
THE CONSTITUTIONAL RIGHTS OF POLITICALLY INCORRECT GROUPS: *CHRISTIAN LEGAL SOCIETY V. WALKER* AS AN ILLUSTRATION

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INTRODUCTION

As *Christian Legal Society v. Walker*¹ illustrates, controversy often arises in public colleges and universities when student-led political or religious (“politically incorrect”) groups espouse viewpoints or advocate practices that differ from, or are allegedly offensive to, others in campus communities.² When politically incorrect

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1. 453 F.3d 853 (7th Cir. 2006).
2. In a legal culture that emphasizes individual constitutional rights, the lay public and

student groups exist, their politically correct opponents within the student body, the faculty, and even the administration may urge college or university officials to refuse to grant them formal recognition, demand that they no longer advocate their beliefs or cease their allegedly discriminatory practices, refuse to allow them access to facilities, and/or deny them funding.³ Yet, as the Seventh Circuit held in *Walker*, politically incorrect student organizations have substantial constitutional rights that public institutions may not deny.⁴

The purpose of this article is to explore the constitutional rights of politically incorrect organizations through the lens of the Seventh Circuit's decision in *Walker*. In so doing, it seeks to provide guidance to public college and university counsel and administrators who confront demands to do something about those groups that are offensive. This article's purpose is accomplished in two parts. Part I discusses *Walker* and the reasoning of both the Seventh Circuit and the dissent. Part II draws upon *Walker* and Supreme Court case law to offer some reflections on the rights of politically incorrect student organizations.

I. CHRISTIAN LEGAL SOCIETY V. WALKER

A. Background

The facts in *Walker* are straightforward. The dispute involved the Christian Legal Society ("CLS") and the dean of the law school, joined by other officials, at Southern Illinois University ("University"), a public institution.⁵ CLS, a nation wide organization of Christian professionals and students, require members to subscribe to the moral principles in its statement of faith, which forbids them from engaging in, or approving, sexual activity outside of marriage, whether by

many lawyers frequently forget that the Constitution generally does not apply to the actions of private parties, but rather, it applies only to "state actions." See *The Civil Rights Cases*, 109 U.S. 3 (1883). As such, while public institutions are subject to the Constitution, private institutions do not face similar restrictions. Practically, this means that private institutions are generally free to ignore the values embodied in the Constitution and the requirements imposed by case law. At the same time, the authors are not suggesting that private institutions should exercise this freedom, especially because state law and/or church law may limit their actions. Moreover, even absent church or state laws, institutions, as a matter of policy, may choose to abide by some of the requirements.

3. *Walker* involved a group that sought to exclude those who engaged in sexual activity outside of traditional marriage, meaning that it would not permit individuals who engaged in homosexual activity or heterosexuals who engaged in non-marital intercourse from serving as voting members or leaders, even though they could attend its meetings. These conflicts notwithstanding, the law is unclear on their outcome as there is a surprising dearth of relevant litigation. The situation is further exacerbated because the small number of directly applicable Supreme Court cases is divided evenly on both sides of the issue.

4. Specifically, the Seventh Circuit ruled that a state college or university's interest in preventing discrimination against homosexuals did not outweigh the organization's interest in expressing its disapproval of homosexual activity by barring active homosexuals (and others) from serving as voting members or serving in leadership capacities even though they participate in the group's activities. *Walker*, 453 F.3d at 857-67.

5. *Id.* at 857.

homosexuals or heterosexuals.⁶ While anyone who wished to do so could attend CLS meetings, only those who subscribed to the organization's statement of faith could become voting members or serve in leadership positions; individuals who did not comply with these beliefs could regain their eligibility by repenting their past conduct.⁷

When the controversy arose during the 2004–2005 academic year, the University's law school recognized seventeen student groups, including the CLS.⁸ Organizations that the law school formally recognized could use its list-serve or e-mail data base, post information on bulletin boards, be identified in an official list of organizations on its website and publications, reserve conference rooms along with meeting and storage space, have a faculty advisor, and receive funding.⁹ Recognition by the law school did not bestow the same benefits from the overall University, a step that would have conferred even greater rights, including more funding; it was unclear how much additional assistance University recognition would have added.¹⁰

In February 2005, an unnamed individual complained to the University officials over CLS's membership requirements.¹¹ Following an investigation, when CLS refused to change its policy on the basis that it was part of the national organization's tenets, the dean of the law school revoked its recognition for violating two of the University's policies.¹² First, the dean charged that CLS violated the University's Affirmative Action/Equal Employment Opportunity ("EEO") policy.¹³ Second, the dean alleged that CLS violated a University policy that required all groups to comply with appropriate federal and state non-discrimination and equal opportunity laws.¹⁴ After having its status revoked, CLS could still meet, but not privately, since others could be present.¹⁵ In addition, the revocation meant that CLS lost privileges such as having a faculty advisor, being identified as a recognized group, and receiving funding.¹⁶

B. District Court Proceedings

Not surprisingly, CLS filed suit in a federal trial court in Illinois in an attempt to have its status as a recognized group restored. CLS sought a temporary injunction claiming that the University violated CLS's First Amendment rights to expressive association, free speech, and free exercise of religion and denied its rights to due process and equal protection. In response, the district court, in an unpublished

6. *Id.* at 857–58.

7. *Id.* at 858.

8. *Id.* at 857.

9. *Id.*

10. *Id.*

11. *Id.* at 858.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

opinion, denied the motion on the ground that the CLS was unlikely to succeed on the merits of its claim.¹⁷ The court did not think that CLS suffered an irreparable harm, describing its injury as speculative, insofar as it was still present on campus, except that it lacked the benefits of official recognition.¹⁸

C. Appeal to the Seventh Circuit

Unhappy with the trial court's rejection of its request for injunctive relief, the CLS appealed, focusing primarily on expressive association and public forum doctrine claims.¹⁹ Deciding that the CLS had both a reasonable likelihood of success on the merits of its claims and that it demonstrated that it suffered irreparable harm, a divided Seventh Circuit, in a two-to-one judgment, reversed in its favor.²⁰

1. Majority Opinion

At the outset of its analysis, the Seventh Circuit, relying on its own precedent, reviewed the four elements that a party requesting a preliminary injunction must prove.²¹ First, the court of appeals explained that a party must demonstrate that it would have a reasonable chance of success on the merits of a claim.²² Second, the court of appeals stated that a party must establish that the harm it would suffer if the injunction were denied would outweigh any harm that the nonmoving party would have experienced if relief were granted.²³ Third, the Seventh Circuit remarked that a party must show that there is no adequate remedy at law.²⁴ Fourth, it specified that a party must establish that granting an injunction would not harm the public interest.²⁵ The Seventh Circuit also reiterated the general rule that if a party meets its burden, a trial court must weigh the merits of granting its request.²⁶

Noting that the dispute involved the First Amendment, the court of appeals indicated that it had to review the case *de novo* since such issues are fact-specific.²⁷ It added that its task was simplified to a degree because only two elements related to granting an injunction were in dispute.²⁸ More specifically, the appellate

17. See *Christian Legal Soc'y v. Walker*, No. Civ. 05-4070-GPM, 2005 WL 1606448 (S.D. Ill. July 5, 2005).

18. *Id.* at *3.

19. *Walker*, 453 F.3d at 859.

20. *Id.* at 857. The Seventh Circuit's opinion was written by Judge Sykes and joined by Judge Kanne.

21. *Joelner v. Village of Wash. Park*, 378 F.3d 613, 619 (7th Cir. 2004) (affirming partially the denial of an adult bookstore owner's request for a preliminary injunction in a dispute over enforcement of specified adult entertainment ordinances).

