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Do as I Say, Not as I Do: The Myth of Neutrality in Nondiscrimination Policies at Public Universities

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Do as I Say, Not as I Do: The Myth of Neutrality in Nondiscrimination Policies at Public Universities*

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Let all with something to say be free to express themselves.
The true and sound will survive.

- FREDRICK S. SIEBERT¹

INTRODUCTION

On September 1, 2011, the headline adorning the front page of *The Daily Tar Heel*, the student newspaper of the University of North Carolina at Chapel Hill ("UNC"), all but guaranteed controversy: "UNC Christian A Capella Group Ousts Gay Member."² Sure

* © 2012 Andrew D. Brown.

1. Fredrick S. Siebert, *The Libertarian Theory of the Press*, in *FOUR THEORIES OF THE PRESS: THE AUTHORITARIAN, LIBERTARIAN, SOCIAL RESPONSIBILITY, AND SOVIET COMMUNIST CONCEPTS OF WHAT THE PRESS SHOULD BE AND DO* 39, 45 (1st ed. 1956).

2. Andy Thomason, *Christian Group Ousts Gay Member*, *THE DAILY TAR HEEL*, Aug. 30, 2011, at 1, available at <http://www.dailytarheel.com/index.php/article/2011/08/4e5c6c791822c>. Group leaders stressed that the member was removed because of his theological beliefs about sexuality, rather than his sexuality itself. *Id.*

enough, the events following Psalm 100's unanimous decision to vote out a member due to his beliefs regarding homosexuality prompted numerous letters to the editor,³ a discussion panel hosted by the School of Journalism,⁴ and even an official university review of the organization's actions.⁵ After the university decided that the group's action did not violate the school's nondiscrimination policy ("NDP"),⁶ calls immediately came to revise the policy,⁷ which had been in place since a 2005 lawsuit prompted changes to the then-existing policy on First Amendment grounds.⁸ In January 2012, a task force comprised of UNC faculty, staff, and students began meeting to discuss possible revisions.⁹

3. See, e.g., Max Berry, Letter to the Editor, *Psalm 100 Must Eject Women Members Too*, THE DAILY TAR HEEL, Sept. 2, 2011, at 12, available at http://www.dailytarheel.com/index.php/article/2011/09/psalm_100_must_eject_women_members_too; Andrew Brown, Letter to the Editor, *Psalm 100 Was Right to Uphold Its Beliefs*, THE DAILY TAR HEEL, Aug. 31, 2011, at 8, available at http://www.dailytarheel.com/index.php/article/2011/08/psalm_100_was_right_to_uphold_its_beliefs; Daniel Fenton, Letter to the Editor, *Psalm 100 Has a Right to Maintain Its Own Views*, THE DAILY TAR HEEL, Oct. 19, 2011, at 8, available at http://www.dailytarheel.com/index.php/article/2011/10/psalm_100_has_a_right_to_maintain_its_own_views; Michael Gee, Letter to the Editor, *Consider All Members' Beliefs in Psalm 100*, THE DAILY TAR HEEL, Oct. 26, 2011, at 8, available at http://www.dailytarheel.com/index.php/article/2011/10/consider_all_members_beliefs_in_psalms_100; Scott Neidich, Letter to the Editor, *Psalm 100 Should Rewrite Constitution*, THE DAILY TAR HEEL, Sept. 1, 2011, at 12, available at http://www.dailytarheel.com/article/2011/09/psalm_100_should_rewrite_constitution.

4. Jamie Gnazzo, *Panel Discusses Psalm 100*, THE DAILY TAR HEEL, Sept. 28, 2011, at 7, available at http://www.dailytarheel.com/index.php/article/2011/09/unc_first_amendment_day_panel_discusses_psalms_100.

5. Paula Seligson, *UNC Will Look into Christian Group*, THE DAILY TAR HEEL, Aug. 31, 2011, at 1, available at http://www.dailytarheel.com/index.php/article/2011/08/unc_will_look_into_christian_group.

6. Andy Thomason, *Psalm 100 Cleared After Investigation*, THE DAILY TAR HEEL, Oct. 17, 2011, at 1, available at http://www.dailytarheel.com/index.php/article/2011/10/unc_clears_psalms_100_after_investigation. For the full text of the University's policy, see *The University of North Carolina at Chapel Hill Official Recognition of Student Organizations: Non-Discrimination Policy*, U.N.C. CHAPEL HILL, <http://www.unc.edu/campus/policies/studentorgnondiscrim.html> (last visited Aug. 29, 2012).

7. *Ripe for Revision*, THE DAILY TAR HEEL, Oct. 18, 2011, at 8, available at http://www.dailytarheel.com/index.php/article/2011/10/ripe_for_revision_the_psalms_100_ruling_calls_for_tighter_language_in_the_discrimination_policy.

8. *Alpha Iota Omega v. Moeser*, No. 1:04CV00765, 2006 WL 1286186, at *2-3 (M.D.N.C. May 4, 2006).

9. Hailey Vest, *Non-Discrimination Policy Task Force to Meet*, THE DAILY TAR HEEL, Jan. 24, 2012, at 3, available at http://www.dailytarheel.com/index.php/article/2012/01/nondiscrimination_policy_task_force_to_begin_meeting_next_week. The author of this Comment was a member of this task force.

Litigation pitting public university NDPs against students' First Amendment rights is a recent phenomenon in the federal courts.¹⁰ In the short time since these cases first started appearing in the mid-2000s, the number of cases in federal courts challenging the NDPs of various public universities has increased precipitously.¹¹ The legality and propriety of NDPs has taken center stage in a larger national debate regarding the proper balance between goals of diversity, equal access, and nondiscrimination on one hand, and First Amendment freedoms on the other.¹² The only instance in which the United States Supreme Court has addressed NDPs in the context of public universities was in *Christian Legal Society v. Martinez*.¹³ The Court found the University of California Hastings School of Law's "all comers" policy—a policy in which no student group may discriminate

10. See generally *Alpha Iota Omega*, 2006 WL 1286186 (involving the University of North Carolina's rejection of a Christian fraternity based on its desire to restrict membership on religious beliefs).

11. See generally *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010) (addressing the University of California Hastings College of Law's denial of recognition for the Christian Legal Society); *Alpha Delta Chi v. Reed*, 648 F.3d 790 (9th Cir. 2011) (involving San Diego State University's denial of recognition for multiple Christian student organizations), *cert. denied*, 132 S. Ct. 1743 (2012); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 443 F. Supp. 2d 374 (E.D.N.Y. 2006) (dealing with City University of New York's denial of recognition to a Jewish fraternity), *vacated*, 502 F.3d 136 (2d Cir. 2007); Bryn Carmichael, *UNCG Student Group Drops Lawsuit, Says It Welcomes All Students*, NEWS & RECORD (Greensboro, N.C.), May 25, 2012, at A15 (discussing the settlement reached between the University of North Carolina at Greensboro ("UNCG") and a religious student organization after the group sued over the university's refusal to grant official recognition based on an alleged violation of UNCG's NDP). The courts have seen challenges to nondiscrimination policies at the high school level as well. See, e.g., *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 637 (9th Cir. 2008) (addressing the refusal of the public school system in Kent County, Washington to allow a high school Bible club), *overruled on other grounds by* *L.A. Cnty. v. Humphries*, 131 S. Ct. 447 (2010); *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 848 (2d Cir. 1996) (regarding the refusal of the Roslyn Union Free School District in New York to officially recognize a student Bible club that required club officers be Christians).

12. See D.A. CARSON, *THE INTOLERANCE OF TOLERANCE* 83 (2012); Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, in *LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES* 194, 195 (Austin Sarat ed., 2012); Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Law?*, 48 B.C. L. REV. 781, 787 (2007) ("[P]lural goods can and do clash. Ensuring equal respect along lines of race, sex, and sexual orientation can conflict with protection of religious freedom."); see, e.g., Blake Farmer, *Vanderbilt Rule Rankles Faith-Based Student Groups*, NPR (Mar. 22, 2012), <http://www.npr.org/2012/03/22/149141095/vanderbilt-rule-rankles-faith-based-student-groups>; *Religious Liberty in Universities*, ALLIANCE DEFENDING FREEDOM, <http://www.alliancedefendingfreedom.org/issues/public-education/university> (last visited Nov. 14, 2012); *What Does Christian Legal Society v. Martinez Tell Us About University Nondiscrimination Policies?*, ACLU (Oct. 27, 2011), <http://www.aclu.org/lgbt-rights-religion-belief/what-does-emchristian-legal-society-v-martinezem-tell-us-about>.

13. 130 S. Ct. at 2978–79.

against anyone for any reason—constitutional.¹⁴ The Court's narrow holding, however, left significant questions unanswered.¹⁵

*Alpha Delta Chi v. Reed*¹⁶ is the most recent addition to the jurisprudence addressing NDPs in public university student organization programs. In that case, the United States Court of Appeals for the Ninth Circuit addressed the next logical question after *Martinez*: If an "all comers" policy is constitutionally valid, what of a nondiscrimination policy that only prohibits discrimination on specific classifications such as religion or race?¹⁷ Pursuant to the standard test for speech restrictions in limited public forums,¹⁸ the court found no facial violations after reviewing the policy for reasonableness and viewpoint neutrality.¹⁹ However, the court's opinion suffers significant legal problems in its application of First Amendment principles, logical problems in the way it conceptualizes NDPs, and practical problems for those who must implement the holding. As such, this Comment argues for several conceptual and practical changes in the way that public universities typically conceive of and implement their nondiscrimination policies for student organization programs.

Analysis proceeds in four parts. Part I discusses the Ninth Circuit's opinion in *Alpha Delta Chi*. Part II discusses several relevant areas of law that, in light of the paucity of specifically applicable legal precedent, should guide the thinking of those seeking to promote nondiscrimination principles within the constraints mandated by the First Amendment. Part III employs Part II's analysis to identify three categories of deficiencies within the Ninth Circuit's opinion: legal problems, conceptual problems, and practical problems. Finally, Part IV suggests a balanced approach for the future that fosters strong expressive rights on campus by designing policies that distinguish *wrongful* discrimination from non-wrongful discrimination and provide clear procedural mechanisms for enforcing such policies in transparent and consistent ways.

14. *Id.* at 2984 ("This opinion . . . considers only whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution.").

15. *Id.*; see also *infra* Part II.A.

16. 648 F.3d 790.

17. *Id.* at 795.

18. *Martinez*, 130 S. Ct. at 2984 (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)).

19. *Alpha Delta Chi*, 648 F.3d at 804.

I. *ALPHA DELTA CHI V. REED*A. *The Lead-Up to the Ninth Circuit's Opinion*

At the time of litigation, the NDP governing San Diego State University's ("SDSU") student organization program was very similar to those applied to student organizations by many universities across the United States.²⁰ The policy stipulated:

On-campus status will not be granted to any student organization whose application . . . restricts membership or eligibility to hold appointed or elected student officer position in the campus-recognized chapter or group on the basis of race, sex, color, age, religion, national origin, marital status, sexual orientation, physical or mental handicap, ancestry, or medical condition, except as explicitly exempted under federal law.²¹

Each student group was required to affirm compliance with this statement each year when it reapplied for official status.²² Failure to obtain official status resulted in the forfeiture of benefits, including access to university facilities and student fees, use of the university's name and logo, free publicity in school publications, and participation in student activity fairs.²³ Fraternities and sororities in violation of the policy forfeited participation in the university's Greek councils that provide leadership training, social activities, and additional recruiting opportunities.²⁴ Essentially, SDSU's student organization program acted as a gatekeeper to the tools and services that are essential for a student organization to effectively participate in campus life, such that failure to gain recognition could mean the difference between a group's life and death.²⁵

20. See, e.g., UCLA, GENERAL CATALOG 2012-13, at 661-62 (2012), <http://www.registrar.ucla.edu/archive/catalog/2012-13/uclageneralcatalog12-13.pdf>; UNIV. OF N.C., UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL POLICY STATEMENT ON NON-DISCRIMINATION (2012), <http://www.unc.edu/campus/policies/nondiscrim.pdf>; *Handbook of Operating Procedures 3-3020: Nondiscrimination Policy*, U. OF TEX. AT AUSTIN U. POL'Y OFF., <http://policies.utexas.edu/policies/nondiscrimination-policy> (last visited Oct. 14, 2012); *Nondiscrimination Policy*, U. OF MICH., http://www.umich.edu/policy_nondiscrim.php (last visited Oct. 14, 2012); *University Statement on Equal Opportunity*, JOHNS HOPKINS U., http://webapps.jhu.edu/jhuniverse/administration/minutes_policies_reports/policies/equal_opportunity/ (last visited Nov. 14, 2012).

21. *Alpha Delta Chi*, 648 F.3d at 796.

22. *Id.* at 795.

23. *Id.*

24. *Id.* at 796.

