IN DEFENSE OF THE HOSTILE TAKEOVER: A MOVE TOWARDS MORE DEMOCRATIC STUDENT ORGANIZATIONS IN *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*

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INTRODUCTION

IMAGINE that a global warming denier joins a student group devoted to environmental activism. The student interjects her views at meetings and seeks to alter group events. She recruits other global warming deniers to join the organization. Ultimately, the deniers outnumber the original members and are elected to leadership positions and effectively change the group's message. This is known as the hostile takeover scenario, and the Justices of the United States Supreme Court think it is unacceptable. On the contrary, hostile takeovers are to be embraced because they are evidence of equal access to groups and ideological diversity. In other words, where there is the risk of a hostile takeover, there is democracy.

In *Christian Legal Society v. Martinez* ("*CLS*"),[1] the Court found that Hastings College of Law did not violate Christian Legal Society's rights to free speech and expressive association when it required them to accept any student interested in membership.[2]

Since the Court's decision, there have been many interpretations of its impact on student organizations and the freedom of expressive association. Many of these arguments center around the concept that student organizations that cannot exclude members will necessarily invite members who are hostile to its mission. This argument relies on the assumption that debate *among* groups promotes more speech than debate *within* groups. While the outcome of *CLS* was fair, the Court leaves open the possibility that in the event of the hostile takeover of a student organization, there could be future litigation or Hastings could change its policies in an effort to prevent the takeover from happening.[3]

This article continues in four parts. Part I explains the background doctrines of freedom of speech, public forums, and association. These

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1. 130 S. Ct. 2971 (2010).
2. *Id.* at 2995.
3. *See id.* at 2992.

background doctrines demonstrate how the application of different principles may result in inconsistent decisions. Part II examines the facts of and the opinions in *Christian Legal Society v. Martinez*. Part III proposes that, because democracy is a core value of the Constitution, people should have equal access to group membership because it ensures ideological diversity. Part IV concludes by suggesting that when making a decision about the convergence of associational rights and anti-discrimination laws, the Court should accept the risk of the hostile takeover.

I. BACKGROUND DOCTRINES

When analyzing a First Amendment dispute, the Supreme Court relies on many doctrines for determining how, when, and where the government may regulate expression.[4] The First Amendment protects the freedoms of speech, assembly, petition, and free exercise of religion as well as freedom from the establishment of religion.[5] In *CLS v. Martinez,* the doctrines of freedom of speech, public forum, and freedom of association are all implicated in the Court's decision.[6] Accordingly, Part I will examine these doctrines as they relate to *CLS*.

A. *Freedom of Speech*

The First Amendment dictates that "Congress shall make no law … abridging the freedom of speech …."[7] Since *Schenck v. United States*, this right has been protected,[8] and the current general rule is that any regulation must be both viewpoint and content-neutral.[9] Yet, there are exceptions for certain types of speech. These exceptions include obscenity,[10] fighting words,[11] illegal advocacy,[12] conduct that communicates,[13] and defamation.[14]

B. *Public Forum Doctrine*

To determine where the government can regulate speech, the Court developed the public forum doctrine.[15] Under this doctrine, some publicly owned lands are reserved for free speech.[16] Public forums are places that have been

4. Julie A. Nice, *How Equality Constitutes Liberty: The Alignment of* CLS v. Martinez, 38 HASTINGS CONST. L.Q. 631, 639 (2011).
5. U.S. CONST. amend. I.
6. *Christian Legal Soc'y*, 130 S. Ct. at 2978.
7. U.S. CONST. amend. I.
8. Schenck v. United States, 249 U.S. 47, 52 (1919).
9. Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969).
10. Miller v. California, 413 U.S. 15, 36-37 (1973).
11. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).
12. *Brandenburg*, 395 U.S. at 447-48.
13. United States v. O'Brien, 391 U.S. 367, 376-77 (1968).
14. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 292 (1964).
15. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515-16 (1939) (plurality opinion).
16. *Id.*

reserved for the public.[17] In these spaces, the government can prescribe time, place, and manner restrictions so long as they are content-neutral.[18] Content-based restrictions are subject to strict scrutiny or, in other words, must be narrowly tailored to serve a compelling government interest.[19] In 1983, the Court distinguished between the traditional public forum, the designated (limited) public forum, and the non-public forum in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.[20]

In *Perry Education Ass'n*, the Court defined the public forum as places, such as public parks and streets, that "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[21] In public forums, the government cannot prohibit all speech.[22] However, the government can create time, place, and manner restrictions as long as they are content-neutral and are "narrowly tailored to serve a significant government interest."[23]

The government can also create a limited (designated) public forum.[24] A limited public forum is created when the government opens up the property for expressive activity.[25] Even though the government does not have to open up this property, once it does, any time, place, or manner restrictions would be evaluated under the same restrictions as a public forum.[26]

The Court later clarified the standard for limited public forums in *Good News Club v. Milford Central School*.[27] In a limited public forum, the government can open up or reserve the forum for certain groups or topics.[28] However, the restrictions must be "reasonable in light of the purpose served by the forum"[29] and "must not discriminate against speech on the basis of viewpoint."[30]

17. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). *See also Hague*, 307 U.S. at 515-16.

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

19. *Id. See also* Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009).

20. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2991-92 (2010) (discussing *Perry Educ. Ass'n*, 460 U.S. at 53-54).

21. *Perry Educ. Ass'n*, 460 U.S. at 45 (citing *Hague*, 307 U.S. at 515).

22. *Id.*

23. *Id.*

24. *Id.* at 47-48. The Court uses designated and limited public forum somewhat inconsistently in its doctrine. For a detailed discussion of this, see Jonathan Winters, *Thou Shall Not Exclude: How* Christian Legal Society v. Martinez *Affects Expressive Associations, Limited Public Forums, and Student's Associational Rights*, 43 U. TOL. L. REV. 747, 751-55 (2012).

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

26. *Id.* at 46.

27. Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

28. *Id.* at 106.