22. *Walker*, 453 F.3d at 859.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

tribunal observed that when dealing with irreparable harm under the First Amendment, it cannot be remedied by money and that injunctions designed to protect such rights are always in the public interest.²⁹

Turning to the likelihood of CLS's success on the merits of its claim, the Seventh Circuit set forth its three reasons for asserting that the organization was entitled to the requested relief before detailing its rationale on each point.³⁰ First, it was unclear whether CLS even violated any of the University's policies, which was the reason proffered by the University for revoking its status as an organized student group.³¹ Second, the tribunal was satisfied that CLS demonstrated the likelihood of proving that the University impermissibly infringed on its right of expressive association.³² Third, it determined that CLS proved that it was likely that the University violated its right to free speech in removing it from a forum in which it had a right to be present.³³

Considering whether CLS failed to follow the disputed University policies, the court of appeals rejected the allegation that the organization violated the directive that all recognized groups had to comply with appropriate federal and state non-discrimination and equal opportunity laws.³⁴ To this end, since the University was unable to identify a federal or state law that CLS violated both in an initial brief pending the appeal and at oral arguments, at the very least, the law school's actions raised the specter of its acting on a pretext, leaving it no choice but to drop this claim.³⁵

The Seventh Circuit next disagreed with the University's claim that CLS violated the University's Affirmative Action/EEO policy since the organization required members to conform to specific standards in accord with its belief system relating to sexual conduct but did not exclude individuals due to their sexual orientations.³⁶ In fact, the court of appeals reiterated that CLS's policies were based on belief and behavior, not status, insofar as it excluded both heterosexuals and homosexuals who refused to comply with its rules.³⁷ The court was even more skeptical of the University's contention that CLS violated the policy since it neither employed anyone nor was it clear that membership was an educational opportunity for members or prospective members.³⁸ To the extent that CLS was a private organization, not an extension of the University, the Seventh Circuit did not think that it was fair to characterize the group as speaking on behalf of the University.³⁹ As such, the court of appeals was satisfied that CLS demonstrated the likelihood of success on the merits of its claim that neither of the University's

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 860–61.

34. *Id.* at 860.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 861.

reasons for revoking its recognition was valid.⁴⁰

At the outset of its review of the First Amendment claim, the Seventh Circuit relied on Supreme Court precedent stretching back more than thirty years in acknowledging that implicit in the freedom of speech, assembly, and petition clauses is the ability to associate freely.⁴¹ Reiterating that this freedom guarantees that the majority cannot force its will on the minority, the Court explained that the government burdens the right to associate in many ways.⁴² The court thus highlighted that the government, qua the administration of a public college or university, impermissibly burdens a group's right of free association by "impos[ing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group' and 'interfer[ing] with the internal organization or affairs of the group.'"⁴³ The court added that governmental interference is heightened when "a regulation . . . forces [a] group to accept members it does not desire"⁴⁴ because in so doing, it "affects in a significant way the group's ability to advocate."⁴⁵

As part of its deliberations, the court acknowledged that because freedom of expressive association is not absolute, it is subject to strict scrutiny, meaning that it can be limited only if justified by a compelling governmental interest.⁴⁶ CLS claimed that the University unconstitutionally intruded on its right by focusing on the related issues of whether it was an expressive association, whether forcibly requiring the group to admit sexually active homosexuals would have significantly affected its ability to criticize the gay lifestyle, and whether its interest outweighed the University's desire to eliminate discrimination against gay people.⁴⁷

As to whether CLS was an expressive association, the Seventh Circuit declared that the answer to this threshold issue was a *sine qua non* of whether the case could proceed.⁴⁸ Based on the tenets in CLS's belief statement, especially its prohibition of non-marital sexual activity, the court of appeals conceded that because neither party disputed the fact, the court was satisfied that it would be difficult to reach any other position than to treat CLS as an expressive association.⁴⁹

The tribunal maintained that simply asking whether the enforcement of the University's anti-discrimination policy would have significantly affected its ability to voice its disapproval of gay activity all but answered the inquiry.⁵⁰ In light of CLS's requirement that voting members and officers subscribe to its statement of

40. *Id.* at 860–61.

41. *Id.* at 861 (citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1311–12 (2006); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); *Healy v. James*, 408 U.S. 169, 181 (1972)).

42. *Id.* at 861–62.

43. *Id.* at 861 (citing *Roberts*, 468 U.S. at 623).

44. *Id.* (citing *Roberts*, 468 U.S. at 623).

45. *Id.* (citing *Dale*, 530 U.S. at 648).

46. *Id.* at 862.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

beliefs, even though its meetings remained open to all, the Seventh Circuit interpreted the University's revocation of the group's recognition as nothing more than an attempt to alter its standards.⁵¹ The court of appeals reasoned that had the University succeeded in forcing CLS to make such a change, then it would have impaired the group's expressive right to be critical of active homosexuals.⁵² As CLS is a faith-based organization, which, at the heart of its beliefs includes the defining value that sexual contact outside of marriage, whether by heterosexuals or homosexuals, is immoral, the court was satisfied that the University's application of its anti-discrimination policy impermissibly burdened CLS's ability to express its opinions.⁵³

Turning to the inquiry over whose interest was greater, the Seventh Circuit began by noting that the University's policy not only had to be justified by a compelling state interest but also could neither be related to suppressing CLS's ideas nor accomplished in a less restrictive manner.⁵⁴ Relying on *Boy Scouts of America v. Dale*⁵⁵ and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,⁵⁶ both of which held that anti-discrimination policies cannot be used to limit expressive conduct if doing so suppresses a group's beliefs or promotes a given point of view, the court of appeals interpreted the University's enforcement of its policy as a coercive attempt to force CLS to change its beliefs or suffer the penalty of losing official recognition.⁵⁷

Because CLS established the likelihood of success on the merits of its claim that the University violated its substantial interest in exercising its First Amendment rights, the court rejected the University's argument that this was not a case of forced inclusion and therefore distinguishable from the precedent that the Seventh Circuit relied on.⁵⁸ Rather than compel the group to do anything, it merely revoked its recognition.⁵⁹ Relying specifically on *Healy v. James*,⁶⁰ where the Supreme Court ruled that a public university must extend recognition to a group with offensive views, the Seventh Circuit interpreted the two disputes as legally indistinguishable.⁶¹ The court of appeals explicated its position, noting that in both instances, the University violated the rights of the student organizations by depriving them of benefits such as channels of communication, funding, and access to facilities.⁶² As such, reasoning that college and university officials could not do indirectly what they may not do directly, the court was satisfied that CLS met its burden of proving that it had a reasonable likelihood of success on the

51. *Id.* at 863.

52. *Id.*

53. *Id.*

54. *Id.*

55. 530 U.S. 640 (2000)

56. 515 U.S. 557 (1995).

57. *Walker*, 453 F.3d at 863.

58. *Id.* at 864.

59. *Id.*

60. 408 U.S. 169 (1972).

61. *Walker*, 453 F.3d at 864.

62. *Id.*

merits of its claim that the University violated its right to expressive association.⁶³

At the start of the final part of its analysis on the likelihood of CLS's success on the merits of its claim, the court reiterated the basic principle of constitutional analysis that if the government excludes a speaker from a forum that the speaker is entitled to be in, then it violated the Free Speech Clause.⁶⁴ Further, the court noted that insofar as the University had not only created such a forum but also granted other benefits, as discussed above about recognized groups, CLS alleged that officials violated the group's rights to free speech by excluding it from the forum without a compelling governmental interest.⁶⁵

As a necessity for its rationale under the public forum doctrine, the court briefly reviewed the three types of fora that the government can create and the level of scrutiny required to exclude speakers from each.⁶⁶ In an open or traditional forum, typically public property such as parks, streets, and sidewalks, the court of appeals indicated that governmentally imposed restrictions are subject to strict scrutiny.⁶⁷ This means that state actors can limit free speech rights only if their actions are narrowly constructed to achieve a compelling government interest. Similarly, in the second type of forum, a designated or limited forum, public property that is opened up for public use as a place of expressive activity, the court maintained that limitations on speech are judged by the same strict scrutiny standard as applied to a traditional forum.⁶⁸ The court explained that the third kind of forum, a nonpublic forum, including locations such as classrooms or college or university meeting facilities, "is not by tradition or designation a forum for public communication," so it is subject to the lowest level of scrutiny.⁶⁹ This means that pursuant to public forum analysis, governmental officials can impose reasonable restrictions on speakers as long as their rules are viewpoint neutral.⁷⁰ The court of appeals added that once the government creates a particular type of forum, whether a physical location or a theoretical classification such as the recognized status at issue, it must follow its own rules when granting access to groups.⁷¹

Having reviewed the types of fora, the Seventh Circuit found that there was some doubt as to whether the University's organizational recognition rule created a limited public forum.⁷² However, the court conceded that even assuming that the University created a nonpublic forum, which would have been subject to the lowest level of scrutiny, CLS had the better argument since it alone was singled

63. *Id.*

64. *Id.* at 865.

