BALANCING A UNIVERSITY'S NONDISCRIMINATION POLICY REGARDING SEXUAL ORIENTATION WITH THE EXPRESSIVE RIGHTS OF STUDENT RELIGIOUS ORGANISATIONS: A USA PERSPECTIVE

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The interest in diversity in American education has led to the creation of written nondiscrimination policies generally prohibiting student groups (as well as individual students and employees) from discriminating against identified categories, such as race, gender, national origin, religion, disability, and sexual orientation. Of these protected categories, sexual orientation has generated considerable recent controversy because, while many states and municipalities have enacted statutes preventing sexual orientation discrimination, the federal legislature (Congress) has not. Religious issues have surfaced in society at large as to whether marriage should be limited to a man and woman and those religious viewpoints carry over into educational institutions with nondiscrimination policies prohibiting discrimination on the basis of sexual orientation. Generally, these policies stipulate a college or university will not recognise a student group that refuses to extend membership and active participation to homosexuals engaging in sexual conduct that would violate the group's religious tenets. In essence, student organisations with such religious beliefs demand that higher education institutions recognise their right to practice their religious beliefs, even at the expense of treating differently persons engaged in homosexual conduct.

The Supreme Court has not addressed a case involving the expressive rights of religious student organisations with regard to issues related to sexual orientation but, the Seventh Circuit, in Christian Legal Society v Walker has recently addressed the extent to which a public educational institution's furtherance of its nondiscrimination policy (in this case, specifically involving sexual orientation) permits restrictions on a student religious organisation's expression. The purpose of this article is to examine the Walker case and to explore the legal issues related to a university's enforcement of its sexual orientation nondiscrimination policy involving a student religious organisation's avowed intention to adhere to its religious tenets.

I INTRODUCTION

Since *Sipuel v Board of Regents of University of Oklahoma*,[1] *Sweatt v Painter*[2] and *McLaurin v Oklahoma State Regents*,[3] three cases antedating *Brown v Board of Education*,[4] the Supreme Court has been actively involved in shaping the nondiscriminatory practices of higher education

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institutions. Over two decades ago in *Bob Jones University v US* (*Bob Jones University*),[5] the Supreme Court upheld the denial of tax exemption for a religious university with racially discriminatory admission policies, observing that 'the Government has a fundamental, overriding interest in eradicating racial discrimination in education'.[6] Thirteen years later, the Court struck down Virginia Military Institute's policy of denying admission to women because the university could not demonstrate an 'exceedingly persuasive justification' for its action.[7] More recently, the debate has broadened and the Court has held that a public university had a compelling interest in fostering a diverse law school student body, thus upholding the use of an affirmative action admissions policy to increase the representation of minorities in its law school,[8] but holding in a companion case that the university's undergraduate admissions policy violated equal protection for what amounted to the implementation of a quota.[9]

The interest in diversity has extended to creation of nondiscrimination policies generally prohibiting student groups (as well as individual students and employees) from discriminating against identified categories, such as race, gender, national origin, religion, disability, and sexual orientation. Of these categories, protection for sexual orientation has generated recent controversy for religious student groups claiming that extending membership and active participation to homosexuals engaging in sexual conduct would violate the religious tenets of their organisations. In essence, the student organisations request that universities recognise their right to practice their religious beliefs, even at the expense of treating differently persons engaged in homosexual conduct.

The Supreme Court has not addressed a case involving the expressive rights of religious student organisations with regard to issues related to sexual orientation but, as indicated in the next section, has examined religious student organisation expressive rights in other factual settings.[10] The extent to which university student religious organisations should be entitled to free speech protection to practice their religious beliefs is complicated when the university has a nondiscrimination policy that prohibits discrimination in a broad range of categories, including sexual orientation.[11] This article explores the legal balancing issues between a university's enforcement of its nondiscrimination policy involving sexual orientation and a student religious organisation's adherence to its religious tenets.

II Supreme Court Protection for the Expressive Rights of Student Religious Organisations

The Supreme Court in three prominent cases over the past twenty-five years has protected the free speech rights of university student religious organisations from overreaching control by university officials. In the seminal, landmark decision, *Widmar v Vincent* (*Widmar*),[12] the Court applied forum analysis[13] to reject a public university's refusal to permit a Christian student group to use university facilities for its meetings similar to a use permitted for other nonreligious groups. The Court reasoned that 'engag[ing] in religious worship and discussion ... are forms of speech and association protected by the First Amendment' and that before a university can exclude a student organisation from 'a [limited] public forum based on the religious content of a group's intended speech, the University must ... satisfy the standard of review appropriate to content-based exclusions [by showing] that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end'.[14] In rejecting the university's claim that it had a compelling interest in not violating the Establishment Clause, the Court responded that, once '[t]he University has opened its facilities for use by student groups, ... the question is whether it can now exclude groups because of the content of their speech[; the Court was] unpersuaded

[under the tripartite *Lemon v Kurtzman* (*Lemon*)[15] test] that the primary effect of the public forum, open to all forms of discourse, would be to advance religion'.[16]

Fourteen years after *Widmar*, the Supreme Court, in *Rosenberger v Rector and Visitors of University of Virginia* (*Rosenberger*),[17] ruled that, where the university had a policy of funding publications of approved student organisations, its refusal to fund the publication of a religious organisation based on the content of its publication constituted impermissible viewpoint discrimination under free speech. Relying upon a recent K-12 religious speech case, *Lamb's Chapel v Center Moriches Union Free School District* (*Lamb's Chapel*)[18] where a unanimous Court had held viewpoint discrimination to be a free speech violation, the *Rosenberger* Court rejected the university's policy that excluded funding for any publication 'primarily promot[ing] or manifest[ing] a particular belie[f] in or about a deity or an ultimate reality'.[19] In refusing to accept the university's position that a 'prohibited [religious] perspective' did not constitute 'viewpoint discrimination', the Court found 'simply wrong' the university's assumption that discrimination 'against an entire class of viewpoints ... (in this case, religion) [is] []supportable [because] all debate is bipolar'.[20] Excluding several viewpoints on the same topic (eg, religion) just as much skews a free speech debate as if a single viewpoint is prohibited, or as the Court expressed it, 'the debate [simply becomes] skewed in multiple ways'.[21] In other words, the Court in *Rosenberger* declared that free speech protected not only a single religious perspective of permissible subject matter (child rearing) such as had been the case in *Lamb's Chapel*,[22] but would protect multiple religious perspectives of a permissible subject as well.[23]

Five years after *Rosenberger*, the Supreme Court, in *Board of Regents of University of Wisconsin System v Southworth* (*Southworth*),[24] addressed the expressive activities of student organisations as a function of allocating mandatory student fees to support student groups. In *Southworth*, student plaintiffs objected to having their student fees support groups with which they disagreed and to a student referendum process that permitted groups to be funded or defunded based on a majority vote of students. A unanimous Court in *Southworth* upheld the distribution of funds to student groups 'that engage in political and ideological expression offensive to [other students'] personal beliefs'[25] where the university's purpose was 'to stimulate the whole universe of speech and ideas [and where] ... the university program had in place a 'viewpoint neutrality requirement ... to protect the rights of the objecting students'.[26] The Court remanded for lower courts to review whether the student fee allocation process satisfied viewpoint neutrality but invalidated the university's referendum process, observing that such an approach 'would undermine the constitutional protection the program requires ... .The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent'.[27] On remand, the university eliminated the referendum[28] and revamped the process for student organisation application for funds. On appeal to the Seventh Circuit,[29] the court of appeals, interpreting *Southworth* as having imposed 'the unbridled discretion standard ... to the University's mandatory fee system [as] ... a component of [the free speech clause's] viewpoint neutrality',[30] upheld 'the [u]niversity's fee system [that] set forth specific and detailed standards guiding the student government discretion'.[31] Nonetheless, the Seventh Circuit still invalidated a part of the funding process as not satisfying the viewpoint neutrality standard where the amount of funding for travel expenses could depend on 'the length of time an organisation has been in existence and the amount of funding an organisation has received in the past [that could be interpreted as] discriminat[ing] against less traditional viewpoints'.[32]

Against the background of these three Supreme Court decisions, the Seventh Circuit, in *Christian Legal Society v Walker* (*Walker*),[33] has recently addressed a different challenge to the authority of a public university to control the expressive activities of a student organisation. *Walker* presents a new issue as yet not addressed by the Supreme Court, namely the extent to which a public educational institution's furtherance of its nondiscrimination policy (in this case, specifically involving sexual orientation) permits restrictions on a student religious organisation's expression. In addition to examining the facts of *Walker* and the Seventh Circuit's opinion, this article will discuss the implications of this case for the recognition and support of student organisations.

