

A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on “Equal Access” for Religious Speakers and Groups

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I. EQUAL ACCESS: THE NEXT GENERATION

A. *The Receding Past*

It's taken some time to get the idea through their heads — and of course some of them still just don't get it — but maybe now, finally, recalcitrant lower court judges and civil libertarians will now come to accept a proposition that some of us thought obvious all along: The Establishment Clause does not authorize, and the Free Speech and Free Exercise Clauses do not *permit*, government discrimination against religious speakers or religious speech on the basis of religious content, viewpoint, or speaker identity — ever.¹

For the past twenty-five years or so, the central legal issue at the intersection of free speech and religion has been the issue (or cluster of issues) that can generically be labelled “equal

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¹ The number of potential “*but see*” cases in the lower courts that could be cited with respect to this proposition is a shocking tribute to the hostility of the state and federal bench over the past two decades (and of those who have argued this position before these judges) to the equal status of religious speech. For selected examples, see *infra* note 22.

access.” Do the religion clauses of the First Amendment require exclusion of religious speakers or groups from public fora (or “limited” public fora) or public benefits, solely on account of the religious content of their speech or purposes? The premise underlying the question was that the Establishment Clause might create an exception to usual First Amendment principles of freedom of speech when the speech (or speaker) in question is religious. Over approximately the last fifteen years, marked from the date of the pivotal case of *Widmar v. Vincent*,² that premise has been repeatedly and decisively rejected in a series of Supreme Court decisions, including two in the 1994-95 Term.

*Rosenberger v. Regents of the University of Virginia*³ and *Capitol Square Review and Advisory Board v. Pinette*⁴, the Supreme Court’s two 1995 religious speech cases, should be regarded as having finally settled the point. *Rosenberger* held that the Free Speech and Free Press Clauses forbid a state university (the University of Virginia) from discriminating in its funding of student publications on the basis of the student groups’ religious viewpoint. Having made the decision to sponsor student publications reflecting a broad range of subjects and viewpoints not necessarily reflecting the views of the University of Virginia, university officials could not exclude from eligibility a student publication simply because it reflected a pervasive religious viewpoint. Equal access, according to the Court in *Rosenberger*, means no discrimination in eligibility for a right, benefit, or privilege — including *funding* — on the basis of religious viewpoint.⁵ *Pinette*, the other important religious speech case of the Term, involved the Ku Klux Klan’s request to post a large Christian cross on the public square in front of the Ohio state capitol during Christmas season. The Court held that the Establishment

² 454 U.S. 263 (1981).

³ 115 S. Ct. 2510 (1995).

⁴ 115 S. Ct. 2440 (1995).

⁵ See *Rosenberger*, 115 S. Ct. at 2519 (noting that viewpoint-based restrictions are not proper). As I discuss below, the Court’s opinion is hedged and tentative as to how this principle would play out in analogous funding contexts, suggesting that its holding might be narrowed. See *infra* notes 23-24, 137-50 and accompanying text. But the core principle of nondiscrimination against religion is emphatically reaffirmed and, significantly, applied to require direct government funding of private religious expression on the same basis as private expression of a non-religious nature. See *Rosenberger*, 115 S. Ct. at 2520 (holding that denying funding is denying free speech).

Clause does not trump the free speech right of private persons or groups to symbolic expression on public property merely because of the religious content of that private expression.⁶

At one level, there is nothing extraordinary about the holdings in *Rosenberger* and *Pinette*. They merely reaffirm, in new contexts, an old principle: Private expression is private expression, and does not cease to remain so just because the expression occurs on government property generally open to the public as a forum for expression (*Pinette*) or, somewhat more controversially, in a government-funded "limited public forum" (*Rosenberger*), unless there is some *other, independent* reason for attributing the private expression in question to the sponsorship of the government. *Rosenberger* and *Pinette* are merely the latest in a long line of Supreme Court decisions standing essentially (and sometimes quite explicitly) for the fundamental First Amendment proposition that government may not discriminate against individuals' or groups' speech on account of its religious nature or the speaker's religious identity.

Widmar v. Vincent,⁷ decided by vote of eight to one in 1981, is the Cornerstone case standing for this proposition. *Widmar* involved a claim to equal access made by a public university student religious group that wished to meet using campus facilities on the same terms as other student groups.⁸ The Court

⁶ See *Pinette*, 115 S. Ct. at 2440. As with *Rosenberger*, the holding in *Pinette* is somewhat hedged. Seven Justices held that the Establishment Clause of the First Amendment does not supply a justification for censoring the public display of a cross by a private group, in a public park, pursuant to an equal access policy. But the Justices were divided on the reasoning: four Justices thought that an equal access policy *per se* defeats any Establishment Clause objection. *Id.* at 2447-50 (plurality opinion). Three Justices would leave open the question of whether there might be some circumstances in which an unattended religious display, even though privately sponsored, might create an appearance of government "endorsement" of religion. *Id.* at 2457-62 (Souter, J., concurring in part and concurring in judgment). These Justices agreed that this possibility could not justify censorship of the private religious expression but instead would require that government pursue more narrowly-tailored means to avoid such a mistaken impression. *Id.* Furthermore, even this action would only be necessary if endorsement would be mistakenly perceived by a "reasonable, informed observer." *Id.* at 2452 (O'Connor, J., concurring in part and concurring in judgment) (emphasis added). Given the narrowness of the concurrences' hypothesized exceptions to the plurality's *per se* rule, it is unclear whether the different approaches have any real-world substantive difference.

⁷ 454 U.S. 263 (1981).

⁸ *Id.* at 265-67. The group was named "Cornerstone," and was Christian in its beliefs and composition. The name of the group was drawn from the New Testament claim that

held that campus religious group expression and association is protected by the Free Speech Clause on the same basis as other student groups' expression and association. Only a "compelling" interest can justify content-based discrimination (including discrimination on the basis of religious content). The Establishment Clause does not supply such a justification, for the straightforward reason that equal treatment of private religious speakers does not constitute anything near an Establishment Clause violation.⁹

Mergens v. Board of Education,¹⁰ decided by vote of eight to one in 1990, upheld Congress' extension of the right of equal access, recognized in *Widmar* with respect to public university students, to students in public high schools who wish to meet for religious purposes using school facilities on the same terms as other student groups. The right to equal access in that case was supplied by the 1984 federal Equal Access Act.¹¹ The Court therefore found no need to reach the claim of a constitutional right of equal access paralleling *Widmar*.¹² The Court turned back attempts by local school districts to define the terms of the Equal Access Act so narrowly as to give school officials essentially unbridled discretion as to which student groups could meet and which ones could be excluded — an attempt that, if successful, would have rendered the Act essentially hortatory.¹³ The Court instead gave the Act a broad construction so as to effectuate its purpose of ending discrimination against religious expression

Jesus Christ is the fulfillment of the Old Testament prophecy that "[t]he very stone which the builders rejected has become the head of the corner," an allusion to the new covenant of God through Jesus Christ. *Matthew* 22:42 (RSV) (quoting *Psalms* 118:22-23).

⁹ *Widmar*, 454 U.S. at 270-75.

¹⁰ 496 U.S. 226 (1990).

¹¹ 20 U.S.C. §§ 4071-4074 (1994).

¹² *Widmar*, 496 U.S. at 247. Justices Marshall and Brennan would have recognized a First Amendment right of "equal access," in addition to the statutory right. *See id.* at 262 (Marshall, J., concurring in judgment). Marshall and Brennan cautioned, however, that the school may be required to take additional steps to make clear that the student religious expression was not sponsored or endorsed by the school, *id.* at 262-63, a position somewhat echoed by the *Pinette* concurrences. *See supra* note 6.

¹³ *Id.* at 244-45. The precise issue in *Mergens* was the meaning of the term "noncurriculum related" in that portion of the Equal Access Act specifying that the requirement of equal access is triggered whenever a school district receiving federal financial assistance allows one or more "noncurriculum related" student groups to meet on school premises during noninstructional time. *Id.* at 237-48.

and in order to prevent school districts from circumventing the objective of the Act through attempted definitional manipulation.¹⁴ Significantly, the Court unanimously rejected the argument that the Act violates the Establishment Clause.¹⁵

And in *Lamb's Chapel v. Center Moriches Union Free School District*,¹⁶ decided unanimously in 1993, the Court held that community groups could not be excluded from equal access to public school facilities for after-hours uses simply because of their religious identity or the religious viewpoint they advanced in their use of the school's facilities. Exclusion of groups based on their religious viewpoint is a plain and egregious violation of the Free Speech Clause for which, the Court held with dispatch, the Establishment Clause supplies no excuse.¹⁷

In light of *Widmar*, *Mergens*, and *Lamb's Chapel*, the results in *Rosenberger* and *Pinette* should have been entirely uncontroversial. All that those decisions do is apply the principles of the *Widmar* line to two directly analogous circumstances: discrimination against religious expression in a limited government program funding private expression of myriad subjects and viewpoints (*Rosenberger*); and discrimination against religious symbolic expression in a public forum where other privately sponsored symbolic expression had long been permitted (*Pinette*).¹⁸ Neither case involves a significant extension of the *Widmar* principle. *Rosenberger's* equal access to funding follows naturally from *Widmar*, *Mergens*, and *Lamb's Chapel*, each of which involved a claim of some type on public resources by a religious group.¹⁹

¹⁴ *Id.* at 244-45.

¹⁵ *Id.* at 247-53 (plurality opinion); *id.* at 260-62 (Kennedy, J., concurring in part and concurring in judgment); *id.* at 262-70 (Marshall, J., concurring in judgment). Justice Stevens's dissent did not argue that the Equal Access Act was unconstitutional, but was limited to statutory interpretation. *Id.* at 270-91.

¹⁶ 113 S. Ct. 2141 (1993).

¹⁷ *Id.* at 2148-49.

¹⁸ The speaker in question in *Pinette* was a local organization of the Ku Klux Klan. Justice Thomas's concurrence is surely correct that the Klan's erection of the cross "is a political act, not a Christian one." *Pinette*, 115 S. Ct. at 2450 (Thomas, J., concurring). The Court analyzed the case as one involving religious expression, however, for purposes of considering and rejecting the proposition that the religious content of the expression invalidated it under the Establishment Clause. *Id.* at 2440-50.

¹⁹ See Michael S. Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 859 n.211 (1993) [hereinafter *Lemon is Dead*] (arguing that funding of religious groups pursuant to religion-neutral policy is indistinguishable in principle from financial benefit of equal

Pinette is even easier. The Court had long treated parks as public fora for expression, including religious expression; and the problem of potentially mistaken attribution was present, but not considered problematic, in those cases as well as in *Widmar*, *Mergens*, and *Lamb's Chapel*.²⁰

The only thing extraordinary about the two cases is that there were any dissents at all — indeed, that cases of this sort continually have to be litigated in the first place. But old habits and hardened attitudes die hard. Our post-War modern tradition of hostility to equal inclusion of religion in the public square — a tradition bred by a severe judicial overreading of the Establishment Clause²¹ — has frequently spilled over into outright discrimination against religious speakers and groups in terms of access to public fora and public privileges of various kinds, producing a steady stream of litigation over these types of issues during the past two decades.²²

access to facilities); see also *Rosenberger*, 115 S. Ct. at 2523 (adopting essentially identical reasoning).

²⁰ See *Lamb's Chapel*, 113 S. Ct. at 2148-49; *Mergens*, 496 U.S. at 248; *Widmar*, 454 U.S. at 271 n.10; see also *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

One concern of the dissenters in *Pinette* (and, to a lesser degree, the concurring Justices in *Pinette*) was that the display of symbolic messages by private groups, unattended by the actual physical presence of the speakers themselves, creates a greater potential for mistaken attribution. See *Pinette*, 115 S. Ct. at 2464 (Stevens, J., dissenting); *id.* at 2453 (O'Connor, J., concurring in part and concurring in judgment). The greater concern with mistaken attribution for religious symbols than for other forms of religious expression occurring on government property does not seem justified by any clear or strong principle, however. One does not know, *just by looking*, that the government has not sponsored a religious rally occurring in a public park, or that a teacher's neutral classroom presence does not connote state sponsorship of student religious groups.

The heightened concern over religious symbols might be explained as a hangover from the Court's badly splintered views (and, consequently, incoherent holding) in the case of *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), which produced five different opinions and a final disposition rejected in principle by a majority of seven Justices: a seasonal display of a Christian nativity scene in a Pittsburgh courthouse was deemed unconstitutional, *id.* at 602; a Jewish menorah outside another municipal building in Pittsburgh was held constitutional. *Id.* at 619-20.

²¹ For a helpful walk through the Establishment Clause's interpretive history since the 1940s, see Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 117-34 (1992). See also *Lemon is Dead*, *supra* note 19, at 800-19 (charting demise of *Lemon* test).

²² In addition to *Widmar*, *Mergens*, and *Lamb's Chapel* — themselves near-unanimous or unanimous decisions where at least one and sometimes both lower courts had ruled that religious expression must be excluded from equal treatment — one can see illustrations of

lower courts' and public officials' resistance to religious equality in a long line of decisions. In the public school student speech context alone, see *Good News/Good Sports Club v. City of Ladue*, 28 F.3d 1501 (8th Cir. 1994) (reversing district court ruling that limiting Christian club's access to school facilities on school days did not violate club members' freedom of speech or religion), *cert. denied*, 115 S. Ct. 2640 (1995); *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244 (3d Cir. 1993) (rejecting school district policy discriminating against student religious clubs); *Hedges v. Wauconda Community Sch. Dist.*, 9 F.3d 1295 (7th Cir. 1993) (rejecting school district policy discriminating against student-distributed literature of religious nature); *Garnett v. Renton Sch. Dist. #403*, 865 F.2d 1121, 1127 (9th Cir.) (construing Equal Access Act to authorize discrimination against religious student groups, if school describes all other student groups as "curriculum related"), *modified*, 874 F.2d 608 (9th Cir. 1989), *vacated*, 110 S. Ct. 2608 (1990) (*Garnett I*), *on remand* 772 F. Supp. 531, 535-38 (W.D. Wash. 1991) (construing Equal Access Act to authorize state law-based discrimination against religious student groups on basis of religious content of their expression), *rev'd*, 987 F.2d 641 (9th Cir.), *cert. denied*, 114 S. Ct. 72 (1993) (*Garnett II*); *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 560 (3d Cir. 1984) (holding that Establishment Clause requires discrimination against student religious group meetings at public schools), *vacated on jurisdictional grounds*, 475 U.S. 534 (1986); *Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646, 649-50 (11th Cir. 1984) (finding that faculty supervised student religious group meeting on school property violated Establishment Clause); *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038, 1048 (5th Cir. 1982) (holding that Establishment Clause forbids voluntary student religious group meetings at public schools), *cert. denied*, 459 U.S. 1155 (1983); *Brandon v. Board of Educ.*, 635 F.2d 971, 978 (2d Cir. 1980) (remarking that before-school voluntary religious meetings were "too dangerous to permit" on same terms as other voluntary student speech), *cert. denied*, 455 U.S. 983 (1981); *Perumal v. Saddleback Valley Unified Sch. Dist.*, 243 Cal. Rptr. 545, 551 (Ct. App.) (upholding school rule prohibiting student dissemination of religious advertisements or literature to other students on ground that Establishment Clause requires suppression of student religious expression at public schools), *cert. denied*, 488 U.S. 933 (1988); *Johnson v. Huntington Beach Union Sch. Dist.*, 137 Cal. Rptr. 43, 52-53 (Ct. App.) (finding that on-campus meetings of Bible study club during school day violated Establishment Clause), *cert. denied for lack of jurisdiction*, 434 U.S. 877 (1977); *Trietley v. Board of Educ.*, 409 N.Y.S.2d 912, 916-17 (App. Div. 1978) (stating that proposed Bible club meetings in public high schools would violate Establishment Clause). *Cf. Settle v. Dickson County Sch. Dist.*, 53 F.3d 152, 156 (6th Cir.) (upholding censorship of student individual research paper topic because teacher believed that it would express religious viewpoint, where permissible scope of topics otherwise unrestricted), *cert. denied*, 116 S. Ct. 518 (1995).

In one very recent case, one federal appellate judge (dissenting) would have held, rather amazingly in light of *Mergens*, *Lamb's Chapel*, *Rosenberger*, and *Pinette*, that student religious expression (religious group meetings during a school's lunch hour open campus) must be discriminated against in a public school setting because of its religious content. *See Ceniceros v. San Diego Unified Sch. Dist.*, 66 F.3d 1535, 1541 (9th Cir. 1995) (Lay, J., dissenting) (stating that majority's "syllogistic reasoning may seem sound, but the basic flaw in the argument's conclusion is the failure to acknowledge that religious activity in a controlled public school environment can never stand on equal footing as other secular noncurriculum activities"). The district court had reached a similar conclusion in an unreported opinion. (The reader should be apprised that I was counsel for the students in the *Ceniceros* case.)

