I. Introduction

According to lore it was a cold night in late November of 1825 when nine students at Union College who “now and then beguiled the long winter evenings and entertained . . . friends with a few baked potatoes and salt and comforted them with apples” laid the foundation for the contemporary Greek system by formally organizing a previously informal social group.¹ The practice of college students banding together in formal groups was nothing new. Phi Beta Kappa, the First Greek letter organization, was established fifty years prior at the College of William and Mary in Virginia.² This tendency to organize into groups reflected a larger American trend noted by Alexis de Tocqueville during his travels.³

Cold relations between college administrators and these first fraternities were not uncommon. Dr. Eliphalet Nott, President of Union College, banned the fledgling organizations from his campus for a number of years.⁴ Mark Hopkins, President of Williams College shared Nott’s sentiments. Hopkins believed that college campuses should be rid of fraternities because “[t]hey create class and factions, and put men socially in regard to each other into an artificial and

² http://www.pbk.org/about/history.htm (last visited Feb. 24, 2005). Like its successors Phi Beta Kappa also began as a social fraternity, however soon became an honorary society after spreading to other campuses. Id.
⁴ The Delta Phi Fraternity. http://www.deltaphi.org/doc/history.html (last visited Feb. 23, 2005). Today Delta Phi lays claim to being the oldest continuous fraternity in the country because the Union chapter did not disband and maintained open operations during Knott’s ban on fraternities. Id.
false position." This negative view of Greek organizations as enclaves of exclusivity has persevered.

Critics and observers have traditionally noted the perpetuation of anti-social behavior fostered by these groups in part because of their closed nature. Additionally the groups have been seen as antithetical to the mission of colleges and universities. Institutions of higher education believe they play a role in students’ personal development by exposing them to a range of viewpoints. “The irony is that during a time when students are exposed to the new and diverse thoughts and lifestyles of college life, they are simultaneously required to fit into a singular, confining mold, denying their own self expression.” Similarly the exclusive nature of these organizations is viewed as competing against campuses’ desires to create inclusive atmospheres. To this end some campuses have mandated that fraternities become coeducational or lose their charters.

At the University of North Carolina at Chapel Hill (UNC) this traditional battle between student organization exclusivity and institutional mission has moved into new territory. The implications of this current debate are much broader than the Greek system, though this Note begins the conversation there. In 2004 Alpha Iota Omega (ΑΙΩ) filed suit in federal court against UNC in response to the university’s 2003 action wherein the recognized student organization status of the fraternity was revoked.

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6 See generally; Esther Wright, Torn Togas: The Dark Side Of Campus Greek Life (1996).
7 Id. at 10.
9 Susan Tifft, Waging war on the Greeks: fraternities and sororities are being force to clean up their acts, Time, April 16, 1990, at 64. (Highlighting Middlebury College where two fraternities chose to accept females to avoid being disbanded.)
II. Description of the Problem

ΑΙΩ was founded in 1999 at UNC Chapel Hill to “uphold the Great Commission of Jesus Christ, by serving members of greek letter organizations through evangelism and mentorship, both on the university campus and in the greater community.” In 2003 ΑΙΩ informed school officials that they would not be able to comply with the institution’s Non-Discrimination and Sexual Orientation policies to the extent that these policies conflicted with their religious beliefs. The members of the fraternity believe that they should have a say in who comprises their membership, which includes not extending invitations to join to non-Christians and homosexuals. The university maintains that it has the right to revoke an organization’s status, when the organization makes such a choice, in order to preserve the institutional missions of inclusiveness and diversity.

As noted above this issue is not confined to the Greek system or to UNC. As of January 2005 at least three other institutions of higher education were facing lawsuits over the same issue, that where a student religious organization has decided that it cannot in good conscious subscribe to certain university policies because of the organization’s religious beliefs the school subsequently revokes the organization’s recognized status. Previous legal disputes over this issue have been settled out of court. At The Ohio State University a suit filed by the law school’s


14 Id.

15 Id. See also Mark Hansen, Christians on Campus; Legal Society Says Universities Must Let it Choose Members, Officers Based on Beliefs, A.B.A.J., Feb. 2005, 12. (referencing pending suits at three law schools including, Penn State University, Arizona State University, and Washburn University).
chapter of the Christian Legal Society was settled when the university agreed to "allow student religious groups to adopt nondiscrimination language consistent with their beliefs."\(^{16}\) However, in this instance it is reported that school officials at Hastings College of Law, and UNC are determined to see the issue through to court.\(^{17}\)

