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Gay Rights Coalition v. Georgetown University: Failure to Recognize a Catholic University's Religious Liberty

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COMMENT

GAY RIGHTS COALITION v. GEORGETOWN UNIVERSITY: FAILURE TO RECOGNIZE A CATHOLIC UNIVERSITY'S RELIGIOUS LIBERTY

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The first amendment of the United States Constitution[1] provides for the protection of religious liberty by absolutely prohibiting the proscription by government of any religious belief.[2] However, while the freedom

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[1] "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The religion clauses apply to state action as well through operation of the due process clause of the fourteenth amendment. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1156 (2d ed. 1988).

[2] *See* 3 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 21.6, at 394 (1986). "The prohibition of any religious belief by the government could never withstand analysis under the religion clauses. These clauses have proscribed all government judgments concerning the propriety or truthfulness of religious doctrine." *Id.*

The United States Supreme Court has interpreted the free exercise clause to constitute an absolute prohibition against governmental regulation of religious beliefs. *See, e.g.*, Gillette v. United States, 401 U.S. 437, 462 (1971) (free exercise clause bars "interference with the dissemination of religious ideas"); Braunfeld v. Brown, 366 U.S. 599, 603 (1961) ("freedom to hold religious beliefs and opinions is absolute"); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952) (religious groups have "power to decide for themselves, free from

to believe is absolute, religious groups engaged in secular activities will not be excused from compliance with governmental regulation of their conduct when the state can establish the existence of a compelling state interest[3] and the absence of less restrictive means of achieving that interest.[4] The judicial approach to determining the validity of free exercise

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state interference, matters of church government as well as those of faith and doctrine"); *see also* Sherbert v. Verner, 374 U.S. 398, 402 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such. Government may neither compel affirmation of a repugnant belief nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities.") (citations omitted); Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961) (statute requiring declaration of belief in God as test for public office violates free exercise clause).

In its initial interpretation of the free exercise clause in Reynolds v. United States, 98 U.S. 145 (1878), the Supreme Court noted the distinction between freedom to believe and freedom to act. "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166. With the adoption of the free exercise clause, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." *Id.* at 164; *see* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) ("conduct remains subject to regulation for the protection of society"); *see also Braunfeld*, 366 U.S. at 607-09 (permitting application of Sunday closing laws to orthodox Jewish merchants); Prince v. Massachusetts, 321 U.S. 158, 170-71 (1944) (upholding conviction of Jehovah's Witness for furnishing minor with religious literature to sell on street in violation of state's child labor law); *Reynolds*, 98 U.S. at 166 (refusing to exempt Mormons from application of criminal anti-polygamy statute).

[3] *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978) (when fundamental right is at stake, burden is on government to show existence of compelling interest). The government may justify a limitation of religious liberty by showing that it is essential to accomplish an overriding governmental interest. *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982) (government's interest in efficient social security system justifies forcing Amish employer to comply with law in violation of his faith); Two Guys v. McGinley, 366 U.S. 582 (1961) (interest in uniform day of rest held sufficiently compelling); McGowan v. Maryland, 366 U.S. 420 (1961) (same). "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Sherbert*, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

Once the existence of a compelling state interest has been established, there must be a determination of whether the interests of government are sufficient to overcome a defense based on a free exercise. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 1076-78 (3d ed. 1986). "[O]nly those interests of the highest order and those not otherwise served" will be considered sufficiently compelling. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); *see also* Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 359 n.55 (1980) (suggesting method for determining whether state's interest is compelling).

[4] *See* Thomas v. Review Bd., 450 U.S. 707, 718 (1981) ("state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"). The burden imposed upon the religious group must be "narrowly tailored" to achieve the government's objective. *See, e.g.*, Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 19 (1986) (order awarding access to company's billing envelopes held not to be narrowly tailored means of furthering state's interest in promoting speech by ex-

claims has been to balance the state's interest in regulation against the resulting burden on religious practice.[5] Recently, in *Gay Rights Coalition v. Georgetown University*,[6] the District of Columbia Court of Appeals ruled that the District of Columbia's interest in eradicating sexual orientation discrimination[7] was sufficiently compelling to "outweigh" any resulting burden that would be placed on a Catholic university's free exercise of religion.[8]

In *Gay Rights Coalition*, two student gay rights groups at Georgetown University, the Gay People of Georgetown University ("GPGU") and the Gay Rights Coalition of Georgetown University Law Center

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posing customers to variety of views). *See generally* L. TRIBE, *supra* note 1, at 1242-51.

[5] *See* 3 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 2, § 21.8, at 402. The balancing test "implies that the degree of burden on religious activity is to be balanced against the importance of the state interest and the degree to which it would be impaired by an accommodation for the religious practice." *Id.*; *see, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (governmental interest in "eradicating racial discrimination in education" was overriding and sufficiently compelling); *see also* Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1519 (1979) (most significant variables in balancing test "are nature and strength of the governmental interest and the extent to which it can be realized if a religious exemption is granted"). The Supreme Court has indicated that "a State's interest . . . however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights . . . protected by the free exercise clause." *Yoder*, 406 U.S. at 214. *But cf.* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969) (discussing standards and guidelines in lieu of balancing test).

