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## Not All Non-Discrimination Policies are Created Equal: Analyzing Public Universities' Attempts to Regulate Membership Requirements of Officially Recognized Student Organizations

James Heilpern

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# NOT ALL NON-DISCRIMINATION POLICIES ARE CREATED EQUAL: ANALYZING PUBLIC UNIVERSITIES' ATTEMPTS TO REGULATE MEMBERSHIP REQUIREMENTS OF OFFICIALLY RECOGNIZED STUDENT ORGANIZATIONS

## I. INTRODUCTION

On August 31, 2011, the members of Psalm 100, a Christian *cappella* group officially recognized as a student organization at the University of North Carolina at Chapel Hill ("UNC"), voted unanimously to remove member Will Thomason from the group because of his views on the morality of gay relationships.<sup>1</sup> The group's constitution required members to ascribe to the group's statement-of-faith which included a belief "that Jesus Christ is the one and only LORD,"<sup>2</sup> to have "[a] developed or clearly developing personal relationship with" Him,<sup>3</sup> and to follow "the guidelines of the Bible."<sup>4</sup> The decision to dismiss Thomason, a senior who had sung with the group since 2006, coincided with his decision to come out-of-the-closet and begin living a gay lifestyle. Mark Templeton, Psalm 100's general director at the time, emphasized, however, that Thomason was removed from the group because of his beliefs not his sexual orientation.<sup>5</sup>

Thomason's dismissal was the front-page headline of the *Daily Tar Heel*,<sup>6</sup> the student-run newspaper at UNC, sparking public outrage and backlash against Psalm 100.<sup>7</sup> Over the next several weeks, the

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<sup>1</sup> Andy Thomason, *UNC Christian A Cappella Group Ousts Gay Member*, THE DAILY TAR HEEL, Sept. 1, 2011, at 1, available at <http://www.dailytarheel.com/article/2011/08/4e5c6c791822c>.

<sup>2</sup> 2010 PSALM 100 CONST.pml, available at <https://uncstudentorgs.collegiatelink.net/organization/psalm-100-christian-a-cappella-ensemble/documentlibrary> (download the file "Psalm 100 Christian A Cappella Ensemble").

<sup>3</sup> *Id.* at art. V.

<sup>4</sup> *Id.* at art. IV.

<sup>5</sup> Thomason, *supra* note 1, at 1.

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., Jerry A. Coyne, *University of North Carolina Chorus Expels Gay Singer*, WHY EVOLUTION IS TRUE (Sept. 3, 2011, 9:06 AM), <http://whyevolutionistrue.wordpress.com/2011/09/03/university-of-north-carolina-chorus-expels-gay-singer/>; Barry Duke, *Sour Note Struck as NC Christian Capella Group Expels Singer for His "Gay Views,"* THE FREETHINKER (Sept. 3, 2011), <http://freethinker.co.uk/2011/09/03/sour-note-struck-as-nc-christian-capella-group-expels-singer-for-his-gay-views/>; Killan Melloy, *School's Christian Choir Tosses Gay Member, Faces Scrutiny*, EDGE (Sept. 2, 2011), <http://www.edgeprovidence.com/?124143>.

controversy dominated conversation on campus. In addition to a plethora of articles and letters-to-the-editor that appeared in campus periodicals,<sup>8</sup> the School of Journalism hosted a panel discussion on the subject during the University's First Amendment Day celebrations,<sup>9</sup> and the University launched an official investigation to see if Psalm 100's decision had violated the school's non-discrimination policy for student groups.<sup>10</sup>

While the University ultimately cleared Psalm 100 of all charges,<sup>11</sup> the controversy highlights the growing tension between university non-discrimination policies and student organizations' First Amendment rights.<sup>12</sup> This tension is not unique to UNC; many universities are asking themselves is how to balance non-discrimination principles and student groups' freedom to be ideologically diverse.

This comment analyzes and critiques two of the most common approaches universities have taken for regulating the membership criteria of student organizations—the “all-comers” and “belief” policies—and explains why neither policy is well-suited for resolving the tension. Rather than using one of these approaches, this comment introduces and encourages the use of a new model—the “code of conduct” policy.<sup>13</sup> This new model has the potential to strike a balance between universities' conflicting interests.

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Part II will focus on the background legal principles undergirding all such models. Part III will focus on the “all-comers policy,” made famous by the Supreme Court's decision in *Christian Legal Society v.*

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<sup>8</sup> See, e.g. Thomason, *supra* note 1, at 1 (reporting Thomason's dismissal – the original article). See also Max Barry, 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/article/2011/09/psalm\\_100\\_must\\_eject\\_women\\_members\\_too](http://www.dailytarheel.com/article/2011/09/psalm_100_must_eject_women_members_too); Paula Seligson, *UNC Will Look into Christian Group*, THE DAILY TAR HEEL, Aug. 31, 2011, at 1, available at [http://www.dailytarheel.com/article/2011/08/unc\\_will\\_look\\_into\\_christian\\_group](http://www.dailytarheel.com/article/2011/08/unc_will_look_into_christian_group). For a more comprehensive list of letters to the editor, see Andrew Brown, *Do as I Say, Not as I Do: The Myth of Neutrality in Nondiscrimination Policies at Public Universities*, 91 N.C.L.REV. 280, 281 n. 3 (2012).

<sup>9</sup> Jamie Gnazzo, *UNC First Amendment Day Panel Discusses Psalm 100*, THE DAILY TAR HEEL, Sept. 28, 2011, at 7, available at [http://www.dailytarheel.com/article/2011/09/unc\\_first\\_amendment\\_day\\_panel\\_discusses\\_psalms\\_100](http://www.dailytarheel.com/article/2011/09/unc_first_amendment_day_panel_discusses_psalms_100). The author of this comment organized and moderated the panel discussion.

<sup>10</sup> Seligson, *supra* note 8, at 1.

<sup>11</sup> Andy Thomason, *Psalm 100 Cleared After Investigation*, THE DAILY TAR HEEL, Oct. 17, 2011, at 1, available at [http://www.dailytarheel.com/article/2011/10/unc\\_clears\\_psalms\\_100\\_after\\_investigation](http://www.dailytarheel.com/article/2011/10/unc_clears_psalms_100_after_investigation).

<sup>12</sup> See *Ripe for Revision*, Editorial, THE DAILY TAR HEEL, Oct. 18, 2011, at 8, available at [http://www.dailytarheel.com/article/2011/10/ripe\\_for\\_revision\\_the\\_psalms\\_100\\_ruling\\_calls\\_for\\_tighter\\_language\\_in\\_the\\_discrimination\\_policy](http://www.dailytarheel.com/article/2011/10/ripe_for_revision_the_psalms_100_ruling_calls_for_tighter_language_in_the_discrimination_policy) (arguing for revision of nondiscrimination policy).

<sup>13</sup> As explained later in this comment, a version of this model is in place at the University of Michigan, although this article encourages a more ideologically consistent version.

*Martinez*.<sup>14</sup> Part IV will then analyze what I will call the “belief test” which, like the all-comers policy, prohibits student organizations from discriminating against members of specified, protected classes but allows them to exclude from membership those students who disagree with them ideologically. Finally, in part V, I will introduce a new approach which I will call the the “code of conduct” model, which would allow student organizations to self-regulate and impose behavioral expectations on their members, thus limiting membership to those individuals willing to conform their *actions* to the organization’s bylaws.

## II. BACKGROUND INFORMATION: LIMITED PUBLIC FORUMS

Public universities around the country have established policies and programs for officially recognizing and providing funding for student-organized groups on campus. The Supreme Court has found that such funding programs constitute state-created “limited public forums.”<sup>15</sup> Limited public forums (“LPFs”) are created when government entities, including public universities, “allow[] public property that traditionally has not been available for assembly and debate”<sup>16</sup>—in this case, student activity funds—to be used as a place for expressive activity by certain speakers or about certain subjects.<sup>17</sup> The key word in this designation is “limited” because “the State is not required to . . . allow persons to engage in every type of speech” within these forums.<sup>18</sup>

As a result, government regulations of speech within LPFs are not “subject to strict[] scrutiny” as they would be in “a traditional or open public forum.”<sup>19</sup> Universities typically must only satisfy the rational basis test,<sup>20</sup> and therefore have the prerogative to “confine[]” the policies and programs governing the creation and regulation of student organizations “to the limited and legitimate purposes for which [they were] created.”<sup>21</sup>

But this “power to restrict speech . . . is not without limits.”<sup>22</sup> Instead, the First Amendment “generally precludes public universities from denying student organizations access to school-sponsored forums

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<sup>14</sup> *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2977 (2010).

<sup>15</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

<sup>16</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 813 (1985) (Blackmun, J., dissenting) (restating the majority’s position) (emphasis added).

