Religious Liberties

Nondiscrimination Rules and Religious Associational Freedom

*By Gregory S. Baylor & Timothy J. Tracey**

Governments are applying rules banning "discrimination" on the basis of religion and "sexual orientation" to religious groups with increasing frequency. As interpreted by the courts, the extent to which the Constitution protects the freedom of religious groups to associate around shared religious commitments is not entirely settled. We believe, however, that a proper regard for religious liberty should move government to exempt religious organizations from such nondiscrimination rules. When government subordinates religious freedom to other public policy objectives, courts should—and must—find violations of the Constitution.

Introduction

Religious groups seek to preserve their collective embrace of particular commitments over time through various means. One of those means is to articulate a creed. In many cases, this creed may still be questioned and challenged, both from within and from without, and, in response to those challenges, religious groups often change, clarify, or reconfirm their beliefs. Many religious groups, particularly those in the Christian tradition, adopt or revise creeds or confessions of faith in the course of and as a consequence of working through these challenges. With varying degrees of rigor, however, religious groups assess the extent to which a particular individual shares its religious commitments before admitting him or her to formal membership in community groups that share such beliefs. More scrutiny is applied to those considered for positions of leadership. A member or leader's subsequent rejection or transgression of the group's commitments may warrant discipline or even expulsion. The freedom to live out this process is what is under attack. One might plausibly ask why the conflict between nondiscrimination rules and religious associational freedom has heated up so much in recent years. We are able to identify at least two reasons; one is rather obvious, the other less so.

The first and more obvious reason is the success of the homosexual rights movement. A growing number of legislative and administrative bodies have added "sexual orientation" to lists of protected characteristics in various nondiscrimination rules. As of this writing, eighteen states and the District of Columbia forbid covered nongovernmental employers from discriminating on the basis of sexual orientation in hiring, promotion, and other employment actions.[1] Before 1989, only two had such a prohibition. In addition, scores of cities and counties now forbid sexual orientation discrimination in employment. Many states and localities forbid sexual orientation discrimination in housing, public accommodations, and business establishments.

Police power rules are not the only means by which governments punish and deter discrimination; they also condition eligibility for public benefits upon compliance with nondiscrimination rules. Public educational institutions routinely condition recognition of student groups upon compliance with nondiscrimination rules. They also condition use of their career services offices to employers willing to pledge compliance with a nondiscrimination rule. Organizations seeking government contracts and grants generally must pledge not to discriminate on the basis of protected characteristics. Many states impose a nondiscrimination rule upon charities seeking to participate in their state employee charitable campaigns. Rules of judicial ethics forbid judges from joining or maintaining their membership in discriminatory organizations.[2]

Given that many religious belief systems deem homosexual conduct immoral, the addition of "sexual orientation" to many government nondiscrimination policies in recent years is partially responsible for the increase in the number of conflicts between these rules and religious associational freedom. But there is another, less obvious, reason why the conflict between religious associational freedom and nondiscrimination rules has intensified: the paradigm shift in Establishment Clause jurisprudence away from "strict separationism" towards "benevolent neutrality."

Our starting point is something self-evident: that a "culture war" is being waged in the United States.[3] Church-state law is at once a battlefield, an offensive weapon, and a defensive shield in the culture war. A key dispute in church-state law concerns the extent to which the Establishment Clause and analogous state constitutional provisions restrain the power of government to include religious entities in public benefit programs. Strict separationists argue that these constitutional provisions generally forbid government from providing benefits to seriously religious entities, including schools and social service providers. Others argue that these constitutional provisions allow government to include religious organizations (even seriously religious ones) in such programs on a neutral basis.

Although there are a number of important exceptions, progressives tend to embrace strict separationism and the orthodox tend to favor neutrality theory. It may be no coincidence that strict separationism, as applied by the Supreme Court, forbids government funding of seriously religious entities (which tend to be "orthodox") but allows funding of merely "religiously affiliated" institutions (which tend to be more "progressive"). Thus, one might understand strict separationism as a weapon progressives use to penalize their cultural opponents. Unsurprisingly, then, many in the orthodox camp decry strict separationism and urge the Court to reject it.

Adherents of both strict separation and neutrality point to *Everson v. Board of Education*, a 1947 decision commonly considered to be the first "modern" Establishment Clause case.[4]

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The rhetoric of *Everson* is strict separationist, the outcome consistent with neutrality theory. Both paradigms have been present in subsequent Establishment Clause jurisprudence. However, in the four decades following *Everson*, strict separationism was the dominant paradigm, particularly in the 1970s and 1980s. During this period, the Court repeatedly held that government violated the Establishment Clause by including religious schools in education funding programs.[5] By the early part of this decade, neutrality had become the dominant paradigm in funding cases.[6] Foreshadowing the paradigm shift in funding cases, the Court repeatedly rejected the argument that the Establishment Clause required or justified government discrimination against non-governmental religious speech.[7]

We believe that the paradigm shift in Establishment Clause funding cases has likely contributed to the recent uptick in conflicts between religious associational freedom and nondiscrimination rules in two ways. First, the Court's changed Establishment Clause jurisprudence diminished the power of a once-potent weapon used by progressives to penalize their cultural opponents. The reduced power of this weapon hardly convinced progressives to give up the fight; instead, they relied in greater measure upon a different weapon: nondiscrimination rules. This shift in rhetoric was particularly obvious during the early debates over President George W. Bush's Faith-Based and Community Initiative. Progressive opponents of the initiative initially tended to invoke standard strict separationist arguments, such as protecting taxpayers from supporting organizations whose religious views they reject. When these arguments failed to gain much traction, attacks on "funding bigotry" took center stage.

Second, the Establishment Clause paradigm shift enabled and caused more intentionally religious organizations to seek participation in government programs, thereby creating conflicts with nondiscrimination rules. Rules barring religious discrimination in employment may have governed the programs for years, but strict separationism generally limited participation to those groups that had no trouble complying with such rules. When seriously religious groups became eligible, conflicts arose.

I. A Brief Survey of Selected Nondiscrimination Rules

Government rules barring discrimination on the basis of religion and sexual orientation might usefully be divided into two categories: police power rules, which governments apply to persons by virtue of their presence in or connection with a particular jurisdiction; and conditions on access to government benefits. What follows is a sampling of such nondiscrimination rules, designed primarily to illustrate the many contexts in which such rules are applied.

A. Police Power Rules

1. Employment

The federal and almost every state government generally forbids employers from taking into account an employee's or applicant's religious beliefs in their personnel decisions. However, virtually all police power laws banning religious discrimination in employment exempt religious employers. Title VII of the federal Civil Rights Act of 1964[8] forbids religious discrimination[9] by covered employers[10] but expressly exempts, in separate statutory sections, religious schools[11] and all religious employers[12] with respect to their treatment of employees and applicants for employment.

Religious exemptions in state laws vary. Some mirror Title VII, explicitly exempting religious employers from their bans on religious discrimination. Others categorically exempt religious employers from *all* the prohibitions of the nondiscrimination law, including ones pertaining to race, sex, and national origin. Still others exempt religious employers only with respect to certain positions.

With regard to sexual orientation, Title VII does not forbid employers from making employment decisions on this basis.[13] Seventeen of the eighteen jurisdictions prohibiting sexual orientation discrimination in employment fairly clearly exempt religious organizations from the prohibition, at least with respect to some job positions.[14]

2. Public Accommodations and Business Establishments

Title II of the Civil Rights Act prohibits discrimination on the basis of race, color, religion, or national origin in public accommodations.[15] In part because of the relatively narrow definition of "public accommodation" in the federal statute, conflicts between the ban on religious discrimination and genuine religious associational freedom are virtually nonexistent.[16]

Many states also ban discrimination in the operation of public accommodations or business establishments. Such bans often cover discrimination on the basis of religion and sexual orientation. Because such state bans often have a broader definition of "public accommodation" (or simply cover the broader category of "business establishments"), conflicts between such laws and religious freedom are more common.