25. See John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 197 (2010); see also Note, *Leaving Religious Students Speechless*:

Prior to litigation, Alpha Delta Chi and Alpha Gamma Omega, a Christian sorority and fraternity, respectively, had applied to SDSU for official recognition for several years.²⁶ SDSU repeatedly denied the groups' applications, stating that the organizations' religious requirements of its leaders and members violated the university's NDP.²⁷ Alpha Delta Chi required of its members "personal acceptance of Jesus Christ as Lord and Savior," "active participation in Christian service," and "regular attendance or membership in an evangelical church."²⁸ Alpha Gamma Omega required that its officers' beliefs and practices be "consistent with orthodox Christian beliefs" and that they sign the following faith statement:

I hereby publicly confess my belief in the Lord Jesus Christ as God and only Savior and give witness to the regenerating power of the Holy Spirit in my life. I will make it a purpose of my life to continue in fellowship with God through prayer and reading of the Holy Scriptures.²⁹

Members of Alpha Gamma Omega were held to lower, yet still restrictive standards.³⁰

As a result of SDSU's repeated denials of their applications, the groups forfeited the benefits listed above and thus suffered second-class status on campus, being required to pay full price to rent university facilities and restricted in the areas in which they could recruit members.³¹ As a result, the groups filed suit, arguing that the NDP violated the students' rights under the First and Fourteenth Amendments.³² The district court granted summary judgment to the university,³³ and the student groups appealed to the Ninth Circuit.³⁴

Public University Antidiscrimination Policies and Religious Student Organizations, 118 HARV. L. REV. 2882, 2903 (2005) ("Universities that have refused to grant explicit exemptions to religious clubs have used religion and sexual orientation antidiscrimination requirements like a sword of Damocles dangling precipitously over a religious club's recognition. Many universities have withdrawn official recognition only to reinstate it later after public outcry, negotiation, or litigation—sometimes maintaining that their position was consistent throughout." (citations omitted)).

26. *Alpha Delta Chi*, 648 F.3d at 795–96.

27. *Id.* at 796.

28. *Id.* at 795.

29. *Id.*

30. *Id.* Members must "sincerely want to know Jesus Christ as their Lord and Savior."
Id.

31. *Id.* at 796.

32. *Every Nation Campus Ministries v. Achtenberg*, 597 F. Supp. 2d 1075, 1079 (S.D. Cal. 2009), *rev'd in part sub nom.* *Alpha Delta Chi v. Reed*, 648 F.3d 790 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1743 (2012).

33. *Id.* at 1100.

B. The Ninth Circuit Decision

On appeal to the Ninth Circuit, the court acknowledged that the plaintiffs' claims presented a question currently unanswered by legal precedent.³⁵ The policy at issue in *Alpha Delta Chi* pertained to the blanket prohibition on a student group's ability to selectively choose members based on certain attributes such as religion, gender, race, and sexual orientation.³⁶ The student groups argued that this policy violated their First Amendment rights in three ways. First, the groups argued that SDSU's NDP had the effect of compelling the admission of members to an expressive association, thus violating First Amendment rights to expressive association.³⁷ Similarly, the groups argued that the university's denial of official recognition violated their free speech rights under the First Amendment because it "excluded them from an expressive forum" based on their religious viewpoint.³⁸ Finally, the groups claimed that the university's conduct targeted the students' religious viewpoints in violation of the Free Exercise Clause.³⁹ The Ninth Circuit held that the university's policy, as written, was viewpoint neutral, thus undermining the First Amendment theories underlying all three claims.⁴⁰ As such, the court held that SDSU's policy, and by extension all policies like it, was "not materially different from the content-neutral all-comers policy approved in *Christian Legal Society v. Martinez*, and must be similarly upheld against First Amendment challenge."⁴¹

The Ninth Circuit began its analysis by attempting to apply *Martinez*'s treatment of NDPs to the circumstances before the court.⁴² As the plaintiffs' claims invoked fundamental speech rights, the court's first task was to classify SDSU's student organization

34. *Alpha Delta Chi*, 648 F.3d at 796. At the district court, the fraternity and sorority were joined by two additional student organizations at California State University Long Beach. Those groups did not join Alpha Delta and Alpha Gamma's appeal. *Id.* at 795 n.1.

35. *See id.* at 795 (referencing *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2978 (2010)). In reality, the UC Hastings NDP on its face resembled the SDSU policy. However, a muddled record, including stipulations by both sides that the policy was an all-comers policy, led the court to restrict its analysis in this manner. *See Martinez*, 130 S. Ct. at 2984. Therefore, the holding in *Martinez* is not controlling in cases like *Alpha Delta Chi*. Discussion of *Christian Legal Society v. Martinez* occurs in greater detail *infra* in Part II.A.

36. *Alpha Delta Chi*, 648 F.3d at 796.

37. *Id.* at 796–97.

38. *Id.* at 797.

39. *Id.* at 804.

40. *Id.* at 803. The court did hold, however, that SDSU's NDP *as applied* may have singled out these student groups and remanded for additional fact finding on this point. *Id.* at 803–04.

41. *Id.* at 803 (citing *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010)).

42. *Id.* at 797.

program.⁴³ Whereas *Martinez* stipulated that a public law school's student organization program was a "limited public forum," the plaintiffs in *Alpha Delta Chi* argued that the program was a "designated public forum," which would require the court to apply strict scrutiny analysis to any restrictions that the university placed on student speech.⁴⁴ The Ninth Circuit found "no material distinction" between UC Hastings' program⁴⁵ and SDSU's program, and thus found SDSU's program to be a limited public forum.⁴⁶ As such, judicial scrutiny of SDSU's restrictions on the forum asked whether the restriction was "(1) reasonable in light of the purpose served by the forum; and (2) viewpoint neutral."⁴⁷

Accordingly, the court first asked whether the SDSU's NDP was reasonable in light of the university's purpose for the student organization program.⁴⁸ To answer this question, the court reviewed the university's student handbook and found diversity and nondiscrimination to be central purposes of the student organization program.⁴⁹ The court deferred strongly and uncritically to the university's asserted pedagogical goals and agreed that the NDP was a reasonable means of accomplishing those goals.⁵⁰ Further, the court found the policy reasonable based on evidence that the groups had alternative means of expression on campus, such as access to social media and the ability to distribute literature.⁵¹

The court next inquired as to whether the university's NDP was viewpoint neutral.⁵² The court began by noting that a restriction on

43. *Id.*

44. *Id.* First Amendment jurisprudence allows government actors to limit the freedom of speech on government owned property to varying degrees based on the nature of the property in question. See EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* 601 (4th ed. 2011). "Designated public forums" are forums for speech that the government has established for the purpose of facilitating free expression in the same way that places like parks and sidewalks have traditionally been understood to be. *Id.* Restrictions on speech in these forums are subject to strict scrutiny analysis by the courts. *Id.* "Limited public forums" are forums that the government has opened up for certain types of speech, such as student speech. *Id.* Restrictions on speech in these forums must only be reasonable, but must still be viewpoint-neutral. *Id.*

45. UC Hastings School of Law was the university in question in *Martinez*, 130 S. Ct. at 2978.

46. *Alpha Delta Chi*, 648 F.3d at 797.

47. *Id.* at 798. The court cited *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 829 (1995), as its support for this test. *Id.* at 797.

48. *Id.* at 798.

49. *Id.* at 799.

50. *Id.*

51. *Id.*

52. *Id.* at 800.

speech is unconstitutional if it is motivated by a purpose to suppress expression.⁵³ However, a restriction may be permissible when it is “viewpoint neutral,” meaning that it “‘serves purposes unrelated to the content of expression,’ and only ‘incidentally burdens some speakers, messages, or viewpoints.’”⁵⁴ The plaintiffs argued that because SDSU’s NDP targeted only some types of discrimination, unlike the policy in *Martinez* that prohibited all types of discrimination, the policy impermissibly targeted certain types of discriminatory content or expression.⁵⁵ More specifically, the plaintiffs argued that the policy discriminated against religiously-based membership restrictions, such as a Christian organization excluding Muslims, while allowing non-religious membership restrictions, such as a collegiate Republicans group excluding Democrats.⁵⁶ Accordingly, the court assessed the University’s purpose for imposing the NDP.⁵⁷

The court rejected the plaintiffs’ argument on several grounds. Primarily, the court held that while the policy may have had the incidental *effect* of burdening religious groups, the *purpose* of the university’s policy was to promote nondiscrimination and equal opportunity for students.⁵⁸ The court stated that “[a]s the Supreme Court has made clear, antidiscrimination laws intended to ensure equal access to the benefits of society serve goals ‘unrelated to the suppression of expression’ and are neutral as to both content and viewpoint.”⁵⁹ To support its holding, the court referenced its decision in *Truth v. Kent School District*,⁶⁰ where the court upheld a public high school’s denial of recognition to a student group seeking to restrict membership based on adherence to a religious statement.⁶¹ Here the court concluded that “the school’s denying the plaintiff student group access to the student organization program was based on [the student group’s] discriminatory membership criteria and not the religious ‘content of the speech.’”⁶² Finally, the court found a

53. *Id.* (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)).

54. *Id.* (quoting *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2994 (2010)).

55. *Id.*

56. *Id.*

57. *Id.* at 801.

58. *Id.*

59. *Id.* (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984) and citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995)).

60. 542 F.3d 634 (9th Cir. 2008), *overruled on other grounds by* *L.A. Cnty. v. Humphries*, 131 S. Ct. 447 (2010).

61. *Id.* at 648.

62. *Alpha Delta Chi*, 648 F.3d at 802.

distinction between forcing an expressive association to admit members and conditioning the benefits of official recognition on adherence to the NDP.⁶³ Because SDSU did not compel the admission of members into either group, the court held that SDSU's NDP did not violate Supreme Court precedent in cases such as *Boy Scouts of America v. Dale*⁶⁴ and *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*.⁶⁵ As such, the court concluded that SDSU's NDP was viewpoint neutral on its face and ultimately held against the plaintiffs on all counts.⁶⁶

II. THE LAW RELEVANT TO UNIVERSITY NONDISCRIMINATION POLICIES

Despite the precipitous increase in litigation over the issue of NDPs and expressive association, the Supreme Court precedent pertaining specifically to NDPs in public universities is sparse.⁶⁷ As such, this Part will begin by assessing how *Martinez*, the only Supreme Court case on point, and *Christian Legal Society v. Walker*,⁶⁸ the only other case on point to reach the federal appellate courts, relate to the facts and arguments presented in *Alpha Delta Chi*. Then, in light of the paucity of precedent directly addressing this issue, this Part will proceed to explore how issues of fact and law similar to

63. *Id.* at 802–03.

64. 530 U.S. 640, 659 (2000) (holding that a New Jersey state law compelling a private association, the Boy Scouts of America, to retain a scoutmaster who did not agree with the group's stance on homosexuality was a violation of First Amendment because it was a "severe intrusion on the Boy Scouts' rights to freedom of expressive association").

65. 515 U.S. 557, 572–73 (1995) (holding that a Massachusetts state law forcing the South Boston Allied War Veterans Counsel to admit the Irish American Gay, Lesbian, and Bisexual Group of Boston to its parade, even though the parade organizers did not agree with the group's message, violated the organizers' First Amendment rights to the "autonomy to choose the content of [their] own message").

66. *Alpha Delta Chi*, 648 F.3d at 803. The court also addressed two other issues presented by the plaintiffs. Primarily, despite the facial validity of the policy, the court recognized that there was evidence that the university had permitted both religious and non-religious groups to gain official recognition despite apparent discriminatory membership restrictions. As such, the court found that the district court erred by granting summary judgment on this matter and remanded. *Id.* at 804. Finally, the court addressed the plaintiffs' claims that SDSU had targeted their religious beliefs in violation of the First and Fourteenth Amendments. *Id.* The court found that SDSU's policy was facially neutral because of its general applicability, but it remanded the case because summary judgment was inappropriate given possible evidence that the policy had been applied only to religious groups. *Id.* at 804–05. While each of these issues is a fertile ground for discussion, this Comment will focus primarily on legal and theoretical issues in the court's treatment of the reasonableness and neutrality of SDSU's policy on its face.

67. *See id.* at 805 (Ripple, J., concurring) ("[T]his case presents an important issue of First Amendment jurisprudence, which . . . is still an open question at the national level.").

68. 453 F.3d 853 (7th Cir. 2006).

those in *Alpha Delta Chi* have arisen in other Supreme Court cases. Ultimately, this Section will set the stage for Part III's discussion of how the Ninth Circuit's decision deviates from the traditional trajectory of cases addressing the conflict of students' expressive rights and university regulation.