Parallels can certainly be drawn between this debate and the earlier challenges to fraternities.\(^{18}\) Both the instant issue and the previous debates centered on the university's interest in fostering a climate of inclusion and in promoting diversity.\(^{19}\) For the student affairs professional there is another interest at stake, the role of spirituality in student development. Thus there are two policy concerns at the heart of the debate; first the university's value of inclusion, and second the role of religion, or spirituality, on the contemporary college campus.\(^{20}\)

Too often these concerns are viewed as conflicting, particularly when the expression of spirituality takes the form of evangelical Christianity. When viewed as conflicting the resolution is the removal of one value from the university campus and the complete "victory" of the other.\(^{21}\) This Note proposes that these conflicting concerns, though viewed as competing, are most

\(^{16}\) Id.
\(^{17}\) Burton Bollag. (Quoting the general counsel for Hastings as stating, "We're definitely going to court on this matter...[w]e think we can win it."). As of March of 2005 a preliminary injunction was issued against UNC forcing the college to reinstate the fraternity pending the outcome of the lawsuit. Christian Fraternity Wins Injunction Against UNC. THE CHARLOTTE OBSERVER. March 5, 2005.
\(^{18}\) supra notes 4-9 and accompanying text.
\(^{19}\) supra notes 7-9 and accompanying text.
\(^{20}\) David French, president of the Foundation for Individual Rights in Education (FIRE), a Philadelphia-based group devoted to free speech on college campuses, views the instant debate as one between "constitutional doctrine and an ideology of nondiscrimination that says that certain kinds of "exclusion" should never be permitted." Online chat with David French, moderator Burton Bullag, transcript available at http://chronicle.com/colloquy/2005/01/studentgroups/.
\(^{21}\) The Conflict Mode Instrument developed by Thomas and Kilmann presents five modes of conflict. Competing, one of the modes is "power-oriented" and concerned with winning. Collaborating "is described as full acknowledgement of both the individual’s and the other's needs or concerns and a focus on finding common ground within a conflict on which to base some mutually agreeable approach to the conflict." Leila V. Moore, Managing Conflict Constructively, THE HANDBOOK OF STUDENT AFFAIRS ADMINISTRATION, 398 (2000).
appropriate when viewed as collaborative. When the student affairs professional looks at the 
issue in this light the needs of all students can be met, and a viable compromise can be reached 
which will contribute to the full mission of the university with regards to educating students. 22 
Furthermore when the issue is looked at in this light a resolution can be adopted which will enable 
the university to truly serve as the marketplace of ideas. This Note will examine the historical and 
contemporary place of these concerns, as well as the relevant legal rights of each, in order to set 
forth a resolution to the debate.

Part III will discuss the university’s policy of inclusion by examining the idea of inclusion 
as a historical value of the university, and by looking at inclusion in the light of diversity, both 
generally and as it relates to homosexual concerns. Part IV will present religion’s historical 
presence in the pantheon of university values, and discuss its contemporary role as vital to the 
development of the full student, as well as its legal rights to be on campus. Part V will synthesize 
the values of inclusion and religion by demonstrating that they work together towards two 
important university missions; the development of the whole person, and the free exchange of 
ideas. Part VI will advance a resolution to the current debate based on the view that diversity and 
religion, as a means of spiritual development, are complementary to each other and the university 
mission.

III. In re Athens

A. The Historical Strand of Inclusion

22 “America’s universities and colleges come in many shapes and sizes. But virtually all of our 
institutions share one key feature: we educate undergraduates, and we want to do so as well as 
we possibly can.” Myles Brand, Seeking the Golden Mean, Educational Record, 21 (1992). For 
purposes of this Note the mission of educating undergraduates includes the development of the 
student as an individual and the university as a forum for the free exchange of ideas. See infra 
notes 84- 90 and accompanying text.
America’s institutions of higher education have a muddled history when looking at the idea of inclusion. American colleges and universities have not always welcomed large segments of the population. Women and blacks were not granted admission into the nation’s colleges and universities and were forced to open their own schools. Coeducation began at the Midwestern land grant colleges, and by the end of the nineteenth centuries almost three quarters of the nations colleges admitted women. Schools for blacks were founded by religious organizations in the North, and even though the first two African Americans to earn bachelors degrees from white institutions received those degrees in 1826, it was not until the 1960’s that all white institutions began to admit blacks.

