THE LOSS OF FREEDOM OF ASSOCIATION IN *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010)

Our First Amendment rights are bedrock principles of our nation's constitutional structure.[1] Because public universities and schools are operated by the state, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[2] The Supreme Court has also said that the First Amendment freedom of association guarantee includes a right for groups to set membership standards.[3] In a limited public forum, however, the state may impose reasonable restrictions on speakers and content so long as the restrictions are viewpoint neutral and reasonable.[4] Last term, in *Christian Legal Society v. Martinez* (*CLS*),[5] the Court held that, as conditions for recognition as a registered student organization (RSO), a public university may require a Christian group to accept as members non-Christians and individuals who engage in homosexual conduct.[6] Because an organization that cannot control its membership cannot control its message, the state discriminates against the content of such an organization's message when it attempts to control the organization's membership requirements as a condition for entrance into a limited public forum. Applying an all-comers rule does not cure this defect because such a rule discriminates against the viewpoint that membership criteria is part of the message.[7] Such a policy is invalid, not only because it discriminates against a particular viewpoint,

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1. *See* U.S. CONST. amend. I.

2. Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 506 (1969).

3. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000); *cf.* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995).

4. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

5. 130 S. Ct. 2971 (2010).

6. *See id.* at 2978, 2994–95. Although the parties disputed the proper interpretation of the university's nondiscrimination policy, see *id.* at 2982–84, the Court only considered whether Hastings' interpretation of its policy—as "mandate[ing] acceptance of all comers," *id.* at 2979—violates the First Amendment. *Id.* at 2984.

7. *Cf. Dale*, 530 U.S. at 648; *Hurley*, 515 U.S. at 573–75.

but also because it discriminates against a viewpoint that is specifically and uniquely protected by the First Amendment's freedom of association. The Court's opinion in *CLS* dramatically undercuts the freedom of association. The Court unjustifiably departed from precedent and merged the speech and association rights of the Christian Legal Society (CLS).

Hastings College of the Law requires student groups desiring financial assistance from the law school and access to school channels of communication and facilities to become RSOs.[8] To become an RSO, an organization must abide by Hastings's nondiscrimination policy, which the school interprets to mean that student organizations must accept any student who wishes to be a member.[9] In 2004, a preexisting student organization at Hastings became affiliated with a national group, the CLS. The national CLS requires that members of local chapters sign a statement of faith confirming their belief in the tenets of Christianity and a pledge to not participate in sexual relations outside of heterosexual marriage.[10] When CLS submitted its application for RSO status, the law school rejected the application. The school explained that, by barring students based on religion and sexual orientation, CLS was not in compliance with the school's nondiscrimination policy.[11] CLS filed suit against various law school officers and administrators alleging that the school's refusal to grant RSO status to CLS violated its rights to free speech, expressive association, and free exercise of religion.[12] The district court granted the law school summary judgment, finding the law school's policy both reasonable and viewpoint neutral.[13] On appeal, the Ninth Circuit affirmed the district court in a short, unpublished decision.[14]

The Supreme Court affirmed.[15] Writing for the Court, Justice Ginsburg first rejected CLS's request to consider the nondiscrimination policy as written, rather than as interpreted by the law school, because CLS had stipulated at the summary judg-

8. *CLS*, 130 S. Ct. at 2979.
9. *Id.*
10. *Id.* at 2980.
11. *Id.* at 2980–81.
12. *Id.* at 2981.
13. *Id.*
14. *Id.*
15. *Id.* at 2982.

ment stage that the school's policy was an all-comers policy.[16] Litigants are entitled to have their case tried upon the assumption that stipulated facts have been established, Justice Ginsburg said, and CLS therefore could not escape from the consequences of its stipulation.[17]

CLS argued that Hastings's policy violated both CLS's freedom of speech and freedom of association. Applying the Court's limited public forum precedents to the freedom of speech claim, Justice Ginsburg stated that any restriction on access to such a forum "must be reasonable and viewpoint neutral."[18] Justice Ginsburg acknowledged another line of Supreme Court precedent under which restrictions on the freedom of association must meet a test much more rigorous than limited public forum analysis.[19] Restrictions on association are only permitted if they serve compelling state interests unrelated to the suppression of ideas and if they are narrowly tailored to achieve those interests.[20] But according to Justice Ginsburg, CLS's expressive association argument and free speech argument merge because "[*w*]*ho* speaks on [an organization's] behalf . . . colors *what* concept is conveyed."[21] The case should be considered solely under the Court's limited public forum precedents, Justice Ginsburg reasoned, because employing the stricter freedom of association test would render the Court's limited public forum test for speech inconsequential whenever there is an intertwined freedom of association claim.[22]

