PENN STATE LAW REVIEW

Comments

Hey! Universities! Leave Them Kids Alone!:[1] *Christian Legal Society v. Martinez* and Conditioning Equal Access to a University's Student-Organization Forum

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I. INTRODUCTION

Imagine the following scenario: You are a student at the unimaginatively-named Public University. You and a handful of other students form a student organization on campus called "Students for World Peace" with the purpose of advocating world peace. Your organization applies for official recognition to take advantage of the benefits provided by the school's registered student organization program: use of classrooms to hold meetings; access to the email system and bulletin boards; the ability to request modest funds; and the

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1. Roger Waters' classic lyrics were the inspiration for this title: "We don't need no education. We don't need no thought control. No dark sarcasm in the classroom. Teachers leave them kids alone. Hey! Teacher! Leave them kids alone." PINK FLOYD, *Another Brick in the Wall (Part II)*, *on* THE WALL (Columbia Records 1979).

opportunity to dialog with other student groups. You willingly comply with the university's regulations, including the university's nondiscrimination policy. Citing its nondiscrimination policy, the university imposes an "accept-all-comers" policy, requiring student groups to accept any student for membership or leadership regardless of the student's beliefs. Your organization is granted official recognition.

After a successful inaugural year, your organization holds elections for the following academic year. To your dismay, a large handful of students who oppose world peace have joined the group and are now running for office. Unfortunately, because the university's accept-all-comers policy prohibits your group from adopting a selective membership policy, these peace-haters take over the organization. The newly elected board's first order of business is to change the organization's mission to impede world peace, believing that disharmony is good for society and that world peace is unattainable.

While some members of the United States Supreme Court think that such a "hostile takeover" of a student organization is unlikely,[2] the Court recently held in *Christian Legal Society v. Martinez*[3] ("*CLS*") that a university may condition official recognition of a student organization on the requirement that the organization accept all students who wish to participate regardless of status or beliefs.[4] As the scenario above suggests, however, if the group is not permitted to engage in selective membership, the Court's holding may have a significant impact on the ability of a student group to communicate its mission and effectuate its goals.[5] *CLS* is the latest Supreme Court case to consider university students' First Amendment rights in connection with a public university's ability to condition access to a student-group forum.[6] Many

2. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2992 (2010) (asserting that the Christian Legal Society's contention that "if organizations must open their arms to all . . . saboteurs will infiltrate groups to subvert their mission and message . . . strikes us as more hypothetical than real").

3. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010).

4. *Id*. at 2978.

5. While many of the cases discussed in this Comment concern the rights of religious student groups, the primary focus is on the student groups' free speech and expressive association rights and not their free exercise rights. Although a free exercise discussion is relevant and beneficial, it is beyond the scope of this Comment. Thus, the arguments made in this Comment are generally applicable to all student groups, whether religious, political, or philosophical, while keeping in mind that religious speech and association are key components of the discussion. In fact, in recent years religious student groups appear to be bearing the brunt of discriminatory restrictions in both higher education institutions and primary and secondary schools. *See* Richard F. Duncan, *Religious Civil Rights in Public High Schools: The Supreme Court Speaks on Equal Access*, 24 IND. L. REV. 111, 113-14 (1990).

6. *See Christian Legal Soc'y*, 130 S. Ct. at 2987 (noting that three Supreme Court cases specifically address this issue: Healy v. James, 408 U.S. 169 (1972), Widmar v.

universities create student-group forums to promote speech and debate on campus.[7] Often, universities will impose restrictions on student groups who wish to participate in the forum.[8]

Courts apply First Amendment public forum analysis[9] to determine the constitutionality of such restrictions.[10] The First Amendment's protection of speech, association, and religion are widely debated concerns on university campuses as they apply to students and student organizations.[11] The First Amendment to the Constitution provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[12]

Application of this constitutional provision to student-group forums raises significant questions about the extent to which public universities may restrict students' speech and associational rights on campus.[13]

Courts have long recognized that students do not "shed their constitutional rights to freedom of expression at the schoolhouse gate."[14]

Vincent, 454 U.S. 263 (1981), and Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995)).

7. *See generally* Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653 (1996) (noting the right of a student group's equal access to a university open forum must be balanced with a university's legitimate regulation of that forum). Paulsen astutely predicted that the "next generation of equal access issues" would be "equal access subject to what terms and conditions?" and noted one such condition for equal access would likely be a requirement of nondiscrimination on the basis of religion. *Id*. at 662-63.

8. *See* Julie A. Nice, *How Equality Constitutes Liberty: The Alignment of CLS v. Martinez*, 38 HASTINGS CONST. L.Q. 631, 633 (2011).

9. *See infra* notes 119-131 and accompanying text (discussing the limited public forum doctrine).

10. *See, e.g.*, Bd. of Regents of the Univ. of Wis. v. Southworth, 529 U.S. 217, 229-30 (2000) (finding First Amendment protections applicable to university student speech and applying forum analysis); Rosenberger, 515 U.S. at 830 (applying forum analysis).

11. *See* Clay Calvert and Robert D. Richards, Interview and Commentary, *Lighting a Fire on College Campuses: An Inside Perspective on Free Speech, Public Policy & Higher Education*, 3 GEO. J.L. & PUB. POL'Y 205, 206 (2005).

12. U.S. CONST. amend. I.

13. A related concern is whether a university may prohibit religious practice on campus or fund a religious student organization. Acknowledging that religious student groups can argue a free exercise claim, this Comment will focus only on the free speech and association claims of student groups.

14. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. . . . The Constitution says that

Courts also have recognized that the First Amendment permits "reasonable regulation of speech-connected activities in carefully restricted circumstances."[15] Thus, courts have deferred broadly to the discretion of universities in matters unique to the educational environment.[16] However, the question remains: when is a university permitted to restrict students' First Amendment rights? According to the Foundation for Individual Rights in Education, 67% of colleges unconstitutionally restrict student speech.[17] This figure is astonishing when one considers the notion that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[18] In fact, courts have consistently acknowledged that the college classroom deserves significant First Amendment protections because the classroom is "peculiarly the 'marketplace of ideas.'"[19] However, this principle, that student speech must be afforded First Amendment protection as an essential element of the exchange of ideas on a university campus, seems to have slipped past the attention of the Supreme Court's majority in *CLS*.[20]

The Supreme Court now permits a university to require student groups to accept-all-comers as a condition for access to a student-group forum.[21] Because a university's policy prohibiting selective membership

Congress (and the States) may not abridge the right to free speech. This provision means what it says.").

15. *Id*.

16. *See* Widmar v. Vincent, 454 U.S. 263, 268 n.5 (1981) ("A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.").

17. FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., SPOTLIGHT ON SPEECH CODES 2010 6 (2011), http://thefire.org/public/pdfs/312bde37d07b913b47b63e275a5713f4.pdf?direct (last visited July 16, 2011).

18. Healy v. James, 408 U.S. 169, 180 (1972) (citing Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

19. *Healy*, 408 U.S. at 180 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)); *see also* Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481 (2005) (noting the "essential purpose" of public universities is to "inspire the exchange of new and challenging ideas," which is precisely what the "Framers had in mind" when adopting the First Amendment's protection of free speech).

20. Adam Goldstein, *Supreme Court's CLS Decision Sucker-Punches First Amendment*, THE HUFFINGTON POST (June 29, 2010, 11:45 AM), http://www.huffingtonpost.com/adam-goldstein/supreme-courts-cls-decisi_b_628329.html (noting the Court's decision "helps no one to assert that public colleges can limit the constitutional rights of students whenever they can rephrase their desire to exclude viewpoints as a desire to include individuals").

21. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2978 (2010) (upholding university's "accept-all-comers" policy).

hinders student speech,[22] student groups and free speech advocates must consider extrajudicial measures to protect students' First Amendment interests. Such a solution may be found in the Equal Access Act,[23] which protects a student organization's right to access a student-group forum in public secondary schools.[24] Either Congress or a state legislature could enact legislation that would limit the ability of a public university to restrict access to its student-group forum. Such legislation could be drafted in a manner that both supports a university's educational goals and protects students' First Amendment rights.

This Comment will argue that the *CLS* decision diverges from prior Supreme Court precedents and disregards fundamental First Amendment principles, which will impact the speech and association rights of student organizations. Part II will survey Supreme Court precedents regarding the permissible scope of a university's regulation of access to a student-group forum. Part III will analyze *CLS*, contrasting the majority and dissenting opinions against the framework of the Court's prior student equal access cases. Part IV will assess the impact that *CLS* may have on the First Amendment rights of students in a student-group forum. Finally, this Comment will conclude with a proposal to adopt legislation that protects the equal access of student groups to a university student-group forum and preserves their free speech and association rights.

II. LEGAL BACKGROUND

The issue presented to the Court in *CLS* was whether a public law school may "condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students."[25] Justice Ginsburg cited three prior decisions that provide the legal framework for deciding cases involving access to a school-sponsored forum: *Healy v. James*,[26] *Widmar v. Vincent*,[27] and *Rosenberger v. Rector*.[28] Taken together, these cases stand for the principle that a public university may not deny "student organizations

22. *See infra* Part IV.B (arguing selective membership is an integral part of a student organization's ability to thrive on a university campus and invoking principles of First Amendment associational freedom).

23. Equal Access Act, 40 U.S.C. §§ 4071-4074 (2006).

24. *See id*. The Act prohibits a public secondary school from restricting a "limited open forum" on the basis of "religious, political, philosophical, or other speech content." *Id*.

25. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2978 (2010).

26. Healy v. James, 408 U.S. 169 (1972).

27. Widmar v. Vincent, 454 U.S. 263 (1981).

28. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995).

access to school-sponsored forums because of the groups' viewpoints."[29] Justice Ginsburg attempted to articulate how the majority's opinion in *CLS* is consistent with these prior decisions.[30] However, a close look at *Healy*, *Widmar*, and *Rosenberger* suggests a very different outcome than that reached by the majority in *CLS*.