Despite this bleak seemingly exclusionary history there has been a historical strand of inclusion in American higher education. Individual institutions educated students, black and white, male and female. Knox College in Galesburg, Illinois was founded in 1837 by abolitionists. Berea College, founded in 1855 by an abolitionist adhered to the belief that “God has made of one blood all peoples of the earth.” In response Berea educated poor whites from Appalachia as well as freed slaves, male and female.

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23 Those institutions initially founded for women did not become true post-secondary colleges until the latter part of the eighteen hundreds. Early institutions of higher education for women included; the Troy Female Seminary (1821), the Hartford Female Seminary (1823), Mt. Holyoke female Seminary in New York, and the Georgia Female College of Macon (1839). CHRISTOPHER J. LUCAS, AMERICAN HIGHER EDUCATION; A HISTORY, 154 (1994).

24 Id. It was not until 1996 that the last two public institutions of higher education to refuse admission to women were forced to go coed by the Supreme Court. U.S. v. Virginia, 518 U.S. 515 (1996)(holding that the Virginia Military Institutes policy of male only admissions and the Commonwealth’s plan to establish a comparable program for females violated the Fourteenth Amendment).

25 CHRISTOPHER J. LUCAS at 158-59, 241-42.

26 http://www.knox.edu/x181.xml (last visited March 26, 2005).


28 Id.
In addition to the practices of individual institutions in educating women and blacks, democratic virtues and Jacksonian ideals of democracy permeated the rapid rise of American post secondary institutions. Antebellum colleges and universities welcomed men from a range of economic backgrounds. The reaction of administrators to secret societies also reflected this historical strand of inclusion as a university value. Today inclusion is amongst the most important virtues of the university under the rubric of diversity.

B. Diversity

Inclusion and diversity are intertwined concepts. If there is inherent benefit to diversity than the inclusion of diverse peoples through admissions is of great value. Additionally, once an institution seeks to diversify its student body those in the minority must feel included as a part of the campus if they are going to have a valid educational experience.

Diversity was legally recognized as a compelling educational value in Justice Powell’s influential opinion in Regents of Univ. of Cal. v. Bakke. The Bakke decision affirmed the use of race as a factor in admissions decisions by the medical school at the University of California at Berkeley. At the core of Justice Powell’s opinion was the recognition that “the atmosphere of "speculation, experiment and creation"- so essential to the quality of higher education- is widely

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29 At one point during the eighteen hundreds Ohio boasted thirty seven colleges for a population of three million, whereas England, with a population of twenty three million had four institutions of higher education. CHRISTOPHER J. LUCAS at 117.
30 Supra note 5 and accompanying text.
31 The Alliance Defense Fund, an evangelical Christian advocacy group took out newspaper ads at five college campuses in 2003 linking unfair treatment of religious groups with the university’s desire for increased inclusiveness. The headline queried, “Are You Experiencing Anti-Christian Bigotry on Campus?” Followed by the introduction; “In the name of ‘diversity’ and ‘tolerance,’ schools are systematically violating the rights of students who follow Jesus.” Burton Bullag at A33.
32 438 U.S. 265 (1978)
33 Id. at 320. The Court struck down the quota based admissions program used by the school, but removed the injunction against considering the race of any applicant. Id.
believed to be promoted by a diverse student body.\textsuperscript{34} The Court recently reiterated the educational importance of diversity in \textit{Grutter v. Bollinger}, and upheld diversity as a compelling government interest.\textsuperscript{35} Citing numerous studies and research the Court noted “that student body diversity promotes learning outcomes, and “better prepares students for an increasingly diverse workforce and society. . .”\textsuperscript{36}

The \textit{Grutter}\textsuperscript{37} decision discussed the concept of a “critical mass” as a vital component of diversity. The University sought to enroll a critical mass of minority students in order to provide admitted minority students a “reasonable environment”\textsuperscript{38} in which to pursue their education. A reasonable environment is arguably an inclusive one, or one in which minority students feel that they can succeed academically and develop their own identity.\textsuperscript{39} Dr. Beverly Tatum\textsuperscript{40} writes that

