Fighting Discrimination with Discrimination: Public Universities and the Rights of Dissenting Students

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Abstract. This article discusses recent legal conflicts between state universities and conservative religious students in the United States, focusing on Christian Legal Society v. Martinez. In recent years, several universities have denied recognition to religious student organizations that discriminate on the basis of religion or sexual orientation. I argue that scholars on both sides of the issue have failed to recognize the full scope of the privilege that the universities demand. If the courts accept the universities’ demands, then the courts dangerously expand the government’s authority to suppress dissenters. No proponent of civil liberties should welcome this change.

In recent years, United States courts have faced repeated clashes between public institutions and conservative citizens over the proper scope of antidiscrimination law. In these debates, one key issue involves religious student organizations that claim the right to deny membership to students who do not accept particular religious and moral beliefs. Few people deny that these organizations may control their membership. The more difficult question is whether a university may deny these student organizations recognition or other privileges. Universities have repeatedly denied recognition to student organizations that adopt discriminatory membership policies. Unsurprisingly, many of these cases involve religious student organizations that discriminate on the basis of religion and/or sexual orientation.¹

Over the last decade, many scholars have given serious and thoughtful attention to the legal aspects of the conflicts between religious student organizations and universities. These discussions have focused heavily on the proper limits of the students’ First Amendment rights. This is an entirely appropriate approach to the subject, at least in the context of First Amendment law. However, I will argue that this focus on the students’ rights has led scholars to underestimate the full scope of the powers that the university has claimed. To that end, I propose that we take a step back from the question of the students’ constitutional rights. Instead, I will attempt to identify what rights and powers each side in these debates has claimed, and what those rights and powers entail. Moreover, I will examine several scholars’ arguments to understand what rights and powers they believe that the various parties have claimed. In the end, I will argue that both the universities’ supporters and their opponents have overlooked the full scope of the powers that the universities have asked the court to recognize. Whatever the universities’ intentions, they have effectively claimed widespread powers to use antidiscrimination law as a justification for suppressing dissenting opinions.

In support of this thesis, I will defend three claims. First, I will argue that there is an important difference between restrictions on religious discrimination and restrictions on sexual orientation discrimination. It will turn out that the restrictions on sexual orientation discrimination present the greater threat to civil liberties. Second, I will argue that when the universities claim an unlimited power to derecognize student organizations that practice sexual orientation discrimination, the universities effectively ask the courts to permit public institutions to selectively target dissenters and curtail their civil liberties. Third, I will argue that the universities’ demands pose a serious threat to civil liberties. Whatever they intended, the universities have asked the courts to legitimize wide-ranging powers to suppress dissenting speech. Consequently, it would be a mistake to construe these debates as a simple disagreement over the limits of antidiscrimination policy. Rather, these debates involve the question of whether we should grant state institutions an extremely broad authority to suppress the liberties of dissenting groups.

1. Discrimination and Antidiscrimination on Campus

The conflicts that lead to debates over the rights and powers of universities and students follow a regular pattern, both in private and public institutions (Paulsen 2001, 1919–21). The university attempts to fulfill its obligation to fight harmful discrimination by adopting a policy that forbids several forms of discrimination. These policies usually mention a number

of standard types, such as discrimination based on race, age, gender, and sexual orientation. Problems arise because some religious student organizations restrict their voting membership or officer positions to students who belong to a particular religion, or who hold certain religious beliefs (Howarth 2009, 891; Leaving Religious Students Speechless 2005, 2882–3). In addition, some religious student organizations require prospective members or officers to accept and follow certain moral restrictions, including a restriction on homosexual intercourse and related behaviors (Howarth 2009, 891,8; Leaving Religious Students Speechless 2005, 2882–3). University officials or student government officials decide that a religious student organization’s constitution or bylaws violate the nondiscrimination policy. The university then denies the student group recognition. Recognition generally involves a range of privileges, including preferential access to meeting spaces, use of campus e-mail, easy access to the university administration, and funding. When the university denies these privileges, it seriously hampers an organization’s ability to operate and publicize their programs (Christian Legal Society v. Martinez, 3002, 3006–7 [Alito, J., dissenting]; Paulsen 2001, 670; Brief for Union of Orthodox Jewish Congregations of America, et al. as Amicus Curiae at 28, Christian Legal Society [No. 08–1371]; cf. Healy et al. v. James et al., 408 U.S. 169 [1971]).

In recent years, legal scholars have debated whether the way that the universities have applied their antidiscrimination policies violates the students’ First Amendment rights, especially freedom of association and freedom of religion. These debates came into focus in a recent case before the Supreme Court of the United States, Christian Legal Society v. Martinez (Christian Legal Society, 130 S. Ct. 2971 [2009]).

The facts in Christian Legal Society follow the usual pattern. The University of California’s Hastings School of Law denied recognition to the Christian Legal Society on the grounds that the organization’s constitution and bylaws conflict with the school’s nondiscrimination policies. School officials argued that the Christian Legal Society’s membership requirements discriminated on the basis of religion and sexual orientation (Christian Legal Society, 130 S. Ct. 2971, 2979–80 [2009]; Howarth 2009, 895–6). The Christian Legal Society brought a lawsuit against the university and lost the case in the federal district court, the court of appeals, and the Supreme Court of the United States (Christian Legal Society, 130 S. Ct. 2971, 2973–4, 2977 [2009]). In the Supreme Court’s opinion, written by Justice Ruth Bader Ginsburg, the Court held that the school had not violated the students’ First Amendment rights. The Court argued that the university’s regulation did not restrict speech, but rather restricted conduct (Christian Legal Society, 2994–5). The Court also argued that the university did not single out the Christian Legal Society or its views for special restrictions, because the university requires all student organizations to accept all students as voting members and officers (Christian Legal Society, 130 S. Ct. 2971, 2993–5 [2009]).
When the Supreme Court made this ruling, it accepted Hastings’ claim that it does not allow any recognized student organization to engage in ideological discrimination. Critics have questioned this claim, and Justice Samuel Alito’s dissent argues vigorously against the Court’s decision to restrict its ruling to the constitutionality of the “accept-all-comers policy.”

The Court provides a plausible defense of this move in its opinion, and I suspect that the Court acted properly. However, in this paper I will work with the assumption that the university did not require all recognized student organizations to refrain from ideological discrimination. Much of the legal scholarship discusses the issue on these terms, and Justice Stevens argued in his concurring opinion that the university may allow some forms of ideological discrimination while forbidding others (Christian Legal Society, 2995 [Stevens, J., concurring]). More importantly, the Court’s opinion in Christian Legal Society left this question open. As a result, I will not discuss the question of whether an accept-all-comers policy is constitutional. Instead, I will treat Christian Legal Society as a case in which a university allowed most forms of ideological discrimination, but did not allow student organizations to engage in any kind of religious or sexual orientation discrimination.