29. *Id.* at 106-07 (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

30. *Id.* (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

The final category is a non-public forum.[31] A non-public forum has not been traditionally open for or designated as a place for expressive communication.[32] There, the government can regulate speech as long as the restrictions are reasonable and not an effort by public officials to suppress a particular viewpoint or speaker.[33]

C. Freedom of Association

In addition to freedom of speech and the public forum doctrine, the Court has found that freedom of association is covered by First Amendment protections.[34] While not mentioned explicitly in the text of the Constitution, the Court has found that association is an essential part of the freedom of speech because advocacy of a point of view is "enhanced by group association."[35] Association can be either intimate or expressive.[36] Intimate association is a "fundamental element of personal liberty"[37] and is most commonly understood in the context of family relationships.[38] Conversely, expressive associations are understood as a "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[39]

The doctrine of freedom of association is unsettled.[40] It has been argued that the intimate association doctrine offers no additional constitutional protections beyond what is already provided by the right of privacy.[41] The expressive association doctrine is confusing at best. While there is a line of association cases that involve political parties and the ability to join groups,[42] this article will only examine the freedom of association as it relates to anti-discrimination laws and the rights of students groups.

D. Anti-Discrimination Laws and Expressive Association

The expressive association doctrine follows two lines in anti-discrimination suits: those requiring inclusion and those allowing exemption from anti-

31. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).
32. *Id.*
33. *Id.*
34. Healy v. James, 408 U.S. 169, 181 (1972).
35. NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460 (1958).
36. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).
37. *Id.*
38. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 625 (1980); Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twentieth Century*, 16 GEO. MASON U. C.R. L.J. 269, 277 (2006).
39. *Roberts*, 468 U.S. at 618.
40. John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 149 (2010).
41. *Id.* at 153.
42. *See* Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1488 (2001).

discrimination laws. For instance, in *Roberts v. United States Jaycees,* the Court held that compelling a national organization to accept women in a local chapter would not violate its constitutional rights.[43] The United States Jaycees were a national nonprofit organization that aimed to "promote and foster the growth and development of young men's civic organizations in the United States."[44] In compliance with Minnesota's anti-discrimination laws, two local chapters of the Jaycees admitted women as members.[45] The national organization sanctioned the local chapters for violating a national bylaw prohibiting admission of women.[46] The local chapters filed a state civil rights complaint against the national organization. The organization responded with a federal lawsuit.[47]

In analyzing the Jaycees' claim of infringement of expressive association, the Court stated that unconstitutional infringement can take many forms.[48] For example, there would be infringement where the government imposed penalties or withheld benefits from individuals because of their membership in a group, or further, where the government required disclosure of the group member's names and interfered with the group's internal organization.[49] By requiring the Jaycees to admit women as members, the state's actions worked as interference with internal organization.[50] In fact, the Court stated that there could be "no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."[51]

Nevertheless, the right of association is not without limitations.[52] Infringements can be justified by regulations that serve a compelling state interest, unrelated to the suppression of ideas, which "cannot be achieved through means significantly less restrictive of associational freedoms."[53] The Court found that Minnesota's interest in eradicating discrimination against women was compelling.[54] Further, the goal of the statute was unrelated to the suppression of expression.[55] Additionally, Minnesota chose the least restrictive means of achieving its compelling interest.[56] As such, the Court held that the Jaycees did not demonstrate that the inclusion of women would impose "any serious burdens on the male members' freedom of expressive association."[57]

43. *Roberts*, 468 U.S. at 612.
44. *Id.*
45. *Id.* at 614.
46. Roberts v. U.S. Jaycees, 468 U.S. 609, 614 (1984).
47. *Id.* at 614-15.
48. *Id.* at 622.
49. *Id.* at 622-23.
50. *Id.* at 623.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. Roberts v. U.S. Jaycees, 468 U.S. 609, 626 (1984).
57. *Id.*

Several years later, the Court extended the *Roberts* holding in *Board of Directors of Rotary International v. Rotary Club*.[58] There, the national rotary organization rescinded the charter of a local club because it had admitted women.[59] The local club and two female members filed suit in state court challenging the action as a violation of a California anti-discrimination statute.[60] As in *Roberts*, the Court found that the state had a compelling interest in eliminating discrimination.[61] Additionally, the Court found no significant impact on the club's expressive activities and held that any "slight infringement" was justified by the state's compelling interest.[62] Likewise, in *New York State Club Ass'n v. City of New York*, the Court upheld the constitutionality of an ordinance that prohibited discrimination by clubs having more than 400 members and providing regular meal service.[63]

In *Boy Scouts of America v. Dale*, for the first time, the Court found that the freedom of association protects a right to discriminate.[64] In *Dale*, the Court held that the application of a state's anti-discrimination law violated the Boy Scouts' right of association.[65] James Dale joined the Boy Scouts when he was eight years old.[66] He became an Eagle Scout and, eventually, an assistant scoutmaster.[67] While he was in college, Dale acknowledged that he was gay.[68] He gave a newspaper interview where he discussed his role as co-president of the student gay rights group and the need for gay role models.[69] After the article was published, Dale received a letter from the Boy Scouts revoking his membership.[70] After Dale requested the reason for his expulsion, the Boy Scouts responded that they "specifically forbid membership to homosexuals."[71] Dale filed suit alleging that Boy Scouts had violated New Jersey's anti-discrimination law.[72]

The Court then had to investigate what the group's message was in order to determine if discrimination against homosexuals was integral to their organization.[73] The Boy Scouts argued that, as a group, their expressive message was anti-homosexual.[74] The Court deferred to the Scouts' brief, which asserted that the organization did have such a message.[75] "As we give deference to an

58. Bd. of Dirs. v. Rotary Club of Duarte, 481 U.S. 537, 548-49 (1987).
59. *Id.* at 542.
60. *Id.* at 542-43.
61. *Id.* at 549.
62. *Id.*
63. N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1, 12 (1988).
64. Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 645.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 648.
74. Boy Scouts of Am. v. Dale, 530 U.S. 640, 649-50 (2000).
75. *Id.* at 648-50.

association's assertions regarding the nature of its expression," Justice Rehnquist said, "we must also give deference to an association's view of what would impair its expression."[76] The Court then elaborated on how the mission of the Boy Scouts exudes these values including being "morally straight."[77] Even though the Scouts were allegedly accepting of heterosexual scoutmasters who advocated tolerance for gays, Dale was a "gay rights activist," and his presence "would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accept homosexual conduct as a legitimate form of behavior."[78]

The Court also rejected the adequacy of the state's interest in combating discrimination.[79] The Court did not describe the state interests in question, but asserted that those interests could not "justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."[80] This is a distinct difference from *Roberts*, where "the Court had demanded a greater showing of interference with the group's expression and had placed more emphasis on enforcing anti-discrimination laws."[81]