If the government fails to demonstrate a sufficiently compelling interest, the free exercise claim will prevail. *See Thomas*, 450 U.S. at 719 (governmental interest of avoiding "widespread unemployment" insufficient to justify infringement on religious freedom of Jehovah's Witness who refused to work on military project); *Yoder*, 406 U.S. at 214, 234 (state's interest in enforcing compulsory school attendance not of "sufficient magnitude to override the interest" of Amish to educate their own children); *Sherbert*, 374 U.S. at 407-09 (state lacked compelling interest to justify denial of unemployment benefits to Sabbatarian who refused to work on Saturday and was fired); Follett v. Town of McCormick, 321 U.S. 573, 576-78 (1944) (ordinance imposing license tax on Jehovah's Witness who distributed religious materials violated first amendment).

[6] 536 A.2d 1 (D.C. 1987).

[7] This interest has been codified in D.C. CODE ANN. § 1-2501 (1987), which provides:

> It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of [various characteristics including sexual orientation].

Id.

In order to ensure equality of treatment in education, D.C. CODE ANN. § 1-2520(1) (1987) provides that "[i]t is an unlawful discriminatory practice . . . for an educational institution . . . [t]o deny, restrict, or to abridge or condition the use of, or access to, any of its facilities and services to any person . . . based upon . . . sexual orientation." *Id.* The statute defines "sexual orientation" to include "male or female homosexuality." *Id.* § 1-2502(28).

[8] *Gay Rights Coalition*, 536 A.2d at 5.

("GRC"),[9] sought to obtain "University Recognition" and equal access to the facilities and services accompanying that status.[10] Georgetown denied official recognition, concluding that such endorsement would be inappropriate for a Catholic university.[11] Subsequently, both groups brought suit against Georgetown alleging that refusal to grant the requested status constituted a violation of the District of Columbia's Human Rights Act ("Act"),[12] which prohibits discrimination by an educational institution against any individual based on sexual orientation.[13] The superior court partially granted the student groups' motion for summary judgment on the statutory issue and ordered that the only issue set for trial would be the validity of Georgetown's alleged constitutional defense.[14] The court ruled after trial that the Act was unconstitutional as applied to the University in light of the free exercise clause of the first amendment.[15]

On appeal, the District of Columbia Court of Appeals severed the "artificial connection" between the "endorsement" and the tangible benefits contained in "University Recognition."[16] Writing for the majority,

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[9] *See id.* at 8-9. The GPGU was initially organized on campus on October 13, 1977 and held weekly meetings thereafter. *Id.* Similar actions took place when the GRC was organized at the Law Center. *Id.*

[10] *Id.* at 14. Both groups were granted "Student Body Endorsement." *Id.* However, after two attempts, neither group was able to obtain "University Recognition." *Id.* As a result, the groups were entitled to receive assistance from the Student Government and use university facilities, but were specifically denied (i) use of a campus mailbox, (ii) use of the Computer Label Service, (iii) use of the mailing services, and (iv) the right to apply for funding. *Id.* at 10.

[11] *Id.* at 11-12. In denying "University Recognition" the administration explained:

> This situation involves a controversial matter of faith and the moral teachings of the Catholic Church. "Official" subsidy and support of a gay student organization would be interpreted by many as *endorsement of the positions taken by the gay movement on a full range of issues.* While the University supports and cherishes the individual lives and rights of its students it will not subsidize this cause. *Such an endorsement would be inappropriate for a Catholic University.*

Memorandum from Dean W. Schuerman to the Student Government (Feb. 6, 1979), *reprinted in Gay Rights Coalition*, 536 A.2d at 11-12 (emphasis added by court). *See generally* HOMOSEXUALITY AND THE MAGISTERIUM: DOCUMENTS FROM THE VATICAN AND THE U.S. BISHOPS 1975-1985 (J. Gallagher ed. 1986) [hereinafter HOMOSEXUALITY AND THE MAGISTERIUM].

[12] *See Gay Rights Coalition*, 536 A.2d at 14.

[13] *See supra* note 7 and accompanying text.

[14] *See Gay Rights Coalition*, 536 A.2d at 14.

[15] *Id.* at 16.

[16] *Id.* at 5. Neither Georgetown nor the student groups requested that the "endorsement" element of "University Recognition" be distinguished from the "tangible benefits" that accompany the status. *Id.* at 20 n.16. However, Judge Mack determined that this separation was "fundamental" and based her analysis on that distinction. *Id.* at 20. This analysis was strongly rejected by Judge Ferren, concurring in part and dissenting in part, who criticized the majority's attempt to "erroneously distinguish between tangible and intangible benefits

Judge Mack declared that the Act did not require one private actor to "endorse" another and determined that, while the statute did not require Georgetown to provide "University Recognition,"[17] it did forbid the University from denying "facilities and services" to the student groups on the basis of sexual orientation.[18] The court acknowledged that enforcement of the Act burdened Georgetown's free exercise of religion,[19] but held that the District of Columbia's interest in eradicating sexual orientation discrimination was sufficiently compelling to override the University's free exercise claim.[20]

In vigorously dissenting to this part of the opinion,[21] Judge Belson asserted that a violation of the Act would require a showing of discrimination based on one's status as a member of a protected group.[22] The dissent argued that Georgetown denied "University Recognition" to the two groups because of their promotion of ideas and activities antithetical

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in evaluating the reach of the Human Rights Act." *Id.* at 47 (Ferren, J., concurring in part, dissenting in part).