Justice Ginsburg began her analysis under the limited public forum standard by evaluating whether Hastings's policy was rationally related to a legitimate public purpose. She noted that although the Court owed no deference to universities on this question, it had previously cautioned against the substitution of judges' own notions of sound policy for those of educators.[23] Justice Ginsburg went on to recite the interests asserted by the law school in maintaining the policy: ensuring that all students

16. *Id.* at 2982.
17. *Id.* at 2983–84.
18. *Id.* at 2984.
19. *Id.* at 2984–88.
20. *Id.*
21. *Id.* at 2985.
22. *See id.*
23. *Id.* at 2988.

have equal access to the opportunities provided in the RSO program; making it easier to police the written terms of the nondiscrimination policy; encouraging tolerance, cooperation, and learning among students; and avoiding subsidizing conduct of which the State of California disapproves.[24] In balancing those interests with any burden to CLS created by the nondiscrimination policy, Justice Ginsburg asserted that CLS was not significantly burdened because non-RSO means of communication remain available to CLS.[25] She also dismissed the concern, voiced by both CLS and the dissenters, that potential saboteurs might attempt hostile takeovers of groups under the all-comers policy, pointing out that RSOs could still condition membership on neutral requirements like attendance or the payment of dues and asserting that these powers would thwart such a takeover.[26] Furthermore, the school would likely revisit its policy if hostile takeovers actually became a problem.[27]

Justice Ginsburg then considered whether the all-comers policy was viewpoint neutral. Although she recognized that the all-comers policy could incidentally burden groups whose viewpoints were outside the mainstream, she concluded that the rule was still viewpoint neutral because it "serve[d] purposes unrelated to the content of expression,"[28] and "aim[ed] at the *act* of rejecting would-be group members without reference to the reasons motivating that behavior."[29] The policy thus withstood challenge under the First Amendment, though the Court remanded the case for further proceedings to determine the viability of CLS's claim of pretext.[30]

In a concurring opinion addressing the dissent's argument that the nondiscrimination policy was plainly unconstitutional, Justice Stevens asserted that, although the First Amendment may protect CLS's membership practices off campus, "it does not require a public university to validate or support them."[31] He argued that Hastings's all-comers policy singled out dis-

24. *Id.* at 2989–91.
25. *See id.* at 2991.
26. *Id.* at 2992–93.
27. *Id.* at 2993.
28. *Id.* at 2994 (citations omitted).
29. *Id.*
30. *See id*. at 2995.
31. *Id.* at 2996 (Stevens, J., concurring).

criminatory conduct, not belief.[32] He emphasized that the proprietor of a limited public forum has the right to establish the boundaries of that forum.[33] As a general matter, Justice Stevens added, the university should be given room to manage its own affairs.[34] Although the law school must treat all participants evenhandedly, "the university need not remain neutral . . . in determining which goals the program will serve and which rules are best suited to facilitate those goals."[35]

Also writing in concurrence, Justice Kennedy sought to distinguish the case from *Rosenberger v. Rector and Visitors of University of Virginia*[36] by asserting that the policy at issue here "applied equally to all groups and views," while the policy in *Rosenberger* did not.[37] Although he recognized that a group that can limit its membership to those who agree in full with its aims and purposes may be more effective in delivering its message or furthering its expressive objectives, Justice Kennedy reasoned that "if the membership qualification were enforced, it would contradict a legitimate purpose for having created the limited forum in the first place."[38] He argued that the RSO program existed to facilitate interaction between students and to enable them to explore new points of view, and that this interest may be better served if students are not allowed to wall off opposing points of view.[39] Finally, Justice Kennedy maintained that the school policy would be void if it were adopted to disadvantage a group on account of its views, but that such a finding of pretext would require further factual development on remand.[40]