III *Christian Legal Society v Walker*: Facts of the Case

Southern Illinois University in *Walker* (and the law school as part of the university) had a nondiscrimination policy that required that the university 'provide equal employment and education opportunities for all qualified persons without regard to[, among other things,] sexual orientation'.[34] The Christian Legal Society (CLS) was one of seventeen recognised student organisations at Southern Illinois University (SIU) School of Law although the university at large had over 400 student organisations that were subject to this nondiscrimination policy.[35] As a recognised organisation at SIU School of Law, CLS was entitled to

> access to the law school List-Serve (the law school's database of e-mail addresses), permission to post information on law school bulletin boards, an appearance on lists of official student organizations in law school publications and on its website, the ability to reserve conference rooms and meeting and storage space, a faculty advisor, and law school money.[36]

The SIU chapter of CLS is part of a national organisation of the same name whose membership includes lawyers as well as law students. The statement of belief of the SIU chapter is a mirror image of the national organisation's Bylaws. In addition to having trusted Christ as Savior, all CLS members and officers are expected to subscribe to the following doctrinal beliefs:[37]

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

The Constitution of the national CLS requires that voting privileges are limited to members who 'sign, affirm, and endeavor to live their lives in a manner consistent with the Statement of Faith'.[38] In the Constitution's section addressing standard for officers, it requires that they 'must exemplify the highest standards of morality as set forth in Scripture, abstaining from "acts of the sinful nature"'. Apparently this requirement applies to all CLS voting members and allows that members who have not exhibited this high standard of morality can be reinstated 'so long as they have since repented of these sins ... and so manifest "the fruit of the Spirit which is love, joy, peace, patience, kindness, goodness, faithfulness, gentleness and self-control"'.[39]

In applying the above Bible-based standards, the CLS chapter at SIU School of Law required

> that officers and members adhere to orthodox Christian beliefs, including the Bible's prohibition of sexual conduct between persons of the same sex. *A person who engages in homosexual conduct or adheres to the viewpoint that homosexual conduct is not sinful would not be permitted to serve as a CLS chapter officer or member.* A person who may have engaged in homosexual conduct in the past but has repented of that conduct, or who has homosexual inclinations but does not engage in or affirm homosexual conduct, would not be prevented from serving as an officer or member.[40]

Upon being notified of the CLS chapter's limitation on membership privileges for homosexuals, the law school dean notified the chapter that the requirement violated the university's affirmative action policy 'to provide equal employment and education opportunities for all qualified persons without regard to race, color, religion, sex, national origin, age, disability, status as a disabled veteran or a veteran of the Vietnam era, *sexual orientation,* or marital status'.[41] Even though the chapter responded to the dean that its provision against homosexual conduct also applied to 'heterosexual persons who ... participate in or condone heterosexual conduct outside of marriage',[42] the dean revoked CLS's status as an approved student organisation, noting that '[n]o student constituency body or recognised student organisation shall be authorized unless it adheres to all appropriate federal or state laws concerning nondiscrimination and equal opportunity'.[43] The effect of derecognition was that

> CLS was no longer able to reserve law school rooms for private meetings. CLS could use law school classrooms to meet, but not privately-other students and faculty were free to come and go from the room. CLS also was denied access to law school bulletin boards, representation on the law school's website or in its publications, and the liberty to refer to itself as the 'SIU Chapter of' the Christian Legal Society. Finally, CLS was stripped of an official faculty advisor, free use of the SIU School of Law auditorium, access to the law school's List-Serve, and any funds provided to registered student organizations.[44]

CLS brought suit against the dean and several other SIU officials (henceforth referred to as SIU) seeking a preliminary injunction to be reinstated as an approved student organisation. The organisation claimed that SIU had violated its First Amendment rights of expressive association, free speech, and free exercise of religion, as well as its Fourteenth Amendment rights of equal protection and due process.

A *Christian Legal Society v Walker: Seventh Circuit Majority Decision*

In an unreported opinion,[45] the federal district court denied CLS's request for a preliminary injunction, articulating three reasons:

1. SIU's Affirmative Action Policy was facially neutral, which meant that SIU could 'deny, withdraw, or suspend the benefits of participation in the internal life of the college community to any group that reserves the right to violate any valid campus rules with which it disagrees'.[46]
2. Revocation of recognized student organization status, while it deprived CLS of 'access to the bulletin boards, private meeting space, storage space, website and publication access, email access, funding eligibility, and use of the SIU name,' did 'not force [the organization] to accept anyone as a member'.[47]
3. CLS's 'right to meet, assemble, evangelize, and proselytize [was] not impaired'.[48]

CLS appealed to the Seventh Circuit which granted the organisation's request for an injunction pending the appeal and, following the submission of briefs and oral arguments, reversed in a 2-1 decision the district court and granted CLS its preliminary injunction.

In awarding the preliminary injunction, the Seventh Circuit determined that CLS had produced sufficient evidence to satisfy its four-part burden of proof that (1) 'it is reasonably likely to succeed on the merits, (2) it is suffering irreparable harm that outweighs any harm the nonmoving party will suffer if the injunction is granted, (3) there is no adequate remedy at law, and (4) an injunction would not harm the public interest'.[49] Since the parties limited their arguments solely to plaintiff's expressive association and free speech claims, those were the only issues addressed by the court of appeals.

Regarding the likelihood of plaintiff to succeed on the merits, the Seventh Circuit found that CLS had presented sufficient evidence to prevail on any one of three claims: (1) 'it is doubtful that CLS violated either of the policies SIU cited as grounds for derecognition'; (2) 'SIU impermissibly infringed on CLS's right of expressive association'; and, (3) 'SIU violated CLS's free speech rights by ejecting it from a speech forum in which it had a right to remain'.[50] Since, as the Seventh Circuit observed, 'any one of [these three] is enough to carry CLS's burden',[51] SIU's burden of showing no success on the merits became, at the very best, somewhat daunting. The court of appeals found that the university Affirmative Action Policy protecting 'equal employment and education opportunities' did not seem to fit since CLS did 'not employ anyone' and it seemed doubtful that 'CLS should be considered an SIU "education opportunity"'.[52] In addition, since CLS's prohibition against extramarital conduct applied equally to homosexual and heterosexual conduct, the court of appeals reasoned that 'CLS's membership policies [were] thus based on belief and behavior rather than status, and no language in SIU's policy prohibit[ed] this'.[53] In short, 'CLS requires its members and officers to adhere to and conduct themselves in accordance with a belief system regarding standards of sexual *conduct*, but its membership requirements do not exclude members on the basis of sexual *orientation*'.[54] Beyond this, the Seventh Circuit observed that 'CLS is a private speaker' and, although CLS received public benefits associated with its recognition as a student organisation, 'subsidized student organizations at public universities are engaged in private speech, not spreading state-endorsed messages'.[55]

Finding CLS to be an expressive organisation 'prohibit[ing] sexual conduct outside of a traditional marriage between one man and one woman [and] ... disapprov[ing] of fornication, adultery, and homosexual conduct',[56] the Seventh Circuit concluded that 'appl[ying] SIU's antidiscrimination policy to force inclusion of those who engage in or affirm homosexual conduct would significantly affect CLS's ability to express its disapproval of homosexual activity'.[57] Indeed, the court of appeals went so far to state that 'forcing [CLS] to accept as members those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to cease to exist'.[58] The Seventh Circuit rejected SIU's claim that its withdrawal of recognition '[was] not forcing CLS to do anything at all' and pointedly observed that SIU's attempt to freeze CLS 'out of channels of communication offered by the universit[y]' permitted the court of appeals to prohibit SIU from seeking to 'do indirectly what it [was] constitutionally prohibited from doing directly'.[59]

Regarding CLS's free speech claim, the Seventh Circuit began with the seminal principle that '[t]he government violates the Free Speech Clause of the First Amendment when it excludes a speaker from a speech forum the speaker is entitled to enter'.[60] Acknowledging that '[t]he level of scrutiny applicable to the government's actions ... depend[s] on the nature of forum from which the speaker has been excluded',[61] the court of appeals made no determination as to whether

SIU had created a public forum, a designated public forum,[62] or a nonpublic forum. Leaving the determination of the kind of forum[63] to the district court, the Seventh Circuit was more troubled by SIU's failure to apply its nondiscrimination policy in a viewpoint neutral manner.

> CLS presented evidence that other recognized student organizations discriminate in their membership requirements on grounds prohibited by SIU's policy. The Muslim Students' Association, for example, limits membership to Muslims. Similarly, membership in the Adventist Campus Ministries is limited to those 'professing the Seventh Day Adventist Faith, and all other students who are interested in studying the Holy Bible and applying its principles'. Membership in the Young Women's Coalition is for women only, though regardless of their race, color, creed, religion, ethnicity, sexual orientation, or physical ability.[64]

Thus, at this point, the court of appeals determined that CLS's free speech claim was framed more by SIU's alleged inconsistent enforcement of its antidiscrimination policy than by the nature of the forum in which CLS's expressive activity was taking place.[65]

Rounding out the requirements for a preliminary injunction, the Seventh Circuit found that CLS would suffer irreparable harm if an injunction were not issued, no adequate remedy at law existed, and an injunction would not harm the public interest. The court of appeals was unpersuaded by SIU's claim that CLS had experienced no irreparable harm since it 'could still hold meetings on campus and could communicate with students by means other than university bulletin boards and listservs'.[66] The Seventh Circuit declared as well-settled that 'violations of First Amendment rights are presumed to constitute irreparable injuries'[67] and that 'denying official recognition to a student organization is a significant infringement of the right of expressive association'.[68] In finding that 'CLS has shown it likely that SIU has violated its First Amendment freedoms', the Seventh Circuit chided the district court for having 'simply misread the legal standards [which in itself] is necessarily an abuse of discretion'.[69] In response to SIU's claim that granting a preliminary injunction would represent a hardship 'associated with [SIU's] being required to recognize a student organization it believes is violating the university's antidiscrimination policy', the Seventh Circuit snapped back that 'if SIU is applying that policy in a manner that violates CLS's First Amendment rights — as CLS has demonstrated is likely — then SIU's claimed harm is no harm at all'.[70]

The dissenting justice in *Walker* diverged from the majority on the insufficiency of the factual record as a basis for supporting a preliminary injunction. In essence, the dissenting justice's outstanding concerns are virtually identical to those of the majority,[71] but, unlike the majority, the dissent was not willing to disturb the district court's denial of an injunction where evidence was lacking as to SIU's alleged inequitable application of its facially neutral nondiscrimination policy. Most telling though is the dissent's application of the Supreme Court's recent decision in *Rumsfeld v Forum for Academic and Institutional Rights, Inc.* (*FAIR*)[72] to suggest that CLS is an outside organisation and, as such, SIU and its Law School have 'their own associational rights' so as to be free from CLS's effort 'to accept a "member" that SIU does not desire'.[73] The dissenting justice is ambiguous regarding the standard to be applied in determining whether CLS's free speech right would have been violated if required to alter its membership policy. While mentioning that implementation of SIU's nondiscrimination policy can be justified if 'the principle of student diversity [is] a compelling state interest',[74] the dissenting justice also suggests that a court may need only engage in a reasonableness-based balancing process to determine how CLS's religious beliefs should be balanced against 'the harm to SIU [of] being forced to accept into its expressive association a group that undermines its message of nondiscrimination and diversity'.[75]

B *Analysis and Implications*

Walker represents an issue that has, as yet, not been addressed by the Supreme Court, namely the balance to be struck between the expressive rights of student organisations and the nondiscrimination policies of host educational institutions. In its three prior decisions regarding student organisations (*Widmar, Rosenberger, Southworth*), the Supreme Court protected the right of free speech access of religious student organisations to physical and financial resources of universities, prohibiting universities from denying resources on other than a viewpoint neutral basis and from permitting such allocations to be determined by majoritarian decision-making. What *Walker* adds to the debate is the extent to which enforcement of a viewpoint neutral nondiscrimination policy can be subject to free speech constraints.