\begin{itemize}
  \item \textsuperscript{34} \textit{Id.} at 312.
  \item \textsuperscript{35} 539 U.S. 306 (2003) (upholding the University of Michigan Law School’s admissions policies because they served the compelling state interest in obtaining educational benefits from a diverse student body).
  \item \textsuperscript{36} \textit{Id.} at 350 (quoting Brief for American Educational Research Association et al. as \textit{Amici Curiae} 3).
  \item \textsuperscript{37} 539 U.S. 306 (2003).
  \item \textsuperscript{38} \textit{Id.} at 336 (quoting \textit{Bakke}, 438 U.S. at 323 (opinion of Powell, J.).
  \item \textsuperscript{39} A definition of a reasonable environment can be extrapolated from the “Riddle Scale of Homophobia.” Taken from Wall’s Beyond Tolerance; Gays, Lesbians and Bisexuals on Campus, the Riddle Scale recognizes eight responses to homosexual behavior. The first four responses are viewed as negative responses, and include; repulsion, pity, tolerance, and acceptance. The second four responses are considered positive responses. These include support, admiration, appreciation, and nurturance. \textit{Available at} http://allies.tamu.edu/Did%20You%20Know/riddle.htm (last visited March 25, 2005). A reasonable environment based on this scale would involve at least support. People at the support level “[w]ork to safeguard the rights of lesbians and gays. People at this level may be uncomfortable themselves but they are aware of the homophobic climate and irrational unfairness.” \textit{Id.} Reasonable cannot necessarily mean free from all discomfort. In his induction address at Williams College in 1985 Francis Oakley stated;

\begin{quote}
The history, moreover, of that most American of educational institutions . . . witnesses forcefully to the power of that central educational institution when wedded to the other long-standing conviction that education is not a process that can wholly be confined to classroom, laboratory, studio or library, but one to which the diverse experience and richly variegated moments of life . . . must all combine to make their particular contribution. Extracurriculum as well as curriculum; play as well as work; fellowship as well as solitude; the foreign as
\end{quote}
“the developmental need to explore the meaning of one’s identity with others who are engage in a similar process manifests itself informally in school corridors and cafeterias across the country.”

Studies have also demonstrated that students who become involved in the life of the university are those students who feel as if they belong and are valued as individuals. Thus, in order for diverse students to succeed in academic settings they need to be in contact with a “critical mass” of similarly situated students.

C. The LGBT Cause

Diversity on campus is clearly not limited to racial minorities. Today many colleges and universities recognize that they have significant Lesbian, Gay, Bisexual and Transgender (LGBT) populations with their own needs, including the need for a supportive environment. LGBT students as a group, like their racial minority counterparts, are often not supported on college and university campuses. This is not just a historical problem, but is a contemporary concern.

Susan Rankin’s Campus Climate survey reported that nineteen percent of LGBT students, faculty and staff feared for their safety in the past year because of their sexual orientation or gender identity. One survey participant reported, “I always hear derogatory comments made about the LGBT community, although they are not always directed to an available online at http://www.williams.edu/ home/about__ mission.php (last visited March 25, 2005)(emphasis added).

40 Dr. Tatum is a trained clinical psychologist and currently the President of Spelman College, a historically black women’s college in Atlanta. www.spelman.edu (last visited March 25, 2005).
42 George D. Kuh, Understanding Campus Environments, in HANDBOOK OF STUDENT AFFAIRS ADMINISTRATION, 52 (Margaret J. Barr and Mary K. Desler eds., 2000).
43 Grutter, 539 U.S. at 338 (noting other bases for “diversity admissions”).
44 supra note 39.
45 BEHIND CLOSED DOORS: THE DARK LEGACY OF THE JOHNS COMMITTEE (PBS 2000).
individual. This type of behavior forces me to hide who I am and causes me much distress." 47
When a group of students feel this way the climate for them is not "reasonable." 48
And institutions of higher education have begun to respond.

 Colleges and universities are opening offices devoted to LGBT issues, and hiring staff to work with LGBT students. Staff members focused on LGBT concerns educate faculty, students and staff on issues of inclusion. They also serve as a soundboard for the LGBT population on their respective campus, and they work with the administration to ensure campus policies treat LGBT students equally. UNC opened a LGBT Office in 2003. The office aims to provide a safe and inclusive environment for all LGBT students at UNC Chapel Hill. 49

It is through this inclusive environment that LGBT students will be able to contribute fully to the diversity of the University. 50

IV. In re Jerusalem

A. The History of Religion on the Quad

Just as the idea of inclusion has both a historical stream and a contemporary role in American higher education so too does religious thought. Religion has played an important role in American higher education, and an examination of such role must begin with the historical record. Christianity was central to the rise of higher education in America. Harvard college was founded with the charge, "In Christi Glorium." Veritas, today's motto, found on the institution's coat of arms, initially meant "divine truth, truth reached ultimately . . . through faith." 51

The coat of arms also reflected the college's belief and mission symbolically. Of the three books on the

47 Id.
48 supra text accompanying note 39.
49 http://lgbt.unc.edu/about/index.html (last visited March 25, 2005). The LGBT Office works under the idea that LGBT students “contribute an essential element to the diversity of the UNC community, enriching the intellectual and social life of the entire University.” Id.
50 Id.
51 "Veritas", Harvard Magazine, 66, July- August 2002. (Quoting from President Lawrence H. Summer’s 2002 Harvard College Commencement Address.)
original shield only two were turned upwards. The downward facing book reflected the limits of human reasoning, acknowledging that some “veritas” could only be revealed by the divine.  