<sup>17</sup> *Id.*

<sup>18</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (emphasis added).

<sup>19</sup> *Id.*

<sup>20</sup> *E.g.*, *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2993 (2010).

<sup>21</sup> *Rosenberger*, 515 U.S. at 829.

<sup>22</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).

because of the group's viewpoints."<sup>23</sup> This is so even when the student organizations in question are religious in nature.<sup>24</sup> As a result, state schools find themselves providing financial support to devotional organizations of all stripes that advance viewpoints that the Establishment Clause prohibits public universities from advocating themselves.<sup>25</sup>

In *Rosenberger*, for example, the Supreme Court refused to allow the University of Virginia to deny funding to an officially recognized student group publishing a self-professed Christian publication. Even though these clubs may be *funded* in part by the government, they themselves are not an extension of the state. They are, instead, speakers merely participating in a government established LPF. Universities generally make it clear that the benefits afforded to officially recognized student groups should not be interpreted as implying that the organization is endorsed or controlled by the university, or that the university is liable for the organization's actions.<sup>26</sup>

Student clubs organized around a guiding set of beliefs will often naturally wish to exercise their "expressive association"<sup>27</sup> and exclude students who hold beliefs contrary to or who are hostile towards the organization's founding beliefs. Accordingly, public universities often find themselves trapped as they strive to avoid viewpoint discrimination in the regulation of their student activity program while at the same time fostering an inclusive atmosphere on campus—both proper and noble goals for a government institution. Allowing officially recognized student groups to exclude dissenting viewpoints from within their ranks may clash with university non-discrimination policies, but attempting to curtail such exclusion may impinge on student organizations' First Amendment freedoms of association, speech, and religion. The number

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<sup>23</sup> *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2978 (2009) (citing *Rosenberger* 515 U.S. 819, (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972)).

<sup>24</sup> See *Rosenberger*, 515 U.S. at 831.

<sup>25</sup> UNC, for example, has officially recognized groups for atheist, Jewish, Hindu, Muslim, and Baha'i students on campus, as well as a plethora of distinct Christian sects. These groups include the Christian Adventist Christian Fellowship-Carolina, Ahmadiyya Muslim Student Association, Carolina Coven, Chabad Student Group at UNC-CH, Chapel Hill Unitarian Universalist Fellowship, Cornerstone – Campus Crusade for Christ, Episcopal Campus Ministry, Muslim Student Association, Newman Catholic Student Center Parish, Othodox Christian Fellowship of UNC CH, Presbyterian Campus Ministry, and Psalm 100. See *Organizations Directory*, UNC-CHAPEL HILL STUDENT LIFE, <https://uncstudentorgs.collegiatelink.net/organizations> (last visited Jan. 31, 2015).

<sup>26</sup> See, e.g. *Rosenberger*, 515 U.S. at 824 (quoting App. to Pet. for Cert. 2a) (quoting the University of Virginia's "standard agreement signed between each CIO and the University.")

<sup>27</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (holding that the Boy Scouts have a constitutional right to exclude a member—in this case a open homosexual—from its membership when "the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.").

of lawsuits over university non-discrimination policies has multiplied in recent years,<sup>28</sup> culminating in 2010 with the Supreme Court decision *Martinez* (discussed below).<sup>29</sup>

Because university nondiscrimination policies do not have to pass strict scrutiny, university administrators have a great deal of flexibility in designing them. Unsurprisingly, after weighing the competing interests, different universities have settled on different approaches—all of which are presumably constitutional. But just because two policies are equally constitutional does not mean that they are equally prudent.

### III. THE “ALL-COMERS” POLICY

Many universities have opted for the simplicity of a universal rule and applied the school’s non-discrimination policy to all student groups without exception. For example, the Student Code of the University of Illinois–Urbana-Champaign (“Illinois”) requires that each “registered organization” sign a “statement executed by the registered agent(s) for the organization [that] declares that the group adheres to the University’s Nondiscrimination policy,”<sup>30</sup> which specifically lists both “religion” and “sexual orientation” as “protected categories.”<sup>31</sup> Similarly, the University of California–Los Angeles (“UCLA”) has a policy which states that “[a]ll groups operating under the authority of The Regents . . . are governed by [the] policy of nondiscrimination.”<sup>32</sup> The practical consequences of this approach are that a student group must accept into its ranks any student who applies for membership, even if his or her inclusion jeopardizes the organizational mission of the group.

The most famous example of such an “all-comers” policy is that of the University of California at Hastings School of Law (“Hastings”), which the Supreme Court upheld as constitutional in 2009.<sup>33</sup> In order to qualify for certain privileges such as university funding and office space, a “Registered Student Organization[.]” (“RSO”) at Hastings has to agree to abide by the school’s nondiscrimination policy which states that no organization associated with the law school “shall . . . discriminate

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<sup>28</sup> See Brown, *supra* note 8, at 282 n. 11.

<sup>29</sup> *Christian Legal Soc’y* 130 S. Ct. at 2971.

<sup>30</sup> *RSO FAQs*, UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN, <http://union.illinois.edu/get-involved/office-of-registered-organizations/register-and-re-register> (last visited Jan 1, 2014).

<sup>31</sup> *University of Illinois at Urbana-Champaign Non-Discrimination Statement*, UNIVERSITY OF ILLINOIS CAMPUS ADMINISTRATIVE MANUAL, <http://cam.illinois.edu/ix/ix-b/ix-b-1.htm> (last visited Jan. 31, 2015).

<sup>32</sup> *Non-Discrimination/Affirmative Action*, UNIVERSITY OF CALIFORNIA OFFICE OF THE PRESIDENT, <http://policy.ucop.edu/doc/2710522/PACAOS-20> (last visited Jan. 1, 2014).

<sup>33</sup> *Christian Legal Soc’y* 130 S. Ct. at 2995.

unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.”<sup>34</sup> For over a decade, Hastings has interpreted this policy, “to mandate acceptance of all comers,” requiring student organizations to “allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs.”<sup>35</sup>

The policy was challenged at the beginning of the 2004–2005 school year by the newly organized, local chapter of the Christian Legal Society (“CLS”). In accordance with the bylaws of the national umbrella organization, the chapter required that student leaders and members of the club sign on to a “Statement of Faith” and “conduct their lives in accord with prescribed principles.”<sup>36</sup> Among other things, the group sought to exclude students who engaged in “unrepentant homosexual conduct”<sup>37</sup> and those “who [held] religious convictions different from those in the Statement of Faith.”<sup>38</sup> When CLS was denied registered student organization (“RSO”) status, they sued in federal district court claiming that Hasting’s policy violated “its First Amendment rights to free speech, expressive association, and free exercise of religion by prompting it, on pain of relinquishing the advantages of recognition, to accept members who do not share the organization’s core beliefs about religion and sexual orientation.”<sup>39</sup>

Writing for a divided court, Justice Ginsburg upheld Hasting’s all-comers policy as viewpoint neutral and, therefore, subject only to the rational basis test.<sup>40</sup> When analyzing the “RSO forum’s function and all surrounding circumstances,”<sup>41</sup> the Court accepted Hastings’ four justifications for its all-comers policy: (1) to “ensure[] that the leadership, educational and social opportunities afforded by RSOs are available to all students;”<sup>42</sup> (2) to facilitate the university’s enforcement of “the written terms of the Nondiscrimination Policy”<sup>43</sup> without inquiring into motive; (3) to “encourage[] tolerance, cooperation, and learning among students”<sup>44</sup> and the development of “conflict-resolution

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<sup>34</sup> *Id.* at 2979.

<sup>35</sup> *Id.* (internal quotations omitted).

<sup>36</sup> *Id.* at 2974.

<sup>37</sup> Brief for Petitioner at 226, *Christian Legal Soc’y v. Martinez*, 319 Fed.Appx. 654 (9th Cir. 2010) No. 06-15956, 2006 WL 3420535 (C.A.9), at \*22.

<sup>38</sup> *Christian Legal Soc’y*, 130 S. Ct. at 2974.

<sup>39</sup> *Id.* at 2978.

<sup>40</sup> *Id.* at 2993 (“It is . . . hard to imagine a more viewpoint-neutral policy than one requiring all student groups to accept all comers.”).

<sup>41</sup> *Id.* at 2988 (internal quotations omitted).

<sup>42</sup> *Id.* at 2989.

<sup>43</sup> *Id.* at 2990.