A. *Legal Precedent Specific to NDPs*

Precedent in the federal appellate courts dealing directly with NDPs at public universities is sparse. As noted above, First Amendment challenges on these grounds are a fairly recent phenomenon.⁶⁹ The only case on these issues to have reached the United States Supreme Court was *Christian Legal Society v. Martinez* in 2010.⁷⁰ While the case certainly offers guidance, its applicability is narrow because the way that the Court framed the NDP, as an "all comers" policy, precludes many NDPs in effect around the country that are more limited in scope. The only other case to have reached the federal appellate level prior to *Alpha Delta Chi* was *Christian Legal Society v. Walker*, a 2006 case in the Seventh Circuit.⁷¹

The factual circumstances giving rise to *Martinez* were very similar to those in *Alpha Delta Chi*. The local chapter of the Christian Legal Society ("CLS") at the University of California Hastings College of Law sought to require its members and leaders to sign a "Statement of Faith" as required by the national parent CLS organization.⁷² The "Statement of Faith" included a stipulation that signatories adhere to traditional notions of Christian sexual morality, a stipulation that UC Hastings decided conflicted with its nondiscrimination policy.⁷³ The university repeatedly denied CLS official recognition, meaning that CLS would forego significant benefits accompanying status as a recognized student organization.⁷⁴ As such, CLS brought suit in federal court claiming violations of First Amendment protections for speech, expressive association, and exercise of religion, and ultimately ended up before the Supreme Court.⁷⁵

The United States Supreme Court ruled in favor of UC Hastings. Ultimately, the Court found the restriction to be reasonable under

69. See *supra* notes 10–19 and accompanying text.

70. 130 S. Ct. 2971 (2010).

71. 453 F.3d 853.

72. See *Martinez*, 130 S. Ct. at 2980.

73. See *id.*

74. *Id.* at 2979–81.

75. *Id.* at 2981.

the limited public forum test for several reasons.⁷⁶ First, the policy succeeded in addressing legitimate pedagogical concerns of the University, avoided a conceptually suspect and practically difficult requirement that the University decipher between discrimination based on belief and status,⁷⁷ and adequately sought to comply with relevant state law.⁷⁸ Second, the policy did not preclude groups like CLS from pursuing alternate methods of interacting or communicating with the campus.⁷⁹ Finally, in response to CLS's assertions that the policy was "frankly absurd," the Court noted that the restrictions imposed by the University need not be advisable, but merely constitutionally permissible.⁸⁰

As for viewpoint neutrality, the Court distinguished UC Hastings' policy from other related precedents in which the Court ruled against universities on First Amendment grounds by noting that UC Hastings' actions did not single out an individual group for reasons of its message or viewpoint.⁸¹ The Court strongly rejected

76. *Id.* at 2988–93.

77. The distinction between "status" and "belief" in a university NDP first appears in a 2005 case at UNC. *Alpha Iota Omega v. Moeser*, No. 1:04CV00765, 2006 WL 1286186, at *2 (M.D.N.C. May 4, 2006). The facts of this case mirror those of *Alpha Delta Chi* and *Martinez*. *Id.* On the case's second trip to the federal district court, the court dismissed the plaintiff's claims after UNC revised its policy to allow discrimination based on religious belief, but not discrimination based on religious status. *Id.* at *5. Discrimination based on religious belief was valid, the court concluded, because organizations had a compelling interest in guarding their ideological commitments and goals. *Id.* Discrimination based on religious status, or perceived religious status, by contrast, was not related to the goal of preserving an ideological message and thus was impermissible. *Id.* This concept has also arisen in the context of religious employment. See generally *Pedreira v. Ky. Baptist Homes for Children*, 186 F. Supp. 2d 757 (W.D. Ky. 2001) (addressing a discrimination and First Amendment claim from a former employee of Kentucky Baptist Homes for Children who had been discharged because of her sexual orientation). One commentator on the *Pedreira* case asked whether the employee's termination was "based upon her sexual orientation or . . . her being unable to uphold the religious mission or principles of her employer?" AMY E. BLACK ET AL., *OF LITTLE FAITH: THE POLITICS OF GEORGE W. BUSH'S FAITH-BASED INITIATIVES* 258 (2004). The opinion, however, provides little guidance on who makes this distinction and how they do it. Accordingly, this distinction has been strongly criticized in cases such as *Martinez*. 130 S. Ct. at 2976 ("CLS's proposal that Hastings permit exclusion because of *belief* but forbid discrimination due to *status* would impose on Hastings the daunting task of trying to determine whether a student organization cloaked prohibited status exclusion in belief-based garb.").

78. *Martinez*, 130 S. Ct. at 2989–91.

79. *Id.* at 2991. The Court noted that CLS could still make some use of the school's facilities and bulletin boards, in addition to publicly available online forms of communication such as Google and Yahoo!. *Id.*

80. *Id.* at 2992. CLS had asserted that "[t]here can be no diversity of viewpoints in a forum . . . if groups are not permitted to form around viewpoints." *Id.* (quoting Brief for Petitioner at 50, *Martinez*, 130 S. Ct. 2971 (No. 08-1371)).

81. *Id.* at 2993. For discussions of these other cases, see *infra* Part III.B.

CLS's argument that the discriminatory effect of the policy was "vulnerable to constitutional assault," because the effect was merely incidental to the actual purpose of the policy and generally applicable to all student organizations.⁸² Yet this element of the opinion significantly narrows its applicability as well. The Court interpreted UC-Hastings' NDP to be an "all-comers" policy, meaning that all recognized organizations must "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs."⁸³ In explicitly limiting the applicability of its decision to "all-comers" policies, the Court left in doubt the constitutionality of more narrowly tailored NDPs that permit some bases for discrimination but not others. Because many of the NDPs at universities are the more narrow form of NDP,⁸⁴ *Martinez's* applicability to disputes such as the one in *Alpha Delta Chi* is imprecise and uncertain.

The only other federal appellate case dealing with NDPs in public universities is *Walker*, a 2006 case in the United States Court of Appeals for the Seventh Circuit.⁸⁵ The factual circumstances are practically indistinguishable from both *Alpha Delta Chi* and *Martinez*. Administrators at Southern Illinois University's ("SIU") law school revoked the official status of the local student chapter of the Christian Legal Society because the group's Statement of Faith conflicted with two university policies with nondiscrimination implications—costing the group access to the benefits necessary to exist on campus.⁸⁶ Despite the factual similarities, the case was before the Seventh Circuit on procedural grounds regarding the district court's denial of an injunction for CLS.⁸⁷ The court did not issue any holding on the merits but, pursuant to the standard of review for injunctions, reviewed the record to decide whether CLS had sufficiently demonstrated that it would succeed on the merits.⁸⁸ Due to the unprecedented nature of the issues in the federal courts, the court did not decide, or see the need to decide, what type of NDP was at issue. The Seventh Circuit's treatment of the issues differs significantly from the analyses in *Alpha Delta Chi* and *Martinez*. However, many of the

82. *Id.* at 2994–95.

83. *Id.* at 2979 n.5.

84. *See supra* notes 20–21 and accompanying text.

85. 453 F.3d 853 (7th Cir. 2006).

86. *Id.* at 858.

87. *See id.* at 858–59.

88. *Id.* at 859–76.

same issues arise in the Seventh Circuit's opinion and thus prove helpful in assessing both *Martinez* and *Alpha Delta Chi*.

The Seventh Circuit's holding did not reach the merits, but its treatment of CLS's claims demonstrates a much more sympathetic tone to the expressive rights of the private entity subjected to speech restrictions. First, the court noted that CLS's Statement of Faith—the same as the one at issue in *Martinez*—did not necessarily violate SIU's NDP merely because it denied those who engaged in or condoned homosexual conduct the ability to pursue leadership positions.⁸⁹ Rather, the policy would deny leadership status to anyone who advocated or engaged in sexual conduct outside of traditional marriage, including “fornication [and] adultery,” whether heterosexual or homosexual.⁹⁰ Thus, contrary to SIU's assertions, CLS's policy could not be said to be unfairly discriminating solely on the basis of sexual orientation.⁹¹ Second, the court inquired as to whether enforcing SIU's policy on CLS would infringe upon the group's rights regarding expressive association.⁹² In stark contrast to the Ninth Circuit's treatment in *Alpha Delta Chi*,⁹³ the Seventh Circuit understood that allowing SIU to enforce the policy with respect to CLS would “forc[e] it to accept as members those who engage [in conduct antithetical to the Statement of Faith],” “impair its ability to express disapproval of active homosexuality,” and “cause the group as it currently identifies itself to cease to exist.”⁹⁴ Significant to this part of the court's analysis was the fact that SIU had not proffered any government interest in enforcing the policy.⁹⁵ In both *Martinez* and *Alpha Delta Chi*, the universities proffered pedagogical interests to justify the restrictions they had placed on expressive associations.⁹⁶ Yet even had SIU asserted interests in enforcing the restriction on CLS's expressive rights, the Seventh Circuit seemed highly skeptical of the validity of such interests, both in the way that it questioned whether SIU could have any interest in “forcing CLS to accept members whose activities violate its creed other than

89. See *id.* at 860.

90. *Id.*

91. *Id.*

92. *Id.* at 862–63.

93. *Alpha Delta Chi v. Reed*, 648 F.3d 790, 802 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1743 (2012).

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

95. *Id.*

96. See *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2989–91 (2010); *Alpha Delta Chi*, 648 F.3d at 802.

eradicating or neutralizing particular beliefs,"⁹⁷ and the fact that it found CLS's interests to be "unquestionably substantial."⁹⁸

B. First Amendment Rights at Public Universities

In light of the insightful yet incomplete guidance provided by *Martinez*, deciphering the proper principles to apply in a case like *Alpha Delta Chi* requires evaluating precedent in several other instances in which public universities have been sued by students on First Amendment grounds. Over the past three decades, a diverse variety of university regulations on students' expressive rights has come before the Supreme Court under the Speech Clause and the Religion Clause. Prior to *Martinez*, all of the cases ruled in favor of the students.

In *Widmar v. Vincent*,⁹⁹ the University of Missouri at Kansas City prohibited a religious student group from continuing to hold meetings in facilities owned by the university.¹⁰⁰ The university asserted its concern that facilitating or accommodating religious student groups would violate First Amendment prohibitions on grounds of "excessive . . . entanglement" between government actors and religious practice.¹⁰¹ Rebuffing that rationale, the Court stated that the university was wrong to conceptualize "allowing religious groups to share the limited public forum" as having "the 'primary effect' of advancing religion."¹⁰² The Court explained that "incidental" benefits to student groups did not violate the Establishment Clause in a forum open to all groups.¹⁰³ It reasoned that the "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."¹⁰⁴

Similarly, in *Rosenberger v. Regents and Visitors of University of Virginia*,¹⁰⁵ a student group organized to publish a Christian magazine on campus brought suit in federal court for various First Amendment claims after the University of Virginia ("UVA") withheld student

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

98. *Id.* at 863–64.

99. 454 U.S. 263 (1981).

100. *Id.* at 265.

101. *Id.* at 270–71. For a discussion of "excessive entanglement," see *Walz v. Tax Commission of New York*, 397 U.S. 664, 674–75 (1970).

102. *Widmar*, 454 U.S. at 272.

103. *Id.* at 273.

104. *Id.* at 274 (citing *Chess v. Widmar*, 635 F.2d 1310, 1317 (8th Cir. 1980)).

105. 515 U.S. 819 (1995).

funding because of the magazine's religious viewpoint.¹⁰⁶ The University argued that distributing funds to a Christian group would violate the Establishment Clause by "send[ing] an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values."¹⁰⁷ The Court rejected this argument, finding that UVA's program was neutral toward religion and did not have the purpose of aiding religious causes.¹⁰⁸ The funds offered by the student activity fund were not extracted to support a religious group, but rather to support "wide-ranging speech and . . . student expression [that] is an integral part of the university's educational mission."¹⁰⁹ The Court held that "[a]ny benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis."¹¹⁰ Further, the Court criticized the dissent's argument that the university should be prohibited from any association with religious expression. It noted that such a requirement would "eventual[ly] raise[] the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy," having the effect of "imperil[ing] the very sources of free speech and expression."¹¹¹

The plaintiffs in *Rosenberger* also claimed violations of speech rights.¹¹² With regard to these claims, the Court noted that because the university's limited public forum provided access to funding for all student journalism organizations,¹¹³ the university could not discriminate based on the viewpoint of an individual organization.¹¹⁴ In addition, the Court drew an important distinction regarding the

106. *Id.* at 827. The university made this decision despite a prior designation of the group as one eligible for access to student funds. *Id.* at 826.

107. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 18 F.3d 269, 286 (4th Cir. 1994), *rev'd*, 515 U.S. 819. By the time litigation reached the Supreme Court, the University had abandoned its defense of this issue, but the Supreme Court addressed it because the Fourth Circuit had based its judgment on the issue and the Supreme Court's dissenting opinions would have upheld the Fourth Circuit on this matter. *Rosenberger*, 515 U.S. at 838.

108. *Rosenberger*, 515 U.S. at 840.

109. *Id.*

110. *Id.* at 843–44.

111. *Id.* at 844–45.

112. *Id.* at 827.

113. The court noted that a student organization program is "a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable." *Id.* at 830.