E. Associational Rights of Student Groups

Over the years, the Court has been faced with a number of suits involving the associational rights of students. In *Healy v. James*, the Court found that Central Connecticut State College violated its students' associational rights.[82] There, a group of students wanted to form a local chapter of Students for a Democratic Society (SDS).[83] The school administration refused to grant SDS recognition on campus because the national SDS's philosophy of civil disobedience was "antithetical to the school's policies."[84] The denial of recognition meant that SDS could not use campus facilities for meetings or use the school's bulletin board or newspaper to communicate with other students.[85] After the denial, SDS brought suit claiming its constitutional rights had been violated.[86]

The Court noted, "[t]here can be no doubt that the denial of official recognition, without justification, to college organizations burdens or abridges that associational right."[87] The Court explained that a disagreement with a

76. *Id.* at 653.
77. *Id.* at 650.
78. *Id.* at 653.
79. *Id.* at 656-68.
80. *Id.* at 659.
81. Farber, *supra* note 42, at 1493.
82. Healy v. James, 408 U.S. 169, 194 (1972).
83. *Id.* at 170.
84. *Id.* at 175.
85. *Id.* at 176.
86. *Id.* at 170.
87. *Id.* at 181.

group's philosophy is not enough to deny a student group recognition.[88] Yet, "[a]ssociational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."[89] The Court concluded that there was insubstantial evidence to show that SDS posed a threat of "material disruption."[90] However, as noted, even if there had been such evidence, the refusal to recognize the group would have been valid.[91]

Widmar v. Vincent helped to shape the future for religious groups intending to express religious ideas and exercise their freedom to associate on public school campuses.[92] In *Widmar,* the University of Missouri at Kansas City had a policy that prohibited student groups from using the facilities for the purpose of religious worship or religious teaching.[93] After this policy went into effect, a student religious group's right to use the facilities was revoked.[94] The student group brought suit.[95] The Supreme Court held that because the University generally permitted other student groups to use its facilities, any restrictions to this open access policy must be constitutionally permissible.[96] Thus, once the school provided a limited public forum, it could not impose viewpoint-based restrictions.[97] Because the school limited access to facilities based on religion, this restriction was not viewpoint neutral.[98]

In *Rosenberger v. Rector & Visitors of University of Virginia*, the University authorized payments from the Student Activities Fund (SAF) for the printing of publications issued by student groups.[99] The University stopped authorization for payments to print a student newspaper because it presented material from a Christian perspective.[100] This practice was authorized by the University's SAF guidelines that prohibited payments for a publication that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."[101] The student group filed suit alleging that the refusal to authorize payment violated its First Amendment rights.[102] As in *Widmar*, the Court found that the policy was not viewpoint neutral.[103] These pre-*Christen*

88. *Id.* at 187.
89. *Id.* at 189.
90. *Id.* at 189-90.
91. *Id.* at 189.
92. *See* Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that a state university violated students' First Amendment Speech rights when it excluded religious groups from becoming official student groups, thereby regulating student speech).
93. *Id.* at 265.
94. *Id.*
95. *Id.* at 266.
96. *Id.* at 277.
97. *Id.*
98. *Id.*
99. 515 U.S. 819, 822 (1995).
100. *Id.* at 827.
101. *Id.* at 822-23 (quoting University of Virginia regulations).
102. *Id.* at 827.
103. *Id.* at 833.

Legal Society cases set forth the necessary backdrop for establishing student group associational rights.

II. *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*

In *Christian Legal Society v. Martinez*, the Court first addressed the issue of whether "a public law school [may] condition its official recognition of a student group … on the organization's agreement to open eligibility for membership and leadership to all students."[104] The Court found that the school could condition official recognition, but left open the question of the policy changes and litigation to prevent a hostile takeover.[105]

A. *The Facts*

Hastings College of Law (Hastings) is a public school in California.[106] At Hastings, student groups had the opportunity to be recognized as a Registered Student Organization (RSO).[107] As a RSO, a student group was entitled to many benefits.[108] These benefits included:

- the ability to seek funds from student-activity fees
- the ability to place announcements in the student newsletter
- use of the bulletin boards to post events
- the ability to recruit new members at an annual Student Organization Fair
- use of school facilities for meeting space
- use of Hastings' name and logo.[109]

As a condition for these benefits, all RSOs needed to abide by certain policies and procedures.[110] The group's membership was limited to students and all prospective RSOs were required to submit their bylaws for approval.[111] Further, RSOs compliance with Hastings's "Policies and Regulations Applying to College Activities, Organizations and Students" was mandatory.[112] Included in these regulations was Hastings's Nondiscrimination Policy.[113] Adopted in 1990, the policy read:

> [Hastings] is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration,

104. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2978 (2010).
105. *Id.* at 2993.
106. *Id.* at 2978.
107. *Id.* at 2979.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*

> faculty, student governments, [Hastings]-owned student residence facilities and programs sponsored by [Hastings], are governed by this policy of nondiscrimination. [Hasting's] [sic] policy on nondiscrimination is to comply fully with applicable law.
>
> [Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.[114]

Hastings interpreted this policy to mean that all RSOs were required to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of her status or beliefs."[115] Simply put, any student organization had to accept all-comers.[116]

In 2004, the Christian Legal Society (CLS) became the first student organization to seek an exemption from the all-comers policy.[117] At the beginning of the academic year, a student group, (that had been a RSO for ten years), affiliated with the national Christian Legal Society to form CLS.[118] In order to become an official chapter, CLS adopted the bylaws of the national organization.[119] These bylaws required members and officers to sign a "Statement of Faith" and to "conduct their lives in accord with prescribed principles."[120] The Statement of Faith read as follows:

> Trusting in Jesus Christ as my Savior, I believe in:
>
> - One God, eternally existent in three persons, Father, Son, and Holy Spirit.
> - God the Father Almighty, Maker of heaven and earth.
> - The Deity of our Lord, Jesus Christ, God's only Son conceived of the Holy Spirit, born of the Virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
> - The presence and power of the Holy Spirit in the work of regeneration.
> - The Bible as the inspired Word of God.[121]

Included in these principles was the "belief that sexual activity should not occur outside of marriage between a man and a woman."[122] Therefore, CLS interpreted

114. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2980 (2010).
115. *Id.* at 2979.
116. *Id.*
117. *Id.* at 2980.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

their bylaws to exclude membership to anyone who engaged in "unrepentant homosexual conduct."[123]

On September 17, 2004, CLS applied for RSO status.[124] Shortly thereafter, Hastings rejected the application.[125] In denying the CLS application, Hastings found that their request did not comply with the nondiscrimination policy because of their exclusions of students on the basis of religion and sexual orientation.[126] CLS then requested an exemption from this policy.[127] Hastings again denied this request, stating: "[T]o be one of our student-recognized organizations … CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation."[128] Despite rejecting the application for RSO status, Hastings would still allow CLS to use facilities, chalkboards, and some campus bulletin boards.[129]

CLS refused to change its bylaws and in October 2004 filed suit against various officers and administrators of Hastings.[130] The complaint alleged that by refusing to grant RSO status, Hastings violated CLS's First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion.[131] Both the United States District Court for the Northern District of California and the Ninth Circuit Court of Appeals awarded summary judgment to Hastings.[132] The Supreme Court granted certiorari and affirmed the Ninth Circuit's judgment.[133]

B. The Decision

Justice Ginsburg wrote for the majority.[134] In her opinion, Ginsburg held CLS to facts stipulated at the outset of the litigation;[135] specifically, that CLS affirmed that Hastings imposed the all-comers rule on all RSOs.[136] After settling this issue, she shifted to the main issues at hand.[137]

First, Ginsburg determined that Hastings, through its RSO program, had established a limited public forum.[138] The limited public forum is established when government entities open property "limited to use by certain groups or

123. *Id.*
124. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2980 (2010).
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 2981.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 2982.
134. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2978 (2010).
135. *Id.* at 2982-84.
136. *Id*. at 2984.
137. *Id.*
138. *Id.*

dedicated solely to the discussion of certain subjects."[139] As a limited public forum, any restrictions that Hastings placed on access must have been both reasonable and viewpoint neutral.[140]

Ginsburg next dismissed CLS's preference to have their associational freedom claims analyzed under strict scrutiny.[141] She stated that the limited public forum precedents provide the "appropriate framework for assessing both CLS's speech and association rights" for three reasons.[142] First, when these "intertwined rights arise in exactly the same context" it would make little sense for a speech restriction to survive review under the limited public forum test only to have it invalidated under a review of expressive association.[143] Second, the strict scrutiny applied in expressive association claims would invalidate a "defining characteristic" of a limited public forum; specifically, that the state "may reserv[e] [them] for certain groups."[144] Third, past expressive association cases focused on regulations that compelled a group to include members.[145] Because CLS sought a state subsidy, the organization merely faced "only indirect pressure to modify its membership policies."[146]

Ginsburg then turned to three cases in which the Court considered disputes between public universities and student groups seeking recognition:[147] *Healy v. James*,[148] *Widmar v. Vincent*,[149] and *Rosenberger v. Rector & Visitors of the University of Virginia*.[150] In *Healy*, the school administration "exceed[ed] constitutional bounds" when it "restrict[ed] speech or association simply because it found the views expressed by [a] group to be abhorrent."[151] In *Widmar*, the University "singled out religious organizations for disadvantageous treatment," thus, the Court applied strict scrutiny.[152] Similarly in *Rosenberger*, the Court reiterated that the University had engaged in viewpoint discrimination when it denied funding to a RSO to distribute a newspaper with a Christian perspective.[153] Ginsburg acknowledged that in all three cases "student groups had been unconstitutionally singled out because of their points of view."[154]

139. *Id.* (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009)).
140. *Id.*
141. *Id.* at 2985.
142. *Id.*
143. *Id.* at 2975.
144. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2985 (2010) (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).
145. *Id.* at 2986.
146. *Id.*
147. *Id.* at 2987-88.
148. 408 U.S. 169 (1972).
149. 454 U.S. 263 (1981).
150. 515 U.S. 819.
151. *Christian Legal Soc'y*, 130 S. Ct. at 2987.
152. *Id.*
153. *Id.* at 2988.
154. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2988 (2010).

The Court applied the limited public forum test,[155] meaning that Hastings's restriction on speech must have been both reasonable and viewpoint neutral.[156] Ginsburg first examined Hastings's policy to determine if it was reasonable.[157] To determine reasonableness, she took into account both the function of the RSO and "all the surrounding circumstances."[158] Ginsburg found that the circumstances were in an educational context.[159] Next, the Court reviewed the four justifications that Hastings gave for its all-comers policy.[160] First, the policy ensured that all students receive the opportunities for leadership, education and social opportunities.[161] Second, Hastings was able to enforce the policy without drawing the distinction between belief and status.[162] Third, Hastings reasonably viewed the all-comers policy as "encouraging tolerance, cooperation and learning among students."[163] Fourth, Hastings's policy incorporated state-law prohibition of funding discrimination.[164] Ginsburg found these justifications to be reasonable.[165] She then bolstered her argument by noting that Hastings allowed "substantial alternative channels that remain open for [CLS-student] communication to take place."[166] Among the "alternative channels" offered by Hastings to CLS as a non-RSO were access to campus facilities to conduct meetings, the use of chalkboards and bulletin boards to advertise events.[167]

Ginsburg then quickly addressed CLS's concerns about hostile takeovers.[168] CLS maintained that the policy could not be reasonable because saboteurs could "infiltrate groups to subvert their mission."[169] Ginsburg argued that this situation was "more hypothetical than real."[170] She stated that RSOs "may condition eligibility for membership and leadership on attendance, the payment of dues, or other neutral requirements designed to ensure that students join because of their commitment to a group's vitality, not its demise."[171] She did state, however, that if students begin to "exploit an all-comers policy by hijacking organizations to distort or destroy their missions, Hastings presumably would revisit and revise its policy."[172]

155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 809 (1985)).
159. *Id.*
160. *Id.* at 2989-90.
161. *Id.* at 2989.
162. *Id.* at 2990.
163. *Id.* at 2988.
164. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2991 (2010).
165. *Id.*
166. *Id.* (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 53 (1983)).
167. *Id.*
168. *Id.* at 2992.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 2993.

