

OPEN ATTENDANCE—THE FIRST AMENDMENT IMPLICATIONS OF FIGHTING DISCRIMINATION AGAINST HOMOSEXUALS IN LAW SCHOOL STUDENT ORGANIZATIONS

INTRODUCTION

It is a long established principle of Supreme Court jurisprudence that the loss of First Amendment freedoms constitutes an irreparable injury.¹ At the same time, many people and organizations throughout the United States recognize homosexuality as an interest worthy of legal protection.² Oftentimes, however, the desire to protect homosexuals from discrimination conflicts with the First Amendment rights of groups or people who disapprove of homosexual activity. In particular, universities all over the country are beginning to realize just how difficult it is to fight discrimination against homosexuals while maintaining respect for the free speech rights of all of their students.³ Over the past several years, many schools have endured struggles over such issues, including Arizona State University, the University of California's Hastings College of Law, Ohio State University, the University of Minnesota, the University of North Carolina at Chapel Hill, Shippensburg University, Southern Illinois University School of Law, Texas Tech University, and Washburn University.⁴

The First Amendment implications of protecting homosexual rights are becoming particularly prominent in America's public law schools.⁵ Many

1. *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976).

2. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding a Texas law making intimate sexual contact between consenting adults of the same sex illegal to be unconstitutional as a violation of the rights of liberty deriving from the Fifth and Fourteenth Amendments); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding a state law banning gay marriage violated the Massachusetts Constitution).

3. *See* Kathleen Murphy, *Can Religious Groups Exclude Non-Believers?*, CHI. TRIB., Nov. 18, 2005, § 2, at 12 (detailing recent conflicts between religious organizations and various schools over non-discrimination policies).

4. *Id.*; *see also* *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 854 (7th Cir. 2006).

5. *See, e.g.*, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 70 (2006) (holding the Solomon Amendment did not violate the First Amendment rights of law schools that wished to prevent military recruiters from interviewing on campus because of their stance on homosexuality); *Suherwanto v. Attorney Gen. of the United States*, 230 Fed. App'x 211, 213 (3d Cir. 2007) (homosexual student allegedly asked by a law school dean to leave the university because his sexual orientation threatened to "destroy the reputation of the law school if

major members of the legal community have joined those supporting the cause of homosexual rights.⁶ Hundreds of law schools have adopted policies prohibiting discrimination on the basis of sexual orientation since the 1970s, and, in 1990, the American Association of Law Schools (AALS) unanimously voted to embrace sexual orientation as a protected category, which led even more schools to institute some variety of an anti-discrimination policy that aimed to prevent homosexuals from facing inequality.⁷ The AALS bylaws include a non-discrimination and affirmative action policy in its membership requirements that states in part that member schools are to provide equality of educational opportunity for all students without discrimination based upon sexual orientation.⁸ Further, a member school must attempt to pursue policies that give its students and graduates equal opportunity to obtain employment

he remained a student"); *Walker*, 453 F.3d at 858 (student organization's status revoked over policies on homosexuality); *Christian Legal Soc'y v. Kane*, No. C 04-04484, 2006 WL 997217, at *3-4 (N.D. Cal. May 19, 2006) (student organization's recognition refused because of policies on homosexuality); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 856-57 (N.D. Tex. 2004) (student challenged university policy that required prior permission for exercising free speech rights outside of certain "free speech area[s]").

6. See, e.g., *Rumsfeld*, 547 U.S. at 52 (explaining that "(FAIR) is an association of law schools. . . . Its declared mission [includes] . . . 'opposing discrimination and vindicat[ing] the rights of institutions of higher education.' FAIR members have adopted policies expressing their opposition to discrimination based on, among other factors, sexual orientation.") (internal citations omitted); see also *infra*, note 7 and accompanying text.

7. See *Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219, 224-25 (3d. Cir. 2004), *rev'd*, 547 U.S. 47 (2006); Reply Mem. in Supp. of Def.'s Mot. to Dismiss Counts III, IV, V, and VI of Pl.'s Compl., *Christian Legal Soc'y v. Walker*, No. 4:05-cv-04070-GPM, 2005 WL 1606448 (S.D. Ill. Aug. 19, 2005), 2005 WL 2840229; see also *Romer v. Evans*, 517 U.S. 620, 652-53 (1996) (Scalia, J., dissenting) (arguing that the Court has taken sides with homosexuals in the "culture wars" as evidenced by job interviews at America's law schools). Justice Scalia added:

[A]nyone who wishes to interview job applicants at virtually any of the Nation's law schools. . . may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, *then* he will have violated the pledge which the Association of American Law Schools requires all its member schools to exact from job interviewers: "assurance of the employer's willingness" to hire homosexuals.

Id.; see also *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting) (noting derisively that the opinion in *Lawrence* was "the product of a Court [and] a law-profession culture, that has largely signed on to the so-called homosexual agenda . . . [T]he American Association of Law Schools (to which any reputable law school *must* seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm . . . that does not wish to hire . . . a person who openly engages in homosexual conduct.").

8. ASSOCIATION OF AMERICAN LAW SCHOOLS, ASSOCIATION HANDBOOK, § 6-4 (a), (b) (1990).

without discrimination on the basis of sexual orientation by expressing to all employers its “firm expectation that the employer will observe the principle of equal opportunity.”⁹ Thus, all member schools (which, as of January 2006, comprised 168 American law schools, both public and private)¹⁰ have at the very least voiced a belief in the importance of protecting their students from discrimination based on sexual orientation through their membership in AALS, even if they have not explicitly adopted their own non-discrimination policy assuring homosexual rights.

Highlighting this ongoing tension between the First Amendment and homosexuality in the world of law schools, a new high-profile clash commenced at the Southern Illinois University School of Law, pitting the school’s anti-discrimination policy against its chapter of the Christian Legal Society’s claims for expressive association.¹¹ In *Christian Legal Society v. Walker*, the United States Appeals Court for the Seventh Circuit reversed the decision of the United States District Court for the Southern District of Illinois, with direction to enter grant of the Christian Legal Society’s (CLS) motion for a preliminary injunction against Southern Illinois University (SIU).¹² SIU had revoked CLS’s university status for alleged violation of SIU anti-discrimination policies based upon a CLS policy that prevents affirmed homosexuals from becoming voting members.¹³ Because the case emerged from an American Bar Association and AALS accredited law school, and as such schools have similar anti-discrimination policies or are bound by the AALS policy, this decision has the potential to monumentally impact both the First Amendment protections, practices, and policies *and* the fight against homosexual discrimination in law school student organizations all across the nation.

This Comment will first analyze the history of the major legal quarrels affecting protection of First Amendment rights of expressive association against the issue of exclusion of homosexuals from private organizations. This will place an examination of the *Walker* decision in its proper contextual framework. The Comment will then conclude with the Author’s analysis of the decision’s potential impact on public law schools and what steps these schools can take to deal with discrimination against homosexuals in their student organizations without violating the First Amendment rights of those groups.

9. *Id.*

10. ASSOCIATION OF AMERICAN LAW SCHOOLS, 2007 HANDBOOK 1, 19–22 (2007) available at http://www.aals.org/about_memberschools.php.

11. *Christian Legal Society v. Walker*, 453 F.3d 853, 858 (7th Cir. 2006); *Walker*, 2005 WL 1606448.

12. *Walker*, 453 F.3d at 867.

13. *Id.* at 858.

I. THE MAJOR EXPRESSIVE ASSOCIATION CASES LEADING TO *WALKER*¹⁴

Generally speaking, First Amendment litigation did not become a part of the Supreme Court's caseload until after World War I,¹⁵ and the protections of the amendment were not applied against the states until 1925.¹⁶ Still, the first major case involving the right of assembly reached the Court in 1876, where in *United States v. Cruikshank* the Court stated in dictum that the right to assemble peaceably:

is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.¹⁷

It was more than eighty years later, in *NAACP v. Alabama ex rel. Patterson*, that the Court first determined the right to engage in association for the advancement of beliefs and ideas (described first in *Cruikshank*) resided in the Due Process Clause, stating, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause . . . which embraces freedom of speech."¹⁸ Read in this light, freedom of association becomes "a necessary precondition to free speech" even though it is "not among the Constitution's explicit protections."¹⁹ As such a "precondition," there could be no meaningful value to the right of assembly if it did not also include the supplementary right to gather together to express and propagate ideas. It is this precondition to the right of assembly with which this Comment is concerned.

14. There are, of course, many cases decided by the Supreme Court that have shaped the right of expressive association. This Comment has not undertaken to give a complete history of those cases. Rather, it is merely an attempt to give a brief outline of the right of expressive association and those cases that are particularly important to the issues arising in *Walker*.

15. MARC A. FRANKLIN, DAVID A. ANDERSON & LYRISSA BARNETT LIDSKY, *MASS MEDIA LAW* 4 (7th ed. 2005).

16. *Id.*

17. 92 U.S. 542, 552 (1876).

18. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

19. Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 649–50 (2002). As Mazzone points out, there were other earlier cases where the Court intimated that the Constitution might contain a right to free association. *Id.* at 650–51. See, e.g., *Sweezy v. N.H.*, 354 U.S. 234, 245, 250–51 (1957) ("Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association."); *Watkins v. United States*, 354 U.S. 178, 197–99 (1957) ("Clearly, an investigation is subject to the command that Congress shall make no law abridging freedom of . . . assembly. . . . Abuses of the investigative process . . . [are] even more harsh when it is past . . . associations that are disclosed and judged."); *Schwartz v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 246 (1957) (holding New Mexico could not prevent a former member of the Communist Party from practicing law merely because of his past association).

The Court has held that the right to expressive association is not absolute,²⁰ and thus, litigation in this area usually turns on the balance of where the right of association ends and the government's right to regulate activity begins. This is a question of determining the point where laws meant to assert a government interest interfere with the rights of a group that has gathered together to engage in First Amendment activity. There are at least four ways in which a group's right to expressive association can be impinged,²¹ but this Comment is most concerned with only one variety—where the government imposes a burden on an association that makes it more difficult or impossible for the group to express the message it wishes to promulgate.²² The following cases highlight the Court's attempt to reach the balance between the government's right to regulate associative discrimination and the First Amendment rights of its citizens in this regard.

A. *An Initial Foray: Healy*

A case that was quite similar to *Walker* emerged in 1972 in *Healy v. James*, when Central Connecticut State College (Central Connecticut) attempted to bar a student organization from access to its campus because the organization members' beliefs were not consistent with school policy.²³ In *Healy*, a group of students attempted to organize a local chapter of Students for a Democratic Society (SDS) at Central Connecticut.²⁴ The school was worried about the group's affiliation with the national branch of SDS.²⁵ SDS stated it would not be affiliated with the national organization of SDS and would instead be "completely independent."²⁶ The Student Affairs Committee voted to approve the request for official recognition, but the President of the College rejected this vote and decided not to grant SDS official recognition.²⁷ He ruled that SDS's philosophy was adverse to Central Connecticut policies and that its independence from the national organization was suspect,²⁸ concluding that recognition should not be given to any organization that "openly repudiates"

20. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

21. *See Mazzone, supra* note 19, at 651–55. The government interferes with a group's right of expressive association when its actions constitutes a burden or denial to an individual (or group) of benefits that increases the costs associated with membership because of associational ties, when it imposes a requirement of associational membership to receive a benefit from the government, and when the government uses a group of citizens to advance the government's own desired expression. *Id.*

22. *Id.*

23. 408 U.S. 169, 174–76 (1972).