114. *Id.* at 831 ("[T]he University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.").

government actor's relationship to the speech. A government entity is permitted to discriminate and control speech when the message is its own.¹¹⁵ However, "[i]t does not follow . . . that viewpoint-based restrictions are proper when the university does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."¹¹⁶ Therefore, when the government itself is not the originator of the speech, but rather funds and facilitates the message of private actors within a limited forum, the government is not able to decide whether speakers are allowed to participate based upon their viewpoints as private actors.¹¹⁷ In other words, if the university chooses to subsidize some student speech, it must subsidize all of it.¹¹⁸

In 2000, the Supreme Court, in *Board of Regents of University of Wisconsin System v. Southworth*,¹¹⁹ reaffirmed the importance of student free speech and viewpoint neutrality in the way that the university allocated resources to groups. The plaintiffs were students who argued that a mandatory fee used to fund the student organization program violated their First Amendment rights by essentially forcing them to fund groups whose ideological beliefs and practices were antithetical to their own.¹²⁰ The Court recognized and validated these interests, yet also recognized the university's "important and substantial purpose . . . [of] facilitat[ing] a wide range of speech."¹²¹ To balance these interests, the Court reasoned that the mandatory fees could be constitutional as long as they were allocated to student organizations in a viewpoint neutral manner.¹²² The Court noted, "There is symmetry then in our holding here and in *Rosenberger*: Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the

115. *Id.* at 833 ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.").

116. *Id.* at 834.

117. *Id.*

118. *Id.* at 837.

119. 529 U.S. 217 (2000).

120. *Id.* at 226–27.

121. *Id.* at 231.

122. *Id.* at 233. The Court's only qualm in holding for the university was evidence in the record that fee allocation was subject to a majority voting referendum. *Id.* at 235. The Court held that this method would be constitutionally impermissible if it effectively undermined viewpoint neutrality. *Id.* Due to unclear evidence in the record on this issue, the Court remanded this issue to the district court for resolution. *Id.* at 235–36.

integrity of the program's operation once the funds have been collected."¹²³

Thus, under the banner of *Widmar*, *Rosenberger*, and *Southworth*, students enjoy significant legal protection for expressive speech and activity under both the Speech Clause and the Establishment Clause. *Martinez* seems to depart from the trajectory of these cases. However, it remains to be seen whether its precedential value will be cabined to true "all-comers" policies or whether it is representative of a broader exception when nondiscrimination norms are at stake.

C. *Rights Pertinent to Group Autonomy*

First Amendment precedent regarding group autonomy outside the university is also pertinent to assessing NDPs in public universities. The legal theory underlying Alpha Delta Chi's free speech claims against SDSU centers upon the notion that restricting the means by which a group of students selects its members or leaders essentially handicaps the group's ability to control the message that it sends to the campus.¹²⁴ As such, one applicable area of law for assessing the Ninth Circuit's handling of the case is the freedom of expressive association. Although not explicit in the Constitution, expressive association is a fundamental right derived from the First Amendment right to the freedom of speech.¹²⁵ The Supreme Court first recognized this right in *NAACP v. Alabama ex rel. Patterson*,¹²⁶ stating that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."¹²⁷

Although technically vested in individuals, the right functionally operates as the right of freedom of speech on a group level: the right of a group to engage in free expression of beliefs and ideas, based on the aggregated speech rights of the group's individuals.¹²⁸ The right is

123. *Id.* at 233.

124. *Alpha Delta Chi v. Reed*, 648 F.3d 790, 796–97 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1743 (2012).

125. *See, e.g., NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958).

126. 357 U.S. 449.

127. *Id.*

128. *See, e.g., Inazu, supra* note 25, at 155; *see also* BLACK'S LAW DICTIONARY 735 (9th ed. 2009) (defining expressive association as "[t]he constitutional right of an individual to associate with others, without undue government interference, for the purpose of engaging in activities protected by the First Amendment, such as speech, assembly, and the exercise of religion").

strongly connected to free speech, and thus it typically enjoys great deference from courts in the form of strict scrutiny.¹²⁹ The rationale for this deference is clear: expressive association is “an indispensable means of preserving other individual liberties” such as “speech, assembly, . . . and the exercise of religion.”¹³⁰

A frequent basis for litigation regarding the right of expressive association, and a central concern regarding NDPs at public universities, involves group membership. The Court has stated that “[f]reedom of association . . . plainly presupposes a freedom not to associate.”¹³¹ The Court first spoke to this issue in *Roberts v. U.S. Jaycees*,¹³² where it noted that government intrusion into the “internal organization or affairs of [a] group” can be an unconstitutional infringement on the right to association.¹³³ Ultimately, the Court upheld a Minnesota statute that effectively forced a local civic organization to admit female members, but it only did so after finding that there was no evidence to show that the forced inclusion of women would hinder the group’s desired expression.¹³⁴

More recently, the Court affirmed this principle in *Boy Scouts of America v. Dale*,¹³⁵ where an adult leader brought a claim under a state law against the Boy Scouts of America for excluding his participation on the basis of his homosexuality.¹³⁶ Citing *Jaycees*, the Court upheld the Boy Scouts’ freedom to exclude Dale¹³⁷:

129. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (explaining that, in addition to explicitly protected activities, the First Amendment contains an “implicit . . . corresponding right” to “associate with others in pursuit of a wide variety of . . . ends” (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)); *NAACP*, 357 U.S. at 460–61 (“[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”); *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 861 (7th Cir. 2006) (“Infringements on expressive association are subject to strict scrutiny.”). But see *Roberts*, 468 U.S. at 623 (“The right to associate for expressive purposes is not . . . absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”); *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 652 (9th Cir. 2008) (stating that a lesser standard of scrutiny applies to restrictions on a group’s speech within a limited public forum), *overruled on other grounds* by *L.A. Cnty. v. Humphries*, 131 S. Ct. 447 (2010).

130. *Roberts*, 468 U.S. at 618.

131. *Id.* at 623.

132. 468 U.S. 609.

133. *Id.* at 622–23.

134. *Id.* at 627–28.

135. 530 U.S. 640 (2000).

136. *Id.* at 645.

137. *Id.* at 656.

This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas Government actions that may unconstitutionally burden this freedom may take many forms . . . like a 'regulation that forces the group to accept members it does not desire.' Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express.¹³⁸

The Supreme Court's treatment of partisan political primaries provides great insight into the contours of constitutional precedent regarding membership and freedom of expressive association. Beginning in 1981, the Court has handed down a comprehensive series of decisions dealing with the interaction between state laws regulating who can participate in partisan primaries and the associational rights of the political parties themselves.¹³⁹ The Court has upheld political parties' expressive associational rights in a number of contexts: where a party's desire for a closed primary conflicted with state laws for open primaries;¹⁴⁰ where a party's desire for an open primary conflicted with a state law for closed primaries;¹⁴¹ and where political parties' desires for closed primaries conflicted

138. *Id.* at 647–48. *But see id.* at 695 (Stevens, J., dissenting) (“[I]f merely joining a group did constitute symbolic speech; and such speech were attributable to the group being joined; and that group has the right to exclude that speech (and hence, the right to exclude that person from joining), then the right of free speech effectively becomes a limitless right to exclude for every organization, whether or not it engages in *any* expressive activities. That cannot be, and never has been, the law.”).

139. *See, e.g.,* *Democratic Party of the U.S. v. Wis. ex rel. LaFollette*, 450 U.S. 107, 112–13 (1981). Also relevant to the nature of the right of association is the 1996 case of *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996). In this case, the Eleventh Circuit upheld the Republican Party of Georgia's decision to exclude the infamous Klansman, David Duke, from the party's presidential primary ballot, citing the parties' association rights and finding that Duke had no right to associate with an unwilling partner. *Id.* at 1232.

140. *See Democratic Party*, 450 U.S. at 112–13. Here, the Wisconsin Supreme Court had held under Wisconsin law that the Democratic National Committee was required to accept to its national convention delegates elected through an open primary in which there was no restriction on who could vote. *Id.* at 113. This requirement clashed with the national party's charter, which stipulated that delegates to the National Convention be selected through a process in which only Democrats could participate. *Id.* at 109. Upon review, the United States Supreme Court ruled in favor of the Democratic Party, reasoning that Wisconsin's declared interests in open primaries did not trump the party's rights to control the makeup of the party's delegation from the state. *Id.* at 126.

141. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 210–12 (1986). Here, the state Republican Party desired to open its primary to unaffiliated voters in an effort to appeal to independent voters, but Connecticut's statutory system mandated closed primaries. *Id.* at 210–11. Once again, the Supreme Court favored the party's associational rights over the state's various interests with regards to protecting voting rights and bolstering the integrity of the electoral system. *Id.* at 225.

with a state constitutional amendment passed through public referendum.¹⁴² The freedom of association is a proven, durable right, capable of overcoming strong state interests. However, the courts have curiously not extended this rationale to student groups who seek to protect expressive freedoms by restricting membership and participation in a manner very similar to the political parties mentioned above.

Finally, the ministerial exception doctrine is also illustrative of the issues at play in *Alpha Delta Chi*. This is a doctrine which recently received strong affirmation through the unanimous decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*¹⁴³ Generally, the ministerial exception refers to the exemption that churches have with regard to the employment of ministers from nondiscrimination elements in federal employment law.¹⁴⁴ Previously a creature of the lower federal courts, the Supreme Court only recently gave the doctrine explicit approval,¹⁴⁵ holding:

The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own. . . . [I]t is impermissible for the government to contradict a church's determination of who can act as its ministers.¹⁴⁶

Technically, the legal authority for the ministerial exception arises from the Free Exercise Clause of the First Amendment and would not extend to organizations or issues falling outside the scope of "religion."¹⁴⁷ As such, it may be a helpful doctrine when litigating

142. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 570–71 (2000). Here, a successful public referendum altered the state's primary voting system so that any voter, regardless of affiliation, was permitted to vote for any candidate. *Id.* at 570. Four state political parties, the Democratic Party, Republican Party, Libertarian Party, and Peace and Freedom Party, all had rules requiring closed primaries for electing their candidates and thus sued on the basis that the new regulations violated the parties' First Amendment rights of association. *Id.* at 571. Once again, the Supreme Court upheld the political parties' claims, holding that California had made the state's interests and the parties' First Amendment rights incompatible "by forcing political parties to associate with those who do not share their beliefs." *Id.* at 586.

143. 132 S. Ct. 694 (2012).

144. See Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 3 (2011).

145. *Hosanna-Tabor*, 132 S. Ct. at 705 ("Until today, we have not had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment.").

146. *Id.* at 703–04.

147. See *id.* at 706; see also Lund, *supra* note 144, at 2–3.

with regard to religiously oriented student groups, but it would not likely be so for expressive student groups that are religiously indifferent. Conceptually, however, the doctrine looks very similar to the right of expressive association. Just like its holding, the Court's reasoning was clearly articulated:

[M]embers of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, *or punishing a church for failing to do so* . . . interferes with the internal governance of the church, depriving the church of control over the selection of *those who will personify its beliefs*. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments.¹⁴⁸

Thus, the same constitutional principles limiting the government's ability to interfere with the internal affairs of expressive associations find life in the area of religious liberty.

III. VULNERABILITIES OF THE NINTH CIRCUIT'S HOLDING

A. *Legal Issues in Alpha Delta Chi*

In the context of the broad range of constitutional precedent discussed in Part II, the vulnerabilities of the Ninth Circuit's decision in *Alpha Delta Chi* begin to come into focus. Primarily, the court fails to recognize important differences between the student organization policies at SDSU and those in *Martinez*. The court's analysis emphasizes several similarities between the programs, yet unfortunately downplays many of the legally significant differences.¹⁴⁹ The court treats the differences as mere technicalities, thus avoiding substantive legal analysis by failing to adequately distinguish the programs.¹⁵⁰ Indeed, the differences between the programs are noteworthy; a policy prohibiting all forms of membership restrictions places different constraints on an organization than a policy

148. *Hosanna-Tabor*, 132 S. Ct. at 706 (emphasis added).

149. See *Alpha Delta Chi v. Reed*, 648 F.3d 790, 797–99 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1743 (2012). These similarities include: (1) official recognition contingent upon compliance with a series of requirements; (2) benefits restricted to officially recognized student organizations; (3) permitting alternative means of interacting with the university community, even for non-recognized student groups; and (4) purposes geared toward equal access, diversity and nondiscrimination. *Id.*

150. See *id.* at 797.

prohibiting only certain types of restrictions.¹⁵¹ In the former, all groups are equally situated in their ability to be selective in their membership.¹⁵² The latter policy, however, only hinders groups who organize around an idea that implicates one of the specific classifications targeted by the policy.¹⁵³ Alpha Delta Chi, a religious organization, only violated the NDP because it sought to condition membership on religious criteria.¹⁵⁴ In *Martinez*, by contrast, the group would have come under scrutiny whether its desired membership restrictions were religious, political, or preference for specific pizza toppings.¹⁵⁵

A second flaw in the court's analysis is the substantial deference that it afforded to the pedagogical interests asserted by SDSU in defense of its NDP.¹⁵⁶ The deference afforded to pedagogical interests at the elementary and secondary level differs significantly from that afforded to similar interests at the university level.¹⁵⁷ Generally, courts give more deference to the asserted pedagogical interests of elementary and secondary schools because of the far greater degree of paternalistic posture over students who are dependent on adult provision and protection and whose attendance is mandatory.¹⁵⁸ Universities, on the other hand, receive less deference, especially

151. Note that while the student organization programs at the respective institutions may look similar both in form and substance, the student group in *Martinez* stipulated that its policy was an "all-comers" rule while the groups in *Alpha Delta Chi* did not. See *supra* note 14 and accompanying text (defining "all-comers" policies).