65. *Id.*

66. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

67. See, e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998).

68. *Forbes*, 523 U.S. at 677.

69. *Perry*, 460 U.S. at 46.

70. *Id.* at 46.

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

72. *Id.*

out for sanctions.⁷³ Put another way, even assuming that the University's Affirmative Action/EEO policy was facially viewpoint neutral, there was strong evidence that it was not applied in such a manner.⁷⁴ To this end, the court of appeals observed that the University acted improperly insofar as officials did not sanction other groups that operated with restrictive membership requirements.⁷⁵ More specifically, the court wrote that the Muslim Students' Association limited its membership to Muslims, the Adventist Campus Ministry was open only to members of the Seventh Day Adventist faith, and the Young Women's Coalition was restricted to women.⁷⁶ Observing that the University sanctioned only CLS for its membership restrictions while leaving other groups unscathed, the court summarily rejected the University's claim that the other organizations would have ceased their discriminatory practices if threatened with loss of recognition as a "nonstarter" because the policy at issue remained in place.⁷⁷

Based on the record, the Seventh Circuit observed that it was unable to evaluate the reasonableness of the University's policy in light of the purposes that the forum served because the purposes were unclear and the court was unwilling to speculate what officials might have intended.⁷⁸ Even so, reiterating that it was not necessary to reach such an outcome at this point because of the "spartan" record before it, the court was satisfied that CLS demonstrated the likelihood of success on the merits of its claim because it was the only group that the University singled out for loss of recognition.⁷⁹

The Seventh Circuit briefly reviewed the balance of harms, finding that the trial court erred when it reasoned that the group did not suffer an injury because it would not have been forced to include anyone in order to comply with the University's non-discrimination policy.⁸⁰ Instead, the court of appeals reasoned that the University's denial of official recognition for CLS was a significant infringement on its right of expressive association and that the trial court misinterpreted the appropriate legal standards when it rejected CLS's request for relief.⁸¹ Accordingly, the Seventh Circuit concluded that the trial court failed to consider whether the University, not CLS, would have been harmed if it had granted the requested preliminary injunction. In so ruling, the court thus rejected the University's claim on appeal that it would have been injured by having to recognize a group that purportedly violated its anti-discrimination policy. The University would not actually have suffered an injury at all insofar as CLS demonstrated that it was likely to succeed on the merits of its claim.⁸² The Seventh Circuit thus reversed, directing the trial court to enter a preliminary

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 886.

77. *Id.*

78. *Id.*

79. *Id.* at 867.

80. *Id.*

81. *Id.*

82. *Id.*

injunction in favor of CLS.⁸³

2. Dissent

Judge Wood's dissent would have dissolved the Seventh Circuit's temporary injunction and would have permitted the University to apply its policy to CLS.⁸⁴ Yet, she also believed that had CLS been able to show that the University's policy had been enforced unevenly, then it would have been entitled to an injunction.⁸⁵ The dissent, which was divided into three parts, proceeded to argue that the majority misinterpreted *Healy* in granting CLS's request for relief.⁸⁶

In the first part of the dissent, Judge Wood essentially argued that, given the record before the Seventh Circuit, there was no reason to grant CLS an injunction.⁸⁷ She noted that there were a variety of uncorroborated allegations by CLS, including that it was the only student group to have lost its recognition.⁸⁸ Although it is clear that many non-Christian religions also disapprove of homosexual behavior and sexual intercourse outside of marriage,⁸⁹ she asserted that it was all but impossible for CLS to have had direct knowledge of the internal policies of the other organizations.⁹⁰ Regardless, Judge Wood would have required the parties to engage in more extensive discovery so that the court could have weighed more carefully whether CLS was the only group to have been sanctioned.⁹¹

In the second part, Judge Wood contended that the majority placed misguided emphasis on *Hurley*.⁹² Instead, she would have applied *Goodman v. Illinois Department of Financial & Professional Regulation*,⁹³ a case involving a chiropractor's challenge to a state regulation prohibiting the telemarketing of medical services.⁹⁴ Under Judge Wood's reading of *Goodman*, a trial court's order

83. *Id.*

84. *Id.* at 867–68 (Wood, J., dissenting).

85. *Id.* at 868–69.

86. *Id.*

87. *Id.* at 868.

88. *Id.*

89. In light of SIU's concern over CLS's stance with regard to premarital sexual activity involving homosexuals (and heterosexuals), it is interesting that officials ignored the fact that Islam, and presumably the Islamic student's organization on campus, express explicit hostility toward homosexuals. Such overt application of a double standard is troubling to say the least. *See, e.g.*, THE QUR'AN, The Poets: 165–66 (Arthur J. Arberry trans., 1955) ("What, do you come to male beings, leaving your wives that your Lord created for you? Nay, but you are a people of transgressors."); THE QUR'AN, The Ant: 56 (Arthur J. Arberry trans., 1955) ("What, do you approach men lustfully instead of women? No, you are a people that are ignorant."). *See also* Nicholas Heer, Homosexuality in the Qur'an, The International Lesbian and Gay Association (July 31, 2000), http://www.ilga.info/Information/Legal_survey/Summary%20information/homosexuality_in_the_quran.htm.

90. *Walker*, 453 F.3d at 870 (Wood, J., dissenting).

91. *Id.* at 869.

92. *Id.* at 870.

93. 430 F.3d 432 (7th Cir. 2005).

94. *Id.* at 437.

can be reviewed only for an abuse of discretion, a situation that was not present, rather than for an independent review of the record when the dispute is over alleged harm to interests protected by the First Amendment.⁹⁵ She contended that had the majority applied what it described as the appropriate standard, in what it admitted was a close case, then the trial court would not have been susceptible to being accused of abusing its discretion.⁹⁶ In fact, the dissent remarked that the closer a case is, then the more discretion that a trial court should be entitled to exercise, which is an approach that, if applied consistently or to its logical conclusion, runs the risk of tying the hands of appellate panels.⁹⁷

The final section of Judge Wood's dissent, which reviewed the likelihood of success on the merits of the First Amendment claims and the balancing of harms, disagreed that CLS succeeded in meeting its burden of proof.⁹⁸ Declaring that the record failed to support the majority's interpretation of the facts that the University violated CLS's First Amendment rights, she again placed great weight on the notion that the three other student groups had yet to testify as to whether they suffered from discrimination based on their membership policies.⁹⁹

When seeking to balance the harms, Judge Wood argued that the University did nothing directly to impede CLS's freedom of expressive association.¹⁰⁰ Moreover, in her view, the University's actions had at most a mild, if indirect, impact on CLS in light of the University's strong interest in providing equal treatment, coupled with its compelling interest in ensuring a diverse student body.¹⁰¹ Interestingly, Judge Wood had no similar concerns over ensuring the diversity of opinions that CLS might have provided, nor did she even concede that there was a lack of testimony over the alleged actions of the other groups that were admittedly non-parties to the litigation.¹⁰²

Rounding out her opinion, Judge Wood relied on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*,¹⁰³ in which the Supreme Court held that Congress could require colleges and universities to give access to military recruiters even though the military's policy of sexual orientation discrimination is offensive to many institutions.¹⁰⁴ Judge Wood relied on *Rumsfeld* to advance the position that the University law school had its own interest in protecting its speech

95. *Walker*, 453 F.3d at 870–71 (Wood, J., dissenting).