The College of William and Mary in Virginia was officially chartered in 1693 and affiliated with the Anglican church. Even though these colonial colleges were chartered with close church relations they were simultaneously directly linked to the state. William and Mary received state subsidies from taxes on tobacco, fur and other commodities, as did Harvard, Yale and Columbia to lesser extents. Higher education’s early association with religion was not restricted to its colonial colleges. In the antebellum years denominations directly controlled a number of state supported universities for some period of time. Even state supported universities mandated chapel attendance for their students. And like their private counterparts the state schools subscribed to the practice of preserving the presidency for an ordained minister.

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53 WILLIAM C. RINGENBERG, *THE CHRISTIAN COLLEGE: A HISTORY OF PROTESTANT HIGHER EDUCATION IN AMERICA*, 39 (1984). The majority of the other colonial colleges were similarly religiously affiliated. Yale was Congregationalist, Princeton, New Light Presbyterian, Brown, Baptist, Rutgers, Dutch Reformed and Dartmouth, New Light Congregationalist. *Id.*
54 *Id.* at 42.
55 *Id.* at 53-54.
56 *Id.* at 82.
57 During the Colonial period there was not a clear delineation between state and private colleges. *Supra text accompanying* notes 55 and 56. *See also* Trustees of Dartmouth College v. Woodward 17 U.S. 518 (1819) (a seminal case in distinguishing private from state control in the college setting).
58 *THE SECULARIZATION OF THE AMERICAN ACADEMY*, ED. GEORGE M. MARSDEN AND BRADLEY J. LONGFIELD 11 (1992). “As late as 1890 President James B. Angell of the University of Michigan. . . reported that twenty-two of twenty-four state schools conducted chapel services, at twelve of which attendance was compulsory, and four still required church attendance as well.” *Id.* The University of Wisconsin had compulsory chapel attendance until 1867 when it became one of the first state universities to do away with the practice. WILLIAM C. RINGENBERG at 126. Mandatory chapel at the United States Military Academy (West Point) remained until 1972. http://www.usma.edu/bicentennial/ history/history_1950on. asp (last visited Feb. 25, 2005).
59 WILLIAM C. RINGENBERG at 127.
B. Religion's Contemporary Role on Campus

With the gradual secularization of America's campuses, evidenced by the above trends in chapel attendance and hiring practices, organizations such as the YMCA and Intervarsity Christian Fellowship stepped in to fill the religious vacuum. Intervarsity continues to play an important role in the lives of students today, boasting chapters on more than 560 college and university campuses. Other religious organizations are equally vibrant. UNC is host to forty-four religious organizations with recognized status ranging from the “Carolina Hindu Association” to “Heels for Heaven.” Research also suggests that some form of religious understanding is important today in the lives of college students. A recent study of College Students Beliefs and Values by the Higher Education Research Institute at UCLA concluded that “[t]here is a high level of spiritual engagement and commitment among college students, with more than half placing a high value on “integrating spirituality” in their lives. . ..”

C. The Legal Rights of Religion on Campus

Religion’s place on campus through the guise of student organizations has certain established legal rights which have bearing on the instant issue. It is important for the student affairs officer to recognize that religious organizations have these rights, and that the expression of these rights does not raise establishment clause concerns. Recognized student religious organizations have clearly defined rights to meet in university facilities. They are also entitled to student activities funds when those funds are generally available. And there is legal precedence supporting the right of private organizations to choose their own membership.

60 Id. at 148 and 154.
1. The Right to Space

In *Widmar v. Vincent* the Court held that where a university makes its facilities generally available for the activities of student groups it cannot restrict the use of those facilities based on the religious practices of the groups. After conducting its meetings in school facilities for four years, Cornerstone, a non-denominational Christian organization at the University of Missouri Kansas City (UMKC), was informed it could no longer do so. The university’s board had previously adopted a resolution prohibiting the use of university buildings for religious worship or teaching.