Ginsburg then evaluated whether Hastings's all-comers policy was viewpoint neutral.[173] She conceded that this part of the limited public forum analysis has "been the constitutional sticking point" in earlier decisions.[174] Despite this, Ginsburg found that by requiring all students to accept all-comers, "it is hard to imagine a more viewpoint-neutral policy than one requiring *all* students to accept *all* comers."[175] She distinguished Hastings from the universities in *Healy*, *Widmar*, and *Rosenberger*.[176] While those universities singled out student organizations because of their point of view, Hastings's policy did not distinguish between groups based on mission.[177] Rather, Ginsburg found that the all-comers condition to RSO status was "textbook viewpoint neutral."[178] CLS attacked the all-comers policy by stating that it had a disparate impact on "those groups whose viewpoints are out of favor with the campus mainstream."[179] Ginsburg dismissed this idea.[180] She then relied on *Employment Division v. Smith*[181] to reject CLS's suggestion that the Free Exercise clause should allow them an exemption from the all-comers policy.[182]

Justices Stevens and Kennedy both wrote concurrences.[183] Stevens wrote to address the dissent's view that Hastings's Nondiscrimination Policy would be "plainly" unconstitutional.[184] He argued that the policy was both content and viewpoint neutral.[185] He added that the policy refused to support discrimination and prohibited conduct rather than belief.[186] He noted that the policy was designed to promote rather than undermine religious freedom.[187] Stevens admitted that the policy might have disparate impact on religious groups, but disparate impact alone does not constitute viewpoint discrimination.[188]

Kennedy wrote separately to support the analysis in the majority opinion and further address the hostile takeover scenario.[189] He distinguished this case from *Rosenberger*.[190] In *Rosenberger*, the essential purpose of the public forum was to "facilitate the expression of differing views in the context of student publications."[191] The public forum was limited because it was confined to

173. *Id.*
174. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2993 (2010).
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 2994.
180. *Id.*
181. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).
182. *Christian Legal Soc'y*, 130 S. Ct. at 2995.
183. *Id.* at 2998 n.27.
184. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2995 (2010).
185. *Id.* at 2996.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 3000.
190. *Id.* at 2999.
191. *Id.* at 2998.

student-run groups and publications.[192] When the school administration denied printing of a student publication because it expressed religious views, the university violated the First Amendment.[193] While the policy in *Rosenberger* was content based, the policy in *CLS* applied equally to all groups and viewpoints.[194] Kennedy then reiterated Hastings's "legitimate" purpose for creating the limited public forum. He described this purpose as enhancing the process of learning through peer interaction, exposure to different "ideas, views, and activities," and cooperative learning.[195] Kennedy then left open the possibility that petitioner would have a claim if the all-comers policy was used to infiltrate the group in order to stifle its views.[196]

Justice Alito wrote for the four dissenting Justices.[197] He began the opinion by stating that the majority "provides a misleading portrayal of [the] case."[198] He proceeded to develop the factual background.[199] He argued that Hastings had three distinct versions of its nondiscrimination policy.[200] These were the written nondiscrimination policy,[201] the all-comers policy mentioned by a dean in deposition,[202] and the "some-comers" policy where Hastings allowed student groups to have conduct requirements.[203] He then stated that the joint stipulation did not specify when the all-comers policy was put into place.[204] Next, Alito argued that the denial of RSO status had negatively affected CLS.[205] Included in these adverse effects were the loss of facility use, difficulty in reserving meeting space for speakers and advice tables, and few student members.[206] Further, he stated that the majority over-emphasized the issue of funding because the RSO status that CLS sought was largely cost free.[207]

Alito then turned his attention to *Healy v. James*.[208] He claimed that the only way that the majority could have distinguished *Healy* is by using the "identity of the student group."[209] In a footnote, Alito argued that CLS was denied RSO status because of the viewpoint that it expressed through its membership requirements.[210] While he believed that *Healy* was controlling,

192. *Id.*
193. *Id.* at 2998-99.
194. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2999 (2010).
195. *Id.*
196. *Id.* at 3000 (Kennedy, J., concurring).
197. *Id.* at 3001 (Alito, J., dissenting).
198. *Id.*
199. *Id.* at 3001-03.
200. *Id.* at 3002-04.
201. *Id.* at 3002.
202. *Id*. at 3003.
203. *Id.* at 3004.
204. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 3005 (2010) (Alito, J., dissenting).
205. *Id.* at 3006.
206. *Id.*
207. *Id.* at 3007.
208. *Id.*
209. *Id.* at 3008.
210. *Id.* at 3009 n.2.

Alito stated that he was "content" to address the case under the limited public forum cases.[211] However, unlike the majority, he analyzed the nondiscrimination and the all-comers policies separately.[212]

He first reiterated the requirements of viewpoint neutrality in limited public forum cases.[213] He pointed to cases that treated religion as a viewpoint and argued that it constituted viewpoint discrimination when Hastings failed to grant CLS RSO status pursuant to its nondiscrimination policy.[214] Alito also claimed that Hastings only required religious student groups to admit members with opposing viewpoints.[215] He argued that the viewpoints of religious organizations were more closely tied with their expression than those of secular groups.[216] With regard to sexual orientation, Alito noted that CLS had a viewpoint that sexual conduct outside a marriage between a man and a woman is wrong.[217]

Alito then turned his attention to the all-comers policy, which he argued was neither reasonable nor viewpoint neutral.[218] The parties stipulated that the forum "seeks to promote a diversity of viewpoints *among* student organizations, including viewpoints on religion and human sexuality."[219] He observed that Hastings students were free to form the same broad range of groups that people can form off campus.[220] However, the all-comers policy was "antithetical to the design of the RSO forum for the same reason that a state-imposed accept-all-comers policy would violate the First Amendment rights of private groups if applied off campus."[221] He rejected each of the policy justifications offered by Hastings, and determined that the policy was not reasonable in light of Hastings's purpose "to promote a diversity of viewpoints '*among*'—not within—registered student organizations."[222] He then argued that even if the policy was facially neutral, there was evidence that the policy was announced as a pretext.[223]

Alito also addressed the argument that an all-comers policy would lead to the dissolution of student groups.[224] He stated that the majority's view on the line between those students who want to change a group's message and those who seek a group's demise was "hopelessly vague."[225] Alito then provided an example to illustrate the problem: he imagined that CLS gained ten additional members who were all Christians but of different denominations.[226] Each