Justice Alito dissented,[41] arguing that the Court's majority opinion "provides a misleading portrayal of this case."[42] First, Justice Alito said Hastings denied CLS's application for RSO status on the basis of the nondiscrimination policy, not the all-

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32. *Id.*
33. *Id.* at 2997.
34. *See id.* at 2997–98.
35. *Id.* at 2998.
36. 515 U.S. 819 (1995).
37. *CLS*, 130 S. Ct. at 2999 (Kennedy, J., concurring).
38. *Id.*
39. *Id*. at 2999–3000.
40. *Id*. at 3000.
41. Chief Justice Roberts, and Justices Scalia and Thomas joined Justice Alito's dissent.
42. *CLS*, 130 S. Ct. at 3001 (Alito, J., dissenting).

comers policy.[43] He explained that although the law school claimed to have changed to an all-comers policy in July 2005, it could present no evidence of the policy's existence.[44] Other groups had regularly restricted membership to those who agreed with their viewpoints, and the law school changed its interpretation of the policy yet again when it filed its brief with the Court, asserting that it permitted organizations to have some "neutral" membership requirements, such as required attendance and dues.[45] Justice Alito further explained that CLS only stipulated that the law school had an all-comers policy, not that their admission was rejected on the basis of that policy, and that the law school admitted in its answer that it did not have an all-comers policy at the time it rejected CLS's application.[46] Justice Alito also accused the Court of distorting the record concerning non-RSO access to campus facilities and disputed the majority's claim that CLS was seeking a subsidy for its activities.[47]

Justice Alito compared the Court's decision to that in *Healy v. James*,[48] where the Court found that a university could not deny RSO organization status to a chapter of Students for a Democratic Society (SDS) even though the members of the organization would not renounce using violence.[49] He remarked that the burden borne by SDS in *Healy* was very similar to that borne by CLS in this case and went on to point out that the Court in *Healy* refused to defer to the judgment of the university in interpreting the right to free speech.[50] Even assuming that the Court's limited public forum jurisprudence controlled in *CLS*, Justice Alito continued, the Court held in the past that universities must maintain strict viewpoint neutrality, including for expression of religious viewpoints.[51] The university's nondiscrimination policy "plainly fails" that standard because it forces religious groups to admit those who do not share their views but does not require other groups to do the same.[52] Contrary to Justice Stevens's view, Justice Alito as-

43. *Id*.
44. *Id*. at 3003.
45. *Id*. at 3004.
46. *Id*. at 3005–06.
47. *Id*. at 3006–07.
48. 408 U.S. 169 (1972).
49. *CLS*, 130 S. Ct. at 3007 (Alito, J., dissenting).
50. *Id.* at 3008.
51. *Id.* at 3009.
52. *Id.* at 3009–10.

serted, the Court previously accepted the conduct at issue in *CLS* as being a form of expression.[53]

Moving to the all-comers policy, Justice Alito argued first that the law school admitted that groups may impose some conduct requirements and that the burden was on the school to show why CLS's conduct requirements were not allowed.[54] He then asserted that even if Hastings truly adhered to an all-comers policy, such a policy would be "antithetical to the design of the RSO forum," which purportedly existed to "foster the expression of diverse viewpoints."[55] Furthermore, he argued that even assuming the policy was viewpoint neutral on its face, there was a good deal of evidence that it was adopted merely as a pretext to deny RSO status to CLS.[56] Finally, Justice Alito warned that students who do not share the viewpoint of an organization might join simply to change the group's message, which would be more likely to happen to groups representing a minority opinion on university campuses.[57]

Tolerance of "the thought we hate" is a defining quality of American society. The Supreme Court has invalidated statutes forbidding cross burning[58] and has rebuffed attempts to curtail neo-Nazi demonstrations.[59] In these and other circumstances, the Court has clearly signaled that even the most repugnant viewpoints are protected by the First Amendment. People may have an individual right to free expression, but they often exercise that right in groups. Protests can involve thousands of people, and Americans frequently organize themselves into groups, such as Mothers Against Drunk Driving (MADD) and the People for the Ethical Treatment of Animals (PETA), to express a viewpoint. The Court has found a violation of the right of expressive association when restrictions on association hinder an expressive association's ability to express a viewpoint.[60] The Court erroneously allowed Hastings's policy to stand,

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53. *Id.* at 3011.

54. *Id.* at 3012–13.