A. Healy

In *Healy v. James*, Central Connecticut State College refused to recognize a student chapter of Students for a Democratic Society on the basis that "the organization's philosophy was antithetical to the school's policies."[31] The Court's key concern was how to apply its First Amendment jurisprudence to student speech and association rights on a university campus.[32] It concluded that students have a First Amendment right of free association and that a public university has a heavy burden to justify any restriction of that right.[33]

The Court's rationale in *Healy* is vital to understanding how First Amendment principles protect student groups' speech and associational rights in a student-group forum. The Court first noted that public universities are not "enclaves immune from the sweep of the First Amendment."[34] This principle, however, must be balanced with an understanding of the special nature of the educational environment.[35] Courts must give wide latitude to school officials to maintain order and make important pedagogical decisions.[36] This "acknowledged need for order" notwithstanding,[37] courts must protect First Amendment rights on university campuses, including the "right of individuals to associate to further their personal beliefs."[38] In *Healy*, the Court recognized that students' free speech is an integral part of a university's purpose.[39] This idea of granting students broad speech and association rights is premised

29. *Christian Legal Soc'y*, 130 S. Ct. at 2978.
30. *Id*. at 2987-88.
31. *Healy*, 408 U.S. at 172.
32. *See id*. at 171.
33. *Id*. at 184-85 ("While a college has a legitimate interest in preventing disruption on the campus . . . a 'heavy burden' rests on the college to demonstrate the appropriateness of that action.").
34. *Id*. at 180 (citing Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969)).
35. *Id*. at 184.
36. *Id*. at 180.
37. *Id*.
38. *Id*.
39. *Id*. at 180-81 ("[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960))).

on the notion that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"[40]

Recognizing that the First Amendment extends to students at a university, the Court balanced the associational interests of students with the university's responsibilities in light of its educational mission.[41] The Court explained that a university's refusal to recognize a student organization was a serious abridgment of students' associational rights.[42] Noting that the vitality of a student organization depends on the ability to communicate with other students,[43] the Court emphasized that the consequences of nonrecognition were significant.[44] Acknowledging the fundamental importance of student groups' access to university facilities and communication channels, the Court imposed a heavy burden on a university's ability to deny recognition to student groups.[45]

Essential to a university's ability to deny recognition is an understanding of the university's educational mission and interest in preventing campus disruption.[46] Neither a university's disapproval of a student group's affiliation with an "unpopular organization"[47] nor the belief that a student group's philosophy is "abhorrent" are grounds for the university to restrict speech or association rights.[48] On the other hand, a university is permitted to deny recognition based on evidence that an organization's activities will be disruptive to the educational environment.[49] In sum, the Court in *Healy* concluded that university students have a First Amendment right of association, which the university may abridge only under a heavy burden of demonstrating why nonrecognition serves a legitimate state interest.[50]

40. *Id.* (citing Keyishian v. Bd. of Regents, 386 U.S. 589, 603 (1967)).
41. *Id.* at 195-96.
42. *Id*. at 181.
43. *Id*.
44. *Id*. at 181-82 ("[T]he organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial.").
45. *Id*. at 184.
46. *See id*.; *see also* Mark J. Fiore, Note, *Trampling the "Marketplace of Ideas": The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915 (2002) (discussing the balance between student free speech rights and a university's right to prevent disruption).
47. *Healy*, 408 U.S. at 187-88.
48. *Id*. at 188-89.
49. *See id*. at 189, 193 (noting that time, place, and manner restrictions are likewise permissible, including a requirement "that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law").
50. *See id*. at 181, 184.

B. Widmar

Justice Ginsburg also cited *Widmar v. Vincent*[51] in framing the Court's student-group forum analysis.[52] In *Widmar*, the Court considered whether a public university may deny access to its facilities on the basis that the student group used the facilities for religious discussion.[53] The University of Missouri barred a registered student group, formed to advance a religious cause, from meeting in campus facilities.[54] The university cited its policy prohibiting the use of its facilities "for purposes of religious worship or religious teaching."[55] The Court held that, because the university had created a student-group forum, it could not deny the student group access to campus facilities.[56] The university's denial of access was an "impermissible content-based exclusion of religious speech."[57] The university, according to the Court, was "unable to justify this violation under applicable constitutional standards."[58]

Citing its analysis in *Healy*,[59] the Court noted that the university must provide appropriate justification for excluding any group because the university had created a forum open to all student groups.[60] The Court concluded that the University of Missouri's justification for exclusion—that the student group violated the campus policy prohibiting the use of university facilities for religious purposes—was unconstitutional.[61] This conclusion marks an important distinction between *Healy* and *Widmar*: the speech in *Widmar* was religious, which raised First Amendment Establishment Clause concerns, while the speech in *Healy* was political, which implicated free speech and association concerns.[62] Applying the *Lemon* Test,[63] the Court quickly dispensed with those concerns and concluded that an equal access policy

51. Widmar v. Vincent, 454 U.S. 263 (1981).
52. *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2978 (2010).
53. *Widmar*, 454 U.S. at 264-65.
54. *See id*. at 265.
55. *Id*.
56. *Id*.
57. *Id*. at 277.
58. *Id*.
59. *See id*. at 267 n.5 ("We . . . have held that students enjoy *First Amendment* rights of speech and association on the campus, and that the 'denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes' must be subjected to the level of scrutiny appropriate to any form of prior restraint." (citing Healy v. James, 408 U.S. 169, 181, 184 (1972))).
60. *Id.* at 267.
61. *Id*. at 277.
62. *Id*. at 268-69.
63. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

for religious student groups does not violate the Establishment Clause.[64] The *Lemon* Test[65] is a three-prong analysis used to determine whether a law implicates the Establishment Clause. The reviewing court considers (1) whether the statute has a secular purpose, (2) whether the principle effects of the statute advance or inhibit religion, and (3) whether the statute fosters an excessive entanglement in religion.[66]

The Court's application of the *Lemon* Test in *Widmar* is instructive. In the Court's view, the university improperly concluded that permitting religious speech or worship in the forum would be, in effect, the state advancing religion.[67] The Court explained that the benefits resulting from a religious group's inclusion in a student speech forum are merely incidental for two important reasons.[68] First, "an open forum in a public university does not confer any imprimatur of state approval" on the group or its beliefs.[69] Second, "the forum is available to a broad class of nonreligious as well as religious speakers."[70] These two justifications led the Court to conclude that the protection of First Amendment speech and association rights, rather than free exercise were the basis for its decision in *Widmar*.[71] Thus, a university may not restrict the speech and association rights of a religious student group merely because a university disagrees with the group's religious exercise or viewpoint.[72] Recognizing that a university's creation of a student-group forum does not require the school to cast its imprimatur on a student group's beliefs or activities is an important conclusion disregarded by the *CLS* majority.

C. Rosenberger

The third case Justice Ginsburg cited in developing the Court's forum analysis was *Rosenberger v. Rector*.[73] In *Rosenberger*, the University of Virginia refused to fund a student group's publication of a

64. *Widmar*, 454 U.S. at 271.

65. For a thorough discussion and criticism of the *Lemon* Test, see Thomas C. Marks, Jr. and Michael Bertolini, *Lemon is a Lemon: Toward a Rational Interpretation of the Establishment Clause*, 12 BYU J. Publ. L. 1 (1997).

66. *Lemon*, 403 U.S. at 612-13.

67. *Widmar*, 454 U.S. at 273.

68. *Id*. at 274.

69. *Id*.

70. *Id*.

71. *Id*. at 273 n.13.

72. *See* Richard A. Epstein, *A Big Year for the First Amendment: Church and State at the Crossroads: Christian Legal Society v. Martinez*, 2009-10 CATO SUP. CT. REV. 105, 128 (2010) (discussing applicability of *Widmar* to *CLS* and noting "[t]here seems to be no meaningful distinction between the cases").

73. *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2978 (2010); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995).

magazine which promoted a religious viewpoint.[74] The university determined that publication of the magazine was a religious activity.[75] A university policy, however, prohibited the funding of religious activities.[76] Applying the limited public forum doctrine,[77] the Court held that the university's refusal to fund a religious group's newsletter because of its religious content was blatant viewpoint discrimination.[78]

The Court noted that "[v]ital First Amendment speech principles are at stake" and identified two dangers inherent in the university's policy.[79] First is the danger to liberty that results from allowing a governmental entity to review print materials for religious content and then flagging that speech as inappropriate.[80] Second is the danger to speech "from the chilling of individual thought and expression."[81] The Court noted that this chilling effect on speech is particularly dangerous in higher education "where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."[82] Thus, the Court insisted, protecting student speech on a university campus is essential to the intellectual success of students and to the nation as a whole.[83]

Against the legal backdrop of *Healy*, *Widmar*, and *Rosenberger*, the Court decided *CLS*.[84] The majority and dissenting opinions, however, apply this legal and historical background in vastly different manners.[85]

III. *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*: AN ANALYSIS

CLS is a case about equal access to a student-group forum.[86] The Court considered whether a public university may impose an "accept-all-

74. *Rosenberger*, 515 U.S. 819, 822-23 (1995).

75. *Id*.

76. *Id*. at 825. The university defined religious activity as "any activity that 'primarily promotes or manifests a particular belief in or about a deity or an ultimate reality.'" *Id*.

77. *See infra* notes 119-131 and accompanying text (discussing the limited public forum doctrine).

78. *Rosenberger*, 515 U.S. at 837.

79. *Id*. at 835.

80. *Id*.

81. *Id*.

82. *Id*.

83. *Id*. at 836 (noting that "[t]he quality and creative power of student intellectual life . . . remains a vital measure of a school's influence" and that university regulations that disparage particular viewpoints of students risk "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").

84. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2978 (2010).

85. *See id*. at 3009 (Alito, J., dissenting) (noting in complete opposition to the majority that under the framework of cases cited by the majority, "Hastings' refusal to register CLS pursuant to its Nondiscrimination Policy plainly fails").

comers" policy as a condition to official recognition and access to the university's student-group forum and its attendant benefits.[87] An accept-all-comers policy requires a student organization to accept any student wishing to apply for membership or leadership in the organization regardless of that student's status or beliefs.[88] Applying the limited public forum doctrine,[89] the Court's majority concluded that an all-comers policy is a constitutionally permissible condition on access to a university's student-group forum.[90]

A. Setting the Stage: The Facts

Hastings College of Law is part of the University of California public-school system.[91] Hastings encourages its students to form student organizations to enhance their educational experiences.[92] Like many other universities, Hastings implemented a registered student organization ("RSO") program to facilitate the creation and management of its student organizations.[93] Official recognition under the RSO program provides student groups with a number of benefits: (1) financial assistance from the university through the mandatory student activity fee; (2) channels of communication—such as the opportunity to publish school-wide announcements, use of designated bulletin boards for advertising, and access to the school email system; (3) participation in the annual Student Organizations Fair; (4) use of school facilities for meetings; and (5) use of Hastings' logo and name.[94] To qualify for official recognition and its attendant benefits, RSOs must comply with certain university regulations, including Hastings' Nondiscrimination Policy.[95] As interpreted by Hastings, the Nondiscrimination Policy

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

87. *Id*. at 2978-79.

88. *Id*. at 2995.

89. *See infra* notes 119-131 and accompanying text (discussing the limited public forum doctrine).

90. *Christian Legal Soc'y*, 130 S. Ct. at 2978.

91. *Id*.

92. *Id*.

93. *Id*. at 2978-79.

94. *Id*. at 2979.

95. *Id*. The parties and the Justices on the Court widely disagreed over what the Nondiscrimination Policy actually said. *Compare id.* at 2982 (majority opinion) (noting "we must resolve a preliminary issue: CLS urges us to review the Nondiscrimination Policy as written . . . and not as a requirement that all RSOs accept all comers"), *with id.* at 3001 (Alito, J., dissenting) (arguing the majority conveniently chose the iteration of the policy that would "free[] the Court from the difficult task of defending the constitutionality" of the policy). Apparently, a written nondiscrimination policy and a

requires student organizations to "accept all comers," meaning that student organizations may not restrict their membership or their leadership on the basis of status or belief.[96]

In 2004, a group of students at Hastings formed the Christian Legal Society ("Society"), a student chapter affiliated with the national Christian Legal Society.[97] The Society is an "association of lawyers, law students, law professors, and judges who profess faith in Jesus Christ" and whose mission is to "maintain a vibrant Christian law fellowship" at Hastings to help its members exemplify the Christian faith.[98] The Society invites all students at Hastings to participate in the group's meetings and activities.[99] Nonmembers, however, may not vote or participate in the leadership of the group.[100] To become a voting member or to hold office in the Society, a student "must affirm a commitment to the group's foundational principles by signing a Statement of Faith."[101]

The Society applied for RSO status and submitted its constitution and bylaws to the Office of Student Services for review.[102] After reviewing the documents, Hastings refused to grant official recognition to the Society, concluding that the organization's constitution violated Hastings' Nondiscrimination Policy on the basis of religion and sexual orientation.[103] Specifically, Hastings required the Society to open its membership to all students, forbidding the religious organization to limit voting membership on the basis of belief in the group's core values.[104] Alternatively, Hastings said that the Society could continue to operate without official recognition, but Hastings would withhold RSO benefits.[105]

verbal incantation of that policy dually existed. The majority resolved the discrepancy by pointing to a joint stipulation between the parties that limited the issue to the all-comers requirement of the nondiscrimination policy. *See id*. at 2984.

96. *Id*.

97. *Id*. at 2980.

98. Petition for Writ of Certiorari at 6, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010) (No. 08-1371), 2009 U.S. S. Ct. Briefs LEXIS 2091 at *15.

99. *See id*. at *15 (explaining that the Christian Legal Society "wants persons who are not CLS members to come, listen, and participate in hopes they will be persuaded to agree with CLS's religious viewpoints").

100. *See id*. at *16.

101. *Id*. The Statement of Faith reflects orthodox Christian tenets including sexual abstinence outside of the traditional marriage between a man and a woman. *Id*.

102. *See id*. at *18.

103. *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2980 (2010). The Statement of Faith articulated the belief that "sexual activity should not occur outside of marriage between a man and a woman." *Id*. Thus, the Society required gay and lesbian students to repent of their homosexual conduct before becoming a member or officer of the Society. *Id*.

104. *See id*. at 2980-81.

105. *See id*. at 2981.

The Society refused to change its bylaws to conform to Hastings' Nondiscrimination Policy.[106] The Society filed suit in federal court against Hastings officials, alleging that Hastings violated the Society's First Amendment rights of free speech, expressive association, and free exercise of religion.[107] The District Court granted summary judgment for Hastings finding that the enforcement of its Nondiscrimination Policy did not violate the student's constitutional rights.[108] Applying limited public forum analysis to the free speech claim, the District Court found that Hastings' Nondiscrimination Policy was viewpoint neutral and reasonable in light of the purpose of the forum.[109] The District Court also rejected the Society's expressive association claims finding the Supreme Court's expressive association precedents inapplicable.[110] The Ninth Circuit affirmed the District Court's decision, citing a stipulation between the parties,[111] and held that Hastings' conditions on recognition were viewpoint-neutral and reasonable.[112]

B. Departing from Precedent: The Majority Opinion

The Supreme Court affirmed the Ninth Circuit's decision and essentially adopted the District Court's reasoning.[113] The majority opinion began with a statement of the rule developed by the Court in *Healy*, *Widmar*, and *Rosenberger*: "the First Amendment generally

106. *See id*.

107. *See id*.

108. Christian Legal Soc'y v. Kane, No. C 04-04484, 2006 U.S. Dist. LEXIS 27347, at *17, 88 (N.D. Cal. April 17, 2006).

109. *Id*. at *43-45.

110. *Id*. at *51.

111. The parties stipulated to the fact that "Hastings requires that registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] [sic] status or beliefs." Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2980 (2010) (quoting the parties' Joint Stipulation) (emphasis in original). This stipulation was hotly debated at oral argument and between the Court's majority, concurring, and dissenting opinions and played a key role in narrowing the scope of the case. *See* Lyle Denniston, *Analysis: A Fatal Stipulation*, SCOTUSBLOG (June 28, 2010, 11:35 pm), http://www.scotusblog.com. Interestingly, the majority's holding that parties are bound to their factual stipulations seems to be one of the key takeaway points of the case. *See, e.g.*, Provident Fin., Inc. v. Strategic Energy, L.L.C., 404 Fed. Appx. 835, 839 n.3 (5th Cir. 2010); Gonzalez v. Compass Vision, Inc., No. 07cv1951, 2010 U.S. Dist. Lexis 106161, at *8 n. 4 (S.D. Cal. Oct. 5, 2010).

112. Christian Legal Soc'y v. Kane, 319 Fed. App'x 645, 646 (9th Cir. 2009). The Ninth Circuit astonishingly disposed of the case in a two sentence opinion: "The parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable. *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649-50 (9th Cir. 2008)." *Id*. at 645-46.

113. *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2978 (2010).

precludes public universities from denying student organizations access to school-sponsored forums because of the groups' viewpoints."[114] Nevertheless, "[b]rushing aside [this] inconvenient precedent,"[115] the Court concluded that Hastings' policy was a "reasonable, viewpoint-neutral condition on access to the student-organization forum."[116]

In order to determine whether Hastings had violated the Christian Legal Society's free speech and free association rights, the Court deliberated about which level of scrutiny it should apply.[117] Justice Ginsburg noted that the Society relied on two separate lines of precedent—one to support its free speech claim and the other to support its free association claim.[118] The distinction between these two areas of precedent is critical.

The first line of cases called for an application of the Court's forum analysis.[119] While the First Amendment provides broad protection against the government regulation of speech, the Supreme Court has recognized certain situations in which the government may restrict speech conducted on property[120] in its care,[121] creating three distinct categories: a traditional public forum, a designated public forum, and a limited public forum.[122]

A traditional public forum provides the broadest protection to speech and includes such "quintessential public" places as a public street

114. *See id*.

115. *Id.* at 3001 (Alito, J., dissenting) (arguing that in spite of the precedent cited by the majority, "the Court arms public educational institutions with a handy weapon for suppressing the speech of unpopular groups").

116. *Id*. at 2978 (majority opinion).

117. *See id*. at 2984.

118. *See id*.

119. *See id*.

120. The Court has noted that the boundaries of property are not limited to physical characteristics. *See, e.g.*, Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995). Thus, while a student organization forum does not fit the traditional mold, the Court has consistently recognized its legitimacy. *Id.* (noting that the university's student forum was a forum "more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable"); Bd. of Regents v. Southworth, 529 U.S. 217, 234 (2000) (noting that the "traditional conceptions of territorial boundaries are difficult to insist upon in an aged marked by revolutionary changes in communications").

121. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 797 (1985). The Court has developed a three-step analysis for reviewing an alleged First Amendment violation: (1) the court first considers whether the activity is protected under the First Amendment; (2) the court then determines the nature of the forum at issue; (3) finally, the court determines whether the restrictions imposed on the activity are appropriate to the forum by applying the correct level of scrutiny. *See* Frantz v. Gress, 520 F. Supp. 2d 677, 681 (E.D. Pa. 2007).