[17] *Id.* at 39. The majority accepted the trial court's finding that a grant of "University Recognition" by Georgetown would necessarily include "an institutional 'endorsement' of the recipient student group." *Id.* at 19 n.14. Judge Mack described the grant of "University Recognition" as "a symbolic gesture, a form of speech by a private, religiously affiliated educational institution." *Id.* at 20. The court, in surveying the free speech cases, quoted West Virginia Board of Education v. Barnette, 319 U.S. 624, 634 (1943), and concluded that the Human Rights Act could not constitutionally require the granting of "University Recognition," thereby avoiding the issue of Georgetown's free exercise defense. *Gay Rights Coalition*, 536 A.2d at 22-26 ("state has no 'power to force an American citizen publicly to profess any statement of belief' "). On statutory, rather than constitutional grounds, the court determined that Georgetown's refusal did not violate the statute. *Id.* at 5.

In dictum, however, the court concluded that "[g]overnment compulsion to grant 'University Recognition' would threaten both the free speech and free exercise guarantees of the First Amendment." *Id.* at 25; *see also infra* note 44 and accompanying text (discussing compelled expression).

[18] *Gay Rights Coalition*, 536 A.2d at 39. The court determined that the Human Rights Act required Georgetown "to equally distribute, without regard to sexual orientation, the tangible benefits." *Id.* at 26. The court also concluded that a review of the trial record revealed "no genuine dispute that the tangible benefits were denied on the basis of sexual orientation. The Human Rights Act was violated to that extent." *Id.*

[19] *Id.* at 31. Although the court determined the "University Recognition" question solely on statutory grounds, it did consider Georgetown's free exercise claim concerning the failure to provide tangible benefits. *Id.* at 30-39.

[20] *Id.* at 38.

[21] The *Gay Rights Coalition* court was greatly divided, with two concurring opinions and four separate opinions concurring in part and dissenting in part.

[22] *See Gay Rights Coalition*, 536 A.2d at 65-66 (Belson, J., concurring in part, dissenting in part). Judge Belson asserted that the Act clearly does not prohibit discrimination based upon a group's advocacy. "Rather, it prohibits discrimination against persons based upon their 'sexual orientation' which, in the words of the statute, 'means male or female homosexuality, heterosexuality and bisexuality, by preference or practice.' " *Id.* at 65 (Belson, J., concurring in part, dissenting in part) (quoting D.C. CODE ANN. § 1-2502(28) (1987)).

to Catholic teachings, rather than their status as homosexuals.[23] Judge Belson criticized the majority's "consistent short-weighting of Georgetown's first amendment rights in the constitutional balancing process"[24] and concluded that even if there was a valid finding that Georgetown had violated the statute, the University should prevail based on its constitutional rights to free speech and free exercise of religion.[25]

The *Gay Rights Coalition* court has construed the Act to require Georgetown University to violate its own religious obligations by subsidizing a doctrine of sexual ethics that directly conflicts with the teachings of the Roman Catholic Church. It is submitted that the District of Columbia Court of Appeals did not adequately balance Georgetown's free-exercise claim against the District's interest in eradicating sexual orientation discrimination. This Comment will examine the extent of the burden which the Act places on Georgetown's religious liberty and will assert that the court has intruded too deeply into intimate matters of religious doctrine. Furthermore, this Comment will assert that Georgetown's first amendment rights have been unnecessarily abridged due to the presence of an alternative solution that would be less restrictive of the University's religious exercise.

THE RELIGIOUS OBJECTION TO STATUS DISCRIMINATION AGAINST HOMOSEXUALS

Georgetown is a Catholic university which abides by the teachings of the Roman Catholic Church.[26] The Catholic Church has established a clear doctrine regarding homosexuality.[27] As a Catholic institution, Georgetown may neither condone nor remain neutral towards homosexuality or the homosexual lifestyle.[28] In an attempt to assume a public

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[23] *See id.* at 64-66 (Belson, J., concurring in part, dissenting in part). Judge Belson presented an analogous situation in which Georgetown could justifiably deny recognition to a group actively advocating and facilitating acts of adultery and fornication. *See id.* at 66 (Belson, J., concurring in part, dissenting in part).

[24] *Id.* at 63 (Belson, J., concurring in part, dissenting in part).

[25] *Id.* at 74 (Belson, J., concurring in part, dissenting in part). Judge Belson agreed with the majority's conclusion that the first amendment protected Georgetown from being required to endorse the groups. However, he criticized the majority's "inconsistent" conclusion that the University could be forced to subsidize the groups' activities. *Id.* at 63 (Belson, J., concurring in part, dissenting in part); *see also supra* note 17 and accompanying text (discussing Georgetown's free speech claim).