55. *Id.* at 3014.

56. *See id*. at 3016–19.

57. *Id*. at 3019.

58. *E.g.*, Virginia v. Black, 538 U.S. 343, 364 (2003); R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992).

59. Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977).

60. *See e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573–75 (1995).

however, despite its great interference with the expressive association rights of student groups. The Court's characterization of the organization's membership requirements as conduct that can be regulated, instead of as expressive speech to be protected, unjustifiably departs from the Court's precedents and seriously undermines the meaning of the First Amendment.

The issue of access to RSO programs had already been addressed by the Court in *Healy v. James*,[61] as Justice Alito pointed out in his dissent. The state interest in restricting financial support for organizations that refuse to denounce violence, as in *Healy*,[62] is much stronger than the interests asserted by Hastings in *CLS*. Nevertheless, the Court in *Healy* held, contrary to this case, that "[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right."[63] The *Healy* Court remanded the case to determine whether there was enough evidence to suggest SDS would not follow school rules.[64] The Court's decision in *CLS* radically departs from this precedent by evaluating Hastings's policy only under its limited public forum jurisprudence.

Even if *Healy* is ignored, however, the Court's limited public forum jurisprudence does not support the conclusion in *CLS*. In a limited public forum, restrictions on speakers must be viewpoint neutral and reasonable in light of the purpose of the forum.[65] The Court has said several times that excluding religious views from a forum is viewpoint discrimination.[66] Even assuming that Hastings's policy really is an all-comers policy, CLS's exclusion is clearly viewpoint discrimination because it excludes from participation any group that uses membership criteria to express its message. Because student organizations exist to further student expression, the Court's characterization of membership requirements as conduct instead of speech seri-

61. 408 U.S. 169 (1972).

62. *Id.* at 173.

63. *Id.* at 181.

64. *Id.* at 194.

65. *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

66. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 109 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 832 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–94 (1993) (citing *Cornelius*, 473 U.S. at 806); Widmar v. Vincent, 454 U.S. 263, 277 (1981).

ously undermines the First Amendment freedom of association rights of student groups.

The Court in *Healy* did say that schools may promulgate rules and regulations to regulate conduct,[67] and the Court in *CLS* categorized Hastings's behavior as such a regulation of conduct. The Court found that "Hastings denied CLS recognition not because the school wanted to silence the 'viewpoint that CLS sought to express through its membership requirements,' . . . but because CLS, insisting on preferential treatment, declined to comply with the open-access policy applicable to all RSOs."[68] In Justice Ginsburg's view, "[a]lthough registered student groups must conform their *conduct* to the Law School's regulation by dropping access barriers, they may express any viewpoint they wish."[69] Writing in concurrence, Justice Stevens insisted that "[t]hose who hold religious beliefs are not 'singled out' . . . those who engage in discriminatory *conduct* based on someone else's religious status and belief are singled out."[70]

In evaluating the Court's decision, it is instructive to look at two cases Justice Ginsburg cited to support the proposition that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[71] The regulation at issue in *Ward v. Rock Against Racism* "require[d] bandshell performers to use sound-amplification equipment and a sound technician provided by the city."[72] The restriction at issue in *Madsen v. Women's Health Center* was an injunction that created time, place, and manner restrictions on abortion protesters demonstrating at abortion clinics or near clinic staff.[73] Justice Ginsburg seemed to assert that a group determining its membership constitutes conduct in the same sense that picketing an abortion clinic or playing a rock concert constitutes conduct. But these actions are not analogous. Neither *Ward* nor *Madsen*

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67. 408 U.S. at 192 (citing Esteban v. Cent. Mo. State Coll., 415 F.2d 1077, 1089 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970)).

68. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2987 n.15 (2010) (citations omitted).

69. *Id.* at 2994 n.26 (emphasis added).

70. *Id.* at 2996 (Stevens, J., concurring) (citations omitted).

71. *Id.* at 2994 (majority opinion) (alteration in original) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

72. 491 U.S. at 784.

73. 512 U.S. 753, 759–61 (1994).

involved regulations affecting the basic message of the group. Rather, those cases dealt only with the manner in which the group could present its message. The viewpoint of an organization is determined by its membership, so a regulation controlling the membership of private groups has an effect on the group's basic message.