24. *Id.* at 172.

25. *Id.*

26. *Id.*

27. *Id.* at 173–74.

28. *Healy*, 408 U.S. at 174–75.

Central Connecticut's interest in and commitment to "academic freedom."²⁹ SDS filed suit against Central Connecticut, with the complaint alleging denial of First Amendment rights of expression and association.³⁰

Justice Powell's unanimous opinion in favor of SDS reversed both the trial court and Second Circuit's decisions dismissing the case.³¹ The Court acknowledged Central Connecticut's refusal to recognize SDS would amount to an abridgment of the SDS's First Amendment right to free association if recognition was denied without justification.³² Central Connecticut did not argue it had a proper justification for infringing SDS's rights, but instead claimed that denial of recognition did not constitute a violation of SDS's rights because it could still meet off of campus, could still distribute written materials off the campus, and could still meet with each other on campus in an informal capacity as individuals—they simply could not do so as a university-recognized chapter of SDS.³³ The Court was willing to concede that Central Connecticut had not directly interfered with SDS's fundamental First Amendment rights, but it rejected the idea that the Constitution's protections are limited only to such direct interference.³⁴ Rather, the Constitution also prevents "more subtle governmental interference."³⁵ Thus, Justice Powell ordered the case to be remanded, emphasizing the Court's "dedication to the principles of the Bill of Rights upon which our vigorous and free society is founded."³⁶

29. *Id.* at 175–76. The president's finding that the SDS was not compatible with university interest in academic freedom was based primarily upon the university's "Statement on Rights, Freedoms and Responsibilities of Students," which was referred to as the "Student Bill of Rights." In particular, Part V of that statement held:

College students and student organizations shall have the right to examine and discuss all questions of interest to them, to express opinion publicly and privately, and to support causes by orderly means. They may organize public demonstrations and protest gatherings and utilize the right of petition. Students do not have the right to deprive others of the opportunity to speak or be heard, to invade the privacy of others, to damage the property of others, to disrupt the regular and essential operation of the college, or to interfere with the rights of others.

See id. at 175 n.5. Apparently, the president believed SDS would not comply with some aspect of this statement.

30. *Id.* at 177.

31. *Id.* at 194.

32. *Id.* at 181.

33. *Healy*, 408 U.S. at 182–83.

34. *Id.* at 183.

35. *Id.*

36. *Id.* at 194.

B. *The Court Narrows the Right of Expressive Association*

Until the 1980s, the Court was usually quite protective of the rights of private groups or individuals to associate with those they wished.³⁷ Starting in 1984, however, in three successive cases, the Court narrowed the scope of protection offered to such private groups by the right of expressive association.³⁸

1. Roberts

In *Roberts v. United States Jaycees*, the Jaycees sued government officials from the state of Minnesota because its Human Rights Act prohibited sex discrimination in places of public accommodation, arguing that forcing them to accept women as members violated their First Amendment rights.³⁹ Justice Brennan authored the 7–0 decision reversing the Eighth Circuit and finding that the Minnesota anti-discrimination law did not violate the Jaycees’ First Amendment rights.⁴⁰

The Court did find that the Jaycees were entitled to First Amendment protection because of the many civic, charitable, lobbying, and fundraising activities in which they engaged.⁴¹ Flowing from these protected activities, the right of expressive association was “plainly implicated” by the Jaycees’ lawsuit.⁴² In fact, Justice Brennan opined that the Minnesota law clearly was an infringement upon the Jaycees’ associational rights because

[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept

37. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977) (holding that non-union teachers in a public school could not be required to finance the expressive activities of the union); *Kusper v. Pontikes*, 414 U.S. 51, 61 (1973) (striking an Illinois law that prohibited voting in the primary of one party within twenty-three months of voting in different party’s primary); *Healy*, 408 U.S. at 194; *Shelton v. Tucker*, 364 U.S. 479, 480, 490 (1960) (teachers in Arkansas challenged a state law requiring disclosure of all memberships to which the teacher had belonged or regularly contributed within the preceding five years as a condition of employment, and the majority held this infringed their rights to free association, even though the state had an interest in ensuring it had hired qualified educators); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) (holding that a state court order requiring the NAACP to divulge its membership lists violated the NAACP’s members of their right to freedom of association).

38. See *N.Y. State Club Ass’n v. City of N.Y.*, 487 U.S. 1 (1988); *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). The Author has omitted discussion of *Rotary* because the Court’s analysis was substantially similar to *Roberts* and further discussion would be largely repetitive.

39. 468 U.S. at 612. The Jaycees also claimed that the law violated their right to intimate association, but this Comment focuses solely on the expressive association claim. See *id.* at 618.

40. *Id.* at 612. Chief Justice Burger and Justice Blackmun did not participate in the decision. *Id.* at 631.

41. *Id.* at 626–27.

42. *Roberts*, 468 U.S. at 622.

members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together.⁴³

Justice Brennan quickly pointed out, however, that the mere existence of associational rights was not dispositive, because the “[t]he right to associate for expressive purposes is not . . . absolute.”⁴⁴ If a state can survive strict scrutiny by showing it infringed on First Amendment rights to serve a compelling interest that is unrelated to the suppression of ideas and cannot be achieved through means significantly less intrusive on associational freedom, the law can survive.⁴⁵

In this case, the Court found all three elements of strict scrutiny were satisfied and thus rejected the Jaycees’ claim. First, the Court found that Minnesota clearly had a compelling interest in eradicating discrimination against women in places of public accommodation that could trump the impact the law might have on the Jaycees’ First Amendment rights.⁴⁶ Second, the law was content neutral, both facially and as applied, and thus there were no concerns that the state’s goal in fighting discrimination was related to the suppression of ideas.⁴⁷ Finally, the Court was also convinced that Minnesota was attempting to advance its interest in the least restrictive means possible.⁴⁸ Particularly important to this last finding was the Court’s contention that the Jaycees had been unable to demonstrate that the law actually worked to impose any kind of “serious burdens on the male members’ freedom of expressive association.”⁴⁹

Specifically, the court was unconvinced that the many civic, charitable, lobbying, fundraising activities, or the messages of the Jaycees would actually be impeded simply by admitting women. The Jaycees had long allowed women to share in its views and participate in various Jaycees’ activities, thus rejecting “sexual stereotyping” without substantial proof that “by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization’s speech.”⁵⁰ In light of this analysis, the Court found that the Minnesota law survived strict scrutiny and it rejected the Jaycees’ challenge.⁵¹

43. *Id.* at 623.

44. *Id.* at 623.

45. *Id.*

46. *Id.*

47. *Roberts*, 468 U.S. at 623–24.

48. *Id.* at 626.

49. *Id.*

50. *Id.* at 628.

51. *Id.* at 631.

2. New York State Club

The actual decision in *New York State Club Association v. City of New York* was not earth shattering in the wake of *Roberts* and *Rotary*; after those decisions it was little surprise the Court held that a New York City ordinance that prohibited racial, religious, or sexual discrimination by certain private athletic clubs with at least 400 members did not violate the First Amendment right of expressive association.⁵² Justice White's majority opinion avoided the strict scrutiny analysis from *Roberts* and *Rotary*, however, relying largely on the fact that the challenging clubs were unable to show that the ordinance would in any way prevent them from "advocat[ing] public or private viewpoints," and that any club that wanted to keep out individuals who did not share its views still could do so, because "the Law erects no obstacle to this . . . [but] merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership."⁵³

New York State Club mattered not for what the Court decided about the clubs themselves, but because, for the first time, the Court enunciated what a litigant would have to do to win on a claim of expressive association: "an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion."⁵⁴ If an association cannot show that an anti-discrimination law prevents it from keeping out those "who do not share the views that the club's members wish to promote," the law being challenged does not violate the First Amendment and the group will have to abide by the regulation.⁵⁵

C. *The First Clash Between Expressive Association and Homosexuality: Hurley*

The year 1995 witnessed the right of expressive association's first high-profile clash with homosexuality. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, a unanimous court held that a Massachusetts law that required the organizers of a private parade to include an association of homosexual marchers it had refused to admit violated the First Amendment because it forced the organizers to impart a message they did not wish to convey.⁵⁶ Writing for the Court, Justice Souter rejected any notion that a

52. N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1, 12–14 (1988).

53. *Id.* at 13.

54. *Id.*

55. *See id.*

56. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 559 (1995).

parade was not expressive activity,⁵⁷ and thus, when Massachusetts forced the parade to include the contingent of homosexual marchers, it “violate[d] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”⁵⁸

This holding reinforced the idea that Justice White’s test from *New York State Club*—whether a group could show its message had actually been impinged—had become the Court’s chief consideration in ruling on claims of expressive association. It also signified a shift away from the limitations on expressive association represented by *Roberts*, *Rotary*, and *New York State Club*.

Of particular importance was the Court’s reluctance to require that the association articulate a specific message that would be impaired.⁵⁹ In fact, the parade council never identified how including the homosexual marchers in its parade would impair its message, or even what that message was, but the Court was content to find that the probable message the council disfavored was “not difficult to identify.”⁶⁰ Thus, *Hurley* was particularly sweeping because the claimants were not required to identify their intended message or how the presence of homosexuals impaired that message. At the time, *Hurley* seemed to stand for the idea that Justice White’s language of *New York State Club*⁶¹ had enabled the Court to greatly expand the protections of expressive association.

D. *The Boy Scouts Usher in the Dale-era of Expressive Association*

Boy Scouts of America v. Dale is probably the most important expressive association case to date.⁶² In *Dale*, an openly gay assistant scoutmaster brought suit under a New Jersey public accommodations law that prohibited discrimination based on sexual orientation after the Boy Scouts kicked him out of the organization because he was a homosexual.⁶³ Writing for a 5–4 majority, Chief Justice Rehnquist held that the law violated the Boy Scouts’ rights of expressive association and the Scouts could not be forced to admit homosexual members.⁶⁴

57. *Id.* at 559, 568.

58. *Id.* at 573.

59. *Id.* at 569 (“[A] narrow, succinctly articulable message is not a condition of constitutional protection.”).

60. *Id.* at 574–75 (“The parade’s organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB’s message out of the parade.”).

61. *See supra* note 55 and accompanying text.

62. 530 U.S. 640 (2000).

63. *Id.* at 643–44.

64. *Id.* at 642–44.

The Court noted initially that even though forced inclusion of unwanted individuals can infringe on a group's freedom of expressive association, the right to expressive association is not absolute and could be abrogated by regulations that survive strict scrutiny.⁶⁵ Thus, to analyze a claimed violation of expressive association, a group must first show that it engages in expressive association, though the group does not have to specifically be an "advocacy group"⁶⁶ Because this standard of "engag[ing] in expressive association" is so broad, the Court had no problem finding that the Boy Scouts engaged in expressive association.⁶⁷

Once a group has made this threshold showing, the Court analyzes whether the forced inclusion of the unwanted individual significantly affects the group's ability to promote its views either publicly or privately.⁶⁸ In this case, that analysis required the Court to "explore, to a limited extent, the nature of the Boy Scouts' view of homosexuality."⁶⁹ This "limited extent" was quite restricted indeed; the Court merely quoted the Boy Scouts' position on the issue *from the Scouts' own brief*—that they taught that homosexual conduct was not "morally straight" and they did not want to "to promote homosexual conduct as a legitimate form of behavior,"⁷⁰—and then the Court exercised almost complete deference to the claim. The Court stated, "We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality."⁷¹ Having accepted the Boy Scouts' claims of what its view of homosexuality was, it was no surprise that the Court also accepted the contention that admitting Mr. Dale as an assistant scoutmaster would significantly impair the ability to express its opinion that homosexual behavior was not legitimate: "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."⁷²

The Court's acceptance of the Boy Scouts' claim of infringement was based on finding that allowing Dale to be a scoutmaster "would, at the very least, force the organization to send a message, both to the youth members and

65. *Id.* at 648.