<sup>44</sup> *Id.*

skills;<sup>45</sup> and, finally, (4) to adhere to state policy which requires that, as a public institution, it “decline to subsidize with public monies and benefits conduct of which the people of California disapprove.”<sup>46</sup>

It is important to note that while the Court may have upheld Hastings’s all-comers policy in *Christian Legal Society*, it did not mandate that other public universities follow suite, nor did it encourage them to do so. On the contrary, the Court stressed that “the advisability of Hastings’ policy[,]” or lack thereof, “does not control its permissibility,”<sup>47</sup> and that “a State’s restriction on access to a limited public forum need not be the most reasonable . . . limitation.”<sup>48</sup> While an all-comers policy is constitutional, there are good reasons for avoiding it.

*A. By Adopting an All-Comers Policy, Universities Run the Risk of Silencing Minority Viewpoints via Hostile Takeovers of Groups Promoting Ideas Out-of-Fashion with Majoritarian Values*

In *Christian Legal Society*, the majority dismissed as a mere “hypothetical” the possibility that students or administrators hostile to a group’s message might attempt to game the system and use a university’s all-comers policy as a way to silence unpopular viewpoints on campus via hostile takeovers.<sup>49</sup> Yet several groups at other universities have actually been taken over in this way. In 1993, for example, the College Republicans at the University of Nebraska successfully seized control of the Young Democrats’ leadership.<sup>50</sup> Showing up en masse on the Young Democrats’ election night, the College Republicans outnumbered the

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* It should be noted that Hastings’ did not even pretend to argue that one of the functions of the RSO program was to foster and promote vigorous debate or discussion – ideally a purpose of any public university LPF. As one author has observed, “[t]he real marketplace of ideas operating at practically every public university . . . is actually . . . to be located in the university’s forum of student organizations [rather] than its classrooms. In contrast to the classroom, where inevitably the instructor exercises practical control over any discussion, expressive student groups facilitate an atmosphere where students can openly share ideas, interests and concerns and thereby further the constitutional goal of uninhibited, robust, and wide-open expression. Therefore, genuine protection of free speech and creative inquiry in one of the vital centers of the Nation’s intellectual life, its college and university campuses, would be fundamentally incomplete if it did not include associational rights for expressive student organizations.” Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations*, 118 HARV. L. REV. 2882, 2884–85 (2005) (internal quotations omitted).

<sup>47</sup> *Christian Legal Society*, 130 S. Ct. at 2992.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations*, 118 HARV. L. REV. 2882, 2885 n. 20 (2005); see also Plaintiff’s Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Defendant’s Cross-Motion for Summary Judgment at 22, *Christian Legal Soc’y v. Kane*, 2006 WL 997217 (N.D. Cal. 2006) (No. C 04 4484 JSW), 2005 WL 3673027.



true members of the group and successfully voted their own members in as their rival's new executive officers.<sup>51</sup>

Additionally, in 2007, the all-comers policy at Central Michigan University ("CMU") left the Young Americans for Freedom ("YAF"), a conservative political club on campus, powerless to fight an attempted hostile takeover.<sup>52</sup> In February of that year, fellow students at CMU organized a Facebook group titled "People who believe the Young Americans for Freedom is a Hate Group," in which the administrator advocated a coup, stating that "[t]he best way to get rid of [YAF], is for everyone in this group to go to their meetings and we all vote each other [sic] on to the eboard [sic] and dissolve the group."<sup>53</sup> Learning about the plot, YAF's chapter president specifically asked university officials if YAF could exclude students who join the club simply to "ruin[] the chapter."<sup>54</sup> But he was informed by CMU's Associate Director of Student Life that he could "not require members to be 'like-minded'" because, ironically, that would be "discrimination based on political persuasion," a violation of the school's all-comers' policy.<sup>55</sup>

This same mentality actually existed at Hastings at the time *Christian Legal Society* was decided. In its amicus brief, the Hasting's student government not only admitted that such hostile takeovers were *possible*, it actually trumpeted the fact that students could "join" <sup>56</sup> organizations which they ideologically disagreed with "in order to effect change from within,"<sup>57</sup> as a positive mechanism for "[c]reatin[ing] an

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<sup>51</sup> *Leaving Religious Students Speechless*, *supra* note 46, at 2885 n. 20.

<sup>52</sup> *Central Michigan University: Student Group's Freedom of Association Under Attack*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, <http://thefire.org/case/739.html> (last accessed Jan. 31 2015).

<sup>53</sup> *People Who Believe the Young Americans for Freedom is a Hate Group*, FACEBOOK (Feb. 24, 2007, 1:00 PM), <http://cmich.facebook.com/group.php?gid=2240601L53>. A screenshot is available at FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, <http://thefire.org/public/pdfs/84184b2b6c6cc204746f57f7a32596cf.pdf?direct> (last accessed Jan. 21, 2015), <http://thefire.org/public/pdfs/84184b2b6c6cc204746f57f7a32596cf.pdf?direct>.

<sup>54</sup> Email from Dennis Lennox II, YAF President, Univ. of Cal. at Hastings Sch. of Law, to Thomas Idema Jr., Dir. of Student Life, Univ. of Cal. at Hastings Sch. of Law (Feb. 20, 2007), available at <http://www.thefire.org/article/7885.html>.

<sup>55</sup> E-mail from Thomas Idema Jr., Dir. of Student Life, Univ. of Cal. at Hastings Sch. of Law, to Dennis Lennox II, YAF President, Univ. of Cal. at Hastings Sch. of Law (Feb. 20, 2007), available at <http://www.thefire.org/article/7886.html>. The university ultimately reversed its decision, citing the "established principles as promulgated by the highest courts" as its rationale. Letter from CMU Office of Student Life to the Presidents of all Campus Registered Student Organizations (Mar. 28, 2007), available at <http://www.thefire.org/e-mail-from-central-michigan-university-office-of-student-life-to-the-presidents-of-all-campus-registered-student-organizations-march-28-2007/>. It is unclear how they would have responded had the situation occurred post *Christian Legal Society*.

<sup>56</sup> Brief of Amicus Curiae Associated Students of the Univ. of Cal., Hastings Coll. of Law in Support of Respondents at 9, *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010) (No. 08–1371), WL 942820, at \*8.

<sup>57</sup> *Id.*

[i]nclusive [c]ampus [a]tmosphere [t]hat is [c]onducive [t]o [c]ollaborative [l]earning.”<sup>58</sup>

*B. All-Comers Policies Create a Chilling Effect on Religious Speech, Effectively Barring Some Minority Religious Viewpoints from Participating in the Marketplace of Ideas*

Even if attempted hostile takeovers are uncommon, an all-comers policy may cause religious organizations to feel forced to withdraw from the forum completely, rather than risk jeopardizing their organization’s vision or doctrine by complying with university standards. This actually occurred in 2012 at Vanderbilt University, which modeled their new non-discrimination policy after Hastings’ in the wake of the Supreme Court’s decision in *Christian Legal Society*.<sup>59</sup> Despite heated and united opposition from religious groups on campus,<sup>60</sup> Vanderbilt adopted an all-comers policy through which “all students are presumed to be eligible for membership in registered student organizations (‘RSO’) and all members of RSOs in good standing are eligible to compete for leadership positions.”<sup>61</sup>

Addressing a town hall meeting about the policy change, Vanderbilt’s provost went so far as to tell students that the university “[doesn’t] want to have personal religious views intrude on good decision making on [Vanderbilt’s] campus.”<sup>62</sup> He “challenge[d]” student groups to be more “open,” and discouraged them from allowing religion to guide their personal decisions, stating “I’m Catholic. What if my faith beliefs guided all of the decisions I make from day to day?”<sup>63</sup> When the audience erupted in applause at this proposition, he emphatically shouted “No they shouldn’t! No they shouldn’t! No they shouldn’t! No they shouldn’t!”<sup>64</sup>

<sup>58</sup> *Id.*

<sup>59</sup> It should be noted that Vanderbilt is a private university, and therefore not bound by the First Amendment. Still, because its non-discrimination policy was modeled after Hastings’, it provides an example of the potential consequences that could follow if a public university were to follow suite.

<sup>60</sup> *See, e.g.* Jim Patterson, *Students, administrators discuss nondiscrimination policy at Furman*, VANDERBILT NEWS (Feb. 1, 2012), <http://news.vanderbilt.edu/2012/02/town-meeting/>; Katherine Weber, *Vanderbilt University’s All-Comers Policy ‘Discouraging,’ But Unites Christian Students*, THE CHRISTIAN POST (May 17, 2012, 4:30 PM), <http://www.christianpost.com/news/vanderbilt-universitys-all-comers-policy-discouraging-but-unites-christian-students-75134/>.

<sup>61</sup> *Nondiscrimination FAQ*, VANDERBILT UNIVERSITY, <http://vanderbilt.edu/about/nondiscrimination/faq.php> (last accessed Jan. 31, 2015).