For example, California courts have construed the state's Unruh Civil Rights Act to ban discrimination on the basis of sexual orientation in business establishments.[17] In *Benitez v. North Coast Women's Care Medical Group*, a lesbian sued her doctor after she declined to perform a particular infertility treatment upon her.[18] The doctor contends that, for religious reasons, she will not provide certain infertility treatments to unmarried women, including homosexual women. The plaintiff in *Benitez* is arguing that the doctor's action violates the Unruh Act's ban on sexual orientation discrimination in business establishments. The doctor asserted a religious freedom defense, and the California Supreme Court is currently considering the viability of that defense.[19] In *Doe v. California Lutheran High School Association*, a Christian high school expelled two students for engaging in homosexual conduct. The students sued, claiming that the school discriminated against them and thus violated the Unruh Act.[20]

Numerous other states forbid sexual orientation discrimination in public accommodations or business establishments. These include Connecticut,[21] the District of Columbia,[22] Hawai'i,[23] Illinois,[24] Maine,[25] Maryland,[26] Massachusetts,[27] Minnesota,[28] New Hampshire,[29] New Jersey,[30] New Mexico,[31] New York,[32] Oregon,[33] Rhode Island,[34] Vermont,[35] Washington,[36] and Wisconsin.[37]

3. Education

Some jurisdictions prohibit religious and/or sexual orientation discrimination by private educational institutions. These include the District of Columbia,[38] Maine,[39] Minnesota,[40] New York,[41] and Vermont.[42] Such bans routinely exempt religious schools.[43]

B. Conditions on Access to Benefits

Police power rules are not the sole means by which governments pressure private organizations to ignore religion and "sexual orientation" in their personnel policies. Eligibility for numerous government benefits is conditioned upon compliance with a nondiscrimination rule. Generally speaking, nondiscrimination conditions on access to benefits currently present a greater threat to religious associational freedom than do police power rules, because they are less likely to exempt religious organizations from their bans on religious and sexual orientation discrimination.

1. Government Contractors and Grant Recipients

Beyond their obligation to comply with Title VII, organizations that receive federal financial assistance are subject to four additional civil rights statutes.[44] None of these statutes forbids discrimination on the basis of religion or sexual orientation, and thus do not substantially implicate religious associational freedom. However, certain program-specific federal statutes forbid recipients of federal funds from discrimination on the basis of religion in employment. These include the Workforce Investment Act of 1998,[45] the Omnibus Crime Control and Safe Streets Act of 1968,[46] the statute governing the Community Development Block Grant program,[47] and the statute governing the Head Start program.[48] In addition to rules governing federal financial assistance, some states require their contractors and grantees—including religious ones—to ignore religion in their staffing decisions.[49]

2. *Access to State Employee Charitable Campaigns*

Through state employee charitable campaigns, many states facilitate donations by their employees to qualified charities. To participate in a campaign, a charity typically must satisfy certain rules laid down by the state. Some states condition eligibility upon compliance with a nondiscrimination rule. For example, Connecticut requires charities to affirm that they "do not discriminate or permit discrimination against any person or group of persons except in the case of bona fide occupational qualification on the grounds of… religious creed… marital status… [or] sexual orientation."[50] Michigan requires charities "to provide equal membership/employment/service opportunities to all eligible persons without regard to… religion."[51]

3. Speech Fora

As discussed below, many public universities have withheld recognition and attendant benefits to student religious groups that "discriminate" on the basis of religion or sexual orientation. Some secondary schools have also applied such rules to student religious groups.[52]

II. The Magnitude of the Threat Posed by Religion and Sexual Orientation Nondiscrimination Rules to Religious Associational Freedom

It is difficult to overstate the threat to religious freedom posed by religion and sexual orientation nondiscrimination rules. A key to understanding the magnitude of the threat is realizing that many homosexual rights advocates equate sexual orientation with race. More specifically, they contend that those that take homosexual conduct into account in personnel decisions are as morally repugnant as those who practice invidious discrimination against African-Americans. If they persuade law-makers and judges to embrace this view, the law would treat theologically conservative religious organizations the same way it treats racists. Racist organizations are utterly marginalized by the law: they are subject to liability under police power rules and they are ineligible for a host of valuable government benefits (properly so). Given the involvement of government in virtually every area of life, there are numerous points of contact between private groups and government. Each of these points of a contact is a context in which a nondiscrimination rule might be applied. It is reasonable to believe that at least some homosexual rights supporters desire to create a similar situation for theologically conservative religious organizations that consider a person's homosexual conduct in making decisions about that person.

There are numerous ways in which we might get closer to such an unwelcome state of affairs. First, more jurisdictions could adopt police power nondiscrimination rules without adequate religious exemptions. Second, government might condition access to more and more benefits upon compliance with religion and sexual orientation nondiscrimination rules. Third, governments might step up enforcement of existing nondiscrimination rules.

One might reasonably speculate that future proposals for police power bans on sexual orientation discrimination will not include adequate religious exemptions. The evolution of the religious exemption in the proposed federal Employment Non-Discrimination Act (ENDA) tends to support this speculation. When it was first introduced in 1994, ENDA categorically exempted non-profit religious employers.[53] Subsequent versions did likewise.[54] The version in the current Congress, however, appears to be somewhat more limited. It categorically exempts only those employers that "ha[ve] as [their] primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief."[55] With respect to religious employers that do not fall within this categorical exemption, the ban on sexual orientation discrimination:

> shall not apply with respect to the employment of individuals whose primary duties consist of teaching or spreading religious doctrine or belief, religious governance, supervision of a religious order, supervision of persons teaching or spreading religious doctrine or belief, or supervision or participation in religious ritual or worship.[56]

There is an additional, somewhat unclear provision that allows religious employers to require employees in "similar positions" to conform to those religious tenets the employer

declares to be significant.[57] Whatever ambiguities exist in this language, it is undeniable that the religious exemption is narrower than in all the previous versions of ENDA.

In addition, the current version of ENDA appears to restrict the power of employers to consider the extramarital sexual activity of their employees—even if they do not single out homosexual behavior for especially adverse treatment. ENDA generally does not impose liability on employers who take actions that have a disparate impact on homosexuals.[58] However, the bill appears to forbid employers in states that do not allow same-sex marriage from adopting and enforcing policies or rules whose application turns on whether employee or applicant is married.[59]

Recent developments in Illinois also contribute to the concern that newer police power bans on sexual orientation discrimination will not include adequate religious exemptions. As footnoted above, it appears as though the recently amended Illinois Human Rights Act does *not* exempt religious employers from its ban on sexual orientation discrimination.

There are other contexts in which religious associational freedom is at risk. For one, theologically conservative institutions of higher education may face challenges to their accredited status. The American Psychological Association (APA), for example, accredits doctoral graduate programs in psychology.[60] In deciding whether to accredit an institution's program, the APA examines whether "the program avoids any actions that would restrict program access on grounds that are irrelevant to success in graduate training."[61] This language is commonly understood to require accredited graduate psychology programs to ignore the sexual orientation of students and faculty. A footnote to this language reads as follows:

This requirement does not exclude programs from having a religious affiliation or purpose and adopting and applying admission and employment policies that directly relate to this affiliation or purpose so long as: (1) Public notice of these policies has been made to applicants, students, faculty, or staff before their application or affiliation with the program; and (2) the policies do not contravene the intent of other relevant portions of this document or the concept of academic freedom. These policies may provide a preference for persons adhering to the religious purpose or affiliation of the program, but they shall not be used to preclude the admission, hiring, or retention of individuals because of the personal and demographic characteristics described in Domain A, Section 5 of this document (and referred to as cultural and individual diversity). This footnote is intended to permit religious policies as to admission, retention, and employment only to the extent that they are protected by the United States Constitution. It will be administered as if the United States Constitution governed its application.