66. *Id.*

67. *See Dale*, 530 U.S. at 650.

68. *See id.*

69. *Id.*

70. *Id.* at 651 (internal citations and quotations omitted).

71. *Id.* The Court did go on to recount various pieces of evidence showing the Boy Scouts disapproved of homosexuality to demonstrate the sincerity of their belief, but it seems clear this was not a necessary step. *See id.* at 651–53.

72. *Dale*, 530 U.S. at 653.

the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”⁷³ Just as how in *Hurley*

the presence of GLIB in Boston’s St. Patrick’s Day parade would have interfered with the parade organizers’ choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts’ choice not to propound a point of view contrary to its beliefs.⁷⁴

The Court refused to alter its finding based on claims that not all members of the Boy Scouts agreed with the official position, because “the First Amendment simply does not require that every member of a group agree on every issue”⁷⁵ Rather, the official position of a group is the one that is “sufficient” to merit the protections of the First Amendment.⁷⁶

Having found the law would infringe on the Boy Scouts’ rights, the Court moved to the last step in the analysis of an expressive association claim—determining if the state interest supported the infringement on the group’s expressive association.⁷⁷ Unfortunately, but unsurprisingly, the Court largely sidestepped the issue of whether the protection of homosexuals against discrimination constituted a compelling state interest. Chief Justice Rehnquist noted how the Court had found the state interest in *Roberts* and *Rotary* to be compelling, indicating that those cases had turned on the nature of the state claim, but he quickly qualified that implication by reiterating that at the same time, the associations in those cases had been unable to show the inclusion of the unwanted individual would significantly burden the ability to express the messages desired.⁷⁸ Leaving the issue murky, the Court concluded that the law impaired the rights of the Boy Scouts and the “interests embodied in New Jersey’s public accommodations law [did] not justify such a severe intrusion on the Boy Scouts’ rights to freedom of expressive association.”⁷⁹ Intimating, but not explicitly holding, that the state’s interest in protecting homosexuals from discrimination was unqualified to abrogate the group’s First Amendment rights, the Court held that the Boy Scouts could not be compelled to admit a homosexual scoutmaster against its wishes.⁸⁰

While *Dale* did not make it completely clear exactly what type of groups could succeed on an expressive association claim (particularly due to the majority’s refusal to explicitly confirm the implied message—that the

73. *Id.*

74. *Id.* at 654.

75. *Id.* at 655.

76. *Id.*

77. *Dale*, 530 U.S. at 656.

78. *Id.* at 657–58.

79. *Id.* at 659.

80. *Id.* at 661.

protection of homosexuals does not count as a compelling interest), on close inspection the case appears to represent at least a small step back from the sweeping language of *Hurley*. First, unlike in *Hurley*, the majority required the association to identify its message and how admittance of the unwanted individual would impair that message.⁸¹ Second, the decision was far from unanimous (unlike *Roberts*, *Rotary*, *New York State Club*, and *Hurley*), with four Justices dissenting,⁸² indicating that deference to the state's interest in fighting discrimination had not completely dissipated. On this view, *Dale* appears to be a return to *Roberts* rather than *Hurley*, despite the fact that the decision ultimately upheld expressive rights.

E. Law Schools Finally Get Involved: Rumsfeld

In 2006, law schools finally grappled firsthand with the issue of homosexuality and expressive association in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,⁸³ foreshadowing the impending conflict that arose in *Walker*, as well as those that will likely continue around the country. In *Rumsfeld*, an association of law schools, the Forum for Academic and Institutional Rights (FAIR), filed suit alleging that the Solomon Amendment⁸⁴ violated its rights of free speech and expressive association.⁸⁵ The Solomon Amendment provided for the denial of certain federal funding to universities that refused to grant access to military recruiters that was at least equal to the access granted to other employers.⁸⁶ FAIR objected to allowing military recruiters on law school campuses because of the policies Congress has adopted regarding homosexuals in the military, claiming it would force the schools to either give up federal funds or stop enforcing their own policies that prevented recruitment activities on campus by employers who did not comply with the FAIR non-discrimination policy.⁸⁷ Chief Justice Roberts authored the 8–0 opinion holding that the Solomon Amendment did not violate the First Amendment and thereby did not infringe on the expressive association rights of FAIR or its member law schools.⁸⁸

FAIR argued that, similar to the situation in *Dale*, allowing military recruiters on campus would impair its capacity “to express [its] message that

81. See *supra* notes 68–76 and accompanying text.

82. Justice Stevens, joined by Justices Souter, Ginsberg, and Breyer, filed a strongly worded and lengthy dissent taking issue with the majority's holding that the Boy Scouts' message would be impaired. See *Dale*, 530 U.S. at 663–700 (Stevens, J., dissenting).

83. 547 U.S. 47 (2006).

84. See 10 U.S.C. § 983 (Supp. 2004).

85. *Rumsfeld*, 547 U.S. at 51. This Comment will discuss only the expressive association claim.

86. *Id.* at 52–53.

87. *Id.*

88. *Id.* at 70. Justice Alito did not participate in the decision. *Id.*

discrimination on the basis of sexual orientation is wrong.”⁸⁹ The Court, however, distinguished *Dale* from the facts of the instant case, saying the Solomon Amendment did not force law schools to offer membership to those with whom they disagreed, which had been the crux of the violation of expressive association in *Dale*.⁹⁰ The military recruiters, as well as any other employer coming on campus, remained as outsiders of the law school community, and the Court labeled this distinction as “critical.”⁹¹ Because the “[s]tudents and faculty are free to associate to voice their disapproval of the military’s message” and because “nothing about the statute affects the composition of the group by making group membership less desirable[,]” the Court held that “[a] military recruiter’s mere presence . . . does not violate a law school’s right to associate, regardless of how repugnant the law school considers the recruiter’s message.”⁹²

Rumsfeld made the *Dale* decision clearer in at least one respect, showing that despite the Court’s fairly broad level of deference to a group’s claims that granting inclusion to certain individuals would impair its ability to spread its message,⁹³ there must be more to the story. At the very least, the group must show that the inclusion complained of truly was “forced,” and that this inclusion prevented them from adequately associating “to voice their . . . message.”⁹⁴ It was in this context that the conflict in *Walker* emerged.

II. BACKGROUND AND FACTS OF *WALKER*

In February of 2005, officials at the SIU School of Law received a complaint about the membership policies of the campus chapter of the Christian Legal Society because the group did not allow active homosexuals to hold leadership positions or become voting members.⁹⁵ On or about February 16, 2005, school officials informed Winter Ramsey (Ramsey), President of CLS at the University, of the complaint.⁹⁶ CLS was then asked for a copy of its statement of membership and leadership policies,⁹⁷ and Ramsey replied in an e-mail that included the following statement regarding CLS policies:

89. *Id.* at 68.

90. *Rumsfeld*, 547 U.S. at 68–70.

91. *Id.* at 69.

92. *Id.* at 69–70.

93. *See* *Boy Scouts of America v. Dale*, 530 U.S. 640, 651 (2000); *supra* notes 68–76 and accompanying text.

94. *See Rumsfeld*, 547 U.S. at 70.

95. *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 858 (7th Cir. 2006).

96. Verified Complaint for Declaratory and Injunctive Relief at 8, *Christian Legal Soc’y v. Walker*, No. 05-4070-GPM, 2005 WL 1606448 (S.D. Ill. July 5, 2005), *rev’d*, 453 F.3d 853 (7th Cir. 2006), 2005 WL 975978.

97. *Id.*

The SIU Chapter of Christian Legal Society has discussed and voted . . . [and] our membership policy is below.

All members of the national CLS . . . are required to sign a Statement of Faith. This Statement of Faith indicates the member holds certain Christian viewpoints

Any student is welcome to participate in CLS chapter meetings and other activities, regardless of religion, creed, sexual orientation or member or non-membership in any other protected class. However, pursuant to the constitution and rules for CLS student chapters of the national CLS, members and officers are required to sign and endeavor to live by the national CLS' Statement of Faith.

CLS interprets its Statement of Faith to require that officers and members adhere to orthodox Christian beliefs, including the Bible's prohibition on 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.⁹⁸

On March 25, 2005, upon receipt and review of CLS's statement of policies, the Dean of the Law School informed CLS that it would no longer receive SIU recognition due to its refusal to allow active homosexuals to join its ranks.⁹⁹ The Dean informed CLS that its refusal violated two University policies—SIU's Affirmative Action/Equal Employment Opportunity Policy and a policy of the SIU Board of Trustees.¹⁰⁰ The Affirmative Action policy stated in its relevant portions that SIU would "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 of the

98. *Id.* at 8–9. CLS's Statement of Faith is as follows:

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

"One God, eternally existent in three persons, Father, Son and Holy Spirit.

God the Father Almighty, Maker of heaven and earth.

The Deity of our Lord, Jesus Christ, God's only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life;

His bodily resurrection and personal return.

The presence and power of the Holy Spirit in the work of regeneration.

The Bible as the inspired Word of God."

Christian Legal Soc'y v. Walker, No. 05-4070-GPM, 2005 WL 1606448, at *1 (S.D. Ill. July 5, 2005).

99. Brief of Defendant-Appellees at 5–6, *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (2006) (No. 05-3239), 2005 WL 3738600.

100. *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 858 (7th Cir. 2006).

Vietnam era, sexual orientation, or marital status.”¹⁰¹ The Board of Trustees policy ordered that “[n]o student constituency body or recognized student organization shall be authorized unless it adheres to all appropriate federal or state laws concerning nondiscrimination and equal opportunity.”¹⁰²

As a result of derecognition, CLS could not:

[R]eserve law school rooms for private meetings . . . 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.¹⁰³

Shortly thereafter, on April 5, 2005, CLS filed suit in the Southern District of Illinois against SIU and law school officials in their official capacity, alleging a violation of its rights to expressive association and free speech.¹⁰⁴ Exactly three months later, the district court denied CLS’s motion for a preliminary injunction against SIU that would have reinstated its official status.¹⁰⁵

CLS appealed the denial of its motion to the Seventh Circuit, and on July 10, 2006, the court reversed the district court’s decision, remanding the case with instructions to enter a preliminary injunction against SIU, which would effectively reinstate CLS as a University-recognized student organization.¹⁰⁶ The court held that CLS had likely not violated the SIU policies and further found that CLS was likely to succeed on its claims that SIU had violated its right to expressive association by “revoking its recognized student organization status” and its right of free speech by excluding it “from a speech forum in which it had a right to remain.”¹⁰⁷

101. *Id.* (internal quotations omitted).