<sup>62</sup> Robert Shibley, *The Fallout from Christian Legal Society*, NATIONAL REVIEW ONLINE (Feb. 6, 2012, 4:00 AM), <http://www.nationalreview.com/articles/290199/fallout-ichristian-legal-society-i-robert-shibley/page/0/1>.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

Separating religious from nonreligious conduct, however, is contradictory to what most religions teach. While many religious people are undoubtedly comfortable with having their religion be only a part of their identity, for many others, religious beliefs constitute the focal point of their lives. It is therefore unsurprising that in the aftermath of Vanderbilt's adoption of an all-comers policy, "13 religious groups . . . determined that complying with the policy could not be reconciled with their religious beliefs," and therefore chose to forsake RSO status.<sup>65</sup> As Vanderbilt's chapter of InterVarsity, an international, non-denominational Christian ministry, explained "[w]hether the university means to or not, taking away this ability [to ensure that members believe in the organization's creed] will slowly lead to a washing out and watering down of our basic faith."<sup>66</sup> Collectively representing over 1,400 students,<sup>67</sup> these thirteen organizations have given up many of the practical benefits available to RSOs including "the use of the Vanderbilt University name to signify their institutional affiliation; eligibility to apply for funding from various sources; participation in the University-sponsored student organization recruitment fair; use of listservs, group mail, and URLs administered by the University; and other resources."<sup>68</sup> While these organizations are still allowed to "meet on campus informally or to rent spaces through the Office of Reservations and Events"<sup>69</sup> and advertise via "certain bulletin boards and kiosks on campus"<sup>70</sup> their ability to compete freely in the marketplace of ideas has been severely handicapped.<sup>71</sup>

In the long run, such disparate treatment is not only unfair to CLS

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<sup>65</sup> Robert Shibley, *Governor McDonnell Should Defend Religious Freedom on Virginia Campuses*, THE DAILY CALLER (Feb. 21, 2013, 4:31 PM), <http://dailycaller.com/2013/02/21/governor-mcdonnell-should-defend-religious-freedom-on-virginia-campuses/2/>; see also, Phillip Young, *Lutheran Student Fellowship at Vanderbilt Forced Into Unofficial Status by University Policies*, THE BROTHERS OF JOHN THE STREADFAST (June 2, 2012), <http://steadfastlutherans.org/?p=20030> (explaining why the Lutheran Student Fellowship gave up RSO status); Letter from Fr. John Sims Baker, Chaplain, to alumni, parents, and friends of Vanderbilt Catholic (Mar. 26, 2012), available at <http://universitycatholic.org/index.cfm?load=page&page=274> (explaining why Vanderbilt Catholic abandoned university recognition).

<sup>66</sup> *FAQ*, INTERVARSITY AT VANDERBILT, <http://intervarsityatvanderbilt.wordpress.com/faq/> (last accessed Jan. 8, 2014).

<sup>67</sup> *A New Semester*, INTERVARSITY AT VANDERBILT (Aug. 27, 2012), <http://intervarsityatvanderbilt.wordpress.com/2012/08/27/a-new-semester/>.

<sup>68</sup> *Nondiscrimination FAQ*, *supra* note 61.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Indeed, Hastings itself is a powerful example of this point. There, being stripped of official recognition and having to rely exclusively on "other avenues" of expression, "ha[d] nearly destroyed the CLS chapter" at Hastings by the time oral arguments were heard – effectively silencing any opposition to the majoritarian view. Reply Brief for Petitioner at 226, *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010) (No. 08–1371), 2010 WL 1316244 (U.S.), at \*5.

and other organizations that promote such cultural heresies as traditional sexual mores, but also cripples groups like OUTLAW, the LGBTQ group that intervened in *Christian Legal Society*. One of the foundational theories supporting the First Amendment is the societal quest for truth. By effectively outlawing certain opinions from the marketplace of ideas, we leave majoritarian views unquestioned. Even if we assume that the majoritarian view promulgated is correct, if we allow it to go unvetted in the public sphere, the rising generation may accept it, but they will not fully understand *why* it is correct. As John Stuart Mill argued:

[T]he peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation—those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.<sup>72</sup>

Thus when Hastings or Vanderbilt effectively bans from their LPF those groups arguing for the reinstatement of traditional sexual mores, they are “robbing” all of their students. Without a full exchange of ideas, all “lose . . . the clearer perception and livelier impression of”<sup>73</sup> the rightness of their cause which can only be “produced”<sup>74</sup> through “coll[iding]”<sup>75</sup> with those they perceive are in “error.”<sup>76</sup>

#### IV. THE “BELIEF” TEST

Other universities have carved out of their otherwise comprehensive nondiscrimination policies an exemption that allows student organizations to exclude classmates who do not share the group’s ideology while continuing to prohibit discrimination on the basis of identity. For example, a portion of UNC’s nondiscrimination policy reads:

Student organizations that select their members on the basis of commitment to a set of beliefs (e.g., religious or political beliefs) may limit membership and participation in the organization to students who, upon individual inquiry, affirm that they support the organization’s goals and agree with its beliefs, so long as no student is excluded from membership or participation on the basis of his or her age, race, color,

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<sup>72</sup> JOHN STUART MILL, *ON LIBERTY* 20 (Penguin Books 1976).

<sup>73</sup> *Id.* at 20.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

national origin, disability, religious status or historic religious affiliation, veteran status, sexual orientation, gender identity, gender expression, or, unless exempt under Title IX, gender.<sup>77</sup>

Similarly, the University of Florida's policy exemption states that:

[S]tudent organization[s] whose primary purpose is religious will not be denied registration as a Registered Student Organization on the ground that it limits membership or leadership positions to students who share the religious beliefs of the organization. The University has determined that this accommodation of religious belief does not violate its nondiscrimination policy.<sup>78</sup>

CLS argued for this policy in its brief in *Christian Legal Society*,<sup>79</sup> and several states have considered or passed resolutions that would mandate these sorts of ideological exemptions.<sup>80</sup>

Interestingly enough, many of these hybrid policies—including the ones governing both the Tar Heels and the Gators—were adopted prior to *Christian Legal Society v. Martinez* as a consequence of either actual or threatened litigation. UNC's policy was adopted in May 2005, after a federal judge issued a preliminary injunction preventing the university from enforcing a prior iteration of the school's non-discrimination policy against Alpha Iota Omega ("AIO"), a Christian fraternity on campus.<sup>81</sup> In the fall of 2003, AIO had been "stripped of its recognition" for refusing to add a required nondiscrimination clause to the fraternity's constitution "because it would have forbidden the group from considering religion when determining membership and participation in the group."<sup>82</sup> AIO expressed particular concern that they would be forced to "admit all applicants, regardless of religion or sexual orientation, because persons of certain religions and certain sexual orientations hold beliefs, pursue goals, and maintain standards of conduct that necessarily conflict with AIO's beliefs, goals and standards of conduct."<sup>83</sup> After months of failed

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<sup>77</sup> *Non-Discrimination for Student Organizations*, THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, <http://policies.unc.edu/policies/student-org-dondiscrim/> (last accessed Jan. 1, 2014).

<sup>78</sup> *Student Organization Constitution Guidelines*, STUDENT ACTIVITIES AND INVOLVEMENT DIVISION OF STUDENT AFFAIRS UNIVERSITY OF FLORIDA, <https://www.studentinvolvement.ufl.edu/Student-Organizations/Organization-Resources/Policies/Non-Discrimination> (last accessed Jan. 1, 2014).

<sup>79</sup> Reply Brief for Petitioner at 226, *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010) (No. 08–1371), 2010 WL 1316244, at \*11.

<sup>80</sup> See, e.g., VA. CODE ANN. § 23-9.2:12 (West 2013); S.B. 719, 2013 Leg., Reg. Sess. (N.C. 2013); S.B. 404, 108th Gen. Assemb., 1st Reg. Sess. (Tenn. 2013).

<sup>81</sup> See *Alpha Iota Omega Christian Fraternity v. Moeser*, No. 1:04CV00765, 2005 WL 1720903 (M.D.N.C. 2005).

<sup>82</sup> *Victory for Freedom of Association at UNC-Chapel Hill*, THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, <http://thefire.org/article/5399.html> (last accessed Jan. 31 2015).