152. See *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2979 (2010).

153. See *Alpha Delta Chi*, 648 F.3d at 795.

154. *Id.* at 796.

155. See *Martinez*, 130 S. Ct. at 2984.

156. The court found that SDSU exerted strong pedagogical goals of promoting diversity and nondiscrimination. *Alpha Delta Chi*, 648 F.3d at 798–99.

157. See, e.g., *DeJohn v. Temple Univ.*, 537 F.3d 301, 315 (3d Cir. 2008) ("[T]here is a difference between the extent that a school may regulate student speech in a public university setting as opposed to that of a public elementary or high school.").

158. See, e.g., *id.* at 316 ("[W]e keep in mind that Temple's administrators are granted less leeway in regulating student speech than are public elementary or high school administrators."); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) ("[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 208 (1982); *Wood v. Strickland*, 420 U.S. 308, 326 (1975); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507, 509 (1969) (holding that grade school administrators could, under certain circumstances, justify infringements of particular types of expression based on the Court's repeated emphasis on the "need for affirming the comprehensive authority of . . . school officials . . . to prescribe and control conduct in the schools").

when First Amendment rights are implicated,¹⁵⁹ in part because university students are independent adults whose attendance is voluntary and geared toward self-expression and exploration.¹⁶⁰ These principles are stated explicitly in *McCauley v. University of the Virgin Islands*¹⁶¹:

Public university administrators are granted *less leeway* in regulated student speech than are public elementary or high school administrators. . . . We reach this conclusion in light of the differing pedagogical goals of each institution, the *in loco parentis* role of public elementary and high school administrators, the special needs of school discipline in public elementary and high schools, the maturity of the students, and, finally, the fact that many university students reside on campus and thus are subject to university rules at almost all times.¹⁶²

Indeed, in *Rosenberger*, the Court noted “the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University’s educational mission.”¹⁶³

In *Alpha Delta Chi*, the Ninth Circuit failed to adequately establish the appropriate standards for assessing SDSU’s asserted pedagogical interests by utilizing the standards it applied in a case involving a high school’s nondiscrimination policy.¹⁶⁴ The court made no mention of cases such as *Southworth*, *Rosenberger*, or *Widmar*,¹⁶⁵

159. See, e.g., *Martinez*, 130 S. Ct. at 2988–89 (“We owe no deference to universities when we consider [questions regarding First Amendment protections] Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist ‘substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.’ We therefore ‘approach our task with special caution,’ mindful that Hastings’ decisions about the character of its student-group program are due decent respect.” (quoting *Bd. of Ed. v. Rowley*, 458 U.S. 176, 206 (1982) and *Healy v. James*, 408 U.S. 169, 171 (1972))).

160. See, e.g., *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 218 (2000) (noting implicitly that the Court would not defer to a student-fee allocation system run subject to majority referendum if it would result in the effect of viewpoint discrimination); *Widmar v. Vincent*, 454 U.S. 263, 270–71, 275–76 (1981) (rejecting a university’s asserted interest in complying with the Establishment Clause and with a state constitution when singling out religious student groups). For a more in-depth discussion of these cases, see *infra* Part III.C.

161. 618 F.3d 232 (3d Cir. 2010).

162. *Id.* at 242–43.

163. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 840 (1995).

164. See *Alpha Delta Chi v. Reed*, 648 F.3d 790, 798–99 (9th Cir. 2011) (referencing *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649 (9th Cir. 2008), *overruled on other grounds by* *L.A. Cnty. v. Humphries*, 131 S. Ct. 447 (2010)), *cert. denied*, 132 S. Ct. 1743 (2012).

165. See *Southworth*, 529 U.S. at 231–32; *Rosenberger*, 515 U.S. at 832–35; *Widmar*, 454 U.S. at 268–69. For more in-depth discussion of these cases, see *supra* Part II.B.

cases where the courts afforded much less deference to the universities' pedagogical interests and more explicitly compared those interests with the First Amendment interests asserted by students.¹⁶⁶ The Ninth Circuit failed to mention SDSU's stipulation that its student organization program was designed to "increase the range of viewpoints advocated in the marketplace of ideas on campus and to enhance the educational experience for students."¹⁶⁷ Instead, it noted only SDSU's asserted goal of "promoting diversity and nondiscrimination,"¹⁶⁸ concluded that required compliance with the NDP was a reasonable means of effectuating that goal, and then immediately moved on in its analysis, failing to apply any judicial scrutiny to the constitutional validity of that purpose.¹⁶⁹

This omission is critical considering the rights at stake and the court's own acknowledgement that the NDP disproportionately burdened religious groups.¹⁷⁰ Had the court adequately scrutinized the university's asserted purpose, it may have revealed a program motivated by anti-religious bias or intolerance for viewpoints that failed to conform to a particular understanding of discrimination.¹⁷¹ Based on the words of Richard Rorty, a prominent philosophy professor who taught at universities such as Princeton, Stanford, and the University of Virginia, unearthing such bias in academia would not be surprising:

I, like most Americans who teach humanities or social science in colleges and universities . . . try to arrange things so that students who enter as bigoted, homophobic, religious fundamentalists will leave college with views more like our

166. See *id.*

167. Brief of Appellants at 41, *Alpha Delta Chi*, 648 F.3d 790 (No. 09-55299), 2009 WL 6303848 at *41.

168. See *Alpha Delta Chi*, 648 F.3d at 799.

169. See *id.* at 800.

170. See *id.* at 804 (The policy "does not target religious belief or conduct, and does not 'impose special disabilities' on . . . religious groups. Any burden on religion is incidental to the general application of the policy."); see also *id.* at 805-06 (Ripple, J., concurring) ("The net result of this selective policy is therefore to marginalize in the life of the institution those activities, practices and discourses that are religiously based.").

171. See, e.g., *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 863 (7th Cir. 2006) ("What interest does SIU have in forcing CLS to accept members whose activities violate its creed other than eradicating or neutralizing particular beliefs contained in that creed? SIU has identified none. The only apparent point of applying the policy to an organization like CLS is to induce CLS to modify the content of its expression or suffer the penalty of derecognition."); see also Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 222 (1992) ("The correct baseline [for religious freedom] is not unfettered religious liberty, but rather religious liberty insofar as it is consistent with the establishment of the secular public moral order.").

own. . . . [W]e do our best to convince these students of the benefits of secularization. We assign first-person accounts of growing up homosexual to our homophobic students for the same reasons that German schoolteachers in the postwar period assigned *The Diary of Anne Frank*. . . . There are credentials for admission to our democratic society, credentials which we liberals have been making more stringent by doing our best to excommunicate racists, male chauvinists, homophobes, and the like. You have to be *educated* in order to be a citizen of our society¹⁷²

Further, evidence that the university may have only enforced the policies against certain groups, which contributed to remands in both *Alpha Delta Chi* and *Martinez*, should have caused the court to inquire more closely as to the validity and constitutional permissibility of SDSU's articulated purpose.¹⁷³ The Ninth Circuit's complete deference to SDSU's purported pedagogical purposes failed to provide the constitutionally sufficient judicial check necessary to protect the plaintiffs' asserted interest.

A third legal problem with the Ninth Circuit's approach to the school's asserted pedagogical interests is its confusion of how those interests should affect university regulation of academic programs versus extracurricular programs. The Ninth Circuit implicitly applied *Martinez's* notion that "[a] college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process."¹⁷⁴ However, this understanding is inconsistent with other Supreme Court decisions. In *Southworth*, the Court presented a different understanding of the nature of student organization programs: "The University's whole justification for fostering [a student organization program] is that it springs from the initiative of the students, who alone give it purpose

172. Richard Rorty, *Universality and Truth*, in RORTY AND HIS CRITICS 1, 21–22 (Robert B. Brandom ed., 2000). He continues: "So we are going to go right on trying to discredit you in the eyes of your children, trying to strip your fundamentalist religious community of dignity, trying to make your views seem silly rather than discussable. We are not so inclusivist as to tolerate intolerance such as yours." *Id.*

173. See *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2995 (2010) (remanding after noting that "[n]either the District Court nor the Ninth Circuit addressed an argument that Hastings selectively enforces its all-comers policy"); *Alpha Delta Chi*, 648 F.3d at 804 ("We remand for consideration of the question whether San Diego State has (1) exempted certain student groups from the nondiscrimination policy; and (2) declined to grant Plaintiffs such an exemption because of Plaintiffs' religious viewpoint.").

174. *Martinez*, 130 S. Ct. at 2988–89.

and content in the course of their extracurricular endeavors.”¹⁷⁵ As this excerpt accurately recognizes, if students fail to populate, facilitate, and lead extracurricular organizations, those organizations cease to exist. As such, it is inaccurate to frame student organizations as a primarily university-initiated component of a university’s pedagogical plan to educate its students. The fact that student organizations are ubiquitous on college campuses and require a significant amount of logistical support from the university does not change the fact that education is indeed possible without them and that they, unlike a university’s academic programs, depend entirely on the voluntary participation of students.¹⁷⁶ As such, granting preferential status to the university’s pedagogical priorities for student organizations, especially over objections based on First Amendment claims, is counter-intuitive since the students are the true owners, originators, and facilitators of these organizations.¹⁷⁷

Finally, the Ninth Circuit erred by misapplying a foundational text regarding the interaction between the freedom of association and antidiscrimination laws. The court cited *Roberts v. U.S. Jaycees* in support of the following:

San Diego State asserts that the purpose of its policy . . . is . . . to ensure that the school’s resources are “open to all interested students without regard to special protected classifications.” As the Supreme Court has made clear, antidiscrimination laws intended to ensure equal access to the benefits of society serve goals “unrelated to the suppression of expression” and are neutral as to both content and viewpoint.¹⁷⁸

Although the court was unclear regarding what it meant by “benefits of society,” it is clear that it included student groups in this category.¹⁷⁹ However, as noted above, student organizations are a manifestation of the collective private activity of students, not a public resource originating from the initiative of the university.¹⁸⁰ As such, the court confused the facilitation and regulation of private activity with the creation and control of that activity. Further, the use of the term “school resources” is dubious at best. One would think that the clearest notion of what counts as “school resources” would

175. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000).

176. See, e.g., *id.*

177. See, e.g., *id.*

178. *Alpha Delta Chi*, 648 F.3d at 801 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984)).

179. See *id.* at 801.

180. See *supra* notes 177–78 and accompanying text.

be the sort of benefits sought by Alpha Delta Chi: access to student fees, meeting space on campus, etc. However, by co-opting student-initiated groups under the umbrella of “school resources,” the court created a self-defeating logical conundrum.¹⁸¹ Identifying the student group as a school resource begs the question of the group’s existence. But if the school’s own policies prevent the group from gaining access to other school resources, then the group may fail to exist in the first place. Thus, the school actually engages in denying resources to Alpha Delta Chi and treating the private expressive association as if the school owns it and can dole it out like any other public benefit.

B. Conceptual Flaws in Alpha Delta Chi

In addition to numerous legal vulnerabilities, the Ninth Circuit’s holding in *Alpha Delta Chi* suffers from foundational conceptual problems as well. The first of these problems arises in how the Ninth Circuit framed and treated the plaintiff’s desired application of the NDP as a special exemption from the viewpoint neutral and generally applicable requirements of SDSU’s NDP.¹⁸² This classification is consistent with how the Supreme Court treated CLS at UC Hastings: “CLS . . . seeks not parity with other organizations, but a preferential exemption from [the university’s] policy.”¹⁸³ Framing the issue in this manner is common in the academy as well. William Marshall, a professor at the University of North Carolina School of Law, argues that CLS’s arguments, like those asserted by Alpha Delta Chi, would create a double standard by allowing religious organizations to discriminate based on religion while preventing secular organizations from doing so.¹⁸⁴ In a similar fashion, Professors Alan Brownstein and Vikram Amar note that:

CLS argued that it is viewpoint discrimination to prohibit religious organizations from discriminating on the basis of

181. Despite the logical incoherence, defining student organizations this way is beneficial for the university’s position. As Suffolk University Law Professor Patrick S. Shin recently wrote, seemingly innocuous decisions on framing issues are often outcome-determinative. In other words, the means by which policymakers frame issues on the front end often guide the characterizations of those issues on the back end. See Patrick S. Shin, *Discrimination Under a Description*, 47 GA. L. REV. (forthcoming 2012) (discussing how legal treatment of conduct-based discrimination has differed significantly depending on what words policymakers chose to describe the discriminatory conduct in question).

182. See *Alpha Delta Chi*, 648 F.3d at 800.

183. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2978 (2010).