[26] *See Gay Rights Coalition*, 536 A.2d at 5-8. The University's Faculty Handbook "describes 'Georgetown University as an American, Catholic, Jesuit institution of higher learning,' seeking to 'uphold, defend, propagate, and elucidate the integral Christian and American cultural heritage.' " *Id.* at 7 (quoting Handbook).

[27] *See infra* note 28 and accompanying text.

[28] *See* Statement of Archbishop John R. Roach on Homosexuality (Jan. 1978), *reprinted in* HOMOSEXUALITY AND THE MAGISTERIUM, *supra* note 11, at 10. "[T]he Catholic community

stance that would be consistent with the normative teachings of the Church,[29] Georgetown denied the GPGU and GRC access to those "facilities and services" that would indicate a position of University endorsement.[30] However, the Church prohibits all Catholics from discriminating against people solely due to their "status" as homosexuals.[31] Therefore,

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recognizes and affirms the human dignity and worth of homosexuals as persons, and accordingly calls for the protection of their basic human rights . . . however, it cannot sanction the gay lifestyle as a morally acceptable alternative to heterosexual marriage." *Id.*

> [H]omosexuals are certainly to be treated with understanding and encouraged to hope that they can some day overcome their difficulties and their inability to fit into society in a normal fashion. . . . However, no pastoral approach may be taken which would consider these individuals morally justified on the grounds that such acts are in accordance with their nature. For, according to the objective moral order homosexual relations are acts deprived of the essential ordination they ought to have.

Sacred Congregation for the Doctrine of the Faith, Declaration on Some Questions of Sexual Ethics (Dec. 29, 1975), *reprinted in* 21 THE POPE SPEAKS 58, 66 (1976). The normative teachings of the Church indicate that "the exercise of the sexual function has its true meaning and is morally good only in legitimate marriage." *Id.* at 64. *See generally* M. DURKIN, FEAST OF LOVE: POPE JOHN PAUL II ON HUMAN INTIMACY (1983).

[29] *See supra* note 28 and accompanying text. One commentator has pointed out the difficulty of remaining faithful to one's religious beliefs in a secular society:

> [T]he cost to a principled individual of failing to do his moral duty is generally severe, in terms of supernatural sanction or the loss of moral self-respect. In the face of these costs, the individual's refusal to obey the law may be inevitable, and therefore in some perhaps unusual sense of the word, involuntary.

Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 337 (1969).

The court noted that state universities may not constitutionally withhold recognition of homosexual student groups. *Gay Rights Coalition*, 536 A.2d at 20 n.15. A university acting "as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent." Healy v. James, 408 U.S. 169, 187-88 (1972). However, the court concluded that Georgetown, as a private university, was under no such restriction. *Gay Rights Coalition*, 536 A.2d at 20 n.15.

[30] *See supra* notes 10-11 and accompanying text. It is asserted that each of these additional "facilities and services" would imply public approval, by linking the name of Georgetown University with the GPGU and the GRC. Judge Belson addressed this concern by noting that "[a]s a university, Georgetown is more than just bricks and mortar; it has a presence beyond its physical confines, and must be concerned with its relationship with several categories of persons who are not physically present at its campus, *e.g.*, potential students and potential benefactors." *Gay Rights Coalition*, 536 A.2d at 71 (Belson, J., concurring in part, dissenting in part).

[31] *See* Statement of Massachusetts Catholic Bishops (May 31, 1984), *reprinted in* HOMOSEXUALITY AND THE MAGISTERIUM, *supra* note 11, at 97.

> Contemporary scholars make an important distinction between homosexual orientation . . . and homosexual activity . . . . Such orientation is regarded generally as morally neutral; it is viewed as a condition which, through no fault of the person involved, implies a lack of complete sexual integration. Homosexual activity, on the other hand, is seen as something objectively wrong inasmuch as it falls short of the ultimate norm of genital expression, i.e., a relationship between male and female within the marital union.

Id.

Georgetown was prevented by Roman Catholic doctrine from discriminating against the groups because of the sexual orientation of their members.[32] It is emphasized that a question still exists as to whether Georgetown's actions violated the Act's prohibition against discrimination based on status alone.[33]

Therefore, Georgetown is obligated to refrain from any practices that would result in discrimination against students due to their status as homosexuals. *See Gay Rights Coalition*, 536 A.2d at 73 n.17 (Belson, J., concurring in part, dissenting in part). Both the GPGU and GRC acknowledged that homosexual students were provided an equal opportunity to "(a) receive a degree, (b) participate in student activities, (c) attend classes, (d) participate in loan programs, (e) participate in athletic programs, (f) participate in awards and honor programs, [and] (g) use the placement service." *Id.* (Belson, J., concurring in part, dissenting in part).

> All such forms of prejudice fall short of the Christian norm and must be combatted to the extent possible . . . . [T]he prejudice against homosexuals is a greater infringement of the norm of Christian morality than is homosexual orientation or activity. The enormity of the moral evil of such prejudice should be obvious.

HOMOSEXUALITY AND THE MAGISTERIUM, *supra* note 11, at 49-50.