122. *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2984 (2010); *Cornelius*, 473 U.S. at 817.

or park.[123] In a traditional public forum, courts apply strict scrutiny.[124] Thus, to impose a content-based restriction, the government must demonstrate a compelling state interest and show that the restriction is narrowly tailored to achieve that interest.[125]

A designated public forum arises where the government opens nontraditional property for use as a place for speech or expressive activity.[126] In a designated public forum, courts also apply strict scrutiny.[127] Thus, where the state designates property as a public forum, any content-based restrictions must be narrowly tailored to achieve a compelling state interest, just as in a traditional public forum.[128]

A government entity establishes a limited public forum where it opens property for a limited use by certain groups or dedicates the property for the discussion of particular subjects.[129] Courts apply a reasonable and viewpoint-neutral standard to restrictions on speech in a limited public forum.[130] Under this standard, a governmental entity may not exclude speech in a way that is unreasonable in light of the purpose of the forum, and it may not discriminate against speech on the basis of viewpoint.[131]

Relying on prior decisions,[132] the Court determined that Hastings' RSO program was a limited public forum.[133] Importantly, the Court noted a university is not required to provide a forum for student speech.[134] However, once the university has opened the forum, it "must respect the lawful boundaries it has itself set."[135] Once a university creates a limited public forum, any restriction on access to the forum on the basis of speech must be reasonable and viewpoint-neutral.[136]

123. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); *Cornelius*, 473 U.S. at 817.

124. *See Christian Legal Soc'y*, 130 S. Ct. at 2984.

125. *See Perry Educ. Ass'n*, 460 U.S. at 45; *Christian Legal Soc'y*, 130 S. Ct. at 2984.

126. *See Perry Educ. Ass'n*, 460 U.S. at 45.

127. *See Christian Legal Soc'y*, 130 S. Ct. at 2984.

128. *See* Widmar v. Vincent, 454 U.S. 263, 268 (1981).

129. *See Christian Legal Soc'y*, 130 S. Ct. at 2984 n.11.

130. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

131. *Id*.

132. The cases the Court cited include Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93 (1993); and Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

133. *See Christian Legal Soc'y*, 130 S. Ct. at 2986.

134. *See Rosenberger*, 515 U.S. at 829.

135. *Christian Legal Soc'y*, 130 S. Ct. at 2988 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

136. *See Christian Legal Soc'y*, 130 S. Ct. at 2984 n.11.

The second line of cases that the Society invoked was the Court's expressive association cases.[137] Restrictions on associational freedom are subject to strict scrutiny and are permitted only if they serve a compelling state interest.[138] Implicit in the First Amendment is the right of expressive association.[139] A corollary of the freedom of speech, the right of expressive association permits people to join together to promote a particular point of view.[140] In creating an expressive association, members of a group have a much stronger voice than they would if they were speaking as individuals.[141] Protecting the right of people to gather together to advance a shared goal is essential to "preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."[142]

The Court has asserted that this right of expressive association permits an organization to create and apply selective membership criteria.[143] Such membership criteria may even conflict with a state's institutional nondiscrimination policies.[144] An expressive association must be allowed to exclude from membership anyone whose presence would affect the group's ability to express its viewpoints.[145] Forced

137. *See id*. at 2985.

138. *See id*.

139. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 647-48 (2000).

140. David E. Bernstein, *Expressive Association After* Dale, 21 SOC. PHIL. & POL'Y 195 (2004) (noting that "[f]reedom of expression must consist of more than the right to talk to oneself").

141. *Jaycees*, 468 U.S. at 633 (O'Connor, J., concurring) (noting that protecting an "association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice").

142. *Id*. at 622.

143. *See id.* at 623 (noting that the freedom of association "plainly presupposes a freedom not to associate"). At the same time, the Supreme Court ruled that a state may constitutionally prohibit invidious discrimination in places of public accommodation. *See id*. at 624 (noting that a state may adopt laws aimed at "eliminating discrimination and assuring its citizens equal access to publicly available goods and services" because such a law, if "unrelated to the suppression of expression, plainly serves compelling state interests of the highest order").

144. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 649 (2000) ("[P]ublic or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message.").

145. *See id*.

inclusion of an unwanted member who disagrees with a group's viewpoint dilutes the group's message.[146]

In *Boy Scouts of America v. Dale*,[147] the Supreme Court addressed an expressive association's right to exclude.[148] The Boy Scouts revoked the membership of James Dale, a scout leader, after the organization learned that Dale was a homosexual and a gay rights activist.[149] The Boy Scouts believed that Dale's membership in the organization would conflict with its view that homosexual conduct is inconsistent with the values it seeks to instill in its young members.[150] The Court held that the application of New Jersey's public accommodations law to require the Boy Scouts to accept Dale as an assistant scoutmaster would violate the Boy Scouts' freedom of expressive association.[151] The Court agreed with the Boy Scouts that Dale's presence as a leader would force the organization to convey a message that was inconsistent with its point of view.[152] The Court affirmed that an expressive association must be allowed to preserve its message by applying selective membership criteria.[153] In order to restrict an organization's expressive association rights, according to the Court, a state must overcome the heavy burden of strict scrutiny.[154]

The majority in *CLS* conveniently sidestepped the holding in *Dale*.[155] Contrary to the Society's argument that its free speech claim and its expressive association claim should be analyzed separately, the Court concluded that the Society's "expressive-association and free-speech arguments merge [and it] therefore makes little sense to treat

146. *See* Bernstein, *supra* note 140, at 195 (arguing that given enough time the "dissenting members forced upon an organization by the government could achieve sufficient power to change the organization's values"); *see also Jaycees*, 468 U.S. at 633 (O'Connor, J., concurring) ("[T]he formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."); Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 MINN. L. REV. 1639, 1667 (2001) ("If the government may co-opt . . . groups by exercising control over their membership and leaders, their ability to raise their voice . . . will be lost.").

147. *Dale*, 530 U.S. at 649.

148. *See* Neal Troum, *Expressive Association and the Right to Exclude: Reading Between the Lines in Boy Scouts of America v. Dale*, 35 CREIGHTON L. REV. 641, 642 (2002) (noting that Dale addresses two conflicting constitutional principles: free speech, or the right to express one's message, and equality, or the right to be free from discrimination).

149. *Dale*, 530 U.S. at 644.

150. *Id*. at 654.

151. *Id*. at 659.

152. *Id*. at 653.

153. *Id*. at 648.

154. *Id*. at 657-58.

155. *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2985 (2010).

CLS's speech and association claims as discrete."[156] Having decided that the two claims merged, the Court made a critical choice to apply the less-restrictive limited public forum analysis.[157] If the Court had adopted its expressive association analysis and applied strict scrutiny when deciding *CLS*, Hastings would have had to demonstrate that its accept-all-comers policy served a compelling state interest that was unrelated to the suppression of ideas and that could not be achieved through less restrictive means.[158] Instead, the Court needed only to consider whether the policy was reasonable and viewpoint neutral.

The Court advanced three reasons for its decision to merge the claims and dismiss strict scrutiny analysis.[159] First, the Court noted that the speech and association rights were closely linked and that it would be "anomalous" for one to survive constitutional scrutiny but not the other.[160] Determining that the expressive association claim played a secondary role in support of the free speech claim, the Court concluded the free speech analysis should control.[161] Second, the Court believed that applying the strict scrutiny analysis would interfere with the university's right to define the characteristics of its student-group forum.[162] Third, the Court argued that the Society sought a "state subsidy" and faced only "indirect pressure to modify its membership policies."[163] Because the group could continue to exist without the "subsidy" according to the Court, the university was not compelling the group to include unwanted members.[164] The Court concluded that the Society's expressive association claim was distinguishable from the Court's expressive association precedents.[165] The Court's decision to merge the claims and apply public forum analysis allowed the Court to

156. *Id*. at 2985.

157. *Id.* at 2986 (concluding that the "limited-public-forum precedents adequately respect both CLS's speech and expressive-association rights, and fairly balance those rights against Hastings' interests as property owner and educational institution").

158. *See Dale*, 530 U.S. at 648.

159. *Christian Legal Soc'y*, 130 S. Ct. at 2985.

160. *Id*.

161. *Id*.

162. *Id*.

163. *Id.* at 2986. *See generally*, Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919 (2006) (arguing the government has no duty to subsidize expressive associations that have discriminatory membership criteria and explaining that excluding groups for their expressive association decisions is different from excluding groups for their viewpoint). The five-member majority in *CLS* fulfilled Volokh's prediction that "[w]hen a subsidy case arises, it seems unlikely that discriminating expressive associations will find the five votes they need to prevail." *Id*. at 1968.

164. *Christian Legal Soc'y*, 130 S. Ct. at 2986.

165. *Id*.

ignore the Society's free association claim and sidestep the more difficult strict scrutiny test.[166]

Deciding that the appropriate framework for review was limited public forum analysis,[167] the Court applied the two-part test to determine whether a university's restriction of speech in a limited public forum is constitutionally permissible: (1) whether the restriction was reasonable in light of the purpose served by the forum; and (2) whether the restriction was viewpoint neutral.[168] Accepting Hastings' numerous justifications for the policy, the Court concluded that the policy was reasonable.[169] First, Hastings' reasoned that the all-comers policy served the goal of providing leadership, educational, and social opportunities for all students within the RSO forum.[170] Second, the Court agreed that the all-comers policy helped Hastings police its Nondiscrimination Policy without requiring the university to inquire into an organization's motives for membership restrictions.[171] Third, the Court accepted Hastings' view that the all-comers policy brought together individuals with diverse backgrounds and beliefs and promoted tolerance and cooperation among students.[172] Finally, the Court agreed that the all-comers policy advanced a state-law goal of preventing discrimination.[173]

The Court then astonishingly concluded that the reasonableness of the all-comers policy was "all the more creditworthy" because alternative avenues of communication were available off campus for the organization to exercise its First Amendment rights.[174] The Court noted that the Society could take advantage of email, websites, and hosts like MySpace, Google, and Yahoo! message groups.[175] The Court further noted that Hastings' regulation of speech only needed to be reasonable, not the most reasonable option.[176]

166. The ability of the Court to disguise one constitutional right under the form of another constitutional right in order to escape the application of a stricter level of scrutiny raises some serious concerns. *See* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 45 (1986) (arguing that it "makes little sense to apply the compelling interest test to a category of cases and then let the government opt out of the category at will").