184. See William P. Marshall, Smith, *Christian Legal Society, and Speech-Based Claims for Religious Exemptions from Neutral Laws of General Applicability*, 32 CARDOZO L. REV. 1937, 1945 (2011).

religious belief while permitting secular political organizations to discriminate on the basis of nonreligious belief. But it is not viewpoint discrimination to prohibit secular political organizations from discriminating on the basis of religious belief while permitting religious organizations to discriminate on the basis of secular beliefs. Religious student organizations receive more associational autonomy than their secular counterparts and religious students receive more protection for their beliefs than students who hold secular beliefs.¹⁸⁵

These arguments essentially contend that affording religious organizations special treatment would violate the Establishment Clause of the First Amendment as well as the Equal Protection Clause of the Fifth and Fourteenth Amendments.¹⁸⁶

However, framing the conflict in this way fundamentally mischaracterizes the issue, leading to errant conclusions. Marshall's support for an NDP that prohibits religious-based membership restrictions relies on the notion that this prohibition applies equally to all groups.¹⁸⁷ While perhaps correct in theory, this understanding fails to match the practical realities of NDPs. Anatole France famously remarked that "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."¹⁸⁸ In the same way, a university may argue that prohibitions on discrimination based on religious beliefs apply to all groups. However, religious groups are really the only groups with any legitimate reason to concern themselves with their leaders' and members' religious beliefs.¹⁸⁹ Indeed, litigation regarding university

185. Alan Brownstein & Vikram Amar, *Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate Distorting State Action*, 38 HASTINGS CONST. L.Q. 505, 533 (2011).

186. See *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion."); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1704 (3d ed. 2009) (describing the "symbolic endorsement test" approach used by some Supreme Court Justices, which measures the existence of an Establishment Clause violation by whether the government action endorses a particular religion or belief); see also Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961) (arguing that the Separation Clause in the First Amendment should be read to "prohibit classification in terms of religion either to confer a benefit or to impose a burden").

187. See Marshall, *supra* note 184, at 1945.

188. ANATOLE FRANCE, *THE RED LILY* 75 (Boni and Liveright, Inc. 1910) (1894).

189. See, e.g., Lund, *supra* note 144, at 30 ("[An employment law prohibition on religious discrimination] makes sense for nonreligious employers. Wal-Mart should treat atheists like Catholics; Wal-Mart should treat atheists who impugn Catholicism the same way it treats Catholics who impugn atheism. But it makes little sense for the law to require that of the Catholic Church. The Catholic Church should not have to hire people who

NDPs disproportionately involves religious student groups—particularly Christian ones.¹⁹⁰

Judge Ripple raises this concern in his concurrence to the *Alpha Delta Chi* decision.¹⁹¹ After recognizing that many non-religiously oriented groups are able to discriminate based on commitment to the ideologies that form the base rationale for organization in the first place, Judge Ripple notes that “[r]eligious students, however, do not have this luxury—their shared beliefs coincide with their shared status. They cannot otherwise define themselves and not run afoul of the [NDP].”¹⁹² Washington University Law Professor John Inazu makes the same point that the “artificial distinction between expression and conduct . . . in some cases [is] one and the same. . . . CLS’s ‘conduct’ is inseparable from its message.”¹⁹³ Thus, arguments defending the validity of NDPs by appealing to “equal applicability” fail to address the point that religious student groups are trying to make.

These arguments seem to assume that all discrimination is bad and that if religious-based discrimination is wrong in some contexts, it must be wrong in all contexts. In a society that increasingly posits morally relativistic tolerance as the supreme virtue,¹⁹⁴ the prevailing sentiments of NDPs and their legal defenders presume that any form of discrimination is *prima facie* invalid. However, as University of San Diego Law Professor Larry Alexander notes,

[A]ll of us well-socialized Westerners know that discrimination against other human beings is wrong. Yet we also realize, if we think about it at all, that we discriminate against others routinely and inevitably.¹⁹⁵

Similarly, Notre Dame Law Professor Richard Garnett argues,

openly reject Catholicism as patriarchal and oppressive.”); Stanley Fish, *Religion Without Truth*, N.Y. TIMES, Mar. 31, 2007, at A15 (“The truth claims of a religion—at least religions like Christianity, Judaism and Islam—are not incidental to its identity; they are its identity.”), available at <http://www.nytimes.com/2007/03/31/opinion/31fishs.html>.

190. See CARSON, *supra* note 12, at 31.

191. See *Alpha Delta Chi v. Reed*, 648 F.3d 790, 805–06 (9th Cir. 2011) (Ripple, J., concurring), *cert. denied*, 132 S. Ct. 1743 (2012).

192. *Id.* at 806 (Ripple, J., concurring) (citing *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 645 (9th Cir. 2008), *overruled on other grounds by* *L.A. Cnty. v. Humphries*, 131 S. Ct. 447 (2010)).

193. See Inazu, *supra* note 25, at 196.

194. See CARSON, *supra* note 12, at 11–12, 74.

195. See, e.g., Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 151 (1992).

[T]o label a decision or action "discrimination" is simply to note that one factor or another was or will be taken into account in the course of a decision; it is to invite, but not at all to answer, the questions whether that decision or action was or would be wrong, and whether the public authority may or should forbid or discourage it.¹⁹⁶

Thus, discrimination cannot be invalid *per se*. It is the essence of group formation—distinguishing with regard to which ideological commitments the group has and which individuals warrant inclusion based on adherence to those commitments. This occurs with groups that form intentionally, such as a church, a political party, or a student group, and groups that form unofficially, such as groups of friends. The reverse is true as well—individuals also discriminate amongst ideologically committed associations when they seek out or avoid involvement in those groups.¹⁹⁷

Thus, Professor Garnett rightly challenges this prevailing norm by changing the question from whether we should allow discrimination to when and why we should allow it.¹⁹⁸ He argues that "[w]hen we say that 'discrimination' is wrong, what we actually mean is that wrongful discrimination is wrong."¹⁹⁹ Exactly what distinguishes *wrongful* discrimination from legitimate discrimination is a difficult question.²⁰⁰ Garnett conceptualizes wrongful discrimination as discrimination that denies human dignity.²⁰¹ Professor Peter Westen offers insight into the question by asserting that notions of equality entail that "people who are alike should be treated alike and its correlative, that people who are unlike should be treated unlike."²⁰² Both of these notions imply that people differ in ways material to how law and society should operate and that law can utilize these distinctions in a manner that rationally provides for those differences yet remains faithful to the idea that all people are created equal.

The current jurisprudence and legal scholarship on NDPs in public universities fails to account for this important distinction. The scholarship frames the actions of groups like CLS and Alpha Delta

196. See Garnett, *supra* note 12, at 198–99.

197. See *id.* at 197.

198. See *id.* at 198–99.

199. See *id.* at 198.

200. See *infra* notes 221–29 and accompanying text.

201. See Garnett, *supra* note 12, at 217.

202. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 538, 539–40 (1982) (citations omitted).

Chi as hypocritical and reliant on double standards in its pursuit of narrow exemptions to otherwise universally applicable NDPs.²⁰³ But such an argument implies that the groups merely sought the exclusive ability to act in a way that they knew was wrongful. What such groups really assert, to the contrary, is that it is not wrongful to restrict candidacy for religious leadership to candidates who actually affirm, in both word and deed, the very beliefs and standards to which the group holds in the first place.²⁰⁴ Because the identity and existence of an ideologically driven student group derives from its common ideological commitment, the survival of such a group logically depends on its ability to preserve and protect the ideology that motivated the group's formation.²⁰⁵ Just as a vegetarian student group organizes to learn about and advocate for vegetarianism, a religious group such as Alpha Delta Chi organizes to learn about and advocate for its religious beliefs on campus.²⁰⁶ To require any of these groups to accept leaders or members with views antithetical to those of the group would go beyond simply forcing association on the unwilling; it would change the fundamental nature of the group. This is an instance in which the discrimination is not wrongful because it is done with the purpose of maintaining the identity and purpose of a group, not with the purpose or effect of denigrating an individual's worth or dignity. Thus, CLS and Alpha Delta Chi's actions are not wrongful discrimination, but rather legitimate discrimination that is wrong only in other contexts.

A second conceptual problem with the court's rationales for upholding SDSU's NDP is the unsound argument that the university's stance is viewpoint neutral. The notion that a university's NDP can be neutral is often based on whether the NDP applies to all student

203. See, e.g., Marshall, *supra* note 184, at 1945.

204. Garnett, *supra* note 12, at 202–03.

205. *Id.* at 197 (“‘Discrimination,’ after all, is just another word for discernment, and for choosing and acting in accord with or with reference to particular criteria. We do, and should, ‘discriminate’—that is, draw lines, identify limits, make judgments, act on the basis of preferences—all the time.”).

206. While this sentence suggests that religious groups are on par in a legal sense with other ideologically motivated groups, the Supreme Court has suggested that this is different and that religion has special privileges under the First Amendment that secular groups do not have. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012) (“The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC’s . . . view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations.”).

groups regardless of convictions and whether it affirmatively articulates a preference with regard to any of the classifications for which it prohibits discrimination.²⁰⁷ This concept is tied intimately to broader arguments that government action must be morally neutral—arguments that enjoy great power, influence, and pervasiveness within the courts and the legal academy.²⁰⁸ Arguments for government neutrality are most prevalent in controversial social issues such as abortion²⁰⁹ and sexual morality²¹⁰ for which there is no clear societal consensus on the morality governing such issues. Notions of moral neutrality arise in uncontroversial areas as well, where the lack of controversy or the law's conformance with the prevailing moral sentiment feeds a societal assumption that law can be neutral.²¹¹

Despite its rhetorical appeal, the notion that government action can be morally neutral is intellectually untenable.²¹² Government inaction can and often does have just as much moral significance as

207. See, e.g., *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2996 (2010) (Stevens, J., concurring) ("It does not reflect a judgment by school officials about the substance of any student group's speech. Nor does it exclude any would-be groups on the basis of their convictions. Indeed, it does not regulate expression or belief at all.").

208. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992) ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. *Our obligation is to define the liberty of all, not to mandate our own moral code.*" (emphasis added)); Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1236 (2004) (concluding "that mere reference to morality should not suffice as a justification for lawmaking").

209. See, e.g., *Casey*, 505 U.S. at 850.

210. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (holding that the "majority may [not] use the power of the State to enforce [moral views regarding homosexual conduct] on the whole society through operation of the criminal law").

211. See, e.g., Steven G. Calabresi, *Render Unto Caesar That Which Is Caesar's, and Unto God That Which Is God's*, 31 HARV. J.L. & PUB. POL'Y 495, 499 (2008) ("[W]e must begin by remembering that all of our legal rules—including the basic prohibitions against murder, assault, and robbery—have religious and moral underpinnings." (emphasis added)).

212. See, e.g., CARSON, *supra* note 12, at 87–92 (arguing that framing non-religious arguments as "neutral" actually advances an alternative set of beliefs and moral assertions); cf. TIMOTHY KELLER, *THE REASON FOR GOD*, at xvii (2008) ("[E]ven as [religious persons] should learn to look for reasons behind their faith, skeptics must learn to look for a type of faith hidden within their reasoning. All doubts, however skeptical and cynical they may seem, are really a set of alternate beliefs. You cannot doubt Belief A except from a position of faith in Belief B. For example, if you doubt Christianity because 'There can't be just one true religion,' you must recognize that this statement is itself an act of faith. No one can prove it empirically, and it is not a universal truth that everyone accepts.").

action, and legislation based on moral consensus does not somehow render such laws less based on morality or more objective. For example, many argue that legalized abortion avoids the need to legislate morality by leaving the actual choice of whether to abort a baby with the woman.²¹³ However, what legalized abortion really demonstrates is a moral choice by society to prefer the moral value of a woman's bodily autonomy to the moral value presented by the life in the womb. From another perspective, legalized abortion simply demonstrates society's judgment that the moral questions pertaining to the baby's life, or even the "potential" life in the womb, are not morally significant enough to address in the legislature or the courts. Try as we may, "[l]aw and morality are inevitably intertwined"²¹⁴ and thus, "[t]he real question is not whether the government has a role in prescribing morals, but which *type* of morality the government should prescribe."²¹⁵

SDSU asserted, and the court agreed, that its NDP was viewpoint neutral because it subjected all student groups to the requirements of the policy and because any burdens it imposed on specific groups were incidental.²¹⁶ However, the policy's language and the practical effects of enforcement evidenced in *Alpha Delta Chi* reveal two distinct fallacies in this argument. First, the argument treats diversity and nondiscrimination as morally neutral ideals. In reality, the fact that the university is promoting these ideals is itself a moral assertion. It asserts that the goals of diversity and nondiscrimination are good, desirable, and morally worthy goals *and* that they are morally preferable to goals of free expression or particular religious values.²¹⁷ Second, the fact that the NDP only prohibits some types of discrimination demonstrates the lack of viewpoint neutrality in the university's stance. By failing to prohibit *all* forms of discrimination, SDSU's policy articulates a viewpoint that only *some* types of discrimination are wrong. Thus, the policy treats similarly situated student groups differently; any group that disagrees

213. See, e.g., *Casey*, 505 U.S. at 850.

214. Calabresi, *supra* note 211, at 500.

215. G. Marcus Cole, *What Is the Government's Role in Promoting Morals? . . . Seriously?*, 31 HARV. J.L. & PUB. POL'Y 77, 79 (2008).

