and *Follett v. McCormick*, 321 U.S. 573 (1944) (same).

258. *Smith*, 494 U.S. at 884. Justice Scalia indicated that the fact that *Smith* involved a criminal law was significant. He stated that "[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable *criminal law*." *Id.* (emphasis added). A plausible argument exists that the Court, Justice Scalia especially, intended to limit the reach of *Smith* to criminal laws.

259. The university may not require the religious organization to prove the truth of any of its beliefs, including its views on homosexuality. Only the group's sincerity with respect to these beliefs may be challenged. *United States v. Ballard*, 322 U.S. 78, 84-86 (1944).

260. The Court has stated:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an

the availability of benefits on a person's willingness to violate their religious faith penalizes the free exercise of constitutional liberties.<sup>261</sup>

Once the religious group has met its burden, the university bears the burden of proof to show a compelling government interest. The university's interest is the struggle to fight discrimination against homosexuals and bisexuals. However, the Supreme Court has held that sexual orientation is not a suspect class deserving of strict scrutiny.<sup>262</sup> This interest must be compared to the right of the religious group to exercise its religious beliefs and practices. The university must then show that this interest is so strong that it outweighs other constitutional rights, or at least in this context is strong enough to outweigh the benefits of a religious exemption.<sup>263</sup>

If *Smith* governed, the university would have a much stronger case. A court would certainly characterize an outright prohibition of discrimination applied to every recognized campus group as a neutral, generally applicable law under the *Smith* analysis. Thus, the courts would be forced to conclude that no burden exists on the religious group, it merely bears the incidental impact of a neutral law. If the *Smith* test applied, the university would certainly win.<sup>264</sup>

## VII. THE RELIGIOUS FREEDOM RESTORATION ACT

### A. Statutory Framework

Whatever the current status of the Free Exercise Clause, Congress provided statutory law as an alternative to the Free Exercise Clause. In 1993, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA)<sup>265</sup>

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adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

*Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981), *quoted by* *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987).

261. *Sherbert*, 370 U.S. at 410. The group's beliefs concerning homosexuality need not be central to the group's beliefs, there may be dissent among the members, and it may be a belief which is not also held by any hierarchical sponsoring body. *Thomas*, 450 U.S. at 715-16.

262. *Bowers v. Hardwick*, 478 U.S. 186, 190-92 (1986).

263. As discussed in the section on association rights, *supra*, purely secular groups may also have a constitutional right infringed by such a university regulation.

264. The authors were unable to find a case where a religious group had won on free exercise grounds when *Smith* was applied.

265. 42 U.S.C. § 2000bb - 2000bb-4 (Supp. V 1993). While this comment was being written, a district court judge declared RFRA an unconstitutional legislative attempt to reverse a Supreme Court decision regarding the burden of proof under the

to restore the strict scrutiny provided under *Sherbert* to all cases. RFRA allows religious organizations to gain the protection for their religious practices from burdensome university regulations without facing the barrier of the *Smith* decision.<sup>266</sup> It prevents the government from indirectly coercing a person's conscience contrary to their religious beliefs.

The Religious Freedom Restoration Act is comprised of five sections.<sup>267</sup> The heart of the Act lies in the first two sections, which articulate the purposes and define the coverage of RFRA.<sup>268</sup> Congress included in section 2000bb of the Act some basic historical findings regarding the Free Exercise Clause and the context in which it arose.<sup>269</sup> These findings demonstrate Congress' support for pre-*Smith* case law and the compelling government interest test.<sup>270</sup> RFRA declares the compelling government interest test to be "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."<sup>271</sup> The Act specifically declares that both neutral laws and laws with discriminatory intent may burden the exercise of one's religion.<sup>272</sup>

The purpose of RFRA, as stated in section 2000bb(b)(1), is to return to pre-*Smith* case law and, thus, restore the compelling government interest test to free exercise claims.<sup>273</sup> RFRA technically creates a separate and independent statutory claim available to persons who feel that the government is hindering their religious practices.<sup>274</sup> Due to its higher standard of review, RFRA is a more favorable cause of action than the Free Exercise

First Amendment. *Flores v. City of Boerne*, 877 F. Supp. 355 (W.D. Tex. 1995).

266. For a more extensive analysis of a RFRA claim as it applies to the issues discussed herein, see Bainbridge, *supra* note 4, at 369.

267. 42 U.S.C. §§ 2000bb - 2000bb-4 (Supp. V 1993).

268. *Id.* § 2000bb and 2000bb-1. § 2000bb-1 reads in part:

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception.

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

269. *Id.* § 2000bb(a)

270. *Id.*

271. *Id.* § 2000bb(a)(5).