167. *See Christian Legal Soc'y*, 130 S. Ct. at 2987.

168. *Id.* at 2988.

169. *Id.* at 2991.

170. *Id.* at 2989.

171. *Id.* at 2990.

172. *Id*.

173. *Id.* at 2991.

174. *Id*.

175. *Id.* (quoting Christian Legal Society v. Walker, 453 F.3d 853, 874 (7th Cir. 2006) (Wood, J., dissenting)).

176. *Christian Legal Soc'y*, 130 S. Ct. at 2992.

Having concluded that the all-comers policy was reasonable, the Court then considered whether the policy was viewpoint neutral.[177] The Court reasoned that it was "hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers" and thus the all-comers policy was "textbook viewpoint neutral."[178]

Finding that Hastings' all-comers policy was constitutional, the Court affirmed the Ninth Circuit's ruling.[179] The Court remanded the case to determine whether the Society had preserved the argument that Hastings selectively applied the all-comers policy as a matter of pretext.[180] On remand, the Ninth Circuit held that the Society had not raised a pretext argument the first time around and thus the issue was not preserved for appeal.[181]

The majority opinion is problematic for a number of reasons.[182] Most importantly for this Comment, in merging the expressive association and speech claims, the Court limited the ability of student organizations to bring expressive association claims.[183] The Court's opinion in *CLS* seems to indicate that as long as a university can demonstrate that its restriction on speech is viewpoint neutral and reasonable in light of the student-group forum, then students' expressive association claims are irrelevant.[184]

The majority's opinion begs the question of whether the Court would have come to a different conclusion if the Christian Legal Society had argued only that its expressive association rights had been violated and not asserted a free speech claim. Such a scenario would be more analogous to *Healy*, where the Court held that the university had a "heavy burden" of demonstrating a compelling state interest in order to infringe on a student group's expressive association rights.[185] Under this scenario, the Court would likely have construed the argument as a free speech argument in light of the public forum doctrine and arrived at the same conclusion that it ultimately did.

177. *Id*. at 2993.
178. *Id*.
179. *Id*. at 2995.
180. *Id*.
181. *See* Christian Legal Soc'y v. Wu, 626 F.3d 483, 488 (9th Cir. 2010).
182. Some commentators have suggested that the *CLS* decision will have significant implications beyond higher education. *See, e.g.*, William E. Thro and Charles J. Russo, *A Serious Setback for Freedom: The Implications of* Christian Legal Society v. Martinez, 261 ED. LAW REP. 473, 481 (2010) ("[N]othing in the Opinion of the Court suggests that the result is limited to higher education. Rather, the decision has broad implications for constitutional law."). However, this Comment will address only those implications that bear on the equal access rights of student groups at universities.
183. *Christian Legal Soc'y*, 130 S. Ct. at 2985.
184. *Id.* at 2985-86.
185. *See* Healy v. James, 408 U.S. 169, 181-84 (1972).

The Court's justifications for merging the free speech and association claims are disconcerting for another reason as well.[186] The Court set a very low threshold for finding that the government is "dangling the carrot of subsidy, not wielding the stick of prohibition."[187] The Court repeatedly denied that Hastings was compelling the membership of unwanted individuals in an expressive association, arguing that the student groups could continue to exist without complying with the policy—only without the benefits derived from recognition.[188] Such an assumption, however, is a figment of reality. As Justice Alito pointed out, university students consider the campus their world.[189] Many student groups cannot survive without the benefits conferred by an RSO program.[190] This point raises the issue of how important access to an RSO program is for the vitality of a student group. Justice Alito sought to answer this question in his dissenting opinion in *CLS*.[191]

186. *See Christian Legal Soc'y*, 130 S. Ct. at 2986.

187. *Id*.; *see also* Robert Luther III, *Marketplace of Ideas 2.0: Excluding Viewpoints to Include Individuals*, 38 HASTINGS CONST. L.Q. 673, 694-95 (2011).

188. *Christian Legal Soc'y*, 130 S. Ct. at 2986, 2991.

189. *Id*. at 3007 (Alito, J., dissenting).

190. *Id*.

191. *Christian Legal Soc'y*, 130 S. Ct. at 3000 (Alito, J., joined by Roberts, Scalia, and Thomas, JJ., dissenting).

IV. A DIFFERENT PERSPECTIVE: JUSTICE ALITO'S DISSENTING OPINION

Writing for the dissenters in *CLS*, Justice Alito expressed his belief that the Court's decision was "a serious setback for freedom of expression."[192] Has the Court turned a corner in its protection of university students' speech and association rights? *CLS* may be indicative of a shift in current jurisprudence to expand a university's ability to limit student speech and association rights.[193] Historically, the Court has sided with student groups, consistently finding that the contested university regulation of speech was unconstitutional.[194] Conversely, in *CLS* the Court upheld a university's regulation of speech as constitutionally permissible, which resulted in a denial of access to the university's student-group forum.[195] Is the reason for the different outcomes merely because in *Healy*, *Widmar*, and *Rosenberger*, the university regulations were not reasonable or viewpoint-neutral, while in *CLS*, the regulations were reasonable and viewpoint-neutral? Or did public policy concerns play a role causing the Court's fiercely-divided decision?[196]

While the relevant policy considerations are beyond the scope of this Comment,[197] the potential consequences of the Court's decision are not insignificant. Alito's dissent raises some salient points about the far-reaching impact of the Court's *CLS* decision.[198] Broadly speaking, *CLS*

192. *Id*. at 3020.

193. *See* Goldstein *supra* note 20 (arguing that the Court's rationale may result in "doing more violence to student expression rights than any decision" in recent years).

194. *See generally* Healy v. James, 408 U.S. 169 (1972) (holding university failed to meet its heavy burden under the First Amendment to deny recognition of student organization where students were willing to abide by reasonable campus rules and regulations); Widmar v. Vincent, 454 U.S. 263 (1981) (holding university's exclusionary policy violated constitutional norms and finding university's interest in achieving separation of church and state was not sufficiently compelling to justify content-based discrimination against religious speech of student group); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) (holding university's denial of funds for religious student group's newsletter violated First Amendment).

195. *See Christian Legal Soc'y*, 130 S. Ct. at 2995.

196. Alito began his dissent with the assertion that the majority's decision rested on a principle far different from the Court's historical free speech jurisprudence: "no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning." *Id.* at 3000 (Alito, J., dissenting).

197. For example, some see the Court's decision as championing LGBT rights. *See* Michael Jones, *The U.S. Supreme Court's 5-4 Gay Rights Split*, CHANGE.ORG (June 28, 2010), http://news.change.org/stories/the-us-supreme-courts-5-4-gay-rights-split (noting that LGBT groups were "celebrating the decision . . . [because] the current Supreme Court [was] throwing [its] weight behind the push for LGBT equality").

198. Justice Alito argued extensively that the Court's focus on the accept-all-comers policy was misplaced. *See Christian Legal Soc'y*, 130 S. Ct. at 3019. Alito argued that

will likely impact the ability of student groups that wish to maintain a core group of individuals committed to a common belief to participate fully in the give-and-take of a university student-group forum.[199]

While Justice Alito's dissent raises many criticisms about the majority's opinion,[200] this comment will address two key issues: (1) the cost of nonrecognition,[201] and (2) the value of permitting selective membership.[202]

A. The Cost of Nonrecognition

Justice Alito opined that the Court's decision will result in the marginalization of unpopular student groups.[203] Prior to *CLS*, the Court consistently held that denial of recognition and access to a forum would be detrimental to a student group.[204] The majority considered it "significant" that the Society had "other available avenues . . . to exercise" its First Amendment rights outside of Hastings' student-group forum.[205] However, this assertion contradicts the concept that a student-group forum provides both the means and protection to student groups wishing to exercise First Amendment rights on campus. Recognizing the majority's attempt to diminish the effects of nonrecognition, Justice Alito noted that "[t]his Court does not customarily brush aside a claim of unlawful discrimination with the observation that the effects of the discrimination were really not so bad."[206] Attempting to correct the majority's mischaracterization of the effects of nonrecognition, Justice Alito pointed to the Court's treatment of nonrecognition in *Healy*.[207] The majority's assertion that the group could have existed outside of the RSO program defies the very purpose for which student-group forums are created: to provide a platform and the means by which students can form groups and engage in thought and discussion on the university campus.

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the Court should have considered Hastings inconsistent application of its written Nondiscrimination Policy instead. *Id.* While this argument is an important criticism of the majority opinion, an analysis of that argument is beyond the scope of this Comment.

199. *See* Thro, *supra* note 182, at 494.

200. For example, Justice Alito argued that the accept-all-comers policy was neither viewpoint-neutral nor reasonable. *See Christian Legal Soc'y*, 130 S. Ct. at 3006-07 (Alito, J., dissenting).

201. *See Christian Legal Soc'y*, 130 S. Ct. at 3006-07 (Alito, J., dissenting).

202. *See id*. at 3014.

203. *See id*. at 3019.

204. *See supra* Part II (discussing *Healy*, *Widmar*, and *Rosenberger*).

205. *See Christian Legal Soc'y*, 130 S. Ct. at 2991.

206. *See id*. at 3006 (Alito, J., dissenting).

207. *See id*. at 3007 (noting that a comparison of *CLS* and *Healy* demonstrates "how far the Court has strayed"); *see supra* Part II.A (discussing *Healy*).