102. *Id.* (internal quotations omitted).

103. *Id.* The court noted that CLS could have meetings on campus, but they would not be assured of privacy.

104. Verified Complaint for Declaratory and Injunctive Relief, *supra* note 96, at 12–15. CLS also alleged violation of the Establishment and Free Exercise Clauses of the First Amendment, and violation of the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, but these issues will not be discussed here, as the majority opinion focused only on the free speech and expressive association claims.

105. *Christian Legal Soc’y v. Walker*, No. 05-4070-GPM, 2005 WL 1606448, at *3 (S.D. Ill. July 5, 2005).

106. *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006).

107. *Id.* at 859–60.

III. THE SEVENTH CIRCUIT OPINION

A. *The Majority Finds Irreparable Injury and Likelihood of Success*

By a 2–1 decision, the Seventh Circuit reversed and remanded the district court’s denial of CLS’s motion for injunction, providing CLS with reinstatement as an officially recognized student organization at the SIU School of Law.¹⁰⁸ Judge Sykes authored the majority opinion and began by laying out the background of SIU’s relationship with its student organization.¹⁰⁹

SIU encourages the formation of student organizations, specifically offering several benefits that are not available to individual students outside of the parameters of group affiliation—access to the law school’s database of e-mail addresses, authorization to post information on SIU Law bulletin boards, inclusion of the group on lists of official student organizations at SIU (both in law school publications and on the SIU’s website), the ability to reserve conference rooms, the ability to hold meetings, storage space at the law school, a faculty advisor, and finally, allocation of funds from the SIU budget.¹¹⁰ The law school at SIU had at least seventeen officially recognized student organizations during the 2004–2005 academic year.¹¹¹

CLS is a national affiliation of law students, attorneys, and other legal professional across the country who have united over their shared common religious belief in Christianity.¹¹² To be a member of CLS, one must subscribe to the CLS statement of faith and agree to live one’s life in accordance with particular moral values.¹¹³ The case at hand arose over one of the values CLS members must subscribe to; namely, that sexual relations are forbidden outside of what CLS considers the traditional forum for such activities—one man and one woman in a monogamous, marital relationship.¹¹⁴ This framework for sexual activity means CLS disapproves of fornication, adultery, and homosexuality.¹¹⁵ Nonetheless, despite its disapproval of such activities, CLS does allow any person to attend its meetings; it simply does not allow anyone

108. *Id.* at 867.

109. *Id.* at 856.

110. *Id.*

111. *Walker*, 453 F.3d at 857. The court included a partial list of the SIU Law student organizations, naming “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, and CLS.” *Id.*

112. *Id.*

113. *Id.* at 857–58; *see also* Verified Complaint for Declaratory and Injunctive Relief, *supra* note 96, at 8–9.

114. *Id.* at 858.

115. *Id.*

to be a member or have a vote in CLS decisions that does not approve the CLS Statement of Faith or who engages in any of these activities without having repented.¹¹⁶

The majority rejected the district court's finding against CLS and outlined three reasons¹¹⁷ CLS was likely to succeed on the merits, any one of which was sufficient to carry its burden and merit reversal.¹¹⁸ First, the court was unconvinced CLS had actually violated any SIU policy, the ostensible grounds for derecognition.¹¹⁹ Second, the court found CLS had succeeded in showing the likelihood that SIU had illegally infringed on its rights of expressive association.¹²⁰ Finally, CLS had been able to show the likelihood that SIU had violated its free speech rights by expelling it from a forum of speech in which it was entitled to remain.¹²¹

Turning to its first point, the majority found it "doubtful" that CLS had actually violated any SIU policy.¹²² SIU first alleged CLS was in violation of a Board of Trustee's policy that refused recognition for any student organization that did not comply with all federal and state laws regarding equal opportunity and nondiscrimination, but the court found that through all the proceedings, SIU had failed to identify a single statute which CLS had violated.¹²³ This failure "raises the specter of pretext; [and] . . . this asserted ground for derecognition simply drops out of the case."¹²⁴

SIU also alleged CLS violated the University's Affirmative Action/EEO policy,¹²⁵ which required SIU to "provide equal employment and education opportunities . . . without regard to . . . sexual orientation."¹²⁶ The majority was "skeptical" of any claim CLS had violated this policy because it did not actually exclude anyone based on sexual orientation, but rather required only adherence by its members to its belief system regarding sexual conduct.¹²⁷ Because CLS believes it is sinful to engage in any sexual conduct outside the context of marriage between one man and one woman, it refuses to offer membership only to those persons not willing to conform their actions to this

116. *Walker*, 453 F.3d at 858.

117. There were numerous claims involved in the initial lawsuit that were not addressed in the appeal but have not been waived and thus could be decided upon remand. *Id.* at 860 n.1.

118. *Id.* at 859.

119. *Id.*

120. *Id.*

121. *Walker*, 453 F. 3d at 859–60.

122. *Id.* at 860.

123. *Id.* See *supra* note 102 and accompanying text for the relevant language of the Board of Trustees' policy.

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

125. *Id.* See *supra* note 101 and accompanying text for the relevant language of the Affirmative Action/EEO policy.

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

127. *Id.*

belief, regardless of whether the sexual actions are of a homosexual or heterosexual nature.¹²⁸ In fact, CLS interprets its membership policies to allow a person of “homosexual inclinations” to be a member, so long as they do not participate in or condone sexual activity (presumably either heterosexual or homosexual) outside of marriage, and since this is the exact same requirement to which a heterosexual must adhere to become a member, the policies enable CLS to treat all prospective members in the same manner.¹²⁹ The court also noted there was no language in the SIU policy prohibiting distinctions based on belief or conduct rather than upon personal status.¹³⁰

The court also found other reasons to be skeptical of SIU’s claims about the policy violations. First, since CLS does not employ anyone, the court was not convinced that the Affirmative Action/EEO policy even applied to it.¹³¹ More importantly, the court relied on *Rosenberger v. Rector and Visitors of University of Virginia*¹³² to hold that affiliated (even if subsidized) student organizations engage only in private speech and are not conduits of a university’s message, and thus the CLS was not a “mouthpiece . . . for the university.”¹³³ Relying on all of these reasons, the court concluded that CLS was likely to succeed on the merits of this claim.¹³⁴

The court then turned to an analysis of the second issue—whether CLS was likely to succeed on the issue of expressive association. The majority cited *Dale* for the proposition that there is “no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire,”¹³⁵ and also reiterated that the freedom to associate “plainly presupposes a freedom not to associate.”¹³⁶ The court also reaffirmed, however, that the Constitution does not prohibit laws that limit rights of expressive association if such laws can survive strict scrutiny.¹³⁷ To make its determination of whether CLS’s rights had been infringed by SIU, the court analyzed three questions: “(1) Is CLS an expressive association? (2) Would the forced inclusion of active homosexuals significantly affect CLS’s ability to express its disapproval of homosexual

128. *Id.*

129. *Id.*

130. *Id.*

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

132. 515 U.S. 819 (1995) (interpreting the Establishment Clause and holding that a state university could not withhold funding from a student publication based on the religious content and views of the publication).

133. *Walker*, 453 F.3d at 861.

134. *Id.*

135. *Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

136. *Id.* (quoting *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (quoting *Roberts*, 468 U.S. at 623)).

137. *Id.* at 861–62 (internal citation omitted).

activity? and (3) Does CLS's interest in expressive association outweigh the university's interest in eradicating discrimination against homosexuals?"¹³⁸

The answer to the first question was fairly apparent in light of the broad standard applied to this question in *Dale*¹³⁹—CLS is an expressive association.¹⁴⁰ The court explained that CLS is an expressive association because it

is a group of people bound together by their shared Christian faith and a commitment to "[s]howing the love of Christ to the campus community . . . by proclaiming the gospel in word and deed" and "[a]ddressing the question, 'What does it mean to be a Christian in law?'" Members must dedicate themselves to the moral principles embodied in CLS's statement of faith; one of those principles is affirmance of "certain Biblical standards for sexual morality." CLS interprets the Bible to prohibit sexual conduct outside of a traditional marriage between one man and one woman. As such, CLS disapproves of fornication, adultery, and homosexual conduct, and believes that participation in or affirmation of such sexual activity is inconsistent with its statement of beliefs.¹⁴¹

In light of CLS's shared expressive conduct, the court concluded that "[i]t would be hard to argue—and no one does—that CLS is not an expressive association."¹⁴²

The answer to the second question—would the forced inclusion of active homosexuals significantly affect CLS's ability to express its disapproval of homosexual activity—was more contentious, but the court did not find the issue to be complicated, saying that to even ask the question was "very nearly to answer it."¹⁴³ As such, the court "ha[d] no difficulty concluding that SIU's application of its . . . policies . . . burdens CLS's ability to express its ideas."¹⁴⁴ Because "CLS's beliefs about sexual morality are among its defining values; forcing it to accept as members those who engage in or approve of homosexual conduct would cause the group . . . to cease to exist."¹⁴⁵ Further, since one of its specific values is that sexual conduct outside the scope of marriage between one man and one woman is sinful, "[i]t would be difficult for CLS to sincerely and effectively convey a message of disapproval of . . . [such] conduct if, at the same time, it must accept members who engage in that conduct."¹⁴⁶

138. *Walker*, 453 F.3d at 862.

139. *See Dale*, 530 U.S. at 648; *supra* notes 66–67 and accompanying text.

140. *Walker*, 453 F.3d at 862.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 863.

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

146. *Id.*

As SIU's derecognition violated CLS's expressive association rights, its action would have to survive strict scrutiny, and the court was forced to analyze if SIU's interest in stopping discrimination against homosexuals outweighed CLS's interest in expressing disapproval of homosexual activity.¹⁴⁷ The court willingly accepted that a state has an interest in curbing discriminatory conduct, as well as in ensuring equal opportunity to access of educational benefits, but it also reiterated that these interests cannot "be applied to expressive conduct with the purpose of either suppressing or promoting a particular viewpoint."¹⁴⁸

On this front, the court sided squarely with CLS:

What interest does SIU have in forcing CLS to accept members whose activities violate its creed other than eradicating or neutralizing particular beliefs contained in that creed? SIU has identified none. The only apparent point of applying the policy to an organization like CLS is to induce CLS to modify the content of its expression or suffer the penalty of derecognition.¹⁴⁹

In contrast to this language strongly disapproving of SIU's interest in regulating CLS, the court noted that CLS's interest in effecting its constitutional rights was "unquestionably substantial"¹⁵⁰ because the "First Amendment protects expression, be it of the popular variety or not."¹⁵¹ Further, "public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message."¹⁵² Consequently, since SIU presented no compelling interest, its policy could not survive strict scrutiny, and CLS once again had shown a likelihood of success on the merits for its claim of expressive association.¹⁵³

Additionally, the majority rejected the claim that the SIU policy did not amount to a "forced inclusion" case such as *Hurley* or *Dale*.¹⁵⁴ The dissent contended this was not a forced-inclusion case at all; rather, CLS remained free to prohibit those who do not share its beliefs from becoming members—it simply could not do so on SIU's dollar.¹⁵⁵ The majority assumed, however, that *Healy* controlled on this issue and that derecognition itself turned the application of the policy into a forced-inclusion case because "the Court [in

147. *Id.*

148. *Id.* (internal citation omitted).