The above list addresses only one corner of the problem: discrimination against

Rosenberger and *Pinette* give reason to hope that we may finally be seeing the beginning of the end of that era — a doctrinal generation in which a strict discriminationist (often misleadingly labelled “strict separationist”) view of the relationship of church and state has held considerable sway. In the dissents in *Rosenberger* and *Pinette*, one can hear the whines and whimpers of the dying discriminationist decades of the 1970s and 1980s.²³ In

student speech, at public schools, on the basis of religious content or viewpoint. Another huge area of discrimination has involved the *Lamb's Chapel* issue of discrimination against religious organizations or institutions in terms of access to or rental of government facilities. See, e.g., *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703 (4th Cir.), cert. denied, 114 S. Ct. 2166 (1994); *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366 (3d Cir.), cert. denied, 498 U.S. 899 (1990); *Concerned Women for Am. v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989); see also *Crowder v. Housing Auth.*, 990 F.2d 586 (11th Cir. 1993) (reversing district court, which had upheld housing authority's order that residents of public housing may not hold voluntary Bible studies in common areas).

²³ *Rosenberger*, 115 S. Ct. at 2533 (Souter, J., dissenting) (joined by Stevens, Ginsburg, and Breyer); *Pinette*, 115 S. Ct. at 2464 (Stevens, J., dissenting); *id.* at 2474 (Ginsburg, J., dissenting).

Justice Souter's *Rosenberger* dissent posits “the primacy of the no-direct-funding rule over the evenhandedness principle” as justification for viewpoint-based discrimination against religious groups in government-funded programs. *Rosenberger*, 115 S. Ct. at 2544. There are two very serious problems with this approach. First, it rests on a thoroughly erroneous reading of the original meaning of the Establishment Clause, a reading that owes more to the Court's earlier precedents than to the actual history of the adoption of the First Amendment. See *id.* at 2528-33 (Thomas, J., concurring) (disagreeing with historical analysis of Justice Souter's dissent); Brief for Petitioners at 36-39, *id.*; see also Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 335 n.110 (1986) [hereinafter *Religion, Equality, and the Constitution*]. Second, Justice Souter's formulation reduces the free speech clause's absolutely bedrock prohibition of viewpoint-based discrimination to a mere “principle” of “evenhandedness” — a mildly shocking move, but a necessary one in light of where Souter is headed with the argument — and then subordinates it to the primacy of the mistaken no-direct-funding rule. As I have argued elsewhere, it makes no sense to read the several provisions of the First Amendment as contradicting each other in principle. *Religion, Equality, and the Constitution, supra*, at 313, 323-25; *Lemon is Dead, supra* note 19, at 801-02; accord LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-2, at 1156 (2d ed. 1988); McConnell, *supra* note 21, at 117-18. It makes still less sense to read one of the clauses (the misread Establishment Clause) as trumping the others (Free Speech and Free Exercise) in the event of contradiction. *Lemon is Dead, supra* note 19, at 843-45 n.171.

The position of the dissenters in *Pinette* is even harder to defend. In essence, the dissenters' argument reduces to the claim that for the government to allow private expression (or at least certain types of private expression) on public property is the same as to endorse it. See *Pinette*, 115 S. Ct. at 2469 (Stevens, J., dissenting) (stating that “the Establishment Clause prohibits government from allowing, and thus endorsing, unattended displays that take a position on a religious issue”) (emphasis added). The premise here is

Justice O'Connor's concurrences in the two cases, one can sense the uncertainty of someone trapped between two paradigms, struggling to reconcile a public commitment to stare decisis²⁴ with a line of cases she publicly has acknowledged is deeply wrong.²⁵ There is obviously more to be said (and litigated) in

badly mistaken. As Professor Doug Laycock wrote a decade ago, "[t]he proposition that government cannot censor speech, and therefore that it does not endorse everything it fails to censor, is not complicated. High school students can understand the proposition if it is explained to them." Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 15 (1986). The Court embraced this reasoning in *Mergens*. See *Mergens*, 496 U.S. at 250 (stating that high school students are mature enough to understand distinction between endorsed and permitted speech). It would seem that the same principle applies in *Pinette*. The most that can be said is that this principle might need to be explained to observers of the cross in *Pinette* — thus the position of the concurrence that the possibility of posting a disclaimer is a less restrictive means than censorship for accomplishing any legitimate state interest in avoiding mistaken attribution. See *Pinette*, 115 S. Ct. at 2457, 2461-62 (Souter, J., concurring in part and concurring in judgment) (discussing benefits and drawbacks of disclaimers).

²⁴ See *Adarand v. Peña*, 115 S. Ct. 2097, 2114-17 (1995) (opinion of O'Connor, J.) (discussing need for "special justification" when overruling precedent); *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (affirming "essential holding" of *Roe v. Wade*, 410 U.S. 113 (1971), on stare decisis grounds).

²⁵ During her career on the Court, Justice O'Connor has been a sharp critic of the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See, e.g., *Aguilar v. Felton*, 473 U.S. 402, 421-22 (1985) (O'Connor, J., dissenting) (criticizing test and arguing that doctrine of stare decisis does not require adherence to Court's decisions under it); cf. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (proposing "endorsement" test as modification of *Lemon*). In more recent years, Justice O'Connor has been much more reticent in her Establishment Clause views, writing increasingly narrow opinions and trying to accommodate contradictory precedents. The result has been a decrease in clarity and significant tension among her Establishment Clause opinions. Compare *Bowen v. Kendrick*, 487 U.S. 589, 622-24 (1988) (O'Connor, J., concurring) (joining majority opinion upholding inclusion of religious institutional recipients of direct government grants to sponsor message of sexual abstinence, but suggesting broadly, with dissenters, that any use of government funds that advances religious message violates Establishment Clause) with *Rosenberger*, 115 S. Ct. at 2525 (O'Connor, J., concurring) (joining majority in holding that exclusion of religious groups or viewpoints from general university funding program is unconstitutional but suggesting that this principle conflicts with principle that government may not fund religion, thus preventing any statement of categorical principle); compare also *Aguilar*, 473 U.S. at 421, (O'Connor, J., dissenting) (arguing that Establishment Clause does not forbid public teachers from providing remedial education on private religious school facilities, at government expense) with *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2497-98 (1994) (O'Connor, J., concurring in part and concurring in judgment) (finding that Establishment Clause forbids creation of limited-purpose public school district to provide remedial education for students in village with predominantly religious membership and no public schools, in order to redress problems created by *Aguilar*).

these areas.²⁶ The pattern of precedents and the Court's incrementalist nature assure that the process will continue to be a two-steps-forward-one-step-back dance for several years to come. But the essential intellectual battle has been won: There is no "religion exception" to the Free Speech Clause or the Free Press Clause; religious speakers and groups are entitled to the same equal access to public fora, public facilities, and public funds as other private speakers and groups receive.²⁷

B. *The Future*

On the (perhaps premature) assumption that these issues have now (or soon will) come to be regarded as settled, I would like to address what I believe to be the next generation of equal access issues: equal access *subject to what terms and conditions*? May government condition religious speakers' or groups' equal access to public fora and public benefits on the religious person's or group's willingness to accede to some government regulation, requirement, or restriction, where such a condition would require the religious group to abandon or compromise an aspect

Justice O'Connor's "message of endorsement" test has been criticized by several scholars. See McConnell, *supra* note 21, at 147 (criticizing Justice O'Connor's endorsement test); *Lemon is Dead*, *supra* note 19, at 815-16 (same); Steven D. Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the No Endorsement Test*, 86 MICH. L. REV. 266 (1987) (same). Justice O'Connor seems to have abandoned this attempt at what she now disparagingly calls "a Grand Unified Theory that would resolve all the cases that may arise under a particular clause," *Kiryas Joel*, 114 S. Ct. at 2498-99, in favor of a case-by-case, context-specific approach. See *Rosenberger*, 115 S. Ct. at 2525-26 (stating that Court decisions must be fact specific).

²⁶ Congress recently has taken up a number of proposals for a "Religious Equality Amendment" to the Constitution, which would clarify that the Establishment Clause does not authorize, and the Free Speech and Free Exercise Clauses do not permit, discrimination against religion or religious speech. See generally *Religious Liberty Bill of Rights, Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 103d Cong., 2d Sess. (June 8, 1995).

²⁷ For reasons I have explained at length elsewhere, I think that a logical implication of this conclusion is that the much-maligned *Lemon* test for determining a statute's validity under the Establishment Clause is intellectually dead. Even if the Court does not formally bury the *Lemon* test, it has already ceased to rely on it as a controlling theory of constitutionality under the Establishment Clause. See *Lemon is Dead*, *supra* note 19; see also *Kiryas Joel*, 114 S. Ct. at 2487 (avoiding reliance on *Lemon* test); *id.* at 2498 (O'Connor, J., concurring in part and concurring in judgment) (noting and approving Court's abandonment of reliance on *Lemon*); *Lee v. Weismann*, 505 U.S. 577, 587 (1992) (declining to invoke *Lemon* test).

of its religious identity, message, autonomy, or belief? May it do so if the condition is a formally neutral one that is applied equally to all speakers or groups without regard to the content of their speech or the substance of their views?

To put the matter concretely, and in terms of the real cutting edge "equal access" issues of the last part of this decade: May the government require, as a condition of equal access for student religious groups at public high schools and universities, that the groups pledge not to discriminate in their membership or officership on the basis of "religion" or "creed," where such a condition is imposed on all student groups pursuant to an across-the-board nondiscrimination statute or regulation? May a state university apply such a nondiscrimination requirement as a condition for a student group to receive student *funds* (as the University of Virginia did in a part of the regulations not at issue in *Rosenberger*²⁸)? And, in what is likely to become a very important issue during the next fifteen years, may the government condition a private religious school's receipt of a voucher on its acceptance of conditions or regulations concerning curriculum, personnel, or student admissions?

Many First Amendment liberals, even those who support the results in *Rosenberger*, *Pinette*, *Widmar*, *Mergens*, and *Lamb's Chapel*, will answer "yes, of course." Government may impose neutral, across-the-board regulations on those who seek equal access to government fora and government funds. After all, isn't equal access *equal* access? Religious speakers and groups, no more or less than non-religious speakers and groups, must accept the burdens that go with the benefits, so long as those benefits are applied alike to all. Old guard strict discriminationists will heartily agree. After all, they think that religious speakers and groups should be excluded from equal benefits in the first place; surely, at the very least, religious speakers must take the thorn with the rose.

Religiously-motivated separationists tend to agree. The assumption (or worry) that the discriminationists are right lies behind their opposition to things like parochial school aid, voucher plans, and sometimes even equal access for student Bible study

²⁸ See *Rosenberger*, 115 S. Ct. at 2514 (noting university's requirement that student organization must "pledge not to discriminate in its membership").

groups on public school campuses. To accept the benefit of equal access (the argument goes) is to strike a Faustian bargain with hell: the government lures religion in with the promise of goodies and then uses the acceptance of the goodies as leverage to regulate religion, to create strength-sapping dependency, to force religious groups to secularize themselves and, in general, subtly to coerce religious speakers and groups to compromise their religious messages, their religious identities, and their religious missions. To use a familiar religious allusion, religious speakers and groups who sign up for government-provided benefits and use government-sponsored public fora will have sold their birthrights for a mess of pottage. Screwtape (to mix metaphors) could not have done better.²⁹

The fear is real and not at all unreasonable, for government frequently does try to play the devil in this regard. My question in this paper, however, is whether government *legitimately* may play such a role. This question is one that takes on increased importance as religious speakers and groups are coming to be granted equal access to government fora and benefits of various kinds. As one set of issues — the fundamental rule of equal entitlement and equal access — is increasingly coming to be settled, the next wave of issues — access on what terms and conditions? — is increasingly coming to be raised.

My proposition in this paper is that the answer to this next generation of questions is (or should be) just about as clear as the answer to the first set was (or should have been) for decades, once certain basic, long-settled principles of First Amendment law are applied in a straightforward manner without a preconceived bias against religious speech and religious exercise. The operative rule is supplied by the doctrine of “unconstitutional conditions”: Government may not condition one legal right, benefit, or privilege on the abandonment of another legal right, benefit, or privilege, the relinquishment of which the government would not have authority to command directly,

²⁹ The character of “Screwtape” comes from C.S. Lewis, an Oxford Christian writer and literature professor of this century, whose *The Screwtape Letters* are an imaginative series of epistles exchanged between Uncle Screwtape, a senior devil, and one of his junior associates here on the scene, concerning how best to manipulate natural human tendencies so as to lead humans to abandon faith in God. C.S. LEWIS, *THE SCREWTAPE LETTERS* (MacMillan 1961) (1942).

unless the condition is directly germane to (in the sense of being practically inseparable from) the nature of the right or benefit itself.³⁰

The difficult issues in applying the unconstitutional conditions doctrine come in defining the exact nature of the “right” which is being conditioned, so as to provide a determinate, baseline point-of-reference against which the constitutionality of the condition may be judged. In the “equal access” context, however, the baseline is fairly well settled: Government may not enforce religion-based content or viewpoint exclusions from a limited public forum. Where such a forum exists, *any* condition or limitation that limits the right of access is a departure from the baseline. Thus, as applied specifically to issues of religion in the public forum, I believe that the doctrine of unconstitutional conditions leads to the following rule: Government may impose no substantive condition on equal access for religious speakers and groups unless the government could impose such a condi-

³⁰ The formulation in the text, though itself rather complicated, is still simplified. Recent scholarship has devoted great attention to the doctrine of unconstitutional conditions and explored the numerous potential refinements and corrections of my restatement of the doctrine. Nonetheless, the basic statement of the doctrine, while concededly imperfect, commands a broad consensus. See, e.g., Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (stating that “[t]he doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether”); Michael W. McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255, 257 (1989) (stating that “[a]ll agree that sometimes, though not always, the denial of a government ‘benefit,’ a form of assistance that would not have been available under common law and which could be repealed *in toto* by the legislature at any time, is a ‘penalty’ on the exercise of a constitutional right”); see also Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6-7 (1988) (describing doctrine of unconstitutional conditions as holding that government may not impose certain conditions on granting privileges or benefits, even if government has absolute discretion to deny privilege or benefit altogether); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1327-47, 1351-78 (1984) (detailing long history of unconstitutional conditions doctrine and suggesting analytical framework); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-46 (1968) (stating that “[d]octrine declares that whatever an express constitutional provision forbids government to do directly, it equally forbids government to do indirectly.”). Cf. Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 989 (1991) (describing issue as “when is the government’s refusal to fund a constitutionally protected choice an impermissible ‘burden’ on the exercise of the right”).

tion directly (that is, independent of the presence or absence of the benefit), without violating some other constitutional or statutory right,³¹ except for conditions inherent in the creation of the limited public forum itself.³² A religious group's acceptance

³¹ In addition to constitutional rights, the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994), has become an important quasi-constitutional statutory right that, because of its nature as a "super-statute," should be treated the same way for purposes of application of the doctrine of unconstitutional conditions. See Michael S. Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 251-54 (1995) [hereinafter *A RFRA Runs Through It*] (explicating RFRA's "super-statute" character with relation to other federal and state law).

³² This last proviso reflects the exception for conditions that are directly "germane," in the strong sense of being inextricably intertwined with the nature of the right or benefit itself (here, access to a forum or common fund). For example, a state university that created a limited public forum for campus student organizations might validly impose some conditions that are directed to assuring that organizations granted access are in fact *student* organizations, even where such a condition might otherwise be thought to limit some other constitutional right (such as freedom of expressive association). Cf. Equal Access Act, 20 U.S.C. § 4071(c)(5) (providing that schools may limit ability of non-school personnel to direct or regularly attend student club meetings in public secondary school limited open forum). This exception, however, is narrow. A state university (or other government entity) ought not be permitted to circumvent the general rule against unconstitutional conditions by the expedient of simply defining its "limited" public forum in terms of the precise condition that is substantively unconstitutional. For example, a state university may not define its *Widmar*-style limited public forum as extending to "all student groups that subscribe to condition X" if X is an unconstitutional condition (such as a prohibition on religious expression).