CLS has become a national vehicle to challenge the authority of law schools (and their parent universities) to restrict religious expression, in much the same way that Child Evangelism Fellowship (CEF) (the parent organisation for Good News Clubs) has for K-12 schools. The organisational purposes of both national organisations include the establishment of local chapters to provide religious-based services to students in a manner consistent with national guidelines.[76] Both CLS and CEF have become litigation flashpoints for challenging the authority of public educational institutions to prohibit or restrict the organisations' religious expressive rights and CEF in particular has marshaled a fairly impressive litigation history successfully protecting those expressive rights.[77] Although CLS would appear to have an advantage in that it deals with an adult student audience and thus would not have to contend with the K-12 issues of impressionability and peer pressure,[78] the religious belief and nondiscrimination policy litigation, as represented in *Walker*, present a difficult free speech challenge.[79]

Walker addresses only the expressive rights of student religious organisations in public universities as those rights come into conflict with the university's nondiscrimination policy. The case does not reach the broader question regarding the free speech rights of individual students that might conflict with a nondiscrimination policy. Thus, for example, the facts in *Walker* do not reach the kind of issues litigated in K-12 schools, such as students wearing T-shirts expressing points of view on social topics.[80] However, while, as reflected in *Walker*, organisation expression involving institutional nondiscrimination policies is litigated primarily under a free speech viewpoint discrimination claim,[81] individual rights are litigated under a private speech claim pursuant to the disruption standard of *Tinker v Des Moines Independent School District*.[82] Individual members of organisations such as CLS would retain their right under a *Tinker* standard to present their views as private speech even if public universities and law schools were successful in refusing to recognise the organisations because their message is considered to be inconsistent with a nondiscrimination policy. The Seventh Circuit in *Walker* indicated that private speech could apply to religious organisations such as CLS, although that application in the past has served primarily to refute an establishment clause claim that an organisation's expressive views represent public endorsement or sponsorship by the university.[83] In any case, as discussed later in this article, the question remains whether private individual speech would have the same reach and impact that private organisational speech would have.

The Seventh Circuit in granting its preliminary injunction in *Walker* not only did not reach the merits of the case but the court left unresolved the kind of forum created by SIU. Since forum analysis has come to play such a significant role in defining expressive rights for student organisations,[84] a consideration of the various forums and how they might affect the expressive rights for religious organisations like CLS is appropriate.

IV Expressive Rights and the Nature of the Forum

The Seventh Circuit in *Walker* discussed briefly the different forums that have been invoked in free speech analysis but did not determine which applied in the case.[85] Although some confusion exists in terminology, courts in the USA generally have recognised three kinds of forums: public or traditional, designated or limited, and nonpublic. Deciding which forum applies to a particular set of facts has been viewed as being important because the nature of the forum has framed an organisation's or individual's scope of expression, as well as an educational institution's authority to limit that expression.

Forum analysis is a judicially-constructed process for balancing government actions to control use of its premises with the limitations free speech imposes on those actions.[86] The level of scrutiny applicable to the government's actions differs depending on the nature of forum from which an individual or organisation has been excluded. The Supreme Court in *Perry Education Association v Perry Local Educators' Association* (*Perry*),[87] identified three kinds of forums: traditional public forum; designated public forum; and, nonpublic forum. A traditional public forum normally applies to public areas set aside by government for public use, such as sidewalks and parks, and, thus, government restriction on free expression in these areas is limited to time, place, and manner of expression, as well as to prevention of clear threats to safety.[88] A designated public forum applies to 'public property which the state has opened for use by the public as a place for expressive activity, ... [a]lthough a state is not required to indefinitely retain the open character of the facility ...'.[89] However, once government opens a forum, 'a state regulation of speech should be content-neutral'[90] and restriction of expression requires 'a compelling governmental interest'[91] and is subject to a strict scrutiny standard of review. The third kind of *Perry* forum, nonpublic, provides for greater government control but still has limitations. A nonpublic forum exists where government has not 'evinced an intention "by policy or practice" to designate [any part of the school or its programs] as a public forum'.[92] Access to a nonpublic forum can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.... [However], the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject'.[93]

A fourth kind of forum, limited public forum was not expressly discussed in *Perry* but has become the predominant form of analysis where religious issues in public schools are concerned.[94] However, as reflected by the Seventh Circuit in *Walker*, courts have not been clear as to how limited public forum fits into the three forums in *Perry*. In *Good News Club v Milford Central School*,[95] the Supreme Court identified a limited public forum as subject to the same reasonableness test as for a nonpublic forum, but with the caveat from *Lamb's Chapel v Center Moriches Union Free School District* (*Lamb's Chapel*)[96] that exclusion of expression based on religious content must be 'reasonable and viewpoint neutral'.[97] To add to the confusion, the Supreme Court in *R.A.V v City of St. Paul, Minnesota*,[98] and *Cornelius v NAACP Legal Defense & Education Fund., Inc*,[99] suggested that a limited public forum can describe a subcategory of 'designated public forum', meaning that it would be subject to the strict scrutiny test. Federal courts have split on where a limited public forum fits,[100] but one recent federal court of appeals has provided a rational explanation of the distinction:

> In a limited public forum, the government creates a channel for a specific or limited type of expression where one did not previously exist. In such a forum, 'the State may be justified in reserving [its forum] for certain groups or for the discussion of certain topics,' subject only to the limitation that its actions must be viewpoint neutral and reasonable. In

> a designated public forum, by contrast, the government makes public property (that would not otherwise qualify as a traditional public forum) generally accessible to all speakers. In such a forum, regulations on speech are 'subject to the same limitations as that governing a traditional public forum'-namely, strict scrutiny.[101]

In the end, both designated and limited public forums must address viewpoint neutrality and subject matter,[102] with the proviso that 'viewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to *protect* against the improper exclusion of viewpoints'.[103]

Although the Seventh Circuit in *Walker* did not reach the merits of the kind of forum SIU had provided for its student organisations, the parties differed dramatically regarding their interpretation of how that forum should be defined. CLS maintained that 'it belonged within SIU's forum and was inappropriately ejected therefrom [since] ejection of an otherwise eligible group from a speech forum is *always* subject to strict scrutiny'.[104] While CLS acknowledged that '[t]he Free Speech Clause certainly permits government to limit access to otherwise non-public fora to a category of speakers or for the discussion of certain subjects[,] [t]he non-discrimination rule ... is *not* a means by which SIU defines the parameters of the forum',[105] in large part, because 'numerous student groups among the 404 SIU [campus-wide] registered student organisations (not to mention SIU's numerous single-sex Greek letter organisations) appear to take protected characteristics into account'.[106] In sum, SIU's impermissible viewpoint discrimination 'permit[ted] students to organize around any shared viewpoint, save one: religion'.[107]

On the other hand, SIU's position is captured in its observation that '[t]he University [has] a clear and substantial interest in creating reasonable nondiscrimination rules for campus activities. Adopting and enforcing a nondiscrimination policy is not the least bit unreasonable, nor is it unconstitutional'.[108] SIU reasoned that 'it cannot be seriously asserted that the University's nondiscrimination policy is anything other than viewpoint neutral' nor can one question that the policy is 'also obviously reasonable [since] ... [t]he purpose of the policy ... [in] "protect[ing] people from pervasive and invidious discrimination on the basis of sexual orientation" ... [served] "to discourage harmful conduct and not to suppress expressive association"'.[109] In terms of free speech, SIU '[had] adopted a neutral nondiscrimination policy [in which] [r]eligion [was] not, in any way, singled out ... for disparate treatment or censorship'.[110] In the absence of evidence that '[SIU's] nondiscrimination policies at issue were created to target the CLS' or that 'that other organizations are defying the nondiscrimination policies of the University but are being permitted to retain recognized status',[111] SIU asserted that the Seventh Circuit had erred in granting CLS a preliminary injunction.

Both positions highlight the, as yet, lack of clarification by the Supreme Court in providing direction for defining the characteristics of protected expression. What seems to be clear is that the forum label is very much interconnected with the criteria associated with the different forums. Three questions remain unresolved: (1) Can any university nondiscrimination policy be enforced against a student organisation, regardless of its impact, as long as the policy is viewpoint neutral and reasonable? (2) Does a university's nondiscrimination policy become a subject concerning which student organisations are entitled to differing perspectives under free speech protection unless the university can demonstrate a compelling interest for restricting that expression? (3) Is a university's nondiscrimination policy subject only to an as-applied challenge in terms of whether all student organisations have been required to comply with the nondiscriminatory categories?