2. The Legal Debate over Discrimination and Antidiscrimination

2.1. Key Background Concepts

I will argue that scholarly debate concerning religious student organizations and antidiscrimination regulations is so far incomplete. At the same time, these debates provide a careful, insightful, and thorough analysis of the key First Amendment issues. In order to show what is at stake in the conflicts between university officials and religious student organizations, I will start by examining the views of several key legal scholars who have addressed Christian Legal Society and similar cases.

In order to understand the debate among legal scholars over Christian Legal Society, it is essential to understand four key concepts in constitutional law. The participants carry out their debates against the background of what John Inazu (2010, 153–4) calls “the well-settled law of freedom of association” (after Koppelman and Wolff 2009, x–xi). Four concepts are crucial to understanding these discussions: freedom of association, antidiscrimination regulations, limited public forums, and content-neutrality.

As Inazu (2010, 506–21) explains, for a number of years the courts have recognized a right to freedom of association. As part of this right, private organizations have a strong right to control their membership (ibid., 154, 168–9; cf. Howarth 2009, 914–5; Leaving Religious Students Speechless 2005, 2884). Since 1984, the courts have further recognized a specific right to freedom of expressive association. Citizens have the right to form...
organizations designed to express or promote a particular moral, political, religious, or other ideology (Inazu 2010, 155–8). As part of this right, private organizations have a strong right to determine their own membership. Noncommercial organizations are usually entitled to deny membership to individuals who do not accept the views that the group is designed to promote (ibid., 168–74). This right is supposed to allow citizens to organize in order to promote particular beliefs or viewpoints without having to deal with interference by their ideological opponents. Such interference might include infiltration, harassment, or takeover (Leaving Religious Students Speechless 2005, 2885–6; Christian Legal Society, 3019n.10, 3018–20 [Alito, J., dissenting]; Paulsen 2001, 1932).

Alongside citizens’ right to freedom of expressive association, the courts have acknowledged that state institutions may have a legitimate interest in fighting against harmful discrimination. They may therefore adopt regulations that forbid various forms of discrimination. Nevertheless, the courts have consistently held that freedom of expressive association can sometimes override the state’s interest in fighting against discrimination. Consequently, the courts have consistently held that public institutions must sometimes grant exemptions from antidiscrimination law to noncommercial expressive associations (Koppelman 2004, 32; Inazu 2010). For example, the courts held that the State of Connecticut must allow the Boy Scouts of America to bar openly homosexual men from serving as scoutmasters (Boy Scouts of America et al. v. Dale, 530 U.S. 640 [1999]). The courts similarly held that the City of Boston may not require a private Irish-American organization to allow a gay and lesbian organization to march in its St. Patrick’s Day parade (Hurley et al. v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., et al., 515 U.S. 557 [1994]).

Despite these limits on the state’s powers, the situation is more complicated in the case of religious student organizations. As Justice Ginsburg, writing for the Court, pointed out, programs of recognized student organizations fall into a special category called “limited public forums” (Christian Legal Society, 2984–6). Limited public forums involve situations in which a public institution establishes a program and opens the program to a wide range of applicants, regardless of whether the officers of the institution agree with the views that participants wish to express (Christian Legal Society, 2984n.11; Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125 [2009]). State institutions have some right to regulate participation and behavior within a limited public forum. However, these regulations usually must meet two criteria. First, there must be a rational basis for the regulation. Second, the regulation must be viewpoint-neutral. That is, the regulations must not single out any particular viewpoint or set of viewpoints for unequal treatment (Volokh 2006, 1922; Christian Legal Society, 2984).
In debates over freedom of speech and freedom of association, it is important to distinguish viewpoint-neutrality from content-neutrality. A rule is content-neutral when the rule does not distinguish between various speakers based on the content of their speech. For example, a rule that forbids everyone from making a speech above 50 decibels in residential neighborhoods is content-neutral. It has nothing to do with the intellectual content of what the person said. In contrast, a rule that said that a person could not give political speeches in public parks would be content-based. It would restrict people from making political speeches, but not from making speeches about religion, sports, gardening, or other non-political subjects. However, this rule would be viewpoint-neutral because it does not single out any particular political viewpoint for restriction (Sunstein 1995, 11–3). It is generally assumed that any content-neutral rule is automatically viewpoint-neutral (ibid., 12; Volokh 2006, 1931). Since any viewpoint expressed is part of the content of a speech-act, any rule that distinguishes between different viewpoints necessarily distinguishes based on content.

All of the scholars that I will examine evaluate cases like Christian Legal Society in terms of these four concepts. Also, despite their disagreements, these scholars generally share four common assumptions. First, the universities have a legitimate power to adopt antidiscrimination regulations, and to some extent the universities may apply these rules in limited public forums. Second, university officials have some obligation to respect students’ freedom of expressive association. Third, outside of a limited public forum, freedom of expressive association sometimes grants private organizations a limited immunity from otherwise legitimate laws. Fourth, within a limited public forum, students’ freedom of expressive association does not make them immune from legitimate regulations on conduct, provided that the regulations have a rational basis and are viewpoint-neutral.

The courts, the litigants in Christian Legal Society, and the scholars that I will examine agree on that much. However, they disagree about what these principles imply in the case of Christian Legal Society. Much of the disagreement focuses on the question of whether the university’s antidiscrimination policy was truly viewpoint-neutral, both as written and in application. Most participants in this debate seem to accept the claim that if the university regulations turn out to be viewpoint-based, then they violate the students’ constitutional rights.

In response to these scholars, I will not directly attempt to resolve the First Amendment issues in question. Rather, I will analyze what powers

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3 It is important to note that no government organization claimed the power to force the Christian Legal Society to accept voting members who reject the moral and religious beliefs in question. The question was only whether the university could exclude them from the limited public forum for doing so.
and immunities the different participants understand the universities and students as having claimed. I will also discuss what additional privileges universities or students would gain if the courts decided in one party’s favor. Finally, I will argue that the powers claimed by the universities have strong implications in the wider public sphere. If the courts side with the universities in these conflicts, then they dangerously expand the power of all public institutions to suppress dissenters. No citizen who wishes to preserve civil liberties should welcome this privilege, whether or not he agrees with the student organizations’ goals.

2.2. Howarth and the Privilege of Ideological Discrimination

In an essay written while Christian Legal Society was in litigation, Joan Howarth (2009) argues in favor of the Christian Legal Society. Her argument illustrates the most basic right that the organization claimed for its members. Namely, the Christian Legal Society claimed that its members have the right to deny membership to people who disagree with the moral and religious claims that it aims to promote, without forfeiting its status as a recognized student organization (Brief for Petitioner at 27–9, 54–8, Christian Legal Society [No. 08–1371]). We could call this the right to participate in the forum while engaging in ideological discrimination.