Cornerstone sued the university claiming the institution’s actions violated their rights to the free exercise of religion, equal protection and the freedom of speech. In finding for Cornerstone the Court focused on the group’s free speech rights. “[R]eligious worship and discussion . . . are forms of speech and association protected by the First Amendment.” Thus to exclude protected speech based on its content, as UMKC attempted, there must be a compelling state interest, and the restriction on the speech must be narrowly tailored to meet that interest.

The University argued that its interest lay in avoiding the establishment of religion. Applying the *Lemon test* the Court found that the “open-forum policy, including nondiscrimination against religious speech” has a secular legislative purpose whose primary effect was neither to advance nor inhibit religion. Finding the first two prongs met the Court had no problem finding that an open-forum policy would not “foster an excessive government entanglement with religion.”

Key to the Court’s decision was characterizing the question not in establishment clause terms,

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65 *Id.* at 277.
66 *Id.* at 265.
69 *Id.* at 270-71.
70 *Id.* at 271.
but in free speech terms of whether the University could exclude groups because of the content of their speech.\(^71\)

2. The Right to Funding

In *Rosenberger v. Rector and Visitors of the University of Virginia*\(^72\) the Court established the right of student religious groups to receive funding from student activity monies. *Wide Awake: A Christian Perspective* at the University of Virginia, a newspaper run by a student organization of the same name applied for student activity funds. The university denied the paper funding because the paper “primarily promotes or manifests a particular belief in or about a deity or an ultimate reality.”\(^73\) The school’s decision was invalidated by the Supreme Court.

Following reasoning similar to the Court in *Widmar* the *Rosenberger* Court found that where a public forum exists a public university may not restrict speech in that forum based on viewpoint discrimination.\(^74\) Likewise the university could not choose to distribute funds in a discriminatory manner to those groups otherwise eligible to receive them. Rather the university is required to allocate its resources in a neutral manner.\(^75\) Responding to the dissents argument that no viewpoint discrimination occurred because University guidelines discriminate against multiple religious views, the majority found that competing viewpoints were found in University funded secular sources, and therefore the religious views must be heard.\(^76\)

3. The Right to Members

\(^{71}\) *Id.* at 273.
\(^{73}\) *Id.* at 823.
\(^{74}\) *Id.* at 829.
\(^{75}\) *Id.* at 835.
\(^{76}\) *Id.* at 831. “The dissents assertion that no viewpoint discrimination occurs because the guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas.” *Id.*
Boy Scouts of America v. Dale\(^77\) provides legal standing for private organizations to restrict their membership. The Boy Scouts revoked the adult membership of a former Eagle Scout upon discovering the individual was a homosexual.\(^78\) The state supreme court ruled that the Boy Scouts revocation of membership was against state law.\(^79\) The Supreme Court looked at the issue of whether this ruling violated the Boy Scouts’ right of expressive association.\(^80\)

The Court held that forcing the Boy Scouts to retain the homosexual member was against the organization’s right of expressive association.\(^81\) The Court employed a three step analysis wherein it determined first that the Boy Scouts engaged in expressive association.\(^82\) The Court next decided that the forced inclusion of homosexuals would “significantly affect the Boy Scout’s ability to advocate public or private viewpoints” by examining the nature of the Boy Scouts stance on homosexuality.\(^83\) Finally the Court held that the forced inclusion of homosexuals would force the Boy Scouts to promote a viewpoint contradictory to its expressed values.\(^84\) Therefore Dale stands for the proposition that a private organization can restrict its membership if the inclusion of certain members would be inconsistent with its values.

Thus a university which chooses to exempt a recognized student organization from its nondiscrimination policy would have precedent under Dale to do so.\(^85\) While there is debate

\(^77\) 530 U.S. 640 (2000).
\(^78\) Id. at 644.
\(^79\) Id.
\(^80\) Id.
\(^81\) Id. at 661. Expressive Association is an implied right found in the First Amendment. “[I]mplicit in the right to engage in activities protected by the first Amendment’ is a ‘corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends.” Id. at 647 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984)).
\(^82\) Dale, 530 U.S. at 648-50.
\(^83\) Id. at 650.
\(^84\) Id. at 654.
\(^85\) But see Forum for Academic and Institutional Rights v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004)(holding that law schools cannot be denied federal funds for refusing to allow the military to recruit on campus because the armed forces exclude homosexuals from service). The decision of the third circuit provides a legal basis for “the autonomy of the academic institution to determine and enforce its own policies on nondiscrimination.” Allison Torres Burtka, Law Schools May Refuse Military Recruiters and Keep Federal Funds, NEWS & TREND, Feb. 2005, 73.
amongst theologians regarding the issue of homosexuality, and different denominations and organizations come down differently on the issue, those that would seek to restrict their membership do so based on their sincere beliefs and values, just as the Boy Scouts did.