What all three questions have in common is that, whether viewing an organisation's expressive right as one of association or free speech or whether labeling the forum as limited

or designated, determination of the subject matter under consideration is crucial. One approach to creation of subject matter would be that a forum is limited only to organisational expression that complies with a university's nondiscrimination policy. In other words, the nondiscrimination requirement defines both the limits of expressive protection and the limits of the forum in which that expression occurs. Essentially this is the position of SIU in *Walker*.[112] A second approach would treat a nondiscrimination policy as a subject concerning which individuals and organisations are entitled to differing expressive perspectives. Thus, the forum is defined not by the categories in a nondiscrimination policy but by the multiple organisational perspectives of those categories. Essentially, this is the argument of CLS in *Walker.*[113] A third approach would evaluate a nondiscrimination policy as to whether it has been uniformly applied to all organisational expression. Thus, the forum is defined not just by the viewpoint neutrality and reasonableness of a nondiscrimination policy but by the consistency with which it is applied. Essentially, this was the position taken by the Seventh Circuit in *Walker*.[114]

A *Organisation Expressive Rights*

Much of the debate in *Walker* depends on how one should interpret and apply a nondiscrimination policy adopted to create fair educational learning opportunities, but where, in the application of the policy, some groups find their expressive rights impaired. In its objection to granting a preliminary injunction to CLS, SIU premised its position on the Supreme Court's observation in *Healy v James*[115] that 'the benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any valid campus rules with which it disagrees'.[116] Asserting its interest in its nondiscrimination policy as legitimate, SIU cited to two more recent cases involving sexual orientation, *Boy Scouts of America v Dale* (*Dale*)[117] and *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (*Hurley*),[118] for the principle that prohibitions against discrimination on the basis of sexual orientation 'are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments'.[119] SIU reasoned that because it '[had] adopted a neutral nondiscrimination policy' CLS could not argue that its 'religious speech ... [had been] singled out ... for disparate treatment'.[120] Unlike *Widmar v Vincent*[121] where the university policy at issue had targeted religious practices and expression by prohibiting 'the use of its facilities for religious worship', SIU claimed that its 'interest [was] legitimate and that [its nondiscrimination] policy advance[d] that interest directly'.[122]

However, one must still address how enforcement of such a nondiscrimination policy would impact the expressive rights of a student organisation. SIU's position, that the right of CLS 'to meet, assemble, evangelize, and proselytize [had not been] impaired [because] ... withholding ... recognized student organization status only mean[t] that [CLS would] have to use other meeting areas and other ways to communicate with members and potential members',[123] is arguably a disingenuous approach. With derecognition came loss of access by CLS to 'university bulletin boards and listservs',[124] as well as the opportunity of representation on the law school's website and in publications and to meet privately in law school rooms (other faculty and students would be free to come and go in the room).[125] In effect, the derecognition of CLS would transform the rights CLS enjoyed as a recognised student organisation into whatever rights individuals within the organisation might be entitled to. In other words, SIU alleged that CLS would still be free to further its purposes, albeit through the efforts of individual CLS members sending individual emails and distributing flyers without access to university means of communication. For SIU

to declare to CLS, 'don't complain — you haven't been harmed',[126] ignores this transformation and erroneously assumes that the rights accruing to a recognised student organisation amount to nothing more than the sum of the accumulated rights of the individuals within the organisation.

CLS recognition permitted the organisation through the university listserv to reach students who otherwise might not want to hear about CLS. While those students could ask that their name be deleted from the university listserv so as not to receive information about CLS, they would then receive no further information about any other recognised student organisation as well. However, a student receiving an email from an individual CLS member could not only demand that no more emails be sent to him or her without affecting the listserv emails, but might be able to allege a violation of the university's nondiscrimination policy if individual emails did not cease. University recognition carried with it not only ease of communication by using the university's listserv, but the convenience of access to all students that might be denied to individuals.[127]

Beyond the issue of access though is the question of an organisation's membership. The Seventh Circuit declared in *Walker* that '[i]mplicit in the First Amendment freedoms of speech, assembly, and petition is the freedom to gather together to express ideas-the freedom to associate'.[128] Thus, while individuals may have the right to express their own views on a subject, those individuals also have the right to form and express those views through an organisation. When individuals form an organisation for expressive purposes, government can neither 'impose penalties or withhold benefits from individuals because of their membership in a disfavored group' nor 'interfere with the internal organisation or affairs of the group'.[129] In rejecting an alleged state nondiscrimination law violation where the Boy Scouts expelled a homosexual assistant scoutmaster, the Supreme Court observed in *Dale* that, 'forced inclusion of an unwanted person in a group infringes the group's freedom of expressive rights if the presence of that person affects in a significant way the group's ability to advocate' its viewpoint.[130] SIU wordsmithed its nonrecognition of CLS as not being an attempt to compel inclusion of persons who engage in homosexual conduct (actually all sexual conduct outside marriage), but rather a 'conditioned exclusion'[131] that fell short of compulsion. The university looked for support to *Boy Scouts of America v Wyman* (*Wyman*),[132] where the Second Circuit upheld denial of the Boy Scouts to participate in the state's workplace charitable campaign because the court determined that the state nondiscrimination law (which included sexual orientation) was both viewpoint neutral and reasonable within the context of a nonpublic forum. The court of appeals in *Wyman* noted that, although a viewpoint neutral law can nonetheless have a disparate discriminatory impact on some organisations, '[s]uch a law is viewpoint discriminatory only if its purpose is to impose a differential adverse impact upon a viewpoint'.[133]

Although the nondiscrimination law in *Wyman* can be said to have the viewpoint neutral purpose of 'protect[ing] persons from the more immediate economic and social harms of discrimination',[134] the question becomes whether, in a university setting such as *Walker*, other countervailing constitutional claims, such as the nature of the forum and the religious nature of an organisation's position (such as CLS), would demand a different result. As discussed earlier, whether a nondiscrimination policy is identified as designated or limited can influence the standard to be applied. Thus, a finding of a designated public forum seems to augur for a conclusion that a nondiscrimination policy is enforceable as long as it is viewpoint neutral and reasonable. On the other hand, a finding of a limited public forum would require a higher standard than reasonableness; the university would have to produce evidence of a compelling interest. However, for purposes of the discussion in this article, the emphasis will be on the standard rather than the forum label.

Assuming for purposes of discussion that SIU's policy satisfies the viewpoint neutral and reasonableness standard, the question is whether the university could produce evidence to satisfy the higher compelling interest standard that requires as well that a government's restriction be narrowly drawn to limit its effect on a constitutional right.[135] The Supreme Court has declared that the government always has the burden of demonstrating a compelling interest.[136] Once the government asserts what it claims is a compelling interest, a court must then determine both whether the asserted interest is in fact 'compelling' and whether that compelling interest has been narrowly drawn to limit its effect on an organisation's constitutional right. Unfortunately, compelling interest analysis is intensely fact-specific, meaning that it is far from an exact science. Members of courts frequently disagree both as to whether a government's interest is compelling and whether, even if compelling, the interest is sufficiently narrow so as to limit its effect on constitutional rights.[137]

A judicial determination as to whether a university has a compelling interest in applying its nondiscrimination policy depends on the nature of the organisation's constituency. In *Roberts v US Jaycees*,[138] the Supreme Court held that 'Minnesota's compelling interest in eradicating discrimination against its female citizens justifie[d] the impact that application of the statute to the Jaycees may have on the male members' associational freedoms'.[139] However, the Court based its decision on its conclusion that 'the Jaycees chapters lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women'.[140] Not only did the national organisation and local chapters 'routinely recruit and admit [members] with no inquiry into their backgrounds' and fail to 'employ any criteria [other than age and sex] for judging applicants for membership [and]' but 'a substantial portion of activities central to the decision of many members to associate with one another ... [were performed by] numerous non-members of both genders'.[141]

Roberts is an interesting case because, while it found that the state had a compelling interest in prohibiting gender-based denial of access to organisation membership, it did so for an organisation lacking in factual adherence to its core set of values. More importantly, the *Roberts* Court left open the possibility that a different set of facts might affect not only the associational expressive rights of an organisation, but a different result in terms of whether a nondiscrimination law would constitute a compelling interest in overriding those rights. Relying on *Roberts*, the Supreme Court in *Dale* held that the Boy Scouts' dismissal of an assistant scoutmaster for his avowed homosexuality did not violate New Jersey's nondiscrimination law where forced readmission of the person would 'affect in a significant way the group's ability to advocate public or private viewpoints'.[142] The Court found that the Boy Scouts engaged in expressive association because 'its adult leaders inculcate[d] its youth members with its value system'.[143]

The threshold for protection of expressive association rights is quite low and is satisfied for an organisation if it 'take[s] positions on public questions'.[144] In the end, the question comes down to whether CLS's expressive association rights affected by the law school's derecognition can be abridged by a viewpoint neutral/reasonableness standard or the higher compelling interest/least restrictive means standard. Despite SIU's protestations that a nondiscrimination policy need satisfy only the lower viewpoint/reasonableness standard,[145] the Supreme Court's decision in *Dale* suggests to the contrary.

B *Challenges Under State Constitutions*

Even assuming that CLS has free speech expressive rights under the US Constitution, the case does not address how those rights might be affected by a more restrictive state constitution.

In *Locke v Davey* (*Locke*),[146] the Supreme Court held that even though state assistance to a student attending a religious college to prepare for the ministry was acceptable under the federal constitution's establishment clause, a state constitution could prohibit the assistance under a more restrictive state constitution without violating the federal free exercise clause. The Court's 'play in the joints'[147] between what the establishment clause permits and the free exercise clause mandates leaves open the possibility that the same 'play in the joints' might exist for free speech as well. In *California Statewide Development Authority v All Persons Interested in the Matter of the Validity of a Purchase Agreement* (*CSCDA*),[148] a case addressing the constitutionality of providing tax exempt bond financing for pervasively sectarian institutions, the California Supreme Court suggested that the state could prohibit such financing under its state constitution religion clause even though the US Supreme Court has disavowed the use of the pervasive sectarian as a viable establishment clause test.[149]

Unlike *Locke* that dealt with the alleged free exercise right of an individual student, CSCDA deals with the expressive rights of an organisation. The expressive rights of a religious higher education institution is reflected in the intensity of its religious beliefs and practices. The extent to which an institution must diminish its beliefs and practices in order to claim public benefits available to all secular and less religious institutions arguably impinges on the institution's free expression. The *Widmar*, *Rosenberger*, and *Southworth* discussed earlier in this article addressed the balance between the federal constitution's establishment and free speech clauses. What has not been addressed is the extent to which states can invoke more restrictive religion clause provisions in their state constitutions to deny organisations expressive rights that they enjoy under the US Constitution.

