

rights while accounting for societal harms from certain categories of speech.<sup>90</sup> Instead, the Court's recharacterization of *Ferber* requires more case-by-case judgments and provides fewer doctrinal tools to distinguish speech closely analogous to previously recognized unprotected categories. In its effort to avoid "free-wheeling" and "highly manipulable" standards, the Court may have ushered in an era of more ad hoc judgments and less predictability in a world of recurrent tension between free speech and other social goods.

2. *Freedom of Expressive Association.* — The federal courts have long since rejected the proposition — famously voiced by Justice Holmes<sup>1</sup> — that the government may, without exception, condition the receipt of benefits such as state funding or employment on the relinquishment of constitutional rights. Despite the attractive simplicity of Justice Holmes's position that the power to withhold a benefit in full implies the power to grant it on any condition, later jurists have recognized that permitting the government to condition benefits on the surrender of constitutional rights would allow it to buy up rights, increasing state power over citizens in ways that the Constitution ought to preclude.<sup>2</sup> This shift in understanding marked the birth of the doctrine of unconstitutional conditions.<sup>3</sup> In keeping with this insight, the Supreme Court ruled in *Rosenberger v. Rector & Visitors of University of Virginia*<sup>4</sup> that although a public university need not provide funding for student organizations, if it chooses to do so it may not condition the funding on the students' surrendering their right to express any viewpoint they wish.<sup>5</sup> Last Term, in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*<sup>6</sup> (*CLS*), the Court held that a public law school may require student organizations to adhere to an "all-comers" policy — obliging them to yield their right under *Boy Scouts of America v. Dale*<sup>7</sup> to exclude would-be members who disagree with their ideology — as a condition

<sup>90</sup> See Nimmer, *supra* note 66, at 939–45.

<sup>1</sup> See, e.g., *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."); *Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895).

<sup>2</sup> See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech.")

<sup>3</sup> See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

<sup>4</sup> 515 U.S. 819 (1995).

<sup>5</sup> *Id.* at 829, 835; see also *Widmar v. Vincent*, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972).

<sup>6</sup> 130 S. Ct. 2971 (2010).

<sup>7</sup> 530 U.S. 640, 648 (2000) (holding that a private expressive association has a free speech right to exclude individuals who disagree with the group's ideology).

of receiving funding and use of school facilities. In applying precedent to uphold the condition on the basis of its reasonableness and viewpoint neutrality, the Court failed to adequately consider the unconstitutional conditions problems presented by the case.

Hastings College of the Law is a public law school in the University of California system.<sup>8</sup> Like other schools, Hastings encourages its students to form extracurricular student groups, which may receive official recognition by becoming “Registered Student Organizations” (RSOs).<sup>9</sup> RSOs are accorded benefits including funding and priority usage of school rooms for meetings.<sup>10</sup> Hastings conditions RSO status on each group’s abiding by the law school’s Policy on Nondiscrimination, which prohibits discrimination “on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.”<sup>11</sup>

In 2004, a group of Christian students at the law school formed the Christian Legal Society (CLS) and applied for RSO status.<sup>12</sup> CLS’s bylaws require voting members and officers to adhere to a Statement of Faith embracing various tenets of the Christian religion as understood by CLS.<sup>13</sup> The bylaws thereby “exclude from affiliation anyone who engages in ‘unrepentant homosexual conduct,’” as well as all non-Christians.<sup>14</sup> Hastings rejected CLS’s application, citing the group’s discrimination on the basis of religion and sexual orientation.<sup>15</sup> CLS continued to operate independently at the law school, but was denied funding and parity with RSOs in the use of law school facilities.<sup>16</sup>

In October 2004, CLS sued Hastings administrators under 42 U.S.C. § 1983, alleging that Hastings’s denial of RSO benefits violated CLS’s free speech, expressive association, and free exercise rights under the First and Fourteenth Amendments.<sup>17</sup> At trial, the parties filed a joint stipulation regarding the policy applied by Hastings to RSOs: “Hastings requires that [RSOs] allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [the student’s] status or beliefs.”<sup>18</sup> In other words, Hastings

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<sup>8</sup> *CLS*, 130 S. Ct. at 2978.

<sup>9</sup> *Id.* at 2978–79.

<sup>10</sup> *See id.* at 2979.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 2980.