It is asserted that Georgetown accommodated the student groups to the fullest extent possible without violating the tenets of its faith, and sought a means of assuring the groups' members "every human and civil right which is their due as persons, without, however, neglecting the rights of the larger community." Statement of Archbishop John R. Roach on Homosexuality, *supra* note 28, at 10.

[32] *See supra* note 31 and accompanying text.

[33] *See Gay Rights Coalition*, 536 A.2d at 67 n.7 (Belson, J., concurring in part, dissenting in part). Judge Belson suggested that the trial court failed to determine "that Georgetown denied recognition because of the 'sexual orientation of any individuals' " and concluded that the case should be remanded "for findings of fact and conclusions of law addressed specifically to the statutory issues." *Id.* at 67 & n.7 (Belson, J., concurring in part, dissenting in part).

Judge Mack concluded that President Healy's correspondence with the Chancellor of the Medical Center offers "conclusive evidence that Georgetown took homosexual orientation into account in its recognition procedures." *Id.* at 28 (citing letter from President T. Healy, S.J. to Chancellor M. McNulty (May 8, 1980)). It is submitted that Judge Belson was correct in asserting that this conclusion was not adequately supported by the evidence at hand.

In Watkins v. United States Army, 847 F.2d 1329, *reh'g en banc granted*, 847 F.2d 1362 (9th Cir. 1988) (en banc), the Ninth Circuit held that an Army regulation violated the constitutional guarantee of equal protection since it served to "target homosexual orientation itself." *Id.* at 1337. Under that regulation, anyone who acknowledged their homosexuality would be "conclusively barred from Army service." *Id.* However, in a vigorous dissent, Judge Reinhardt explained that:

> [H]omosexuals are defined by their conduct—or, at the least, by their desire to engage in certain conduct. With other groups, such as blacks or women, there is no connection between particular conduct and the definition of the group. When conduct that plays a central role in defining a group may be prohibited by the state, it cannot be asserted with any legitimacy that the group is specially protected by the Constitution.

Id. at 1357 (Reinhardt, J., dissenting). While *Watkins* stands for the proposition that discrimination against persons of homosexual orientation is unconstitutional, it is submitted

It is suggested that Georgetown's religious objections were directed only towards the promotion of homosexual conduct.[34] The University had traditionally granted "University Recognition" to student organizations whose stated purposes were civically oriented and, therefore, broadly compatible with Catholic doctrine.[35] Since the stated purposes of the GPGU and GRC were presented as encouraging homosexual behavior,[36] rather than merely promoting gay rights in general, it was determined by Georgetown officials that the University would not subsidize groups that encouraged activity antithetical to Church teachings.[37] The court's holding in *Gay Rights Coalition* fails to adequately explain how such a determination by University officials rises to the level of "status" discrimination in light of the Church's antidiscriminatory prohibitions.[38] Thus, it is highly questionable whether Georgetown even violated the District of Co-

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that the case illustrates the difficulty of distinguishing "homosexual orientation" from "homosexual conduct."

[34] *See Gay Rights Coalition*, 536 A.2d at 18. President Healy had "testified that the University does not distinguish between students on the basis of their sexual orientation and said that group activity merely promoting the legal rights of gay people would present no religious conflict." *Id.*

[35] *See id.* at 17. Georgetown had granted "University Recognition" to the Jewish Students Association, the Democratic Socialist Organizing Committee, and others. *Id.* at 17-18. President Healy noted that if the GPGU and the GRC were able to conform so as to be broadly compatible with Church teachings, there would be no bar to recognition. *Id.*; *see supra* note 28 and accompanying text.

When a women's rights group had posted notices concerning artificial birth control and abortion, President Healy investigated to determine whether the occurrence was "an isolated instance or whether [they were] an essential part of the collective activity." *Gay Rights Coalition*, 536 A.2d at 18.

[36] *See Gay Rights Coalition*, 536 A.2d at 8 nn.5-6. The matter which gave rise to the greatest concern among the Georgetown officials was a provision in GPGU's Constitution which provided that among its purposes was "the development of responsible sexual ethics consonant with one's personal beliefs." *Id.* at 18. The University was similarly concerned with GRC's stated "commitment to the provision of information to gay and lesbian law students concerning 'Washington's gay community.'" *Id.* Thus, it was not the mere status of the groups' members which created the conflict with Church doctrine, but rather, the stated purposes of these groups which gave rise to such a conflict.

[37] *See id.* at 19. President Healy stated that "a grant of 'University Recognition' to GPGU and GRC would conflict with Georgetown's duty not to undermine the Roman Catholic teaching that 'human sexuality can be exercised only within marriage.'" *Id.*

[38] *See supra* note 31 and accompanying text. For an illustration of "status" discrimination against homosexuals, see Lesbian/Gay Freedom Day Comm., Inc. v. United States Immigration & Naturalization Serv., 541 F. Supp. 569, 588 (N.D. Cal. 1982) (government policy of excluding alien homosexuals from entering United States solely because of their status as homosexuals held unconstitutional), *aff'd sub nom.* Hill v. United States Immigration & Naturalization Serv., 714 F.2d 1470 (9th Cir. 1983). *But see In re* Longstaff, 716 F.2d 1439, 1450 n.56 (5th Cir. 1983) (by enacting Immigration & Nationality Act § 212(a)(4), Congress "clearly intended" to engage in status discrimination against homosexuals), *cert. denied*, 467 U.S. 1219 (1984).

lumbia's Human Rights Act.