C *Other Issues*

Were a final decision to hold that enforcement of a nondiscrimination policy is a compelling interest justifying derecognition, an organisation like CLS would face a hard choice whether to alter its theological position in order to gain reinstatement.[150] The Supreme Court, in effect, forced Bob Jones University to make the same choice when the Court upheld denial of the university's tax exempt status for its theologically-grounded, race-based admissions policies[151] but that case did not raise the kind of free speech issues in the post-*Lamb's Chapel* world that frame the debate today.[152] In fact, SIU took the position in its appeal Brief that the Seventh Circuit was not required 'to solve the theological questions offered by the CLS or its allies'.[153] However, given the prominence of free speech issues in university student organisation cases like *Widmar*, *Rosenberger*, and *Southworth*, one could just as easily argue today, as CLS did in its Brief, that the fact that 'elimination of race discrimination [in *Bob Jones University*] is a compelling interest simply does not lead to the conclusion that there is a compelling interest in forcing student religious groups to ignore religion and extramarital sexual conduct in choosing their leaders and voting members'.[154]

The question for the future is the amount of flexibility in the interpretation of expressive association that courts will allow so that student religious organisations can pursue their religious-based conduct beliefs even though those beliefs may be at odds with a university's interpretation of its nondiscrimination policy. At stake is the hard choice that courts must make in terms of balancing the university's responsibility to protect its students from discrimination with the limits that a university's nondiscrimination policy should be permitted to place on student organisation expression in a forum created by the university.

Part of this balancing may involve the *Walker* dissent's problematic application of *FAIR*. If the dissent is correct in its interpretation of *FAIR* that a higher education institution or a law school has a greater interest in advancing its expressive association claims against members (student organisations) as opposed to those outside the institution (e.g., military recruiters),[155] then organisations such as CLS will have a difficult task in prevailing. In other words, the university or law school would seem to have a compelling interest in enforcing its nondiscrimination policy against those within as opposed to those recruiters who only enter briefly and then depart. However, this line of reasoning arguably stands *FAIR* on its head. If a law school does not adopt the sexual orientation message of military recruiters who are entitled to campus access under the Solomon Act, it seems equally implausible that a law school adopts the religious beliefs of a student organisation entitled to have access to the campus. As indicated by the Supreme Court in *Widmar*, *Rosenberger*, and *Southworth*, we have long moved past the argument that a religious organisation's presence on campus serves to impute its religious message to the university in violation of the Establishment Clause. What SIU is proposing and what the *Walker* dissent appears to concur with has more insidious implications, namely that a university, while it must endure under free speech the presence of a religious student organisation, can nonetheless shape an organisation's expression to conform with the government's expressive preferences. Lost in the dissent's discussion of *FAIR* is the concept of private speech and the forum that the university and its law school has opened for student organisation expression. The concern, it would seem, is not that the law school would adopt the speech of its student members, but rather that the law school will have the authority to impose nonspeech on those members.

In the long run, at issue may be more than a university's recognition of student organisations. Some religious universities have institution-wide nondiscrimination policies virtually identical to CLS's in *Walker*.[156] For these institutions, a determination that a university can refuse to recognise or can derecognise student organisations with a policy similar to CLS's opens the question as to what the future might hold for a broader implementation of sexual orientation nondiscrimination. At present, sexual orientation has no federal statutory protection,[157] although some federal courts have granted sexual orientation protection under the Fourteenth Amendment.[158] Whether courts will protect these universities' objections to homosexuality as it relates to a general prohibition against all extramarital sexual misconduct remains to be seen.[159] If such occurs, these universities will face a twofold challenge: (1) how to separate the beliefs of students and employees about homosexuality from sexual misconduct; and (2) how to demonstrate a consistency in punishing both homosexual and heterosexual extramarital misconduct. These, however, are factual issues and do not reach the fundamental question as to how religious institutions can continue to be true to their religious beliefs if compelled to recognise practices inconsistent with those beliefs.

V Conclusion

Walker presents the most recent challenge to the expressive rights of student organisations. While eradication of discrimination from university campuses is a worthy purpose so also is the encouragement of organisations that meet the social, cultural and moral needs of students. While no one would seriously claim that universities are prohibited from imposing reasonable regulations on student organisations, the reasonableness of a regulation becomes more contentious when the foundational beliefs of those organisations are challenged as being unreasonable. Free speech decisions, such as *Widmar*, *Rosenberger* and *Southworth*, provide helpful precedents regarding university regulation of religious organisations, but they dealt with university rules that targeted religious organisations.[160] In *Walker*, on the other hand, the impact on CLS was

disparate, not direct. How forum and viewpoint discrimination analyses will apply to viewpoint neutral nondiscrimination policies is not yet clear. One can argue that once a university has opened its forum to over 400 student organisations, First Amendment expressive association and free speech rights should protect the expressive perspectives of even student organisations with less favored views. In the end, though, courts will have to determine how much 'play in the joints'[161] is necessary under the First Amendment to both allow a university to fulfill its mission of providing nondiscriminatory educational opportunities and to permit divergent student organisation perspectives that seem to be at odds with that mission.

Endnotes

1. 332 US 631 (1948) (upholding writ of mandamus to compel black student's admission to law as equal protection violation).
2. 339 US 629 (1950) (holding that University of Texas' denial of admission to black applicant where state had no law school for black students constituted violation of equal protection). *Sweat v Painter* presaged the outcome in the K-12 decision in *Brown v Board of Education*, 347 US 483 (1954).
3. 339 US 637 (1950) (finding equal protection violation in law school's assigning black student to a classroom row reserved for colored students).
4. 347 US 483 (1954).
5. 461 US 574 [10 *Ed Law Rep* 918] (1983).
6. Ibid 604.
7. *United States v Virginia*, 518 US 515, 531 (1996).
8. See *Grutter v Bollinger*, 539 US 306 [177 *Ed Law Rep* 801] (2003) (finding no equal protection violation where the law school's interest in a diverse student body was compelling and holding that the admissions program was narrowly tailored to serve its compelling interest in obtaining the educational benefits that flow from a diverse student body).
9. See *Gratz v Bollinger*, 539 US 244 [177 *Ed Law Rep* 851] (2003) (holding that undergraduate admissions policy of awarding 20 points to all underrepresented minorities of 100 needed to guarantee admissions was not narrowly tailored for equal protection purposes to justify the university's interest in diversity).
10. The Supreme Court has entered the sexual orientation debate only peripherally. In *Lawrence v Texas*, 539 US 558 (2003) the Court held that Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional under the due process clause, as applied to adult males who had engaged in consensual act of sodomy in privacy of home. More recently, the debate has shifted to the constitutionality under the federal equal protection clause of state constitutional amendments limiting marriage to a man and woman. See e.g., *Citizens for Equal Protection v Bruning***,** 455 F 3d 859 (8th Cir 2006) (upholding state constitutional amendment limiting marriage to a man and woman using a rational basis review under the equal protection clause and limiting *Lawrence v Texas* to the criminalizing of homosexual conduct).
11. For an interesting K-12 case not involving sexual orientation but involving a student religious organization's requirement that only student members who had experienced a religious conversion were entitled to serve as officers, see *Hsu v Roslyn Union Free Sch. Dist.*, 85 F 3d 839 [109 *Ed Law Rep* 1145] (2d Cir 1996), *cert. denied*, *Roslyn Union Free Sch. Dist. No. 3 v Hsu By and Through Hsu*, 519 US 1040 (1996) (despite school board's nondiscrimination policy prohibiting discrimination on the basis of religion, the Second Circuit upheld, on the basis of protecting the organization's expressive rights, a student religious group's provision in its organization constitution that only persons with a certain kind of religious experience were entitled to serve as officers).
12. 454 US 263 [1 *Ed Law Rep* 13] (1981).
13. See *Perry Educ. Ass'n v Perry Local Educators' Ass'n*, 460 US 37, 45, 46 [9 *Ed Law Rep* 23] (1983) where the Supreme Court identifies three different forums: a public forum 'which by long tradition or by government fiat have been devoted to assembly and debate [where in order for] the state to enforce

a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end'; a limited public forum where 'the state has opened [its public property] for use by the public as a place for expressive activity' and where as long as the state 'retain[s] the open character of the facility, ... it is bound by the same standards as apply in a traditional public forum'; and, '[p]ublic property which is not by tradition or designation a forum for public communication' which 'the state may reserve ... for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view'.

14. Ibid 269, 270, 272.
15. 403 US 602, 612-613 (1971) ('First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion'.).
16. *Widmar*, 454 US, 273.
17. 515 US 819 [101 *Ed Law Rep* 552] (1995).
18. 508 US 384 [83 *Ed Law Rep* 30] (1993).
19. Ibid 823.
20. Ibid 831, 832.
21. Ibid 832.
22. In terms of religious viewpoints, *Lamb's Chapel* represented a relatively simple bipolar debate involving religion because at issue was only one church's film series on child discipline where 'the presentation of a religious point of view [concerned] a subject [child rearing] the District otherwise open[ed] to discussion on District property'. Ibid 396.
23. This difference essentially explains the vote by Supreme Court Justices in *Lamb's Chapel* and *Rosenberger*. In *Lamb's Chapel*, a unanimous Court sidestepped the issue as to whether 'all religions and all uses for religious purposes [could be] treated alike', and phrased the key question in the case to be whether a school district could 'discriminate[] on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint'. *Lamb's Chapel*, 508 US, 393. In *Rosenberger*, a 5-4 decision, Justice Souter, speaking for the four dissenters, observed that prohibiting funding to all religious perspectives did not constitute viewpoint discrimination and disagreed with the majority regarding whether the prohibition of all religious perspectives would constitute viewpoint discrimination; by denying funding to all religious activities, 'government [was not] assist[ing] those espousing one point of view, [and thus was not required by] neutrality . . . to assist those espousing opposing points of view, as well' *Rosenberger*, 515 US, 895 (Souter, J., dissenting).
24. 529 US 217 [142 *Ed Law Rep* 624] (2000).
25. Ibid 227.
26. Ibid 230, 232. The Court recognized that a university was free to set up a student fee system that permitted objecting students to not support groups with which they disagreed, but the Court 'decline[d] to impose a system of that sort as a constitutional requirement, ... [noting that] [t]he restriction could be so disruptive and expensive that the program to support extracurricular speech would be ineffective, [and that] [t]he First Amendment does not require the University to put the program at risk'. Ibid 232.
27. Ibid 235. *The Supreme Court in Santa Fe Indep. Sch. Dist. v Doe*, 530 US 290 [145 *Ed Law Rep* 21] (2000) invalidated the use of a majoritarian vote in determining whether a single student could deliver a religious message prior to home football games. '[T]he majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced'.
28. See *Southworth v Bd. of Regents of Univ of Wis. Sys.*, 221 F 3d 1339, *4 (Table) [148 *Ed Law Rep* 572] (7th Cir 2000). Following the Supreme Court's decision the President of the University of Wisconsin System issued a memorandum (which the Regents presented to the Seventh Circuit) to the various campus chancellors 'directing that UW System policies governing the use of allocable student fees be amended to prohibit the use of referenda to allocate funding to student organizations for extracurricular

speech and expressive activities'. Nonetheless, a federal district court on remand from the Seventh Circuit held that '[d]irect democratic referenda ... necessarily sacrifice viewpoint neutrality', which appears to have put an end to the referendum issue. *Fry v Board of Regents of University of Wisconsin System***,** 132 F Supp 2d 744, 750 [153 *Ed Law Rep* 83] (WD Wis 2000).