96. *Id.* at 871.

97. *Id.*

98. *Id.* at 872.

99. *Id.* at 870.

100. *Id.* at 874–75.

101. *Id.* at 875.

102. *Id.*

103. 126 S. Ct. 1297 (2006).

104. *Id.* at 1313. For a discussion of *Rumsfeld* and its significance for higher education, see William E. Thro, *The Constitutionality and Current Status of the Solomon Amendment*, 4 NACUA NOTES, Aug. 31, 2006, (on file with author). For a discussion of one aspect of *Rumsfeld*, see William E. Thro, *The Spending Clause Implications of Rumsfeld v. Forum for Academic and Individual Rights*, ENGAGE: J. OF FEDERALIST SOC'Y PRAC. GROUPS, Oct. 2006, at 81, available at <http://www.balch.com/resources/publications/Engage.pdf>.

and associational rights.¹⁰⁵ She argued that in contrast to the military recruiters whom the Supreme Court characterized as outsiders in *Rumsfeld*, here CLS sought to force its way into insider status as a recognized student organization despite the fact that the University did not wish to include the CLS opinions as a part of the University's academic community.¹⁰⁶ As such, the dissent would have affirmed the denial of CLS's request for a preliminary injunction on the grounds that the organization failed to demonstrate the likelihood of success on its claims and the trial court did not abuse its discretion in so ruling.¹⁰⁷

III. REFLECTIONS

As *Walker* demonstrates, there is an inevitable tension between the freedom of association and a college or university's desire to prevent discrimination.¹⁰⁸ On the one hand, *Healy* holds that a public college or university may not deny recognition to a student group simply because that group is offensive.¹⁰⁹ *Widmar v. Vincent*¹¹⁰ mandates that if the college or university allows recognized groups to use institutional facilities, then a recognized student group cannot be denied access because of its views.¹¹¹ In *Board of Regents of the University of Wisconsin System*

105. *Walker*, 453 F.3d at 873 (Wood, J., dissenting).

106. *Id.* at 876 (citing *Rumsfeld*, 126 S. Ct. at 1312).

107. *Id.*

108. Of course, there is no obligation for a college or university to recognize student groups. However, if a college or university chooses to do so, then it must treat all student groups the same. See WILLIAM A. KAPLIN & BARBARA H. LEE, 2 THE LAW OF HIGHER EDUCATION § 10.1.1 (4th ed. 2006). The fact that a group is offensive does not constitute a basis for denying recognition.

109. As the Supreme Court explained:

The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of "destruction" thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.

Healy v. James, 408 U.S. 169, 187-88 (1971).

110. 454 U.S. 263 (1981). The Supreme Court addressed "whether a state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion." *Id.* at 264-65.

111. Rejecting the notion that a University can close its facilities, the Court concluded:

Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.

The University's institutional mission, which it describes as providing a "secular education" to its students, does not exempt its actions from constitutional scrutiny. With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state

v. Southworth,¹¹² the Supreme Court held that if a public college or university provides funds to student organizations,¹¹³ funding decisions must be made in a viewpoint-neutral manner.¹¹⁴

Thus, a group that holds racist, sexist, homophobic, anti-Semitic, or other offensive views, including those that mock Christianity,¹¹⁵ is entitled to recognition, access to facilities, and funding.¹¹⁶ Similarly, *Dale* and *Hurley*, both

universities.

Here the [institution] has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Id. at 267–70 (citations and footnotes omitted).

112. 529 U.S. 217 (2000).

113. Many, if not most, public colleges and universities provide funding to recognized student groups by using the proceeds of mandatory student fees. *See generally id.* (Souter, J., concurring). Under such an arrangement, students end up indirectly funding groups that they find objectionable. *Id.* at 243. These student objections to funding objectionable groups resulted in the *Southworth* litigation. In rejecting the student objections, the Supreme Court observed:

The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support. . . . Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected. We conclude that the University . . . may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle.

Id. at 233–34 (citations omitted).

114. Of course, the Court's analysis begged the question of what constitutes viewpoint neutrality. Unfortunately, insofar as the parties in *Southworth* stipulated that the university allocated funds in a viewpoint-neutral manner, the Court did not address this issue. The Court did suggest that the university's policy of allowing the general student body to overturn funding decisions through a referendum was unconstitutional. *Id.* at 235. Simply stated, the Court refused to permit the will of the political majority to substitute for viewpoint neutrality, reflecting Justice O'Connor's well-stated observation that "we do not count heads before enforcing the First Amendment." *McCreary County v. ACLU*, 545 U.S. 844, 884 (2005) (O'Connor, J., concurring) (striking down a public display of the Ten Commandments at a courthouse).

115. In light of concerns when Christian groups seek funding, the lack of an outcry over religious bigotry, especially anti-Christian, is underwhelming. *See, e.g.*, Steve Duin, *Up in Arms Over the Jesus Cartoons*, OREGONIAN (Portland, Or.), May 21, 2006, at CO1, available at 2006 WLNR 8823054 (reporting that officials at the University of Oregon refused to punish a student newspaper that published cartoons that mocked the crucified Jesus).

116. However, while the institution may not refuse recognition because of the student organization's viewpoint, the institution may require the organization to (1) obey the campus rules; (2) refrain from disrupting classes; and (3) obey all applicable federal, state, and local laws. *See* 2 KAPLIN & LEE, *supra* note 108, § 10.1.1, at 1052–53 (interpreting *Healy v. James*, 408 U.S. 169 (1972)).

As a practical matter, this means that the institution can impose some neutral criteria for recognition, such as having a faculty advisor, having a constitution, and having a certain number of members. However, the institution cannot deny recognition simply because the institution or a

of which allowed private organizations to exclude homosexuals, support the proposition that broad non-discrimination policies cannot be applied to student organizations.¹¹⁷

On the other hand, the Supreme Court in *Healy* held that student organizations can be required to obey generally applicable laws and regulations, which supports the proposition that non-discrimination policies can be applied to student organizations.¹¹⁸ *Roberts v. United States Jaycees*¹¹⁹ and *Board of Directors of Rotary International v. Rotary Club of Duarte*,¹²⁰ in both of which the Supreme Court held that a private organization's freedom of association was trumped by the compelling interest of eliminating societal discrimination, reinforce this conclusion. Yet, upon further reflection, resolving the tension becomes relatively easy and certain principles emerge.

First and perhaps most importantly, there is a constitutionally significant distinction between a student organization's discrimination based on belief and discrimination based on immutable characteristics.¹²¹ As the Supreme Court has made clear, discrimination based on belief is entitled to absolute protection.¹²² "While the law is free to promote all sorts of conduct in place of harmful behavior,

significant part of the campus community dislikes the organization. Moreover, *Healy* also states that the institution may not deny recognition because members of the organization at other campuses or in the outside community have engaged in certain conduct. *Healy*, 408 U.S. at 185–86.

117. This conclusion is reinforced by *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996), where the Second Circuit held that

[W]hen a sectarian religious club discriminates on the basis of religion for the purpose of assuring the sectarian religious character of its meetings, a school must allow it to do so unless that club's specific form of discrimination would be invidious (and would thereby violate the equal protection rights of other students), or would otherwise disrupt or impair the school's educational mission.

Id. at 872–73. For a commentary on this case, see Charles J. Russo & Ralph D. Mawdsley, *Hsu v. Roslyn Union Free School District No. 3: An Update on the Rights of High School Students Under the Equal Access Act*, 114 EDUC. L. REP. 359 (1997).

118. *Healy*, 408 U.S. at 181.

119. 468 U.S. 609 (1984).

120. 481 U.S. 537 (1987).

121. To use an extreme example, the College Chapter of the Ku Klux Klan may not exclude African-Americans simply because they are African-Americans. However, it may exclude anyone who refuses to endorse the group's perverted philosophy of racial and anti-Catholic bigotry. Thus, if there is an African-American who endorses the group's irrational ideology of hatred, the group must accept that individual.