<sup>83</sup> *Moeser*, 2006 WL 1286186 at \*1.

negotiations with University administrators,<sup>84</sup> AIO ultimately sued and obtained a favorable preliminary injunction which required UNC to re-recognize the fraternity and allow the group to “limit[] membership and participation in their organization to students who, upon individual inquiry, affirm that they support [AIO’s] goals, agree with [AIO’s] beliefs, and agree to conform their behavior to [AIO’s] tenets and standards of conduct.”<sup>85</sup> The university quickly amended its non-discrimination policy in order to moot the rest of the suit.<sup>86</sup>

Similarly, the University of Florida circulated a memo<sup>87</sup> to all student organizations informing them that in order to maintain official university recognition, they would all need to amend their constitutions to include the following provision: “[Name of organization] will not discriminate on the basis of race, creed, color, religion, age, disability, sex, sexual orientation, marital status, national origin, political opinions or affiliations, and veteran status as protected under the Vietnam Era Veterans’ Readjustment Assistance Act.”<sup>88</sup>

A coalition of religious organizations protested the change of policy.<sup>89</sup> Beta Upsilon Chi, a Christian fraternity, filed suit in federal court, and the Gator Christian Society engaged University Vice-President Patricia Telles-Irvin in a debate, exchanging a series of letters discussing the policy and possible alternatives.<sup>90</sup> As an example, at UNC, the university ultimately backed down and granted religious organizations an exemption from the policy.<sup>91</sup>

These ideological exemptions allow the marketplace of ideas to function, enabling groups to express minority opinions without the fear that outsiders will compromise their institutional message through censorship or hostile takeovers. That does not mean, however, such

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<sup>84</sup> See *Victory for Freedom of Association at UNC-Chapel Hill*, *supra* note 82.

<sup>85</sup> *Moerer*, 2006 WL 1286186 at \*2.

<sup>86</sup> See *id.* at \*12.

<sup>87</sup> Memorandum from The Center for Student Activities and Involvement to Student Organization Officers and Advisors (Apr. 25, 2008), available at <http://thefire.org/public/pdfs/3b1dd3bfa32facaaf9f2c3d395416612.pdf?direct>.

<sup>88</sup> THE UNIVERSITY OF FLORIDA DIVISION OF STUDENT AFFAIRS, *Student Organization Constitution Guidelines* (2008), available at <http://thefire.org/public/pdfs/79ed6c5b50e0baad1a181d1fd6d1837b.pdf?direct>.

<sup>89</sup> See Adam Kissel, *Victory for Religious Liberty at University of Florida, But Freedom of Association Still in Jeopardy*, THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, <http://thefire.org/article/10194.html> (last accessed Jan. 31 2015).

<sup>90</sup> Letter from Anda Neiconi, GCL President, Univ. of Fla., to Patricia Telles-Irvin, Vice President of Student Affairs, Univ. of Fla. (Dec. 8, 2008), available at <http://thefire.org/public/pdfs/2aeb51b7a529130b62b41735b02b5ac9.pdf?direct>.

<sup>91</sup> An important lesson from these lawsuits may be that, in general, university administrators are afraid of being sued, and enact and modify policies intentionally to minimize the possibility of such lawsuits and the bad publicity that inevitably accompanies them.

policies will guarantee that groups espousing controversial messages will thrive, nor that their counter-majoritarian messages will be well received by the student body. On the contrary, in order to survive, groups promoting unpopular messages will be forced to engage their opponents in the public sphere if they hope to continue to recruit new members.

An example of the market naturally weeding out unpopular ideas took place at UNC only a few years after the AIO debacle. In 2008, a small group of extremely conservative students led by senior Riley Matheson founded a local chapter of Youth for Western Civilization (“YWC”),<sup>92</sup> a national organization branded by some as a white supremacist hate group due to their hardline stance on immigration.<sup>93</sup> The group’s extreme hostility towards undocumented workers attracted the ire of the more liberal elements on UNC’s campus, resulting in organized protests against YWC whenever they attempted to bring a speaker to campus.<sup>94</sup> By the time Matheson graduated in 2009, YWC’s public persona was so damaged that he was unable to find a conservative on campus willing to serve as his replacement.<sup>95</sup> As a result, he turned the reins of his brainchild over to Nikhil Patel, a political moderate who (ironically) was the son of two immigrants himself.<sup>96</sup> During his short tenure as president, Patel attempted to rehabilitate YWC’s image, hoping

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<sup>92</sup> See Anika Anand, *In the Spotlight*, THE DAILY TAR HEEL, (Apr. 20, 2009), available at [http://www.dailytarheel.com/article/2009/04/in\\_the\\_spotlightbr\\_](http://www.dailytarheel.com/article/2009/04/in_the_spotlightbr_).

<sup>93</sup> See Rachel Coleman, *Protestors Prevent Former U.S. Representative from Speaking*, THE DAILY TAR HEEL, (Apr. 15, 2009), available at [http://www.dailytarheel.com/article/2009/04/protestors\\_prevent\\_former\\_u.s.\\_representative\\_from\\_speakingbr\\_](http://www.dailytarheel.com/article/2009/04/protestors_prevent_former_u.s._representative_from_speakingbr_); Preston Spencer, *Conservative Leader to Speak*, THE DAILY TAR HEEL (April 13, 2009), available at [http://www.dailytarheel.com/article/2009/04/conservative\\_leader\\_to\\_speakbr\\_](http://www.dailytarheel.com/article/2009/04/conservative_leader_to_speakbr_). See also, *No Space for Hate at UNC*, IPETITIONS, <http://www.ipetitions.com/petition/nospaceforhate> (last accessed Jan. 1, 2014).

<sup>94</sup> See, e.g., Laura Hoxworth, *Protesters Stop Speech*, THE DAILY TAR HEEL (April 15, 2009), available at [http://www.dailytarheel.com/article/2009/04/protesters\\_stop\\_speechbr\\_](http://www.dailytarheel.com/article/2009/04/protesters_stop_speechbr_) (“Police used pepper spray to disperse crowds of protestors in Bingham Hall on Tuesday outside the room where former congressman Tom Tancredo was scheduled to speak on immigration but was forced to leave.”); *University Officials: Six People Arrested in Protest*, Official Statement, THE DAILY TAR HEEL (April 23, 2009), available at [http://www.dailytarheel.com/article/2009/04/university\\_officials\\_six\\_people\\_arrested\\_in\\_protestbr\\_](http://www.dailytarheel.com/article/2009/04/university_officials_six_people_arrested_in_protestbr_) (Stating that during a speech by former U.S. representative Virgil Goode “[s]ome audience members jeered and heckled . . . One small group walked out shortly after [the speech] began. Some set off personal body alarms that had to be located and turned off by police. Two others unfurled a banner with a profane statement.”); Chelsea Bailey and Colleen Volz, *YWC Brings Another Speaker; Protest Ensues*, THE DAILY TAR HEEL. (Dec. 6, 2009), available at [http://www.dailytarheel.com/article/2009/10/ywc\\_brings\\_another\\_speaker\\_protest\\_ensues](http://www.dailytarheel.com/article/2009/10/ywc_brings_another_speaker_protest_ensues) (“Wielding a horse whip, chains and a paddle, fellow protesters pretended to scold Koch for a variety of ‘offenses.’ They pretended to beat her and led her into the auditorium in chains” to protest former U.S. Treasurer Bay Buchanan’s speech).

<sup>95</sup> See Telephone Interview with Nikhil Patel, Former President of the UNC Chapter of YWC (Dec. 26, 2013).

<sup>96</sup> See Amanda Ruehlen, *An Unlikely Leader*, THE DAILY TAR HEEL, (Oct. 9, 2009) at 1, available at [http://www.dailytarheel.com/article/2009/10/an\\_unlikely\\_leader](http://www.dailytarheel.com/article/2009/10/an_unlikely_leader) (“If [Patel] hadn’t offered to be president, the group wouldn’t exist.”).

that by toning down the rhetoric he would be better able to promote certain aspects of Western culture on a very liberal campus.<sup>97</sup> Patel's strategy, however, was unappreciated by the national leadership of YWC, who pressured him into resigning by the end of 2009.<sup>98</sup> By reinstating the group's original agenda and rhetoric, the group seems to have signed its own death warrant, completely disappearing from campus by the 2011 school year.<sup>99</sup> There simply was no demand in the marketplace for the ideas YWC was selling. At the time of the writing of this article, every chapter of the YWC across the country had met a similar fate.<sup>100</sup>

Given how vitriolic the opposition to YWC was at UNC in 2009,<sup>101</sup> it would not be difficult to imagine an attempted hostile takeover had UNC not amended its all-comers policy in 2005. The quiet demise of YWC, however, demonstrates that the market works, and allowing ideological organizations to discriminate on the basis of ideology does not mean that offensive ideologies will rule the day. Nevertheless, as explained below, there are problems with the "belief" model.

#### A. *The "Belief Test" Creates Perverse Incentives for Groups to Stifle Internal Debate or Discussion*

The YWC saga and specifically Patel's forced resignation at UNC also demonstrates the weaknesses inherent in the "belief" test. Since the group's founding, Patel had openly admitted that he "[did] not agree with some of the national group's political ideals,"<sup>102</sup> assuming leadership as a favor to his friend, Matheson, "in order to promote free speech and diversity of thought" on campus.<sup>103</sup> He believed that many conservatives

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<sup>97</sup> Telephone Interview with Nikhil Patel, Former President of the UNC Chapter of YWC (Dec. 26, 2013).