29. *Southworth v Bd. of Regents of Univ of Wis. Sys*., 307 F 3d 566 [170 *Ed Law Rep* 122] (7th Cir 2002).
30. Ibid 580. The Seventh Circuit rejected the university's claim that the 'unbridled discretion standard' was not part of free speech, relying on a series of Supreme Court precedents. See *Freedman v Maryland*, 380 US 51, 56 (1965) (invalidating a broad grant of authority to a state Board of Censors focusing on standing and prior restraint, but with the observation that, '[i]n the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license'); *Shuttlesworth v City of Birmingham*, 394 US 147, 150 (1969) (finding unconstitutional a city's ordinance, as written, because it conferred upon the city commission in granting parade permits 'virtually unbridled and absolute power to prohibit any "parade," "procession," or "demonstration" on the city's streets or public ways'); *City of Lakewood v Plain Dealer Publishing* Co., 486 US 750, 757-759 (1988) (invalidating a city ordinance authorising the mayor to grant or deny applications for annual newsrack permits, noting two identifiable risks to free expression where unbridled discretion is vested in a government official-the risk of self-censorship and the risk that the licensing official, not limited by express standards, will use his power to suppress speech); *Forsyth County v Nationalist Movement*, 505 US 123, 132-133 (1992) (invalidating a county ordinance allowing the county administrator to set a charge of up to $1,000 for a parade permit

    > [t]here [were] no articulated standards either in the ordinance or in the county's established practice [regarding] any narrowly drawn, reasonable and definite standards; [not only is] the decision how much to charge for police protection or administrative time . . . left to the whim of the administrator, ... [but] [n]othing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees.).

    Contra, *Thomas v Chicago Park Dist.*, 534 US 316 (2002) (upholding a city ordinance requiring a permit for a parade or assembly where the Court concluded that the ordinance provided reasonably specific and objective standards to limit the discretion of the Park District and to protect against the risk that the Park District would deny a permit based on the content of the speech involved.).
31. *Southworth*, 307 F 3d at 589.
32. Ibid 594. See *Chicago Acorn v Metropolitan Pier & Exposition Auth.*, 150 F 3d 695, 699 (7th Cir 1998) (finding the Authority's denial of a permit fee to distribute leaflets and hold a rally at Navy Pier violated free speech where the Authority had granted a waiver to the Democratic National Convention on the grounds that 'its policy is to waive fees for users who will generate large favorable publicity', with the Seventh Circuit reasoning that 'a favorable publicity criterion is especially likely to have political consequences, since the only political users of the pier who will generate large favorable publicity are respectable, popular politicians and respected, well-established political groups; pariahs need not apply'.)
33. 453 F3d 853 (7th Cir 2006).
34. Ibid 860.
35. In addition to CLS, other recognised student organisations at the law school included: the Black Law Student Association, the Federalist Society, the Hispanic Law Student Association, Law School Democrats, Lesbian and Gay Law Students and Supporters, SIU Law School Republicans, the Student Animal Legal Defense Fund, Women's Law Forum. Ibid 857. See also, Reply Brief Of Plaintiff-Appellant, Christian Legal Society Chapter Religious Liberty Advocates Of The Christian Legal Society at * 17 and Defendants' – Appellees' Brief, *3 where SIU had some 400 student organizations on its entire campus.
36. Ibid.
37. For the national organisation's Bylaws, Article 2 – Statement of Faith, see: <www.clsnet.org/lsmPages/

lsm_manual/lsmStuManApp.php#bylaws> at August 10 2006. The SIU law school chapter's Statement of Faith can be found at *Christian Legal Society v Walker*, 2005 WL 1606448 at *1 (SD Ill. 2005) .

38. Christian Legal Society Constitution, Article IV (4.2). Membership. This provision is accessible at: <www.clsnet.org/lsmPages/lsm_manual/lsmStuManApp.php#bylaws> at August 10 2006.
39. See CLS Constitution, Article V (5.2). Officers, at website note 38. The Constitution references Bible verses for the kinds of behavior unacceptable for officers: Galatians 5:19-21; Exodus 20; Matthew 15:19; Romans 1:27; 1 Corinthians 6:9-10, 6:11, Ephesians 2:1-9, Titus 3:3-7.
40. *Christian Legal Society v Walker*, 2005 WL 1606448, *1 (S.D.Ill. 2005). (emphasis in original).
41. Ibid *2 (emphasis in original).
42. *Walker*, 453 F 3d, 858.
43. *Christian Legal Society v Walker*, 2005 WL 1606448 at *2.
44. *Walker*, 453 F 3d, 858.
45. *Christian Legal Society v Walker*, 2005 WL 1606448 (S.D.Ill. 2005) .
46. Ibid *2.
47. Ibid.
48. Ibid..
49. *Walker*, 453 F 3d, 859.
50. Ibid 859-60.
51. Ibid 859.
52. Ibid 860, 861.
53. Ibid 860.
54. Ibid (emphasis in original).
55. Ibid 861. The Seventh Circuit cites to both *Rosenberger* and *Southworth* to support its conclusion that '[i]t would be a leap ... to suggest that student organizations are mouthpieces for the university'. See *Rosenberger*, 515 US, 833-34; *Southworth*, 519 US, 229, 233.
56. Ibid 860.
57. Ibid 862.
58. Ibid.
59. Ibid 864. See *Hurley v Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 US 557, 579 (1995) (reversing injunction against private organizers of St. Patrick's Day parade who had prohibited homosexual groups from participating, observing that, 'While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government'.).
60. *Walker*, 453 F 3d at 865. See *Rosenberger*, 515 US, 829 ('When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction'.).
61. *Walker*, 453 F 3d, 865.
62. The Seventh Circuit uses 'designated public forum' instead of the more frequently used 'limited public forum' generally applied to educational institutions, although the definition of the two names appears to be very similar. Cf ibid. (a 'designated public forum, is created when the government opens a nontraditional public forum for public discourse') with *Good News Club v Milford Cent. Sch.*, 533 US 98, 106 [154 *Ed Law Rep* 45] (2001) and *Rosenberger*, 515 US, 829 (regarding a limited public forum, a State may be justified in reserving [its forum] for certain groups or for the discussion of certain topics'.). Part of the confusion in this area flows from the Supreme Court's apparent interchangeable use of 'designated' public forum and 'limited' public forum in *Perry Educ. Ass'n v Perry Local Educators' Ass'n***,** 460 US 37, 46-47 [9 *Ed Law Rep* 23] (1983) (defining this forum under either name as 'public property which the state has opened for use by the public as a place for expressive activity [even though] it was not required to create the forum in the first place'.). Ibid 45.
63. What constitutes a forum for free speech purposes in an educational institution is broad-based and can

apply in 'a metaphysical' as well as 'a spatial or geographic sense'. *Rosenberger*, 515 US, 830.

64. *Walker*, 453 F 3d, 866.
65. See ibid. ('[E]ven assuming at this stage of the litigation that SIU's student organization forum is a nonpublic forum-making the lowest level of scrutiny applicable-we believe CLS has the better of the argument. ... We need not reach [the issue of the forum] given our conclusion that CLS has demonstrated a likelihood of success on its claim that SIU is applying its policy in a viewpoint discriminatory fashion'.).
66. Ibid 867.
67. Ibid. See *Elrod v Burns*, 427 US 347, 373 (1976).
68. Ibid. See *Healy v James*, 408 US 169, 181 (1972).
69. Ibid.
70. Ibid.
71. See *Walker*, 453 F 3d, 869 (Wood, J., dissenting).
72. 126 S Ct 1297 (2006) (unanimous decision that Solomon Act, requiring that institutions receiving federal funding provide same access to military recruiters as for other outside recruiters, did not compel law schools to speak the government's message or violate the law school's right of expressive expression).
73. *Walker*, 453 F 3d, 876 (Wood, J., dissenting).
74. Ibid 875.
75. Ibid 876.
76. For information regarding starting CLS chapters, see <www.clsnet.org/. For information to start Good News Clubs under CEF, see, www.cefonline.com/> at 10 August 2006.
77. See *Good News Club v Milford Central School***,** 533 US 98 [154 *Ed Law Rep* 45] (2001) (holding that school's exclusion of Good News Club from meeting after hours at school based on its religious nature was unconstitutional viewpoint discrimination); *Child Evangelism Fellowship of New Jersey Inc. v Stafford Tp. Sch. Dist***.,** 386 F 3d 514 [192 *Ed Law Rep* 670] (3d Cir 2004) (holding that school district violated free speech of Good News Club by not permitting it to distribute its materials in a limited public forum); *Rusk v Crestview Local School Dist***.,** 379 F 3d 418 [191 *Ed Law Rep* 84] (6th Cir 2004 (upholding school district's distribution of Good News Club flyers in materials sent home with students to their parents)); *Wigg v Sioux Falls School Dist***.,** 382 F 3d 807 [192 *Ed Law Rep* 15] (8th Cir 2004) (holding that school district's prohibition of teacher participating in after-school Good News Club in the same elementary school where she taught constituted violation of teacher's free speech); *Child Evangelism Fellowship of Maryland, Inc. v Montgomery County Sch. Dist***.,** 373 F 3d 589 [189 *Ed Law Rep* 42] (4th Cir 2004) (holding that allowing Good News Club access to public school's take-home flyer forum would not violate the establishment clause).
78. See e.g., *Van Orden v Perry*, 125 S Ct 2854, 2871 (2005) (upholding monument with Ten Commandments on Texas capital grounds, observing that '[t]he display is not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state'.). (Breyer, J., concurring in judgment); *Good News Club v Milford Cent. Sch.*, 533 US 98, 117 [154 *Ed Law Rep* 45] (2001) (rejecting public school's claim that permitting Good News Club to meet on school premises after school would violate Establishment clause, observing that '[i]n any event, even to the extent elementary school children are more prone to peer pressure than are older children, it simply is not clear what, in this case, they could be pressured to do'); *Skoros v City of New York***,** 437 F 3d 1, 23 (2d Cir 2006) (upholding school district's holiday display policy permitting the menorah, star and crescent, and other holiday symbols, as symbols of pluralism, but not a cross or nativity scene, reasoning under the Establishment Clause's endorsement test that 'we assume the objective observer is an adult who, in taking full account of the policy's text, history, and implementation, does so mindful that the displays at issue will be viewed primarily by impressionable schoolchildren'.).
79. See e.g., *Christian Legal Soc. Chapter of University of California v Kane***,** 2006 WL 997217 (ND Cal. 2006) (in a set of facts virtually identical to *Walker*, a federal district court refused to grant an injunction requiring Hastings College of Law to fund CLS activities as it did other recognised student