<sup>13</sup> *Id.* & n.3.

<sup>14</sup> *Id.* at 2980 (quoting 1 Joint Appendix at 226, *CLS*, 130 S. Ct. 2971 (No. 08-1371)).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 2981; *id.* at 3006 (Alito, J., dissenting).

<sup>17</sup> *Id.* at 2981 (majority opinion).

<sup>18</sup> *Id.* at 2982 (second alteration in original) (quoting 1 Joint Appendix, *supra* note 14, at 221) (internal quotation mark omitted).

required RSOs to accept “all comers,”<sup>19</sup> without regard for status or ideology; this policy contrasted with the nondiscrimination policy as written, which forbade only discrimination based on a few specific factors, not including, for instance, political ideology.<sup>20</sup> Hastings prevailed in the district court and on appeal to the Ninth Circuit.<sup>21</sup>

The Supreme Court affirmed. Writing for the Court, Justice Ginsburg<sup>22</sup> began by determining that the Joint Stipulation placed only the all-comers policy before the Court, precluding it from scrutinizing the more specific “as-written” policy.<sup>23</sup> She also refused to consider CLS’s argument that Hastings’s policy, even if facially neutral, had been adopted pretextually with the aim of harming CLS on account of its disfavored viewpoint, because that argument had not been addressed by the courts below.<sup>24</sup>

Justice Ginsburg next concluded that Hastings’s RSO program, like the program analyzed in *Rosenberger*, was properly categorized as a “limited public forum” and examined under the appurtenant doctrine.<sup>25</sup> Under that doctrine, the state may place conditions on access to a limited public forum with the caveat that it “may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, . . . nor may it discriminate against speech on the basis of . . . viewpoint.”<sup>26</sup> Justice Ginsburg considered the free speech and expressive association claims together under this limited public forum framework.<sup>27</sup> Applying this standard to Hastings’s all-comers condition, the Court scrutinized the policy for reasonableness and viewpoint neutrality.<sup>28</sup>

Justice Ginsburg first determined that the condition was reasonable, “taking into account the RSO forum’s function and ‘all the surrounding circumstances.’”<sup>29</sup> First, because RSOs are funded from

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<sup>19</sup> Hastings actually allows discrimination based on other criteria, including capacity to pass a skills-based test. *Id.* at 2979 n.2. Thus, it does not literally require RSOs to accept “all comers.” *See id.* at 3004 (Alito, J., dissenting).

<sup>20</sup> *See id.* at 2979 (majority opinion).

<sup>21</sup> *Id.* at 2981.

<sup>22</sup> Justice Ginsburg was joined by Justices Stevens, Kennedy, Breyer, and Sotomayor.

<sup>23</sup> *CLS*, 130 S. Ct. at 2982–84.

<sup>24</sup> *See id.* at 2995.

<sup>25</sup> *Id.* at 2984 & n.12.

<sup>26</sup> *Id.* at 2988 (omissions in original) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)) (internal quotation mark omitted); *see also id.* at 2987–88 (discussing precedents involving limited public forums for student groups).

<sup>27</sup> *See id.* at 2985–86. The Court relegated discussion of CLS’s free exercise challenge to a brief footnote, finding it clearly foreclosed by *Employment Division v. Smith*, 494 U.S. 872 (1990). *CLS*, 130 S. Ct. at 2995 n.27. The dissent did not take issue with the majority’s treatment of the free exercise claim.

<sup>28</sup> *CLS*, 130 S. Ct. at 2988–93 (reasonableness); *id.* at 2993–95 (viewpoint neutrality).

<sup>29</sup> *Id.* at 2988 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985)).

mandatory student fees, “the all-comers policy ensures that no Hastings student is forced to fund a group that would reject her as a member.”<sup>30</sup> Second, “the all-comers requirement helps Hastings police the written terms of its Nondiscrimination Policy” by preventing status discrimination disguised as ideology discrimination.<sup>31</sup> Third, the policy “encourages tolerance, cooperation, and learning” by requiring students to interact with other students of different viewpoints.<sup>32</sup> Fourth, Hastings permissibly decided “to decline to subsidize . . . conduct of which the people of California disapprove.”<sup>33</sup> Justice Ginsburg also thought the policy especially “creditworthy in view of the ‘substantial alternative channels that remain open for . . . communication’” between CLS and other students, such as the internet.<sup>34</sup> Finally, the majority concluded that CLS’s fear of “hostile takeovers” — scenarios in which many students who disagree with CLS’s ideology would attend meetings under the all-comers policy, vote to elect leaders with their views, and elide the beliefs of the original CLS members from the group’s mission statement — was “more hypothetical than real.”<sup>35</sup>