149. *Id.* (emphasis added).

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

151. *Id.* (internal citation omitted).

152. *Id.* at 863–64 (internal citation omitted).

153. *Id.* at 864.

154. *Id.*

155. *See Walker*, 453 F.3d at 873–74 (Wood, J., dissenting).

Healy] . . . drew a distinction between rules directed at a student organization's actions and rules directed at its advocacy or philosophy; the former might provide permissible justification for nonrecognition, but the latter do not."¹⁵⁶ The court ruled that the present case was "legally indistinguishable" from *Healy* and thus there was little doubt CLS had presented a forced-inclusion claim or that it should prevail upon it.¹⁵⁷

At that point, the majority turned to its analysis of the free speech claim. The CLS claim was that the government violates the First Amendment when it "excludes a speaker from a speech forum the speaker is entitled to enter."¹⁵⁸ It argued SIU had created such a forum for its student organizations, and derecognition effectively expelled them from that forum even though there was no compelling reason justifying the action.¹⁵⁹ The court found that SIU had created a public forum for its student organizations,¹⁶⁰ and the label given to the forum was not vital to the legal conclusion because even under the standard of review most favorable to SIU, CLS still had "the better of the argument."¹⁶¹

CLS's argument on the free speech violation triumphed because, even though SIU's policies were neutral on their face, there was evidence they had been applied in a way that discriminated on the basis of viewpoint.¹⁶² The court explained:

Once the government has set the boundaries of its forum, it may not renege; it must respect its own self-imposed boundaries.

....

. . . According to the present record evidence, CLS is the only student group that has been stripped of its recognized status on the basis that it discriminates on a ground prohibited by SIU's . . . policy. CLS presented

156. *Id.* at 864 (majority opinion) (internal citation omitted).

157. *Id.* The dissent distinguished *Healy* by saying the difference was that the student organization was not even allowed to meet on the university's campus or coffee shop, whereas in the present case CLS could still meet at school and had other ample alternative channels for communicating with each other. *Id.* at 874 (Woods, J., dissenting). While the point of this Comment is not to discuss the difference between forced-inclusion cases and the mere refusal to provide a forum for a group's speech, *Healy* strongly suggests the Supreme Court does not favor the dissent's analysis on this issue. See *Healy v. James*, 408 U.S. 169, 183 (1972) ("[P]ossible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by [nonrecognition].").

158. *Walker*, 453 F.3d 865, 865 (internal citation omitted).

159. *Id.*

160. See *id.* at 866 n.2 ("Accordingly, while the parties appeared to agree at oral argument that we are probably dealing with a 'limited public forum,' we will not hold them to that agreement because they were plainly arguing for different levels of scrutiny and the 'forum' terminology has not always been clear.").

161. *Id.* at 866.

162. *Id.*

evidence that other recognized student organizations discriminate in their membership requirements on grounds prohibited by SIU's policy. The Muslim Students' Association . . . 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

For whatever reason, SIU has applied its antidiscrimination policy to CLS alone SIU contends there is no evidence that other groups would continue to discriminate if threatened with nonrecognition, but that argument is a nonstarter. SIU's . . . policy, which SIU insists applies to all student organizations, is a standing threat of nonrecognition; assuming it applies, that is the whole point of the policy.¹⁶³

The majority conceded that a final decision on the reasonableness of the policy was not appropriate since the actual purposes of the policy had not been fully argued.¹⁶⁴ And while the court acknowledged that the record was "spartan" on SIU's purposes for the speech forum, it asserted that was not dispositive since CLS was able to show a likelihood of success on its claim that SIU applied the policy in a viewpoint-discriminatory manner,¹⁶⁵ intimating that SIU's purposes (whatever they may be) would not be able to withstand the inevitable standard of strict scrutiny review that accompanies such regulations.

Having analyzed all three reasons CLS was likely to succeed on the merits, the court concluded by balancing the harms. Weighing in favor of CLS, the court reiterated that CLS had shown irreparable harm since a First Amendment violation always constitutes such injury, and reaffirmed that the controlling precedent of *Healy* held that "denying official recognition to a student organization is a significant infringement of the right of expressive association."¹⁶⁶ Further, the court concluded that as CLS had shown a likelihood of success on the merits of the free speech claim, "[o]ne way or the other, CLS has shown it likely that SIU has violated its First Amendment freedoms."¹⁶⁷

Weighing against SIU, the court first noted that the district court had misread the standard of irreparable harm, which by itself necessarily constituted an abuse of discretion.¹⁶⁸ Further, SIU had been unable to demonstrate they would incur any harm whatsoever beyond "the hardship

163. *Walker*, 453 F.3d at 866–67 (emphasis added).

164. *Id.* at 867.

165. *Id.* The dissent objected to the decision to rule on the free speech claim since the record was admittedly incomplete. See *infra* note 174 and accompanying text.

166. *Walker*, 453 F.3d at 867.

167. *Id.*

168. *Id.*

associated with being required to recognize a student organization it believes is violating the university's antidiscrimination policy."¹⁶⁹ This harm did not suffice, however, as CLS had demonstrated likelihood of success on its claims that SIU had violated its First Amendment rights—since SIU's claimed harm was predicated on an interest that violated the constitutional rights of CLS, such harm was in fact "no harm at all."¹⁷⁰ Thus, because SIU would sustain no harm upon a grant of the injunction and CLS would incur irreparable harm upon its denial, the court reversed and remanded the decision of the district court, ordering that the preliminary injunction be entered against SIU.¹⁷¹

B. *The Dissent*

Judge Wood dissented from the majority,¹⁷² opining that the decision was only "possible . . . by asking the wrong questions, and thus arriving at the wrong answers."¹⁷³ Taking the record as it stood,¹⁷⁴ the dissent disagreed that CLS had carried its burden, arguing it failed to show a likelihood of success on the merits of any of its claims and it failed to show it would suffer irreparable harm outweighing the harm that SIU would incur upon reversal.¹⁷⁵

First, Judge Wood rejected the majority's distinction between discrimination on the basis of sexual orientation and sexual conduct.¹⁷⁶ His primary contention was that there was no support or opposition in the record for the idea that CLS would or had actually allowed a homosexual who chose not to be sexually active to be a CLS member or leader, or that heterosexuals who participated in non-marital sexual conduct had ever been or would ever be prevented from CLS membership or leadership capabilities.¹⁷⁷

Next, Judge Wood argued CLS had not shown a likelihood of success on its claim that SIU had violated its rights of expressive association because the case at hand was distinguishable from *Dale* and *Healy*.¹⁷⁸ He differentiated *Dale* by saying the present case was not one of forced inclusion because SIU

169. *Id.*

170. *Id.*

171. *Walker*, 453 F.3d at 867.

172. *Id.* at 867–76 (Wood, J., dissenting).

173. *Id.* at 867.

174. Judge Wood's first contention was that much of the majority opinion was based upon a record that was far too incomplete to support the decision. *See id.* at 869. Due to the state of the record, Judge Wood argued that it was "virtually impossible to evaluate the Law School's action with respect to CLS without knowing whether it conforms or not to the treatment of similar organizations." *Id.* at 870. As such, he argued that the temporary injunction should be dissolved so that SIU could enforce its policies until the case was decided in full on the merits. *Id.* at 867.

175. *Id.* at 872.

176. *See Walker*, 453 F.3d at 873.

177. *Id.*

178. *Id.* at 873–74.

did not force CLS to accept anyone like the statute in *Dale* would have forced the Boy Scouts to do; rather, SIU had “simply declined to give certain additional assistance (financial and in-kind) to organizations that violate its nondiscrimination policy.”¹⁷⁹ He also argued the situation was quite different from the events in *Healy* because SIU had not banned CLS from meeting on university grounds and because technological advances since the 1970s enabled CLS to maintain a campus presence outside of the scope of official university recognition, one that was not available to the challengers in *Healy*.¹⁸⁰

Finally, Judge Wood turned to the balancing of the harms.¹⁸¹ While conceding that CLS had a valid interest in its rights to expressive association, he also found that nothing SIU had done directly impeded those rights, and any indirect effects were “mild.”¹⁸² Further, the dissent found SIU had very important interests at stake. First, SIU had a compelling interest in obtaining a diverse student body, and a decision that required them to include discriminatory groups “might undermine their ability to attain such diversity.”¹⁸³ Second, relying on dicta from *Grutter v. Bollinger*,¹⁸⁴ Judge Wood argued SIU itself had compelling expressive association and free speech interests in preventing CLS from spreading its message, so its harm “at the least, must be balanced against the harm to SIU from being forced to accept into its expressive association a group that undermines its message of nondiscrimination and diversity.”¹⁸⁵

179. *Id.* at 873–74 (Judge Wood failed to respond to the majority’s contention that derecognition goes beyond a mere “failure to fund.”).

180. *Id.* at 874.

181. Judge Wood also refused to accept the majority’s finding that CLS had shown a likelihood of success on its free speech claim, primarily because the state of the record was too incomplete to show SIU had applied its Affirmative Action/EEO policy in a discriminatory way. *Id.* Specifically, he found the constitutions of the other student organizations that had been offered as evidence were “too weak a reed on which to rely” and with the lack of other evidence, the court had “no way of knowing whether those organizations were actively discriminating on a prohibited basis.” *Id.*

182. *Id.* at 875.

183. *Id.*

184. 539 U.S. 306, 328 (2003) (The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”).

185. *Walker*, 453 F.3d at 875–76. Judge Wood distinguished this argument from the similar argument that failed in *Rumsfeld*, see *supra*, notes 92–94 and accompanying text, by noting that the law schools in *Rumsfeld* were trying to exclude outsiders whose speech was not a part of the school’s expressive association, whereas here, CLS was effectively attempting to force the school to accept the speech of someone who would be an “insider.” Thus, while the Solomon Amendment would not force a school to accept a member it does not desire to have among its ranks, a holding for CLS would do so. *Walker*, 453 F.3d at 876.

IV. THE RAMIFICATIONS OF *WALKER*A. *What Can Law Schools Do?*

A central question remaining after *Walker* is what the decision, and the *Dale*-era of expressive association in general, means for the many public law schools in America that wish to fight discrimination against homosexuals in their student organizations. In light of the recent decisions in *Hurley*, *Dale*, and *Rumsfeld*, the addition of *Walker* likely spells a great deal of trouble for the types of inclusive policies schools such as Southern Illinois University have hoped would ensure a welcoming and open educational environment for all of their students.

In this Author's opinion, until the Court is prepared to recognize discrimination against homosexuals as a compelling interest,¹⁸⁶ law school policies that force student groups to include individuals as members whom they do not wish to embrace will, in all likelihood, see results similar to those in *Hurley*, *Dale*, *Rumsfeld*, and *Walker*, rather than the inclusive mandates of *Roberts*, *Rotary Club*, and *New York State Club*.

The remainder of this Comment is predicated upon the contention that *Walker* (combined with the recent Supreme Court jurisprudence outlined above) stands for the idea that expressive organizations that can prove their message will be impaired by including homosexuals as members have a First Amendment right *not* to admit such individuals. With this view on the state of the law, the remainder of this Comment attempts to determine how public law schools can endeavor to stop discrimination against homosexuals in their student organizations without violating the First Amendment.