organisations where CLS wanted an exemption to practice its religious beliefs in manner similar to *Walker*; however, the court observed that the CLS chapter in *Kane* had presented no evidence that other organisations functioned in a manner that violated the School's nondiscrimination policy). However, CLS litigation has resulted in a number of public universities amending their nondiscrimination policies permitting student organisations to conduct their meetings in a manner consistent with sincerely held religious beliefs. For examples, see press releases regarding such universities as Pennsylvania State University and Washburn University discussed at: <www.clsnet.org/clrfPages/index.phpx> at 8 October 2006. See also, Reply Brief of Plaintiff-Appellant, Christian Legal Society Chapter, * 11-12 for an explanation of the resolution of other litigation. Religious Liberty Advocates of the Christian Legal Society.

80. See *Nixon v Northern Local Sch. Dist. Bd. of Educ*., 383 F Supp 2d 965 [201 *Ed Law Rep* 904] (SD Ohio 2005) (granting preliminary injunction to student to wear T-shirt with Christian Bible verse on the front and on the back the message, 'Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!', noting that message was not vulgar, obscene, plainly offensive, or disruptive).
81. See *Christian Legal Soc. Chapter of University of California v Kane***,** 2006 WL 997217 (ND.Cal 2006) (upholding refusal to recognize a CLS chapter at Hastings Law School in part because CLS had not produced evidence that the law school's nondiscrimination policy had not been applied to other student organizations).
82. 393 US 503 (1969). Cf *Sypniewski v Warren Hills Regional Bd. of Educ***.,** 307 F 3d 243 [170 *Ed Law Rep* 83] (3d Cir 2002) (holding that school district's application of its racial discrimination policy to students wearing T-shirts with term 'redneck' violated free speech rights of students where school officials testified that T-shirts created only 'ill will' in the school) with *Harper v Poway Unified Sch. Dist*., 445 F 3d 1166 [208 *Ed Law Rep* 164] (9th Cir 2006) (upholding denial of preliminary injunction to student wearing T-shirt with messages, 'be ashamed, our school embraced what god has condemned' and 'homosexuality is shameful', because the school found the shirt to be 'inflammatory' and in applying *Tinker v Des Moines Indep. Sch. Dist*., 393 US 503, 509 (1969) the Ninth Circuit agreed that the T-shirt 'intrude[d] upon ··· the rights of other students'.).
83. See *Rosenberger v Rector and Visitors of University of Virginia***,** 515 US 819, 842, 845 (1995). The Supreme court in invalidating the university's refusal to fund the publication of a religious student organization, observed that:

> 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. . . The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.

84. See *Widmar*, 454 US, 263, 267, 270 (holding that because 'the University [had] created a forum generally open for use by student groups', the Court held that in order for the university to enforce its regulation forbidding use of university buildings 'for religious worship or religious teaching, the university must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end'); *Rosenberger*, 515 US, 829 (holding that university was required to fund a religious organization's publication because '[o]nce it has opened a limited forum, ... the [university] must respect the lawful boundaries it has itself set. The [university] may not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum"'); *Southworth*, 529 US, 230 (holding that 'even though the student activities fund [was] not a public forum in the traditional sense of the term, ... the viewpoint neutrality requirement of the University program [was] in general sufficient to protect the rights of the objecting students; [however], [t]he student referendum aspect of the program for funding speech and expressive activities ... appear[ed] to be inconsistent with the viewpoint neutrality requirement'.).
85. See *Walker*, 453 F 3d, 865-86.

86. Forum language has found its way into federal statutes which borrow from judicial language. See the *Equal Access Act*, 20 U.S.C. §§ 4071-4074, that prohibits a school with a limited open forum and receiving federal funds from denying student groups the opportunity to meet on school premises.
87. 460 US 37, 45-46 [9 *Ed Law Rep* 23] (1983).
88. Traditional public forums are places in one in which 'by long tradition or by government fiat have been devoted to assembly and debate, ... streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"'. Ibid 45, quoting from, *Hague v CIO*, 307 US 496, 515, (1939).
89. Ibid 46.
90. *Widmar v Vincent*, 454 US 263, 277 [1 *Ed Law Rep* [13]] (1981).
91. *Cornelius v NAACP Legal Defense & Educational Fund*, 473 US 788, 800 (1985) (Cornelius addressed whether the federal government violated free speech by excluding legal defense or advocacy organisations from its combined charity fund drive; the Court did not reach the merits of the case and remanded to determine whether the government had engaged in viewpoint discrimination.).
92. See *Bannon v School District of Palm Beach County*, 387 F 3d 1208, 1213 [193 *Ed Law Rep* 78] (11th Cir 2004), quoting from, *Hazelwood School District v Kuhlmeier*, 484 US 260, 267 [43 *Ed Law Rep* 515] (1988) where the Court determined that a designated public forum can be created only by a 'policy or practice [in opening] facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations'.
93. *Cornelius*, 473 US, 800.
94. See generally, Denise Daugherty, 'Free Speech in Public Schools: Has the Supreme Court Created a Haven for Viewpoint Discrimination in School-sponsored Speech?' (2004) 20 *Georgia State University Law Rev* 1061.
95. 533 US 98, 106 (2001), referencing the Court's analysis in *Lamb's Chapel v Center Moriches Union Free School District*, 508 US 384, 392 (1993).
96. 508 US 384 (1993).
97. *Lamb's Chapel*, 508 US, 393.
98. 505 US 377, 427 (1992) (Stevens, J. concurring).
99. 473 US 788, 796 (1985).
100. Limited public forum as a subset of designated public forum: *Bowman v White*, 444 F 3d 967, 976 (8th Cir 2006); *Make the Road by Walking, Inc. v Turner*, 378 F 3d 133, 143 (2d Cir 2004); *Donovan v Punxsutawney Area Sch. Bd.*, 336 F 3d 211, 225 (3d Cir 2003); *Chiu v Plano Indep. Sch. Dist.*, 260 F 3d 330, 346 n. 12 (5th Cir 2001); *Hopper v City of Pasco*, 241 F 3d 1067, 1074 (9th Cir 2001); *Chabad-Lubavitch of Ga. v Miller*, 5 F.3d 1383, 1391 n. 13 (11th Cir.1993). Limited public forum as a nonpublic forum: *Ridley v Mass. Bay Transp. Auth.*, 390 F 3d 65, 76 n. 4 (1st Cir 2004); *Summum v City of Ogden*, 297 F 3d 995, 1002 n. 4 (10th Cir 2002).
101. *Child Evangelism Fellowship of MD, Inc. v Montgomery County Public Dist.*, 2006 WL 2294272, *4 (4th Cir 2006), quoting from *Good News Club*, 533 US, 106-07 and *Int'l Soc'y for Krishna Consciousness, Inc. v Lee*, 505 US 672, 678-79 (1992)
102. See generally, Ralph Mawdsley, '*Lamb's Chapel* Revisited: A Mixed Message on Establishment of Religion, Forum and Free Speech' (1995) 101 *Ed Law Rep* 531.
103. *Child Evangelism Fellowship of MD, Inc. v Montgomery County Public Dist.*, 2006 WL 2294272, *6 (4th Cir 2006) (emphasis in original). See *Southworth*, 529 US, 235 (directing remand as to one portion of a forum access policy (the student referendum for funding) because it was 'unclear ... what protection, if any, there is for viewpoint neutrality'); *Santa Fe Indep. Sch. Dist.*, 530 US, 304-05 (holding that '[l]ike the student referendum for funding in *Southworth*' the student election system at issue provided 'insufficient safeguards [for] diverse student speech'.).
104. Reply Brief Of Plaintiff-Appellant, *15 (emphasis in orginal).
105. Ibid *17 (emphasis in orginal).
106. Ibid *18.
107. Ibid.