216. See *Alpha Delta Chi v. Reed*, 648 F.3d 790, 801 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1743 (2012).

217. See, e.g., CARSON, *supra* note 12, at 81 ("[T]he new tolerance, while making its claims to be free from any ethical, moral, or religious system of thought, is in fact hugely inconsistent. The problem, I shall argue, is worse than mere inconsistency in an argument: it is in fact smuggling into the culture massive structures of thought and imposing them on others who disagree, while insisting that the *others* are the intolerant people.").

with the university with respect to the wrongfulness of a particular form of discrimination is prohibited from access to the university's student organization program.²¹⁸ The results are far from "incidental" as the court claims²¹⁹ and more akin to censorship. SDSU's NDP is itself discriminatory and failure to properly perceive and engage with that truth can only operate to divorce jurisprudence on NDPs from reality.

C. Practical Problems for NDPs

Upholding the validity of NDPs like SDSU's presents practical problems as well. A glaring problem of narrow NDPs is whether or not such policies themselves can ever truly be applied in a nondiscriminatory manner. As noted above, religious groups are not the only groups with rational reasons for limiting membership based on characteristics identified by policies like SDSU's.²²⁰ In *Alpha Delta Chi*, SDSU stipulated that restrictive membership policies were prevalent on campus,²²¹ and the court's remand to the district court was based in part on factual findings that SDSU's African Student Drama Association allowed only students from Africa to hold leadership positions.²²² Similarly, student a capella groups, Greek organizations, and club sports teams routinely discriminate based on gender. Universities must allow for at least some exceptions to these policies in order for groups to remain distinctive.²²³ Yet, these permitted discriminatory practices rarely cause controversy because the group's rationales for discriminating often make sense in light of

218. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 844 (1995) (discussing how policies prohibiting religious groups depend not on a position of true neutrality, but must assess potential violations on standards of "secular orthodoxy"); see also Minow, *supra* note 12, at 826 ("Nonreligious people may think that it is the secular space that is neutral and all-encompassing, but religious people do not. For them, the secular is one of many spaces, and potentially one that is threatening to commitments and practices held dear." (citing Nancy Rosenblum, *Introduction* to OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH 3, 5 (Nancy L. Rosenblum ed., 2000))).

219. See *Alpha Delta Chi*, 648 F.3d at 801.

220. See *supra* Part II.B.

221. Brief of Appellants at 10–11, *Alpha Delta Chi*, 648 F.3d 790 (No. 09-55299), 2009 WL 6303848 at *10–11.

222. See *Alpha Delta Chi*, 648 F.3d at 804.

223. For example, if the Republican Club is forced to accept Green Party members, then it is no longer a Republican Club, but rather a Republican and Green Party Club. See Garnett, *supra* note 12, at 210–11 ("[T]he particular membership criteria that the CLS sought to employ—that is, the Statement of Faith and compliance with traditional Christian standards of sexual morality—are controversial, but it does not and should not strike many people as wrong for, say, a Republican club to exclude registered Green Party members.").

the organization's stated purpose.²²⁴ However, each additional exception that a university grants from an NDP further erodes the policy's general applicability, thus undermining a critical element of the policy's claim to legal permissibility and coherency.²²⁵ Actions singling out religious groups begin to look arbitrary and indefensible. The fact that this problem arose in *Martinez*,²²⁶ *Walker*,²²⁷ and again in *Alpha Delta Chi*²²⁸ lends credibility to questions of whether these policies can ever be applied in a manner that is truly nondiscriminatory without destroying all semblance of group autonomy.

Another practical problem raised by the narrower brand of NDPs pertains to the task of deciphering a group's ideological convictions and corresponding motivations behind those convictions.²²⁹ As Professor Marshall has noted, deciphering between belief and animus in the context of religious organizations can be an exceedingly difficult task.²³⁰ At least one author has questioned whether deciphering such dubious distinctions is possible, or even desirable.²³¹ Why then delegate to the university the power to decipher distinctions between an individual's status and beliefs or between belief and animus?²³² The American legal and political

224. See *id.*

225. See Minow, *supra* note 12, at 788 ("Yet each additional exemption from a general rule further undermines the governmental purpose behind its rule.").

226. See *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2995 (2010) ("Neither the District Court nor the Ninth Circuit addressed an argument that Hastings selectively enforces its all-comers policy . . ."); see also *id.* at 3004 (Alito, J., dissenting) ("[T]he record is replete with evidence that, at least until Dean Kane unveiled the accept-all-comers policy in July 2005, Hastings routinely registered student groups with bylaws limiting membership and leadership positions to those who agreed with the groups' viewpoints.").

227. See *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 866 (7th Cir. 2006) ("For whatever reason, 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.").

228. See *Alpha Delta Chi v. Reed*, 648 F.3d 790, 803–04 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1743 (2012).

229. See, e.g., Brief for the Petitioner at 29, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553), 2011 WL 2414707 at * 29 ("Even reasons that sound superficially secular are often religious at their core."); see also Lund, *supra* note 144, at 34 (discussing how difficult it may be to distinguish between religious and nonreligious decisions by a church).

230. See Marshall, *supra* note 184, at 1941.

231. See Note, *supra* note 25, at 2900–02.

232. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2564 (2012) (Alito, J., dissenting) ("The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth."); *Alpha Iota Omega v. Moeser*, No. 1:04CV00765, 2006

tradition has long been skeptical of the government's use of coercive power within the marketplace of ideas, and for good reason.²³³ Andrew Koppelman has stated that "it is unseemly, and potentially abusive, for [government actors] to tell organizations—particularly organizations with dissenting... views—what their positions are."²³⁴ Despite the danger posed,²³⁵ advocacy for this concept persists in legal scholarship.²³⁶

Professor Inazu's article points out the problems of courts finding comfort in "reasonable alternatives" for a student organization that has been denied official recognition.²³⁷ Courts have repeatedly given significant weight to alternatives such as social media and off-campus meeting places in determining the reasonableness of NDPs.²³⁸ Even with these alternatives, however, non-recognized student groups are still at a significant disadvantage as compared to groups with access to these benefits. As Professor Inazu's article points out, failure to obtain official recognition and its corresponding benefits often results in the death of a student

WL 1286186, at *5–6 (M.D.N.C. May 4, 2006) (discussing the need for universities to strike a balance between protecting the First Amendment rights of students and "maintaining 'viewpoint neutrality in the allocation of funding support' " (citing *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233 (2000))).

233. See, e.g., Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. CIN. L. REV. 1, 3 (1991) ("[P]erhaps the worst umpires or referees of truth are the oppressive arms of government which will always attempt to impose an orthodoxy consonant with the frequently corrupt interests of the bureaucracy.").

234. ANDREW KOPPELMAN & TOBIAS BENJAMIN WOLFF, *A RIGHT TO DISCRIMINATE?* 24 (2009).

235. See Lund, *supra* note 144, at 55–57 (describing how juries unfamiliar with or hostile toward a specific religion are especially susceptible to suggestions that the religious organization under scrutiny used religious beliefs as a pretext for an action that was actually discriminatory).

236. See, e.g., Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965, 2023 (2007) ("[F]or churches that do not claim that their tenets require discrimination, a decision influenced by discrimination is a mistake (or worse) from the church's point of view, and the state is merely requiring the church to fix it.").

237. Inazu, *supra* note 25, at 190–97 ("[W]ithholding some benefits—like access to meeting space or email lists or the opportunity to be part of a public forum—can be akin to stomping out a group's existence. After [*Martinez*], the Hastings-Christian-Group-that-Accepts-All-Comers can exist, and the Christian-Legal-Society-for-Hastings-Law-Students-that-Can-Sometimes-Meet-on-Campus-as-a-Matter-of-University-Discretion-If-Space-Is-Available-but-Can't-Recruit-Members-at-the-Student-Activities-Fair can exist. But the Hastings Christian Legal Society—whose views and purposes are in no way sanctioned by and can be explicitly disavowed by Hastings—cannot.").

238. See, e.g., *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2991 (2010); *Alpha Delta Chi v. Reed*, 648 F.3d 790, 799 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1743 (2012).

organization.²³⁹ In 2005, the members of a Jewish fraternity at the College of Staten Island were denied official recognition for restricting membership to men.²⁴⁰ After losing its suit in federal court,²⁴¹ the fraternity disbanded.²⁴² Similarly, at the time of this writing, the Christian Legal Society at UC Hastings no longer appears to exist.²⁴³ As these instances indicate, the alternatives that courts have deemed reasonable do not adequately take into consideration the vital importance of access to student fees, recruitment activities, and university communication services to the existence of on-campus student organizations.

Finally, if a university is genuinely committed to fostering diversity of people and of viewpoints, protecting a wide variety of ideological commitments is critical. Most NDPs are fundamentally oriented toward the individual and conceptualize the only means of promoting campus diversity as guaranteeing diverse viewpoints *within* student organizations.²⁴⁴ However, allowing a College Republican to hold office in the Young Democrats compromises the Young

239. Inazu, *supra* note 25, at 197; *accord* Lund, *supra* note 144, at 27 (arguing that if the ministerial exception is extinguished, “churches will exist only at the sufferance of government—any hostile government could choose to destroy them by simply passing a generally applicable religious discrimination law and then making no exception for religious groups”).

240. *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 443 F. Supp. 2d 374, 380 (E.D.N.Y. 2006), *vacated*, 502 F.3d 136 (2d Cir. 2007).

241. *Chi Iota Colony*, 502 F.3d at 139.

242. Inazu, *supra* note 25, at 191.

243. *See Student Organizations*, U. CAL. HASTINGS C.L., <http://www.uchastings.edu/student-services/student-orgs/index.html> (last visited Oct. 14, 2012).

244. Leading universities from around the country require student organization compliance with NDP for registration; these NDPs generally explicitly prohibit discrimination against individuals of certain protected classifications, but contain no mention of group autonomy. *See, e.g.*, UNIV. OF VA. COLL. AT WISE, STUDENT ORG. HANDBOOK 2010–2011, at 20 (2010), http://www.wise.virginia.edu/studentlife/files/studentlife/StudentOrganizationHandbook_2010_2011.pdf; *Nondiscrimination Policy*, VANDERBILT U., http://www.vanderbilt.edu/student_handbook/university-policies-and-regulations#equal (“Registered student organizations must be open to all students as members and must permit all members in good standing to seek leadership posts.”) (last visited Nov. 14, 2012); *Student Orgs: Requirements for Registration*, U. MICH., <http://studentorgs.umich.edu/guidebook/requirements> (last visited Nov. 14, 2012) (requiring organization compliance with the university’s NDP, found at http://www.umich.edu/policy_nondiscrim.php). Some universities do provide for some accommodation of group autonomy in the form of exceptions for religious beliefs. *See* UNIV. OF FL., STUDENT ACTIVITIES AND INVOLVEMENT 2 (2011), <https://www.studentinvolvement.ufl.edu/Portals/1/Documents/Organizations/Register/Docs/Policy%20UF%20constitution%20guidelines%201112%20sg%20info%20included-%20new%20logo%20updated%20nondiscrimination.pdf>.

Democrats' ability to preserve faithfulness to Democratic ideology.²⁴⁵ A broader perspective on diversity, one that considers both group autonomy and individual interests, reveals that a university can better promote diversity through ensuring strong protections for groups to develop their ideological stances and to offer a safe zone for those who are like-minded.²⁴⁶ Protecting group autonomy will enable diverse, ideologically-driven groups to develop and articulate ideas more effectively, enhancing campus dialogue by increasing the coherency of diverse viewpoints, sharpening the distinction between divergent ideas, and broadening the opportunity for intellectual progress through the marketplace of ideas.

IV. A WORKABLE POLICY

The problems plaguing NDPs admittedly arise from the difficult task of balancing several competing goals. The clear and overwhelming trend in academia has demonstrated a strong preference for prioritizing the norms of equal access, diversity, and nondiscrimination. Unfortunately, as examples such as *Martinez* and *Alpha Delta Chi* demonstrate, prioritizing those goals has frequently come at the expense of expressive freedoms. "[O]ur constitutionalism . . . includes values other than equality . . ."²⁴⁷ Indeed, the First Amendment and its jurisprudential progeny provide stalwart protections for the freedoms of conscience, thought, and expression by way of protecting speech, association, assembly, and the free exercise of religion.²⁴⁸ As demonstrated above, the current methods utilized have not only significant legal and conceptual vulnerabilities, but are counterproductive to the inquisitive and deliberative environments that universities ought to be.

Moving forward, several principles derived from the analysis in Part III should guide attempts to balance these goals. Most importantly and most practically, universities must acknowledge that

245. See, e.g., Lund, *supra* note 144, at 39 ("Any lay person can imagine the serious burden that is placed on churches and congregations who would have to accept a minister whose spiritual authority they reject. Week after week, churches will have to get by with a minister they do not want and that they do not believe God wants them to have.").