1. A New Approach is Necessary

The majority in *Walker* acknowledged that a public university has an interest in ending discrimination in its student organizations.¹⁸⁷ The court restricted the reach of that interest, however, holding that no antidiscrimination policy can be applied to an expressive organization if the purpose of the policy is to suppress or to promote any one particular viewpoint.¹⁸⁸ A state is free to promote the ideas it wishes, but it cannot do so by "interfer[ing] with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the

186. The Author makes no prediction as to when or if this will occur. Even Justice Stevens's dissent in *Dale*, the Supreme Court writing most willing to extend protection to homosexuals on this issue, stopped short of explicitly finding homosexuality to be a compelling state interest. See *Boy Scouts of America v. Dale*, 530 U.S. 640, 663–700 (2000).

187. See *Walker*, 453 F.3d at 863.

188. *Id.*

government.”¹⁸⁹ The Seventh Circuit stated that SIU could not identify a single purpose for forcing CLS to include homosexuals as members beyond SIU’s simple disagreement with its views about the rights of homosexuals and SIU’s hopes for “eradicating or neutralizing” such beliefs.¹⁹⁰

Clearly, the court in *Walker* felt SIU was interfering with protected speech purely because it disagreed with the message of that speech. This understanding causes a huge problem for law schools, because the truth in many cases is likely that the court was exactly right. Many schools would probably admit that they completely disagree with the viewpoints of groups that discriminate against homosexuals, and that they do not want to allow student groups to express such a message on their campus. This is almost exactly what FAIR argued in *Rumsfeld*.¹⁹¹ Since the Supreme Court has failed to recognize the protection of homosexuals as a compelling state interest, however, the frank reality is that this interest simply is not good enough. No school will be able to promote the kind of tolerance and inclusiveness it wishes when its argument boils down to the fact that it dislikes the message the challenging group wishes to send.

A new approach is necessary. Schools need to focus their efforts in a different direction. Instead of being dedicated purely to a one-sided, legislative attack on the eradication of conflicting viewpoints, schools need to find ways to make conversations about discrimination a two-way street, one upon which all viewpoints are allowed to travel. If free speech in universities truly is to operate in the marketplace of ideas,¹⁹² schools must realize they are merely a powerful market force, not the holders of a monopoly on the public discourse inside the hallways of America’s institutions of higher learning.

189. *Id.* (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995)).

190. *Id.*

191. *See, e.g., Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006) (“FAIR argues that the Solomon Amendment violates law schools’ freedom of expressive association. According to FAIR, law schools’ ability to express their message that discrimination on the basis of sexual orientation is wrong is significantly affected by the presence of military recruiters on campus and the schools’ obligation to assist them.”).

192. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“But when men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”); *see also Note, Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations*, 118 HARV. L. REV. 2882, 2884–85 (2005) (“The *real* marketplace of ideas operating at practically every public university . . . is actually more likely to be located in the university’s forum of student organizations than in its classrooms.”) (internal citation omitted).

This means that a respect for the free speech rights of all students is necessary.¹⁹³ In a world where might does not make right, the way to make headway in fighting discrimination will be to change people's minds, particularly by encouraging students to interact with people whose views do not match their own. In other words, the First Amendment should not be seen as a barrier to a school's inclusive goals—indeed, quite the opposite. The First Amendment itself can be the instrument for effecting inclusion and equality—the First Amendment in all its forms—debate, discussion, and co-existence. The remainder of this Comment will focus on ways for universities to encourage the acceptance of homosexuals, not merely by respecting the First Amendment rights of all, but by utilizing the powers afforded by the First Amendment itself to effect important changes.

2. Legislative Methods For Fighting Discrimination Will Prove Unviable Because Viewpoint-Neutrality is a High Hurdle

The right to expressive association is not an absolute right.¹⁹⁴ The state can pass a law that infringes on this right, but such a regulation will be subject to strict scrutiny.¹⁹⁵ However, the analysis above shows that the type of anti-discrimination policies employed in *Walker* are hardly on solid legal ground, and satisfying strict scrutiny will be unlikely. Schools need to realize that if they are currently employing anti-discrimination policies that apply to student organizations which prevent them from keeping homosexuals out of their groups, those policies are likely to be challenged as unconstitutional. As such, schools need to consider other ways to promote their interests.

In a legal universe where homosexual rights do not constitute a compelling state interest, there are two alternative approaches. The first, one that would appear to be difficult to bring to fruition, would be to find a purpose for ending the discrimination that is not related to viewpoint. The second, which would seem to be more viable, would be to find ways of promoting the viewpoint and messages that a school embraces without violating First Amendment rights by interfering with the message a particular student organization wishes to articulate.

In the context of universities, legislative alternatives to fighting discrimination, while perhaps not altogether unworkable, are limited in utility for two major reasons. First and most obviously, the purpose of eradicating discriminatory viewpoints, quite simply, exists.¹⁹⁶ Many schools will want to

193. See *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”).

194. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Walker*, 453 F.3d at 861.

195. *Walker*, 453 F.3d at 861–62 (internal citations omitted).

196. See *supra* note 191 and accompanying text.

get rid of discriminatory viewpoints simply because they disagree with them, and this is not a legitimate reason for interfering with the right of association. When this illegitimate purpose remains in the background, any other purpose (no matter how legitimate) that accomplishes the same goal will automatically be suspect. Any public university that finds a justifiable purpose unrelated to viewpoint for forcing inclusion of homosexuals in a student organization would still have to litigate the same battles regarding the illegitimate purposes that could account for the forced inclusion. Further, the challenging group will have just as strong a claim to the exercise of its First Amendment rights as it would in a more explicit attempt to legislate based on viewpoint. In light of the case law discussed within this Comment, such a battle is all but ensured of ending in a loss for the school.

The second reason finding a purpose unconnected to viewpoint is so difficult is related to the first, but deserves its own treatment. The problem here is that it seems highly unlikely that viewpoint can ever be entirely divorced from legislation aimed at ending discrimination against homosexuals. Because the Supreme Court has never found homosexual rights to be a compelling interest, any attempt to limit a group's right to exclude homosexuals is inherently expressing a viewpoint—that discrimination against homosexuals is wrong, and those who think it is not should be stopped from promoting their message.

Viewed in this light, it may seem the only difference between discrimination against women and discrimination against homosexuals is that the Supreme Court has found the women's cause to be compelling and has not for homosexuals. It is unlikely that *Roberts*, *Rotary*, or *New York State Club* would have come out any differently even if any of the claimants had a more powerful argument that the exclusion of women was a vital part of their expressive message that could not be expressed as well if women were among the group's members. Perhaps not even Alfalfa and his He-Man Women Hater's Club of *Little Rascals* fame could succeed on a claim of expressive association in the twenty-first century. Put simply, women's equality is now considered a more important interest than First Amendment rights of association, but it would be hard to argue that policies aimed at promoting the inclusion of women are actually devoid of viewpoint discrimination.

Walker illustrates this second point nicely. While it would appear at first glance that a public law school's interest in equal access to educational opportunity for all of its students is a viewpoint neutral purpose for a policy prohibiting discrimination, the *Walker* majority explicitly rejected that precise argument. The court found that, "[c]ertainly the state has an interest in eliminating discriminatory conduct and providing for equal access to opportunities. But the Supreme Court has made it clear that antidiscrimination

regulations may not be applied to expressive conduct with the purpose of either suppressing or promoting a particular viewpoint.”¹⁹⁷ In other words, the majority refused to distinguish the motive of equal access to educational opportunities from viewpoint discrimination.¹⁹⁸

Still, because the *Walker* court did not reject outright the idea of equal access to educational opportunity as an important interest, there may be seemingly plausible ways of getting around the viewpoint-neutrality barriers facing a school that wishes to prevent discrimination against its students. A derivative version of the SIU policy challenged in *Walker* that would come closest to eliminating concerns about its viewpoint-neutrality would be a blanket prohibition on discriminatory membership policies, one that did not list any protected categories of people. A policy requiring every recognized student organization to allow anyone who wanted to join to be accepted as a member would be facially neutral and would be very easy to apply even-handedly. Of course, such a law would still be subject to strict scrutiny because it would force some groups to associate with those they do not wish to in violation of their right to expressive association. However, the school could mount a much stronger argument that it had a compelling interest unrelated to the suppression of ideas with a policy that was applicable to all student organizations and all classes of students if it was neutral on its face. In the end, however, this sort of plan does little in the way of avoiding litigation since it would impinge the rights of every single student group with less than fully open membership policies.¹⁹⁹ It also does nothing to promote open debate rather than coercion through forced silence, a First Amendment value that should be at the forefront of a school’s concern.²⁰⁰

A more experimental approach a school could take would involve an attempt to shift the underlying focus of its anti-discrimination policy.

197. *Walker*, 453 F.3d at 863 (internal citations omitted).

198. *Id.* at 858. Because the SIU policy in *Walker* specifically mentions sexual orientation as a protected category, however, *Walker* probably should not be read unequivocally to stand for the premise that policies aimed at equal educational opportunity are always viewpoint based. The SIU policy guaranteeing equal educational opportunities does explicitly mention “sexual preference” as a protected category against discrimination, but it also includes the categories of race, color, religion, sex, national origin, age, disability, status as a veteran of the Vietnam Era, and marital status, implying that the difference between viewpoint discrimination and viewpoint neutrality often comes down to little more than whether or not the protection of a particular category of people constitutes a compelling governmental interest.

199. See *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations*, *supra* note 192, at 298–99 (explaining how many groups’ very existence depend on the ability to discriminate in membership, even if the person being discriminated against enjoys protected status or is exercising a constitutional right).

200. See *Whitney v. California*, 274 U.S. 357, 375–376 (1927) (Brandeis, J., concurring) (“Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.”).

Basically, a school would argue its policy is not aimed at viewpoint; it is aimed at the societal harm that discrimination against homosexuals inflicts. Insight into this idea can be gained from a somewhat unlikely source—feminist criticism of pornography—as seen in the famous obscenity case *American Booksellers Association, Inc. v. Hudnut*²⁰¹ and the scholarly criticism it provoked. *Hudnut* involved an Indianapolis anti-pornography ordinance that was struck down as an unconstitutional violation of the First Amendment in a Seventh Circuit opinion written by Judge Frank Easterbrook.²⁰² The law, drafted in large part by renowned feminist scholar Catherine MacKinnon,²⁰³ was quite novel. It made no reference to the general obscenity standards such as prurient interest, offensiveness, or standards of the community,²⁰⁴ but instead aimed to prevent only pornography that debased the equality of women.²⁰⁵

The law was struck down as unconstitutional for several reasons, but one of its fatal shortcomings was that it tried to eliminate this type of pornography by labeling it “low value,” while at the same time arguing it could be regulated because it “influences social relations and politics on a grand scale, that it controls attitudes at home and in the legislature.”²⁰⁶ Judge Easterbrook rejected this argument as precluding itself.²⁰⁷ The fact that pornography had the power to perpetuate the subordination of women “simply demonstrates the power of pornography as speech.”²⁰⁸ The power to influence attitudes proves speech has value, and since our “Constitution forbids the state to declare one perspective right and silence opponents. . . . the government must leave to the people the evaluation of ideas.”²⁰⁹ Implicitly, Judge Easterbrook’s contention about the power of pornography seems applicable to the power of the message that homosexuality is not an appropriate lifestyle, and this in turn is the reason legislation against such speech is so often rejected as an attempt to suppress the conveyance of ideas.