V. Synthesis

There are at least two areas in which the idea of religious freedom on campus and the institutional value of inclusion complement one another. From the student affairs perspective the inclusion and support of both religious organizations and LGBT students are mutually necessary to develop the whole student. In the realm of academic values the collaboration of the two groups is necessary to the university’s role as the marketplace of ideas.

A. The Development of the Whole Person

Vital to the existence of the university is the student. While a college degree is awarded based on the completion of a certain number of credits, the institutions focus on the student, at least from the standpoint of the student affairs administrator, is not limited to intellectual training, but rather is concerned with the development of the whole person. The multitude of student

86 The issue is not the legitimacy of various views on homosexuality. The Dale Court noted “Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” 530 U.S. 640 at 651 (quoting Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 714 (1981).

87 The National Association of Student Personnel Administrators describes the mission of the university in relation to the student as follows;

One of the basic purposes of higher education is the preservation, transmission, and enrichment of the important elements of culture: the product of scholarship, research, creative imagination, and human experience. It is the task of colleges and universities to utilize this and other educational purposes as to assist the student in developing the limits of his potential and in making his contribution to the betterment of society.

The philosophy imposes upon educational institutions the obligation to consider the student as a whole- his intellectual capacity and achievement, his emotional make-up, his physical condition, his social relationships, his vocational aptitudes and skills, his moral and religious values, his economic resources, and his aesthetics appreciation. It puts emphasis, in brief, upon the development of the student as a person rather than upon his intellectual training alone.
organizations that exist on contemporary campuses are a reflection of this focus on the student as a whole.

Whether these organizations are religious in nature, or are concerned with the inclusion of LGBT students, they serve an important function in students' education. Therefore post-secondary institutions need to, at a minimum, support all types of student organizations that help to fulfill this mission. Critical to this support is funding and the opportunity to use campus facilities. The benefit of recognized organization status is often the difference between an organization succeeding or failing.

Furthermore the importance of administrative support of religious organizations in the context of student development is heightened by the importance of religion in the lives of individual students. Therefore if the student is at the center of the University mission the University should be encouraging of programs and organizations that are important to her students.

**B. The Marketplace of Ideas**

While the idea of academic freedom pertains to faculty as opposed to students, it is worth mentioning in the present discussion because it reflects a relevant university wide value.

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James J. Rhatigan, *The History and Philosophy of Student Affairs*, in *The Handbook of Student Affairs Administration*, 16 (Margaret J. Barr and Mary K. Desler eds., 2000) (emphasis added) (quoting National Association of Student Personnel Administrators, Points of View (1989)).

88 It should be noted that many recognized student organizations are exclusive in their membership. Honor societies such as Phi Beta Kappa or Golden Key exclude those students who do not qualify academically. Though some colleges have required fraternities to admit women the vast majority have separate houses for men and women. Intramural sports have individual leagues for men and women in addition to coeducational leagues to meet the needs of all students. Unlike some of these examples the fraternity at UNC is not limiting membership based on immutable characteristics such as race or gender, but rather on a belief. David French, Religious Freedom v. Civil Rights, Online Interview with Burton Bullag (Jan. 27, 2005) (transcript on file with author).

89 *Id.*

90 *Supra* note 64 and accompanying text.

91 A 1915 statement by the American Association of University Professors (AAUP) refused to confer the status of university on religious institutions of higher education because they were as antithetical to the freedom of inquiry. Stanley Fish, *What's Sauce for One Goose: The Logic of Academic Freedom*, in *Academic Freedom and the Inclusive University*, 4 (Sharon E. Kahn and
and students are the beneficiaries of an ethos of academic freedom. The Court has recognized academic freedom as an institutional value in numerous decisions. The Grutter Court noted, “[w]e have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” In Rosenberger the Court also highlighted this policy consideration of the university as a university objective. “For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”

An understanding of academic freedoms relation to religious freedom and inclusion in the University begins with defining the concept. However, a precise definition of academic freedom is

Dennis Pavlich eds. 2000). Stanley Fish believes that “in an institution founded on dogma, some avenues of inquiry may have been closed off even before the classroom doors open.” Id. But see generally ANTHONY J. DIEKEMA, ACADEMIC FREEDOM & CHRISTIAN SCHOLARSHIP 8 (2000). Diekema, the former President of Calvin College, believes that academic freedom is vital even on the campuses of Christian institutions, and that academic scholarship from a Christian worldview can contribute uniquely to the world of academia. Id. at 110-111.