Some students and psychologists urged the APA to drop the footnote, complaining that some religious schools created an "atmosphere of exclusion" by drawing their faculty and students from among those who agreed with their statements of faith and codes of conduct. After extensive review, the APA elected not to eliminate the footnote. The U.S. Department of Education's role may well have been decisive. The Department suggested that if the APA removed the footnote, it would consider revoking APA's status as an accrediting body.[62] The APA explicitly identified the Department's exertion of pressure as an important reason why it chose not to eliminate the footnote.[63] It is hardly inconceivable that the APA might try once again to change its stance towards conservative religious schools, and that a more accommodating Secretary of Education might allow that to happen.

Although not a present concern, it is not inconceivable that the tax-exempt status of theologically conservative religious groups might one day be in jeopardy. Those defending the application of sexual orientation nondiscrimination rules to religious groups routinely cite *Bob Jones University v. United States*, the case in which the Supreme Court upheld an Internal Revenue Service decision to revoke the university's tax-exempt status because of its racially discriminatory admissions standards.[64] Some academic commentators have suggested similar treatment for organizations that deem homosexual conduct immoral and adopt personnel policies consistent with that belief.[65]

III. Constitutional Limits on the Application of Religion and Sexual Orientation Nondiscrimination Rules to Religious Organizations

A. Right of Expressive Association

The Supreme Court has recognized that implicit in the First Amendment freedoms of speech, assembly, and petition is the freedom to gather to express ideas—what the Court terms a "right of expressive association."[66] Expressive association is protected because "[i]f the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect."[67] The Supreme Court has already held that in some circumstances the right of expressive association trumps governmental nondiscrimination policies. The Court in *Boy Scouts of America v. Dale*,[68] for example, held that New Jersey violated the Boy Scouts' expressive association rights by applying the New Jersey Law Against Discrimination to force the Scouts to retain an active homosexual as a scoutmaster.[69] The Court determined that the Scouts were an expressive association because they seek to instill values in young people through activities like camping and fishing.[70] Among these is that "homosexual conduct is not morally straight."[71] Forcing the Scouts to include a gay scoutmaster, the Court said, "would… surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs."[72]

Likewise, the Court held in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*[73] that Massachusetts could not use its public accommodations law to force the private organizers of a St. Patrick's Day parade to include a contingent of self-identified homosexual persons.[74] The Court found that the parade is "a form of expression," the parade marchers "are making some sort of collective point, not just to each other but to bystanders along the way."[75] The parade organizers were not espousing any views about human sexuality.[76] Forcing the parade organizers to include the homosexual persons, according to the Court, would "violate[] the fundamental rule of protection under the

First Amendment, that a speaker has the autonomy to choose the content of his own message."[77]

When the government forbids a religious organization from discriminating on the basis of religious belief, whether directly through a police power rule or indirectly as a condition on access to a benefit, the government's actions run contrary to *Dale* and *Hurley.* Religious organizations, such as churches, student groups, private religious schools, or religious charities, are expressive associations.[78] Like the Scouts in *Dale*, they seek to instill certain values in their members, employees, and/or patrons.[79] They operate to foster Christian belief, educate young people, or perform social services. These are the exact activities that Justice O'Connor listed in *Roberts v. United States Jaycees* as examples of expressive association.[80] "[P]rotected expression may… take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service."[81] For this reason, there is generally little debate concerning whether a religious organization is an expressive association.[82]

For government to use a nondiscrimination policy to force religious organizations to accept members or hire employees who disagree with their religious beliefs impermissibly burdens the right of expressive association. A church stays true to its doctrine by hiring only pastors and other employees that adhere to church doctrine. A private religious school ensures that its faculty teaches consistent with the school's beliefs by hiring only teachers that share its beliefs. A religious student group maintains its religious mission and identity by restricting those that lead the group to hold the same beliefs. Like the Scouts in *Dale*, telling these groups to abandon their religious criteria for employees or members forces them to "propound a point of view contrary to [their] beliefs."[83]

For example, in *Christian Legal Society v. Walker*, Southern Illinois University (SIU) denied a Christian Legal Society (CLS) chapter the status and benefits of official university recognition because of the group's religious criteria for officers and members.[84] The Seventh Circuit Court of Appeals held that SIU's application of its antidiscrimination policy to CLS violated the group's right of expressive association.[85] "SIU's enforcement of its antidiscrimination policy upon penalty of derecognition can only be understood as intended to induce CLS to alter its membership standards… in order to maintain recognition."[86] Application of the antidiscrimination policy in this way, according to the Seventh Circuit, "burdens CLS's ability to express it ideas."[87]

Governments typically argue that conditioning access to a benefit on agreement to a nondiscrimination policy is distinguishable from the direct application of a nondiscrimination policy at issue in cases like *Dale* and *Hurley*.[88] *Dale* and *Hurley,* according to the government, are "forced inclusion" cases; the government was directly forcing an association to accept persons that alter its expression. The denial of a government benefit to a religious group is different, since the government is not forcing the religious group to do anything. The religious group is free to associate and speak all it wants; it simply cannot have access to the funding, university recognition, government contract, or other benefit the government happens to be administering. The government thus concludes that *Dale* and *Hurley* should not apply.

This argument is an overly narrow construction of the right of expressive association. The Supreme Court has explained that interference with the right of expressive association may "take many forms."[89] Even where government is not directly regulating or restraining a group's ability to associate, the government may nonetheless be impermissibly interfering with the right of expressive association. In *NAACP v. Alabama ex rel. Patterson,*[90] for example, the Court held that for Alabama to require the NAACP to disclose its membership lists was an unconstitutional burden on association even though the state had "taken no direct action… to restrict the right of members to associate freely."[91] Likewise, in *Healy v. James*,[92] the Court held that the denial of official college recognition violated Students for a Democratic Society's associational rights even though the "administration ha[d] taken no direct action to restrict the rights of petitioners to associate freely."[93]

The Supreme Court recently considered *Patterson* and *Healy* in deciding *Rumsfeld v. FAIR.*[94] It explained that although the laws at issue in those cases "did not directly interfere with an organization's composition, they made group membership less attractive, raising the same First Amendment concerns about affecting the group's ability to express its message."[95] That the "same First Amendment concerns" are raised whether the interference with the right of expressive association is direct or indirect suggests that any distinctions between the two are constitutionally insignificant.