Embedded in Indianapolis’s argument, however, was the idea that pornography should be legislated against purely because of the harm it produces. Criticism of the *Hudnut* decision elicited support for this claim, with scholars arguing that such a law was constitutional because

201. 771 F.2d 323 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986).

202. *Id.* at 324, 332.

203. *See id.* at 325.

204. *Id.*

205. *Id.* In all, the Indianapolis ordinance prohibited six enumerated types of pornography involving the “sexually explicit subordination of women.” *See id.*

206. *Hudnut*, 771 F.2d at 331.

207. *Id.*

208. *Id.* at 329.

209. *Id.* at 325, 327.

[t]he legislation aimed at pornography as defined here would be directed at harm rather than at viewpoint. Its purpose would be to prevent sexual violence and discrimination, not to suppress expression of a point of view. . . . Because of its focus on harm, antipornography legislation would not pose the dangers associated with viewpoint-based restrictions.²¹⁰

A school could try to make take this argument by applying it to the social and educational harms of discrimination against homosexuals. Of course, there are major obstacles, not the least of which is that the argument has never been successfully made. Further, Professor Cass Sunstein notes that one of the major advantages of the argument in the context of pornography is that the government would have “concrete data to back its legitimate purposes,”²¹¹ an advantage a law school would not likely have on the issue of educational discrimination against homosexuals, data that would be difficult and expensive to obtain. There is also criticism of such an approach. For example, Professor Laurence Tribe argued that the distinction between harm and viewpoint was superficial and that “[a]ll viewpoint-based regulations are targeted at some supposed harm, whether it be linked to an unsettling ideology . . . [or] to socially shunned practices.”²¹² In light of all these impediments, this option does not seem particularly viable at present, but is certainly an interesting proposal that might be worthy of further exploration, especially as social science data emerges relating to these issues.

Before moving on, it is worth mentioning the necessity of neutrality in the application of the non-discrimination policies that do exist. It would be naïve to assume that every public law school will eliminate policies similar to SIU’s, since many schools will still seek to keep specific language regarding sexual orientation in their non-discrimination policies, regardless of the implications of doing so after *Walker*. This being the case, it should be noted, though it is seemingly obvious, that if a school insists on keeping policies similar to SIU’s, every student organization needs to be held to the same standards.

The *Walker* court took special note of arguments by CLS that other student organizations at SIU that held or applied exclusionary membership policies were never threatened with derecognition, saying this was “strong evidence that the policy has not been applied in a viewpoint neutral way.”²¹³ CLS complained about this treatment, and the court held that SIU’s response to these claims—“there is no evidence that other groups would continue to discriminate if threatened with nonrecognition,”—was a “nonstarter.”²¹⁴ As

210. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 612 (1986).

211. *Id.*

212. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 925 (2d ed. 1988).

213. *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 866 (7th Cir. 2006).

214. *Id.*

the court observed, the very point of having the policy is for it to act as a standing threat of derecognition to any student organization that is unwilling to comply.²¹⁵

It should be clear that any law school insisting on keeping similar policies should not, for any reason, apply them haphazardly or unevenly. There is simply no rationale for inviting the legal battles likely to ensue, beyond the even more obvious considerations of promoting fairness and honesty in policy-making. Even if a law school could find a court that would be open to disagreement with the decisions in *Walker* or *Dale*, a substantial problem remains if other student organizations are allowed to break the policy being challenged without repercussion, and the school would stand to lose an important legal triumph. There is simply no straight-faced way to argue that a policy is not aimed at viewpoint if it is not applied neutrally and even-handedly.

In the end, while it may not be impossible, finding a viewpoint-neutral way of legislatively promoting homosexual rights in opposition to the First Amendment rights of those who wish to express views hostile to the inclusion of homosexuals is certainly a daunting task. In light of the hurdles detailed above, and the possibility that an interest in equality of educational opportunity may not be good enough, it may not be worth the energy and costs involved with making an argument for a school's interest in promoting tolerance or inclusiveness. Thus, in a legal universe where homosexual rights do not constitute a compelling interest and in which little possibility exists for an antidiscrimination policy that proves viewpoint-neutral, we must look elsewhere for a means by which law schools might successfully end discrimination against homosexuals in their student organizations.

3. Value-Promotion Without Infringement—Effectively Using the First Amendment To Promote Tolerance

A second alternative—finding ways to promote a public law school's interest in ending discrimination against homosexuals in their student organizations without impinging on a group's First Amendment rights—is legally plausible, in this Author's opinion. The following analysis will attempt to outline basic plans a law school could take to promote a message of inclusivity, along with some possible legal and practical implications of such actions. This analysis is animated by the conviction that the law school should always attempt to promote its values without impinging on the beliefs and rights of any of its students.

215. *Id.* at 86.

a. Tailoring Policy Language Towards Inclusiveness

One possibly feasible (but complicated) alternative would be for a law school to attempt to tailor a policy to the exact holdings of *Dale* and *Walker*. Such a policy would read (rather clumsily) that “No student organization may refuse membership to any person on any basis that would not interfere with the organization’s ability to exercise its First Amendment rights.” This sort of policy would technically allow an organization to express its message, but to do so it would have to ensure its organizational policies were shaped to meet the burden of proving why accepting a particular person would infringe on its rights. One of Justice Stevens’s major arguments in his dissent in *Dale* was that the Boy Scouts had not proven that keeping homosexuals out of its midst affected its ability to express its message.²¹⁶ While it is unlikely certain faith-based organizations (such as CLS) would have as difficult a time proving this as did the Boy Scouts in *Dale*,²¹⁷ the balance is shifted towards more inclusive interests when the group asserting the right has a burden of proving that its message will actually be impaired by inclusion of homosexuals. Still, at least two major obstacles stand in the way of a policy of this sort. The first relates to a potential legal deficiency, and the second to a concern over the intended function of the judiciary.

First, a policy such as outlined above would clearly be subject to vagueness challenges. Vagueness is a consideration of procedural due process that aims to ensure people or entities are aware of the criminal consequences of their actions by providing a “sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.”²¹⁸ A law or policy that is void for vagueness is one where a person “of common intelligence must necessarily guess at its meaning and differ as to its application”²¹⁹ The example policy statement laid out above would likely be vague because an organization probably could not be expected to understand exactly where the line should be drawn as to which exclusionary

216. See *Boy Scouts of America v. Dale*, 530 U.S. 640, 685 (2000) (Stevens, J., dissenting). Justice Stevens writes “[a] State’s antidiscrimination law does not impose a ‘serious burden’ or a ‘substantial restraint’ upon the group’s ‘shared goals’ if the group itself is unable to identify its own stance with any clarity.” *Id.*

217. CLS had a stronger case in this respect than did the Boy Scouts, as evidenced by the sparse treatment this subject received in the *Walker* opinion. This is nowhere more apparent than in the fact that the dissent in *Walker* limits its discussion of the expressive association claim to an argument that SIU did not require the CLS to accept anyone instead of claiming the CLS was unable to show the admittance of a homosexual to its membership would impair its message. See *Walker*, 453 F.3d at 873 (Wood, J., dissenting).

218. *Jordan v. De George*, 341 U.S. 223, 231–32 (1951). The doctrine is not applied exclusively to criminal statutes. Rather, it applies to statutes or policies that involve a “penalty.” See *id.* at 231.

219. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

policies are necessary to express its message and which policies would not interfere with its expressive message, without more guidance than is given in the example policy statement. Since the whole point of this type of policy would be to avoid the pitfalls of viewpoint discrimination that more concrete direction would entail, adding any guiding details may defeat the purpose and supposed benefits of this strategy.

Second, such a policy would create a very real concern over questions of judicial function; most importantly, it may be no part of a judge's role to determine the subjective belief of an organization concerning whether the inclusion of an individual impairs its First Amendment rights. This view of judicial function is one that sees a court's job as entailing the duty to make a legal determination of whether a group's rights have been infringed. Nothing in that function involves a hunt for how sincere or consistent a group's belief is, though that should obviously play a role in the determination of how seriously the challenged statute impinges upon the organization's rights. This is precisely the argument Chief Justice Rehnquist made in *Dale* when preaching deference to a group's claim that its rights have been infringed upon:

The New Jersey Supreme Court analyzed the Boy Scouts' beliefs and found . . . that the exclusion of members like Dale "appears antithetical to the organization's goals and philosophy." *But our cases reject this sort of inquiry; it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent.*²²⁰

Chief Justice Rehnquist went on to state that an inquiry to "determine the nature of the Boy Scouts' expression with respect to homosexuality" was not necessary,²²¹ and that they could not "doubt that the Boy Scouts sincerely holds this view."²²² While Justice Stevens clearly did not accept this argument,²²³ his dissent failed to distinguish between adjudicating how seriously a challenged law impinges on a group's rights in the context of strict scrutiny review, which is clearly a relevant determination,²²⁴ and passing judgment over what amounts to little more than an organization's subjective belief that it has a cause of action.

220. *Dale*, 530 U.S. at 650–51 (internal citations omitted) (emphasis added).

221. *Id.* at 651.

222. *Id.* at 653.

223. For just one example, see *id.* at 684 (Stevens, J., dissenting). Justice Stevens wrote, "The evidence before this Court makes it exceptionally clear that BSA has, at most, simply adopted an exclusionary membership policy and has no shared goal of disapproving of homosexuality." *Id.*

224. Because one of the prongs of the strict scrutiny test is whether the state's interest can be "achieved through means significantly less restrictive of associational freedoms," the strength of an organization's claim will directly affect how closely tailored the law must be to restrict the least amount of associational freedom possible. See *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 861–62 (7th Cir. 2006).

In light of these objections to an imprecise and indefinitely worded policy, it would seem that despite its obvious benefits, such a choice may lead to litigation that would result in the invalidation of the policy as vague, and a different path should be utilized.

b. University-Endorsed Campaigns For Tolerance

One option to limit discrimination against homosexuals that could clearly be employed without violating expressive rights would be for a law school to take an active stance and campaign for its own views on open membership without actually requiring groups to abide by those views. There is absolutely nothing that would prohibit a school from exercising its own First Amendment rights by voicing its own opinions on the benefits of open and non-discriminatory student organizations.

The *Walker* majority noted that a school is free to “promote all sorts of conduct in place of harmful behavior.”²²⁵ We see government advocate particular opinions as better than other views all of the time without passing a law that holding the alternative viewpoint is illegal, whether through television commercials urging college football fans to send their children to their favorite university or billboards advocating the purchase of toll road passes for quicker and easier travel on the state’s highway systems. Each of these promotes a course of conduct as preferable to other alternatives, which inherently involves a statement that a particular way of thinking is also preferable to another—University A offers a better learning environment than does University B, it is better to not have to stop at a toll booth and search for change than it is to do so—but neither requires someone to articulate a message they do not wish to, and thus these promotions do not violate rights of expressive association.

Law schools do this sort of thing all of the time. What school does not have hundreds of advertisements in its hallways for job opportunities it views as worthy of obtaining or does not hold workshops expressing its view of the best method of impeaching a witness? There is simply no reason a public law school could not, and should not, choose to advocate what it feels to be a proper viewpoint—that student organizations should have open membership policies and that discrimination against homosexuals is improper. As such, schools should consider hosting lectures, debates, and discussions that promote an interest in non-discrimination. This choice violates the rights of none and advances persuasion as a method for changing attitudes rather than coercion.