Unfortunately, it is not clear that present public forum doctrine would forbid such an outcome, though this is less a problem with my theory than with the imprecision of the Court's public forum doctrine. The difficulty comes from the Court's three-category formulation of public forum doctrine, which seems, in theory, to permit government to "close" or even "limit" a forum by the use of whatever description it sees fit. As Professor Douglas Laycock has written, "[t]he implication is that the government can convert a limited public forum to a nonpublic forum without any reason whatever, or even because of hostility to speech." Laycock, *supra* note 23, at 46-47. As Laycock correctly observes, "[i]t makes little sense to apply the compelling interest test to a category of cases and then let the government opt out of the category at will." *Id.* I would add that it similarly makes little sense to apply the compelling interest test to a category of cases and then let the government have broad discretion to manipulate the criteria that define the boundaries of the category. Yet the Court's decisions in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), and *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788 (1985), come dangerously close to sanctioning exactly that sort of manipulation. The Court's statutory decision in *Mergens*, the high school equal access case, takes a step in Professor Laycock's direction. The Court's opinion (which cites Laycock's article generously) interpreted the Equal Access Act's "limited open forum" provision, which is triggered by a school's practice of allowing "noncurriculum related" student groups to use school premises, to forbid definitional manipulation by school districts of the parameters of their forum so as to deem all favored groups curriculum-related and to exclude all others on the pretense that the school does not have a limited open forum. See *Mergens*, 496 U.S. at 246-

of rights of “equal access” thus provides no greater justification for government regulation of religious speakers, groups, or institutions than government would possess in any event. Because of religious speakers’ and groups’ *other* First Amendment rights under the Free Speech and Free Exercise Clauses, I submit that government may not condition a religious speaker’s or group’s equal access to a public forum, public benefit, or any otherwise generally available privilege on the religious speaker’s or group’s abandonment of rights of religious autonomy, identity, self-definition, self-governance, or religiously-motivated conduct. In short, the Constitution does not permit the government to play Screwtape.

Though this principle is reasonably straightforward, its application to religious speakers and program beneficiaries is controversial and is likely to remain so for a good many years. In the remainder of this paper, I will address three different contexts in which this type of issue is beginning to arise, taking them up in roughly the same order in which the Supreme Court ad-

47. Though the statute and the Constitution are not congruent on what constitutes a “forum,” the Court’s attitude in *Mergens* (where the manipulation was fairly obvious) suggests the possibility of a similar attitude toward governmental manipulation of the “limitations” of a “limited public forum” as well.

The “unconstitutional conditions” doctrine and “limited public forum” analysis are two peas in a pod. Both are doctrines about conditional rights that government could deny entirely. Both are about equality of treatment with respect to whatever scope of rights government decides to grant. And both pose the problem of how to frame a doctrine that purports to impose constitutional limits on government’s ability to condition access to a benefit or privilege which it is conceded to have power to condition in some respects. The “unconstitutional conditions” doctrine may thus be a useful way of viewing the problem of forum manipulation under the Court’s public forum doctrine: the definition/condition of the forum should be treated the same way as would a forum defined *more* broadly (that is, without the condition). Then, the definitional limitation may be understood as a collateral *condition* of access. For example, a limited forum “defined” by a university as extending to “all student groups that do not advocate communism” is equivalent to a forum for “all student groups” plus the *condition* that such groups must “not advocate communism.” Where such a condition would be an unconstitutional interference with equal access to the forum as more broadly described, so is any such definitional “limitation” on the “limited” public forum unconstitutional. The condition or limitation should be severed from the forum, and access provided without regard to the condition. Conversely, where a condition is constitutional, or simply cannot be understood as collateral to or severable from the very nature of the forum, then it provides a valid limitation on equal access. For example, a university forum limited to “student groups” is permissible because the condition — that the groups be comprised of “students” — is directly germane to the forum and, in any event, content and viewpoint neutral. *See infra* text accompanying notes 70-71.

dressed their parallel situations in the first round of modern equal access issues (1981-1995). In Part II, I address unconstitutional (or otherwise illegal) conditions on equal access for student religious groups at public colleges and universities — paralleling the context in which the Supreme Court recognized the right of equal access in the foundational case of *Widmar v. Vincent* in 1981.³³ In doing so, I will focus on what has become the recurrent problem of the use of “nondiscrimination” requirements to forbid campus religious groups from maintaining religious membership or officership requirements.

In Part III, I address unconstitutional conditions on equal access for student religious groups at public high schools — paralleling the Court’s 1990 decision construing and upholding the Equal Access Act in *Mergens*.³⁴ The use of “nondiscrimination” requirements as a tactic to exclude religious groups from the benefits of the Equal Access Act may well prove to be the cutting edge issue in this area for the second half of this decade — an issue typified by an important New York case called *Hsu v. Roslyn Union Free School District*, currently working its way through the lower federal courts.³⁵

Finally, in Part IV, I will offer some preliminary thoughts on what is likely to be the equal access/unconstitutional conditions issue of the future, foreshadowed by the Court’s recent decision in *Rosenberger* and by the growing popularity of “voucher” proposals for education funding: May government attach regulatory strings (that it could not otherwise impose) to the receipt of a voucher by private religious schools?

II. A FUNNY THING HAPPENED ON THE WAY TO THE STUDENT ACTIVITIES OFFICE: THE CASE FOR STUDENT GROUP MEMBERSHIP AUTONOMY

My first illustration comes from my personal experience as an informal advisor to the Christian Legal Society student chapter at the University of Minnesota Law School. The story I’m about

³³ 454 U.S. 263 (1981).

³⁴ *Mergens*, 496 U.S. at 226.

³⁵ 876 F. Supp. 445 (E.D.N.Y. 1995), *aff’d in part, rev’d in part*, Nos. 95-7311, 95-7333, 1996 WL 272859 (2d Cir. May 15, 1996).

to tell is true. The names have not been changed to protect the innocent (if innocents there be), because I think the story would lose some of its force and reality if I made the example some fictitious midwestern university. I tell the story not to embarrass my school — which, in the end, did the right thing (though perhaps for the wrong reasons) — but because my discussions with national religious freedom groups and with national campus religious ministry organizations convince me that the Minnesota situation is increasingly common: public universities around the nation are applying university, local, or state “nondiscrimination” codes to campus religious groups that make use of university facilities on the same basis as other campus student groups (pursuant to constitutional rights recognized in *Widmar*) and finding that such groups are in violation of the requirement that they not discriminate on the basis of *religion*. As a consequence, they are threatened with the loss of their First Amendment rights of equal access.³⁶

The Minnesota experience is representative both of the pattern in which these disputes arise and of the types of arguments on both sides. The University of Minnesota, like many state colleges and universities, has an “equal opportunity” or “nondiscrimination” policy. Minnesota’s Equal Opportunity Statement (EOS) reads as follows:

The University of Minnesota is committed to the policy that all persons shall have equal access to its programs, facilities, and employment without regard to race, religion, color, sex, national origin, disability, age, veteran status, creed, marital status, public assistance status, or sexual orientation.

In the fall of 1994, two campus Christian organizations, the Christian Legal Society (CLS) and Graduate Christian Fellowship (GCF) had run-ins with University officials over their alleged violation of this policy. The violation in each case consisted of the group’s “Statement of Faith” (set forth in its constitution or

³⁶ The General Counsel for Inter-Varsity Christian Fellowship, a prominent organization of Christian student groups at college campuses around the nation, reports that these situations are brought to her attention at a rate of 5-10 a year, and that this likely constitutes the tip of the iceberg. So far as I am aware, there have been no reported decisions involving this issue at the college level. See generally Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369, 369 (1994).

bylaws) and the requirement that voting members and officers of the organization subscribe to the purposes and goals of the organization as reflected in that statement of faith. A student group must have its constitution "approved" by the Student Activities Office in order to possess "registered" group status. Registered group status carries with it certain rights and benefits to which all student organizations at the University are entitled, including equal access to University facilities, reduced rental rates for certain University facilities, reduced advertising rates in the *Minnesota Daily* (a campus newspaper) and eligibility for funding from various University sources, including the student activities fund.

An official in Minnesota's Student Affairs Office determined that the groups' statement of faith requirements, and similar provisions in the constitutions of dozens of other campus religious groups (Christian, Jewish, Muslim, and perhaps others), were in probable violation of the Equal Opportunity Statement. The CLS and GCF groups were told that they would be refused registered student group status (and its attendant benefits) unless they removed such requirements from their constitutions and bylaws. The students were thus put to a choice: abandon their statement of faith as a requirement for officers and voting members; or forfeit their rights as a student group to "equal access" to university facilities.³⁷

For a number of reasons, the groups decided that they could not abandon their respective statements of faith.³⁸ First, the statement of faith was, in each case, a *statement* of the group's common faith: having the statement itself as part of its constitution was an important part of each group's expression of its

³⁷ As is not infrequently the case when dealing with university bureaucrats, the students had some difficulty pinning down who was responsible for this policy. The official in the Student Activities Office told leaders of the student groups that he had been told he must reject such constitutions by officials in the University Attorney's Office. The University Attorney's Office in turn initially said that the Student Activities Office had made that determination on its own, and that the students should take up their beef there because the University Attorney's Office was not responsible for the Student Activities Office's interpretations of the EOS and would neither embrace nor disaffirm that interpretation.

³⁸ For purposes of clarity, I should note that what follows is a description of the actual reasons of the student members of these particular religious groups for *wishing to assert* their legal rights. The legal rights themselves are not necessarily limited by the motivations for asserting them. The scope of the legal rights is a separate question.

collective identity. Second, having officers who subscribed to the statement of faith — that is, who were committed to the group's message and identity — was considered vital to that identity. The leaders of the Christian Legal Society were especially clear in this regard: they wanted to maintain a distinctive identity and they considered a requirement that officers share a commitment to that distinctive Christian identity both an important way of maintaining that identity *and* an important statement in its own right. They were not afraid that "hostiles" (atheists, heretics, schismatics) would somehow "take over" the group — though I have heard that argument from other religious groups, who seem genuinely to fear that persons hostile to their message would seek to thwart it by invading the group and "capturing" its access rights or otherwise disrupting the activities of the group.³⁹ Quite the contrary, the Christian Legal Society wanted affirmatively to *invite* and *welcome* nonbelievers to its meetings, as an important part of its outreach, but simultaneously to maintain its distinctively Christian identity. This leads to the third reason why the group's members considered it important to maintain their statement of faith requirement: they did not want to *remove* such a requirement at the (unlawful) direction of government authorities; they did not want implicitly to *disaffirm* their commitment to a certain set of religious principles. Their attitude was that this was an exceedingly mild temptation to abandon their commitment to Jesus Christ, in comparison with what their Christian forbearers had endured at the hands of many. How could they disown the importance of their commitment to Jesus Christ for a few dollars and an e-mail account, when early Christians did not disown Christ under torture and death? The Christian Legal Society was convinced that it would be wrong in principle — scandalous, in the sense of being detrimental to their message — to let government officials tell them how religious they could or could not be as a collective entity.⁴⁰

³⁹ See *Hsu*, 876 F. Supp. at 455-56. Apparently, there was anecdotal evidence that some student groups at the University of Minnesota had attempted to "invade" others, and that student religious groups and student political groups had been the targets of such tactics in the recent past.

⁴⁰ For an excellent explanation of the religious freedom interest in avoiding "scandal," see John H. Garvey, *Cover Your Ears*, 43 CASE W. RES. L. REV. 761, 763-65 (1993).

To give away the end of the story (which, for academic purposes, is not as important as the legal analysis in the middle), the University finally, after seven months of legal wrangling, changed its “mind” and agreed to let campus religious groups impose religious requirements on their voting members. In doing so, the University did not agree that the position taken by the Student Activities Office was legally wrong; it just agreed not to take that position.⁴¹ In my judgment, the University backed down only because it came to believe that these student groups actually would file a lawsuit against the University, and that that would be politically embarrassing. The issue is likely to recur, however, and the students’ arguments for membership autonomy thus present issues of great interest and importance to those interested in the implications of such issues for system of freedom of expression.⁴²

A. *Nonconstitutional Arguments*

To interpret a university “Equal Opportunity Statement” or nondiscrimination policy — even one mandated for public accommodations or public universities as a matter of state or local law — as applying to voluntary campus *student* groups *within* the university is stretching things a bit. The University of

⁴¹ The Associate General Counsel wrote:

[R]egistered student group status will not be withheld from any student group on the ground that the group’s constitution contains a statement of faith or religious principles to which officers and voting members of the group are expected or required to subscribe. This letter does not necessarily reflect agreement with any or all of the arguments stated in your December 5, 1994 letter to General Counsel Mark Rotenerg.

Letter from Kathryn B. Brown, Associate General Counsel, University of Minnesota, to Michael Paulsen (April 18, 1995) (on file with author).

After agreeing that student groups could maintain religious membership requirements, the Student Affairs Office asserted a new objection to the Christian Legal Society’s Constitution. The CLS Constitution provided that, in the event of a dispute among the membership as to a point of interpretation of the Constitution, the national Christian Legal Society would be called on to resolve the dispute. The Student Affairs Office maintained that it should resolve any such dispute and that it was improper for such organizations to be “controlled” by “outside” organizations. The University backed down under the threat of a lawsuit. *Healy v. James*, 408 U.S. 169 (1972), discussed below, squarely controls this issue.

⁴² The reader should be aware that I was the author of the opinion letter presenting these arguments to the University.

Minnesota's EOS, for example, says that all persons shall have "equal access to *its programs, facilities, and employment,*" without regard to race, religion, sex, sexual orientation, and other specified categories.⁴³

There is at least substantial room for doubt whether the activities of student organizations can fairly be deemed programs *of the University*, so as to be subject to the policy of nondiscrimination with respect to access to "its" programs and facilities. For starters, it seems an unnatural reading of the language of the Equal Opportunity policy. More basically, such an interpretation seems inconsistent with a key premise underlying the Supreme Court's decision in *Widmar v. Vincent*, holding that state universities must, under the Free Speech Clause, accord equal access to student religious groups and that such access does not violate the Establishment Clause. In rejecting the University of Missouri's Establishment Clause objection to equal access, the Court observed that the programs, activities, and expression of campus groups cannot fairly be attributed to the university itself.⁴⁴ "[A]n open forum in a public university does not confer any imprimatur of state approval" because an equal access policy "would no more commit the University . . . to religious goals' than it is 'now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,' or any other group eligible to use its facilities."⁴⁵ The whole point of *Widmar* is that, in a limited public forum created by the government, the student speakers are not the government and their speech is not the government's. It follows that student religious groups' statements of faith are, at bottom, *their* statements of faith; likewise, their programs and activities are *their* programs and activities, not the University's.

Rosenberger makes clear that this remains true even if the student organizations are funded, according to some neutral formula, by the University itself, as part of its creation of a limited

⁴³ See *supra* p. 669 for the full text of the Equal Opportunity Statement.

⁴⁴ *Widmar*, 454 U.S. at 270-74; see *id.* at 274 (holding that "an open forum at a public university does not confer any imprimatur of state approval on religious sects or practices").

⁴⁵ *Id.* at 274 (quoting *Chess v. Widmar*, 635 F.2d 1310, 1317 (8th Cir. 1980), the court of appeals opinion in that case).

public forum. As in *Widmar*, the fact that the expression remains that of a private, student group was essential to the Court's conclusion in *Rosenberger* that the Establishment Clause is not violated by neutral inclusion of the group in the limited public forum's attendant benefits — in *Rosenberger*, including funding.⁴⁶

In light of *Widmar* and *Rosenberger*, it is somewhat strange to argue that the programs of every student group on campus are programs of the University.⁴⁷ Indeed, quite to the contrary, *Widmar* seems to compel the conclusion that the relevant University "program" is its decision to allow a broad range of student groups to use university facilities and funding — that is, its decision to *have* a "limited public forum" for student groups.⁴⁸ If anything, to exclude a religious student group from access to this limited public forum because of its statement of religious beliefs or its commitment to maintaining religious standards for its leadership constitutes discrimination against student religious groups on the basis of "religion" and "creed," in violation of the EOS (and, as explained below, of the First Amendment as well).

⁴⁶ *Rosenberger*, 115 S. Ct. at 2522-25. The Court in *Rosenberger* noted that the University of Virginia had "taken pains to disassociate itself from the private speech involved in [that] case." *Id.* at 2523. Would the situation be different if the University had, quite the contrary, declared that all student organizations were "sponsored" by the University? Putting aside the evident absurdity of such a declaration as a meaningful statement in most such situations (where left-wing and right-wing student political organizations are both similarly "sponsored"), see *Widmar*, 454 U.S. at 274 n.14, the Court's decision in the high school equal access case, *Mergens*, suggests that the state may not create its own Establishment Clause problem and thereby seek to justify exclusion of religious groups, simply by declaring that all student groups are sponsored by the school. If that "sponsorship" is really nothing more than equal access to a school-created limited forum for voluntary student groups, it is not sponsorship for purposes of the Establishment Clause. See *Board of Educ. v. Mergens*, 496 U.S. 226 (1990). Thus, while it is clearly true that a student group's programs and activities are not the programs or activities of the university itself when the university says they are not, it is probably not less true that the programs and activities of student groups cannot be deemed those of the university itself *whenever* the situation is one of a true limited public forum rather than that where government is itself speaking or "enlists private entities to convey its own message." *Rosenberger*, 115 S. Ct. at 2518.