211. *Id.* at 3009.
212. *Id.* at 3009-10.
213. *Id.* at 3009.
214. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 3009-10 (2010) (Alito, J., dissenting).
215. *Id.* at 3010.
216. *Id.* at 3012.
217. *Id.*
218. *Id.* at 3013.
219. *Id.*
220. *Id.*
221. *Id.* at 3014.
222. *Id.* at 3015-16.
223. *Id.* at 3016-17.
224. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 3019 (2010) (Alito, J., dissenting).
225. *Id.*
226. *Id.*

individual denomination did not agree with CLS's views on sexual morality.[227] These new members then became elected as officers and ended CLS's affiliation with the national organization;[228] thus, the message of the group would be changed.[229] He stated that whether this change "represent[ed] reform or transformation may depend very much on the eye of the beholder."[230]

Alito then criticized Justice Kennedy's approach to the hostile takeover scenario.[231] While Kennedy left the door open for litigation if the all-comers policy were used to infiltrate the group, he did not explain how such a claim would proceed.[232] Because the all-comers policy was found to be both viewpoint neutral and reasonable, Alito argued that these characteristics could not be altered by a change in membership in an RSO.[233]

Ultimately, Alito stated that the Court "refuse[d] to acknowledge the consequences of its holding."[234] The policy would permit "small unpopular groups to be taken over by students who wish change the views that the group expresse[d]."[235] The rules suggested by Ginsburg that would require attendance, payment of dues, and behave politely would do nothing to "eliminate this threat."[236] Alito ended his opinion by stating: "[T]oday's decision is a serious setback for freedom of expression in this country."[237]

III. BECAUSE THEY PROMOTE DEMOCRACY, HOSTILE TAKEOVERS ARE NECESSARY

Student groups should be modeled to promote democracy. Because ideological diversity and equality are indispensable to democracy, the Court must be willing to risk a hostile takeover. Ideological diversity is necessary to determine the message of a group and this debate must take place *within* rather than *among* groups. This process is evidenced in both private and public institutions.

A. Democracy as a Core Value of the Constitution

Democracy is a core value of the Constitution.[238] The Framers of the Constitution developed the structure of the government with separation of powers

227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 3019 (2010) (Alito, J., dissenting).
235. *Id.*
236. *Id.*
237. *Id.* at 3020.
238. Robert Justin Lipkin, *The Quest for the Common Good: Neutrality and Deliberative Democracy in Sunstein's Conception of American Constitutionalism*, 26 CONN. L. REV. 1039, 1047 (1994).

to serve as a protection for democracy.[239] Individual rights of freedoms of speech, petition, and assembly were established to ensure a healthy democratic process.[240] As a core value, democracy relies on ideological diversity or "more speech" and equality.[241] In fact, "[f]or the framers, heterogeneity was beneficial, indeed indispensable; discussion [had to] take place among people who were different."[242]

Since the early twentieth century, ideological diversity has been protected by the courts as vital to a democracy.[243] Justice Brandeis famously wrote: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence,"[244] and "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth[.]"[245] Dissenting in *Abrams v. United States*, Justice Holmes wrote: "[T]he ultimate good desired is better reached by free trade in ideas."[246] Justice Black wrote: "[T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[247] Similarly, Justice Brennan wrote: "[R]ight conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[248] Thus, in a democratic society, we must be able to tolerate opposing viewpoints within a single body and accept that inclusion may result in a hostile takeover.

"If liberty and equality, as is thought by some, are chiefly to be found in democracy, they will be best attained when all persons alike share in government

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239. As the dissenting Justices of the Court explained in *Myers v. United States*:

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

272 U.S. 272, 293 (1926) (Brandeis, J., dissenting), *majority opinion overruled by* Humphrey's Executor v. United States, 295 U.S. 602 (1935).

240. *See* Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

241. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 882 (2010) ("Speech is an essential mechanism of democracy."); Powers v. Ohio, 499 U.S. 400, 407 (1991) ("Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."); J.E.B. v. Ala. *ex rel.* T.B., 511 U.S. 127, 146 (1994) (internal citation omitted) ("It reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy.").

242. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 24 (1993).

243. Jessica Knouse, *Restructuring the Labor Market to Democratize the Public Forum*, 39 STETSON L. REV. 715, 736-37 (2010).

244. Whitney v. Cal., 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

245. *Id.*

246. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

247. Associated Press v. United States, 326 U.S. 1, 20 (1945).

248. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

to the utmost."[249] Just as democracy requires diverse viewpoints, it also demands equality.[250] It would be impossible to have ideological diversity without equal access to a forum. Indeed, equality was viewed as vital to the Founding Fathers, who included "all men are created equal" as a key provision in the Declaration of Independence.[251] Although not originally expressly provided for in the Constitution or Bill of Rights, equality persisted; despite the institution of slavery, the Founders were committed to equality in the United States.[252] In 1968, through the Fourteenth Amendment, equality became an expressly enumerated value in the Constitution.[253]

B. *Argument that the* CLS *Decision Will Lead to Dissolution of Student Groups*

One of the central arguments of those opposed to the Court's decision in *CLS* is that it will lead to the dissolution of student groups.[254] The standard argument is that the implementation of an accept all-comers policy would allow students to disband a group with which they disagreed. Those with majority viewpoints could then silence those with minority viewpoints.

Organizations would then experience inner turmoil. Instead of being competitive with other student organizations, the competition would be within the organizations.[255] Thus, atheists could be at the head of religious organizations; a homophobe could be the head of a gay rights organization, and gender based organizations will not survive.[256] Then, the "homogenized … views of the collective would replace the sharply defined perspectives of competing advocacy groups."[257] If this is allowed to happen, "[t]he public university forum will no longer be a place where the ideas of student groups can be freely formed or expressed."[258]

Therefore, instead of promoting diversity, the all-comers policy will rid the campus of a diverse student body.[259] There will be no intellectual diversity

249. Ernest Abisellan, *Fostering Democracy Through Law and Civic Education*, FLA. B.J., Jan. 2000, at 59, 62 (quoting ARISTOTLE, POLITICS BOOK 4).

250. Elizabeth Anderson, *What is the Point of Equality?*, 109 ETHICS 287, 313 (1999).

251. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

252. Knouse, *supra* note 243, at 732.

253. U.S. CONST. amend. XIV.

254. *See* Heather A. Kennedy, Intolerance in the Name of Tolerance: Will the United States Supreme Court's Circular Reasoning in Its Decision of *Christian Legal Society v. Martinez* Be the Downfall of Student Organizations as We Know Them? 29 (Jan. 24, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1776183.