272. *Id.* § 2000bb(a)(2).

273. *Id.* § 2000bb(b)(1).

274. *Id.* § 2000bb(b)(2).

Clause for such persons. The Act applies to "all cases where free exercise of religion is substantially burdened"<sup>275</sup> by any government actor.<sup>276</sup> With the availability of a claim under RFRA, the Free Exercise Clause should only be relied upon when the claim involves a "hybrid" case as described in *Smith*,<sup>277</sup> though RFRA obviously applies to these claims as well.

Section 2000bb is a restatement of the compelling governmental interest test.<sup>278</sup> The teeth of the Act is its application to laws of general applicability, thus departing from the rule in *Smith*.<sup>279</sup> Section 2000bb-1(c) describes the judicial relief available.<sup>280</sup> RFRA is available as a claim or a defense.<sup>281</sup> While the available relief is not enumerated, the term "appropriate relief" gives the court discretion to determine the germane remedy for the person whose religious exercise has been infringed.<sup>282</sup> Standing rules are governed by article III of the Constitution.<sup>283</sup>

The last four sections tie up the loose ends. 42 U.S.C. § 1988 was amended to provide for an award of attorneys in a RFRA claim.<sup>284</sup> Section 2000bb-2 supplies definitions important to the construction of the Act.<sup>285</sup> Section 2000bb-3 states that the Act applies to both federal and state governments, that it applies to all subsequently passed laws unless specifically excluded, and that the Act does not authorize the government to burden religious belief in any manner.<sup>286</sup> Finally, section 2000bb-4 declares that the Act does not affect the Establishment Clause.<sup>287</sup> It also seems to say that denying a government benefit (or exemption) to a religious person or entity because of their religious practices may violate RFRA.<sup>288</sup>

275. *Id.* § 2000bb(b)(1).

276. *Id.* § 2000bb-3(a).

277. *See supra* note 252 and accompanying text.

278. *Id.* § 2000bb-1(a).

279. *Id.* § 2000bb-1(a) *See supra* note 249-251 and accompanying text.

280. 42 U.S.C. § 2000bb-1(c), which states:

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

281. *Id.*

282. *Id.*

283. *Id.*

284. 42 U.S.C. § 1988 (Supp. V 1993).

285. *Id.* § 2000bb-2.

286. *Id.* § 2000bb-3.

287. *Id.* § 2000bb-4.

288. *Id.*

Congress has the power to expand constitutional rights under section 5 of the Fourteenth Amendment.<sup>289</sup> Hence, RFRA is within the scope of congressional powers even though the rights protected in this Act are expressly within the bounds of the First Amendment.<sup>290</sup> This provision only authorizes Congress to expand rights. Congress clearly does not have the power to restrict rights protected by the Constitution.

The essence of RFRA is that it restores strict scrutiny review to free exercise claims.<sup>291</sup> Practically, this difference in the level of scrutiny employed by the courts translates as the difference between probable success and probable defeat.<sup>292</sup>

Strict scrutiny is the highest level of review and requires that the means which the regulation employs be the least restrictive means to accomplish the end—a compelling government interest.<sup>293</sup> This can be contrasted to rational basis review, the lowest level of scrutiny. This standard requires that the means employed by the regulation be rationally related to the end—a legitimate government interest.<sup>294</sup>

*Smith* distinguished between "neutral, generally applicable" laws which have an incidental effect on a person's religious beliefs, and a "neutral, generally applicable" law which also infringes upon another constitutionally protected right.<sup>295</sup> Thus, the Court will employ the compelling interest test when a free exercise claim is brought in conjunction with a second claim that would merit the compelling interest test on its own.<sup>296</sup>

RFRA would extend the compelling government interest test to all situations "where free exercise of religion is substantially burdened."<sup>297</sup> This would not absolutely restrict the burdening of religious practices.<sup>298</sup> The purpose of RFRA is to return to the case law of *Sherbert* and *Yoder*, which

289. U.S. CONST. amend. XIV, § 5.

290. For a more complete discussion of this power, see Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us?*, 141 U. PA. L. REV. 1029 (1993).

291. 42 U.S.C. § 2000bb(b)(1).

292. "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Sherbert*, 374 U.S. at 406 (citation omitted).

293. *E.g.*, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2220 (1993).

294. *E.g.*, *City of Cleburne, Texas v. Cleburne Living Center Inc.*, 473 U.S. 432, 448 (1985).

295. *Smith*, 494 U.S. at 881.

296. *Id.*

297. 42 U.S.C. § 2000bb(b)(1) (Supp. V 1993).