In support of the right that the Christian Legal Society asserted, Howarth challenges two claims that Hastings presented and the Supreme Court subsequently affirmed. First, Howarth challenges the claim that the regulations in question involved conduct rather than speech. Both the Supreme Court and the ACLU claimed that discrimination is a matter of conduct, not speech (Howarth 2009, 906, 916). However, Howarth (2009, 918–9) argues that the conduct in question was the students’ decision to limit membership to students who share the group’s ideology. The point of freedom of expressive association is that it allows individuals to form organizations dedicated to promoting a particular ideology, and to prevent people who do not share that ideology from joining the organization (Howarth 2009, 916–8). In that respect, it is misleading to argue that the regulations covered conduct. Freedom of speech involves more than just the verbal expression of certain statements. It also includes other rights that are integral to the expression of differing points of view. At present, constitutional law does not allow the state to label everything except the actual pronunciation of particular sentences as conduct, and therefore subject to restriction (Paulsen 2001, 1919–22, cited in Koppelman 2004, 35–6). In particular, the courts have clearly held that freedom of expressive association is an essential part of citizens’ right to express dissenting

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4 See Koppelman 2004, 35–6, for a thoughtful objection to Paulsen’s application of this doctrine.
viewpoints. As an anonymous student note in *Harvard Law Review* argues, “If freedom of speech is to mean more than a phony freedom to mimic majoritarian ideas, then it must entail the freedom to associate” (Leaving Religious Students Speechless 2005, 2884).

Second, Howarth (2009, 913–5) challenges the district court’s claim that the university’s regulations were viewpoint-neutral. Howarth emphasizes a point that the Christian Legal Society made in its brief before the Supreme Court. At the time when Hastings denied recognition to the Christian Legal Society, it allowed a number of other organizations the privilege to limit their membership on the grounds of ideology (*Christian Legal Society, 3004 [Alito, J., dissenting]; Brief for Petitioner at 11–14 Christian Legal Society [No. 08–1371]). Both the Democratic student organization and a pro-life organization were allowed to limit membership to students affiliated with the relevant party (*Christian Legal Society, 3004 [Alito, J., dissenting]). As Justice Samuel Alito pointed out in his dissent, “Hastings currently has more than 60 registered groups and, in all its history, has denied registration to exactly one: the Christian Legal Society (CLS)” (*Christian Legal Society, 3000 [Alito, J., dissenting]). In essence, Hastings denied the right to engage in ideological discrimination to the Christian Legal Society and only the Christian Legal Society.

Howarth also argues that applying regulations against religious discrimination to religious student organizations’ membership policies has little or no legitimate purpose. According to Howarth (2009, 924), the students who want to limit the leadership of a Christian student organization do not thereby engage in invidious discrimination. Rather, such students are simply forming an ideological group and claiming the right to control the content of its expression (ibid., 914–5). The right to take such measures provides an important defense against states and/or members of the dominant group that would interfere with dissenters. All groups dedicated to promoting an unpopular ideology should treasure this right (ibid., 916–8, 936–7). As Howarth says,

The principle of equality or nondiscrimination that insists on the right of Democrats to join the Young Republicans, or homophobes to join the Gay-Straight Alliance, or people who do not subscribe to the CLS statement of purpose to join the CLS, is an overly formal, inconsequential, empty version of equality. (Howarth 2009, 897)

2.3. Volokh on Freedom and Subsidies

In a 2006 essay, Eugene Volokh argues that constitutional law recognizes a university’s power to deny recognition to groups that practice ideological discrimination. Moreover, Volokh (2006) claims that universities have the power to exercise this privilege selectively. A university may refuse to recognize groups that engage in specific types of ideological discrimination, even
if they generally allow recognized student organizations to limit membership to students who share the group’s stated beliefs and goals.

Volokh (2006) offers two main arguments in support of this claim. First, he argues that public institutions must respect citizens’ constitutional rights, but those institutions may refuse to subsidize citizens’ exercise of those rights. For example, even if women have a right to obtain an abortion, it does not immediately follow that the government must fund abortion (Volokh 2006, 1924–7).\(^5\) With respect to freedom of association, Volokh argues that student organizations have the right to discriminate in their choice of membership. However, the state is not obligated to subsidize groups that discriminate (ibid., 1924–6). To some extent, public institutions have the power to refuse funding and other forms of aid to private institutions that promote ideologies that the officers of that institution oppose. The state may choose where it will spend its money, even if it selectively chooses not to fund the exercise of citizens’ constitutional rights.

Despite these arguments, Volokh recognizes that the state’s privilege is not unlimited. State institutions do not have an unlimited power to deny admission to a limited public forum (Christian Legal Society, 2987–8; Alexander and Alexander 2005, 382; Dimitrakopoulos 2007, 517–8). In that context, a state institution may only adopt regulations that are viewpoint-neutral and have a rational basis. Volokh argues that regulations against ideological discrimination can meet these criteria, even if the regulations selectively forbid some types of ideological discrimination but not others.

Volokh (2006, 1926–7, 1933) presents two arguments for this claim. First, he argues that a university could have several rational justifications for denying recognition to student groups that practice discrimination. For example, one purpose of establishing a program of recognized student organizations is that students who participate in or lead such organizations bolster their credentials. The school could reasonably decide that it only wants to provide funding for organizations that offer such opportunities to all students (ibid., 1926). Volokh (ibid., 1927) also cites President John F. Kennedy’s argument that no person should have to help fund an organization that discriminates against him.

Second, Volokh argues that restrictions in question are content-neutral. He argues that the rule in question applies to all groups, whether they are secular or religious. A rule against religious discrimination would forbid a Vietnamese students’ organization, a Young Democrats’ organization, a newspaper, a bridge club, a Christian organization, and a Hindu organization from discriminating against Hindus (Volokh 2006, 1933; cf. Christian Legal Society, 2996–7 [Stevens, J., concurring]). Obviously, it would seem

\(^5\) On the subject of abortion, he cites Rust v. Sullivan and several other cases (Volokh 2006, 1924; cf. Rust et al. v. Sullivan, Secretary of Health and Human Services, 500 U.S. 173 [1990]).
strange to require a Hindu organization to accept Hindus, but this is precisely the point. Every group must follow the exact same rule: it just happens that some groups are not interested in breaking it.

Volokh acknowledges that there are reasons to be suspicious of his claim that rules against religious discrimination apply uniformly to all student organizations. In particular, he recognizes that these rules have disparate impact on different types of organizations. The rule is unlikely to cause noticeable problems for the bridge club or the Young Democrats. However, it requires Christian organizations and Hindu organizations to allow ideological opponents to become members and officers (Volokh 2006, 1932; cf. Howarth 2009, 891–2; Christian Legal Society, 2996–7 [Stevens, J., concurring]). A classic question about such rules is whether they would require Jewish student religious organizations to accept members of Jews for Jesus as members and officers (Brief for Union of Orthodox Jewish Congregations of America, et al. as Amicus Curiae at 18, Christian Legal Society [No. 08–1371]). This example may seem far-fetched, but it is not. Prof. Anthony Campolo (2003, 35–6), a sociologist and popular Christian speaker, claims that the leader of a campus group called the “Hebrew Association” complained to him that a group of ethnically Jewish students were coming to meetings of the Hebrew Association and attempting to convert students to Christianity. Hastings’ rules against religious discrimination would seem to require Jewish student organizations to accept such students as voting members or forfeit recognition. Again, these restrictions seem to have little effect on the bridge club or the Young Democrats, especially when universities allow such groups to discriminate based on ideology. They could have a very large effect on Jewish religious organizations (Volokh 2006, 1937–8; Brief for Union of Orthodox Jewish Congregations of America, et al. as Amicus Curiae at 16–9, Christian Legal Society [No. 08–1371]).