Reinforcing this assertion is the fact that the Supreme Court has specifically held that to impose penalties or withhold benefits from individuals because of their exercise of associational rights violates the right of expressive association.[96] In *Keyishian v. Board of Regents,*[97] for example, the Court held that a public university could not deny persons the benefit of employment because of their association with "'subversive' organizations."[98] It expressly rejected the premise "that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."[99]

At least three federal circuit courts have specifically held that it violates the right of expressive association for government to condition access to a benefit on accepting persons inimical to an association's purpose. The Seventh Circuit in *Walker*, as noted above, held that conditioning official university recognition on agreement to a religion and sexual orientation nondiscrimination policy violated the local CLS chapter's expressive association rights even though Southern Illinois University "was not forcing CLS to do anything at all."[100] The Eighth Circuit in *Cuffley v. Mickes*[101] held that requiring the Ku Klux Klan to accept "non-Aryans" as a condition of participating in Missouri's Adopt-a-Highway program violated the Klan's right of association though the Klan had "no right to adopt a highway."[102] The Second Circuit in *Hsu v. Roslyn Union Free School District No. 3*[103] held that it violated the statutory right of equal access for a school district to condition recognition of a religious student group on the group's pledge not to discriminate on the basis of religion.[104]

More generally, the doctrine of unconstitutional conditions mandates that the government cannot attach a string to a benefit so as to "produce a result which it could not command directly."[105] In *Rumsfeld v. FAIR,* for example, the issue before the Court was whether the federal government could use the Solomon Amendment to condition government funding on granting military recruiters equal access to university campuses.[106] The Court explained that "the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students."[107] *Dale* and *Hurley* establish that the government cannot directly force religious organizations to accept members or hire employees that disagree with their religious beliefs. The doctrine of unconstitutional conditions means the government should not be able to accomplish the same result simply by conditioning a benefit on agreement to a religion nondiscrimination policy.

The primary case relied on by government defendants for their argument that conditioning access to a benefit can be distinguished from *Dale* is *Boy Scouts of America v. Wyman*.[108] In *Wyman*, the Scouts were denied participation in Connecticut's state employee charitable campaign. Connecticut denied the Scouts' application to be an approved charity because they bar homosexual persons from membership.[109] The Scouts sued arguing that the exclusion from the charitable campaign violated their expressive association rights under *Dale*.[110] The Second Circuit held that the Scouts' expressive association rights had not been violated, distinguishing *Dale* as an attempt to directly force the Scouts to accept a member that would compromise its message.[111]

Wyman's reasoning is suspect on a number of grounds. First and foremost, the underlying premise of *Wyman*—that an indirect burden on associational rights is permissible—runs contrary to the well-established Supreme Court precedent explained above.[112] Second, *Wyman* improperly conflates forum analysis and expressive association.[113] The Second Circuit deemed Connecticut's charitable campaign a nonpublic forum, and thus found reasonableness the applicable standard of review for the Scouts' expressive association claim.[114] The right of expressive association, however, is not contingent on the nature of the forum.[115] If a group otherwise has a right to be in a speech forum, whether public or not, the question is can that right of access be conditioned on accepting persons inimical to the group's purpose? The constitutional analysis of that condition is divorced from the nature of the forum involved.[116] Third, *Wyman* rests on the dubious proposition that Connecticut's charitable campaign involves a government subsidy.[117] The only money involved in the campaign, however, comes from state employees giving their own money to private charities of their choice.[118] Because this is private money, not government money, the charitable campaign should not have been analyzed as a government subsidy.[119] Moreover, access to the campaign forum itself is not properly considered a government subsidy.[120] If forum access were a subsidy, then the government in *Good News Club v. Milford Central School,*[121] *Lamb's Chapel v. Center Moriches Union Free School District,*[122] and *Rosenberger v. Rector of the University of Virginia*[123] should have been able to deny the religious groups access to its forum simply by contending that it had chosen not to subsidize religion. Instead the Supreme Court held in each case that excluding the religious group from the government's forum ran afoul of the First Amendment.[124] Access to a forum is thus treated as a right and not a benefit.

Perhaps it is obvious, but the argument that *Dale* is distinguishable as a forced inclusion case is not applicable in the context of police power rules. *Dale* itself dealt with a police power rule—the New Jersey Law Against Discrimination.[125] The law applied to the Scouts directly and regardless of whether the Scouts were seeking any sort of government benefit.

B. Free Speech Clause

Application of a nondiscrimination policy to a religious group may also be viewpoint discriminatory under the First Amendment. It is frequently the case that when government forbids religious organizations from selecting members or hiring employees who share their religious beliefs, it allows other organizations to hire employees or select members that share their organizations' beliefs, whether those beliefs are political, economic, or social.[126] For example, public universities often forbid groups formed around religious ideas but allow groups formed around other ideas. The environmental group may require members to support conservation or recycling. The chess club may require that officers and members share an interest in playing chess. The Republican club may require officers and members to support Republican political ideas. Yet the universities forbid religious groups from requiring that officers and members share the groups' religious beliefs. This difference in treatment is religious viewpoint discrimination.[127]

Government typically claims that this sort of treatment of religious organizations is neutral because *all* organizations must pledge not to select members or hire employees on the basis of religious belief to have access to a particular benefit.[128] This is of course an easy promise for nonreligious organizations. But to claim that such a condition is neutral when applied to a religious organization is formalism that turns a blind eye to reality and ignores established Supreme Court precedent.[129]

In *Widmar*, the university conditioned use of school facilities on student groups refraining from "religious worship or religious teaching."[130] Non-religious student groups could easily comply with this condition and use university facilities; however, the religious group could not. The university, therefore, withdrew the religious group's previously granted access to meeting space.[131] Even though the condition applied to all university groups, the Supreme Court ruled that it was not content-neutral and applied strict scrutiny in holding that the condition violated the religious group's right of expressive association and freedom of speech.[132]

Similarly, in *Rosenberger*, the university argued its policy was viewpoint-neutral because it was not denying funding to a particular religious perspective but denying all student organizations funding for religious content.[133] The Supreme Court disagreed:

It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long

as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.[134]

Finally, in *Lamb's Chapel*, school officials argued that they were not discriminating against a church that sought access to show a religious film because all community groups were banned from speaking on religious subject matter.[135] The Supreme Court again dismissed the argument that this was neutral:

> That all religions and all uses for religious purposes are treated alike… however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.[136]

Like the government's treatment of religious organizations in *Widmar, Rosenberger*, and *Lamb's Chapel*, when government conditions access to a benefit on agreement to a religion nondiscrimination policy, government applies to all groups a condition that matters only to religious groups. While the nondiscrimination requirement applies to all organizations, it prevents only the religious organizations from accessing the particular government benefit in question, because only religious organizations need to apply religious qualifications for membership or employment to protect their expressive purpose.[137]

C. Free Exercise Clause

The government also violates the Free Exercise rights of religious organizations when it forbids them from selecting members or hiring employees on the basis of religious belief.[138] Government typically argues that its nondiscrimination policy is neutral and generally applicable and therefore not subject to strict scrutiny under *Employment Division v. Smith*.[139] Regulations "impos[ing] special disabilities on the basis of religious views or religious status," however, remain presumptively unconstitutional, even under *Smith*.[140] The Supreme Court in *Church of the Lukumi Babalu Aye v. City of Hialeah*[141] struck down an ordinance that prohibited slaughtering animals for religious purposes, but not for commercial purposes or sport.[142] The Court held that the law was "substantially underinclusive" and, therefore, impermissibly targeted religion.[143]

When government applies a rule of no religious discrimination to a religious organization it similarly targets religion. For example, the government's nondiscrimination policy prohibits a Quaker organization from requiring its employees or members to adhere to pacifist religious beliefs, but permits an antiwar organization to tell employees or members they must oppose war. It prohibits an Orthodox Jewish organization from requiring members and officers to adhere to a kosher diet for religious reasons, but permits a vegetarian organization to tell its members and officers that they must not eat meat. In each instance, the government's objective of forbidding discrimination is pursued with respect to religious organizations, but not with respect to analogous non-religious organizations. Such a policy is fatally under-inclusive and unconstitutional under the Free Exercise Clause.[144]

It is also often the case that the government, at least in practice, is granting other organizations exemptions from its nondiscrimination policy.[145] For example, a public university's nondiscrimination policy may forbid gender discrimination but fraternities and sororities are granted exemptions to select members on the basis of gender.[146] Any such exemptions render the government's nondiscrimination requirement not generally applicable and, therefore, subject to strict scrutiny.[147]

While the so-called "hybrid-rights doctrine" has received a mixed reception by the federal courts, the Supreme Court in *Smith* expressly preserved the application of strict scrutiny for "a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns."[148] Using the "cf." signal, the Court invoked *Roberts v. Jaycees*, a case involving both freedom of association and a nondiscrimination rule, and quoted the following: "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 [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed."[149] If there were ever a case warranting application of the hybrid rights doctrine, the government's decision to prohibit religious organizations from selecting members or hiring employees on the basis of religion is it.