B. THE IMPORTANCE OF SELECTIVE MEMBERSHIP

Likewise, permitting university student groups to employ selective membership criteria is important to the vitality of a student-group forum. The Court's majority reasoned that prohibiting selective membership criteria through the application of an accept-all-comers policy is a legitimate application of a university's nondiscrimination policy.[208] However, the Court artfully sidestepped the issue of whether a university may restrict First Amendment speech that violates its nondiscrimination policy.[209] The Court's holding permits a university to require student organizations to accept-all-comers, but it leaves open the question of how far a university may go in applying its nondiscrimination policy at the expense of First Amendment rights.[210] In fact, the majority and the dissent disagreed over which policy was even at issue.[211] In the end, the majority settled on the all-comers policy, leaving unsettled the issues about the nondiscrimination policy for another day.[212] However, even a cursory reading of the majority's opinion reveals favorable support for a university's right to restrict speech based on the enforcement of a nondiscrimination policy as long as the policy is reasonable and viewpoint neutral.

The Court's seeming approval of subjugating First Amendment rights to a nondiscrimination policy raises some concerns. If a university applies a nondiscrimination policy that prohibits discrimination only on the basis of race, gender, and religion, could the university permit a political group to restrict membership to students who subscribe to the group's particular political ideology while forbidding a religious group from restricting membership to students who believe in its particular religious beliefs? Under the majority's rationale in *CLS*, the answer to this question appears to be yes. Justice Ginsburg seemed very comfortable with the fact that Hastings interpreted its nondiscrimination policy to mean that a group must "accept-all-comers."[213] The Court reasoned that all groups were affected in the same way, thus the policy

208. *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2990-91 (2010).

209. *See* Richard A. Epstein, *So Much for Religious Liberty*, FORBES.COM (June 28, 2010, 4:50 PM), http://www.forbes.com/2010/06/28/religion-speech-legal-supreme-court-opinions-columnists-richard-a-epstein.html.

210. *See id*.

211. *Compare, e.g.*, *Christian Legal Soc'y*, 130 S. Ct. at 2984 (majority opinion) (explaining that the opinion "considers only whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution"), *with id*. at 3001 (Alito, J., dissenting) (arguing that the majority wrongly based its analysis "on the proposition that the relevant Hastings' policy is the so-called accept-all-comers policy").

212. *Id*. at 2984.

213. *Id*. at 2988-89.

was reasonable and viewpoint neutral.[214] But, Hastings asserted that the accept-all-comers policy applied to all student groups. However, if Hastings applied its accept-all-comers policy only to certain groups, as defined by the nondiscrimination policy, it seems that the Court still would have upheld the policy as constitutionally permissible because the policy would have been applied consistently as to that type of group—for example all religious groups would be required to accept all students. Thus, a university could apply its nondiscrimination policy in a way that affects certain student groups—such as religious groups—different from other groups—such as political groups—yet still comply with the Court's reasonable and viewpoint-neutral standard.[215]

The Ninth Circuit's opinion in *Truth v. Kent School District*[216] illustrates the willingness of courts to adopt such a conclusion.[217] A group of students formed a religious group, Truth, at a public high school and applied for recognition and funding from the Kent School District.[218] The District invoked its nondiscrimination policy, claiming the policy prohibited recognition of student organizations that discriminate on certain grounds including religion.[219] When the District denied recognition because Truth restricted its membership to Christians only, the group sued the District alleging the policy violated the students' First Amendment rights.[220] Truth argued that the District did not apply its nondiscrimination policy to other student groups and permitted those groups to restrict membership on grounds other than religion.[221]

According to the court, the District's nondiscrimination policy applied to discrimination on the basis of religion but not to discrimination on the basis of political belief.[222] Thus, the District could prohibit religious groups from excluding non-Christians from membership pursuant to the nondiscrimination policy while allowing other groups, such as EarthCorps and the Gay-Straight Alliance, to restrict its membership to students who support a specific political viewpoint.[223] The ability of a school district or university to apply its nondiscrimination policy in such a manner suggests school

214. *Id*. at 2992-94.
215. *See* Luther *supra* note 187, at 694-95 (noting that *CLS* will permit policy-makers and universities to "rephrase their desire to exclude viewpoints as a desire to include individuals") (quoting Goldstein *supra* note 20).
216. *Truth v. Kent Sch. Dist.*, 542 F.3d 634 (9th Cir. 2009).
217. *Id*. at 648.
218. *Id*. at 637.
219. *Id*. at 639.
220. *Id*. at 638.
221. *Id*.
222. *Id*.
223. *Id*.

administrators may apply nondiscrimination policies to weed out unpopular student organizations.[224] It also suggests that universities and school districts recognize the value of selective membership, because administrators seem willing to permit politically correct groups to condition group membership.[225]

Although courts have agreed that a university has an interest in enforcing a nondiscrimination policy through the use of an all-comers policy, key counterarguments identify the importance of permitting student groups to impose selective membership criteria.[226] One obvious reason to allow student groups to exercise selective membership is the threat of a hostile takeover like the scenario at the beginning of this Comment.[227] Most would agree with Justice Ginsburg that such a proposition is "more hypothetical than real."[228] In fact, the Society provided no evidence that saboteurs were waiting in the shadows to "infiltrate groups to subvert their mission and message."[229] Nonetheless, ensuring that a student group's rights are secure and free from the threat of infringement—or hostile takeover—is important.[230] Simply put, it is not the place of the judiciary to deny protection of a constitutional right merely because the court believes the threat to that right is not significant or even probable.[231]

The slim likelihood of a hostile takeover notwithstanding, expressive identity is important to protect against the more subtle forms of interference with a group's speech and associational activities.[232] For an expressive association, deciding who can speak will determine the group's message.[233] As Justice Alito noted, a student group's First

224. *See* Richard A. Epstein, *A Big Year for the First Amendment: Church and State at the Crossroads: Christian Legal Society v. Martinez*, 2009-10 CATO SUP. CT. REV. 105, 129 (2010) (noting that Hastings' application of its Nondiscrimination Policy "in such a haphazard manner" suggests the University intends "to prevent organizations like CLS from using facilities because they discriminate on grounds of sexual orientation" and thus "the all-comers policy becomes a pretext for a much more focused discriminatory activity").

225. *See* Joan W. Howarth, *Teaching Freedom: Exclusionary Right of Student Groups*, 42 U.C. DAVIS L. REV. 889, 892 (2009) ("Few of us would spend much energy defending the right of a person who eats bacon for breakfast, burgers for lunch, and steak for dinner to become the President of the Vegetarian Society.").

226. *See* Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 858 (2d Cir. 1996).

227. *See supra* Part I.

228. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2992 (2010).

229. *Id*.

230. *See* Howarth *supra* note 225, at 894-95 (noting the critical importance of First Amendment protections to ensure group autonomy and to foster "identity-forming, idea-forming entities").

231. *See Christian Legal Soc'y*, 130 S. Ct. at 3006 (Alito, J., dissenting).

232. *See id*. at 3014.

233. *See id*.

Amendment rights are "burdened by the 'forced inclusion' of members whose presence would 'affec[t] in a significant way the group's ability to advocate public or private viewpoints.'"[234]

V. RECOMMENDATION: A PROPOSAL FOR LEGISLATION

Now that the Supreme Court has held that a university may require student groups to accept-all-comers as a condition of access to a student-group forum, what steps may be taken to protect the endangered speech and association rights of student groups? Admittedly, the Court's holding is narrow in that it provides discretion to universities to enact an accept-all-comers policy, but such a policy is not required.[235] Thus, a university is free to allow student groups to engage in selective membership. However, now that the Court has approved a university policy that prohibits selective membership in student organizations, other universities will likely enact policies similar to Hastings' all-comers policy in an effort to mitigate perceived discrimination or inequalities.[236] Student groups and free speech advocates uncomfortable with the Court's holding should consider extrajudicial measures. One way to ensure that student groups are protected from an all-comers policy is through carefully drafted legislation.

A state legislature or the United States Congress could enact a statute that provides broad protection to students' free speech and expressive association rights in a university's student-group forum. Courts have upheld legislation aimed at providing students with broad speech and association rights.[237]

For example, in *Moore v. Watson*,[238] a federal court upheld an Illinois statute[239] that created a statutory public forum for student speech. The statute designated "[a]ll campus media produced primarily by students at a State-sponsored institution of higher learning" as a public forum for student expression.[240] The court in *Moore* noted that the Illinois legislature created the statute as a direct response to the Seventh

234. *Id*. (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 647-48 (2000)). *See* Howarth *supra* note 225, at 926-28 (discussing the need for schools and student groups to have expressive identities).

235. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2995 (2010).

236. *See*, *e.g.*, Badger Catholic v. Walsh, Nos. 09-1102, 09-1112, 2010 WL 3419886 (7th Cir. Sept. 1, 2010) (noting "[w]e deferred action on this appeal," regarding similar facts and issues to *CLS*, until the Supreme Court decided *CLS*).

237. *See infra* Part V.A.

238. Moore v. Watson, No. 09 C 701, 2010 U.S. Dist. LEXIS 92578, at *1 (N.D. Ill. Sept. 7, 2010).

239. College Campus Press Act, 110 ILL. COMP. STAT. 13/1 (2008).

240. *See* 110 ILL. COMP. STAT. 13/10; *see also Moore*, 2010 U.S. Dist. LEXIS 92578, at *34.

Circuit's holding in *Hosty v. Carter*.[241] In *Hosty*, the Seventh Circuit held that a university could regulate student speech in a subsidized school newspaper as long as the regulations were "reasonably related to legitimate pedagogical concerns."[242] The Illinois legislature disagreed with the court's granting universities censorship abilities and passed legislation to protect student speech by requiring strict scrutiny analysis.[243] The court in *Moore* found that because the Illinois legislature created a designated public forum for student speech when a university permitted the publication of student media, any restrictions on student speech in campus newspapers were subject to strict constitutional scrutiny.[244] *Moore* demonstrates that carefully drafted legislation can provide significant protection for students' rights in a university student-group forum. The Equal Access Act[245] provides an excellent model for such legislation.