⁴⁷ In fact, University of Minnesota officials had, in the recent past, explicitly disclaimed that student groups were covered by the Equal Opportunity Statement and made public statements disassociating the University from the positions expressed, and activities conducted by, controversial or discriminatory student groups. See, e.g., THE MINNESOTA DAILY, Mar. 9, 1992, at 1 (describing University position with respect to "White Student Union").

⁴⁸ *Widmar*, 454 U.S. at 267-70, 272.

B. Constitutional Issues

1. Free Speech

The technical, "statutory" arguments are suggestive of the much larger issue at the core of such disputes: do campus religious groups have a constitutional *right*, grounded in the First Amendment, to maintain doctrinal requirements for their members, or are such requirements a pernicious form of discrimination that university officials have a legitimate interest (perhaps even a "compelling" one) in prohibiting?

Widmar suggests that the former answer is the correct one. In *Widmar*, the Court held that a state university, having made the decision to recognize and make its facilities available to a broad spectrum of student groups, could not deny such status and benefits to a particular student group because of the group's religious purpose and identity or because the nature of its speech and activities is religious. For a state university like Minnesota to withdraw "registered" student group status (the decision that carries with it the bundle of rights of the type at issue in *Widmar*) because of a religious group's statement of faith and membership decisions based on that statement of faith, is to engage in very nearly the precise conduct that *Widmar* forbids: discrimination on the basis of a group's religious nature and membership. Indeed, one who was more suspiciously inclined might be led to think that the use of "nondiscrimination" requirements in such a manner is a thinly-veiled attempt to circumvent *Widmar* because of disagreement with its equal-access-for-religion result. So viewed, the use of nondiscrimination requirements as a means to exclude religious groups because of their religious character is little different in principle from white primaries and literacy tests. Even if that is not the actual purpose of the policy, the consequence of validating such an approach would be to permit those public universities that desired to avoid *Widmar* to do so under the guise of application of a "neutral" nondiscrimination policy.

Some, no doubt, will regard this characterization as unfair. Nondiscrimination laws and rules are familiar and well-accepted. Few these days would take seriously an employer's argument that racially discriminatory employment practices are protected as

“free speech.”⁴⁹ What makes the application of nondiscrimination requirements to campus student groups any different?

Several things. First, the application of nondiscrimination requirements in this context is much more directly a regulation targeted at *expression*. Under *Widmar*, students’ constitutional rights to freedom of speech include the right to “equal access” to a university-created forum for student groups, without discrimination on the basis of the religious content of the group’s expression. A religious group’s “statement of faith” is unquestionably part of that group’s religious expression. Less clearly, but no less convincingly, a religious group’s policy of requiring that officers of the group adhere to that statement is also an integral part of that group’s religious expression. At the very least, it is an important means of maintaining the character of the group that produced the “statement.” Application of a nondiscrimination requirement, so as to alter a group’s composition, thus impacts directly on the group’s expression. So applied, the requirements are, in the classic taxonomy of the late Melville Nimmer, “anti-speech” rather than a “non-speech” regulations.⁵⁰ The speech restriction in the statement-of-faith context is not merely incidental to regulation of conduct having nothing to do with any ideas being conveyed by that conduct (as is more the case with employment discrimination). Rather, the regulation appears to be directed chiefly at the assertedly discriminatory *ideas* entailed in the statement of faith. Moreover, the speech interest of campus student groups seems much more connected with the identity of the group than the “speech interest” of the hypothetical racist employer is to the operation of most businesses. In a sense, adherence to the tenets of a religious student

⁴⁹ “Hostile environment” claims, however, may have pushed the envelope of “discriminatory employment practices” so far as to present serious First Amendment issues. See Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791 (1992). Cf. Mary Becker, *How Free is Speech at Work?*, 29 U.C. DAVIS L. REV. 815 (1996) (taking free speech objections to hostile environment claims seriously, but ultimately rejecting those objections). The statement in the text refers to a purported defense to direct employment discrimination that suggested that an employer is free to express racist views and that discrimination on the basis of these views is therefore permissible.

⁵⁰ MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT* § 2.04, at 2-25 (1984).

group is a "BFOQ" (bona fide occupational qualification) for officership in such a group.⁵¹

Finally, and perhaps most importantly, it is not at all clear that the government's "antidiscrimination" regulation is "neutral" at all. Rather, it forbids one particular type of ideological associations — religious associations — from making membership decisions on ideological grounds. Presumably, a gay rights group may limit its officers to supporters of gay rights. A Marxist club could require that its officers subscribe to the tenets of the club, however broadly or narrowly fashioned. In each case, the basis for "discrimination" is shared ideological commitment, not immutable characteristic; ideological commitment is not regulated. To decline to extend the same treatment to religious organizations is not application of a "neutral" antidiscrimination law. Quite the contrary, it is targeting a particular type of expressive association for discrimination. In a very real sense, forbidding religious groups (and no others) from discriminating on the basis of lack of commitment to the group's defining ideology is an anti-speech regulation directed at a particular group of viewpoints—religious viewpoints. That is precisely the Free Speech Clause violation identified in *Rosenberger* and *Lamb's Chapel*.⁵² The better view, then, under conventional Free Speech Clause doctrine, is that a public college or university may not forbid student religious groups to maintain, and apply as an officership criterion, a religious statement of faith.

2. Freedom of Association

If the *Widmar* line of cases alone were not enough, there is plenty of reinforcement in the Supreme Court's decisions recognizing that the First Amendment Free Speech Clause embodies a right to "freedom of association" for expressive activity.⁵³ Indeed, the reinforcement is, if anything, stronger than the front line.

⁵¹ I explore presently the "hard cases" presented by this position. See *infra* notes 94-109 and accompanying text.

⁵² See *Rosenberger*, 115 S. Ct. at 2517; *Lamb's Chapel*, 113 S. Ct. at 2145.

⁵³ *Widmar* itself recognizes freedom of expressive association as an integral component of the freedom of speech. See *Widmar*, 454 U.S. at 268-69 (discussing both speech and "association" rights).

The leading freedom of association case in the campus speech context is *Healy v. James*,⁵⁴ which the Court cited with approval in *Widmar*. *Healy*, a 1972 decision, is wonderfully on-point for the issue of freedom of association for campus religious groups in the 1990s, in an ironic, sauce-for-the-gander sort of way. *Healy* arose out of the campus ferment of the late 1960s. A campus chapter of Students for a Democratic Society (SDS) had been denied recognition and attendant benefits at Central Connecticut State College. Among the reasons cited for the College's denial of recognition to the SDS group was the College's view that the "philosophy"⁵⁵ of the SDS group, as perceived by College administrators to include advocacy of violence and disruption, was "counter to the official policy of the college."⁵⁶

The irony, of course, is that the *Healy* era's campus radicals are today's tenured professors, deans, and university administrators, who now must deal with groups whose philosophies are perceived to run counter to *today's* "official policy of the college." The positions of campus religious groups, especially those that affirm traditionalist positions on such matters as abortion and sexuality, are often "politically incorrect" on today's campuses. University officials often perceive such traditionalist positions as being in tension with nondiscrimination policies — policies that were, in part, an outgrowth of the 1960s progressive milieu during which they came of age — and thus may view with suspicion the student groups espousing such traditionalist positions today. Conflict over perceived issues of inclusiveness sorely tests the commitment of *Healy*-generation university officials to the free speech values championed and won by student activists of the 1960s.⁵⁷

⁵⁴ 408 U.S. 169 (1972).

⁵⁵ *Id.* at 187.

⁵⁶ *Id.* (quoting statement of College's President).

⁵⁷ For a fascinating narrative that reflects these feelings of tension between free speech values and present-day political values embodied in campus "nondiscrimination" policies, see Thomas C. Grey, *How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. DAVIS L. REV. 891 (1996).

The Supreme Court in *Healy* began by noting the importance of the constitutional rights in question:

Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. . . . There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right.⁵⁸

The Court held that the College's denial of recognition violated the free speech and association rights of the students in the SDS group. The Court noted that "a college has a legitimate interest in preventing disruption on the campus."⁵⁹ However, the Court rejected the idea that a college or university could deny recognition (or the incidents of recognition) to a student group because of the content of the group's views or its association with a national organization sharing the same or similar views. The words of the Court in rejecting the college administration's position speak directly to the University of Minnesota issue of deregistration of campus religious groups that maintain a statement of faith:

The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, . . . the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of "destruction" thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.⁶⁰

To deny recognition and attendant benefits to campus religious groups because of the content of their speech (their constitutions and statements of faith) and the nature of these groups as expressive associations defined by shared commitment to those ideals, is to engage in very nearly the precise conduct forbidden by *Healy*.⁶¹ The "mere disagreement" with a religious group's "philosophy" — its statement of faith and its policy of

⁵⁸ *Healy*, 408 U.S. at 181.

⁵⁹ *Id.* at 184.

⁶⁰ *Id.* at 187-88.

⁶¹ *Healy* is, in a sense, the first case in the Equal Access Canon of cases. *Healy* sets the stage for *Widmar*, and is cited with approval in *Widmar*. See *Widmar*, 454 U.S. at 269.

requiring officers to subscribe to the principles stated therein — is no basis for limiting the group’s speech or association. That the “disagreement” with a religious group’s principles may be cast (with considerable straining) in terms of a “nondiscrimination” or “equal opportunity” policy does not affect this conclusion, any more than the fact that the tenets of the SDS in *Healy* were regarded by college officials as “subversive” or “disruptive” entitled those college officials to expel such groups. The “discrimination” that the University of Minnesota Student Affairs Office sought to forbid is the precise speech and association in which the Christian Legal Society (CLS) and Graduate Student Fellowship (GCF) sought to engage. Like SDS a generation earlier, both CLS and GCF sought to form groups committed to certain ideals. That some university officials might consider such ideals to be discriminatory, even “abhorrent,”⁶² does not authorize them to restrict the speech or association of the group.

Subsequent to *Healy*, the Supreme Court has addressed freedom of association in several non-campus contexts. Though the Court’s decisions are neither perfectly principled nor perfectly clear, they do (for the most part) set forth a reasonably clear, intelligible, and sensible set of rules. As such, they constitute a body of law much less problematic than many other crannies of constitutional jurisprudence. The overarching rule that emerges from these decisions can be stated as follows: Other than in a commercial context, private groups’ First Amendment freedom of association rights include *the freedom to define and control the terms of membership in that group*. This right of expressive association entails the corollary right of expressive *disassociation* as well. This set of rights is at its strongest where a group’s essential purposes are expressive — religious, political, or otherwise ideological — and where interference with the group’s membership practices is thus highly likely to interfere with a group’s expression of its own distinctive message. The rights are weakest where the group is engaged in commercial activity in the public marketplace, and where the commercial element so strongly predominates over any expressive element that application of nondiscrimination laws is likely not directed at the expression

⁶² *Healy*, 408 U.S. at 188.

itself and impacts on such expression only as an incidental consequence of regulating marketplace conduct.

Consider first the extremely important case of *Democratic Party v. Wisconsin*,⁶³ decided in 1980. In *Democratic Party*, the Court considered the question of whether the state of Wisconsin could compel the national Democratic Party to seat a delegation to the Party's national convention that was chosen in a manner that violated the rules of the national Party. (Wisconsin insisted on an "open primary;" the national Democratic Party wanted a "Democrats only" primary.) The Court held that such compulsion would violate the national Democratic Party's freedom of association for expressive purposes. The Court wrote that:

[T]he freedom to associate for the common advancement of political beliefs . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only

Here, the members of the National Party, speaking through their rules, chose to define their associational rights by limiting those who could participate in the processes leading to the selection of delegates to their National Convention. On several occasions this Court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions — thus impairing the party's essential functions — and that political parties may accordingly protect themselves from intrusion by those with adverse political principles.⁶⁴

The principles of the *Democratic Party* decision seem directly applicable to the campus religious group situation. In the Minnesota situation, as in *Democratic Party*, CLS's and GCF's freedom of association "presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only."⁶⁵ In the Minnesota situation, as in *Democratic Party*, CLS and GCF chose to "define their associational rights by limiting those who could participate in the process leading to

⁶³ 450 U.S. 107 (1981).

⁶⁴ *Id.* at 122 (emphasis added) (quotation marks, citations, and footnote omitted). The Court in *Democratic Party* also quoted with approval Professor Laurence Tribe's treatise on constitutional law: "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *Id.* at 122 n.22 (quoting L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 791 (1st ed. 1978)).

⁶⁵ *Id.* at 122.

the selection of” the group’s leaders.⁶⁶ With such campus religious groups, as with *Democratic Party*, compelled inclusion of persons “unaffiliated” with the group “may seriously distort its collective decisions,” thus “impairing the [group’s] essential functions.”⁶⁷

There is no principled ground for distinguishing *Democratic Party*, unless there is some reason to believe that group association for religious expression is entitled to less First Amendment protection than group association for political expression — a proposition belied by innumerable cases, including *Widmar*. There is only one additional step to the argument from *Democratic Party*: the step onto campus. The members of a student “Young Democrats” group on a public university campus have, I submit, the same constitutional rights of freedom of expressive association (and disassociation) as the national Democratic Party. That proposition is established by *Healy* (which addressed essentially this issue with respect to Students for a Democratic Society) and reaffirmed in *Widmar* (which can fairly be read as extending the same associational rights to religious groups). In short, the fact that a group is a campus organization seeking to exercise expressive freedoms on campus cannot itself be leveraged into an argument that university officials may restrict that group’s speech or association.⁶⁸ *Democratic Party* plus *Healy* plus *Widmar* equals a substantive First Amendment right of freedom of expressive association and disassociation for public university campus religious groups.

It follows that university officials cannot force such groups to abdicate their rights of expressive association as a condition of “equal access” to a limited public forum for expression. That is the “unconstitutional conditions” aspect of the argument. As the Court put it in a related context, in *Thomas v. Review Board*, “[a] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program.”⁶⁹ Here, the “public program” in question is itself a First Amendment right — access to the limited public

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Widmar*, 454 U.S. at 268-69; *Healy*, 408 U.S. at 181.

⁶⁹ 450 U.S. 707, 716 (1981).

forum. To paraphrase *Thomas*, a group may not be compelled to choose between the exercise of one First Amendment right (freedom of expressive association) and another one (participation in a limited public forum).

Nor can university officials evade this conclusion merely by defining the limited public forum as comprised of “campus groups *who do not discriminate in specified ways.*” *Democratic Party, Widmar*, and *Healy*, taken together, establish that the “limitation” in a limited public forum cannot itself be a substantively unconstitutional limitation on freedom of expressive association.⁷⁰ The definition of the “limited” forum might, on the margins, create situations where speech or association rights are narrower than they would be in the world at large, but only, I submit, to the extent that the restriction is inherent in the nature of the very enterprise of creating the limited public forum, such that one could not readily think of the restriction as being “severable” from the creation of the forum. For example, a university creating a *Widmar*-style limited public forum for expression and association by *student* groups might limit on-campus meetings only to groups composed primarily of students, even though this would in some sense limit the “association” rights of the student groups in question. In such a case, the limitation is directly germane to the nature of the forum itself, in the sense that the limitation might be thought non-severable from the nature of the forum: at some point, the university must be able to restrict access to that subset of the general public that is the focus of its mission, or else there is no such thing as a “limited” public forum, only all-or-nothing fora. Importantly, however, the power to restrict association rights as an incident of the power to define the forum is not unbounded. If it were, *Healy* would have been wrongly decided, for what (purportedly) concerned the college president was the SDS’s *association* with the national network of the Student Democratic Society chapters — the “outside agitators.”⁷¹

⁷⁰ See *supra* note 32.

⁷¹ *Mergens*, the high school equal access case, is also instructive on this point. In *Mergens*, school officials asserted that the school’s forum was limited to curriculum-related student groups and that the Equal Access Act, which is triggered only where the school allows some “noncurriculum related” clubs to meet, therefore did not apply. The Court looked at the actual nature of the clubs and found that the school’s attempt to define the

Finally, *Democratic Party* cannot be distinguished from the campus student group situation on the ground that campus groups receive financial support from the university. *Rosenberger* closes that potential escape hatch. Where the university is not engaged in *its own* speech, but is merely sponsoring a forum for *student* expression, the fact that the university's sponsorship of *the forum* involves funding does not distinguish it from the situation where its sponsorship of the forum is limited to meeting space.⁷²

religious club out of the school's forum must be rejected: "To define 'curriculum related' in a way that . . . permits schools to evade the Act by strategically describing existing student groups, would render the Act merely hortatory." *Mergens*, 496 U.S. at 244. See also *supra* note 32 (discussing *Mergens* opinion).