D. Church Autonomy Doctrine

The Supreme Court has found that the religion clauses of the First Amendment provide religious organizations with the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[150] This so-called "church autonomy doctrine" has been applied in a line of cases protecting religious organizations against employment laws that would otherwise interfere with their internal management. For example, in *Alicea-Hernandez v. Catholic Bishop of Chicago*,[151] the Seventh Circuit held that a religious organization could not be held liable under Title VII for gender and race discrimination claims brought by a former press secretary, since it "would result in an encroachment by the state into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."[152] Likewise, in *NLRB v. Catholic Bishop of Chicago,*[153] the Supreme Court held that the National Labor Relations Act could not be applied to lay teachers employed by Catholic schools, since it "would implicate the guarantees of the Religion Clauses."[154]

The protections of the church autonomy doctrine are not limited to actual churches; rather, they have been extended to various religiously-affiliated institutions, including schools, hospitals, and charities.[155] The Sixth Circuit in *Hollins v. Methodist Healthcare*[156] in fact specifically held that to invoke these protections "an employer need not be a traditional religious organization such as a church, diocese, or synagogue, or an entity operated by a traditional religious organization."[157]

When government applies a religion nondiscrimination law to a religious organization, either directly or indirectly, it intrudes into the internal affairs of a religious organization. It rips away from the organization the ability to define itself as religious. The organization must hire employees or accept members that disagree with its core religious beliefs.

This interferes with the internal management of religious organizations and therefore runs afoul of the First Amendment religion clauses.[158]

CONCLUSION

The increased application of sexual orientation and religion nondiscrimination rules to religious organizations poses a serious threat to the constitutionally protected freedom of such organizations. Theologically conservative religious organizations are particularly threatened by this trend, as they are more likely to draw members of their communities from among those who share their faith commitments, both doctrinal and behavioral. Such organizations are also far more likely to resist the societal trend towards affirmation of homosexual activity.

One need not agree with their theological and moral positions to be concerned about the attack on their core freedoms. Religious organizations should be allowed to maintain their distinctly religious character, free from undue government pressure. Such freedom, properly understood, does not merely restrain the government's power to regulate their practices through police power rules. It also limits the state's authority to pressure religious groups to abandon sincere religious beliefs and practices by withholding valuable benefits or full participation in public life. Fortunately, the Supreme Court has already laid a solid foundation for the full constitutional protection of these important exercises of freedom, and we are cautiously optimistic that the courts will protect liberty in the event legislatures and other rule making bodies give insufficient weight to the Constitution's guarantees.

Endnotes

1 D.C. Code § 2-1402.11(a) (2007); Cal. Gov't Code § 12940(a) (West 2007); Conn. Gen. Stat. § 46a-81c (2007); Haw. Rev. Stat. § 378-2(1)(a) (2006); 775 Ill. Comp. Stat. Ann. § 5/1-103(Q) (2007); Me. Rev. Stat. Ann. tit. 5, § 4553(10)(G) (2006); Md. Ann. Code Ann. art. 49B, § 16(a)(1) (2007); Mass. Gen. Laws. Ann. ch. 151B, § 4(1) (West 2007); Minn. Stat. Ann. § 363A.08(2) (West 2007); Nev. Rev. Stat. 613.330(1) (2006); N.H. Rev. Stat. Ann. § 354-A:2(I) (2006); N.J. Rev. Stat. Ann. § 10:5-12(a) (West 2006); N.M. Stat. Ann. § 28-1-7(A) (2007); N.Y. Exec. Law § 296(1)(a) (McKinney 2007); S.B. 2, 74th Legis. Assem., 2007 Reg. Sess. (Or. 2007) (enacted) (Oregon Equality Act, signed May 9, 2007); R.I. Gen. Laws § 28-5-7(1) (2006); Vt. Stat. Ann. tit. 21, § 495(a)(1) (2006); Wis. Stat. Ann. § 111.36(1)(d) (West 2007). As of this writing, bills banning sexual orientation employment discrimination in two states (Colorado and Iowa), are on their governors' desks. S.B. 07-025, 66th Gen. Assem., 1st Reg. Sess., (Colo. 2007) (as passed by Senate, May 3, 2007); S. File 427, 82d Gen. Assem., 1st Reg. Sess. (Iowa 2007) (as passed by Senate Apr. 25, 2007).

2 See, e.g., Vermont Code of Judicial Conduct, Admin. Order No. 10 (2000).

3 James Davison Hunter, Culture Wars: The Struggle to Define America (1991).

4 330 U.S. 1 (1947).

5 Ball v. United States, 140 U.S. 131 (1891); Aguilar v. Felton, 473 U.S. 402 (1985); Meek v. Pittenger,

421 U.S. 349 (1975) (plurality in part); Lemon v. Kurtzman, 403 U.S. 602 (1971); Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Essex v. Wolman, 409 U.S. 808 (1972) (summarily aff'd).

6 Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Rosenberger v. Rector & Visitors, 515 U.S. 819 (1995); Agostini v. Felton, 521 U.S. 203 (1997); Mitchell v. Helms, 530 U.S. 793 (2000); Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

7 Widmar v. Vincent, 454 U.S. 263 (1981); Westside Bd. of Educ. v. Mergens, 496 U.S. 226 (1990)

(plurality in part); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Capitol Square Review & Advisory Bd. v. Pinette,

515 U.S. 753 (1995) (plurality in part); Rosenberger, 515 U.S. 819; Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

8 Title VII, § 701, July 2, 1964, Pub. L. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e (2007)).

9 42 U.S.C. § 2000e-2(a) (2007). Title VII also forbids discrimination on the basis of race, color, sex, or national origin. *Id*.

10 *Id*. § 2000e(b) (defining "employer").

11 *Id*. § 2000e-2(e) ("[n]otwithstanding any other provision of this subchapter… it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion").

12 *Id*. § 2000e-1(a) ("[t]his subchapter shall not apply to… a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities").

13 The proposed Employment Non-Discrimination Act of 2007 would impose civil liability upon employers who discriminate on the basis of "sexual orientation" and "gender identity." H.R. 2015, 110th Cong. § 1 (2007). Notably, it does not categorically exempt religious employers. *Id*. § 6. Previous versions did tend to categorically exempt religious employers. *See, e.g.,* H.R. 3285, 108th Cong. § 9 ("This Act shall not apply to a religious organization.").

14 It is unclear, however, whether Illinois' ban on sexual orientation discrimination covers religious employers. The Illinois Human Rights Act declares that a religious organization is not an "employer" subject to liability for religious discrimination "with respect to the employment of individuals of a particular religion." 775 ILCS 5/2-101(B)(2). In other words, a religious employer may "discriminate" on the basis of religion. It is far from self-evident that this language permits a religious employer to take a person's homosexual orientation or conduct into account in personnel decisions.

15 42 U.S.C. §§ 2000a-2000a-6 (2007). Title II does not ban discrimination on the basis of sexual orientation.

16 *Id*. § 2000a(b).