Volokh (2006, 1932–3) provides two responses to such claims. First, he argues that disparate impact does not necessarily make a rule content-based. For example, if a local government restricted the volume of all demonstrations in public parks, the restriction would hinder the Hare Krishnas’ exuberant celebrations much more than it would hinder Fulan Gong’s silent protests. It does not follow that the rule would be content-based. All rules have different impacts on different people—sometimes intentionally and sometimes unintentionally. The mere fact of disparate impact is not enough to show that a rule is content-based (ibid., 1932–4).

Second, Volokh argues that university antidiscrimination policies are not content-based because they only make distinctions based on the beliefs of the persons that the university protects. According to Volokh (2006, 1932), a university policy is only content-based if it makes distinctions based on

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6 The example is mine, not Volokh’s.
the beliefs of the person whose conduct the university aims to restrict. Suppose that a Protestant wants to be an officer of a Roman Catholic student organization. A rule against religious discrimination would not single out the student organization because it promotes Roman Catholicism. This rule would only hold that there are certain ways that no organization may act toward a student based on the student’s belief in Protestantism. More generally, the rule would restrict all student organizations from treating any student in those particular ways based on the student’s religious beliefs or practices. Granted, such regulations would have a disparate impact on religious organizations. These regulations could greatly hamper religious student organizations, but they would have little effect on bridge clubs, intramural teams, or most political organizations. However, disparate impact alone is not sufficient to make a rule content-based.

Volokh’s arguments on this point are particularly helpful because they present an interpretation of the powers that the universities have claimed. Volokh acknowledges that there are limits to the universities’ power to regulate a limited public forum. However, he provides a plausible set of reasons why the universities have not violated these limits. Volokh recognizes that the university may not simply state that it disagrees with certain views and therefore deny its proponents the right to participate in a limited public forum. However, Volokh denies that this is what universities have done.

In support of Volokh, I would argue that there are strong reasons to doubt that the university adopted its antidiscrimination policy in order to interfere with students’ freedom of association. Imagine the following scenario. A group of university officials sat down and observed that many religious students disapprove of same-sex intercourse and related behaviors. They then discussed various plans to hamper those students’ expression of their beliefs. As part of this effort, they decided to deny recognized student organizations the right to discriminate on the basis of sexual orientation.

This might happen. However, consider an alternative possibility. A group of university officials discovered that a chess club had devised subtle ways of discouraging LGBT students from joining. On further investigation, the officials discovered that a number of political organizations, social clubs, and intramural sports teams refused to let LGBT students become voting members. There was no evidence that the leaders of these organizations had strong convictions about sexual morality. All the evidence indicated that the leaders of these organizations had a bigoted disdain for LGBT persons, and therefore did not want to associate with LGBT students. This bigotry had created great emotional and psychological difficulty for many LGBT students, but LGBT students had not challenged the organizations because they were afraid of retaliation. In order to stop
student organizations from mistreating LGBT students in this way, the university adopted an anti-discrimination policy that forbids sexual orientation discrimination. The university officials were not thinking about religious groups or morally conservative organizations; they would have adopted the same policies even if no such organizations existed. Unfortunately, they adopted a rule with a very wide scope, and it swept in a number of organizations that wish to foster sincere moral commitments to a set of principles that preclude same-sex intercourse and related behaviors. The university did not target groups like the Christian Legal Society. They were simply a casualty of a policy aimed to combat bigoted discrimination.

At the very least, the second scenario seems the more charitable interpretation. This does not mean that university officials were without fault. They may have been insensitive to the Christian Legal Society’s concerns. They may have welcomed the fact that the legitimate rule also hampers their ideological opponents. Still, Volokh (2006, 1933–4) reasonably argues that it would be cynical to assume that a university adopted such a rule in order to hinder students’ freedom of expressive association. Without strong evidence of pretext, it may be dangerous to let the courts presume that the university deliberately aimed to suppress dissenting views.

In essence, Volokh argues that the universities have not claimed the right to suppress the freedom of expressive association of student groups whose ideologies they oppose. They have merely claimed the right to adopt general rules that prevent non-ideological discrimination, even if those rules indirectly hinder some students’ freedom of expressive association.

2.4. Rubenfeld and Koppelman on Freedom of Expressive Association

At this point in the argument, we have a clash of rights and powers. Howarth asserts that students have a right to participate in a limited public forum, without forfeiting their right to engage in ideological discrimination. Against this position, Volokh contends that the university should have the power to adopt rules that forbid discrimination against specific categories of people, even if such rules indirectly limit students’ freedom of expressive association.

Volokh’s critics might ask what harm the courts would cause if they required universities to make exceptions for students who engage in acts of freedom of expressive association. As Howarth points out, there is something suspicious about the claim that Muslim students are harmed when they are excluded from Christian organizations. The “harm” involved comes dangerously close to the position that a person who promotes a set of beliefs thereby harms people who disagree with that belief.
In reply to this question, I answer that there are serious reasons to be suspicious of granting dissenting student organizations an unlimited immunity from antidiscrimination regulations. To support this claim, I will draw on Jed Rubenfeld (2001; 2002) and Andrew Koppelman’s (2004) warnings about the serious problems that the courts would create if they recognized an unlimited right to freedom of expression.

Jed Rubenfeld presents a strong argument against granting citizens unlimited freedom of expressive association. In an insightful essay, Jed Rubenfeld (2001) argues against overly broad protections for freedom of expression. Rubenfeld argues that almost any activity could count as a form of expression. For instance, he gives the example of a motorcyclist who drives at sixty-five miles per hour in a fifty-mile-per-hour zone. In court, the motorcyclist claims that he was expressing his disagreement with the law, which he believes will actually increase traffic fatalities. Rubenfeld (ibid., 767–9) jokingly surmises that the courts might call this action expressive, and therefore potentially entitled to constitutional protection. More generally, Rubenfeld (ibid., 769) argues that the intent to express disagreement with a law cannot be sufficient grounds for granting immunity against the state’s power to enforce otherwise valid laws.

Rubenfeld applies this point directly to the issue of antidiscrimination law and freedom of expressive association. He argues that any form of discrimination could be considered expressive. As he says,

Every person and every organization that wants to discriminate probably has good expressive reasons for doing so. Discrimination is profoundly expressive. It is by far the most effective way most people have of expressing their view of the superiority of their own group and the inferiority of others. (Rubenfeld 2001, 769)

In an earlier essay, Rubenfeld gives the example of a white homeowners’ association. This group might claim that its purpose is to promote a particular way of life, and therefore claim the right to discriminate in housing (Rubenfeld 2002, 1161). It is dangerous to allow a strong presumption in favor of freedom of expression unless we put some limits on what counts as an expressive action.