298. *Smith*, 494 U.S. at 894 (O'Connor, J., concurring).

struck a sensible balance between "religious liberty and competing state interests."<sup>299</sup>

Since the Court handed down the *Smith* decision, lower federal courts have reversed many earlier decisions on free exercise claims.<sup>300</sup> In *Yang v. Sturner*,<sup>301</sup> the court stated its regret in applying the new standard set forth in *Smith*.<sup>302</sup> This standard compelled the court to reverse an earlier opinion which invalidated a law permitting the unauthorized performance of autopsies under certain circumstances.<sup>303</sup> The petitioners were a Hmong couple whose religious beliefs prohibited autopsies, which they viewed as a mutilation of the body.<sup>304</sup> Because the law was neutral and facially valid, the incidental impact on a minority religion was irrelevant.<sup>305</sup> In the court's earlier decision under the strict scrutiny standard, it found that there was no compelling state interest in mandating autopsies on persons whose religious beliefs prohibit such actions.<sup>306</sup>

The effects of *Smith* have indeed been far reaching. The court in *St. Bartholomew's Church v. City of New York*<sup>307</sup> allowed New York City to designate a church as a landmark and to regulate any structural alterations to the church building.<sup>308</sup> The commission placed in charge of this regulation forbade the church to expand, finding that the landmarking law applied to old buildings in general; thus, the church could not show the "necessary hardship" to receive certification to alter its own building, despite the growing needs of its ministry.<sup>309</sup> Under the *Smith* test, this facially neutral law constitutionally authorized the city to tell a church what it could and could not do to its own building. The *Sherbert* Court, and hence RFRA, would almost certainly demand the opposite result. The balancing test mandated by RFRA would require the court to weigh the city's interest in regulating the alteration of historical buildings against the church's right to use its property to pursue the needs of its ministry.

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299. *Id.* at 902 (O'Connor, J., concurring).

300. When RFRA was being passed, over 60 cases in the lower courts had relied on *Smith* to override religious liberty. See 139 CONG. REC. S14,350-01 and S14,353 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch).

301. 750 F. Supp. 558 (D.R.I. 1990).

302. *Id.*

303. *Id.* See *Yang v. Sturner*, 728 F. Supp. 845, 846-47 (D.R.I. 1990), *opinion withdrawn*, 750 F. Supp. 558 (D.R.I. 1990).

304. *Sturner*, 750 F. Supp. at 558.

305. *Id.* at 559.

306. *Sturner*, 728 F. Supp. at 856.

307. 914 F.2d 348 (2d Cir. 1990).

308. *Id.* at 351-52.

309. *Id.*

In *United States v. Philadelphia Yearly Meeting of Religious Society of Friends*,<sup>310</sup> the Internal Revenue Service levied against the salaries of two of the group's employees who had not paid part of their taxes due to a religious belief forbidding them from paying the "military portion of their taxes."<sup>311</sup> The group refused to comply with the levy because of the group's policy to not "coerce or violate the consciences" of its members.<sup>312</sup> While the group violated the law under *Smith*, the court refused to punish them because the group reasonably believed that under *Sherbert*, the prevailing law at that time, they could successfully challenge the law.<sup>313</sup> The court criticized the decision in *Smith* and gave a strong indication that the balancing test of *Sherbert* would produce a different result.<sup>314</sup>

RFRA, however, may do more harm than good depending on how the courts define the term "substantially." There are two possible constructions of this term. It could be construed to simply mean more than *de minimis*. On the other hand, courts could construe this term in its stronger sense to be a new balancing test where the court must determine the significance of the burden on the person's religious exercise. Adoption of the latter view would pose a serious long-term detriment to claimants under RFRA.

Assuming the courts adopt the latter construction, the term "substantially" would establish a separate "hoop" to jump through for a person whose free exercise rights have been violated. This new requirement would force the courts to determine whether the burdened religious practice is central to the person's faith. If this is the case, the Act would run afoul of constitutional law. Courts may not weigh the "centrality" of a religious practice.<sup>315</sup> Courts cannot determine what the commandments of a person's faith are and how important that belief is to that faith.<sup>316</sup> As stated in *Thomas v. Review Board, Indiana Employment Security Division*, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit

310. 753 F. Supp. 1300, 1305-06 (E.D. Pa. 1990).

311. *Id.* at 1301.

312. *Id.*

313. *Id.* at 1305-06.

314. *Id.* at 1306.

315. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 474-476 (1988). The Court in *Smith* held that this would be the equivalent of weighing the importance of the prohibited speech in a free speech case. *Smith*, 494 U.S. at 886-87. See also *supra* note 259 and accompanying text.