A. A Model: The Equal Access Act

In 1984, Congress passed the Equal Access Act ("Act").[246] The Act prohibits public secondary schools that receive federal funding and that create a limited open forum for students from denying equal access to the forum on the basis of a student groups' religious, political, or philosophical speech.[247] A "limited open forum" under the Act is a specially designed forum for student speech that is different from the "limited public forum" of First Amendment jurisprudence, although they bear important similarities.[248] According to the Act, a school creates a

241. Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005); *see Moore* at *32. For a discussion of *Hosty v. Carter*, see Michael O. Finnigan, Jr., Comment and Casenote, *Extra! Extra! Read All About It! Censorship at State Universities:* Hosty v. Carter, 74 U. CIN. L. REV. 1477 (2006) (arguing that the Seventh Circuit's decision diminished the effect of First Amendment rights on a university campus and provided a precedent for restricting student speech at least in student publications).

242. *Moore*, 2010 U.S. Dist. LEXIS 92578, at *32 (quoting Hosty v. Carter, 412 F.3d 731, 734 (7th Cir. 2005)). This legitimate pedagogical concern standard is widely applied in education law cases. *See* Hazelwood Sch. Dist. V. Kuhlmeier, 484 U.S. 260 (1988) (holding First Amendment is not violated when educators exercise editorial control over content of student speech if actions are reasonably related to legitimate pedagogical concerns); *see also* Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 Fla. L. Rev. 63 (2008) (discussing the implications of this standard on speech restrictions in schools).

243. *Id*. at *34-35.

244. *Moore*, 2010 U.S. Dist. LEXIS 92578, at *34.

245. Equal Access Act, 20 U.S.C.A §§ 4071-4074 (2006).

246. *Id*.

247. *See id*. § 4071(a).

248. *See* Duncan, *supra* note 5, at 116 ("The Equal Access Act creates a legislatively defined, artificial construct."); Laycock, *supra* note 166, at 36 (noting that while the

limited open forum when it provides an opportunity for noncurriculum-related student groups to meet on campus during noninstructional time.[249]

Congress passed the Act because courts were ignoring and misconstruing the Supreme Court's holding in *Widmar*.[250] Thus, the Act is based largely on the Court's reasoning in *Widmar*.[251] As explained above,[252] in *Widmar* the Court concluded that the University of Missouri could not deny equal access to a religious student group even though the University proffered a compelling state interest of maintaining separation of church and state.[253] The Court stated that incidental benefits enjoyed by religious groups as a result of inclusion in a university's limited open forum do not constitute an advancement of religion.[254] This conclusion is foundational to the Equal Access Act.[255] In spite of the Court's clear articulation in *Widmar* that religious worship and discussion are forms of speech and association entitled to First Amendment protection even in the nation's public schools,[256] Congress believed it was necessary to pass the Act to "address perceived widespread discrimination against religious speech in public schools."[257]

Thus, the Act applies the Supreme Court's *Widmar* doctrine[258] to public high schools.[259] The authors of the Act were primarily concerned

Act's definition "resembles" the judicial limited public forum, the Act "goes well beyond the Supreme Court's cases").

249. 20 U.S.C.A. § 4071(b). The Act's term "noncurriculum related student group" has produced much debate and litigation as schools and student groups have attempted to interpret the meaning of the term to manipulate the Act's applicability. *See* Laycock, *supra* note 166, at 36-37. Parsing the meaning of this term, however, is beyond the scope of this Comment.

250. *See* Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 239 (1990); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a public university must provide equal access to religious student groups when the university has created a limited public forum for student organizations).

251. *See* Rosemary C. Salomone, *From* Widmar *to* Mergens*: The Winding Road of First Amendment Analysis*, 18 HASTINGS CONST. L.Q. 295, 302-03 (1991).

252. *See supra* Part II.B (discussing the Court's *Widmar* decision).

253. *See* Widmar v. Vincent, 454 U.S. 263, 270-71, 276 (1981).

254. *See id*. at 273 (noting that the University's claimed interest, while compelling, was not "sufficiently 'compelling' to justify content-based discrimination" against the student group's religious speech).

255. *See* Salomone, *supra* note 251, at 303.

256. *See Widmar*, 454 U.S. at 269.

257. Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 239 (1990) (citing H.R. Rep. No. 98-710, at 4 (1984); *See* S. Rep. No. 98-357, at 10-11 (1984)).

258. *See Widmar*, 454 U.S. at 263.

259. *See* Prince v. Jacoby, 303 F.3d 1074, 1081 (9th Cir. 2002) ("[T]he term 'equal access' means what the Supreme Court said in *Widmar*: religiously-oriented student activities must be allowed under the same terms and conditions as other extracurricular activities, once the secondary school has established a limited open forum."); Salomone, *supra* note 251, at 296.

with ending discrimination against religious student groups.[260] However, courts have broadly applied the Act, prohibiting public schools from discriminating against student groups espousing religious, political, and philosophical speech.[261] The Act contains a "policing provision"[262] that allows a school to deny access if a group's meeting "materially and substantially interfere[s] with the orderly conduct of educational activities."[263] Thus, the Act provides schools some control over speech in light of a school's pedagogical mission.[264] In spite of numerous attempts by secondary schools to limit the access of a variety of student groups under the Act, the Supreme Court upheld the act as constitutional in *Board of Educ. v. Mergens*.[265]

In *Mergens*, the Court considered whether the Equal Access Act prohibited a high school from denying a student religious club access to school facilities.[266] Students at Westside High School requested permission to organize a student religious club.[267] The school refused to recognize the club because it believed that recognizing a religious club would violate the Establishment Clause.[268] The students sued, alleging that the school's denial of access violated the Equal Access Act.[269]

After performing a lengthy analysis of the Act, the Court determined that the Act was both constitutional and applicable to the

260. *See* Susan Broberg, Note, *Gay/Straight Alliances and Other Controversial Student Groups: A New Test for the Equal Access Act*, 1999 BYU EDUC. & L.J. 87, 90 (1999) (noting that while the clear intent of the Act was to protect religious speech, the explicit language of the Act protects not only religious speech but also political, philosophical, and other forms of speech). "[T]he very words that granted the right to free expression of religion by voluntary student groups also grant similar access to homosexual support groups, atheist clubs, and other 'fringe' groups." *Id.* at 89.

261. *See* Robert C. Boisvert, Jr., *Of Equal Access and Trojan Horses*, 3 LAW & INEQ. 373, 393 (1985) (noting that many legislators supported the Act "solely for its protection of religious speech" even though the language of the Act seem to protect the rights of nonconventional student groups as well, such as the Ku Klux Klan, the Nazi Party, and the Young Communist League).

262. *Id.* at 373, 393.

263. 20 U.S.C.A. § 4071(c)(4).

264. *See* Michael P. Aaron, Note, *The Equal Access Act: A Haven for High School "Hate Groups"?*, 13 HOFSTRA L. REV. 589, 614 (1985) (concluding that the Equal Access Act's broad protection of student speech must be balanced with schools' "educational role of imparting democratic values").

265. Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226 (1990) (holding that the Equal Access Act requires public high schools receiving federal funds to provide equal access to school facilities to religious student groups where the school has created a limited open forum).

266. *Id*. at 231.

267. *Id.* at 232. The purpose of the student group was to allow students to study the Bible, fellowship, and pray together. *Id.*

268. *Id*. at 233.

269. *Id*.

case before the Court.[270] Finding that Westside had created a limited open forum pursuant to the Act, the Court held that Westside denied the student group equal access in violation of the Act.[271] Invoking the *Lemon* Test,[272] the Court found that the Act did not violate the Establishment Clause.[273] The Court asserted that a "crucial difference [exists] between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Speech and Free Exercise Clauses protect."[274] This same reasoning could provide the framework for an Equal Access Act in higher education.[275] A Second Circuit case illustrates the possibility that an Equal Access Act for higher education could counterbalance the Court's holding in *CLS*.

B. A Case Study: Hsu v. Roslyn

The Second and Ninth Circuits disagree on whether the Equal Access Act protects the right of a student group to exclude from membership students who disagree with the group's message or values.[276] The Second Circuit, in *Hsu v. Roslyn*,[277] applied the Supreme Court's expressive association precedent, while the Ninth Circuit, in *Truth v. Kent*,[278] applied the Court's limited public forum analysis of reasonableness and viewpoint neutrality.[279] A brief overview of *Hsu* is revealing.