Andrew Koppelman (2004) presents a more specific argument for the concern that unlimited freedom of expressive association could nullify the state’s capacity to enforce antidiscrimination law. Koppelman fully supports freedom of expressive association, but he presents reasons to fear that the courts have begun to give too much deference to associations’ claims that the state has interfered with their expressive interests. Koppelman focuses on the case *Boy Scouts of America v. Dale* (*Boy Scouts of America et al. v. Dale*, 530 U.S. 640 [1999]). Koppelman (2004, 27–30) argues that in *Dale*, the Supreme Court gave too much deference to the Boy Scouts of America’s claim that opposition to homosexuality is part of its expressive purpose. Moreover, they gave too much deference to the Boy Scouts of America’s
claim that allowing Dale to be an assistant scoutmaster would hinder this expressive purpose (ibid., 30). Koppelman’s argument is complicated, but it raises an important point. Unbridled freedom of expressive association would entitle any private noncommercial organization to discriminate against anyone, merely by claiming that it must discriminate in order to protect the organization’s expressive purposes. If the courts recognized such a broad immunity for participants in a public forum, then the courts would effectively nullify antidiscrimination rules within that forum.

Together, Rubenfeld and Koppelman present a serious challenge to theorists who argue that freedom of expressive association gives private organizations an expansive immunity from antidiscrimination law. Namely, they must show how this immunity is consistent with the rule of law. If Koppelman’s argument is correct, then decisions such as Dale could allow any noncommercial association to claim that its acts of discrimination count as exercising its right to freedom of expressive association. If the courts were to grant citizens such an unbridled privilege, then they would effectively nullify antidiscrimination law. At least, they would nullify it in noncommercial contexts. Wherever unbridled freedom of expressive association is recognized, the mere belief that one should discriminate would entail a right to discriminate (Koppelman 2004, 27–8). It would be dangerous to grant citizens such an unlimited right.

3. Antidiscrimination and Viewpoint Neutrality

These arguments show that there are serious problems with both the powers that the universities have claimed and the immunities that the student organizations have demanded. Religious student organizations assert that freedom of expressive association requires that the universities grant exemptions. From one perspective, their claim is plausible. The whole point of freedom of expressive association is to allow private organizations to exclude people who do not accept a particular ideology. However, unbridled freedom of expressive association could nullify any attempt by the university to prevent invidious discrimination in limited public forums. When we focus on the students’ First Amendment rights, restrictions on religious student organizations present a difficult case.

However, some of the difficulty stems from the fact that scholars have focused on the rights and immunities that the students have asserted. While understandable in the legal context, this approach leads both critics and supporters of restrictions to overlook the full scope of the powers that the universities have claimed for themselves. In essence, public universities have claimed the power to declare certain behaviors as protected in such

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a way that any opposition to that behavior counts as an attack on the person himself. Moreover, they have used this power to deny rights to dissenting students that public institutions must ordinarily grant to all citizens. This demand is troubling in itself. It is even more disturbing because the courts sometimes allow the university to disguise this power not only as conduct regulation, but also as content-neutral.\(^8\) When the courts allow universities to make this move, the courts dangerously undercut one of the major limits on the state’s power to regulate private expression, namely, the requirement that certain types of restriction must be content-neutral. By allowing the universities greater leeway to declare restrictions in public forums content-neutral, the courts undermine a vital safeguard for dissenting speech.

In order to see why the courts’ concessions to universities represent an expansion of the state’s privileges, it is important to see how they break down the barriers between different types of discrimination. Both critics and supporters of the universities’ claims usually treat religious discrimination and sexual orientation discrimination as identical.\(^9\) However, there is a crucial difference between the two types of discrimination. Policies that forbid religious discrimination usually target a wide range of conflicting religious and antireligious ideologies. Policies against sexual orientation discrimination usually target one specific moral viewpoint for disfavor: the view that same-sex intercourse and related behaviors are immoral. This difference is crucial in the context of public forum cases. If the courts allow universities to apply policies forbidding religious groups from sexual orientation discrimination, then the courts open the door to viewpoint-based restrictions in limited public forums.

There are special dangers in allowing the universities to apply regulations that forbid sexual orientation discrimination that may not be present when the university forbids other forms of discrimination. To see the danger, it is important to distinguish between various kinds of antidiscrimination policies. Typically, such policies forbid discrimination based on a list of specific categories. For example, in Christian Legal Society, Hastings School of Law had an antidiscrimination policy that forbade discrimination based on “race, color, religion, national origin, ancestry, disability, age, sex, or sexual orientation” (Christian Legal Society, 2979). At first glance, all of these prohibitions seem similar. However, the categories on this list fall into two types: ascriptive characteristics and matters of belief or behavior.

The first type of antidiscrimination policy involves ascriptive characteristics, which are characteristics that a person cannot alter through any change of belief and behavior. At most, a person can alter these categories through medical intervention. These characteristics include race, color,
national origin, ancestry, disability, and age. Some of these characteristics are matters of brute fact, some are matters of social construction, and some might be a mix of the two. Whatever their origin, no amount of changes in a person’s belief or behavior can change these characteristics. Ingmar Bergman could not do anything that would change him from an ethnic Swede to an ethnic Korean (Vermilye 2007, 4–5). Governor Arnold Schwarzenegger has attained American citizenship, but he cannot do anything that would change the fact that his national origin is Austrian (Leamer 2006, 13–4, 199). Despite medical advances, none of us can change our age.

The second category involves discrimination based on characteristics that a person can change by altering his beliefs or behavior. Of the characteristics on Hastings’ list, religion is the most obvious member of this category. A person who renounces the belief that Muhammad was a prophet, declares that Jesus Christ is the Son of God, and voluntarily receives Trinitarian baptism becomes a Christian. Similarly, a person who was raised a teetotaler and begins drinking moderate amounts of alcohol at parties becomes a social drinker.

The reason that regulations against sexual orientation discrimination pose special difficulties is that sexual orientation discrimination falls on both sides of this divide. More precisely, the term “discrimination based on sexual orientation” refers to a number of different types of discrimination. Some of these types relate to ascriptive characteristics, and some deal with beliefs and behaviors. To see the force of this point, consider the following possible rules:

1. No group may discriminate against people with a strong inclination towards homosexual intercourse and related behaviors.
2. No group may discriminate against people who engage in homosexual intercourse and related behaviors, or against people who express an intention to do so at some future time.
3. No group may discriminate against people who believe that homosexual intercourse and related behaviors are morally acceptable.