THE BALANCING ANALYSIS

After concluding that the University had violated the Act,[39] the court proceeded to apply the "balancing" analysis to determine whether the government's interest in eliminating sexual orientation discrimination was sufficiently compelling to override Georgetown's constitutional defense.[40] However, the court erred by failing to consistently apply the "compelled speech" analysis throughout the balancing process. In addition, the court failed to appreciate the centrality of the religious beliefs that were threatened when it concluded that Georgetown's constitutional claims were "substantially" outweighed by governmental interests.

The *Gay Rights Coalition* court chose to distinguish "endorsement" from the various other tangible benefits contained in Georgetown's scheme of "University Recognition"[41] and proceeded to analyze each element separately.[42] Based on the plain meaning of the Act, the court concluded that the University was not required to "endorse" any student group.[43] In dictum, the court explained that any construction of the Act that would require such "endorsement" would be violative of the first amendment's prohibition against compelled expression.[44] The court then determined that the tangible benefits in question were merely "facilities and services"[45] and weighed the governmental interest only against Georgetown's free exercise defense.[46] As a result, the court apparently concluded that a compelled expression analysis was unnecessary because the tangible benefits at issue were not the equivalent of speech.[47] Conse-

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[39] *Gay Rights Coalition*, 536 A.2d at 30.

[40] *See id.* at 30-39; *see also supra* note 5 and accompanying text (describing balancing test).

[41] *See Gay Rights Coalition*, 536 A.2d at 20. The court declared that this distinction was "fundamental." *Id.*

[42] *Id.* at 21-30.

[43] *Id.* at 21. The court reasoned that "the statute prohibits only a discriminatory denial of access to 'facilities and services' provided by an educational institution" and concluded that an " 'endorsement' is neither." *Id.* (citation omitted).

[44] *See id.* at 5. Although the court felt that it had construed the Act in such a way as not to implicate Georgetown's free speech protections, *see id.*, it nevertheless discussed a number of Supreme Court cases illustrating the fact that Georgetown could not be forced to "embrace a repugnant philosophy." *Id.* at 22-26; *see, e.g.*, Wooley v. Maynard, 430 U.S. 705, 713 (1977) (state cannot constitutionally require individual to participate in dissemination of ideological message); West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (compulsory flag salute violates first amendment).

[45] *Gay Rights Coalition*, 536 A.2d at 20 (citing D.C. CODE ANN. § 1-2520 (1987)); *see supra* note 43.

[46] *See Gay Rights Coalition*, 536 A.2d at 38-39.

[47] *See id.* at 20. The court concluded that the tangible benefits in question were "not an abstract expression of the University's moral philosophy." *Id.* The court also noted that

quently, the court erred in dismissing the issue of compelled speech.

In *Wooley v. Maynard*,[48] the Supreme Court declared that the government may not compel a person to be a vehicle for an ideological point of view with which he disagrees.[49] Thus, it would appear that this absolute protection would enable Georgetown to refrain from directly subsidizing the activities of GPGU and GRC. Consequently, any construction of the Act that would require the University to publicly associate itself with the activities of these groups[50] would be seen as an unconstitutional intrusion upon Georgetown's right to free speech. Therefore, the court's failure to conduct a free speech analysis with regard to the tangible benefits resulted in a "short-weighting of Georgetown's first amendment rights in the constitutional balancing process."[51]

GEORGETOWN'S CONSTITUTIONAL CLAIMS WERE NOT SUBSTANTIALLY OUTWEIGHED

In order to ensure fairness in the balancing process, a reviewing court should always consider the centrality and sincerity of the religious beliefs

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Georgetown never alleged that compelled access to these facilities and services would "constitute a forced subsidy of speech to which it is opposed." *Id.* at 26 n.21. It is submitted that Georgetown never made this assertion and chose to litigate the case on an "all or nothing basis" because Georgetown had no indication that a reviewing court would choose to make such a distinction between the tangible and intangible benefits flowing from University Recognition. *See id.* at 20 n.16.

[48] 430 U.S. 705 (1977).

[49] *Id.* at 713. The Supreme Court declared that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714; *see also* Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 20 (1986) (state requirement that public utility include in its billing envelopes speech of third party with whom utility disagreed "impermissibly burden[ed] appellant's First Amendment rights"). As Judge Mack pointed out, "the burden on the utility's First Amendment rights was of a degree considerably less intrusive than it is here." *Gay Rights Coalition*, 536 A.2d at 24 n.19.