Justice Ginsburg next determined that the all-comers policy was “textbook viewpoint neutral,” finding it “hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers.”<sup>36</sup> She distinguished it on that basis from policies that had been struck down in previous cases because the “universities [in those precedents had] singled out organizations for disfavored treatment because of their points of view.”<sup>37</sup> She described the all-comers policy as more analogous to clearly permissible viewpoint-neutral restrictions like Hastings’s requirement that RSOs be composed only of Hastings students.<sup>38</sup> And she noted that viewpoint neutrality does not bar a policy that has disparate impacts on different viewpoints, so long as it is not adopted with the purpose of creating those effects.<sup>39</sup>

Because the restriction was reasonable and viewpoint neutral, the Court upheld it under the limited public forum doctrine.<sup>40</sup> To the ma-

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<sup>30</sup> *Id.* at 2989. *But see id.* at 2979 n.2; *id.* at 3015 (Alito, J., dissenting) (discussing permissible grounds for exclusion, including failure to pay membership fees and poor performance on a knowledge- or skills-based test).

<sup>31</sup> *Id.* at 2990 (majority opinion).

<sup>32</sup> *Id.* (quoting 2 Joint Appendix, *supra* note 14, at 349) (internal quotation mark omitted).

<sup>33</sup> *Id.* at 2990 (quoting Brief of Hastings College of the Law: Respondents at 35, *CLS*, 130 S. Ct. 2971 (No. 08-1371)) (internal quotation marks omitted).

<sup>34</sup> *Id.* at 2991 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 53 (1983)).

<sup>35</sup> *Id.* at 2992.

<sup>36</sup> *Id.* at 2993.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 2985.

<sup>39</sup> *Id.* at 2994.

<sup>40</sup> *Id.* at 2995.

jority, this case was distinguishable from *Dale* because, whereas *Dale* involved a state-imposed penalty on exclusionary activity,<sup>41</sup> *CLS* merely involved a state refusal to subsidize such activity.<sup>42</sup> Echoing Justice Holmes, the Court pronounced: “The First Amendment shields *CLS* against state prohibition of the organization’s expressive activity, however exclusionary that activity may be. But *CLS* enjoys no constitutional right to state subvention of its selectivity.”<sup>43</sup>

Justice Stevens concurred separately. Because the dissenters argued that the as-written policy was at issue and clearly unconstitutional, he wrote to defend his view that the as-written policy, like the all-comers policy, was “plainly legitimate.”<sup>44</sup>

Justice Kennedy also concurred separately. He delineated the contours of his agreement with the majority: “[H]ere the school policy in question is not content based either in its formulation or evident purpose; and were it shown to be otherwise, the case likely should have a different outcome. Here, the policy applies equally to all groups and views.”<sup>45</sup> This qualification perhaps implies that Justice Kennedy would have joined the dissenters — changing the case’s outcome — had the as-written policy been at issue. Justice Kennedy also suggested that he would be sympathetic to an as-applied challenge if *CLS*’s hypothetical “hostile takeover” scenario actually came to pass.<sup>46</sup>

Justice Alito dissented.<sup>47</sup> His core argument was that the majority erred in refusing to consider *CLS*’s arguments about the as-written policy<sup>48</sup> and its claim that the all-comers policy was a pretextual way for the school to deny recognition to *CLS*.<sup>49</sup> Relying primarily on *Dale*, the dissent also disputed Justice Stevens’s assertion that the as-written policy was constitutional.<sup>50</sup> Finally, Justice Alito contended that the all-comers policy was unconstitutional under limited public forum doctrine. He argued that the policy actually conflicted with the motivations behind the RSO forum, making it unreasonable in light of the program’s purposes.<sup>51</sup> And he asserted that the all-comers policy was biased against nonmainstream viewpoints since those viewpoints are most likely to be overridden when non-like-minded individuals

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<sup>41</sup> The law struck down in *Dale* prohibited discrimination on the basis of sexual orientation in public accommodations. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 645 (2000).