⁷² *Rosenberger*, 115 S. Ct. at 2518 (stating that "[t]he University tries to escape the consequences of our holding in *Lamb's Chapel* by urging that this case involves the provision of funds rather than access to facilities."). The Court's opinion then proceeds to refute this purported distinction. *Id.* at 2518-20.

The Court in *Rosenberger* was careful to distinguish the situation of government's *own* speech. The Court identified *Rust v. Sullivan*, 500 U.S. 173 (1991), *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), as falling into the government's-own-speech category. *Rosenberger*, 484 U.S. at 2518-19. The *Rust* distinction seems sound. The program in question was a government program, and the speech limitation on private grantees participating in a government program was a limitation only on speech carried on within the context of the government program. *Rust*, 500 U.S. at 192-95. (*Bowen v. Kendrick*, 487 U.S. 589 (1988), similarly ought to be understood as a government's-own-speech case.)

The distinction of *Kuhlmeier* is also sound, and I think worthy of note as an important doctrinal development in its own right. *Kuhlmeier* was the case upholding a public high school principal's censorship of a controversial article in the school newspaper. The case has sometimes been read as suggesting that high school students' free speech rights are narrower in the school context than free speech rights in the "outside" world, and narrower than had previously been thought to be the case under the Court's expansive holding in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). *Rosenberger's* distinction, however, points in the direction of those features of *Kuhlmeier* that suggest it be read as a "government-control-of-its-own-speech" case, not a "students-have-no-rights" case: the school newspaper, while written by students, was published by the school district, with school district funds, and under the supervision of school personnel directing a for-credit academic course. *Kuhlmeier*, 484 U.S. at 262-63, 271-72. Thus, *Kuhlmeier* can be read (and in light of *Rosenberger's* treatment, probably should be read) as a case involving government's right to control the content of its own expression.

With respect, I find the *Rosenberger* Court's distinction of *Taxation With Representation* unpersuasive, but that is because I find *Taxation With Representation* unpersuasive in the first place. *Taxation With Representation* upholds a viewpoint-based preference for lobbying by a specific type of issue-advocacy organization (veterans organizations). The lobbying in question was, of course, not government speech, but the private speech of the advocacy organizations. The disparate financial treatment involved is difficult to reconcile with cases holding that such disparate financial treatment of an organization, based on its speech content,

The Court's next three freedom of association cases all involved the question of application of state or local nondiscrimination requirements to ostensibly "private" community service clubs. In each case, the Court ruled against the private club's claim that application of the nondiscrimination laws would unconstitutionally interfere with its freedom of expressive association. However, in each case the Court emphasized the *commercial, business* nature of the affected association — organizations like the Jaycees and Kiwanis clubs — and took pains to distinguish the situation of a genuinely political, religious, or other ideological group, whose expressive purposes would be impaired by any government interference with its membership decisions. While these three cases may be questionable on their own terms, none casts doubt on the principles of *Democratic Party* as they apply to the campus student group situation.

In *Roberts v. United States Jaycees*,⁷³ the Court upheld the constitutionality of the Minnesota Human Rights Act's prohibition on sex discrimination, as applied to the United States Jaycees ("Junior Chamber of Commerce"). The Court emphasized what it considered to be the commercial nature of the Jaycees organization and found that the state's interest in eradicating sex discrimination in commercial organizations was sufficiently compelling to outweigh any marginal interference with the Jaycees' freedom of association.⁷⁴ While this sort of ad hoc "weighing" of the importance of a free speech interest against a mere statutory policy interest should make lovers of liberty nervous — on what theory can one ever get a "compelling" interest, sufficient to trump a constitutional right, out of a policy of a lesser (i.e., nonconstitutional) order? — and while the placement of the Jaycees into the category of a "commercial" organization should at least give one pause, the Court at least limited its ad hoc

is presumptively in violation of the First Amendment. See, e.g., *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987).

⁷³ 468 U.S. 609 (1984).

⁷⁴ *Id.* at 626 (noting that Jaycees can fairly be characterized as a "place of public accommodation" offering goods, privileges, and commercial advantages, and that "[a]ssuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests"). See also *id.* at 628 (stating that "distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent").

balancing so as to steer clear of “core” First Amendment speech. The Court strongly suggested that the same balancing act could not be done at the expense of political or religious freedom of association — and might not even apply to private “business” clubs that made out a stronger claim of some genuine ideological motivation. In fact, the Court’s language in *Roberts* is as supportive of the principle of freedom of association as was its language in *Democratic Party*, and supports the freedom of campus religious groups fairly plainly:

An individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed

Government actions that may unconstitutionally infringe upon this freedom can take a number of forms, . . . [including] interfere[nce] with the internal organization or affairs of the group There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.⁷⁵

While this freedom of association “is not, however, absolute,”⁷⁶ the Court upheld the restriction on the Jaycees’ membership decisions only because there was “no basis in the record for concluding that admission of women as fully voting members would impede the organization’s ability” to engage in freedom of expression presenting its own distinctive view.⁷⁷ Put another way, the Jaycees never really put into play a cognizable claim of

⁷⁵ *Id.* at 622, 623. Justice O’Connor stated:

[A]n association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members. . . . Protection of the association’s right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.

See also *id.* at 633 (O’Connor, J., concurring).

⁷⁶ *Id.* at 623.

⁷⁷ *Id.* at 627.

expressive association (and disassociation). Citing *Democratic Party*, the Court emphasized that the Minnesota statute, as applied to the Jaycees:

*[R]equires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members.*⁷⁸

Roberts thus does not in any way lessen the validity of campus religious groups' freedom of association rights with respect to statements of faith and doctrinal restrictions on membership or officership. Campus religious groups are not "commercial" organizations, by any stretch of the imagination. Moreover, unlike the Jaycees, application of a University "nondiscrimination" rule to invalidate a campus religious group's religious membership requirements *would*, quite literally, require a change in the group's "creed" and restrict such group's "ability to exclude individuals with ideologies or philosophies different from those of its existing members."⁷⁹ Nothing in *Roberts* indicates that the state could restrict a group's freedom of expressive association under such circumstances. To the contrary, *Roberts's* reaffirmation of *Democratic Party* as the applicable rule in such situations supports the conclusion that campus religious groups have the First Amendment right to define their own membership.

*Board of Directors of Rotary International v. Rotary Club of Duarte*⁸⁰ is essentially a clone of *Roberts*. At issue in *Rotary* was the constitutionality of a California public accommodations statute forbidding sex discrimination, as applied to Rotary clubs. The Court again emphasized the "business" nature of Rotary clubs, noted that Rotary clubs do not take positions on "public questions," and found that the evidence failed to demonstrate that admitting women would have an effect on any expressive purpose of the Rotary club.⁸¹ The Court emphasized that the California statute did not "require the clubs to abandon or alter any of [its] activities Nor does it require them to abandon their classification system or admit members" in contravention of

⁷⁸ *Id.* (emphasis added).

⁷⁹ *Id.* at 627.

⁸⁰ 481 U.S. 537 (1987).

⁸¹ *Id.* at 548.

the clubs' stated criteria.⁸² Under these circumstances, the Court found that the state's interest in eliminating sex discrimination in commercial contexts prevailed over the Rotary's freedom of association claim.

The last case in the service/business club trilogy, *New York State Club Association, Inc. v. City of New York*,⁸³ was a facial challenge to New York City's Human Rights Act, brought by a coalition of clubs. The Court found that the Act was not subject to a facial challenge because (as the plaintiffs conceded) the Act "could be constitutionally applied at least to some of the large clubs, under [the] Court's decisions in *Rotary* and *Roberts*."⁸⁴ The Court was again careful to distinguish this ordinance from regulations that would impair expressive association. The Court emphasized that, on its face, the Act did not "affect 'in any significant way' the ability of individuals to form associations that will advocate public or private viewpoints" nor "require the clubs 'to abandon or alter' any activities that are protected by the First Amendment."⁸⁵ The Court continued, in language that implicitly reaffirmed the constitutional right of religious and political groups to employ religious or ideological criteria for membership:

If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end. Instead, the Law 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. It is conceivable, of course, that 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.⁸⁶

The Court noted that, given the procedural posture of the case as a facial challenge to the law, there was no record evidence to

⁸² *Id.*

⁸³ 487 U.S. 1 (1988).

⁸⁴ *Id.* at 12.

⁸⁵ *Id.* at 13 (quoting *Rotary*, 481 U.S. at 548).

⁸⁶ *Id.*

support any such assertion that a large percentage of the affected clubs would fall into this category, which the Court seemed to presume would be constitutionally protected from regulation.⁸⁷

If there was any doubt as to the seriousness of the Court's commitment to the principle of freedom of expressive association, the unanimous decision last Term in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*⁸⁸ should erase it. *Hurley* involved the attempted application of a Massachusetts "public accommodations" law to a privately-sponsored St. Patrick's Day Parade in Boston. A group of gay, lesbian, and bisexual descendants of Irish immigrants (who identified themselves by the acronym "GLIB") sought to march in the parade as a distinct "unit" of the parade, as an expression of their solidarity. The parade organizers refused and GLIB sued. The Massachusetts courts held that the parade was a public accommodation and rejected the parade organizers' claims of a First Amendment right to exclude GLIB from their parade.

The Supreme Court reversed. The Court first found that the organization of a parade involved the First Amendment expression and association rights of the parade organizers, rejecting the lower courts' findings that no expression was involved because of the loose standards traditionally employed by the parade's organizers.⁸⁹ The Court then turned to the question of the state's power to forbid the parade's organizers from discriminating against GLIB and to require that they admit GLIB to the parade. The Court noted that "every participating unit [in the parade] affects the message conveyed by the private organizers," and that an order requiring GLIB's inclusion in effect required the parade organizers "to alter the expressive content of their parade."⁹⁰ That was the nub of the problem, the Court found:

[O]nce the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the

⁸⁷ *Id.* at 13-14.

⁸⁸ 115 S. Ct. 2338 (1995).

⁸⁹ *See id.* at 2344-46.

⁹⁰ *Id.* at 2347.

public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. *But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message* [T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.⁹¹

The Court was not insensitive to the object of the public accommodations statute: forbidding acts of discrimination toward certain classes. But it was emphatic that the state could not use its interests in this regard to justify ordering a private entity to engage in speech or association with which it disagreed:

The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.⁹²

Hurley slams the door on university interference with a campus religious group's ability to discriminate on the basis of religion. It reaffirms that private groups are private groups and do not forfeit that status just because their exercise of rights of free expression occurs on government property or is authorized by a permit. It reaffirms that private groups have the right to control their own messages. It reaffirms that membership in a group affects that group's message. It reaffirms that compelled membership is therefore a violation of a private organization's right to control its own message. It rejects the idea, outside of the commercial context, that the state's interest in forbidding discrimination authorizes state interference in expressive association designed to maintain a distinctive message. And it does all this unanimously.

⁹¹ *Id.* at 2347, 2348 (emphasis added).

⁹² *Id.* at 2350.

The Court's cases concerning freedom of association thus support a reasonably clear line: so long as the basis of a group's "discrimination" is ideological, that "discrimination" is absolutely protected by the First Amendment. So says *Democratic Party*. So too says *Hurley*. The state may determine, however, that race or sex — no Supreme Court decision has yet gone beyond these two categories — may not be used as proxy criteria for adherence or non-adherence to a group's stated principles, at least not where a group's purposes and functions are primarily commercial and where the group fails to demonstrate that inclusion of the affected groups impairs its ability to convey a distinctive ideological position. So say *Roberts*, *Rotary*, and *New York State Club Association*. All three of these latter cases, however, reaffirm the principles of *Democratic Party*. *Hurley* makes plain that the limitation of the *Roberts* trilogy to "commercial" clubs is sincere. And *Healy* and *Widmar* make plain that these same principles apply to campus student groups, including religious groups. As applied to religious groups on campus, the Court's freedom of association cases generate a rule that is eminently sound: *Where a group seeks to maintain a distinctive identity based on shared ideological commitments and operates wholly or primarily in a noncommercial context, the First Amendment requires that the group be free to make adherence to the purposes and positions of the group a condition of membership.*

The easiest case for this proposition is campus religious groups' freedom to maintain religious membership and officership requirements — the next generation of *Widmar* issues. Simply put, religious groups get to be religious. This means that they must be accorded the same degree of freedom to define the boundaries of their religious communities, on campus pursuant to a *Widmar*-style limited public forum policy, as churches are in the general society. Clearly, this means that student religious groups have the constitutional right to "discriminate" on the basis of sincere religious commitments.

In principle, the same analysis should apply to "ideological" discrimination by non-religious ideological groups as well. The troubling hypothetical is the campus white supremacist or neo-Nazi club, but it is troubling chiefly because of the difficulty of maintaining one's constitutional principles when they benefit hateful ideas. The analysis, however, is largely the same: The

White Supremacist Club may not exclude potential members based on their race. They may, however, require members to support the purposes and message of the organization. One might suppose the latter rule to have the same effect as the former, but that does not permit the use of race as a proxy criterion for ideology. This permits a lot of hateful speech, but unless one is of the extreme view that the First Amendment's usual tolerance of "hateful" private expression (lest government be permitted to censor speech because of popular disagreement with it) is somehow overruled by the Fourteenth Amendment's Equal Protection Clause, this must be recognized as a cost of freedom. The First Amendment permits hateful ideological speech. It likewise permits hateful ideological freedom of expressive association.⁹³

⁹³ An additional problem remains: What if the hypothetical White Supremacist Club seeks to exclude blacks — even those who are willing to subscribe to its white supremacist creed — on the theory that exclusion is necessary to preserve the "integrity" of its white supremacist message (or out of fear that black applicants will feign agreement with the group's principles in order to "take over" the club). One is tempted simply to dismiss such extreme hypotheticals as not falling within the realm of real-world experience. But consider a mirror-image hypothetical that seems less far-fetched, and that usefully illustrates an important difference between ideological discrimination and true status discrimination: a student organization whose expressed purpose is to "promote African-American identity, culture, and advancement." The group obviously has a stronger First Amendment interest in excluding *white supremacists* (who do not support the group's purposes) than in excluding *whites* (who may). The African-American student organization might still have an interest in having black students as its leaders, and in excluding non-blacks, but this interest is one of symbolic expression resulting from conduct that is asserted to carry an expressive message, not a pure freedom of expressive association interest of maintaining the group's ability to maintain its distinctive message by excluding those who do not agree with that message.

Suppose that government permits organizations to discriminate on the basis of shared ideology — to exclude those who disagree — but forbids discrimination on the basis of race or some other immutable characteristic, as among persons who support the purposes of the group. In such a situation, the government's regulation is clearly a non-speech regulation. Under traditional speech clause analysis, such a regulation is subject only to the *O'Brien* test, which asks whether the regulation is within the constitutional power of the government, furthers an *important or substantial* governmental interest unrelated to the suppression of free expression, and incidentally restricts First Amendment freedoms no more than is essential to the furtherance of that interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). This is a decidedly lower standard than the "strict scrutiny" test, which permits restrictions only where there is a *compelling* state interest that can be accomplished by no less restrictive means. The *O'Brien* test should apply to the hypothesized regulation, but strict scrutiny should apply to a regulation that forbids groups from discriminating on the basis of ideology. In theory, the former type of restriction might be defensible in some

What about religious groups' discrimination in membership on the basis of race, sex, or sexual orientation? These questions are slightly more difficult than the pure "discrimination on the basis of religion" claim, but they are governed by the same principles: where the alleged exclusion or discrimination in membership is the consequence of a sincere religious belief, the exclusion must (outside of a commercial context) be permitted as part of the group's First Amendment free speech right of expressive disassociation, unless a compelling state interest justifies

circumstances, even when the latter type is not.

Of course, a student organization's creed might collapse the two issues into one, cast solely in terms of ideological affinity: "All members and officers must support white supremacy and therefore reject the idea that blacks may be members of this organization." Or, in a not unimaginable position of a religious organization: "All officers must support the scriptural principle that women may not exercise positions of leadership over men and that practicing homosexuals may not exercise any leadership position." Such statements could be pretextual and could be sincere. These possibilities might support a second-order rule requiring testing the *bona fides* of a group's statement of its ideology. Such a rule is implicitly supported by *Roberts's* examination of whether the Jaycees truly asserted some distinctive ideological position, and is supported by analogy to the "sincerity" inquiry in free exercise clause doctrine. *See, e.g., Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) (holding that narrow function of reviewing court is to determine whether honest religious conviction existed). The necessary deference granted to a private organization's ability to define its own ideology might mean, as a practical matter, that the *O'Brien* standard could rarely be made to apply.