17 Cal. Civ. Code § 51 (West 2007).

18 No. GIC 770165, 2004 WL 5047112, at *1 (Cal. Super. Ct. Oct. 28, 2004), *vacated*, N. Coast Women's Care Med. Group v. Super. Ct., 37 Cal. Rptr. 3d 20, (Cal. Ct. App. 2005), *vacated*, 40 Cal.Rptr.3d 636 (Cal. Ct. App. 2006), *review granted and superseded*, 139 P.3d 1 (Cal. Jun. 14, 2006) (No. S142892).

19 N. Coast Women's Care Med. Group, 139 P.3d 1.

20 No. RIC 441819 (Cal. Super. Ct. filed Dec. 15, 2005). *See also* Butler v. Adoption Media, LLC, No. C 04-0135, 2007 WL 963159, at *1 (N.D. Cal. Mar. 30, 2007) (Unruh Act sexual orientation discrimination claim against adoption websites).

21 Conn. Gen. Stat. § 46a – 81d (2007).

22 D.C. Code § 2-1402.31.

23 Hawai'i Stat. § 489-1 *et seq*.

24 775 ILCS 5/1-102 *et seq.*

25 Me. Rev. Stat. § 4591-94F.

26 Md. Ann. Code art. 49B § 5.

27 Mass. Gen. Laws Ann. ch. 272, §§ 92A, and 98.

28 Minn. Stat. §363A.01 *et seq.*

29 N.H. Rev. Stat. § 354-A:1 *et seq*.

30 N.J. Stat. Ann. § 10:5-1 *et seq.*

31 N.M. Stat. Ann. § 28-1-1 *et seq.*

32 N.Y. Exec. Law § 296(2).

33 Oregon Equality Act, S.B. 2, signed into law on May 9, 2007.

34 R.I. Gen. Law. § 11-24-2.

35 9 V.S.A. § 4502.

36 West's RCWA § 49.60.215.

37 W.S.A. § 106.52.

38 D.C. Code § 2-1402.41

39 Me. Rev. Stat. Ann. §§ 4601 and 4602 (prohibiting discrimination on the basis of sexual orientation but not on the basis of religion).

40 Minn. Stat. Ann. § 363A.13.

41 N.Y. Educ. Law § 313 (prohibiting discrimination on the basis of religion and sexual orientation).

42 Vt. Stat. Ann. tit. 9, § 4502 (prohibiting discrimination on the basis of creed and sexual orientation)

43 D.C. Code § 2-1401.03(b) (permits religious schools to give preference in admissions to "persons of the same religion"); Me. Rev. Stat. Ann. § 4602 ("The provisions in this subsection relating to sexual orientation do not apply to any education facility owned, controlled or operated by a bona fide religious corporation, association or society."); Minn. Stat. Ann. § 363A.23(1) ("It is not an unfair discriminatory practice for a religious or denominational institution to limit admission or give preference to applicants of the same religion."); *id*. at § 363A.26 (religious exemption from ban on sexual orientation discrimination); N.Y. Educ. Law § 313(1)(a) (permitting religious schools to "discriminate" on the basis of sexual orientation); *id*. at § 313(3)(a) (permitting a religious school "to make such selection of its students as is calculated by such institution to promote the religious principles for which it is established or maintained").

44 Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*.; Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-07; Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794; and Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-88

45 29 U.S.C. § 2938(a)(2).

46 42 U.S.C. § 3789d(c)(1).

47 42 U.S.C. § 5309.

48 42 U.S.C. § 9849(a).

49 *See* Paul Taylor, *The Costs of Denying Religious Organizations the Right to Staff on a Religious Basis When They Join Federal Social Service Efforts*, 12 Geo. Mason U. Civ. Rts. L.J 159, 196 n. 128 (2002) (listing eleven states).

50 Connecticut State Employee Campaign Committee 2005 application materials (on file with the authors).

51 Michigan State Employees Combined Campaign Steering Committee 2005 application materials (on file with the authors).

52 Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839 (2nd Cir. 1996).

53 S. 2238, 103rd Cong. § 7 (1994); H.R. 4636, 103rd Cong. § 6 (1994).

54 H.R. 1863, 104th Cong. § 6 (1995); S. 869, 105th Cong. § 9 (1997); H.R. 1858, 105th Cong. § 9 (1997); S. 1276, 106th Cong. § 9 (1999); H.R. 2355, 106th Cong. § 9 (1999); S. 1284, 107th Cong. § 9 (2001); H.R. 2692, 107th Cong. § 9 (2001); S. 19, 107th Cong. § 509 (2001); S. 1705, 108th Cong. § 9 (2003); H.R. 3285, 108th Cong. § 9 (2003); S. 16, 108th Cong. § 709 (2003).

55 Employment Non-Discrimination Act of 2007, H.R. 2015, § 6(a).

56 *Id*. § 6(b).

57 *Id*. § 6(c).

58 H.R. 2015, 110th Cong. § 4(g).

59 *Id*. § 8(a)(5).

60 http://www.apa.org/ed/accreditation/accrfaq.html (last visited May 5, 2007).

61 Guidelines and Principles for Accreditation of Programs in Professional Psychology, *at* http://www.apa.org/ed/accreditation/G&P0522.pdf (last visited May 5, 2007).

62 33 Monitor on Psychology 1, *Accreditation Committee Decides to Keep Religious Exemption* (January 2002). http://www.apa.org/monitor/jan02/exemption.html.

63 *See id.*

64 461 U.S. 574 (1983).

65 Russell J. Upton, Comment, *Bob Jonesing Baden-Powell: Fighting the Boy Scouts of America's Discriminatory Practices by Revoking Its State-Level Tax-Exempt Status*, 50 Am. U. L. Rev. 793 (2001); David A. Brennen, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 B.Y.U. L. Rev. 167 (2001); David B. Cruz, Note, *Piety and Prejudice: Free Exercise Exemption From Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. Rev. 1176 (1994).

66 Rumsfeld v. FAIR, 547 U.S. 47, 126 S. Ct. 1297, 1311-12 (2006); Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

67 FAIR, 126 S. Ct. at 1312.

68 530 U.S. 640 (2000).

69 *Id*. at 654.

70 *Id*. at 649-50.

71 *Id*. at 651.

72 *Id*. at 654.

73 515 U.S. 557 (1995).

74 *Id*. at 574-75.

75 *Id*. at 568.

76 *Id*. at 572; *see also Dale*, 530 U.S. at 655 ("purpose of the St. Patrick's Day parade in Hurley was not to espouse any views about sexual orientation").

77 *Hurley*, 515 U.S. at 573.