<sup>42</sup> *CLS*, 130 S. Ct. at 2979.

<sup>43</sup> *Id.* at 2978.

<sup>44</sup> *Id.* at 2995 (Stevens, J., concurring).

<sup>45</sup> *Id.* at 2999 (Kennedy, J., concurring).

<sup>46</sup> *Id.* at 3000.

<sup>47</sup> Justice Alito was joined by Chief Justice Roberts and Justices Scalia and Thomas.

<sup>48</sup> *CLS*, 130 S. Ct. at 3001–09 (Alito, J., dissenting).

<sup>49</sup> *Id.* at 3016–19.

<sup>50</sup> *Id.* at 3009–13.

<sup>51</sup> *Id.* at 3013–16.

join; because the all-comers policy effectively puts disfavored speakers at the mercy of a majority of students, Justice Alito argued that it may be less viewpoint neutral than the majority had suggested.<sup>52</sup>

In upholding the all-comers policy on the grounds that it is reasonable and viewpoint neutral, the Court correctly applied the standard set forth in its limited public forum precedents. But the Court's analysis in *CLS* makes clear that the reasonableness-and-viewpoint-neutrality test of those precedents is inadequate to reach important unconstitutional conditions concerns that can emerge in limited public forum cases. The threat posed to the freedom of speech by conditions on state-provided benefits calls for a more sophisticated analysis.<sup>53</sup>

*CLS* squarely presented an unconstitutional conditions problem.<sup>54</sup> Through the RSO program, the state offered benefits: funding and priority use of school facilities. But it conditioned them on the non-exercise of a constitutional right: the recipient group's First Amendment right as an expressive association under *Dale* to exclude individuals who disagree with its ideology. The Supreme Court's limited public forum jurisprudence provides the framework courts use to analyze unconstitutional conditions problems that arise in the context of restrictions on entry into such forums; it is accordingly a species of unconstitutional conditions test.<sup>55</sup> It requires only that such conditions meet two requirements: viewpoint neutrality and reasonableness.<sup>56</sup>

The First Amendment precludes certain types of government interference with private speech.<sup>57</sup> This right is not solely for the benefit of the protected speaker; free speech theory presumes that there is a broad societal benefit to having a free "marketplace of ideas," pro-

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<sup>52</sup> *Id.* at 3016 & n.10.

<sup>53</sup> The proper interpretation of the Joint Stipulation, *CLS*'s accusations of pretext, and the debate between Justices Stevens and Alito regarding the constitutionality of the "as-written" policy are beyond the scope of this comment.

<sup>54</sup> See Sullivan, *supra* note 3, at 1421–22 ("Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference.").

<sup>55</sup> Although the Court does not speak of it in those terms, other commentators have made this connection. See, e.g., Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 667 n.32 (1996) ("The 'unconstitutional conditions' doctrine and 'limited public forum' analysis are two peas in a pod.").

However, not all restrictions on entry into limited public forums pose unconstitutional conditions problems. Some restrictions are not conditions at all (as with a forum restricted to blue-eyed speakers, because non-blue-eyed speakers cannot change their eye color), and some conditions do not pressure constitutional rights (as with a forum restriction barring convicted murderers, because there is no constitutional right to be a murderer). See Sullivan, *supra* note 3, at 1423–24, 1426.

<sup>56</sup> See *CLS*, 130 S. Ct. at 2988.

<sup>57</sup> See, e.g., *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 640–42 (1943).

ted from state manipulation.<sup>58</sup> Individual contributions to the marketplace thus potentially benefit not only the individual speakers but the entire polity,<sup>59</sup> and even views widely considered abhorrent may have salutary effects.<sup>60</sup> The Court's requirement that restrictions on entry into limited public forums be viewpoint neutral gives substance to the intuition that where the government seeks to promote private speech, it should do so only in ways that neither increase state control over private expression nor warp the marketplace of ideas in favor of some viewpoints at the expense of others.<sup>61</sup> Yet although it is viewpoint neutral, the all-comers condition in *CLS* threatens to do both. Where speakers accept the benefit, the all-comers condition enables the state to constrain their speech.<sup>62</sup> And where some speakers, like *CLS*, decline the benefit, it lets the state distort the marketplace of ideas in favor of speakers who accept its inclusionist ideology by giving them exclusive access to benefits. But these troubling aspects of the condition were not cognizable under the Court's limited public forum analysis.