If the nondiscrimination policy has the first meaning, then it forbids discrimination based on ascriptive characteristics. A person cannot simply decide not to have certain inclinations in sexual matters, any more than a person can decide not to like chocolate. Changing such inclinations generally requires strong ascetic effort, psychological counseling, or some combination of the two. In many cases, it might be impossible to alter such inclinations, even with psychological help.10 If this is all that the

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10 I do not mean to take any position on what counts as having a sexual orientation, whether it can be changed, or whether any existing therapies are reliable. I only claim that such inclinations are persistent enough that, for practical purposes, many people must accept such
nondiscrimination policy forbids, then it is content-neutral. The policy does not require anyone to accept people who do not share their beliefs. Religious student organizations may still exclude students who believe that it is morally acceptable to act on an inclination towards same-sex intercourse and related behaviors. The university only interferes with student organizations that would exclude a student based on the student’s inclinations in such matters.

If the nondiscrimination policy has the second or third meaning, then it is neither content-neutral nor viewpoint-neutral. In particular, under the third interpretation, the university only interferes with organizations whose members wish to express the belief that homosexual intercourse and/or related behaviors are wrong. The policy allows the university to interfere with religious student organizations that limit membership to people who disapprove of certain sexual behaviors, but it allows groups like Parents and Friends of Lesbians and Gays to limit membership to people who do not disapprove of those same behaviors. It is hard to see how this policy could count as viewpoint-neutral. It singles out one particular belief. It then places restrictions on people who hold this belief, but not on people who hold opposing beliefs.

Granted, as Volokh and others have argued, the university would not allow any group on campus to discriminate against students who believe that such behavior is morally acceptable. In *Christian Legal Society*, the Supreme Court apparently thought that this fact would make the policies viewpoint-neutral (*Christian Legal Society*, 2994–5). However, the Court’s argument is misleading, because it assumes that forbidding sexual orientation discrimination is analogous to forbidding all forms of religious discrimination. It is not. To see the disanalogy, consider the following example. Suppose that a university passed a rule that no recognized student organization may exclude Christians from voting membership and officer positions. However, the university allows student organizations to discriminate against practicing members of other religions. The university requires Jewish religious organizations to accept members of Jews for Jesus as voting members and officers, despite the potential threat to the organizations’ stated purposes. The university also requires the Muslim organizations, Hindu organizations, and atheist organizations to allow Christians to become voting members and officers. However, it allows Christian student organizations to exclude Jews, Muslims, Hindus, and atheists from membership. This seems like a clear case of a viewpoint-based policy, and Volokh (2009) concedes that it is viewpoint-based.

I contend that such a policy is analogous to one-sided policies that forbid sexual orientation discrimination. When a group wishes to promote a set inclinations as a more or less permanent part of their lives. Even proponents of reparative therapies sometimes acknowledge this point. See, for example, Jones and Yarhouse 2011.
of religious and moral beliefs that prohibit same-sex relationships and related behaviors, such a policy would require them to admit students who believe that same-sex relationship and related behaviors are morally acceptable. When a group wishes to promote the view that same-sex relationships and related behaviors are morally acceptable, the rule does not require them to admit such students. I contend that this fact makes the policy viewpoint-based. On the subject of the morality of same-sex relationships and related behaviors, it protects the proponents of one and only one viewpoint. Moreover, the protection in question is the privilege of directly interfering with the speech interests of their ideological opponents. If it is viewpoint-based to protect Christians and only Christians, then it is viewpoint-based to protect students who believe that same-sex relationships and related behaviors are good, but refuse to protect students who believe that such behaviors are bad.

4. The Broader Threat to Civil Liberties

The most disturbing aspect of cases involving religious student organizations is not that the universities singled out one particular moral viewpoint for restrictions. The greater problem is that institutions that we rely on to guard civil liberties have accepted the university’s claim that it should have this power. Not only the courts, but even the ACLU supported the university (Howarth 2009, 899n.3, 916; Brief for American Civil Liberties Union, et al., as Amicus Curiae, Christian Legal Society [No. 08–1371]). For example, in Christian Legal Society, Hastings’ administrators apparently used the nondiscrimination policy to suppress an organization that held views on religion and sexual orientation that the administrators found objectionable. Moreover, they did so despite the fact that the Christian Legal Society explicitly allowed people with strong inclinations toward homosexual intercourse and related behaviors to be members (Howarth 2009, 909–11; Christian Legal Society, 2990). They were even willing to accept students who sometimes act on those inclinations, as long as the prospective members acknowledged that such actions are wrong and made a sincere attempt to change. Yet the Supreme Court and the ACLU seemed to accept the universities’ restrictions as viewpoint-neutral.

Howarth comes closer to recognizing the complications posed by regulations against sexual orientation discrimination. She deals in detail with the fact that sexual orientation involves a complex interplay of belief, status, and behavior (Howarth 2009, 921–3). Still, she does not deal directly enough with the fact that regulations against sexual orientation discrimination narrowly target a specific viewpoint for disfavor. She acknowledges that it is important not to conflate groups that oppose same-sex relationships and related behaviors with groups that discriminate against people who have such inclinations (ibid., 898–900, 907–12). However, she fails to
acknowledge clearly that unlike regulations against religious discrimination, regulations against sexual orientation discrimination single out one particular viewpoint for disfavor. In the context of limited forum analysis, this distinction is crucial, because it raises the possibility that even if both kinds of regulation are content-based, only regulations against sexual orientation discrimination target a specific viewpoint for restriction.

Volokh’s argument provides an illuminating example of the problems that arise when scholars fail to distinguish the two types of antidiscrimination legislation. He acknowledges that singling out particular religious viewpoints for restrictions would be unacceptable, but he fails to notice that many universities single out particular viewpoints regarding sexual morality. He concedes that the university may not single out Muslim organizations and require that they allow non-Muslims as voting members. At least, it may not do this if it allows other religious groups to limit voting membership to their co-religionists. Volokh (2009) even acknowledges that such restrictions would be viewpoint-based. However, Volokh fails to acknowledge that university policies on sexual orientation discrimination single out one side in a dispute for restriction. Such policies do not require people who believe that homosexual intercourse and related behaviors are morally acceptable to open their organizations to ideological opponents. In the case of religion, universities place restrictions on organizations that promote a wide range of conflicting viewpoints. In the case of sexual orientation, universities only place restrictions on the proponents of the view that homosexual intercourse and related behaviors are morally wrong. If singling out Muslims is viewpoint-based, then singling out people who believe that homosexual intercourse and related behaviors are morally wrong is also viewpoint-based. In the context of limited forum analysis, this point is crucial. It raises the possibility that even if both kinds of regulation are content-based, only regulations against sexual orientation discrimination target a specific viewpoint for restriction.

5. The Dangers of Unbridled Antidiscrimination Legislation

The issue of viewpoint-based regulations is important because it illustrates the serious dangers involved when universities claim the privilege of selectively denying recognition to discriminatory student organizations. Hastings College of Law applied its antidiscrimination regulations to the Christian Legal Society in part because the Christian Legal Society limited membership to students who believe that homosexual intercourse and related behaviors are wrong. This raises the question of what the limits are to the power that universities have claimed. In effect, this power seems to give the university wide scope to suppress any view that it does not like. At least, it authorizes the university to suppress the view that any
particular behavior is morally wrong, simply by declaring that opposition to that behavior is discriminatory. The university could then use this power to curtail the civil liberties of students who disapprove of such behavior.