78 *See* Christian Legal Soc'y v. Walker, 453 F.3d 853, 862 (7th Cir. 2006) (holding that religious student group is an expressive association); Christian Legal Soc'y v. Kane, 2006 WL 997217, at *20 (N.D. Cal. May 19, 2006) (holding that religious student group is an expressive association); Circle Sch. v. Pappert, 381 F.3d 172, 182 (3d Cir. 2004) ("[b]y nature, educational institutions are highly expressive organizations, as their philosophy and values are directly inculcated to students"); *Roberts,* 468 U.S. at 636 (O'Connor, J., concurring) (citing to Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925), a case about private schools, as an example of an expressive association). *Cf. FAIR,*

126 S. Ct. at 1311-13 (analyzing expressive association claim of private law schools).

79 It is legally insignificant that some cases may involve the right to choose employees as opposed to the right to choose members, as was at issue in Dale and Walker. The Supreme Court has held that the important distinction is between expressive activity and commercial activity, not employees and members. *See Roberts,* 468 U.S. at 633-34 (O'Connor, J., concurring); *see also FAIR*, 126 S. Ct. at 1312 ("the freedom of expressive association protects more than just a group's membership decisions"). For example, lawyering to advance social goals is protected speech, *see* NAACP v. Button, 371 U.S. 415, 429-30 (1963), but ordinary commercial law practice is not. *See* Hishon v. King & Spalding, 467 U.S. 69, 78 (1984). While governmental regulation of the "commercial recruitment of new members" may be permissible, Roberts, 468 U.S. at 635 (emphasis added), governmental regulation of member recruitment by noncommercial groups, such as the Scouts or the Christian Legal Society, violates the First Amendment. *See Dale,* 530 U.S. at 659; *Walker,* 453 F.3d at 862-64. In most cases, the religious groups at issue in these cases are nonprofit, 501(c)(3) organizations. They are specifically prohibited from operating for "commercial purposes." Airlie Foundation v. IRS, 283 F. Supp. 2d 58, 63 (D.D.C. 2003) (denying 501(c)(3) status to organization for engaging in excessive commercial activity); see also 26 U.S.C. § 501(c)(3) (2007). Accordingly, these organizations generally fall on the noncommercial, expressive side of the line.

80 468 U.S. 609.

81 *Id*. at 636 (O'Connor, J., concurring).

82 *Walker*, 453 F.3d at 862 ("It would be hard to argue—and no one does—that CLS is not an expressive association."); Kane, 2006 WL 997217, at *20 ("Hastings does not dispute that CLS engages in expressive association.").

83 *Dale*, 530 U.S. at 654.

84 *Walker*, 453 F.3d at 857-59.

85 *Id*. at 864.

86 *Id*. at 863.

87 *Id*.

88 Boy Scouts of America v. Wyman, 335 F.3d 80, 91 (2d Cir. 2003) ("The effect of Connecticut's removal of the BSA from the Campaign is neither direct nor immediate, since its conditioned exclusion does not rise to the level of compulsion. Consequently, Dale does not, by itself, mandate a result in the current case."); Walker, 453 F.3d at 864 ("SIU objects that this is not a "forced inclusion" case like Dale or Hurley because it is not forcing CLS to do anything at all, but is only withdrawing its student organization status."); Kane, 2006 WL 997217, at *16 ("Hastings is not directly ordering CLS to admit certain students. Rather, Hastings has merely placed conditions on using aspects of its campus as a forum and providing subsidies to organizations."); Evans v. City of Berkeley, 38 Cal. 4th 1, 13 (2006) ("the city did not purport to prohibit the scouts from operating in a discriminatory manner; it simply refused to fund such activities out of the public fisc") (internal quotations and citations omitted); Ass'n of Faith-Based Organizations v. Bablitch, 454 F. Supp. 2d 812, 816 (W.D.Wis. 2006) ("Nothing suggests that any member would be compelled to abandon its rights to expressive association in exchange for this limited benefit.").

89 *Dale*, 530 U.S. at 640; see also Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) ("Government actions that may unconstitutionally infringe upon this freedom can take a number of forms.").

90 357 U.S. 449 (1958).

91 *Id*. at 461; *see also* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 101-02 (1982).

92 408 U.S. 169 (1972).

93 *Id*. at 183; *see also* Lyng v. Int'l Union, 485 U.S. 360, 367 n.5 (1988) ("It is clear from previous decisions that associational rights are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference, and that these rights can be abridged even by government actions that do not directly restrict individuals' ability to associate freely.") (internal citations and quotations omitted).

94 126 S. Ct. 1297.

95 *Id*. at 1312.

96 *Roberts*, 468 U.S. at 622; *see also* Clingman v. Beaver, 544 U.S. 581, 586-87 (2005) (observing that it "impose[s] severe burdens on associational rights… to disqualify the [Libertarian Party] from public benefits or privileges"); *FAIR*, 126 S. Ct. at 1312 (observing that the "freedom of expressive association protects" against laws that "impose penalties or withhold benefits based on membership in a disfavored group").

97 385 U.S. 589 (1967).

98 *Id*. at 595.

99 *Id*. at 605. *See also* United States v. American Library Ass'n, 539 U.S. 194, 210 (2003) ("the government may not deny a benefit to a person on a basis that infringes his constitutionally protected… freedom of speech even if he has no entitlement to that benefit") (internal citations and quotations omitted).

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

101 208 F.3d 702 (8th Cir. 2000).

102 *Id*. at 705 n.2, 708-09; see also Knights of the Ku Klux Klan v. East Baton Rouge Parish Sch. Bd., 578 F.2d 1122 (5th Cir. 1978) (holding that school district could not condition use of gymnasium on Ku Klux Klan abandoning its discriminatory membership practices violated First Amendment).

103 85 F.3d 839 (2d Cir. 1996).

104 *Id*. at 872-73. *See also* Boy Scouts of America v. Till, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (conditioning after-school use of school facilities on agreement to nondiscrimination policy violated First Amendment); Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ., 443 F. Supp. 2d 374 (E.D.N.Y. 2006) (conditioning recognition of Jewish fraternity on agreement to university nondiscrimination policy violated associational rights); 922 F. Supp. 56 (N.D. Ohio 1995) (conditioning use of Convention Center on agreement with a nondiscrimination policy subject to strict scrutiny); Roman Catholic Foundation v. Walsh, 2007 WL 1056772 (W.D. Wis. Apr. 4, 2007) (conditioning university recognition and funding of religious student group on agreement to religion nondiscrimination policy violated group's right of expressive association); 97 Ga. Op. Att'y Gen. 32 (1997) (conditioning university recognition of a religious student organization on agreement to a religion nondiscrimination policy violated the organization's right of association).

105 Perry v. Sindermann, 408 U.S. 593, 597 (1972).

106 *Id*. at 1207.

107 *Id*.

108 335 F.3d 80.

109 *Id*. at 85.

110 *Id*. at 88.

111 *Id*. at 91.

112 *See* discussion *supra* notes 24-43.

113 *Wyman*, 335 F.3d at 91-92.

114 *Id*. at 92.

115 *Walker*, 453 F.3d at 861-64.

116 *Id*.; *see also* Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 666-67 & n.32 (Spring 1996) (explaining that "[t]he condition or limitation should be severed from the forum").

117 *Wyman*, 335 F.3d at 91-92 (relying on Regan v. Taxation with Representation, 461 U.S 540 (1983), to frame its analysis).

118 *Id*. at 84 (noting that "employees make voluntary contributions to charities selected from a list of participating organizations set forth in a booklet that is distributed at the workplace" and that "[g]ifts are made by payroll deduction").

119 The Supreme Court has explained that the government subsidy cases, such as *Regan*, 461 U.S. 540, and *Rust v. Sullivan,* 500 U.S. 173 (1991), only apply "in instances in which the government is itself the speaker, or instances… in which the government used private speakers to transmit specific information pertaining to its own program." Legal Services Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (internal citations and quotations omitted); see also Bd. of Regents of Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217, 229 (2000) (observing that government subsidy cases apply only where "funds raised by the government will be spent for speech and other expression to advocate and defend its own policies"); Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 834 (1995) (rejecting application of government subsidy cases because "the University does not itself speak or subsidize transmittal of a message it favors" through a student activity fee). The State of Connecticut neither speaks through its charitable campaign nor pays participating charities through its campaign to transmit its message. Cf. Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 805 (1985) ("The Government did not create the [Combined Federal Campaign] for purposes of providing a forum for expressive activity."). Rather, the charitable campaign was created to provide opportunities for state employees to give their money to charity. Thus, the Second Circuit erred in analyzing the charitable campaign under the government subsidy cases. *See Velazquez*, 531 U.S. at 542 (rejecting application of government subsidy cases because legal services program does "not [ ] promote a governmental message").