Nonetheless, I believe that the formal distinction is significant and may have consequences for real-world conduct in other contexts: a whites-only country club likely would not be willing to — and therefore probably could not — publicly assert an ideological commitment to racial discrimination, shared by all its members. A Jaycees club (and even the national association) could not assert a shared ideological commitment to the exclusion of women from their civic, service, and business purposes. There is, I submit, much to be gained — in terms of both the public policy of nondiscrimination and the preservation of private liberty — by an approach that permits private organizations or individuals to opt out of public antidiscrimination norms, but only if they say they are conscientiously opposed to those norms on sincere moral or religious grounds. As Professor Laycock has argued:

Exemptions make it possible to compromise conflicts like these. Without the possibility of exemptions, then either you can not have a gay rights law, or the gay rights law has to apply to the appointment of the Catholic clergy and to everything else that goes on within conscientiously objecting churches. Exemptions make possible a world in which the gay citizens of American can live their life, [sic] *and* in which those who have conscientious objections to gay sex can have a private enclave in which they can live their faith and do not have to fully conform to the rules that have freed gays from discrimination in secular society.

Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 147 (1995).

the restriction. I have written elsewhere that what should count as a “compelling” interest in First Amendment cases should be construed narrowly, in keeping with the justification for the compelling interest test as a virtually unavoidable implied *exception* to a specified constitutional freedom.⁹⁴ I have also written elsewhere, more specifically, that *Bob Jones University v. United States*,⁹⁵ the case in which the Supreme Court found that the government has a compelling interest in penalizing a religious college’s sincere religiously-based policy forbidding interracial marriage and dating among its students, was wrongly decided.⁹⁶ I will not repeat those arguments here, other than to note that in no other case would it be thought remotely tolerable to argue that the government has a compelling interest in conditioning equal access to an otherwise available public benefit on interference with a religious organization’s purely internal membership practices. *Bob Jones* strikes me as *sui generis* — a just result that seemingly had to be reached because of our national commitment to racial equality and our shameful national history of slavery and segregation, but that ought not to have been reached at such expense to constitutional principle — and should be treated as such. It should not be permitted to generate consequences much beyond the facts of the particular case.

Thus, even accepting *Bob Jones* as part of the law, it seems to me that private racial discrimination may plausibly (if imperfectly) be distinguished from other types of private discrimination on the ground that the Constitution *does* reach private conduct in the Thirteenth Amendment context. I am not entirely persuaded by this distinction, but I am even less persuaded that the rule of *Bob Jones* can justifiably be extended beyond the race context.

⁹⁴ See *A RFRA Runs Through It*, *supra* note 31, at 263 (arguing that “compelling interest” refers to extremely narrow range of permissible justifications for infringements on religious liberty); *id.* at 267 n.54 (referring to compelling interest as “implied, atextual exception to a seemingly absolutist text”); see also Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 233 (explaining that compelling interest is implied exception based on necessity and therefore must satisfy stringent standard in showing necessity).

⁹⁵ 461 U.S. 574 (1983).

⁹⁶ See *Religion, Equality, and the Constitution*, *supra* note 23, at 362-68 (condemning Bob Jones University’s policy on religious grounds but condemning Court’s decision in *Bob Jones University* on constitutional grounds).

Case law subsequent to *Bob Jones* confirms this instinct. *Roberts v. Jaycees* involved sex discrimination by a private club. *Roberts* appears to hold that the government may have a compelling interest in preventing sex discrimination, but the Court limited its holding to sex discrimination *in commercial contexts*,⁹⁷ a holding that the Court took care *not* to extend to alleged sex discrimination by religious organizations based upon sincere religious doctrine (such as a religious organization's decision to restrict ordination to men). Reading the (mixed) signals, my hunch is that if a campus religious organization, for sincerely-held doctrinal reasons, discriminated in leadership eligibility or membership status on the basis of sex — such as, for example, some traditionalist Christian, orthodox Jewish, or fundamentalist Muslim religious beliefs might lead some such groups to do — that the Court would not, in such a context, find the interest in eradicating sexual discrimination to prevail over such groups' First Amendment rights of expressive (and religious) association.⁹⁸

With respect to sexual orientation, the Court's opinion in *Hurley*, while not perfectly explicit on the point, seems to say that the state's interest in prohibiting discrimination on the basis of sexual orientation is *not* sufficiently compelling to trump private groups' rights of expressive association, at least in a non-commercial context.⁹⁹ The area of sexual orientation discrimi-

⁹⁷ The Court has not been clear as to the boundary line separating purely ideological private groups and "commercial" or "business" groups. If *Roberts* is right in counting the Jaycees in the latter category, on which side of the line does a private college or university fall? A private elementary or secondary school open to the general public? In my view, the better approach is to treat all private entities with publicly stated ideological commitments as presumptively entitled to freedom of expressive disassociation in their membership practices, absent a showing that the commercial aspect of the entity so clearly predominates over any ideological identity as to make the assertion of a right of expressive association appear pretextual or nominal. In any event, access to a limited public forum — be it a *Widmar*-style forum, or a *Rosenberger*-style forum of equal access to funding, or a § 501(c)(3)-style forum of equal access to tax-exempt status — does not affect whether a group falls into the "commercial" or "ideological" category.

⁹⁸ Indeed, one federal district court, relying on *Hurley*, has recently concluded that the state's interest in preventing gender discrimination provided no basis for excluding the Nation of Islam from renting the Cleveland Convention Center for a "men only" religious meeting, consistent with its religious beliefs concerning separation of the sexes during worship. *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56 (N.D. Ohio 1995).

⁹⁹ *Hurley* notes, however, that the parade organizers:

nation is, as a practical matter, more important than race or sex discrimination, because of increasing friction between traditionalist religious groups and gay rights groups over the doctrinal stands of those religious groups that hold homosexual conduct to be a sin or evidence of the sinful condition of humankind.¹⁰⁰ Few campus religious groups' statements of faith mention homosexuality, but several affirm the primacy of scripture as an essential part of their creed. The application of such creeds could well lead to scriptural interpretations that forbid practicing homosexuals from exercising positions of leadership in some religious groups. The Christian groups with which I am familiar at the University of Minnesota almost universally make clear that any doctrinal stance they have against homosexual conduct does not imply discrimination (as they understand it) against homosexuals as a class of "sinners" different from any other. In the words of one formulation: "We believe that Jesus Christ calls all persons to forgiveness and discipleship. Any person in the University community, regardless of race, color, religion, sex, national origin, handicap, veteran status, or sexual orientation is welcome not only to participate in [our] activities, but also to explore our beliefs and viewpoints." That same constitution later specifies that officers and voting members must be committed to the purpose and life of the organization, as set forth in the group's statement of faith. The group might well interpret its statement of faith to exclude practicing homosexuals from leadership positions. Under *Hurley*, a claim that such a view constitutes discrimination should lose to the First Amendment defense that such positions are protected by the rule that "a speaker has the autonomy to choose the content of his own message."¹⁰¹

Finally, the *least* persuasive extension of *Bob Jones* would be an argument that the state has a "compelling" interest in prevent-

[D]isclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.

Hurley, 115 S. Ct. at 2347.

¹⁰⁰ For a general discussion, see Bainbridge, *supra* note 36, at 369.

¹⁰¹ *Hurley*, 115 S. Ct. at 2347.

ing religious organizations from discriminating on the basis of *religion* in their membership and leadership decisions. It is highly doubtful that government ever has a “compelling” interest in preventing religious “discrimination” by religious organizations with respect to its membership and leadership decisions, and *Roberts* requires such a compelling interest before interference with associational rights can even be contemplated.¹⁰² The Supreme Court’s First Amendment Free Exercise Clause decisions suggest that a religious organization’s membership decisions are at the core of the right to religious free exercise.¹⁰³ It is the Free Exercise Clause that supplies the icing on the cake for the constitutional right of membership autonomy for campus religious groups.

3. Free Exercise of Religion

To this point, my argument has been a straight free speech and freedom of association argument, not a Free Exercise Clause argument. The only claim made with respect to religion is that religious group expression and association are entitled to *no less* constitutional protection than other expression — that is, that the Establishment Clause does not authorize impairment of a religious group’s free speech or freedom of association rights — and that religious “discrimination” is a species of First

¹⁰² The Minnesota Supreme Court has found a compelling interest in preventing religious discrimination by commercial enterprises. *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 852 (Minn. 1985), *appeal dismissed*, 478 U.S. 1015 (1986). *McClure* did not assert a compelling state interest in preventing religious discrimination by religious groups with respect to their membership and leadership decisions in non-commercial contexts.

¹⁰³ *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-14 (1976). *Cf.* *Employment Div., Department of Human Resources v. Smith*, 494 U.S. 872, 882 (1990) (recognizing related nature of religious groups’ rights to freedom of association and to free exercise of religion). I take up this point presently. *See infra* notes 104-09 and accompanying text. Moreover, Congress has exempted churches from Title VII’s prohibition of religious discrimination, with respect to *all* of a church’s employment decisions, and the Supreme Court has upheld this exemption, implicitly acknowledging that government lacks a compelling interest in regulating religious institutions in this area. *Corporation of Presiding Bishop of the Church of Latter Day Saints v. Amos*, 483 U.S. 327, 339 (1987). *See also A RFRA Runs Through It, supra* note 31, at 264-70 (arguing that governmental interest may not qualify as compelling where it is not uniformly pursued with respect to all situations of same category).

Amendment “ideological discrimination” that is protected by the Free Speech Clause.

But the fact that the groups in question *are* religious gives yet another layer of First Amendment protection to campus groups’ right to “discriminate” on the basis of religion, in two ways. First, the Free Exercise Clause bars the application of laws that impose special disabilities on the basis of religious status or belief. *Employment Division v. Smith*,¹⁰⁴ the Court’s notable re-trenchment in the area of the Free Exercise Clause, is best known for its holding that facially neutral statutes do not ordinarily violate the Free Exercise Clause (except where they had been previously held to do so).¹⁰⁵ Less well known is that the Court in *Smith* reiterated that laws “impos[ing] special disabilities on the basis of religious views or religious status” are presumptively unconstitutional, and subject to strict scrutiny — a point that became the centerpiece of the Court’s decision in *Church of Lukumi Babalu Aye v. City of Hialeah* three years later.¹⁰⁶

Some may be tempted to argue that nondiscrimination laws fall in the former category: they are across-the-board rules of general applicability; religious and non-religious groups alike must abide by these restrictions. Such an argument is seriously mistaken. As noted above, where ideological association is not generally made a basis of regulation, to single out religious association as a disfavored form of ideological association is not “neutral” with respect to religion; it forbids ideological associations made along religious lines, but not other ideological lines. To apply a nondiscrimination-on-the-basis-of-religion rule to a religious group’s membership practices is to create a religion-specific classification and to “impose special disabilities” on that basis, which is just what *Lukumi* forbids.¹⁰⁷ The unanimous decision in *Lukumi*, that the Free Exercise Clause forbids laws that

¹⁰⁴ 494 U.S. 872 (1990).

¹⁰⁵ For criticism of *Smith*, see Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revivionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990). Cf. *A RFRA Runs Through It*, *supra* note 31, at 251 n.8 (noting that no scholar defends *Smith*’s “exceptions” in favor of decisions in unemployment compensation cases and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), as principled or in any way justifiable).

¹⁰⁶ *Smith*, 494 U.S. at 877; *Lukumi*, 508 U.S. 520, 531-32.

¹⁰⁷ *Lukumi*, 508 U.S. at 521. *Accord* *McDaniel v. Paty*, 435 U.S. 618, 641 (1978).

target religion in a discriminatory manner, neatly parallels the unanimous decision in *Lamb's Chapel* the same Term that the Free Speech Clause forbids discrimination against religious viewpoints.

Second, the Court in *Smith* preserved the vitality of a long line of cases protecting the autonomy of religious institutions and groups in matters of religious doctrine, discipline, and self-governance, including — most directly applicable here — standards of conduct required of members in a religious group.¹⁰⁸ Religious organizations get to make their own membership and leadership determinations, establish their own standards for the faith, and set up their own means of interpreting their standards and applying them to their members. A university rule that forbade religious student groups to agree to doctrinal requirements for membership or officership in their religious groups would violate this right to religious autonomy.¹⁰⁹

The sum force of these arguments — freedom of speech under *Widmar*, freedom of association under *Widmar*, *Healy*, *Democratic Party*, the *Roberts* trilogy, and *Hurley*; and free exercise of religion under *Smith*, *Lukumi*, and the “institutional autonomy” line of cases — seems to me overwhelming. The issue is

¹⁰⁸ *Serbian Eastern Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 713-714 (1976). See also *Smith*, 494 U.S. at 877 (citing *Milivojevic* with approval).

¹⁰⁹ The recently-enacted Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4, prohibits all levels of government from imposing substantial burdens on religious exercise, even if the burden results from a rule of general applicability, absent compelling justification for application of that burden in the particular situation where challenged. RFRA § 3, 42 U.S.C. § 2000bb-1(a). It seems highly unlikely that a university could ever show, as RFRA requires, a “compelling” interest — that is, an interest of “paramount” importance to the state, *Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963); RFRA § 2(b), 42 U.S.C. § 2000bb-1(b)(1) — in applying a requirement of nondiscrimination on the basis of religion to religious student groups, with respect to those groups’ religious membership requirements. Even if the university’s requirement serves “compelling” interests in some of its applications in other contexts, it is hard to imagine that the university could meet its burden of demonstrating that application of such a requirement to religious groups both serves a compelling governmental interest and is “the least restrictive means of furthering that compelling governmental interest.” RFRA § 3(b), 5(3), 42 U.S.C. § 2000bb-1(b)(2). See also *Bainbridge*, *supra* note 36 (arguing that RFRA creates right of religious student group membership autonomy).

RFRA, by express terms, cuts across and “trumps” other government statutes unless Congress has explicitly exempted some law or class of laws from RFRA’s super-statute prohibitions. RFRA § 2, 42 U.S.C. § 2000bb-3(a) to 3(b). See *A RFRA Runs Through It*, *supra* note 31, at 253-54. RFRA thus operates much like a “constitutional” limitation on the enforcement of other government statutes and regulations.

one that, to my knowledge, has yet to be decided by a federal court. The half-dozen or so universities (that I know of) that have been challenged on this principle have all backed down without a court fight. But the issue is definitely one that is coming over the horizon. The only question is whether a *high school* case, presenting the same issue in a slightly more troubling context, will be decided first.

III. WAITING FOR THE OTHER *Hsu* TO DROP: UNCONSTITUTIONAL CONDITIONS ON "EQUAL ACCESS" IN THE HIGH SCHOOL CONTEXT

The issues just discussed are presented in a case that, as of this writing, is awaiting decision by the Second Circuit: *Hsu v. Roslyn Union Free School District No. 3*.¹¹⁰ *Hsu* is one of those cases that "has eyes on it" — that is, is a good candidate for eventual Supreme Court review. The issue presented is essentially identical to that presented in the University of Minnesota situation, except that it arises in the public high school context.

The principles at stake are the same. A *Widmar*-like right of equal access at the high school level was created (or recognized — a more than semantic difference that I will take up presently¹¹¹) by Congress in 1984, in the Equal Access Act, and upheld by the Supreme Court in *Board of Education v. Mergens*.¹¹² *Mergens* makes it difficult to distinguish high school student groups from college student groups on this question. But, as all Court-watchers know, context is everything. A critical number of Justices' votes are not principle-driven, but context- or intuition-driven. And in this respect, the high school context somehow "feels" different: surely (the thinking goes) public high school officials may require that student clubs, meeting on school premises and (to some extent) under school auspices, be open to

¹¹⁰ 876 F. Supp. 445 (E.D.N.Y. 1995), *aff'd in part, rev'd in part*, Nos. 95-7311, 95-7333, 1996 WL 272859 (2d Cir. May 15, 1996). The reader should be apprised that I participated as co-counsel in an amicus curiae brief in support of the students' appeal in the *Hsu* case.

As this Article went to press, the Second Circuit issued its decision in the *Hsu* case. The Second Circuit opinion is discussed briefly below. See *infra* note 136. Nothing in the Second Circuit's analysis affects my arguments below.

¹¹¹ See *infra* notes 126-29 and accompanying text (discussing how right of equal access at high school level is more than statutory).

¹¹² 496 U.S. 226 (1990).

all comers. Or is the correct answer that student groups meeting pursuant to the Equal Access Act are *private* groups with the same rights of association and autonomy as their college-level counterparts; that is, that just as *Mergens* follows from *Widmar*, *Hsu* should be resolved the same way as the University of Minnesota situation?