92 “It [academic freedom] arises from the essence, the very "soul" of the academy.” ANTHONY J. DIEKEMA at 8. The mission statement of the University of the University of North Carolina;

The University exists to teach students at all levels in an environment of research, free inquiry, and personal responsibility; to expand the body of knowledge; to improve the condition of human life through service and publication; and to enrich our culture.

To fulfill this mission, the University must:

provide high-quality undergraduate instruction to students within a community engaged in original inquiry and creative expression, while committed to intellectual freedom, to personal integrity and justice, and to those values that foster enlightened leadership for the State and the nation. . . .


93 Id. at note 1 page 8.
94 539 U.S. 306 at 328.
95 Rosenberger, 515 U.S. at 720.
difficult to find.\textsuperscript{96} As a concept it has existed in western society since the time of Plato, whose academy, “alive with the recorded dialogues of Socrates, was dedicated to the art of critical debate, the posing of questions, and the search for solutions.”\textsuperscript{97} This quote provides some guidance on a definition of academic freedom, it is a concept related to debate, questioning and searching for answers to those questions generated from debate.

Diekema proposes that academic freedom is “the principle in the academy which, while holding to the universal merits of objectivity and reason, both acknowledges the legitimacy (and inevitability) of varied worldviews among professors and insists on the clear articulation of the fundamental presuppositions which characterize those worldviews.”\textsuperscript{98} Under this definition academic freedom is not mutually exclusive with religious thought.\textsuperscript{99} Rather a religiously motivated worldview is as legitimate in the debate of the academy as a secularly motivated worldview. Therefore an institution of higher education dedicated to academic freedom for its professors is doctrinally inconsistent when it de-legitimizes a worldview by forcing upon its adherents the Hobbesian choice of conformity or expulsion.

\textbf{VI. Conclusion; A Proposed Resolution}

In light of the preceding concerns college and university administrators would be best served to exempt religious organizations from their non-discrimination policies. Exemption would recognize that religious organizations, even those which are limiting in their membership are vital to the development of the whole person.\textsuperscript{100} These organizations also play a role in the robust

\textsuperscript{96} ROBERT K. POCH, ACADEMIC FREEDOM IN AMERICAN HIGHER EDUCATION: RIGHTS RESPONSIBILITIES AND LIMITATIONS XV (1993) \textit{quoting} William Kaplan, The Law of Higher Education 180 (1985). The concept of academic freedom eludes precise definition. It is a concept that draws from both the world of education and the world of law. Courts have increasingly used academic freedom as the catch-all term to describe the legal rights and responsibilities of the teaching profession. \textit{Id.} \textit{See also} ANTHONY J. DIEKEMA at 4-5.

\textsuperscript{97} ROBERT K. POCH, ACADEMIC FREEDOM IN AMERICAN HIGHER EDUCATION; RIGHTS RESPONSIBILITIES AND LIMITATIONS 3 (1993).

\textsuperscript{98} \textit{Id.} at 85.

\textsuperscript{99} Supra note 87.

\textsuperscript{100} Supra notes 83-85 and accompanying text.
exchanging of ideas that is the university, and contribute to campus diversity. Additionally, exemption would recognize that religion has a reserved place on campus as part of the history of education.

Furthermore, there is both university and legal precedent for such an action. Rosenberger and Widmar provide legal access to campus facilities and student organization monies. Dale provides a private organization the right to choose its membership based on its beliefs. At the institutional level, the Ohio State University settled their lawsuit with their chapter of the Christian Legal Society by rewriting their nondiscrimination policy to exempt religious organizations.

However the legitimate concerns of LGBT students must simultaneously be taken into account. Institutions which do not have established offices or officers to address LGBT student issues should look into starting one on their campus. Establishing such a position will reassure the LGBT population that the campus is not just “tolerating” their presence, but is actively supporting them as an important part of the campus community. By ensuring that the environment is reasonable for each of these groups the university can serve best serve its students in their personal development, and serve society by enabling debate and the reanalysis of ideas.

101 Supra notes 88- 94 and accompanying text.
102 The historical role of religion on campus begs the question of intent with regards to the question of how compelling an interest the state has in avoiding the establishment of religion at a public university. See generally Patrick M. Garry, Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion, 57 Fla. L. Rev. 1.
103 Supra notes 64- 72 and accompanying text.
104 Supra note 81 and accompanying text.
105 Burton Bollag at A33.
106 Supra notes 46- 47 and accompanying text.
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