<sup>98</sup> Victoria Stilwell, *Local YWC Presidency Switches Hands*, THE DAILY TAR HEEL, (Dec. 6, 2009), available at [http://www.dailytarheel.com/article/2009/12/local\\_ywc\\_presidency\\_switches\\_hands](http://www.dailytarheel.com/article/2009/12/local_ywc_presidency_switches_hands).

<sup>99</sup> At the start of the 2009–2010 school year, there were only three YWC members, including Patel. By the time he was pressured into resigning, his successor Daryl Ann Dunigan, was the only registered YWC member left at UNC. Telephone Interview with Nikhil Patel, Former President of the UNC Chapter of YWC (Dec. 26, 2013).

<sup>100</sup> In 2009, YWC founder Kevin Deanna told Fox News that the group had established chapters at UNC, Vanderbilt University, American University, Elon University, the University of Rhode Island, the University of Connecticut-Storrs, and Bentley University. Joshua Rhett Miller, *Right-Wing College Group Riles Students on Campuses Nationwide*, FOX NEWS, (April 29, 2009), <http://www.foxnews.com/story/2009/04/29/right-wing-college-group-riles-students-on-campuses-nationwide/>. As of Jan. 1, 2014, none of those colleges' websites listed YWC as an officially recognized student group. Additionally, YWC's official website has been taken down. See [www.westernyouth.com](http://www.westernyouth.com).

<sup>101</sup> *Supra* note 94.

<sup>102</sup> Stillwell, *supra* note 98.

<sup>103</sup> *Id.*



and independents on campus would be willing to ignore some of the more radical beliefs of the national organization if the local chapter stressed some of the more positive planks on the platform.<sup>104</sup> His attempts to rebrand the organization were rebuffed by what was left of YWC's dwindling membership, one of which contacted the national headquarters with complaints that "the group was becoming too liberal."<sup>105</sup> While Patel was ousted from leadership by the *national* umbrella organization, under UNC's nondiscrimination policy, the disgruntled members probably could have removed him. In fact, if enforced as written, UNC's nondiscrimination policy could shutdown all internal dialogue within ideologically oriented organizations on campus. Since any student who disagreed with any portion of the organization's foundational beliefs could (and presumably should) be excluded from membership, how could any organizations ever internally evolve?

In other words, "the belief test" only works if one assumes that the beliefs of ideological organizations remain uniform and stagnant over time. But history teaches quite a different lesson. For example in its 1956 Presidential Platform, the Republican Party stated, "We are proud [] and shall continue our far-reaching and sound advance in matters of basic human needs—expansion of social security—broadened coverage in unemployment insurance—improved housing—and better health protection for all our people."<sup>106</sup> This is certainly a profound contrast from the positions taken by Republican candidates in 2012, and reflects an ongoing, internal dialogue that has taken place within the party over the last sixty years.<sup>107</sup>

While these changes in beliefs are usually gradual, sometimes these ideological shifts can be quite sudden, taking place over the course of just a few short years. For example in 1968, the Democratic presidential platform stated emphatically that, "Our most urgent task in Southeast Asia is to end the war in Vietnam by an honorable and lasting settlement which respects the rights of all the people of Vietnam . . . We reject as unacceptable a unilateral withdrawal of our forces which would allow

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<sup>104</sup> Telephone Interview with Nikhil Patel, Former President of the UNC Chapter of YWC (Dec. 26, 2013).

<sup>105</sup> *Id.*

<sup>106</sup> *Republican Party Platform of 1956*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25838> (last accessed Jan. 1, 2014).

<sup>107</sup> See, e.g., *Where The Republican Presidential Candidates Stand on Social Security*, THE HUFFINGTON POST (Jan. 16, 2012), [http://www.huffingtonpost.com/2012/01/12/gop-candidates-on-social-security\\_n\\_1203608.html](http://www.huffingtonpost.com/2012/01/12/gop-candidates-on-social-security_n_1203608.html) (stating that Rep. Ron Paul and Gov. Rick Perry believe that Social Security is an unconstitutional "Ponzi scheme," Sen. Rick Santorum "would cut Social Security benefits for current beneficiaries," and Gov. Mitt Romney and Speaker Newt Gingrich would like to see the program at least partially privatized).

that aggression and subversion to succeed.”<sup>108</sup> But, just four years later, the platform had changed, and instead advocated complete disengagement from the Vietnam War.<sup>109</sup>

These paradigmatic shifts, and the internal debates and discussions that lead to them, occur within private organizations, as well. The Boy Scouts of America’s (“BSA”) recent policy change regarding homosexuals is emblematic of this process. In 2000, the Supreme Court upheld BSA’s right to exclude prospective members and leaders solely on the basis of sexual orientation, stating: “the forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public and private viewpoints.”<sup>110</sup>

At the time, BSA claimed that the presence of gays in the organization, either as scouts or leaders, would force them to “convey approval of homosexual conduct,”<sup>111</sup> behavior which it believed was antithetical to leading a “clean”<sup>112</sup> and “morally straight”<sup>113</sup> life as defined by the organization. Nonetheless, less than fifteen years later, BSA reversed course, and now “no youth may be denied membership in the Boy Scouts of America on the basis of sexual orientation or preference alone.”<sup>114</sup> This organizational evolution did not occur in a vacuum. Rather, BSA came to its decision after months and years of intense internal research, debate and discussion.<sup>115</sup>

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<sup>108</sup> *Democratic Party Platform of 1968*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29604> (last accessed Jan. 1, 2014).

<sup>109</sup> *See Democratic Party Platform of 1972*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=29605> (last accessed Jan. 1, 2014) (emphasis added).

<sup>110</sup> *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

<sup>111</sup> Brief for Petitioner, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (No. 99-699), 2000 WL 228616, at \*21.

<sup>112</sup> *Id.* at \*6.

<sup>113</sup> *Id.*

<sup>114</sup> *Membership Standards Resolution*, BOY SCOUTS OF AMERICA, <http://www.scouting.org/sitecore/content/membershipstandards/resolution/resolution.aspx> (last accessed Jan. 2, 2014). It should, however, be pointed out that the organization has not necessarily reversed its opinion about homosexual behavior, since the resolution keeps in place the organization’s ban on gay leaders and stipulates that “any sexual conduct, whether homosexual or heterosexual, by youth of Scouting age is contrary to the virtues of Scouting.” *Id.*

<sup>115</sup> *See, e.g.*, Miranda Leitsinger, *Boy Scouts: We’re keeping policy banning gays*, NBC NEWS (Jul. 17, 2012), <http://usnews.nbcnews.com/news/2012/07/17/12790471-boy-scouts-were-keeping-policy-banning-gays> (“The Boy Scouts of America will keep their controversial policy banning gay scouts and leaders after a confidential two-year review, the organization said Tuesday.”); Joshua Cobb, *AT&T CEO commits to ending ban on gay Boy Scouts, leaders*, THE EXAMINER (Jul. 17, 2012), <http://theexaminer.com/stories/news/att-ceo-commits-ending-ban-gay-boy-scouts-leaders> (reporting that a member of the BSA Executive Board committed to ending the ban on gays); Media Release, Boy Scouts of America (Jan. 28, 2013), <http://www.scouting.org/MembershipPolicy.aspx> (“Currently, the BSA is discussing potentially removing the national membership restriction regarding sexual orientation.”); Deron Smith, *Media Statement*, BOY SCOUTS OF AMERICA (Jan. 28, 2013), <http://www.scouting>

Nor are religious communities immune from such organizational evolution. Within the last ten years alone, many of the largest faith groups in America including the Episcopal Church,<sup>116</sup> the Presbyterian Church (USA),<sup>117</sup> and the Evangelical Lutheran Church in America<sup>118</sup> have altered their positions on gays and lesbians. Not only do they no longer believe that gay relationships are inherently sinful, but the Episcopalians and Lutherans have actually both elected openly gay bishops.<sup>119</sup>

If these internal discussions are occurring within the largest political parties, civic organizations, and churches in America, they should also be allowed and expected within corresponding student groups on college campuses. But by making the belief test the only authorized way to protect the institutional integrity of a club, a university incentivizes student organizations to employ it—even if they would otherwise be tolerant of such discussions. The belief test is a one-size-fits-all mechanism, forcing student groups to silence and expel any member who suggests revisiting any of the organization’s key tenets. After all, isn’t proposing an alteration or amendment to a group’s statement of faith synonymous with expressing disbelief or dissatisfaction with that statement and with the group’s current ideological bent?