[50] *See supra* notes 10, 11 & 30 and accompanying text. It is submitted that Georgetown refused to grant access to these facilities because it would result in the University's name being publicly associated with the group's activities. Georgetown had originally counterclaimed to prevent the student groups from using "Georgetown University" in their names but for undisclosed reasons chose not to appeal the trial court's dismissal of this claim. *Gay Rights Coalition*, 536 A.2d at 14 n.12. Although the *Gay Rights Coalition* court stated that the issue was no longer before them, it is asserted that this is actually an important basis for Georgetown's defense. It is still unclear whether these groups may use the Georgetown name. While Chief Judge Pryor determined that "Georgetown's refusal to allow the student groups to use its name [wa]s not unlawful discrimination[,]" *id.* at 40 (Pryor, C.J., concurring), Judge Ferren concluded that "Georgetown University may not lawfully refuse to accord the plaintiff gay rights groups . . . permission to use the university name." *Id.* at 46-47 (Ferren, J., concurring in part, dissenting in part).

[51] *Id.* at 63 (Belson, J., concurring in part, dissenting in part); *see also supra* note 3 and accompanying text (discussing compelling state interest).

involved and the extent to which they would be affected by regulation.[52] However, the *Gay Rights Coalition* court disregarded the sincerity of Georgetown's objections when it determined that compelled access to the tangible benefits would result in a "relatively slight burden on Georgetown's religious practice."[53] The court neglected to emphasize the fact that "compelled tolerance"[54] of GPGU and GRC by the University would result in the identification of Georgetown with these groups and would thus violate Georgetown's religious obligation to refrain from assuming a stance of neutrality or indifference towards the purposes of these groups.[55] Therefore, by failing to appreciate the full extent of the

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[52] Bagni, *supra* note 5, at 1519 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)). One commentator has suggested that a proper determination of the constitutionality of a statute would require the balancing of the governmental interest involved "against the claim for religious liberty, which would [in turn] require calculation of two factors: first, the sincerity and importance of the religious practice for which special protection is claimed; and second, the degree to which the governmental regulation interferes with that practice." Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 80 HARV. L. REV. 1381, 1390 (1967); *see also Gay Rights Coalition*, 536 A.2d at 45 (Newman, J., concurring) ("the Supreme Court has indicated that the compass of the right to free exercise of religion is measured not only by the importance of the governmental interest but by the nature of the burden imposed on the religious objector" (citing Braunfeld v. Brown, 366 U.S. 599, 606 (1961))); L. TRIBE, *supra* note 1, at 1244 ("clearly a conflict which threatens the very survival of the religion or the core values of a faith poses more serious free exercise problems than does a conflict which merely inconveniences the faithful").

[53] *See Gay Rights Coalition*, 536 A.2d at 38. Georgetown attempted to demonstrate that it had fully accommodated GPGU and GRC by classifying the few remaining benefits yet to be given to them as "relatively insignificant." *Id.* From this the court reasoned that total compliance with the Act would result in a "relatively slight" burden on Georgetown's first amendment rights. *Id.* It is asserted, however, that the fact that Georgetown characterized the benefits to be derived by GPGU and GRC as "relatively insignificant" does not necessarily imply that the burden on its first amendment rights would also be "relatively slight."

[54] *See id.* at 58-59 (Ferren, J., concurring in part, dissenting in part). Judge Ferren concluded that the Act would require Georgetown merely to "tolerate" the groups and provide a forum for their views. *Id.* at 53 (Ferren, J., concurring in part, dissenting in part). By disagreeing with the majority's definition of "endorsement," Judge Ferren reasoned that a university would not be required to approve of ideas but would simply have "to let someone else have a say without indicating what [it] . . . think[s] about it." *Id.* at 59 (Ferren, J., concurring in part, dissenting in part). Judge Belson, however, defined "tolerate" to mean "to not interfere with; allow; permit" and concluded that "Georgetown has tolerated fully the activities of the student groups." *Id.* at 68 n.12 (Belson, J., concurring in part, dissenting in part).

[55] *See supra* note 28 and accompanying text. It is asserted that the "tangible benefits" at issue in this case are the equivalent of "endorsement." As Judge Ferren concluded, if the Act is construed so as to require compelled endorsement, it is difficult to "comprehend how enforcement of student access to visible, tangible benefits such as an office, a telephone, mailing services, and advertising privileges financed by the university would be any less evidently an unconstitutional requirement." *Id.* at 51 (Ferren, J., concurring in part, dissenting in part).

burden that was placed on Georgetown's rights to free exercise and free expression, the court attributed insufficient weight to Georgetown's constitutional claims in the balancing process.

It follows that the court erred in its determination that the government's legitimate interest in eradicating sexual orientation discrimination was sufficiently compelling to override Georgetown's constitutional defense.[56] Although the District of Columbia has chosen to attach great importance to this interest,[57] the Supreme Court has yet to identify homosexuals as a suspect or quasi-suspect class for equal protection purposes.[58] It is therefore suggested that Georgetown's constitutional claims were sufficient to overcome the asserted governmental interests.