255. William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of* Christian Legal Society v. Martinez, 261 EDUC. L. REP. 473, 494-95 (West 2010).

256. Charles J. Russo & William E. Thro, *Another Nail in the Coffin of Religious Freedom?:* Christian Legal Society v. Martinez, 12 EDUC. L.J. 20, 27 (2011); Kennedy, *supra* note 254, at 32.

257. Thro & Russo, *supra* note 255, at 495.

258. Zachary R. Cormier, Christian Legal Society v. Martinez*: The Death Knell of Associational Freedom on College Campus*, 17 TEX. WESLEYAN L. REV. 287, 302 (2011).

259. Thro & Russo, *supra* note 255, at 495.

because students will be unable to encounter those with whom they disagree.[260] Universities will then have one student group that communicates a single "highly diluted message or none at all."[261] "The public university forum will not be a breeding ground for new and converging ideas and beliefs, but rather an incubator of political correctness and student groups with schizophrenic, if not completely contradictory, viewpoints."[262] This would greatly inhibit the ability of schools to provide a well-rounded education because leaders in the world require ideological competition.[263]

C. Hostile Takeover: Why It Is a Good Thing

Since democracy is a core value of the Constitution, any judicial decision that promotes democracy is correct—especially in an educational environment. The Court has repeatedly held that the government has an interest in diversity in higher education.[264] Implicit in diversity is increased exposure to viewpoints. Those who contend that the *CLS* decision will lead to a homogenous school should examine other groups.

Justice Alito and other critics of the Court's decision emphasize the distinction between competition "among" groups and "within" groups.[265] However, this logic is faulty. Competition within a group will determine the message, and therefore, actions of a group. By allowing only those who agree wholeheartedly with the group's existing mission or excluding members who are not in complete agreement with the mission, the organization becomes unable to change and grow and therefore, unable to contribute to the marketplace of ideas.

If membership can be conditioned on agreement with the group's message (at that point in time), then there is no free trade of ideas. Anyone who objects, even partially, to the precondition or oath will be rejected. Therefore, the group's ability to experience a variety of viewpoints or "more speech" will be severely restricted.

The members of the group create the message that a group disseminates. While an existing message will serve as a way of attracting like-minded people to the group, it must be recognized that the founding group members created that message. This message will change over time by new group members through debate and discussion. This concept will be explored by first looking at private organizations, political parties, and then Congress.

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260. Russo & Thro, *supra* note 256, at 28.

261. Cormier, *supra* note 258, at 301.

262. *Id.*

263. Thro & Russo, *supra* note 255, at 494-95.

264. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 270-71 (2003) (explaining this in the Equal Protection context); Grutter v. Bollinger, 539 U.S. 306, 328-33 (2003) (holding that the educational benefits that diversity was designed to produce were substantial, including to promote cross-racial understanding, to help break down racial stereotypes and to enable students to better understand persons of different races, to promote learning outcomes, to better prepare students for an increasingly diverse workforce and society, and to better prepare students as professionals).

265. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 3013 (2010).

Two private organizations have drastically and obviously changed their messages over time: the National Rifle Association (NRA) and the Girl Scouts of the USA (Girl Scouts). When the NRA was founded, its primary mission was to "promote and encourage rifle shooting on a scientific basis."[266] Since 1871, it has evolved into one of the nation's largest lobbying groups that advocates for the protection of the Second Amendment.[267] Similarly, when the Girl Scouts was founded in 1912, the program focused mainly on survival skills and outdoor activities: hiking, basketball, camping, studying first aid, and how to tell time by the stars.[268] Over time, the organization expanded activities that focused on contemporary issues like drug use, violence prevention, literacy, and health education.[269] The group even voted to change the interpretation of "to serve God" in its Promise.[270] Members may now "substitute another word or phrase for 'God' in their Oath."[271] Despite these significant changes, the Girl Scouts is still one of the most widely recognized private groups in the United States.[272]

While for both agencies the core value or subject remained the same (guns and girl power), they experienced significant changes in the ways that their foundational message was disseminated. The same occurred in Justice Alito's hypothetical about CLS.[273] If CLS admitted new members of different denominations who ended the affiliation with the national CLS, the student group would still retain its original base as a Christian organization.[274] However, continued debate within a group will determine the message of the group.

If more speech is beneficial for debate among groups, it is equally healthy for debate within groups. In fact, debate within groups is inevitable and healthy. If either Girl Scouts or NRA decided not to admit any members with different viewpoints, their messages and missions could have become stagnant and the group less effective. If Girl Scouts had stayed within their original mission of providing girls with outdoor programming and survival skills, they arguably might not have had as much impact on the lives of American women today.[275] Likewise, if the NRA had merely focused on the scientific theory and shooting of

266. *A Brief History of the NRA*, NAT'L RIFLE ASS'N, http://www.nra.org/aboutus.aspx (last visited Dec. 27, 2012).

267. *Id.*

268. *Girl Scout History*, GIRL SCOUTS OF AM., http://www.girlscouts.org/who_we_are/history/ (last visited Dec. 27, 2012).

269. *Girl Scouts Timeline: 1990s*, GIRL SCOUTS OF AM., http://www.girlscouts.org/who_we_are/history/timeline/1990s.asp (last visited Dec. 27, 2012).

270. *BSA and Religious Belief*, BOY SCOUTS OF AM., http://www.bsa-discrimination.org/html/god-top.html (last modified Oct. 12, 2012).

271. *Id.*

272. Sarah Amos, *After 98 Years the Girl Scouts Get a Makeover*, ABC NEWS (July 7, 2010, 9:32 AM), http://abcnews.go.com/blogs/headlines/2010/07/after-92-years-the-girl-scouts-gives-themselves-a-makeover/.

273. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 3019 (2010).

274. *Id.*

275. *Famous Girl Scouts*, GIRL SCOUTS CROSS TIMBERS COUNCIL, http://web.archive.org/web/20060207165421/http://www.girlscoutsctc.com/famousgs.html (last visited Dec. 27, 2012).

guns, the political landscape would be vastly different.[276] Both organizations have experienced changes in membership and leadership, but both are still widely recognizable.