While an all-comers policy threatens student groups’ right to expressive association, allowing organizations to limit membership only through a “belief test” incentivizes organizations to handicap their own ability to evolve and stay relevant as social circumstances and internal opinions change. As one student group at Tufts University put it, the belief test “[f]orc[es] [student organizations’] beliefs to stay static,”<sup>120</sup>

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.org/executiveboarddecision.aspx (stating that the BSA Executive Board needs more time to study the issue and gather opinions from the scouting community);The Church of Jesus Christ of Latter-day Saints, *Church Issues Statement on Boy Scouts of America*, MORMON NEWSROOM (April 25, 2013), <http://www.mormonnewsroom.org/article/church-statement-boy-scouts-of-america> (stating that the LDS church has officially endorsed easing the ban on gays in BSA); *Boy Scouts of America votes to ease ban on gay members*, BBC NEWS, May 23, 2013 <http://www.bbc.co.uk/news/world-us-canada-22650143>.

<sup>116</sup> *Stances of Faiths on LGBT Issues: Episcopal Church*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/stances-of-faiths-on-lgbt-issues-episcopal-church> (last accessed Jan. 1, 2014).

<sup>117</sup> S. Donald Fortson III, *The Road to Gay Ordination in the Presbyterian Church (U.S.A.)*, CHRISTIANITY TODAY (May 12, 2011), <http://www.christianitytoday.com/ct/2011/mayweb-only/gayordinationpcusa.html>.

<sup>118</sup> Catherine Saillant, *Evangelical Lutheran Church elects first openly gay bishop*, LOS ANGELES TIMES (May 31, 2013), <http://articles.latimes.com/2013/may/31/local/la-me-ln-lutheran-first-openly-gay-bishop-20130531>.

<sup>119</sup> See *id.*; *Stances of Faiths on LGBT Issues: Episcopal Church*, *supra* note 116.

<sup>120</sup> Kris Coombs, Martine Kaplan, and Duncan MacLaury, Op-Ed., *In Response to Rev. Kepler*, THE TUFTS DAILY, (Feb. 11, 2013), <http://tuftsdaily.com/opinion/2013/02/11/op-ed-in-response-to-rev-kepler/>. It should be noted, however, that the authors were members of the Coalition Against Religious Exclusion and were arguing for the reinstatement of Tufts’ all-comers policy when

even if the group's constitution contains provisions for amendments. Article VII of Psalm 100's constitution, for example, states that "any article can be amended by a [three-fourths] vote of the group."<sup>121</sup> While this may be feasible for modifying the responsibilities of the group's musical director<sup>122</sup> or procedure for auditions,<sup>123</sup> it is difficult to imagine an amendment to the group's statement of belief or moral membership requirements<sup>124</sup> even being proposed.

While dissidents of such groups could always break away and form rival organizations, this wastes administrative resources, and as a practical matter, may not always be possible for ideological or religious minorities who already represent a tiny minority of the university's population.

### B. *The "Belief" Test is Ambiguous and Difficult to Administer*

The Psalm 100 controversy also demonstrates just how difficult the "belief" test is to administer. UNC began investigating Thomason's removal from Psalm 100 less than a week after the group voted to dismiss him. Even at that time the university's associate director of student activities and organizations admitted that "the unusual nature of the situation ma[de] crafting a plan of action difficult"<sup>125</sup> and the director of the LGBTQ center at UNC conceded that there "was not enough information to know it was a case of discrimination."<sup>126</sup> As a result, it took the university more than a month and a half to conclude that Psalm 100 had not violated the school's non-discrimination policy.<sup>127</sup>

As a consequence, many felt that both the university's decision and policy, in general, were merely based on "semantics."<sup>128</sup> Psalm 100 was always careful to clarify that Thomason was dismissed not because of his sexual orientation but because he disagreed with one of the group's core beliefs—that gay relationships were inherently sinful—even though "nowhere in the constitution of Psalm 100 did the organization make explicit their requirement that members believe that homosexuality is incompatible with Christianity."<sup>129</sup> The case would have been even more complicated had Thomason claimed he *did* believe that gay relationships

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they made this statement.

<sup>121</sup> 2010 PSALM 100 CONST., *supra* note 2, at art. VII.

<sup>122</sup> *See id.* at art. VI.

<sup>123</sup> *See id.* at art. V.

<sup>124</sup> *Id.* at art. IV.

<sup>125</sup> Seligson, *supra* note 8.

<sup>126</sup> *Id.*

<sup>127</sup> *See* Thomason, *supra* note 11.

<sup>128</sup> *Ripe for Revision*, *supra* note 12.

<sup>129</sup> Thomason, *supra* note 11.

were sinful, but he was simply not living in accordance with his religious beliefs. After all, other than taking the individual's word for it, how can a university administratively determine what someone does or does not actually believe?

A prudent and practical nondiscrimination policy for student groups, therefore, must be easier to administer than the "belief" test. It should not take a university a month and a half to determine if one of its policies has been violated every time a potential controversy arises. On top of that, a prudent nondiscrimination policy should protect organizational speech from being chilled by external forces without discouraging internal debate or the possibility of organizational evolution.

## V. THE CODE OF CONDUCT TEST

The solution is what I call the "code of conduct" model of nondiscrimination policies. Public universities should allow student organizations, as private entities merely taking advantage of a government-sponsored LPF, to self-regulate, and impose a code of conduct on its members, even if the university itself would lack either the inclination or the constitutional authority to pass such regulations. Student organizations, therefore, would remain open to all students, but prospective members would need to decide whether they wanted to be a member of the organization badly enough to voluntarily conform their behavior to the affirmative and restrictive requirements established by the organization. This of course, places the onus of responsibility on the clubs for clearly defining what, if any, behavioral requirements they will impose on their members. In the absence of such clearly defined rules, no behavioral requirements would be presumed, nor could be enforced.

The University of Michigan ("Michigan") has a similar policy already in place. They require all student organizations to create a constitution and by-laws to "establish the specific rules of guidance by which [sic] the group is to follow and implement."<sup>130</sup> So long as the proposed constitution satisfies certain "minimum requirements,"<sup>131</sup> creation of such a document is one of the only "requirements to becoming recognized."<sup>132</sup> Among these "minimum requirements," is the inclusion of both an article describing "[m]embership requirements and limitations"<sup>133</sup> and another that discusses the "[r]emoval of [m]embership

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<sup>130</sup> *Constitution and Bylaws*, MICHIGAN STUDENT LIFE, <http://campusinvolvement.umich.edu/content/constitution-and-bylaws> (last accessed Feb. 2 2015).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

and [o]fficers.”<sup>134</sup>

Nonetheless, Michigan has still fumbled by creating a tiered hierarchy within their student activity program. Those student groups that “[h]ave missions that are consistent with the University’s mission and the goals and objectives”<sup>135</sup> of a specific department or university unit are eligible to apply to become a “sponsored student organization” (“SSO”).<sup>136</sup> SSO status grants an organization special privileges unavailable to other groups on campus including the “[a]bility to accept tax deductible contributions,” the ability to be covered by Michigan’s insurance program, and the “ability to benefit from University’s tax-exempt status” and use a “University Purchasing Card.”<sup>137</sup> However, certain groups such as “religious organizations” and “political or partisan organizations” are ineligible.<sup>138</sup> This inequality is problematic not because religious and political groups cannot become SSOs but because other organizations can. Having any student club be officially sponsored by the university jeopardizes the framework established in *Rosenberger* that student organizations should be considered private speakers who are merely taking advantage of an LPF, not an extension of the state itself.<sup>139</sup> It also unfairly favors those viewpoints of organizations that “[h]ave missions that are consistent with the University’s mission.”<sup>140</sup> After all, even non-partisan organizations can have controversial opinions and beliefs.

Despite these defects, Michigan’s student activity program has come the closest to approximating the ideal in practice. Without administrative opposition, some religious organizations have included in their constitutions requirements that leaders must refrain from gay or lesbian relationships. For example, the constitution of the Michigan chapter of the InterVarsity International Christian Fellowship (“ICF”) requires “all those involved in the leadership roles” of the club “avoid[] behaviors that displease God and are not edifying to others including . . . [s]exual immorality, including but not limited to homosexual relations and sexual relations outside of marriage.”<sup>141</sup> The Michigan chapters of the Black

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<sup>134</sup> *Id.*

<sup>135</sup> UNIV. MICH. CTR. FOR CAMPUS INVOLVEMENT, *University Sponsorship*, GUIDEBOOK FOR STUDENT ORGANIZATIONS, <http://campusinvolvement.umich.edu/content/university-sponsorship> (last accessed Jan. 13, 2014).