120 *Cf*. Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919, 1920 n.1 (April 2006) (classifying without explanation "access to government property" as a form of government subsidy and citing to Rosenberger, 515 U.S. 819).

121 533 U.S. 98 (2001).

122 508 U.S. 384 (1993).

123 515 U.S. 819.

124 *See Good News Club,* 533 U.S. at 109; *Lamb's Chapel,* 508 U.S. at 394; *Rosenberger,* 515 U.S. at 831-32.

125 *See Dale*, 530 U.S. at 645.

126 *See, e.g., Hsu*, 85 F.3d at 860-61 (listing school groups that require officers and/or members to agree with their purpose and mission); *Bablitch*, 454 F. Supp. 2d at 814 (listing other charities participating in the Wisconsin State Employees Combined Campaign that in some way restrict hiring or selection of board members).

127 *See Good News Club,* 533 U.S. at 109 (excluding Good News Club from school facilities because it "seeks to address… the teaching of morals and character from a religious standpoint" was unconstitutional viewpoint discrimination); *Lamb's Chapel,* 508 U.S. at 394 (denying religious group access to school facilities to show film series on child-rearing "because the series dealt with the subject from a religious standpoint" was unconstitutional viewpoint discrimination); *Rosenberger,* 515 U.S. at 826, 831-32 (denying student activity funds to student newspaper because of the "religious editorial viewpoints" taken by the paper on subjects including "stories about homosexuality" was unconstitutional viewpoint discrimination).

The government's decision to treat similarly situated organizations differently also violates the Equal Protection Clause of Fourteenth Amendment. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) ("Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike."). For example, in Alpha Iota Omega Christian Fraternity v. Moeser, No. 04-765 (M.D.N.C. Mar. 2, 2005) (order granting preliminary injunction), the district court held that for the University of North Carolina to condition recognition of a religious student organization on agreement to a religion nondiscrimination policy violated the Equal Protection Clause, since it "imposed conditions on [a Christian student group] which are inapplicable to other student groups seeking university recognition," and entered a preliminary injunction that "would place the Plaintiffs on the same footing as non-religious organizations which select their members on the basis of commitment."

128 *Kane*, 2006 WL 997217, at *11; *see also* Christian Legal Society v. Kane, 2005 WL 850864, at *8 (N.D. Cal. Apr. 12, 2005) ("Hastings' policy would… bar an atheist group from excluding those who are religious," just as it would a religious group).

129 *See Widmar*, 454 U.S. 263; *Rosenberger*, 515 U.S. 819; *Lamb's Chapel*, 508 U.S. 384.

130 *Widmar*, 454 U.S. at 265.

131 *Id*. at 265.

132 *Id*. at 269-70.

133 *Rosenberger,* 515 U.S. at 830-31.

134 *Id*. at 831-32.

135 *Lamb's Chapel*, 508 U.S. at 393.

136 *Id*.

137 Unlike other organizations, religious organizations define themselves by their shared religious beliefs. "Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself." Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) (emphasis added).

138 *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 728-29 (1871) (affirming "[t]he right to organize voluntary religious associations to assist in the expression and dissemination of… religious doctrine").

139 494 U.S. 872, 878-80 (1990); *see also* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993) ("our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice").

140 *Smith*, 484 U.S. at 877.

141 508 U.S. 520.

142 *Id*. at 543-46.

143 *Id*.

144 *Id*. at 546.

145 *See, e.g., Bablitch,* 454 F. Supp. 2d at 814 (noting that "Defendants have permitted several other charitable organizations… to participate notwithstanding that these organizations have similar requirements of faith affirmation for its board members"); *Walker*, 453 F.3d at 866-67 ("SIU has applied its antidiscrimination policy to CLS alone, even though other student groups discriminate in their membership requirements on grounds that are prohibited by the policy.").

Even if the exemptions are provided only in practice and not evident from the face of the nondiscrimination policy, they still trigger strict scrutiny under Smith, 494 U.S. 872. See Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 167 (3d Cir. 2002) (because "the Borough ha[d] tacitly or expressly granted exemptions from [sign] ordinance's unyielding language for various secular and religious… purposes," the ordinance was not generally applicable).

146 A university's exemption for fraternities and sororities from its nondiscrimination policy cannot be excused as necessary for compliance with Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2007). The Title IX exemption only exempts universities from liability under Title IX for recognizing fraternities and sororities. *See id.* at § 1681(a)(6)(A). It does not bar universities from otherwise prohibiting fraternities and sororities from discriminating on the basis of gender. Thus, any exemption given from the university's own nondiscrimination requirement is purely voluntary.

147 *Smith*, 494 U.S. at 884 ("where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason"); *see also* Rader v. Johnston, 924 F. Supp. 1540, 1551-53 (D. Neb. 1996) (university's granting of exceptions from on-campus residency rule rendered rule not generally

applicable); Blackhawk v. Pennsylvania, 381 F.3d 202, 209-10 (3d Cir. 2004) (exemptions from fee requirement caused Game Code to "fail[ ] the general applicability requirement").

148 *Smith,* 494 U.S. at 882.

149 *Id*., citing *Roberts*, 468 U.S. at 622.

150 Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952). *See also* Serbian E. Orthodox Dioceses v. Milivojevich, 426 U.S. 696, 714 (1976) ("courts are bound to accept the decisions… of a religious organization… on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law"); Hutchison v. Thomas, 789 F.2d 392, 394 (6th Cir. 1986) ("First and Fourteenth Amendments permit… religious organizations to establish their own rules and regulations for internal discipline and government").

151 320 F.3d 698 (7th Cir. 2003).

152 *Id*. at 702-04; *see also* Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 790-91 (9th Cir. 2005); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1577-78 (1st Cir. 1989); Petruska v. Gannon University, 462 F.3d 294 (3d Cir. 2006); Rayburn v. General Conf. of Seventh-day Adventists, 772 F.2d 1164, 1168-69 (4th Cir. 1985); McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972); Hutchison v. Thomas, 789 F.2d 392, 393 (6th Cir. 1986); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 363 (8th Cir. 1991); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1302-04 (11th Cir. 2000); Minker v. Baltimore Annual Conf. of United Methodist Church, 894 F.2d 1354, 1358 (D.C. Cir. 1990).

153 440 U.S. 490 (1979).

154 *Id*. at 507.

155 *See, e.g.,* EEOC v. Catholic Univ., 83 F.3d 455 (D.C. Cir. 1996) (university); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991) (hospital); Shaliehsabou v. Hebrew Home of Greater Wash., 363 F.3d 299 (4th Cir. 2004) (religious charity); Feldstein v. Christian Sci. Monitor, 555 F. Supp. 974 (D. Mass. 1983) (religious corporation).

156 474 F.3d 223 (6th Cir. 2007).

157 *Id*. at 225.

158 For this reason, employment nondiscrimination laws, like Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a) (2007), explicitly exempt religious employers. *See* Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000) ("The exemptions reflect a decision by Congress that religious organizations have a constitutional right to be free from government intervention.").

Government sometimes contends that the Establishment Clause of the First Amendment actually requires the application religion nondiscrimination rules to religious organizations receiving government benefits. This argument has been largely rejected by the federal courts. *See, e.g.,* Lown v. Salvation Army, 393 F. Supp. 2d 223 (S.D.N.Y. 2005); Pedreira v. Kentucky Baptist Homes for Children, 186 F. Supp. 2d 757 (W.D. Ky. 2001); but see Dodge v. Salvation Army, 1989 WL 53857 (S.D. Miss. Jan. 9, 1989).