270. *Id*. at 232-34.
271. *Id*. at 246-47.
272. *See supra* notes 63-66 and accompanying text.
273. *Mergens*, 496 U.S. at 248 (noting that the Court's decision in *Widmar* is controlling: "[w]e think the logic of *Widmar* applies with equal force to the Equal Access Act").
274. *Id*. at 249.
275. *See infra* Part V.C.
276. *Compare* Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 855 (2d Cir. 1996) (holding that the Equal Access Act protects the expressive activity of limiting a student group's leadership to certain categories of people, if relevant to the group's message or purpose), *with* Truth v. Kent Sch. Dist., 542 F.3d 634, 647 (9th Cir.) (noting that the District's policies proscribing the student group's membership restrictions "do not implicate any rights that Truth might enjoy under the Act"). Whether the Court's *CLS* decision resolves this Circuit split remains to be seen. This Comment argues that the Equal Access Act provides greater protection to student groups than the Court was willing to recognize in *CLS*.
277. Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 855 (2d Cir. 1996).
278. Truth v. Kent Sch. Dist., 542 F.3d 634 (9th Cir. 2008).
279. *See* Neal H. Hutchens, *Supreme Court to Consider Authority of Public Colleges and Universities to Impose Nondiscrimination Policies on Student Groups in* Christian Legal Society v. Martinez, 254 ED. LAW REP. 477, 477-78, 482, n.39 (2010). Whether the Court's holding in *CLS* extends to secondary schools remains to be seen. The Court likely did not intend to extend its holding to secondary schools given its focus on

In *Hsu*, the Second Circuit considered whether the Equal Access Act required a school district, which had a broad nondiscrimination policy, to recognize a religious student group that required its officers to be Christians.[280] Several students at Roslyn High School wanted to start an after-school Bible Club.[281] The students insisted that they be allowed to restrict Club officers to professing Christians.[282] The students argued that requiring the Club to accept non-Christian officers would influence the mission of the Club and interfere with the Club's speech at meetings.[283] The school, however, refused to recognize the Club on the basis that the Club's condition for officers violated the school's nondiscrimination policy.[284] The Second Circuit concluded that the Club's selective officer requirement was essential to the expressive content of its meetings and to the preservation of its mission and identity and thus was protected by the Equal Access Act.[285]

The court noted that the Act created a statutory free speech right for students to form extracurricular groups that engage in religious, philosophical, or political discourse at public secondary schools.[286] The Act, according to the court, was intended to require neutrality by schools towards religious groups such that students "engaging in religious speech have *the same rights* to associate together and speak as do students" who meet for other reasons, such as to discuss politics or philosophy.[287] However, the court noted, neither the legislative history nor the Supreme Court had provided much guidance about whether the Act allowed after-school religious groups to limit its leaders to a particular religion.[288]

Turning to the Supreme Court's expressive association cases, the court found an integral connection between the Club's exclusionary leadership policy and the Club's religious speech.[289] Who was chosen to

universities and the lack of discussion about secondary schools or any applicable precedents. *See generally* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2992 (2010).

280. Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 855 (2d Cir. 1996).

281. *Id*. at 848.

282. *Id*.

283. *Id*. at 851.

284. *Id*. at 848.

285. *Id*. at 848.

286. *Id*. at 854.

287. *Id*. (quoting 130 Cong. Rec. 19,216 (1984) (statement of Sen. Denton)) (emphasis in the original).

288. *Id*. at 855.

289. *Id*. at 857. The court relied on the reasoning in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), though the court noted that *Hurley* was not controlling since the case before the court involved a federal statute—the Equal Access Act. *Id.* at 856. Interestingly, when the Second Circuit decided *Hsu*, the Supreme Court had not yet decided *Dale*. The court would likely have found *Dale* to be particularly instructive.

lead the Club would determine the religious content of the Club's speech.[290] Refusing to separate the Club's leadership from the Club's speech, the court concluded that the Equal Access Act protected the Club's selective membership criteria.[291] According to the court, the right of expressive association was a necessary corollary of the Act's protection of student speech.[292] Thus, "the Act contains an implicit right of expressive association when the goal of that association is to meet for a purpose protected by the Act."[293]

C. A Proposal: A Higher Education Equal Access Act

What the Equal Access Act provides for Establishment Clause concerns in secondary school forums, an Equal Access Act for higher education could provide for expressive association concerns in public university student group forums. The *Mergens* case involved "the intersection of two First Amendment guarantees—the Free Speech Clause and the Establishment Clause."[294] Similarly, cases like *CLS* involve the intersection of student's First Amendment speech and association rights and universities' nondiscrimination policies.[295] Secondary schools, like Westside in *Mergens*, wanted to remain neutral with regard to religion.[296] To escape Establishment Clause violations, secondary schools restricted the access of religious student groups to student-group forums.[297] Schools believed that being forced to include religious student groups would confer the imprimatur of the school on religion in violation of the Constitution.[298] The adoption of the Equal Access Act and resulting case law, however, demonstrates that including religious student groups in a student-group forum does not require a school to endorse religion.[299] Instead, the Act requires a school to tolerate speech and expressive association.[300]

290. *Id*. at 858.
291. *Id*.
292. *Id*.
293. *Id*.
294. Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 263 (1990) (Marshall, J., concurring).
295. *See, e.g.*, William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 709 (2011) (noting that at an institutional level, such as at universities, "the main clash between . . . equality and religious liberty is going to come when the state insists that religious groups receiving state subsidies adhere to nondiscrimination rules. . . .").
296. *Id*. at 264.
297. *Id*.
298. *Id*.
299. *Id*.
300. *Id*.

Thus, Congress or a state legislature could pass an act[301] similar to the Equal Access Act that regulates student-group forums at public universities.[302] The act could mandate equal access—including the use of university facilities, communications channels, and funding from the student activity fee—for student groups regardless of the groups' religious, political, or philosophical speech and associational activities.

Critical to the success of such an Act is the recognition that a student group's exercise of speech or expressive association does not bear the imprimatur of the university. The majority in *Widmar*, which provided the framework for the Equal Access Act, concluded that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices."[303] The Equal Access Act codified this concept by distinguishing between student-initiated speech and school-sponsored speech.[304] Similarly, an equal access act for higher education could create a statutory open forum whenever a university opens a forum for student groups.

The act would need to be carefully drafted to protect both speech and expressive association rights.[305] For example, the act could forbid a university from applying its nondiscrimination policy in a manner that interferes with a religious, political, or philosophical group's expressive association rights. The act could provide a policing provision recognizing a university's right and responsibility to maintain order and

301. The constitutional authority for such an act is beyond the scope of this Comment. The act could find legitimacy in a provision similar to that found in the Equal Access Act applying the Act to secondary schools receiving federal funds.

302. Legislatures have often adopted measures intended to overcome unpopular judicial decisions in order to provide greater freedoms under the First Amendment. For example, the Supreme Court decided in *Oregon v. Smith*, 494 U.S. 872 (1990), that a state could deny unemployment benefits to workers who were fired for using illegal drugs for religious purposes. *Id*. The workers at issue were Native Americans who smoked peyote, an illegal substance in Oregon, as part of their religious exercise. *Id*. at 874. The Court noted that an individual's religious beliefs do not excuse him from obeying a valid law prohibiting conduct that the government is free to regulate. *Id*. at 878-79. The workers argued that the government must show a compelling state interest before limiting their Free Exercise Rights. *Id*. at 883. The Court rejected this strict scrutiny analysis as inapplicable to the case. *Id*. at 885. Congress responded to the Court's decision by passing the Religious Freedom Restoration Act in 1993. 42 U.S.C. § 2000bb (2006). The Act required Courts to apply strict scrutiny in determining whether a governmental entity violated the Free Exercise Clause. *Id*.; *see generally* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1 (1994).

303. Widmar v. Vincent, 454 U.S. 263, 274 (1981).

304. *See* Equal Access Act, 20 U.S.C.A § 4071 (2006).

305. *See* Truth v. Kent, 542 F.3d 634 (9th Cir. 2008) ("Congress knows how to draft a statute placing otherwise content-neutral laws of general applicability that incidentally burden a *First Amendment* activity under the same judicial scrutiny as laws specifically targeting the religious content of a group's expression.").

control. However, the act could require the application of strict scrutiny analysis to any restrictions imposed on access to a student-group forum.

The Court's student forum precedents[306] impose an important principle that the majority of the Court seems to have ignored: the university campus is "peculiarly the 'marketplace of ideas.'"[307] This principle requires courts to provide "vigilant protection of constitutional freedoms" on a university campus.[308] The Court has consistently concluded that the nation's universities are bastions of free speech and thought.[309] Indeed, this lofty principle is foundational to many universities' student forum programs.[310] The marketplace of ideas concept should be embodied in a statutorily created student-group forum doctrine for higher education. If university students are to fully engage in free speech and thought, then they should have the full benefits of the First Amendment. If universities wish to provide student groups with a forum for speech under the guise of the First Amendment, then universities must be held accountable to the boundaries that they have set.[311]

VI. CONCLUSION

While the First Amendment protects a student's speech against a university's viewpoint discrimination, the Court's decision in *CLS* grants a university significant discretion restricting access to a student-group forum at a public university.[312] Students do not have a constitutional right to form student groups on a university campus. Thus, a university may refuse to open a student-group forum on campus. However, once a university has opened its campus to some student groups, creating a limited public forum, the university should be required provide equal access to all student groups.[313] The Court's decision in *CLS* severely restricts the access of students to student-group forums. An equal access act for higher education could redefine the limits of a university's ability to control student speech and association rights.

306. *See supra* Part III.

307. Healy v. James, 408 U.S. 169, 180 (1972) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

308. *Id*. at 180 (citing Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

309. *See supra* Part II.

310. *See* Luther *supra* note 187, at 686-91 (discussing the debate between benefits and subsidies in the context of *Christian Legal Society v. Martinez*).

311. *See Christian Legal Soc'y*, 130 S. Ct. at 2988; Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

312. *See* Luther *supra* note 187, at 694-95.

313. *See Rosenberger*, 515 U.S. at 829.

The Court's decision in *CLS* highlights an important debate that is likely to occur in a variety of areas in First Amendment jurisprudence. The debate involves the balancing of two important values: the freedoms of speech and association versus nondiscrimination policies.[314]

Foundational to the integrity of our system of higher education is the recognition that our nation's universities are characterized by a "tradition of thought and experiment" that depend on broad First Amendment protections.[315] University administrators should heed Justice O'Connor's warning in *Rosenberger* against tampering with students' First Amendment rights.[316] Suppressing the "free speech and creative inquiry" of students will destroy the quality and creativity of the nation's institutions of higher learning.[317]

314. *See* Thro, *supra* note 182, at 488 (noting that contrary to its prior precedents, the Court "vindicated equality over the freedom of expression, the freedom of religion, and the freedom of civil associations" with the consequence that "such a coercive choice [is] chilling for those who disagree with the prevailing social mood or government's current position on an issue").

315. *Rosenberger*, 515 U.S. at 836.

316. *Id*. at 836.

317. *Id.* at 836.