122. Indeed, the fact that a group has offensive views does not constitute a basis for denying recognition to a student organization. See 2 KAPLIN & LEE, *supra* note 108, § 10.1.1. As the Supreme Court explained:

The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of "destruction" thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.

Healy, 408 U.S. at 187–88.

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.”¹²³ “[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.”¹²⁴ Indeed, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”¹²⁵ Thus, regardless of whether an organization may discriminate based on immutable characteristics, it may discriminate based on belief. In other words, the Democrats can exclude Republicans, the Muslims can exclude the Christians and Jews, the Catholics can exclude Protestants, and the Students for Abstinence until Marriage can exclude those who believe in casual sex. An institution may not deny recognition, access to facilities, or funding because of a group’s beliefs.¹²⁶

Second, for purposes of freedom of association cases, there probably is a constitutionally significant distinction between discrimination based on race or gender and discrimination based on other immutable characteristics.¹²⁷ The Equal

123. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995).

124. *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981).

125. *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981).

126. The only real judicial guidance on the issue whether funding is viewpoint neutral emerged in the subsequent litigation in *Southworth*. *Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, 307 F.3d 566 (7th Cir. 2002). Following the Supreme Court’s decision, the objecting students withdrew their stipulation that the university’s actions were viewpoint neutral and unsuccessfully challenged the funding system. *Id.* at 568. Rejecting the students’ claim that the funding system lacked viewpoint neutrality, the Seventh Circuit focused on the amount of discretion that the university granted to the student government association to allocate fees. *Id.* at 581–92. The Seventh Circuit held that if the student government association had unbridled discretion, a term that originated in the Court’s jurisprudence involving the denial of licenses and permits, then the University violated the requirement of viewpoint neutrality. *Id.* at 580–84.

Assuming that the Seventh Circuit’s analysis was correct, viewpoint neutrality essentially requires a mechanical approach, then three observations necessarily follow. First, if funding decisions are made using mathematical formulae, then viewpoint neutrality is achieved. For example, if funding requests are approximately twice the amount of the available funds and a college or university grants each student organization one-half of the amount requested, then the allocation is viewpoint neutral. Second, since the Supreme Court acknowledged that scarce resources such as access to money or the ability to participate in a political debate could be denied to those who do not demonstrate a certain level of support, see *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998), then student organizations with large memberships could receive more money than those with small memberships. By way of illustration, an organization with 300 members could be given more money than an organization with ten. Third, since the Court suggested that viewpoint neutrality is lost when decisions are based on politics, the practice of student politicians meeting and negotiating acceptable allocations of fees is unacceptable. Viewpoint neutrality means that an organization should not have to worry about its level of political influence in a student government.

127. Of course, there is a profound debate about whether sexual orientation is an immutable characteristic. Put another way, is it genetic or is it a choice or some combination? This question is well beyond the scope of this article or, for that matter, our current level of knowledge regarding genetics or human behavior. Moreover, the question is irrelevant. As explained *infra* notes 138–141 and accompanying text, even if sexual orientation is an immutable characteristic,

Protection Clause,¹²⁸ which applies to “*persons*, not *groups*,”¹²⁹ is “essentially a direction that all persons similarly situated . . . be treated alike.”¹³⁰ The “general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”¹³¹ At the same time, this general rule gives way in those rare instances when statutes infringe upon fundamental constitutional rights or utilize “suspect” or “quasi-suspect” classifications.¹³² To the extent that racial classifications “are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality”¹³³ and “call for the most exacting judicial examination,”¹³⁴ they are, regardless of their purpose,¹³⁵ “constitutional only if

discrimination because of sexual orientation is subjected to rational basis scrutiny.

128. U.S. CONST. amend. XIV, § 1.

129. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). *See also* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279–80 (1986) (Powell, J., joined by Burger, C.J., Rehnquist, J., concurring). Indeed, “[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.” *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (citation omitted). If a program treats everyone equally, there is no equal protection violation. *Romer v. Evans*, 517 U.S. 620, 623 (1996) (explaining that the Equal Protection Clause enforces the principle that the Constitution neither knows nor tolerates classes among its citizens).

130. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

131. *Id.* at 440; *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

132. *Cleburne*, 473 U.S. at 440–41; *Graham v. Richardson*, 403 U.S. 365 (1971); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

133. *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). *Cf.* *United Jewish Orgs. v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring) (“[A]n explicit policy of assignment by race may serve to stimulate our society’s latent race consciousness.”); *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting) (“Here the individual is important, not his race, his creed, or his color.”).

134. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (Powell, J., joined by White, J.). *See also Adarand*, 515 U.S. at 227 (“Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”); *Croson*, 488 U.S. at 500–01. Moreover, “the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’” *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand*, 515 U.S. at 227).

135. Indeed, the Court has “insisted on strict scrutiny in every context, even for so-called ‘benign’ racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation.” *Johnson*, 543 U.S. at 505. *See also Adarand*, 515 U.S. at 226 (“[D]espite the surface appeal of holding ‘benign’ racial classifications to a lower standard, because ‘it may not always be clear that a so-called preference is in fact benign.’” (quoting *Bakke*, 438 U.S. at 298)); *Croson*, 488 U.S. at 500 (“But the mere recitation of a ‘benign’ or legitimate purpose for a racial classification is entitled to little or no weight. Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.” (citation omitted)). As Justice Thomas observed:

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government’s racial classifications are drawn by those who wish

they are narrowly tailored to further compelling governmental interests.”¹³⁶ Similarly, classifications based on gender are subject to “quasi-strict scrutiny” and are upheld only if they (1) serve important governmental objectives; and (2) are substantially related to the achievement of those objectives.¹³⁷ In contrast, classifications based upon age,¹³⁸ disability,¹³⁹ sexual orientation,¹⁴⁰ or income¹⁴¹ are subjected merely to rational basis scrutiny.

Distinctions between and among strict scrutiny, quasi-strict scrutiny, and rational basis scrutiny, which is determinative in Equal Protection cases, may also be dispositive in freedom of association cases.¹⁴² Freedom of association cases

to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.

Adarand, 505 U.S. at 240 (Thomas, J., concurring). In other words, if the government “denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race,” the citizens’ right “to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.” *Croson*, 488 U.S. at 493 (O’Connor, J., joined by Rehnquist, C.J., White & Kennedy, JJ., announcing the judgment of the Court).

Further, the history of racial classifications suggests that great deference to governmental findings simply leads to further discrimination. *Cf.* *Korematsu v. United States*, 323 U.S. 214, 235–40 (1944) (Murphy, J., dissenting). Indeed, the entire notion of under-representation “rests upon the ‘completely unrealistic’ assumption that minorities will [make a particular choice] in lockstep proportion to their representation in the local population.” *Croson*, 488 U.S. at 507 (quoting *Sheet Metal Workers Int’l Ass’n v. EEOC*, 478 U.S. 421, 494 (1986) (O’Connor, J., concurring in part and dissenting in part)). Consequently, in only rare instances will there be sufficient evidence to justify a finding of present-day effects of prior intentional discrimination. *See Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

136. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). “‘Absent searching judicial inquiry into the justification for such race-based measures,’ we have no way to determine what ‘classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’” *Id.* (quoting *Croson*, 488 U.S. at 493).

137. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976). Applying this standard, the Supreme Court generally upheld statutes that seem to be a reasonable means of compensating one gender for past societal discrimination. *See Califano v. Webster*, 430 U.S. 313 (1977) (upholding a statute that allowed women to use a different method of calculating retirement benefits). Moreover, the Court has invalidated those statutes that appear to be based on a sexist stereotype. *See United States v. Virginia*, 518 U.S. 515 (1996) (invalidating exclusion of women from state operated military academy); *Orr v. Orr*, 440 U.S. 268 (1979) (invalidating a statute that allowed alimony from men to women but prohibited alimony from women to men); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (invalidating a provision that exempted women from the requirement of proving dependency in order to collect survivor benefits). *But see Nguyen v. INS*, 533 U.S. 53 (2001) (upholding a federal statute that treated the foreign-born children of male U.S. citizens differently from the children of female U.S. citizens).