LESS RESTRICTIVE ALTERNATIVES WERE AVAILABLE

The District of Columbia may only justify an inroad on Georgetown's religious liberty by showing that no less restrictive means were available to achieve the governmental interests involved.[59] Furthermore, if a construction of the Act is fairly possible by which the constitutional question may be avoided, then the court is mandated to construe the statute so as to avoid the issue of constitutionality.[60] Therefore, the *Gay Rights Coalition* court was required to interpret the Act so as to protect homosexuals against sexual orientation discrimination without unnecessarily burdening

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[56] *See Gay Rights Coalition*, 536 A.2d at 38. However, Judge Belson, in disagreeing with the majority, explained that "the act of . . . the District of Columbia Council, in identifying a governmental interest and adopting legislation to serve it, cannot, of itself, establish that the interest is so compelling as to override competing constitutional rights." *Id.* at 73 (Belson, J., concurring in part, dissenting in part). *See generally supra* note 5 and accompanying text (discussing balancing compelling state interest with sincere religious beliefs).

[57] *See* Howard Univ. v. Best, 484 A.2d 958, 978 (D.C. 1984) ("elimination of discrimination within the District of Columbia should have 'highest priority' ").

[58] *See* Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir. 1987) (noting that Supreme Court's decision in Bowers v. Hardwick, 478 U.S. 186 (1986), indicates Court would not find homosexuals to be suspect class). *But see* Watkins v. United States Army, 847 F.2d 1329, 1349 *reh'g en banc granted*, 847 F.2d 1362 (9th Cir. 1988) (en banc) (distinguishing *Padula* and concluding that persons of homosexual orientation constitute suspect group under equal protection doctrine). However, it is submitted that *Watkins* is distinguishable since it involved discrimination against persons based solely upon their "status" as homosexuals.

[59] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 602-04 (1983) (challenged regulation must be least restrictive means by which government can attain its compelling end); United States v. Lee, 455 U.S. 252, 257-60 (1982) (same); Thomas v. Review Bd., 450 U.S. 707, 718-19 (1981) (same). *See generally* L. TRIBE, *supra* note 1, at 846-59 (discussing requirement of least restrictive means to compelling end).

[60] *See* Machinists v. Street, 367 U.S. 740, 749 (1961) (federal statutes are to be construed to avoid serious doubt of their constitutionality). The Act must be construed so as to protect the rights of homosexuals without becoming unnecessarily entangled in a constitutional issue. *See generally* 1, 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION §§ 2.01, 45.11 (4th ed. 1985).

the University's constitutionally protected rights.

Since Georgetown's objections focused upon the stated purposes of GPGU and GRC, which implicitly included the promotion of homosexual conduct,[61] the court should have considered the option of having the groups restructure their constitutions to become more broadly compatible with the goals of the University.[62] Such an approach would have constituted the least restrictive means of promoting the District of Columbia's interest in eradicating sexual orientation discrimination, while still preserving Georgetown's first amendment rights.[63] Alternatively, the court could have chosen to grant the groups access only to those facilities and services that would not have been associated with the name of Georgetown.[64] A concurring jurist determined that this would result in a "separate but equal" treatment of homosexuals at the University.[65] However, it is asserted that students entering a Catholic university cannot reasonably expect direct subsidy of their promotion of activities antithetical to Church teachings.

CONCLUSION

The District of Columbia Court of Appeals has determined that the Human Rights Act requires religiously affiliated institutions to directly subsidize activities that are antithetical to their own religious beliefs. This construction, besides standing in direct opposition to the first amendment prohibition against compelled expression, significantly impairs the free exercise of religious beliefs by those institutions. In its attempt to provide for the protection of homosexual rights, the *Gay Rights Coalition* court has unconstitutionally attempted to promote social equality at the expense of religious liberty.[66]

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[61] *See supra* note 36 and accompanying text.

[62] *See supra* notes 36-37 and accompanying text. If the objectionable clauses of the constitutions were reworded so as to promote homosexual rights generally, rather than homosexual conduct, it is submitted that Georgetown would have no objection to providing access to all tangible benefits.

[63] *See supra* note 4 and accompanying text.

[64] *See supra* notes 10, 30 & 50 and accompanying text.

[65] *See Gay Rights Coalition*, 536 A.2d at 49 (Ferren, J., concurring in part, dissenting in part).

[66] Subsequent to the preparation of this Comment, Congress proposed an amendment to the District of Columbia Human Rights Act that would exempt religious institutions from compliance with the Act's provisions requiring recognition of homosexual organizations.

Originally introduced by Sen. William Armstrong (R-Colo.), the "Armstrong Amendment" would terminate all funding to the District of Columbia if the city does not enact changes to the Act so as to provide an exemption for religious educational facilities. The amendment states:

> Notwithstanding any other provision of the laws of the District of Columbia, it shall not be an unlawful discriminatory practice in the District of Columbia for any educa-

tional institution that is affiliated with a religious organization or closely associated with the tenets of a religious organization to deny, restrict, abridge, or condition—

(A) the use of any fund, service, facility, or benefit; or (B) the granting of any endorsement, approval, or recognition to any person or persons that are organized for, or engaged in, promoting, encouraging, or condoning any homosexual act, lifestyle, orientation, or belief.

The Nation's Capital Religious Liberty and Academic Freedom Act, Pub. L. No. 100-462, 102 Stat. 2283 (1988).

The District of Columbia Council has sought to challenge the propriety of Congress' attempt to condition the expenditure of public funds in this manner.