The actual facts of *Hsu* are worth a brief detour. In the fall of 1993, plaintiffs Emily Hsu and Timothy Hsu sought to form a Christian Bible club at Roslyn High School in Roslyn, New York. A wide variety of other student clubs were permitted to meet on school premises, including the Chess Club, Art Club, Math Club, Key Club, Fashion Club, and others. The students claimed the right to meet for a Bible study club, pursuant to the terms of the Equal Access Act and the Supreme Court's 1990 decision in *Mergens*. Although the students' right to meet was as clearly established as anything ever is in constitutional law, school officials nonetheless expressed doubt about the students' right to form such a club and said that they would need to research the question. In mid-November, the students were informed that the school was still checking the legality of the proposed club. In December, the school board held a meeting on the issue. At that meeting, Assistant Superintendent Silverman told school board members that "the school district was required to grant the Bible club access, even though it did not want the club to meet."¹¹³ Even so, one of the board members suggested that the School District "merely refuse federal financial assistance" in order to avoid the need to comply with the Equal Access Act.¹¹⁴ This was evidently recognized as unfeasible, so the board did the next best thing: it simply tabled the proposal.

The students, miffed, approached the school principal and the assistant superintendent again. They were told that the school board had taken no action — not a particularly helpful response. The school officials did inform the students, however, that the school board required a constitution for the proposed Bible club. In January of 1994, the students submitted one. In late January, Assistant Superintendent Silverman told the stu-

¹¹³ See *Hsu*, 876 F. Supp. at 488 (citing *Emily Hsu Aff.* ¶ 15).

¹¹⁴ *Id.* at 448.

dents that the School Board “had a problem with” the club’s constitution.¹¹⁵

For starters, the school officials said, the students had to change their definition of “Christian fellowship.” Article I, section I of the students’ constitution had begun by stating that “Christian fellowship is when Christians gather to praise God” School officials wanted the word “Christians” changed to “people” because they felt that the word “Christians” was too exclusive. This was a somewhat strange request, given that Article I, section II of the group’s constitution provided that “[m]eetings are open to all and limited to only Roslyn High School students regardless of race, color, age, religion, sex, national origin, or physical handicap.”¹¹⁶ The students reluctantly yielded, apparently believing that the change would not truly compromise the meaning of their definition of “Christian fellowship,” since it was still clear that it was, after all, a definition of “Christian fellowship.” The School’s change was irritating, but not debilitating.

Unfortunately, the School Board also wanted the students to change or delete a provision that stated that officers of the group “must be professed Christians either through baptism or confirmation.” The students compromised yet again, changing their Constitution to read: “All members eligible to vote will also be eligible to run for offices. Accepting Jesus Christ as savior is a requirement for all officers.”¹¹⁷ Assistant Superintendent Silverman was still dissatisfied with this more ecumenical requirement of Christian belief, and told the students that she would not forward the constitution to the school board. Finally, on February 14, 1994, the Hsus sued their school. They moved for a preliminary injunction. Then, and only then, did the school district pass a resolution recognizing the formation of, and granting access to, the Bible club. But there was one last indignity and condition: the School Board’s resolution *itself* specified that the Christian Bible study club “shall be limited to Roslyn High School students, and no student shall be discriminated against or excluded from participating in or having access to the Club, *including without limitation entitlement to be an officer of the*

¹¹⁵ *Id.* at 449.

¹¹⁶ *Id.* at 463 (Appendix A).

¹¹⁷ *Id.* at 449.

Club, on the basis of creed or religion."¹¹⁸ The School District maintained that this proviso was required by its own Equal Opportunity Policy, which provides:

The Board, its officers and employees will not discriminate against any student . . . on the basis of race, color, national origin, creed or religion, marital status, sex, age or handicapping condition.

This policy of nondiscrimination includes: access by students to . . . student activities.¹¹⁹

The lawyers for the Hsus then adjusted the focus of the lawsuit to this substantive condition on equal access. They amended the complaint and brought a new motion for a preliminary injunction. The students lost in the district court, but obtained a partial reversal of fortune in the Second Circuit.¹²⁰

Given the course of conduct engaged in by the school district, it is difficult to view the school district's position as anything other than a pretext for discrimination against the Bible study group because of hostility to its message. But proving pretext is difficult, and the case has proceeded as a straight test case on the lawfulness of the school district's imposition of the condition. Shorn of the school district's evident bad faith, there is superficial appeal to the argument that the nondiscrimination policy of the school district, which applies by its terms to student activities, requires that student clubs adhere to a nondiscrimination policy as well. The problem with this position is the same as the problem with the University of Minnesota's initial position: it mistakenly assumes that student clubs, exercising their rights to meet pursuant to the Equal Access Act, are "activities" *of the school*. Such reasoning is flatly incompatible with the notion of a limited forum, and with the rationale under which the Court upheld religious group meetings on school premises in *Mergens*.¹²¹ A private speaker in a government-created limited public forum is not the government. It is still a private speaker. If that were not the case — if equal access meant government

¹¹⁸ *Id.* at 450.

¹¹⁹ *Id.*

¹²⁰ See *infra* note 136.

¹²¹ *Mergens* distinguished, with barely a mention, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), as a case involving school control over the curriculum, as opposed to a limited forum for student expression. See *Mergens*, 496 U.S. at 236.

sponsorship — *Widmar* and *Mergens* could not have been decided the way they were. Those cases rejected, without dissent, the Establishment Clause arguments raised by the governmental defendants for the simple reason that private speech is not government speech.

The position of the Roslyn School District, and the analysis of the district court upholding that position, is thus premised on a simple category mistake. Once it is recognized that the Christian Bible study club at Roslyn High School is not a program or activity of the Roslyn School District, but an exercise of statutory equal access rights by a private entity, *Hsu* becomes a fairly easy case: the statutory right of equal access, conferred by the Equal Access Act, cannot be conditioned on a requirement that the private entity abandon its rights to freedom of expression and association as a private entity (under *Healy*, *Democratic Party*, *Roberts*, and *Hurley*) or its rights to the free exercise of religion (under the “institutional autonomy” line of Free Exercise Clause cases or under the Religious Freedom Restoration Act).¹²²

The most plausible argument on the school district’s side is not the one on which the district court relied (the false claim that granting equal access to a limited open forum permits the school to regulate the membership practices of the group granted access). Rather, the better argument is that students have diminished free speech rights to expressive association — and, perhaps especially, diminished rights of expressive *disassociation* — in a public school context. Put another way, the school may have a “compelling interest” in assuring opportunities for social

¹²² The district court got off on the wrong foot:

If the bible club were a distinctly private club then there would be force to plaintiffs’ contention . . . that the club and its members may discriminate on the basis of religion, race, sex, *etc.*, in their private affairs as against others. However, they are not a distinctly private group — they are a student group, which sought and was granted school-recognized access to public school facilities. Presumably, the bible club and its members intend to take advantage of the benefits attendant to equal access. It is not unreasonable to require that they also accept the conditions thereto, including the prohibition on discrimination against any Roslyn student.

Hsu, 876 F. Supp. at 455. The premise of the court’s analysis is that according a speaker or group equal access to a limited public forum makes the speaker or group subject to regulation that would otherwise be constitutionally impermissible. *Id.* at 456-58.

interaction for *all* students, and this interest justifies — in a school context — a germane limitation on the “forum” to allow only such groups as will be open to all students. Such an argument might find support in the recent line of Supreme Court cases holding that students have diminished constitutional liberties (or that the state has enhanced countervailing interests) in a variety of school situations: diminished free speech rights as speakers at school assemblies, because of the age and impressionability of younger students;¹²³ diminished free press rights when working on the school newspaper for a journalism class;¹²⁴ diminished First Amendment rights as against a school district’s decision to remove controversial or “offensive” books from the school library;¹²⁵ and diminished expectations of privacy from school officials’ searches or from drug testing as a condition of participation in athletics.¹²⁶

The difficulty with this line of argument is that none of these cases says that public secondary school students do *not* have the right of freedom of expressive association. Furthermore, *Tinker v. Des Moines Independent School District*, the leading case on public school students’ free speech rights, despite being hobbled at the margins by decisions apparently limiting its reach, recognizes quite broad Free Speech Clause rights of public school students — presumably including the freedom of association that the Court has (elsewhere) found a logical corollary of the freedom

¹²³ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685-86 (1986) (upholding disciplinary action against student who made implicit sexual innuendos in nominating speech for student council officer, because of presence of 14-year-olds). *But cf.* *Brown v. Hot, Sexy, & Safer Prods., Inc.*, 68 F.3d 525, 540-41 (1st Cir. 1995) (upholding school-sponsored mandatory assembly in which speaker made sexually explicit remarks about individual students’ genitals, erections, and masturbation, and about relationship between anal sex and excrement), *cert. denied*, 116 S. Ct. 1044 (1996).

¹²⁴ *Kuhlmeier*, 484 U.S. at 260. As noted above, however, *Kuhlmeier* can be easily understood as a case about government control over its own expression, since the school was the publisher of the newspaper and the writing and editing was done within the context of a curricular offering. *Id.* at 262. *Rosenberger* appeared to distinguish and limit *Kuhlmeier* on this ground. *See supra* note 72 (discussing *Rosenberger* opinion).

¹²⁵ *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (plurality opinion).

¹²⁶ *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

of speech.¹²⁷ *Tinker* remains good law, and was expressly reaffirmed in *Hazelwood School District v. Kuhlmeier*.¹²⁸

Moreover, the Equal Access Act appears premised on the idea of group expressive association. The Act builds on *Widmar*, which built on *Healy* — the first major expressive association case involving student groups — and brought the equal access concept into the high school context, largely on the premise that *Tinker* establishes that free speech principles should apply to expression by high school and junior high school students in much the same way as they do to expression by college student groups. The background premise of the Equal Access Act thus appears to be one of embracing and implementing perceived First Amendment rights to freedom of expression in a group context, with all that that implies for freedom of association.

The Equal Access Act is at the forefront of the dispute in *Hsu*.¹²⁹ For school district officials to prevail on the argument that public school students lack the right of expressive disassociation in the context of a limited open forum for student group meetings under the Act requires sustaining the argument that the Act either itself authorizes school districts to limit equal access by any formally neutral rule or does not impair pre-existing legal authority of school districts to do so. Such an argument must overcome three large hurdles, however.

The first hurdle is the logic and language of the statute itself. No provision of the Equal Access Act itself empowers school districts to take such action, and several provisions lean strongly against any suggestion that the Act assumed the existence of, much less intended to “preserve,” any such pre-existing authority on the part of school districts. The “construction” provisions of section 4071(d) provide that the Act shall not be construed to “authorize the United States or any State or political subdivision thereof” to do any of several things. Perhaps the most important of these is subsection (d)(7), which insists that the Act not be construed to authorize any agency of government “to abridge

¹²⁷ See *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969) (stating that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”).

¹²⁸ *Kuhlmeier*, 484 U.S. at 266.

¹²⁹ The case also presents a constitutional claim under the Free Speech Clause, which I discuss presently.

the constitutional rights of any person.”¹³⁰ Thus, even if the Equal Access Act does not create a right fully coextensive with the scope of students’ First Amendment rights, this subsection makes reasonably clear that the statutory right of access thus created does not supply any excuse for school officials collaterally to restrict students’ baseline First Amendment rights in any other respect. This language comes close to explicitly embracing the unconstitutional conditions doctrine, as applied to the Act’s quasi-constitutional entitlement: access to a limited open forum may not be conditioned on forfeiture of students’ constitutional rights in some collateral respect.

That, of course, does not establish that secondary school students in fact do have freedom-of-association rights. That proposition seems left unstated, as a background premise. Subsection (d)(6), however, reinforces the inference that that is, in fact, the operative premise. Subsection (d)(6) is a bar against any construction that would permit a school district “to limit the rights of groups of students which are not of a specified numerical size.”¹³¹ This rule appears designed to preclude any ingenious attempt to exclude a student group as a consequence of a formally “neutral” school rule concerning minimum (or perhaps maximum) size. One could argue that, applying the maxim of *expressio unius*, other neutral rules must therefore be permissible. But the negative inference is extremely weak here, and the real point is the background legal premise that the Act seems to embrace: students have rights of freedom of association in connection with their group meetings.

Finally, subsection (d)(1) forbids a school district from interfering with the “form or content of any prayer or other religious activity,” strongly suggesting a hands-off attitude toward the conduct and internal arrangements of student religious groups, as they concern matters of religious doctrine and practice. To the extent membership equals message — as *Democratic Party*, *Roberts*, and *Hurley* all affirm — regulation of religious group membership is regulation of the content of their religious message, in violation of this subsection. In sum, the hypothesized argument that students lack rights of expressive association finds little

¹³⁰ 20 U.S.C. § 4071(d)(7).

¹³¹ *Id.* § 4071(d)(6).

comfort in the Equal Access Act, and much that suggests the contrary.

The second major hurdle for the argument that students have diminished freedom of association rights is that the right of high school students to meet on school premises for group expression is more than just statutory. Even were there no Equal Access Act, students wishing to form religious clubs would likely be found to have a First Amendment right of equal access to a school's "limited public forum" permitting voluntary student clubs and activities, just as *Widmar* found a constitutional equal access right. The Court in *Mergens* did not reach this issue, because it found for the students on their statutory claim and that was enough to dispose of the case. But the court of appeals in *Mergens* had reached the issue and found a constitutional right, as well as a statutory one,¹³² Justice Marshall and Justice Brennan would have decided *Mergens* on this ground as well,¹³³ and four other Justices had embraced this position in a previous case.¹³⁴ If the right to equal access at the secondary school level is of constitutional dimension, just as it is at the college level, and that right in the college context includes a right of expressive association and disassociation, one is hard pressed to find a reason why the right should have radically narrower contours at the high school level when it comes to the free association aspect of the Free Speech Clause. *Tinker* stands squarely in the way of any such conclusion.

Finally, even if the right of equal access were merely statutory, the Equal Access Act contains no clear exclusion of the requirements of the Religious Freedom Restoration Act (RFRA), which

¹³² *Mergens v. Board of Educ.*, 867 F.2d 1076, 1079 (8th Cir. 1989), *aff'd*, 496 U.S. 226 (1990).

¹³³ *Mergens*, 496 U.S. at 262 (Marshall, J., concurring in judgment).

¹³⁴ *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 553 (1986) (Burger, C.J., dissenting); *id.* at 555 (Powell, J., dissenting). The Supreme Court's decision in *Bender* vacated, on jurisdictional grounds, the Third Circuit's pre-Equal Access Act decision holding that an activity period at a public high school constitutes a "limited public forum" to which student religious clubs are presumptively entitled to equal access but that the Establishment Clause nonetheless required suppression of such meetings. See *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 559-60 (3d Cir. 1984) (finding constitutional limited public forum for student group meetings at public high school.) The Supreme Court majority expressed no view on the merits, but the dissenters on the jurisdictional point embraced the "limited public forum" view of the lower courts. *Id.* at 551-56.

by its terms applies to all federal law. To the extent that application of RFRA yields, on the free exercise grounds discussed above with respect to college student groups, a right of student religious group membership autonomy, that right is not forfeited by meeting pursuant to the requirements of the Equal Access Act.

Is the state interest in requiring that all student groups (even political or religious groups) be open to all students (even those who disagree with a group's ideology) and, more specifically, that all students must be permitted to become *officers* of such groups regardless of ideological differences, more "compelling" in the high school context than in the college context? This seems doubtful. The argument for the state's interest, in each case, carries with it the implicit premise that meetings of student clubs, within a limited public forum, are *the schools'* programs and activities. That, of course, is the central mistake, repeated at a different stage of the analysis. Where the government creates a limited public forum, the speech and activities of the participants are not the government's speech and activities. Only if *the creation of the forum* is somehow a sham, demonstrably devised as a vehicle for fostering discrimination, is a different issue presented.¹³⁵

In sum, the argument for distinguishing high school students' freedom of expressive association rights from college students', in an equal setting, can succeed only if (1) high school students *do* shed at least their right to freedom of expressive *association* at the schoolhouse gate; (2) the Equal Access Act is construed to permit school districts to restrict students' association for the purposes of engaging in religious, political, or philosophical speech; *and* (3) the Religious Freedom Restoration Act is somehow construed not to create an overriding right of religious autonomy. None of these propositions appears to be sound. If the argument for religious group membership autonomy with respect to the University of Minnesota situation is correct, it is correct at the high school level too.¹³⁶

¹³⁵ Cf. *Lemon Is Dead*, *supra* note 19, at 834-38 (arguing that private action in state-created forum does not constitute state action for Establishment Clause purposes); *id.* at 834 & n.16 (noting exception where government pursues deliberate strategy of deputizing "pseudo-private" actors to engage in conduct constitutionally forbidden to government).