138. *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

139. *Cleburne*, 473 U.S. at 439–40.

140. *Romer v. Evans*, 517 U.S. 620, 623 (1996).

141. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18–21 (1973).

142. Of course, Equal Protection cases necessarily are limited to classifications by the government. *See The Civil Rights Cases*, 109 U.S. 3 (1883).

involve evaluating whether the government's interest in preventing discrimination is sufficiently compelling to trump the private group's freedom of association. While *Roberts* and *Rotary Club* demonstrate that preventing gender discrimination trumps the freedom of association, and while it is logical to assume that preventing racial discrimination also trumps the freedom of association, it is by no means certain that preventing discrimination based on age, disability, or sexual orientation trumps freedom of association. In other words, preventing discrimination based on suspect or quasi-suspect classifications might be more compelling than preventing discrimination against people within those classifications subject to rational basis review. If so, then a college or university may not force student groups to refrain from age, disability, and sexual orientation discrimination. The ability to force student organizations to refrain from discrimination may be limited to race and gender.

Third, while the federal Free Exercise Clause¹⁴³ does not compel a public college or university to treat a religious organization differently than a non-religious organization,¹⁴⁴ there is no constitutional distinction between religious

143. U.S. CONST. amend. I. Before 1990, the U.S. Supreme Court interpreted the Free Exercise Clause in a manner that generally favored religious rights. Specifically, any governmental policy that burdened the free exercise of religion was struck down unless the State could show a compelling governmental interest. *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). Thus, for example, the Court ruled that the Amish could refuse to send their older children to public schools even though Wisconsin law required that children younger than sixteen attend school. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Under this approach, it was quite likely that a public college or university would be required to accommodate a student's religious objections to curriculum. For example, requiring a student to attend class on a holy day certainly burdens religion and the college or university's interest in having the student attend on that particular day seems far from compelling.

In 1990, the Supreme Court effectively rewrote its Free Exercise Clause Jurisprudence. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court abandoned its previous undue burden/compelling governmental interest standard. Instead, the Court declared, "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or proscribes).'" *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). Put another way, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

As a practical matter, this means that if a statute, policy, or regulation applies to everyone and is motivated by some concern other than a desire to discriminate against religion, then the Free Exercise Clause does not require accommodation of religion. In other words, if the professor's attendance policy applies to everyone and has some purpose other than discriminating against religion, then the fact that it interferes with the religious practices of some students is irrelevant. The college or university *will not be required* to excuse the students. However, the college or university could *choose* to excuse the students.

144. *Smith*, 494 U.S. at 879. The result in *Smith* was extremely controversial and upsetting to many religious communities. In response to *Smith*, many States passed legislation mandating that state and local government follow the pre-*Smith* standard. See, e.g., ALA.CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. § 41-1493 (2004 & Supp. 2006); CONN. GEN. STAT. ANN. § 52-571b (West 2005 & Supp. 2006); FLA. STAT. ANN. §§ 761.01-761.05 (West 2005 & Supp. 2007); R.I. GEN. LAWS §§ 42-80.1-1-4 (2006); S.C. CODE ANN. §§ 1-32-10-60 (2005 & Supp.

and non-religious organizations.¹⁴⁵ In other words, while the Federal Constitution does not compel public colleges and universities to give preferential treatment to religious groups,¹⁴⁶ it does prohibit public colleges and universities from treating

2006). By passing the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, Congress attempted to reinstate the pre-*Smith* standard. Yet, the Supreme Court invalidated that statute. See *City of Boerne v. Flores*, 521 U.S. 507 (1997). Because of *Flores*, the *Smith* case remains the applicable standard for public colleges and universities.

145. There is an important exception to the *Smith* standard. *Smith*, 494 U.S. at 878–79. When a Free Exercise claim is combined with another separate and independent constitutional claim, such as a Free Speech claim, a different standard applies. In these “hybrid” situations, the constitutional standard is the standard that would be utilized in the independent constitutional claim. *Id.* at 882 & n.1. Thus, if a Free Exercise claim is combined with a Free Speech claim, the claim should be evaluated using the Free Speech analysis.

This exception for hybrid claims allows religious organizations to discriminate based on gender and race if such discrimination is mandated by their religion.

146. However, in some states, it may be that the state constitution requires preferential treatment for religious organizations. To explain, state constitutions are significantly different from the Federal Constitution. See Robert F. Utter, *Freedom and Diversity In a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 239, 241–42 (B. McGraw ed., 1984). Specifically, the Federal Constitution represents a delegation of power to the Federal Government while the state constitutions represent a limitation on power of the states. The highest court of New York observed:

The Federal Constitution is one of delegated powers and specified authority; all powers not delegated to the United States or prohibited to the States are reserved to the States or to the people. Great significance accordingly is properly attached to rights guaranteed and interests protected by express provision of the Federal Constitution. By contrast, because it is not required that our State Constitution contain a complete declaration of all powers and authority of the State, the references which do appear touch on subjects and concerns with less attention to any hierarchy of values

Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 366 n.5 (N.Y. 1982). See also *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 785 (Md. 1983).

Most importantly for present purposes, the state constitutions can provide greater protections for individual liberties than the Federal Constitution. In other words, the federal standard is a floor but the state standard can be a ceiling. Over the past thirty years, there have been numerous instances where state courts have interpreted state constitutional provisions as providing greater protection for civil liberties. A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976). Indeed, Justice Brennan, alarmed at the unwillingness of the Burger Court to expand federal constitutional rights, explicitly called for an increased reliance on state constitutional law. William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (“[A]lthough in the past it might have been safe . . . to raise only federal constitutional issues . . . it would be most unwise these days not also to raise the state constitutional questions.”). Because state constitutional provisions can provide more protection than the Federal Constitution, it is possible that religious issues will be decided differently under the State Constitution than under the Federal Constitution.

Consequently, a state equivalent to the Free Exercise Clause may well demand that religious groups be treated more favorably than non-religious groups. Most obviously, some state courts have declared that the state’s Free Exercise Clause utilizes the pre-*Smith* standard. In those States, any undue burden on the free exercise of religion must be justified by a compelling governmental interest. As a practical matter, this means that a college or university generally must accommodate a student’s religious-based request to be excused from an assignment.

religious groups worse than non-religious groups.¹⁴⁷ Thus, in *Widmar*, the public institution was obligated to provide access to the religious organization.¹⁴⁸ Similarly, in *Rosenberger*, the public institution was obligated to provide funding to the religious publication.¹⁴⁹ If a college or university provides any benefit to

147. As an agency or institution of a State, a public college or university has the authority to make religious policy subject only to the commands of the Constitution. Originally, this authority was quite broad. Prior to the adoption of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1, the Establishment Clause, like other provisions of the Bill of Rights, limited only the Federal Government. See *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833). Thus, the states were free to do whatever they wished with respect to religion, subject only to the commands of their own state constitutions. See *Locke v. Davey*, 540 U.S. 712, 723 (2004) (describing the history of state constitutional restrictions on the establishment of religion). Now that the Fourteenth Amendment has made both the Establishment and Free Exercise Clauses applicable to the States, see *Everson v. Bd. of Educ.*, 330 U.S. 1, 17–18 (1947) (incorporating the Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause), the states are restricted substantially in their authority to make religious policy. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 214–15 (1972) (stating that the free exercise clause allows parents to refuse to send children to school beyond the age of thirteen); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (explaining that the Establishment Clause prohibits the practice of daily reading from the Bible in the public schools, even where students are allowed to absent themselves upon parental request). However, because there is “play in the joints” between what the Establishment Clause prohibits and what the Free Exercise Clause requires, *Locke*, 540 U.S. at 718, the states retain substantial sovereign authority to make religious policy.