Similarly, diverse viewpoints enhance political debate within political parties. The United States is a two-party system dominated by the Republican and Democratic parties.[277] However, within these two parties are various subgroups with different and competing viewpoints or agendas.[278] These factions work within a larger group to make their voices heard, to convince those in the majority to adopt their viewpoints, or at least to incorporate those viewpoints into their political platform.[279] If this process does not work, the party can break off into its own entirely different group.

Citizens alienated by the major political parties can find minority organizations that better represent their viewpoints.[280] During elections, these parties often run third or minority candidates for office.[281] While these candidates might not have a chance at winning, their participation in the electoral process still allows for their viewpoints to be heard.[282] They contribute ideas to the public and to other candidates and thus, ultimately impact the legislative process.[283] In groups, this principle functions in a similar manner. If some members of the group have different viewpoints then other members, their voice will be heard during the voting or election process—whether these group members began with a majority/minority view or not. The minority members' voices will still shape the ultimate group message.

Just as private organizations and political parties are enhanced by debate within groups, so is the United States Congress. Every few years, the people elect new Senators and Representatives to office.[284] These candidates almost certainly campaigned on the concept of policy change in some capacity.[285] Every

276. Sam Stein, *Disclose Act: Super PAC Transparency Legislation to be Introduced by House Democrats*, HUFFINGTON POST (Jan. 26, 2012 8:32 AM), http://www.huffingtonpost.com/2012/01/25/disclose-act-super-pac-chris-van-hollen_n_1232008.html.

277. Ryan Lizza, *But Is a Third Party Possible?*, N.Y. MAG. (Apr. 16, 2006), http://nymag.com/news/politics/16743/.

278. Frank Newport, *Tea Party Supporters Overlap Republican Base*, GALLUP.COM (July 2, 2010), http://www.gallup.com/poll/141098/Tea-Party-Supporters-Overlap-Republican-Base.aspx?version=print; Claire Suddath, *A Brief History of Blue Dog Democrats*, TIME.COM (July 28, 2009), http://www.time.com/time/politics/article/0,8599,1913057,00.html.

279. *See Third-Party Candidates Can Influence U.S. Presidential Elections*, AMERICA.GOV (Aug. 20, 2007), http://www.america.gov/st/washfile-english/2007/August/20070820180912lnkais0.4578668.html; *Third Party Presidential Candidates*, CB PRESIDENTIAL RESEARCH SERVS., http://www.presidentsusa.net/thirdparty.html (last visited Dec. 27, 2012).

280. *See* Lizza, *supra* note 277.

281. *Third-Party Candidates Can Influence U.S. Presidential Elections*, *supra* note 279.

282. *Id.*

283. *See* Lizza, *supra* note 277.

284. U.S. CONST. art. I, § 3, cl. 1; U.S. CONST. art. I, § 2, cl. 1.

285. *See American President: A Reference Resource (Bill Clinton)*, UNIV. OF VA. MILLER CENTER, http://millercenter.org/president/clinton/essays/biography/3 (last visited Dec. 27, 2012); *American President: A Reference Resource (George W. Bush)*, UNIV. OF VA. MILLER CENTER, http://millercenter.org/president/gwbush/essays/biography/3 (last visited Dec. 27, 2012).

election, candidates for office campaign on changing the governmental body that they wish to join. The message of the legislative body or student organization will then necessarily change. When these new legislators are sworn into office, the membership of Congress has changed—yet, we still call it Congress.

The instant that the new members take office, the political sway of the legislature is changed. The political party with the most representation will have more ability to get their legislative goals accomplished. The debate within the body will naturally swing in their favor. They will have more people to speak, more resources, and more votes. However, they will still need the votes of those in a minority party in order to get anything accomplished. The minority party will still be able to air their viewpoints, offer changes to proposed legislation, and try to sway others to their side (in Congress or in the public). Continued debate in a democratic system is vital because it expresses ideological diversity.

Similarly, when a registered student organization elects new officers, it will still remain that same registered organization. Because Congress and student organizations are comprised of people, the viewpoints/missions/messages can never stay the same. If a majority of group members are unhappy with the way that a student organization is being run, they are able to elect new officers—just as if people are unhappy with the way that government is being run, they elect new representatives. After the election, the message of the group will consequently change.

"Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."[286] The process of elections and legislating described above is neither quick nor efficient, but it remains the most effective way to ensure that diverse viewpoints are represented. The same is true of allowing multiple viewpoints inside one student group. While having a global warming denier join a group dedicated to environmental activism—even as an officer—might slow down group decisions, democracy requires that his viewpoint be heard even if it hampers the decision process.

IV. PUTTING IT ALL TOGETHER

As demonstrated in Part I, the doctrine of association, as it relates to nondiscrimination laws, is unsettled. In *CLS v. Martinez*, Ginsburg skirts this issue by merging the expressive association and freedom of expression claims.[287] Thus, the decision was made under the more lenient scrutiny of public forum rather than the heightened scrutiny used for associational freedoms.[288] According to Professor Nice, in *CLS* it is unequal treatment that concerns the Court; therefore, the Court takes into account equality in a manner similar to equal protection doctrine rather than association.[289] She observes that the Court may have substituted the intent to discriminate that is required to get to heightened scrutiny under equal protection with viewpoint discrimination that is required in

286. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 944 (1983).
287. Nice, *supra* note 4, at 640-41.
288. *Id.* at 641.
289. *Id.* at 639-40.

public forum.[290] If this is true, the Court is taking into account the importance of equal access to a forum, but in its treatment of hostile takeovers, ignores the value of ideological diversity within a group.

The outcome of the decision in *CLS* was correct. However, the Court erred in its treatment of hostile takeovers. Characterizing the hostile takeover situation as “more hypothetical than real,” downplays the real possibility that a hostile takeover or other change in viewpoint could occur on campus or in another organization. Providing that in the event of a hostile takeover scenario, Hastings could change its rules undermines the purpose of the forum that the school created: providing leadership and social opportunities and encouraging tolerance among students. Further, it undermines democracy.

In the future, when faced with the convergence of freedom of association and anti-discrimination laws, the Court’s decision should advance the core constitutional value of democracy. For this purpose, the decision must promote ideological diversity and equal access to forums. In sum, the Court should learn to stop worrying and love the hostile takeover.

290. *Id.* at 639-41.