225. *Id.* at 863 (quoting *Hurley v. Irish-American Gay, Lesbian, and Bi-Sexual Group of Boston*, 515 U.S. 557, 579 (1995)).

c. Open Attendance

Of course, many schools may wish to do more than merely promote their own viewpoint, and there is at least one substantive, legislative method of furthering such goals whereby a public law school could implement a policy advancing its desires for reducing discrimination against homosexuals in its student organizations without violating First Amendment rights.

Perhaps the best substantive policy option is the idea that a school could likely enforce a regulation requiring all student organizations to allow anyone who is a member of the school to attend group meetings, so long as the school does not force the group to offer membership to those who do not affirm the group's shared message (an "open-attendance" policy). While this was not precisely the controverted issue in *Walker*, the decision implicitly supports the idea that merely allowing someone who does not agree with or affirm a student organization's beliefs or policies to attend a meeting does not interfere with the group's rights of expressive association.²²⁶

The *Walker* court held, "When the government forces a group to accept for membership someone the group does not welcome and the presence of the unwelcome person 'affects in a significant way the group's ability to advocate' its viewpoint, the government has infringed on the group's freedom of expressive association."²²⁷ Read literally, this language supports the argument that if the government is not forcing a group to accept members it does not wish to recognize, no rights of expressive association have been violated.

The rhetoric in *Dale* lends itself to the same argument—that a group is never stopped from promoting its message simply because someone who disagrees is present. The Court focused purely on forced inclusion in a group's membership: "*Forcing a group to accept certain members* may impair the ability of the group to express those views, and only those views, that it intends to express."²²⁸ This, too, suggests a group's rights are only hindered when it is forced to enroll unwanted individuals as official members.

This argument for open attendance hinges on the idea that non-members of a group do not share in the group's collective identity and thus have no voice in expressing the group's message. For all intents and purposes, such individuals are no different than any other person in the world. Any message that individual expresses, whether explicitly through words or implicitly through actions or identities, is his or her message alone.²²⁹ At least two

226. *Id.* at 861. The court uses language specific to forced membership in explaining why mandatory inclusion is a violation of the First Amendment: "When the government forces a group to accept for membership someone the group does not welcome. . . ." *Id.* (emphasis added).

227. *Id.* (emphasis added).

228. *Dale*, 530 U.S. at 648 (emphasis added).

229. See *supra* notes 89–92 and accompanying text. In *Rumsfeld*, FAIR tried to challenge this notion and the court unanimously rejected FAIR's contention. It specifically stated that the

contentions support this conclusion—the rejection of the theory that “mistaken belief” regarding a group’s message by outsiders constitutes a violation of the First Amendment, and repudiation of any differentiation between outsiders who attend a group’s meeting and outsiders who do not.

First, the possibility that mistaken belief by outsiders as to what the message of a group actually is should not be considered ample grounds to support a claim for violation of expressive association. This claim has already been implicitly rejected in First Amendment jurisprudence. Directly on point is *Dale* (a case protecting and arguably expanding the rights of expressive association), which noted only that including unwanted individuals *as members* kept a group from promoting “those views, and only those views, that it intends to express.”²³⁰ This arguably amounts to a rejection of the idea that allowing mere attendance sends any message at all. Further support is found in *Hurley*, even though the likelihood of mistaken belief must seem inherently present, and the Court discusses that exact possibility.²³¹ The reality is that the case did not turn on such a contention. The parade organizers did not win because the presence of outsiders held the potential to send a message they did not wish to express—they won precisely because their presence actually did send such a message.²³² Thus, in this Author’s opinion, *Hurley* was much different than mere attendance at a group’s meetings; it amounted to the bestowing of a de facto membership upon individuals the association did not wish to include. This is strong proof that the attendance of nonmembers at a group’s private meetings does not send any message and has no bearing on a group’s rights of expressive association.

Second, a distinction between the speech of non-member attendees and non-member, non-attendees is superficial. An outsider who has no share in the control of a group does not become an insider merely by attending meetings. If the only benefit of membership in a group could be obtained through attendance at meetings, it is unlikely the group is organized around expressing a message as defined by the Court in *Dale*, and thus, would not be entitled to the protection of expressive association.²³³ No one would argue that the speech of a non-member of a group who has never attended that particular

Army’s presence at a school did not impair the law schools’ message. By analogy, a law school’s message should not effect a student organization’s message.

230. *Id.*

231. *Hurley v. Irish-American Gay, Lesbian, and Bi-Sexual Group of Boston*, 515 U.S. 557, 575 (1995) (“GLIB’s participation would likely be perceived as having resulted from the Council’s customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well.”).

232. *Id.* at 576 (“[W]hen dissemination of a view contrary to one’s own is forced upon a speaker intimately connected with the communication advanced, the speaker’s right to autonomy over the message is compromised.”).

233. *See Dale*, 530 U.S. at 648–50.

group's meetings or had any real association with the group amounts to speech by the group. When the only difference between outsiders and their relationship to a group is attendance at meetings, there is no real difference at all.

To be sure, there is room for argument against a policy that would require open attendance. Issues such as privacy, discriminatory application of policies, and violation of a group's potential rights of intimate association are beyond the scope of this discussion, but there are some concerns worth referencing in further detail.

First, open attendance, while certainly a step towards heightened inclusivity, does not achieve exactly what many schools will actually desire—the potential for full inclusion of all students in all educational opportunities. For example, the CLS policies in *Walker* would actually permit open attendance.²³⁴ Related to this, the level of interest students would show in attending the meetings for groups of which they cannot become members, who do not share their values, and who do not actually desire their presence, is certainly uncertain.

Most importantly, there are other ways a group could still mount an expressive association claim. Whenever the government interferes with the internal affairs or structure of an association in a way that impairs the group's ability to expound its message, a potential violation of its right to expressive association is at hand.²³⁵ It is not hard to imagine a scenario where the attendance of non-members at meetings could impair a group's ability to express its message apart from any of the concerns discussed previously. To mention a few possibilities, it could become significantly more difficult to conduct group meetings in an orderly fashion, or members might feel less camaraderie or trust in the organization and be afraid to express opinions that might be viewed as unpopular by those not espousing the group ethos. Further, forced inclusion has never been viewed as the only infringement upon expressive association,²³⁶ and it is not completely implausible that open attendance could be added to the list.

Despite these concerns, open attendance is an attractive option for schools desiring to take a proactive approach to making their student organizations more inclusive. Open attendance goes far in meeting a school's goals of student-group equality without violating the First Amendment rights of those students, thus satisfying what should be two paramount objectives of any law school. While the prospect of litigation always remains a possibility, a school wishing to legislate against discrimination on the basis of sexual orientation

234. See *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 858 (7th Cir. 2006).

235. See *Dale*, 530 U.S. at 648.

236. Mazzone, *supra* note 19, at 651–55.

would have a defensible position with an open-attendance policy, unlike many of the options outlined above.

4. What *Should* Law Schools Do?

In light of the above discussions, it is this Author's belief that it will not be possible to completely eradicate discrimination against homosexuals among student organizations in public law schools without violating the First Amendment in a legal landscape where sexual orientation does not constitute a compelling state interest. The simple truth is that the relevant Supreme Court case law since *Healy* has only protected the expressive association rights of women and groups who are trying to prevent homosexuals from becoming members. With these thoughts at the forefront, it is this Author's contention that the best method of fighting discrimination in public law school student organizations is for schools to adopt an open-attendance policy similar to the one described above, combined with a prominent public campaign of university-endorsed speech promoting the school's preference for equality and inclusivity among its student organizations.

It is possible to promote a school's interest in inclusiveness without violating the First Amendment, and this should be every school's goal. If one believes that First Amendment rights "acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission,"²³⁷ then it is hard to support any plan where the price is abrogation of expressive rights. Further, none of the activities and freedoms protected by the First Amendment could be "vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."²³⁸ Thus, as important as equality of opportunity is to the educational environment of America's public law schools, a dynamic protection of the First Amendment rights of its students is of even greater consequence.

The acceptance, or potential acceptance, of homosexuality in the mainstream of American culture, should not be enough to force those who disagree to give up their First Amendment rights. As stated by Chief Justice Rehnquist in the majority opinion of *Dale*:

Indeed, it appears that homosexuality has gained greater societal acceptance. But this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views. The First Amendment protects expression, be it of the popular variety or not. . . . And the fact that an idea may be embraced and advocated by increasing numbers of people is all the

237. *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989).

238. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)

more reason to protect the First Amendment rights of those who wish to voice a different view.²³⁹

Chief Justice Rehnquist reminds us that the First Amendment is not subject to the changing viewpoints on what constitutes popular morality in America.

In the environment of America's public law schools, these words are difficult to contextualize. Law schools often consider themselves to be the starting point of social change and enlightenment, but they also almost certainly believe themselves to be the ultimate protectors of the First Amendment. Added to this dilemma is the fact that both sides of the issue see themselves as the minority voice, a voice so many law schools consider to be the most worthy of protection. It is this predicament that makes the fight against discrimination in student organizations so difficult, but this is also what makes the solution offered here so viable. Schools need to balance their desire for inclusivity with a healthy respect for the First Amendment rights of every student, and this combination affords them the chance to do both. By adopting the open-attendance policy, they maintain the requisite deference to the First Amendment while legislating against what they consider unacceptable behavior, and by endorsing a campaign of their own speech, they put their money where their mouth is. The message this sends is that the school believes discrimination against homosexuals is wrong, but instead of simply banning dissenting opinions and coercing compliance, they are relying on success through the merit of their argument, a concept critical to the educational mission of any law school—that of winning advocacy.

Admittedly, the situation here is tricky, and the First Amendment does not always provide easy answers, but Justice Brandeis once explained how this pivotal freedom should operate:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine [T]hey knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. *Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of*

239. *Dale*, 530 U.S. at 660 (citations omitted).

*governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.*²⁴⁰

Perhaps the answer to the problem of discrimination in student organizations is not as clear as we might like, but the open-attendance policy respects Justice Brandeis's vision of the core meaning of the First Amendment. Public law schools should feel free to promote their viewpoints and legislate to enforce them, but they must never do so at the cost of their students' rights, for such a price threatens to bankrupt the First Amendment, surely a tragedy of great magnitude.

CONCLUSION

Christian Legal Society v. Walker confirmed that the *Dale*-era of expressive association continues to govern litigation between state attempts to prevent discrimination against homosexuals and the private associations that wish to prevent homosexuals from being a part of their groups. Public law schools across the country need to realize that until the protection of homosexuals is considered a compelling interest, they will likely not be able to stop most of their student organizations from discriminating against the school's homosexual students merely by the use of a nondiscrimination policy. The open-attendance policy outlined here, combined with an active campaign of university-endorsed speech advocating tolerance, provides these schools with a viable method for promoting their interests while maintaining a healthy respect for the First Amendment rights of each of their students. This is a balance that will never be easy to strike, but in a time where so many American students with different values and viewpoints must coexist with one another, it is imperative that schools do whatever they can to ensure their students have every available means of striking the balance between First Amendment rights and tolerance.

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240. *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) (citations omitted).

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