Several examples demonstrate the point. A state college or university professor may excuse a Jewish student from class for Yom Kippur while refusing to excuse the student who wishes to attend a political protest. A police department may allow a female officer, who is Jehovah’s Witness, to wear a skirt while forcing other female officers to wear pants. A public school cafeteria may offer Muslim students an alternative to pork while refusing to offer alternative meals to those students who simply dislike pork. In each instance, the government is not constitutionally required to accommodate the religious exercise, see *Smith*, 494 U.S. at 879, but is not constitutionally prohibited from doing so.

148. *Widmar v. Vincent*, 454 U.S. 263, 267–70 (1981). See also *id.* at 264–65.

149. The Court concluded that such viewpoint discrimination was unconstitutional when it observed:

We conclude, nonetheless, that here, as in *Lamb’s Chapel*, viewpoint discrimination is the proper way to interpret the University’s objections to [the religious publication]. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995). Moreover, the Court emphasized that provision of money was no different than the right to obtain recognition or to access space when it noted that:

The University urges that, from a constitutional standpoint, funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not. Beyond the fact that in any given case this proposition might not be true as an empirical matter, the underlying premise that the University could discriminate based on viewpoint if demand for space exceeded its availability is wrong as well. The government cannot justify viewpoint discrimination among private

non-religious organizations, it must provide those benefits to religious organizations as well.¹⁵⁰

Fourth, the Establishment Clause¹⁵¹ does not mandate a constitutional

speakers on the economic fact of scarcity. Had the meeting rooms in *Lamb's Chapel* been scarce, had the demand been greater than the supply, our decision would have been no different. It would have been incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible.

Id. at 835. In sum, if the University chooses to fund student groups, it may not refuse to fund a group simply because that group has a religious viewpoint.

150. In short, there is a mandate for viewpoint neutrality. As the Court, in upholding the constitutionality of mandatory student activity fees, observed:

The University must provide some protection to its students' First Amendment interests, however. The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support. Viewpoint neutrality was the obligation to which we gave substance in *Rosenberger v. Rector & Visitors of Univ. of Va.* There the University of Virginia feared that any association with a student newspaper advancing religious viewpoints would violate the Establishment Clause. We rejected the argument, holding that the school's adherence to a rule of viewpoint neutrality in administering its student fee program would prevent "any mistaken impression that the student newspapers speak for the University." While *Rosenberger* was concerned with the rights a student has to use an extracurricular speech program already in place, today's case considers the antecedent question, acknowledged but unresolved in *Rosenberger*: whether a public university may require its students to pay a fee which creates the mechanism for the extracurricular speech in the first instance. When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others. There is symmetry then in our holding here and in *Rosenberger*: Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected. We conclude that the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle.

Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 233–34 (2000) (citations omitted).

151. U.S. CONST. Amend. I ("Congress shall make no law respecting an establishment of religion . . ."). The Establishment Clause has a Libertarian aspect, which limits the power of the Federal Government and the states with regard to the people. The Libertarian purpose of the Establishment Clause mandates "a freedom from laws instituting, supporting, or otherwise establishing religion." Philip Hamburger, *SEPARATION OF CHURCH AND STATE* 2 (2002). Contrary to popular belief, the Establishment Clause "does not say that in every and all respects there shall be a separation of Church and State." *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). Rather, the Establishment Clause must be viewed "in the light of its history and the evils it was designed forever to suppress," *Everson*, 330 U.S. at 14–15, and must not be interpreted "with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970). That constitutional objective is clear:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or

distinction between religious organizations and non-religious organizations.¹⁵² If a

non-attendance.

Everson, 330 U.S. at 15–16. In short, the Establishment Clause “does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises . . . as to have meaningful and practical impact.” *Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., joined by Harlan, J., concurring). It permits “not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.” *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., joined by Rehnquist, C.J., White & Scalia, JJ., concurring). Indeed, as Justice Scalia has observed, “there is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.” *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring). Moreover, the history is equally clear— “[w]e are a religious people whose institutions presuppose a Supreme Being.” *Zorach*, 343 U.S. at 313. “The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.” *Schempp*, 374 U.S. at 213.

152. In addition to the Libertarian aspect described *supra* note 151, the Establishment Clause has a Federalism aspect that limits the power of the Federal Government with regard to states. See William H. Hurd & William E. Thro, *The Federalism Aspect of the Establishment Clause*, ENGAGE: J. OF FEDERALIST SOC’Y PRAC. GROUPS, Oct. 2004, at 62. The Federalism aspect of the Establishment Clause mandates that the Federal Government may not interfere with the states’ ability to make religious policy subject only to the limitations imposed by the Constitution. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring) (“The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with [the States’ religious policy choices].”). See also Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2357 (1997) (“Congress has no power to dictate a position on religion . . . for states. It has no power to dictate church-state relations at all—where ‘state’ refers to the governments of the several states. This is the core meaning of the Establishment Clause.”). Thus, when the states exercise their sovereign authority to make religious policy, the federal government may not interfere. See *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., joined by Rehnquist C.J, White, & Thomas JJ., dissenting) (noting that the Establishment Clause was adopted, in part, “to protect state establishments of religion from federal interference”). See also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1879 (1833) (stating that the Establishment Clause was intended “to exclude from the national government *all power* to act upon the subject [of religion]” (emphasis added)); *id.* (“[T]he whole power over the subject of religion is left *exclusively* to the State governments, to be acted upon according to their own sense of justice and the State constitutions” (emphasis added)). Moreover, this limitation on the powers of the Federal Government was recognized widely at the time of the Framing. See James Madison, General Defense of the Constitution (June 12, 1788), in 11 THE PAPERS OF JAMES MADISON 129, 130 (Robert A. Rutland, et al. eds., 1977) (“There is not a shadow of right in the general government to intermeddle with religion. Its least interference with [religious policy of the States] would be a most flagrant usurpation.”); James Iredell, Debate in North Carolina Ratifying Convention (June 30, 1788), in 5 THE FOUNDERS’ CONSTITUTION 89, 90 (Philip B. Kurland & Ralph Lerner eds., 1987) (stating that the Federal Government “certainly [has] no authority to interfere in the establishment of any religion whatsoever”). Indeed, as one of America’s leading constitutional historians observed:

[A] widespread understanding existed in the states during the ratification controversy that the new central government would have no power whatever to legislate on the subject of religion. This by itself does not mean that any person [sic] or state understood an establishment of religion to mean government aid to any or all religions or churches. It meant rather that religion as a subject of legislation was reserved exclusively to the states.

public college or university treats religious organizations like non-religious organizations,¹⁵³ there is no Establishment Clause violation.¹⁵⁴ In *Widmar*, the

LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 74 (1986). Similarly, Professor Schragger has explained:

[T]he Religion Clauses emerged from the Founding Congress as local-protecting; the clauses were specifically meant to prevent the national Congress from legislating religious affairs while leaving local regulations of religion not only untouched by, but also protected from, national encroachment.

Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1823 (2004). See also AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 32–42 (1998).

The principle that the Federal Government may not interfere with the states' sovereign authority to make religious policy is demonstrated easily. Most obviously, prior to the adoption of the Fourteenth Amendment, the states had the sovereign authority, subject only to their respective state constitutions, to establish or disestablish a church. Had Congress, in the exercise of its Article I powers, attempted to force the States to establish or disestablish a church, Congress would have acted unconstitutionally. In other words, Congress could not have passed a statute requiring the states to choose between receiving federal funds and establishing or disestablishing a church. Similarly, after the adoption of the Fourteenth Amendment, the states have the sovereign authority to choose to fund religious activity indirectly. The Establishment Clause does not prohibit the indirect funding of religion. See *Zelman*, 536 U.S. at 652 (school choice vouchers may be used at private schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13–14 (1993) (disabled student at private religious school could receive special education services); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986) (the state could provide funds for the education of a blind student studying for the ministry). The Free Exercise Clause does not require that the states indirectly fund religious education or activity. See *Locke*, 540 U.S. at 712. If Congress, in the exercise of its Article I powers, attempts to force the states to fund or not to fund indirectly religious activity, then Congress acts unconstitutionally. In other words, Congress could not pass a statute requiring the States to choose between receiving federal funds and allowing religious schools to participate in a school choice program.