246. See *infra* notes 258–70 and accompanying text (discussing the marketplace of ideas).

247. Inazu, *supra* note 25, at 152–53.

248. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

not all discrimination is wrongful and adjust their goals accordingly.²⁴⁹ This fundamental failure to do so has resulted in NDPs that overreach, chill expression, compromise robust ideological debate, and destabilize the moral grounds for opposing truly wrongful discrimination. Universities should adopt a comprehensive understanding of diversity that acknowledges that having a student body that looks different does not guarantee having a student body that thinks differently. If the academy is truly devoted to promoting an atmosphere composed of and intellectually interested in a variety of viewpoints, the methods the university employs toward that end should look past the traditional indicators of diversity, such as race, nationality, and sex, and consider genuine ideological diversity such as religious, political, and philosophical viewpoints. Additionally, universities must acknowledge that associational rights matter, that individual rights have limits, and that forced acceptance of members and leaders into unwilling groups is not the only means of achieving diversity. The current approach, to the contrary, forces association upon the unwilling²⁵⁰ and idolizes the rights of the individual at the expense of the rights of the group.

Public universities can put these principles into practice by ensuring two primary elements in their NDPs. First, NDPs should clearly articulate the ability for ideologically oriented student groups to restrict membership and leadership based on the ideological commitments that form the basis for the group's existence. These protections should take place within the context of an otherwise universally applicable policy that prohibits discrimination on any other grounds. While universities should demonstrate substantial deference to the groups in stipulating their ideologies, especially when they are controversial or unpopular,²⁵¹ deference to ideological convictions should not be unbridled. Discrimination that either propagates or engages in violence should be prohibited.²⁵² The First

249. See *supra* Part III.B.

250. See, e.g., *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2985 (2010) ("‘Freedom of association,’ we have recognized, ‘plainly presupposes a freedom not to associate.’ Insisting that an organization embrace unwelcome members, we have therefore concluded, ‘directly and immediately affects associational rights.’” (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000))); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 862–63 (7th Cir. 2006).

251. *Texas v. Johnson*, 491 U.S. 397, 418 (1989) (“The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas.”).

252. See Inazu, *supra* note 25, at 204.

Amendment itself conditions the right of assembly on such assembly being peaceable; thus, for this reason and many others, nonviolence is a reasonable and essential limitation to place on student organizations.²⁵³ Discrimination by student groups should also comply with various legal provisions whereby the government has constitutional authority to prohibit discrimination on classifications such as race.²⁵⁴ Barring these forms of violent or illegal behavior, however, student groups should generally enjoy substantial deference in defining their ideological commitments.

Although these protections may appear to be exceptions that swallow the rule, what they actually do is distinguish between wrongful and non-wrongful discrimination. Rather than fracturing the foundations of an existing rule, this more nuanced approach crafts a more narrowly tailored rule by prohibiting all discrimination that is not reasonably related to the group's interest in protecting its ideological identity and expression. Further, a student rejected from membership in an organization on ideological grounds is not without remedy. The rejected student may simply start her own organization in the same manner as the organization that rejected her on ideological grounds.²⁵⁵

In addition to protecting reasonable membership restrictions, NDPs should provide clear procedural mechanisms regulating membership restrictions and disputes arising from them. When the UNC Task Force began meeting to discuss revisions to the university's NDP following the incident with the Christian a capella group, two of the chief concerns that arose were the undefined standards applied by the group and the university's lack of clear procedures for dealing with an alleged violation of the policy.²⁵⁶ Indeed, there is much to be gained by all interested parties in

253. U.S. CONST. amend. I.

254. *See, e.g.,* *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723–25 (1961) (finding a violation of the Equal Protection Clause in circumstances where the State has “insinuated itself into a position of interdependence” with a private actor that acts in a discriminatory manner); *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (finding that under Amendment XIII of the United States Constitution, Congress has the power to remedy the “badges and incidents of slavery”).

255. The money used to fund student organization programs often comes not from the university, but from mandatory fees charged to students. *See, e.g.,* *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 222 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 840 (1995). Thus, student organization program benefits are public goods or “benefits of society,” *Alpha Delta Chi v. Reed*, 648 F.3d 790, 801 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1743 (2012), and should be available to any student who has paid the fee.

256. *See Vest, supra* note 9.

clarifying the process in each of these areas. For example, NDPs could institute high evidentiary requirements regarding what ideological commitments the organization requires for membership or leadership and ensure that each of its members affirm the group's core commitments prior to attaining such status.²⁵⁷ Regulations such as these will add consistency and transparency to the way that student organizations select and remove members or leaders and to the way that the university investigates student organizations charged with violating the policy. The regulations will protect both student organizations and university administrators from accusations of arbitrarily targeting or employing animus or bias in how they enforce their policies upon students or student groups, respectively. Finally, procedural protections will provide clear standards and easy-to-apply mechanisms for both student organizations and universities in dealing with disputes between students and student organizations.

In addition to yielding benefits in the context of individual disputes, altering the conceptual and practical landscapes of nondiscrimination policies will yield broader systemic benefits as well. Fostering expressive association provides a far better method of exposing undesirable ideas by subjecting such forms of expression, whether controversial or not, to the marketplace of ideas.²⁵⁸ As Justice Oliver Wendell Holmes noted, "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market"²⁵⁹ This is true all the more in a setting where intellectual scrutiny and competition for intellectual viability is perhaps at its highest level in our society—the university.²⁶⁰ *Rosenberger* noted that

257. These evidentiary burdens could be high, but they would also need to be flexible with regard to how student groups could choose to demonstrate their beliefs. Requiring a student group to place its beliefs into a written document, for example, could constitute compelled speech, which the Supreme Court has held invalid in cases such as *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988) (invalidating a state law that required professional fundraisers to disclose to potential donors that the charities were paying the fundraisers to solicit donations).

258. See, e.g., Thomas Jefferson, First Inaugural Address (Mar. 4, 1801) in *WRITINGS* 492, 492–93 (Merrill D. Peterson ed., 1984) (arguing that one can safely allow for “error of opinion . . . where reason is left free to combat it”).

259. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also *MELVILLE NIMMER, NIMMER ON FREEDOM OF SPEECH* 7–12 (1984) (“If acceptance of an idea in the competition of the market is not the ‘best test’ for this purpose, what is the alternative?”).

260. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“The essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. . . . *Teachers and students must always*

the university holds a central place as “one of the vital centers for the Nation’s intellectual life”²⁶¹ and argued that the “danger [of chilling speech] is especially real in the University setting, where the State acts against a background and tradition of *thought* and *experiment* that is at the center of our intellectual and philosophic tradition.”²⁶²

Accordingly, protecting expressive association and expression more generally in the university is of “critical importance.”²⁶³ The United States Court of Appeals for the Third Circuit stated that “free speech . . . is the lifeblood of academic freedom.”²⁶⁴ Allowing discriminatory expression in an intellectually fierce environment like the university will subject the animus-based discrimination feared by some²⁶⁵ to intense scrutiny and pressure. Aside from cementing the opposition of those already against the discriminatory ideas proposed, the intellectual and societal pressure applied to those ideas will cause more organic change among those indifferent to the ideas and perhaps even within the group that originally promotes them.²⁶⁶ As Justice Brandeis famously quipped, “Sunlight is said to be the best of disinfectants,”²⁶⁷ and thus, whether such ideas survive would depend on the proponents’ willingness and ability to defend such animus, both intellectually and personally.²⁶⁸ After all, as Andrew Kopelman has noted, “Discrimination is not so cheap as it was before, and a

remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.” (emphasis added)); *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 243 (3d Cir. 2010) (“Public universities encourage teachers and students to launch new inquiries into our understanding of the world.”).

261. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995).

262. *Id.* at 835 (emphasis added).

263. *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008).

264. *Id.*

265. See Marshall, *supra* note 184, at 1941–42.

266. See *Barenblatt v. United States*, 360 U.S. 109, 144 (1959) (Black, J., dissenting) (“It is . . . the right to err politically, which keeps us strong as a Nation. For no number of laws against communism can have as much effect as the personal conviction which comes from having heard its arguments and rejected them, or from having once accepted its tenets and later recognized their worthlessness.”); Minow, *supra* note 12, at 782 (“Even advocates for antidiscrimination norms may find it wise to back off from direct governmental regulation of religious groups’ employment practices in order to allow struggles over discrimination issues to proceed internally within particular religious communities. Changes would then be legitimate and meaningful if the religious group stands against discrimination in its employment practices and programs.”).

267. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (Frederick A. Stokes Co. 1932) (1913).

268. See *Whitney v. California*, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring) (“[T]he fitting remedy for evil counsels is good ones. . . . [T]he remedy to be applied is more speech, not enforced silence.”); *Proverbs* 18:6–7 (English Standard Version) (“A fool’s lips walk into a fight, and his mouth invites a beating. A fool’s mouth is his ruin, and his lips are a snare to his soul.”).

group will have to decide whether discrimination is worth the added cost.”²⁶⁹ The alternative approach, forcibly imposing flawed nondiscrimination norms on unwilling groups, may result in profoundly negative reactions.²⁷⁰

In addition to stigmatizing wrongful discrimination, promoting a truly open forum for a wide variety of student expression will result in a campus forum that is better primed for dialogue. Open dialogue allows space for clarity on certain viewpoints that appear arbitrarily discriminatory but are perhaps well-founded and intellectually rational.²⁷¹ It will protect the ability of minority groups to shape, articulate, and advocate for views that challenge the majority stance.²⁷² For example, “[t]he rise of gay equality and public visibility coincided—not coincidentally, however—with the rise of vigorous

269. KOPPELMAN & WOLFF, *supra* note 234, at xiii.

270. See Minow, *supra* note 12, at 823–24 (“Religious people who have traveled here for religious freedom may well move again, or mobilize to fight back. Religious groups, once mobilized to fight against civil rights reforms, can be effective in ways that make life worse for the intended beneficiaries of the reforms. Backlash to progressive social change can produce newly restrictive treatment, undermine initial reforms, erode public support for the government that was pursuing the reform, and further mobilize reactionary forces with even broader agendas for retrenchment. In addition, backlash can eliminate informal accommodations that may have taken place and produce rigidity in the positions taken by competing groups that otherwise might reach practical accommodations.”).

271. Few statements better encapsulate this notion than Justice Brandeis’s poetic concurrence in *Whitney v. California*:

Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject . . . that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and *that the fitting remedy for evil counsels is good ones*. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worse form. *Recognizing the occasional tyrannies of governing majorities*, they amended the Constitution so that free speech and assembly should be guaranteed.

274 U.S. at 375–76 (Brandeis, J., concurring) (emphasis added).

272. See, e.g., JOHN STUART MILL, ON LIBERTY 93, 95 (Michael B. Mathias ed., Pearson Longman 2007) (1859) (“[H]owever true [something] may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth. . . . He who knows only his own side of the case . . . has no ground for preferring either opinion.”).

protection for . . . the freedom of association”²⁷³ despite the efforts of public universities “to bar gay rights groups from recognized student organization status on account of their supposed encouragement of what was then illegal behavior.”²⁷⁴ Free speech is vital because someone is bound to disagree, and that someone may have substantial political or cultural power.²⁷⁵ As Professor Inazu noted, “We tolerate these forms of expression not because we endorse them or seek to emulate them, but because we recognize the state’s tendencies to dominate and control through the interpretations and meanings it assigns to a group’s activities.”²⁷⁶ Maximizing the ability of students to exercise expressive rights would best align a public university’s NDP with the overarching pedagogical goals at the university level where expression, exploration, and intellectual dialogue are paramount.²⁷⁷ Accordingly, the suggestions above provide a reasonable approach to balancing competing fundamental interests in a manner that better effectuates the university’s goal of stigmatizing elements of discriminatory animus and behavior while simultaneously maximizing students’ fundamental expressive rights.

CONCLUSION

The current legal status of NDPs in the context of public university student organization policies is plagued by legal uncertainty, conceptual inconsistency, and clumsy, ineffective approaches to balancing the competing constitutional interests of equal treatment and free expression. The practical result is a culture in higher academia where, as a Harvard graduate once noted in a commencement speech, “The freedom of our day is the freedom to devote ourselves to any values we please, on the mere condition that we do not believe them to be true.”²⁷⁸ Unfortunately, the requirement of actual controversy and the winner-take-all nature of the adversarial system render litigation an unlikely venue from which to find a result that sufficiently incorporates all relevant concerns. As

273. Dale Carpenter, *Expressive Association and Anti-Discrimination Law after Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1532–33 (2001).

274. Brief for Petitioner at 30, *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971 (2010) (No. 08-1371), 2010 WL 711183 at *30.

275. See, e.g., *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting) (“The freedoms . . . guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.”).

276. See Inazu, *supra* note 25, at 203.

277. See *supra* Part II.A.

278. ROBERT BELLAH ET AL., *THE GOOD SOCIETY* 44 (1992).

such, universities should take the initiative to be deliberative and innovative in exploring new, untested models that will protect expressive freedoms by properly distinguishing between prudential, expressive discrimination and wrongful, invidious discrimination. Under this system, where diversity, freedom of expression, and group autonomy are all respected, universities will maintain their status as bastions of “free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life.”²⁷⁹

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279. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995).

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