The implications of this power go far beyond issues involving limited public forums. The larger danger is that this privilege licenses the state to single out a particular behavior and declare that all opposition to that behavior is discriminatory. The state could then declare that regulations that interfere with citizens who oppose those behaviors count as viewpoint-neutral. Since such regulations ostensibly aim to protect the victims of discrimination, the university would be free from the normal constitutional limitations on viewpoint-based regulations. For example, suppose that a university declared that the Women’s Christian Temperance Union (WCTU) was opposed to persons who consume alcohol, not just the consumption of alcohol. The university could pass regulations that target student WCTU organizations, but call these regulations viewpoint-neutral. Worse yet, the university could do this without treating students as similarly discriminatory if they denounce, revile, or exclude teetotalers. The university could then deprive the WCTU’s members of all the normal constitutional protections against viewpoint-based regulations. This privilege would not nullify WCTU members’ freedom of speech, but it would severely curtail their freedom from state interference.

I stress the dangers of granting the universities free reign to treat antidiscrimination regulation as viewpoint-neutral because it provides a counterpoint to Rubenfeld and Koppelman’s arguments. Rubenfeld and Koppelman convincingly argue that nondiscrimination regulations— not to mention the rule of law— must not be subordinated to an unbridled freedom of expressive association. However, they do not pay enough attention to the dangers of unbridled antidiscrimination policies. If public institutions have the right to declare any behavior as protected, so that all opposition to that behavior counts as discrimination, then it is hard to see what room dissenters have to express their disagreement with that behavior. For this reason, I argue that we should not allow universities to treat their policies as viewpoint-neutral if they single out proponents of one particular moral belief for restriction. The fact that the university is opposing students who criticize others’ behavior should make no difference. Proponents of all moral beliefs should receive a certain minimum of equal treatment. The fact that a person chooses to express disapproval of others’ behavior rather than affirmation should not empower the state to give him diminished constitutional protection.

11 Also, it might deprive them of all the standard protections against content-based regulations, if the courts accept Volokh’s (2006) claim that such restrictions are content-neutral.
6. Objections and Replies

6.1. Volokh on Content-Neutrality

I have argued that universities that enforce antidiscrimination policies concerning sexual orientation on dissenting student organizations are applying a viewpoint-based rule. However, as I noted earlier, Volokh (2006, 1930–3, 1937–8; 2009) challenges this claim. He acknowledges that such actions subject religious student organizations to burdens that other types of student organization do not share. However, Volokh argues that such a rule is only content-based if it differentiates between the beliefs of the persons whose expression will be restricted. A rule that targeted Muslims for special restrictions would be content-based. However, universities typically pass rules that make distinctions based on the beliefs of the people who will be protected (Volokh 2006, 1930–3, 1937–8; Volokh 2009). So, the rules are not only viewpoint-neutral but content-neutral.

While Volokh’s argument may be valid in other contexts, he overlooks the fact that the student organizations in question are attempting to protect themselves from interference. Elsewhere, Volokh acknowledges that the university may not allow Muslim groups to exclude Christians unless it also allows Christians to exclude Muslims. Presumably, such a policy would be viewpoint-based. However, Volokh fails to recognize that the university could easily establish such policies without making any direct reference to the viewpoints of the groups that wish to discriminate. Rather, the university could pass a rule saying that no student organization may discriminate against people who believe in Islam. The only viewpoint mentioned in this policy is the viewpoint of the students whom it protects from discrimination. Therefore, by Volokh’s argument, it would be content-neutral. However, this clearly seems like an example of a viewpoint-based rule. It grants people who hold one set of beliefs the right to demand admission to groups with competing ideologies, without granting the same right to people with an opposing set of beliefs.

This argument shows that Volokh’s distinction between rules that target certain students for restriction and rules that target certain students for protection is irrelevant. This distinction may be valid in some cases, and Volokh cites precedent. However, this distinction breaks down when the “protection” in question involves the privilege of interfering with ideological opponents. Suppose that the university passed a rule that no student could tear down the posters for other students’ events, unless the student tearing down the poster was trying to promote traditional Judeo-Christian morality. This seems like an obvious case of a viewpoint-based rule, despite the fact that it only refers to the beliefs and motivations of the

students whom it protects. The “protection” involved in such cases is the right to interfere with other students’ freedom of speech. Similarly, in the case of student organizations’ membership policies, the question is whether student organizations must accept members who do not agree with the ideology that the group wants to promote. When a university singles out students who hold a particular belief and grants them a right to interfere with others’ ability to organize, the university’s actions are not neutral between the “protected” students and their ideological opponents. Consequently, it would be a mistake to claim that just because the policies single out a particular group for protection, they are content-neutral.

It might seem that my response to Volokh leads to the conclusion that religious student organizations should have immunity from rules against religious discrimination. It does not. I am only disputing Volokh’s claim that certain policies are content-neutral. On that question, I hold that Hastings’ restrictions on both religious discrimination and sexual orientation discrimination are content-based. However, in limited public forum cases the key question is whether the policies are viewpoint-neutral. As I argued earlier, restrictions on religious discrimination typically cover a wide range of religious and anti-religious viewpoints. So, restrictions on religious discrimination are content-based, but they might not be viewpoint-based. Restrictions on sexual orientation discrimination are both content-based and viewpoint-based.13

6.2. Burdens to the University

A more powerful challenge to my argument is that it might place serious burdens on the university’s legitimate attempts to prevent invidious discrimination against LGBT students. I conceded earlier that we should not assume that the Hastings officials deliberately crafted policies designed to interfere with students’ freedom of expressive association. It seems more likely that they were trying to prevent bigoted discrimination against persons who engage in same-sex intercourse and related behaviors. The rule also hindered the freedom of expressive association of groups who aim to promote ideologies that entail that people should refrain from such behavior.

In response to this challenge, I readily concede that universities may forbid student organizations from discriminating against LGBT students. More generally, if university officials reasonably and sincerely determine that students who adopt certain beliefs or engage in certain behaviors are

13 I do not mean to argue that Hastings’ application against religious discrimination was viewpoint-neutral. Hastings’ application of its rule are subject-matter restrictions, which are difficult to categorize. See Stone 1987. My point is that whatever we decide about the Hastings’ restrictions on religious discrimination, its restrictions on sexual orientation discrimination were viewpoint-based, at least in their application to CLS.
likely to experience regular mistreatment, then the university should have a limited power to single out groups for special protections. However, if the members of a student organization can make a credible case that opposition to LGBT behavior is part of the group’s purpose, and a nondiscrimination policy would hinder that purpose, then the university should grant an exemption to that group.

The fact that my argument allows the university to establish these rules but requires that they grant exemptions creates some difficulties. On one hand, it is well-established legal doctrine that groups may sometimes claim the right to an exception from an otherwise valid policy if the application of that policy would interfere with their exercise of a constitutional right. However, whether or not citizens are entitled to such exemptions sometimes depends on the burdens that such exceptions place on the ability of the state to pursue its legitimate goals.14

If the courts required that universities grant exemptions, this could create at least two serious burdens for the universities. First, the exception could swallow the rule and seriously impair the universities’ ability to promote equal treatment for LGBT students. Every group on campus could claim that opposition to same-sex relations and related behaviors is part of its purpose. If so, then the university would be powerless to stop widespread discrimination within the forum.