316. *Smith*, 494 U.S. at 887. Under this construction of the term "substantially," courts may find themselves empowered to determine whether the claimed religion actually requires, rather than prefers, the burdened religious practice. Such a result would be disastrous to those whose religious faith *requires* very little, but who are taught to live by convictions. Personal convictions may vary within a faith and will thus be viewed, not as central tenets of a faith, but as philosophical preferences.

First Amendment protection. . . . Courts are not arbiters of scriptural interpretation.<sup>317</sup>

When courts decipher two possible interpretations of a statute and one would lead to an unconstitutional result, courts should adopt a "saving" interpretation.<sup>318</sup> For this Act to retain its meaning and be consistent with constitutional law, courts must interpret the word "substantially" to simply mean more than *de minimis*. Such a construction is consistent with pre-*Smith* case law. The Court in *Sherbert* stated that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."<sup>319</sup> *Yoder*, without mentioning that an undue or substantial burden was required, found that the rights of the Amish to exercise their religious beliefs outweighed the government's interest in enforcing laws which accomplished a compelling interest because their beliefs were deeply held (and thus presumably of substance).<sup>320</sup>

### B. Applying RFRA to Nondiscrimination Clauses

As set forth above, RFRA is primarily a restoration of old free exercise law. Applying strict scrutiny to the university regulations requiring religious groups to sign a nondiscrimination clause contrary to their religious beliefs, the regulation clearly cannot stand. A religious organization faced with such a dilemma should raise a RFRA claim or defense in conjunction with a free exercise claim.<sup>321</sup>

To uphold such a regulation, the university must demonstrate a compelling governmental interest in including sexual orientation in the list of protected classes. Precedent to date would make that an almost impossible task.<sup>322</sup> Discrimination on the basis of sexual orientation is subject to rational basis review.<sup>323</sup> The Court has rejected suspect class status to homosexuals.<sup>324</sup> The university's interest in protecting homosexuals from

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317. 450 U.S. 707, 714-16 (1980). "Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses." *Id.* at 715.

318. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

319. *Yoder*, 406 U.S. at 220 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)).

320. *Id.* at 216.

321. Until the Supreme Court rules on the constitutionality of RFRA, it would be well-advised to raise both RFRA and the Free Exercise Clause and leave it to the court to determine which claim to rule on.

322. *See Bowers v. Hardwick*, 478 U.S. 186 (1986).

323. *Id.* at 194.

324. *Id.*



discrimination must give way to the student's rights to speech, association, and the free exercise of religious beliefs.

Assuming, *arguendo*, that a university could demonstrate a compelling governmental interest in adding sexual orientation to the list of protected classes, the university must then demonstrate that it is employing the least restrictive means possible in achieving its interest.<sup>325</sup> At this point, the religious group could claim that an exemption granted to objecting religious organizations would be less restrictive. Since the university's interest in prohibiting discrimination on the basis of sexual orientation would not trump the rights of religious organizations, courts would have to find the university regulation overbroad and force the university to narrow the scope of the regulation.

The Religious Freedom Restoration Act will most likely prove to be a very valuable tool in upholding the rights of religious groups and individuals. In the context of the university setting, RFRA provides both a shield and a sword to religious organizations desiring to separate themselves from government regulation.

### VIII. CONCLUSION

If all mankind, minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.<sup>326</sup>

While some people advocate requiring student religious groups to sign nondiscrimination statements with good intentions, the truth of the matter is that this position damages the First Amendment rights of all Americans, not just those with a religious perspective. John Stuart Mill's concept of liberty is embodied by the terms of the First Amendment. Any infringement upon the First Amendment actually constitutes an infringement on liberty.

Notwithstanding the fact that both Mill and the drafters of the Constitution died long ago, the power of their ideas lives on in the American legal process. Perhaps the most eloquent recent statement of this idea comes from Justice Souter, who stated:

The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups, or indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech

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325. See *supra* text accompanying note 214.

326. JOHN STUART MILL, ON LIBERTY AND OTHER WRITINGS 20 (Stefan Collini ed., Cambridge University Press 1989) (1859).

Clause has no more certain antithesis. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.<sup>327</sup>

The Supreme Court's analysis to date suggests that sexual orientation cannot be a mandatory part of a nondiscrimination clause required for recognition of university student organizations, especially those groups espousing a religious belief precluding them from submitting to the nondiscrimination clause. In the midst of the homosexual rights movement's campaign for tolerance, it is ironic that they now advocate intolerance of a contrary viewpoint and seek to prevent such a voice from being heard, even if offensive. The university campus is the epitome of the "marketplace of ideas" and the government should not be in the position of declaring which viewpoint is worthy of being heard.

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327. *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995).