Although the *CLS* holding also can be construed as a mere restriction on the manner in which a message can be conveyed, this method of expression (membership criteria) is specifically protected by the Constitution. The Supreme Court said that the First Amendment protects the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[74] Because presenting one's message through association is a constitutional right articulated by the Court in past cases, the Court was disingenuous to characterize associative rights as conduct, allowing such rights to be curtailed as merely "the way the message can be conveyed" without separately balancing the state interest against the constitutional associational right.[75] Restrictions on the right of an expressive association to set membership requirements are acceptable only if they do not interfere with the organization's ability to convey its preferred message.[76]

The Court has upheld some laws requiring private clubs to admit women because the laws did not interfere with the group's ability to disseminate its preferred views.[77] But the Court has struck down restrictions on the membership of private organizations when the restrictions would interfere with the organization's ability to control its message. In *Boy Scouts of America v. Dale*, the Court found that requiring the Boy Scouts to accept homosexual scoutmasters infringed on the Boy Scouts's freedom of association.[78] The Boy Scouts asserted that homosexual conduct is inconsistent with the Scout Oath, which requires scouts to be "morally

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74. Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

75. *Compare* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000), *and* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573–75 (1995), *with CLS*, 130 S. Ct. at 2994 n.26.

76. *See Roberts*, 468 U.S. at 627.

77. *See, e.g.*, N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987); *Roberts*, 468 U.S. at 627.

78. 530 U.S. 640, 656 (2000).

straight" and "clean."[79] While cautioning that "an expressive association can[not] erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message," the Court decided to "give deference to an association's view of what would impair its expression."[80] In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Court held that Massachusetts could not require a parade to include a group of Irish homosexuals, because such a requirement "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[81] Whatever reason the parade organizers had for excluding the Irish homosexual unit, "it boils down to the choice of a speaker not to propound a particular point of view."[82] An organization that wants to express a particular message cannot be forced to accept members that would inhibit its ability to do so.

If the right to exclude is constitutionally guaranteed in cases where an organization's ability to convey its message depends on such a right, it is difficult to see how the Court was able to conclude that the law school's policy did not endanger CLS's right to expressive association. If CLS had accepted the all-comers policy, it would have been difficult for CLS to express the view that Jesus Christ is God if, for example, CLS were infiltrated by a large group of new members who held to the view that Christ was a mere man. If a non-Christian block of students joined the group and elected an atheist leader, then the organization's integrity would be undermined, as an atheist president would not have the same zeal in spreading CLS's religious message. The original purpose of CLS to express Christian ideas would be defeated.

Additionally, CLS's stance in support of Christian beliefs and in opposition to homosexual conduct was much clearer than the Boy Scouts's stance in *Dale*. Whereas CLS's bylaws specifically required practice of the Christian faith and rejection of homosexual behavior, the Boy Scouts's position in *Dale* relied on the assertions that a homosexual scoutmaster would undermine the values of the Scout Oath represented by the terms

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79. *Id.* at 650.
80. *Id.* at 653.
81. 515 U.S. 557, 573 (1995).
82. *Id.* at 575.

"morally straight" and "clean."[83] As the Court admitted in *Dale*, "[d]ifferent people would attribute to those terms very different meanings."[84] There is certainly no ambiguity regarding CLS's views on Christian beliefs and homosexual conduct.

Justice Ginsburg nevertheless attempted to distinguish *CLS* from *Dale* and *Hurley*. She argued that the parade in *Hurley* was different because it took place in "the most traditional of public forums: the street."[85] But this difference is insignificant. CLS, after all, alleged viewpoint discrimination, and such discrimination is allowed in neither traditional public forums nor in limited public forums.[86] Justice Ginsburg sidestepped the holding in *Dale* by refusing to engage CLS's freedom of association claims separately from its free speech arguments because "its expressive-association and free-speech arguments merge."[87] But in doing so, Justice Ginsburg contradicted her own reasoning: apparently the membership of an organization is not central enough to its viewpoint for restrictions on membership to qualify as restrictions on viewpoint, but the membership of an organization does affect its viewpoint enough to make separate consideration of free exercise claims and expressive association claims unnecessary.[88]

Justice Ginsburg gave other reasons for not subjecting the case to analysis under the Court's freedom of association precedents. She argued that forcing university rules to pass two tests—one for free speech claims and another for freedom of association claims–would undermine the purpose of limited public forums as a jurisprudential construct.[89] But if a policy does indeed implicate two independent First Amendment rights, why should not the bar be higher? These two separate tests exist to protect basic constitutional rights. They were not devised merely to annoy college administrators. Justice Ginsburg also stated that, in part because it involved a subsidy, the

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83. *Dale*, 530 U.S. at 650.