Noting that both policies are reasonable and viewpoint neutral, the majority likened the all-comers condition to Hastings's requirement that RSOs be composed solely of Hastings students. This analogy is valid under the limited public forum framework. But a closer examination of the constitutional distance between the two policies — which that framework overlooks — demonstrates the framework's shortcomings in addressing the animating intuition of unconstitutional conditions doctrine: the government sometimes threatens rights as much by offering benefits in exchange for their voluntary surrender as by prohibiting them outright.<sup>63</sup>

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<sup>58</sup> See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); JOHN STUART MILL, *On Liberty*, in *ON LIBERTY AND OTHER ESSAYS* 5 (John Gray ed., Oxford Univ. Press 1991) (1859).

<sup>59</sup> See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (“The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”); cf. Sullivan, *supra* note 3, at 1490 (“[T]he preferred constitutional liberties at stake in unconstitutional conditions cases do not simply protect individual rightholders piecemeal.”).

<sup>60</sup> See MILL, *supra* note 58, at 59.

<sup>61</sup> Cf. Sullivan, *supra* note 3, at 1490–97 (discussing the threat that the state will use conditioned benefits both to increase its power over private “spheres of autonomy” and to promote compliant citizens over those who reject its conditioned benefits).

<sup>62</sup> Cf. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001) (striking down a conditional grant by which the government sought “to use an existing medium of expression and to control it [through conditioned subsidies] . . . in ways which distort its usual functioning”).

<sup>63</sup> It is beyond the scope of this comment to present a fully formed alternative unconstitutional conditions test or to argue for or against the ultimate outcome reached by the majority. Rather, its modest aim is to identify troubling free speech issues present in *CLS* but not cognizable under the Court's chosen framework.

First, although the bar on nonstudents can be expressed in the language of unconstitutional conditions — to gain access to the forum, one must give up one’s right<sup>64</sup> not to be a Hastings student — that restriction does not meaningfully pressure the relevant right: no one would choose to become a student merely to gain access to the forum. By contrast, though CLS refused to conform to the all-comers policy, a different group with a similar desire to exclude might decide that it could better communicate its message by surrendering its *Dale* rights in exchange for the benefits.<sup>65</sup> One failing of the Court’s limited public forum test, then, is that it does not recognize that conditions that have a real chance of leading rightholders to give up their rights are often more troubling than those that do not.<sup>66</sup>

Second, the all-comers condition is peculiarly ideological, in that liberals tend to favor rules requiring inclusion of preferred groups (for example, nondiscrimination policies) and conservatives generally prefer to maintain rights to expressive exclusion.<sup>67</sup> Thus, although it is viewpoint and even content neutral, the condition lets the state restructure the forum and the private speech taking place within it in a liberal manner by requiring that participants give up a right to behave in a certain non-liberal fashion.<sup>68</sup> By the same token, a no-swearing condition — one requiring speakers to give up their well-established right to exclaim “*fuck the draft*”<sup>69</sup> — would be ideologically conservative and similarly troubling, though also viewpoint neutral. A students-only restriction, by contrast, is unlikely to engender ideological discord in contemporary America. The point is that where a state actor seeks to bend the private exercise of speech rights to better align with its ideological commitments, the fact that it does so in a viewpoint-neutral and reasonable way should not be dispositive for a court seeking to vindicate the freedom of speech.

Third, the all-comers condition does not merely make it more difficult for the speaker to express its viewpoints; it makes it harder for the

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<sup>64</sup> See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (holding that the Constitution bars states from mandating public school attendance).

<sup>65</sup> Indeed, several RSOs had discriminatory policies before CLS sued, at which point Hastings sought to apply the all-comers policy to those groups and they complied. See *CLS*, 130 S. Ct. at 3004 (Alito, J., dissenting).

<sup>66</sup> See Sullivan, *supra* note 3, at 1426; see also *supra* note 55.

<sup>67</sup> This is a broad characterization. But what is important is the fact that the condition is ideologically charged, not the labels applied to the groups who support and oppose it.

<sup>68</sup> That Hastings expresses a liberal viewpoint through its condition does not mean that the condition is not viewpoint neutral. That requirement is met so long as the condition does not facially discriminate among private viewpoints and is not designed to disadvantage disfavored private viewpoints. See Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1934–35 (2006).