¹³⁶ A postscript: As this article went to press, the Second Circuit issued its decision in

IV. UNCONSTITUTIONAL CONDITIONS ON VOUCHERS (AND THE LIKE)

My final example of unconstitutional conditions on equal access is foreshadowed by the Court's recent decision in *Rosenberger*. The Court in *Rosenberger* found that private religious groups have an equal access right to not be excluded from a "limited public forum" in the form of government *funding* of private groups' advocacy or activities, on account of their religious viewpoint. The Court held that the University of Virginia's Student Activities Fund "is a forum more in a metaphysical sense than in a spatial or geographic sense, *but the same principles are applicable.*"¹³⁷

This is a major doctrinal breakthrough in First Amendment law. In the recent past, the Court has held several times that

Hsu. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, Nos. 95-7311, 95-7333, 1996 WL 272859 (2d Cir. May 15, 1996). The Second Circuit reversed in part and affirmed in part the district court's denial of a preliminary injunction. The opinion alternates between a thoughtful and sensitive analysis of the freedom of association aspects of "equal access" (discussed solely as a statutory right under the Equal Access Act) and a rather discordantly clumsy, cut-the-baby-in-two application of those principles. The Second Circuit's analysis of the right of expressive association tracks in some respects the analysis presented here. However, the court found that the right only protected the student Bible study group's selection of *some* of its officers — those that the court deemed to have more centrally important religious roles within the group. *Id.* at *11. The court found that the students could insist that the group's President, Vice President, and Music Coordinator shared the Christian beliefs of the group, but could not require that the Secretary or Activities Coordinator adhere to the group's religious views, on the theory that most of the functions of those officers could be performed by non-Christians without doing great damage to the group's actual expression. *Id.* The court insisted that a line be drawn, lest a slippery slope lead to the "plainly insupportable" position that the group could require that all members subscribed to the group's religious tenets. *Id.*

With all due respect, it is the Second Circuit's arbitrary, and somewhat presumptuous, line that is "plainly insupportable." Judge Van Graafeiland's pithy concurrence surely has the better of the majority in noting that "the Club members are better qualified than are we to determine the duties and necessary qualities of all their leaders." *Id.* at *29 (Graafeiland, J., concurring in part and dissenting in part). The Second Circuit majority's resolution of *Hsu* has the aura of a political compromise. The specific resolution reached seems unprincipled and will almost certainly prove unstable, assuring that the issue will continue to be litigated (either at the Supreme Court, or in other instances) and that the ultimate resolution will either be more blanket recognition of the right of religious groups to control their own membership and officership or a repudiation of such rights altogether. Whatever the final resting place of the courts on this issue, the Second Circuit's opinion does not describe it. Rather, the court's opinion is more likely to become the major opening salvo in the debate over this issue, not the last word.

¹³⁷ *Rosenberger*, 115 S. Ct. at 2517 (emphasis added).

neutral inclusion of religious groups or religious beneficiaries in a government-funded program is not *forbidden* by the Establishment Clause.¹³⁸ *Rosenberger* breaks little if any new ground on this point. (In fact, there is substantial backsliding on this principle, in terms of the number of dissenting votes against it.)¹³⁹ But the free speech holding of *Rosenberger* — that exclusion of potential funding beneficiaries on account of religious viewpoint violates the Free Speech Clause — is big news. *The First Amendment creates an affirmative right of equal access to funding by religious speakers and groups.*¹⁴⁰

Ten years ago, in the first law review article I wrote on the religion clauses, I suggested that limited public forum analysis should apply to government funds, as well as government fora of the type at issue in *Widmar*, and that there should be a correlative First Amendment right of equal access to government funds, where government has provided a financial benefit to a broad spectrum of groups.¹⁴¹ In 1986, this was perhaps a radical proposition. In 1996, this is not radical at all; it is an estab-

¹³⁸ See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2469 (1993) (holding that government program that provided sign language interpreter for deaf boy who attended religious school did not violate Establishment Clause); *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 489 (1986) (holding that state vocational financial assistance to student studying for ministry at pervasively religious college would not violate Establishment Clause); *Mueller v. Allen*, 463 U.S. 388, 402 (1983) (upholding Minnesota statute that allowed parents to take tax deductions for expenses incurred in sending their children to parochial schools). None of these cases formally overrules *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), but *Nyquist* surely must be regarded as moribund in light of these subsequent decisions. See *Religion, Equality, and the Constitution*, *supra* note 23, at 356-59 (arguing that distinctions between *Mueller* and *Nyquist* do not supply principled basis for different outcome on question of constitutionality).

¹³⁹ Arguably, *Rosenberger* is a step beyond *Mueller* and *Zobrest* in that it upholds direct state funding of specifically religious activities — an evangelistic, religious student publication. *Rosenberger*, 115 S. Ct. at 2523-24. *Witters*, which involved state-funded education of a vision-impaired individual at a pervasively-religious college in pursuit of the individual's desire to become a minister, involves much the same principle as *Rosenberger*.

¹⁴⁰ This issue was presented on remand in the *Witters* case. The Washington Supreme Court held that the Washington state constitution forbade the use of state vocational rehabilitation funds for religious education and vocational training and rejected *Witters*'s argument that this exclusion violated the Free Exercise Clause of the First Amendment. *Id.* at 1122-23. The Supreme Court denied certiorari. *Witters v. State Comm'n for the Blind*, 771 P.2d 1119 (Wash.) (*Witters II*), *cert. denied sub nom.*, *Witters v. Washington Dep't of Servs. for the Blind*, 493 U.S. 850 (1989).

¹⁴¹ *Religion, Equality, and the Constitution*, *supra* note 23, at 328, 357-58, 368-69.

lished principle. True, the Court in *Rosenberger* didn't dive headlong into the water on this proposition, but just barely poked its toes in. The Court was unprepared to *say* it — indeed, went out of its way to make clear it was not (yet) saying anything of the kind¹⁴² — but its *holding* logically implies that where a state adopts a “voucher” system to provide government financial support for students attending private schools, it may not disallow the use of such vouchers for attendance at private religious schools.¹⁴³ The issue is already being litigated¹⁴⁴ and may one day reach the Supreme Court. The idea that the Constitution *mandates* inclusion of private religious schools in voucher programs is one that is on its way — perhaps as little as five to ten years away from commanding widespread acceptance.

In the meantime, if it wasn't clear before *Rosenberger*, it should be abundantly clear after *Rosenberger* that inclusion of religious schools in voucher plans is at least constitutionally permissible.¹⁴⁵ Education choice and “voucher” schemes are the issue du jour of state legislatures, with a number of states either having adopted or considering such plans for their schools. One of the questions frequently posed in the state legislatures is whether religious schools may (or must) be included in voucher schemes that include nonreligious private schools.¹⁴⁶ Clear thinking on *that* question is essential to clear thinking on a series of questions that comes up at the same time: does a reli-

¹⁴² *Rosenberger*, 115 S. Ct. at 2522 (stating that “[o]ur decision, then, cannot be read as addressing an expenditure from a general tax fund”).

¹⁴³ Of course, logic has never been much of a driving force in the Supreme Court's decisions in this area. As Professor McConnell points out, the *Rosenberger* majority opinion emphasizes, as if important to the judgment, factors that are irrelevant to the Court's major premises. Michael W. McConnell, *Religion and the Court 1995: A Symposium*, 58 FIRST THINGS 31, 31-32 (1995).

¹⁴⁴ The Milwaukee voucher plan litigation, originally in federal court, *Miller v. Benson*, 878 F. Supp. 1209 (E.D. Wis.), *vacated*, 68 F.3d 163 (7th Cir. 1995), subsequently became an original action in the Wisconsin Supreme Court, which divided three-three on whether the inclusion of religious schools in parental choice voucher plans was constitutionally required or forbidden. *State ex rel. Thompson v. Jackson*, 546 N.W.2d 140 (Wis. Mar. 29, 1996). The Wisconsin Supreme Court therefore lifted a stay of state trial court proceedings.

¹⁴⁵ See *supra* note 138 (discussing *Mueller*, *Witters*, and *Zobrest*).

¹⁴⁶ Again, I am writing in part from my own experience. See Testimony of Professor Michael Stokes Paulsen Before the Education Funding Division of the Senate Education Committee of the Minnesota Senate on S.F. 1851 (January 26, 1996) (concluding that inclusion of private religious schools in any voucher plan that includes other private schools is constitutionally required).

gious school's acceptance of voucher funds from students give the state greater authority to regulate religious schools' admissions practices, hiring practices, curriculum, or other matters of school policy and administration than it otherwise would have?

Again, the intuitive answer is "yes." And again, the intuitive answer is wrong. Inclusion, on a religion-neutral basis, in a government program does not turn a religious school into an organ of the government. If it did, inclusion of such schools would be unconstitutional under the Establishment Clause (contrary to *Mueller v. Allen*,¹⁴⁷ *Witters v. Washington*,¹⁴⁸ and *Zobrest v. Catalina Foothills*,¹⁴⁹ and now *Rosenberger*.¹⁵⁰) Religious private schools have a First Amendment "equal access" right to accept voucher funds from their students, if such vouchers could be used at secular private schools. (The students, and parents, have a correlative "equal access" right to *choose* religious schools as voucher recipients, if secular private schools may be chosen.) The state consequently cannot condition this right of equal access on the relinquishment of any other constitutional or statutory rights that the religious school, as a private entity, possesses. I do not wish to take on the huge question of exactly what types of direct government regulations of religious schools violate the Free Exercise Clause, the Free Speech Clause, or the Religious Freedom Restoration Act. My point here is a narrow one concerning the effect of a school's receiving a voucher on the scope of government's regulatory authority in these areas: *Whatever the legally permissible scope of government authority to regulate private religious schools, that scope is not enlarged by a religious group's acceptance of voucher funds that the government has provided to students on a religion-neutral basis.* I would note, moreover, that the issues of autonomy, self-definition, freedom of association and expression, and free exercise for religious schools are closely parallel to those of college or high school student religious groups, discussed at length above. A religious school's decision to maintain a distinctive religious creed and to teach any and all subjects from a perspective informed by that creed is at the

¹⁴⁷ 463 U.S. 388 (1983).

¹⁴⁸ 474 U.S. 481 (1986).

¹⁴⁹ 113 S. Ct. 2462 (1993).

¹⁵⁰ 115 S. Ct. 2510 (1995).

absolute core of that religious institution's collective First Amendment freedom of expression. Any governmental regulation of a private religious school's curriculum that infringes on this aspect of the school's expression is presumptively unconstitutional. Similarly, a religious school's decision to require its leadership — teachers, administrators, and others that the school regards as essential models of its creed to its students — to adhere to and support the religious institution's religious creed, purposes and policies, lies within the core of First Amendment expressive association protected by the *Healy-Democratic Party-Roberts-Hurley* line of cases, just as determining the criteria for membership and officership selection lies within the core of expressive association of a student religious group or club. And, though this application is not self-evident, a religious school's religious *admissions* standards and policies and its system of religiously-motivated discipline for violation of the religious school's standards of conduct should be thought of as part of the school's First Amendment expression and association.

In each case, the school's rights of autonomy and free association can be justified by reference to the Free Speech Clause alone: institutional autonomy and freedom of association in these respects is essential to preserve expressive autonomy. Reinforcing all of this is a religious school's *religious* freedom, protected under the Free Exercise Clause, under RFRA, and under state constitutions. To be sure, in each situation the claim of constitutional right is subject to override upon a showing by the state that a regulation is essential to protect a "compelling" state interest; and the state arguably (though not clearly) has stronger interests with respect to regulation of education than with respect to the regulation of private student clubs that have no purpose apart from religious expression and association. As noted earlier, I have argued elsewhere that what constitutes a "compelling" interest should be construed much more narrowly than has been the inclination of courts in recent years.¹⁵¹ The exact scope of "compelling" interests remains subject to considerable debate. But it seems clear beyond debate that a state's interest in interfering with the religiously-informed curriculum,

¹⁵¹ *A RFRA Runs Through It*, *supra* note 31, at 264-83.

employment, and admissions decisions of private religious schools does not become any *more* “compelling” by virtue of the fact that religious schools (or, more precisely, families wishing to choose religious schools) have been granted equal access to the limited public forum of a religion-neutral, generally available voucher program. To use *equal access* somehow to ratchet-up the “compellingness” of a state’s regulatory interest is to impose an unconstitutional condition on equal access to the forum.¹⁵²

Let me illustrate all this with a short story. A Minnesota business group had been considering proposing a “compromise” draft school voucher plan. A representative of this group called me a few months back just to make sure that they were correct in their assumption that (1) a proviso that required private religious schools who accepted vouchers to have an open admissions policy would not be an “excessive entanglement” in violation of the Establishment Clause; and that (2) a proviso restricting private religious schools’ ability to expel or suspend students for conduct in violation of school disciplinary rules would also not violate the Establishment Clause.

I hesitated, in part because I tend to think that purported Establishment Clause questions of “entanglement” (“can the government do this, or will the program be struck down under *Lemon v. Kurtzman?*”) are actually free exercise questions of religious institutional autonomy (“does this restriction violate the right of the religious organization to the free exercise of religion?”). I asked why the sponsors wanted to impose such provisos. The response was telling: One of the objections made by voucher opponents is that a voucher system permits private schools to skim the cream off the student populace and that private schools that receive voucher students should be made to labor under the same restrictions as public schools, lest they have a competitive advantage. But, I asked, can’t private schools (if so inclined) “skim the cream” now? Yes, but now they would be doing it with state money, was the response.

¹⁵² Of course, it is entirely possible that, in any given case, the government previously had not regulated religious private schools to the constitutional limit, but becomes more inclined to do so, or to test those limits, as a consequence of the adoption of a voucher plan. That is not a legal question about the scope of governmental power, however, but a political question about whether government is more inclined to refrain from exercising constitutionally permissible powers in one situation as opposed to another.

That, alas, is the analytic mistake that is so easy to make. Private schools redeeming vouchers are not thereby more “public” than they once were. If they were, the inclusion of religious schools in voucher programs would violate the Establishment Clause. Nor are they, in any relevant sense, receiving “state money.” They are receiving money *from parents* of students, which was provided through a state program enabling parents’ private choices. A necessary premise of the constitutional validity of such arrangements is that schools whose students bring government-provided financial assistance, made available on a religion-neutral basis, have not lost one iota of their private capacity. Their expression is still *their* expression, not the government’s. “Equal access” is the right of a *private* entity to make use of a generally available government benefit without discrimination on the basis of the content and viewpoint of its speech and association. If equal access to a limited public forum (or a “limited public fund ’em”) is a legal *right*, that right may not be conditioned or limited by any proviso that would be substantively unconstitutional as applied to the private religious entity if it did *not* exercise its right of equal access.

Those who would seek to use vouchers as a lever for enhanced regulatory authority must be proceeding on the assumption that equal entitlement of parents to choose religious schools as the recipients of vouchers, and of such institutions to participate in a voucher program, is not constitutionally required. It is, instead, a *gift* that the state need not give; and, that being so, the state may impose conditions on the gift. Those who are concerned about religious liberty and autonomy can offer one of two responses: Refuse to accept the “gift” (the position of religious separationists) or refuse to accept that equal access *is* a “gift” in the first place. The first option condemns religious institutions to discriminatory exclusion. The second option argues that equal access is an entitlement that gives Screwtape no greater entree than he had before.

Defenders of the discriminatory exclusion view often cast themselves as defenders of religious liberty. A good example is Justice Souter’s dissent in *Rosenberger*, which recites all the usual lines about the need to “protect religion from a corrupting

dependence on support from the Government.”¹⁵³ Buried in this oft-recited maxim is the premise that ultimate receipt of government funds, no matter the form or manner, would entitle the Government to go ahead and corrupt religion. It is true that Government often tries this tactic. But the correct constitutional rule is not that religious groups must therefore be excluded from generally available benefits; it is that a religious group’s receipt of neutrally-provided “benefits,” without discrimination, does not permit Government to impose “corrupting” conditions on religious groups or religious adherents. Religious liberty does not require discrimination against religion — that is the canard that the equal access line of cases, including *Rosenberger*, puts to rest — but instead requires that equal access to public fora and public benefits not be construed to authorize government regulation or control of religious institutions, religious expression, religious association, religious autonomy, or religious exercise.

CONCLUSION

It may take some time for these points to gain acceptance (if indeed they ever do), just as it took some time for the idea of equal access to gain acceptance. I offer them not as a prediction of the direction in which the courts actually will go, but as a prescription for the direction in which the courts *should* go if they take the underlying premises of equal access and limited public forum doctrine seriously. The past fifteen years’ trend, and the decisions last year in *Pinette* and especially *Rosenberger*, give reason to hope that the Supreme Court, despite resistance in the lower courts, has taken the implications of its equal access free speech doctrine seriously. It remains to be seen whether this commitment will carry over into the next generation of equal access issues.

¹⁵³ *Rosenberger*, 115 S. Ct. at 2547 (Souter, J., dissenting).