153. Of course, in some states, the state constitution may mandate a different standard. A practice that is perfectly acceptable under the federal Establishment Clause may be prohibited by the state Establishment Clause. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Supreme Court held that the Federal Constitution allowed a state to operate a "school choice" program that included private religious schools. However, many state constitutions contain provisions, called "Blaine Amendments," which explicitly state that no public money can ever be provided to a religious school. See Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657 (1998). In the college and university context, this means that it is possible that a state Establishment Clause could forbid a public college or university from providing access or funding to a student religious organization. In other words, the scope of what the college or university may do will vary depending upon the nature of the state constitution.

154. There may be an exception to this rule when a college or university provides direct funding to religious services. Although colleges and universities are obligated to fund religious groups, colleges and universities also may refuse to fund certain broad classes of activities. This necessarily begs the question of whether a college or university may distinguish between "religious activities" and "non-religious activities" of a religious group. For example, if a college or university regularly funds "refreshments" for meetings can it refuse to fund communion wafers and wine for a religious group because a communion service is a "religious activity?"

This is an extraordinarily difficult issue. On the one hand, a direct funding of religious services would seem to be a *per se* violation of the Establishment Clause. It seems clear that government cannot give a direct subsidy to a religious organization for non-secular activities.

Court rejected a public institution's argument that it would violate the Establishment Clause by allowing religious groups to use its facilities.¹⁵⁵

Although the Supreme Court avoided the issue in *Lamb's Chapel* by deciding the case on narrower grounds, it seems likely that the government could exclude religious worship services from a limited public forum. Given the Supreme Court's analogy between student organizations and limited public forums, it seems logical that a college or university could refuse to fund religious worship activities.

On the other hand, determining what is sacred or secular to an individual group necessarily requires of the college or university a large degree of inquiry into the affairs and beliefs of the group. The Supreme Court has suggested that such inquiries may violate the Establishment Clause. See *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) ("It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs."). Moreover, it seems nonsensical that the constitutionality of funding a specific activity would depend entirely on whether the group thought the activity was sacred. If it is acceptable for the French Club to eat French bread and drink French wine as part of its activities, then why is it unacceptable for a Christian group to do the same.

155. In *Widmar*, the Court observed:

The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech. In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to the range of an open forum's likely effects. It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion.

We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases.

Widmar, 454 U.S. at 273–74 (citations omitted).

Acting in large part in response to the stimulus provided by *Widmar*, Congress enacted the Equal Access Act, 20 U.S.C. §§ 4071–74 (2000). Under the terms of the Equal Access Act, if any public secondary school receives federal financial assistance and permits non-curriculum related student groups to meet on school premises during non-instructional time, the school cannot withhold the privilege of gathering because of the religious, political, philosophical, or other content of the speech at such meetings. *Id.* The Supreme Court upheld the Equal Access Act in *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990). Relying on statutory interpretation rather than the constitutional question, the Court interpreted Congressional intent as recognizing that most high school students could understand that allowing a religious club to function in school does not imply endorsement of religion. *Id.* at 250. Yet, because Congress did not define "noncurriculum related," the Court thought it necessary to do so in order to ascertain the status of some student groups. *Id.* at 237–39. The Court found that insofar as several existing clubs failed to satisfy the criteria, the religious group was entitled to meet in school. *Id.* at 246–47.

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993), another case set in the context of public elementary and secondary education, reinforced the Establishment Clause analysis from *Widmar* and *Mergens*. *Id.* at 395. *Lamb's Chapel* arose when a local school board in New York allowed its facilities to be used for "social, civic, and recreational purposes" but banned all use for "religious purposes." *Id.* at 386. A religious group that was denied the opportunity to use school facilities, not for worship, but to show a film that presented a religious perspective on child rearing unsuccessfully challenged the policy. *Id.* at 387–89, 390 n.4. On further review of rulings in favor of the board, the Supreme Court, in a rare unanimous opinion, reversed in favor of the group. *Id.* at 397. However, the Supreme Court avoided the issue of

Similarly, in *Rosenberger*, the Court disagreed with a public institution's argument that it would violate the Establishment Clause by funding a religious publication.¹⁵⁶ Moreover, a college or university may treat a religious organization *more favorably* than non-religious organizations without violating the

whether banning activities with a "religious purpose" was constitutional. *Id.* at 390 n.4. Instead, in a hybrid situation wherein it treated religious speech as a form of free speech, the Court essentially extended *Mergens'* rationale. More specifically, the Court maintained that since the school board created a limited public forum by allowing films or lectures on child rearing in general, it violated the group's free speech rights by engaging in viewpoint discrimination simply because organizers of the event sought to address the same topic from a religious perspective. *Id.* at 394. *See also* *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703 (4th Cir. 1994) (deciding that a board regulation in Virginia, which allowed officials to charge churches an escalating rate for the use of school facilities, discriminated both against religious speech and interfered with or burdened the church's right to speak and practice its religion); *Shumway v. Albany County Sch. Dist. No. 1*, 826 F. Supp. 1320 (D. Wyo. 1993) (similar result).

Eight years later, a similar dispute arose in a second case from New York, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), when officials refused to permit a non-school-sponsored club to meet during non-class hours so that members and moderators could discuss child-rearing along with character and moral development from a religious perspective. Even though officials forbade the religious club from meeting, they allowed three other groups to gather because although they addressed similar topics, they did so from a secular perspective.

Reversing in favor of the club, the Supreme Court reasoned not only that the board violated its rights to free speech by engaging in impermissible viewpoint discrimination when it refused to permit it to use school facilities for its meetings, which were not worship services, but also that such a restriction was not justified by fears of violating the Establishment Clause. *Id.* at 107–09, 112–13. *See also* *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 400 F. Supp. 2d 581 (S.D.N.Y. 2005) (enjoining enforcement of a policy that would have refused to allow the outside religious group to use school facilities on Sundays for religious services and worship as it violated the First Amendment as a form of religious viewpoint discrimination).

156. The Court observed:

It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises. This is so even where the upkeep, maintenance, and repair of the facilities attributed to those uses are paid from a student activities fund to which students are required to contribute. The government usually acts by spending money. Even the provision of a meeting room, as in *Mergens* and *Widmar*, involved governmental expenditure, if only in the form of electricity and heating or cooling costs. The error made by the Court of Appeals, as well as by the dissent, lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient. If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then *Widmar*, *Mergens*, and *Lamb's Chapel* would have to be overruled. Given our holdings in these cases, it follows that a public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers, on a religion neutral, say first-come-first-served, basis. If a religious student organization obtained access on that religion-neutral basis and used a computer to compose or a printer or copy machine to print speech with a religious content or viewpoint, the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall.

Rosenberger, 515 U.S. at 842–43 (citations omitted).

Establishment Clause.¹⁵⁷

IV. CONCLUSION

In sum, the constitutional rights of the politically incorrect student organizations largely trump a public college or university's desire to prevent student groups from engaging in discrimination. Discrimination on the basis of belief is absolutely protected.¹⁵⁸ While a college or university can force non-religious organizations to refrain from discrimination based on race and gender, it might not be able to prohibit discrimination because of other immutable characteristics such as age, disability, or sexual orientation.¹⁵⁹ Religious organizations *must* be treated at least as favorably as non-religious organizations, *can* receive more favorable treatment, and, in some instances, might be constitutionally entitled to treatment that is more favorable.¹⁶⁰

157. See *Cutter v. Wilkinson*, 544 U.S. 709, 719–24 (2005) (stating the Religious Land Use and Institutionalized Persons Act, which requires preferential treatment for religion, does not violate the Establishment Clause); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (“[W]e in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause.”); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (recognizing that the government may sometimes accommodate religious practices without violating the Establishment Clause).

158. See *supra* notes 124–26 and accompanying text.

159. See *supra* notes 138–41 and accompanying text.

160. As discussed *supra* notes 145 and 155, it is possible that a “hybrid free exercise” claim under the Federal Constitution or a claim under the State Constitution would lead to this result.