<sup>69</sup> See *Cohen v. California*, 403 U.S. 15, 26 (1971) (noting that “words are often chosen as much for their emotive as their cognitive force” and upholding the right to use strong language).



speaker to form and hold viewpoints at all by subjecting groups with nonmainstream views to dilution through the addition of more moderate voting members.<sup>70</sup> In this sense, though it is, like the classically permissible restrictions alluded to by Justices Ginsburg and Kennedy,<sup>71</sup> viewpoint neutral, it is also particularly *viewpoint constraining*. The majority correctly noted that viewpoint-neutral speech restrictions that have incidental negative effects on some viewpoints are generally not unconstitutional.<sup>72</sup> But in the limited public forum context — defined by the state’s duty to facilitate private speech without regard for viewpoint — a court would properly be suspicious of a condition that results in fewer viewpoints than would exist absent the proffered benefit. This context is quite different from that of a viewpoint-neutral law passed to advance a non-speech-related state goal, such as noise control<sup>73</sup> or orderly administration of the draft;<sup>74</sup> it is likewise dissimilar to restrictions like the students-only policy, which are necessary to effectuate the relevant program (in this case, a program to promote the speech of Hastings students). Where the state establishes a program with the aim of promoting private speech, conditions on that program that have the effect of distorting such speech by eliminating extreme viewpoints — or else forcing them to compete on uneven terms by denying them the program’s generally available benefit — should be closely scrutinized.

Fourth, Hastings amasses RSO funds through student fees.<sup>75</sup> In essence, then, the program lets the school manufacture otherwise unconstitutional state control over speech by charging students money — which they could otherwise use to express their private views anyway — and then returning it to them with restrictive conditions attached. (The students-only policy, by contrast, reasonably prevents redistribution of funds from students to non-students.) This use of government taxing and spending power to leverage otherwise impermissible government influence over a constitutionally protected zone is precisely what unconstitutional conditions doctrine is meant to prevent.<sup>76</sup>

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<sup>70</sup> By contrast to the “hostile takeover” threat complained of by CLS and dismissed by the majority as improbable, some degree of dilution would follow inexorably from the all-comers condition every time a student joined a group that would have excluded him on the basis of ideological disagreement in the absence of the condition.

<sup>71</sup> *CLS*, 130 S. Ct. at 2985 (students-only policy); *id.* at 2998 (Kennedy, J., concurring) (restrictions based on subject matter or expertise of speaker).

<sup>72</sup> *Id.* at 2994 (majority opinion); *accord* Volokh, *supra* note 68, at 1931–33.

<sup>73</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781, 796–97 (1989).

<sup>74</sup> See *United States v. O’Brien*, 391 U.S. 367, 382 (1968).

<sup>75</sup> See *CLS*, 130 S. Ct. at 2989.

<sup>76</sup> See Sullivan, *supra* note 3, at 1493 (“The state may have many good reasons to deal out regulatory exemptions and subsidies, but gaining strategic power over constitutional rights is not one of them.”).

Finally, the Court's position in *CLS* is incompatible with *FCC v. League of Women Voters*<sup>77</sup> (*LWV*). In that case, the Court, in an opinion by Justice Brennan, rightly struck down the federal government's requirement that noncommercial radio and television stations receiving certain federal funds not "engage in editorializing,"<sup>78</sup> reasoning that it unconstitutionally penalized a station's use of its own funds to editorialize.<sup>79</sup> The effect of the condition would have been to reduce the amount of editorial opinions available to the public.<sup>80</sup> Under the doctrine of *CLS*, this funding scheme would be a limited public forum and the troubling condition would be upheld because it was viewpoint neutral<sup>81</sup> and reasonable, just like a students-only restriction. *CLS* makes clear, then, that the government may now structure a limited public forum so as to reduce the exercise of a free speech right so long as this is not done in a viewpoint-discriminatory way. The *LWV* Court's penalty/nonsubsidy analysis, though admittedly unsatisfactory,<sup>82</sup> took cognizance of important issues that are ignored by the newer limited public forum framework.