Second, the university could face the burden of determining which groups are sincerely committed to the moral views in question, and which are using such claims as a pretext. As the Supreme Court noted, this requirement could be burdensome enough that it provides a legitimate reason for adopting an accept-all-comers policy (Christian Legal Society, 2990). Granted, universities could require that each student group that requests an exemption make a plausible case that opposition to particular behaviors is an important part of the group’s purpose and that the nondiscrimination rule would seriously hinder that purpose. If university administrators must monitor such distinctions, then they must not only review organizations’ policies carefully, but they would probably also have to consider appeals. This change might require a significant amount of their employees’ time, which would effectively raise the cost of implementing their nondiscrimination policy.

To lessen this burden, the courts could give considerable deference to the university’s judgments of reasonableness, but allow student organizations resource to the courts in disputed cases. However, this solution could make the problem worse. If the courts are too deferential to the universities, then the courts would effectively nullify the student organizations’ immunity. A biased or unscrupulous administrator could refuse to take the claims of religious student groups seriously. However, if the courts require the

14 See, for example, Procunier v. Martinez, 416 U.S. 396 (1974).
universities to be too deferential to the student organizations, then the exception could easily swallow the rule. Any group with an *ad hoc* claim that it promotes opposition to same-sex intercourse and related behaviors would have immunity. The question is whether the courts could chart a viable middle path. This middle path would have to give the universities sufficient room to protect students who engage in unpopular behaviors without effectively nullifying students’ freedom of expressive association. Moreover, it would have to do so in a way that did not subject the universities (and the courts) to a constant stream of litigation.

I concede that the Christian Legal Society’s supporters must squarely address this issue. Since this question is at least partly empirical, I will not attempt to resolve the question. However, I will offer two reasons to believe that the burdens are not sufficient to absolve the universities from making exceptions.

First, this difficulty is not limited to cases involving limited public forums. As Justice Alito argues, we expect state institutions in the wider public sphere to temper their nondiscrimination policies in order to accommodate citizens’ First Amendment rights (*Christian Legal Society*, 2993). Granted, state institutions have a stronger legitimate interest in regulating a public forum. Consequently, a small burden on the state institution’s ability to pursue its interest may count for more than it would in the wider public sphere. Nevertheless, the fact that the courts do not treat these burdens on antidiscrimination legislation as excessive in the wider public sphere provides some reason to be suspicious of claims that these burdens are too great in limited public forums.

Second, there are advantages to requiring student organizations to explicitly state reasons why a nondiscrimination policy would hinder their ability to promote a particular lifestyle. To some extent, such a requirement can expose groups with insincere or *ad hoc* objections. Moreover, it can raise costs for groups. In some cases, it forces student organizations to abandon discriminatory policies or risk losing members. This is not to say that discrimination would always be costly to student organizations. If a behavior is sufficiently unpopular, then groups who discriminate against it could gain members. However, the fact that a group must provide a rationale could shift costs more heavily to groups with insincere or *ad hoc* claims than to groups that wish to promote a particular moral viewpoint. Finally, it forces groups to put their arguments on display for public scrutiny and for review by university officials. At the same time, it also puts pressure on university officials to provide a plausible reason for not believing the students’ claims.

In presenting this argument, I do not mean to suggest that market forces would sort out all the problems. Nor do I mean to say that an open discussion will always lead to understanding and mutual respect. I only claim that requiring student organizations to present a case for their claim
could force the argument out into the open. While imperfect, such measures would raise costs for both insincere student organizations and biased or insincere university officials. While they have costs, such measures would be preferable to giving a blank check to either side in these conflicts.

6.3. Favoring Religious Students

A related problem is that the requirement that the university make exceptions could favor religious organizations over non-religious. It could also favor some religious groups over others. Many religions have long-standing and well-codified rules. Christian, Jewish, and Islamic student organizations could easily point to religious texts to justify various behavioral restrictions. Proponents of secular worldviews, new religions, and less formal religions might find it more difficult to support their claims. If so, the university would probably find it more difficult to deny exemptions to the Christian Legal Society than to deny exemptions to secular conservative organizations or socially conservative Buddhist organizations. This situation would be unfair to secular students, members of new religions, and members of less formally codified religions. They would find it much harder to sustain the claim that their religious or philosophical commitments require opposition to behaviors that their university would like to promote or protect.

Again, I acknowledge that this point poses a difficulty, but it is a difficulty that we already accept in other areas. In particular, the United States allows exemptions from military service for both religious and secular conscientious objectors (Army Regulation 600–43 [2006]). On this issue, Quakers or members of highly codified religions could find it easier than their secular counterparts to convince the relevant authorities that they have sincere and considered conscientious objection. It does place some burden on the military, since they require an interview with a chaplain and a psychologist (Army Regulation 600–43 [2006]). However, to my knowledge, there have been few public complaints in recent years that the military favors religious conscientious objectors. Even if there were such complaints, the fact remains that we accept whatever inequalities arise in other areas. It is not clear why the mere fact that some groups will have a harder time proving sincerity is reason enough to deny everyone exemptions.

7. Conclusion

In many cases, universities have claimed that they should have the power to deny recognition to student organizations unless those organizations grant voting membership to students who believe that same-sex intercourse and related behaviors are morally acceptable. The implications of
this claim go far beyond the context of the university, and they involve more than questions about freedom of association. If the courts recognize this power, then they strike at the heart of the distinction between content-neutral, content-based, and viewpoint-based rules. This distinction represents a crucial safeguard against abuse of the state’s power to regulate conduct. In effect, universities have demanded the power to single out particular behaviors for protection, and declare that students who wish to engage in peaceful opposition to such behaviors are practicing discrimination. Moreover, they have argued that the university’s interest in combating discrimination overrides the dissenters’ constitutional rights. Unchecked, this privilege would enable public institutions to declare any moral view that they disagree with as inherently discriminatory, and therefore give diminished constitutional protection to citizens who attempt to propagate such views.

Rubenfeld is probably correct when he argues that unlimited freedom of expression would spell the end of the rule of law. However, an unchecked power to declaring opposing viewpoints as discriminatory would severely constrain the citizens’ right to propagate dissenting moral views. For this reason, it is very dangerous to grant universities the power to declare that the proponents of one particular view have the right to join opposing ideological groups. It is important that student organizations retain the right to control their ideological message. It is even more important to prevent public institutions from singling out particular moral viewpoints for diminished protection. For this reason, the disputes over religious student organizations have serious effects beyond the question of students’ rights. If we fail to protect the right of religious student organizations to exclude members who hold conflicting moral beliefs, then we threaten the liberties of anyone who wants to dissent from the views that the state endorses.

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