108. Defendants' – Appellees' Brief, * 13.
109. Ibid *18, quoting from *Boy Scouts of America v Wyman,* 335 F 3d 80, 94-95 (2nd Cir 2003).
110. Ibid.
111. Ibid *19.
112. See *Child Evangelism Fellowship of South Carolina v Anderson School Dist.* 5, 2006 WL 1867893 (D.S.C. 2006) (upholding school charging usage fee for Good News Club where the following school-created categories for which no usage fee was charged held to be viewpoint neutral and not a violation of Club's religious perspective: free access to 'district schools and school-related organizations', designating such use as 'school use' and noting that '[p]arent-teacher organizations/associations, district organizations, band and athletic booster clubs, SADD, 4-H clubs, FFA and FHA organizations, and other similar organizations are considered school organizations; free access for usage "as a result of joint business/education partnerships" with the District; and free use of the facilities to groups which began using the facilities "at a time when fees were not charged for such uses or to organizations or groups who have made use of the district's facilities for at least twenty years"'.).
113. See *Child Evangelism Fellowship of MD, Inc. v Montgomery County Public Dist.,* 2006 WL 2294272, *8 (4th Cir 2006) (finding that a school district's unfettered discretion to deny access to the take-home flyer forum for any reason at all-including viewpoint discrimination against the proselytizing Good News Club –'invest[ed] governmental officials with boundless discretion over access to the forum [that] violate[d] the First Amendment ... even in limited public and nonpublic forums'.).
114. See *Christian Legal Soc. Chapter of University of California v Kane,* 2006 WL 997217 (ND Cal 2006) (upholding refusal to recognize a CLS chapter at Hastings Law School in part because CLS had not produced evidence that the law school's nondiscrimination policy had not been applied to other student organizations).
115. 408 US 169 (1972) (invalidating university's refusal to recognize Students for a Democratic Society chapter as violation of free speech where university's denial was based only on unsubstantiated fear of disruption, but noting that denial of recognition would be permissible on showing that group refused to comply with reasonable regulations of the university).
116. Ibid 193-94.
117. 530 US 640 (2000) (holding that applying New Jersey's public accommodations law to require Boy Scouts to admit plaintiff homosexual as a scoutmaster would violate Boy Scouts' First Amendment right of expressive association).
118. 515 US 557 (1995) (holding that application of Massachusetts' public accommodation law to essentially require that defendants admit gay, lesbian, and bisexual descendants of Irish immigrants to march as a group in St. Patrick's Day parade would alter expressive content of the parade and violated the First Amendment).
119. *Dale,* 530 US 640, 658, citing *Hurley,* 515 US, 572.
120. Defendants' - Appellees' Brief, *18.
121. 454 US 263 (1981).
122. Defendants' - Appellees' Brief, *17,18.
123. Ibid *10.
124. *Walker*, 453 F 3d, 867. See also, Reply Brief of Plaintiff-Appellant, *14.
125. Ibid 858.
126. Defendants' - Appellees' Brief, *11.
127. See Reply Brief of Plaintiff-Appellant, *13 ('[a]mong the most valuable benefits of recognition is the ability to communicate quickly and cheaply with the entire law school body through the law school's email listserv'.).
128. *Walker*, 453 F 3d, 861.
129. *Roberts v United States Jaycees,* 468 US 609, 622, 623 (1984) (holding that Jaycees' rule prohibiting women from full membership violated Minnesota's discrimination statute and did not violate the organization's expressive association right).
130. *Dale,* 530 US, 648. SIU in its Brief before the Seventh Circuit limited *Dale* to an exclusion where the person (in this case a scoutmaster) was a gay rights activist. However, one can just as readily argue

that the person being an activist does not necessarily serve as a limitation on removing homosexuals as much as an observation that being an activist is what brought the scoutmaster's status to the attention of the Boy Scouts. *See* Defendants' - Appellees' Brief at *14-15. Since the membership and leadership requirements for CLS addressed conduct and not beliefs, one is unlikely to know what a member really does in his or her private life absent some form of declaration.

131. Defendants' - Appellees' Brief, *17.
132. 335 F 3d 80 (2nd Cir 2003).
133. Ibid 94.
134. bid.
135. See *Ashcroft v American Civil Liberties Union*, 542 US 656, 675 (2004) (granting injunction against enforcement of Child Online Protection Act (COPA) as likely to burden adults' access to some protected speech, despite 'a compelling interest in protecting minors from exposure to sexually explicit materials'.) (Stevens, J. concurring).
136. See *Gonzales v O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S Ct 1211, 1218-20 (2006) (holding that government had failed under the Religious Freedom Restoration Act (RFRA) to demonstrate a compelling interest in penalizing religious use of hoasca); *Cutter v Wilkinson*, 544 US 709 (2005) (upholding increased level of protection of prisoners' and other incarcerated persons' religious rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA) as not overcome by the government's claim that it had a compelling interest in not violating the Establishment Clause).
137. See *Samson v California***,** 126 S Ct 2193 (2006) (Court upholding suspicionless search of parolee as fulfilling same valid government interests as for search of incarcerated prisoners, with disagreement by dissent that government's interest in suspicionless searches of prisoners did not apply to parolees) Cf ibid 2197 (majority) with ibid 2205 (Stevens, J., dissenting); *Randall v Sorrell***,** 126 S Ct 2479 (2006) (Court invalidating state law setting contribution limits on amounts individuals, organizations, and political parties could contribute to campaigns of candidates for state office as violating First Amendment free speech protections; members of Court agreed that state had compelling interest in preventing corruption or appearance of corruption in election financing, but disagreed as to a compelling interest for contribution limits based on the amount of time devoted to fund raising). Cf ibid 2503 (Thomas, J., concurring) with ibid 2506 (Stevens, J. dissenting).
138. 468 US 609 (1984).
139. Ibid 623. The *Minnesota Human Rights Act (Act)*, provided in part: 'It is an unfair discriminatory practice: "To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex"'. Minn. Stat. Ann. § 363.03 (3).
140. Ibid 621.
141. bid.
142. *Dale*, 530 US, 640, citing to *Roberts*, 468 US, = 623.
143. Ibid 641.
144. *City of Dallas v Stanglin*, 490 US 19, 24 (1989) (rejecting expressive associational rights for dancing at dance hall where participants were not engaging in First Amendment protected expression while associating with one another). See *Pi Lamba Phi Fraternity, Inc. v Univ of Pittsburgh*, 229 F 3d 435, 444 [147 *Ed Law Rep* 915] (3d Cir 2000) (citing to *Roberts* in rejecting expressive association claim of fraternity denied access to campus following drug raid at fraternity house where 'the Chapter never took a public stance on any issue of public political, social, or cultural importance'.).
145. Defendants' - Appellees' Brief, *15-18.
146. 540 US 712 [185 *Ed Law Rep* 30] (2004).
147. Ibid 719.
148. 55 Cal Rptr.3d 487 [216 *Ed Law Rep* 895] (2007).
149. See *Mitchell v Helms*, 530 US 793 [145 *Ed Law Rep* 44] (2000).
150. See Reply Brief of Plaintiff-Appellant, *19 where CLS represents the choice as follows: 'SIU essentially offered the chapter a choice between two unattractive options: (1) abandoning its leadership and membership criteria in order to obtain the benefits of recognition; or (2) relinquishing its access to

the speech forum in order to maintain its leadership and membership criteria'.

151. *Bob Jones Univ v US*, 461 US 574 [10 *Ed Law Rep* 918] (1983) (university prohibited interracial dating and marriage based on its interpretation of passages in Genesis in the Bible; in upholding loss of tax exempt status, the Supreme Court relied on claim that eradication of race discrimination was 'fundamental public policy'; Bob Jones University has since changed its racially discriminatory policies and has had its tax exempt status restored).
152. For a discussion of Bob Jones University, see Ralph Mawdsley and Steven Permuth, '*Bob Jones University v United States*: A Decision With Little Direction' (1983) *Ed Law Rep* 1039 (commenting on the Court's reference only to a compelling interest argument eradicating race discrimination in the context of free exercise of religion.).
153. See Defendants' - Appellees' Brief, *13.
154. Reply Brief of Plaintiff-Appellant, *28.
155. See *Walker*, 453 F 3d, 876.
156. See the following published nondiscrimination policy for Liberty University, an evangelical, Bible-centered higher education institution: 'Liberty University School of Law — Policy on Nondiscrimination' <http://www.liberty.edu/academics/law/index.cfm?PID=8533> at 9 September 2006.
157. However, protection may be appropriate under related concepts under such statutes as Title VII. See *Barnes v City of Cincinatti*, 401 F 3d 729 (6th Cir 2005) (finding Title VII discrimination on the basis of gender for intentionally discrimination against officer, who was pre-operative male-to-female transsexual, by demoting him).
158. See *Lawrence v Texas*, 539 US 558 (2003) (invalidating under the due process clause of the Fourteenth Amendment a Texas statute criminalizing private same-sex acts); *Romer v Evans*, 517 US 620 (1996) (holding that Colorado constitutional amendment prohibiting all legislative, executive, or judicial action designed to protect homosexual persons from discrimination to be a violation of equal protection clause). See also, *Johnson v Johnson*, 385 F 3d 503, 530 (5th Cir 2004) (upholding equal protection claim of homosexual former Texas prisoner against prison officials based on sexual orientation discrimination where allegedly he qualified for safekeeping status but was treated differently than other vulnerable inmates because of his sexual orientation and was subjected to 'an arbitrary and irrational classification' whereby prison officials acted out of 'hostility and animus'.).
159. See *Gay Rights Coalition v Georgetown Univ*., 536 A 2d 1, 33 [44 *Ed Law Rep* 309] (DC Cir 1987) (finding sexual orientation under District of Columbia ordinance prohibiting sexual orientation discrimination where the university had denied access to homosexual groups to its campus based on religious beliefs, the court of appeals reasoning that the District was entitled to protect its interest in 'the eradication of sexual orientation discrimination'.).
160. See *Widmar*, 454 US, 265 (Board of Curators regulation prohibited the use of University buildings or grounds 'for purposes of religious worship or religious teaching'); *Rosenberger*, 515 US, 823 (university withheld authorization for payments for plaintiff's paper because it 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality'); *Southworth*, 529 US, 224 (while not targeted as directly as the other two cases, the university policy provided that the student body [could] vote either to approve or to disapprove an assessment for a particular [student organization]', something the religious organisations were concerned would permit unpopular views to be subject to majoritarian views).
161. The term, 'play in the joints' became part of the Supreme Court's rationale in *Locke v Davey*, 540 US 712, 718 [185 *Ed Law Rep* 30] (2004), upholding the State of Washington's refusal under its state constitution to permit a state grant to be used by a student pursuing a theology major. The Court reasoned that the Constitution permitted flexibility in applying the two religion clauses so that 'some state actions permitted by the Establishment Clause [are] not required by the Free Exercise Clause'. In the context of cases like *Christian Legal Society v Walker*, the concept 'play in the joints' is used to query how much flexibility the free speech clause affords public educational institutions to control the expressive rights of student organisations in furthering what the institutions contend are their valid interests.