A more nuanced and comprehensive constitutional analysis accounting for issues like those discussed in this comment is not without drawbacks. Although such an analysis identifies important constitutional considerations that are overlooked by the Court's test, it lacks the determinacy of the limited public form framework. As a result, it cannot create the certainty of a given outcome's correctness that was produced by the majority's Holmesian conclusion that Hastings's condition was permissible because "[t]he First Amendment shields *CLS* against state prohibition of the organization's expressive activity . . . [b]ut *CLS* enjoys no constitutional right to state subvention of its selectivity."<sup>83</sup> No approach that accounts for all the ways the state might threaten constitutional rights can produce objective, uncontested results in complex and difficult unconstitutional conditions cases like *CLS*.<sup>84</sup> The Court correctly determined that the all-comers policy was

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<sup>77</sup> 468 U.S. 364 (1984).

<sup>78</sup> *Id.* at 366 (quoting 47 U.S.C. § 399 (1982), amended by Public Communications Act of 1988, Pub. L. No. 100-626, § 10(a), 102 Stat. 3207, 3211).

<sup>79</sup> *See id.* at 399-401.

<sup>80</sup> *See id.* at 384.

<sup>81</sup> *See id.*

<sup>82</sup> *See, e.g., Sullivan, supra* note 3, at 1439-42.

<sup>83</sup> *CLS*, 130 S. Ct. at 2978. The actual question, of course, is not whether *CLS* has a right to state support or whether Holmes's petitioner had a "right to be a policeman" — they plainly do not — but instead whether the state may offer support to which the relevant rightholders have no right on condition that they give up other rights they do have. The majority's rhetoric evades this question.

<sup>84</sup> *See Dennis v. United States*, 341 U.S. 494, 524-25 (1951) (Frankfurter, J., concurring in the judgment) ("The demands of free speech . . . are better served by candid and informed weighing

a reasonable and viewpoint-neutral restriction on participation in a limited public forum. But this easy formalism is wholly inadequate to explain why the state was permitted in this case to offer students benefits on the condition that they surrender a portion of their right to free speech. As Justice Holmes once observed in a different context, “General propositions do not decide concrete cases.”<sup>85</sup> The Court should not have pretended otherwise.

3. *Material Support for Terrorism*. — Having determined that “any contribution” to a foreign terrorist organization “facilitates” that organization’s terrorist activity,<sup>1</sup> Congress made it a federal crime “knowingly [to] provid[e] material support or resources to a foreign terrorist organization.”<sup>2</sup> Under this material support statute, “material support” was defined to include not only money and weapons, but also, among other things, “training” and “personnel.”<sup>3</sup> Yet, since this statute’s enactment, the boundaries of what exactly constitutes material support have been subject to repeated congressional revision and near-constant litigation. Last Term, in *Holder v. Humanitarian Law Project*<sup>4</sup> (*HLP*), the Supreme Court clarified these constitutional boundaries. Upholding a ban on providing any type of nonmedical or nonreligious training or assistance to terrorist organizations, the Court insisted that Congress could, consistent with the First Amendment, criminalize even the teaching of how to apply the Universal Declaration of Human Rights so long as the lesson’s recipient had been designated a foreign terrorist organization.<sup>5</sup> Central to this decision was the Court’s broad deference to the national security judgments of Congress and the executive branch as to what constituted a likely threat of furthering terrorism. Yet, the Court’s uncritical reliance on these judgments stood in fundamental tension with the heightened scrutiny that it purported to apply. At the same time, this broad deference reflected the Court’s longstanding tendency to defer to the political branches’ empirical judgments about serious, unpredictable national security threats.

In 1997, the Secretary of State designated thirty groups as foreign terrorist organizations,<sup>6</sup> including the Kurdistan Workers’ Party (PKK)

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of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved.”)

<sup>85</sup> *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

<sup>1</sup> 18 U.S.C. § 2339B (2006 & Supp. III 2009).

<sup>2</sup> *Id.* § 2339B(a)(1).

<sup>3</sup> *Id.* § 2339A(b)(1).

<sup>4</sup> 130 S. Ct. 2705 (2010).

<sup>5</sup> As long as teaching to such organizations derived from “specialized knowledge” or imparted a “specific skill,” according to the Court, it fell under the statute. *See id.* at 2720.

<sup>6</sup> Congress gave the Secretary of State the authority to designate an entity “a foreign terrorist organization” and defined the criteria by which the Secretary would make such a designation. *See* 8 U.S.C. § 1189(a)(1), (d)(4) (2006).