<sup>136</sup> *Id.*

<sup>137</sup> UNIV. MICH. CTR. FOR CAMPUS INVOLVEMENT, *University Benefits Grid*, GUIDEBOOK FOR STUDENT ORGANIZATIONS, <http://campusinvolvement.umich.edu/content/university-benefits-grid> (last accessed Jan. 13, 2014).

<sup>138</sup> UNIV. MICH. CTR. FOR CAMPUS INVOLVEMENT, *supra* note 135.

<sup>139</sup> See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 824 (1995).

<sup>140</sup> UNIV. MICH. CTR. FOR CAMPUS INVOLVEMENT, *supra* note 135.

<sup>141</sup> CONST. OF INTERVARSITY INT’L CHRISTIAN FELLOWSHIP, appendix B, *available at*

Scholars and Professionals (“BSAP”)<sup>142</sup> and The Graduate Christian Fellowship<sup>143</sup> have similar policies in place. Other groups, such as the Latter-day Saint Business Student Association, extend these behavioral expectations to the general membership of the club.<sup>144</sup> Each of these groups, however, clearly has an open membership policy, irrespective of the student’s self-identified sexual orientation, religion, race, or any other protected characteristic. Because such requirements are plainly expressed in the constitution, students are fully aware that they are committing to live according to specific, restrictive guidelines when they voluntarily choose to seek leadership positions or join the club. This approach strikes the right balance for at least two reasons as discussed below.

*A. This Code of Conduct Model Empowers Student Organizations to Protect Their Institutional Integrity from Hostile Takeovers*

In contrast to a true all-comers policy, when universities allow student organizations the discretion to impose behavioral norms on their members, universities ensure that organizations can create institutional safeguards to protect themselves from attempted hostile takeovers. While all clubs are still technically open to all members, a nuanced code of conduct devised by the organization’s leadership would make such a hostile takeover even more difficult than it already is. Imagine how difficult it would be to stage a coup of ICF at Michigan. Rather than simply finding enough ideological opponents of the club to join the group and vote their friends onto the board as the University of Nebraska College Republicans did,<sup>145</sup> the would-be board members would need to abstain from all extra-marital sexual conduct and underage drinking.<sup>146</sup> If they failed to do so, they could be removed from office, even if they were fairly elected.<sup>147</sup> These behavioral requirements would, at the very

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<https://maizepages.umich.edu/organization/icfmichigan/documentlibrary> (download the file “Constitution/bylaws”). Lest any think ICF was targeting the LGBTQ community, the ICF Constitution also prohibits leaders from entering into “[r]omantic relationships with non-Christians,” “[d]runkenness,” and “underage drinking/buying or offering alcohol . . . to minors.” *Id.*

<sup>142</sup> BSAP CONST., art. IX, available at <https://maizepages.umich.edu/organization/BSAP/documentlibrary> (download file “Constitution/Bylaws”).

<sup>143</sup> GCF CONST., art. IX, available at <https://maizepages.umich.edu/organization/GCF/documentlibrary> (download file “Constitution/Bylaws”).

<sup>144</sup> LDSBSA Constitution, art. III, sect. 2, available at <https://maizepages.umich.edu/organization/Latter-daySaintBusinessStudentAssociation/documentlibrary> (download file “Constitution/bylaws”) (“[M]embers shall abide LDSBSA standards which are the standards of The Church of Jesus Christ of Latter-day Saints.”) The standards of the LDS church include complete abstinence from gay or lesbian relationships. THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, HANDBOOK 2: ADMINISTERING THE CHURCH 195–96 (2013).

<sup>145</sup> *Supra* note 50.

<sup>146</sup> *See supra* note 141.

<sup>147</sup> CONST. OF INTERVARSITY INT’L CHRISTIAN FELLOWSHIP, *supra* note 141 at art. VIII,

least, serve as an additional procedural obstacle to be overcome, and certainly make attempted hostile takeovers appear to be a less feasible tactic. Student organizations could further protect their institutional integrity by making adherence to the code of conduct for a specified period of time a prerequisite for membership eligibility or leadership. Such requirements would force ideological opponents to challenge each other's beliefs in the marketplace of ideas, rather than manipulating a university policy.

These institutional safeguards would also make it far less likely that a religious organization would feel forced to choose between the integrity of its faith and official university recognition. While still an all-comers policy of sorts, any club could protect its associational integrity and ensure its members honored the organization's beliefs by implementing a code of conduct on its members or leadership. After all, students who disagree with a club's beliefs are probably going to be unwilling to live by that organization's rules. Such a code of conduct might include mandatory attendance of religious services, payment of tithes or offerings, adherence to a dietary code, or the wearing of a religiously prescribed garb like yarmulkes or hijabs.

It is important, however, to remember that if these behavioral requirements are *too* restrictive, these organizations will have trouble recruiting new members and may lose ground in the marketplace of ideas. Under this model, it is the organizations themselves, as private entities, which must weigh the pros and cons of imposing such a code of conduct rather than the university mandating what they must do. Many will choose not to. Michigan has over 1,000 student organizations, of which dozens are religiously affiliated. Despite having the right to regulate their members' behavior, many have adopted less restrictive, open membership policies.<sup>148</sup>

### B. *The "Code of Conduct" Model Allows Internal Dialogue*

Furthermore, unlike the belief test, the code of conduct model neither discourages nor chills internal debate and discussion within groups that could lead to institutional evolution over time. So long as members' behavior continues to conform to the club's codified expectations, they

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sect. 1.

<sup>148</sup> See, e.g. CHRISTIAN COLLEGIATE FELLOWSHIP (CCF) CONST. AND BYLAWS, available at <https://maizepages.umich.edu/organization/ccf/documentlibrary> (download file "Constitution/Bylaws"); THE ORTHODOX CHRISTIAN FELLOWSHIP CONST., available at <https://maizepages.umich.edu/organization/OCF/documentlibrary> (download file "Constitution/Bylaws"); CONST. OF THE CHRISTIAN SCIENCE ORGANIZATION, available at <https://maizepages.umich.edu/organization/cso/documentlibrary> (download file "Constitution/Bylaws").



can disagree with specific planks of their club's platform, and even lobby internally for change, without risking retribution. Because conforming one's behavior contrary to one's beliefs may be burdensome, this approach will likely only be undertaken by someone who truly cares about the organization and agrees with a majority of its beliefs, rather than, as discussed above, someone who simply wants to undermine the organization.

The Michigan model allows groups like ICF, BSAP, and LDSBSA to prohibit gay or lesbian behavior while at the same time allowing dissenting members of the group to discuss and debate the policy without fear of retribution as long as their behavior continues to conform to the club's policies. Had UNC's nondiscrimination policy simply allowed Psalm 100 to self-regulate according to their own constitution, Thomason could have remained in the group if his behavior continued to conform to the group's interpretations of "the guidelines of the Bible."<sup>149</sup> This would have allowed Thomason to weigh the pros and cons of membership, and personally decide whether singing with the group was important enough to him to change his conduct. By doing so, he could have attempted to persuade his fellow singers to agree with his doctrinal interpretation of scripture—a debate that is currently being waged in churches, seminaries, and religious institutions across the country. If three-fourths of Psalm 100 ever agreed with him, they could pass an amendment to their constitution.<sup>150</sup> It would be a slow process, but obtaining the consent of the governed always is.

## VI. CONCLUSION

This comment has attempted to outline the strengths and weaknesses of various approaches different public universities have taken in their attempts to regulate the membership requirements of their recognized student organizations. Because these non-discrimination policies must only pass the rational basis test, all of these approaches are almost certainly constitutional. But not all constitutional policies are equally wise. An all-comers policy, for example threatens to undermine the marketplace of ideas by disfavoring culturally heretical ideas, while the belief test is hard to administer and makes the internal evolution of clubs difficult.

Therefore, when fashioning a non-discrimination policy, universities should aim to protect groups from *external* assaults without encouraging

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<sup>149</sup> It would have been better if Psalm 100 had, like ICF and BSAP at Michigan, specifically enumerated in the Constitution what these guidelines were.

<sup>150</sup> PSALM 100 CONST., *supra* note 2, at art. VII.

groups to silence all *internal* debate or discussion. In addition, universities should remember two key points: (1) registered student organizations are speakers participating in a government sponsored LPF, not an extension of the government; and (2) the marketplace of ideas works: allowing controversial groups on campus does not mean that their ideological beliefs will win out. The best model, therefore, is the one that allows (but does not require) groups to regulate the behavior of its members if they so choose. Doing so places the onus of responsibility squarely on the shoulders of the student organization, forcing them to weigh the practical costs of imposing such a code of conduct against their interest in protecting their organization's message.

*James Heilpern*