84. *Id.*

85. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2986 n.14 (2010).

86. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n., 460 U.S. 37, 46 (1983).

87. *CLS*, 130 S. Ct. at 2985.

88. *Compare id.* at 2985 (declining to consider free speech and freedom of association rights separately because the arguments merge) *with id*. at 2994 n.26 ("Although registered student groups must conform their *conduct* to the Law School's regulation by dropping access barriers, they may express any viewpoint they wish . . . .") (emphasis added).

89. *Id.* at 2985.

RSO program created a paradigmatic limited public forum.[90] Even if the RSO program involved some direct funding, this should not matter because the Court held in *Rosenberger* that when a university "expends funds to encourage a diversity of views from private speakers," it cannot discriminate against certain viewpoints in the disbursement of those funds.[91] The presence of a small subsidy should not allow the university to deny students their right to freedom of association.

The law school also argued, essentially, that it was not trying to control the membership of CLS but was only saying that CLS cannot be a registered student organization if it maintains its discriminatory policies.[92] The problem with that argument is that freedom from viewpoint discrimination means the ability to convey a viewpoint on equal footing with other viewpoints.[93] Some groups will be severely disadvantaged without the ability to exclude members based on belief and as a result will be unable to convey their viewpoint from a position of equal footing. The RSO policy creates two classes of viewpoints: one that has the advantage of using campus channels of communication, access to university facilities, and even subsidies, and another that has none of these advantages merely because it chooses to exercise its right of expressive association. The policy forces CLS to "pick its poison" by deciding whether to weaken its message by either allowing people who disagree with it into the group or going without the advantages that accrue to RSOs. Forcing CLS into a disadvantaged position regardless of its choice is at odds with the principle of a free marketplace of ideas.[94]

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90. *Id.* at 2986.

91. Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995).

92. *See CLS*, 130 S. Ct. at 2991–92.

93. *See, e.g.*, *Rosenberger*, 515 U.S. at 828 (holding that state university may not regulate speech based on the content of its message); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (holding that the government may not regulate speech in ways that prefer one viewpoint over another).

94. *See, e.g.,* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."); *see also* N.Y. State Bd. of Elections v. Torres, 552 U.S. 196, 208 (2008) ("The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference." (citation omitted)); FCC v. Pacifica Found., 438 U.S. 726, 745–46

Justice Ginsburg argued that the all-comers policy was viewpoint neutral because it applied to all groups.[95] But the Court had previously stated in *Rosenberger* that a regulation that discriminates against multiple viewpoints is no more valid than a regulation that discriminates against only one viewpoint.[96] Incorporating, even unconsciously, an official viewpoint into a widely applicable standard does not cure the viewpoint from being a government-imposed orthodoxy, which is exactly what the First Amendment exists to prohibit.[97]

The Court in *CLS* attempted to avoid direct conflict with prior precedents that held exclusion of religious speech from a forum to be viewpoint discrimination by classifying an organization's membership procedures as conduct rather than viewpoint. In doing so, the Court both ignored the logic of its most recent freedom of association decisions and radically departed from precedent, including *Dale* and *Hurley*. Restrictions on the freedom of association in a limited public forum should be required to pass both the freedom of speech and the freedom of association tests because any rule that restricts expressive association necessarily discriminates against the viewpoint that expressive association is a valid means of conveying one's message and thus cannot be viewpoint neutral. The lack of such neutrality merits the additional scrutiny that the free speech and the free association tests provide when independently applied. By ignoring the implications of CLS's right to freedom of association, the Court wrongly departed from its association precedents and seriously undermined this crucial First Amendment right.

Jack Willems

(1978) (Stevens, J.) (plurality opinion) ("For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.").

95. *CLS*, 130 S. Ct. at 2993 ("It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers.").

96. *Rosenberger*, 515 U.S. at 831 ("It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.").

97. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.").