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**CAMPUS CITIZENSHIP AND ASSOCIATIONAL FREEDOM:
AN ARISTOTELIAN TAKE ON THE
NONDISCRIMINATION PUZZLE**

Chapin Cimino*

ABSTRACT

Student expressive association on campus is a thorny thicket. Student affinity groups often choose to organize around a shared principle or characteristic of the groups' members, which, by definition, makes those students different in some way from their peers. In order to preserve the group's sense of uniqueness, these groups often then wish to control their own membership and voting policies. They feel, in essence, entitled to discriminate—a right arguably embodied by the First Amendment freedom of expressive association. When campus groups actually exercise this right, however, they run into university antidiscrimination policies, which can cost them official campus recognition. Thus, in the name of one important value, schools trample on another: *campus citizenship*. Both nondiscrimination and campus citizenship are values of equality.

At this moment, whose notion of equality is to prevail? Is it the university's, taking the form of a blanket nondiscrimination policy? Or is it the student group's, taking the form of the desire to maintain both associational freedom and campus citizenship?

Current First Amendment doctrine is ill-equipped to resolve the tension between these competing values, or "ends." It is ill-equipped because any traditional First Amendment test is written to consider only one "end"—the end of the regulator. This was true prior to the Supreme Court's June 2010 decision in *Christian Legal Society v. Martinez*. However, the Court's opinion in *CLS* made the situation worse by applying the simplistic and unhelpful "limited public forum" test. The limited public forum test may have been the least common denominator between competing doctrines, but choosing it was a mistake.

This Article takes on several tasks. It explains the notion of *campus citizenship*, showing how the goal of equality on campus actually has two aspects to it—the equality of the students potentially excluded from a group, and also the equality of the group that is excluded from the campus. It shows how and why current doctrine, but especially the limited public forum doctrine, are not up to the task of resolving the

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inherent conflict in this dual conception of equality. Finally, it offers a new (and neo-Aristotelian) means-ends analysis courts should use in this context in order to account for the dual ends of these cases: nondiscrimination and expressive association.

INTRODUCTION

Expressive association is a thorny thicket, but student expressive association raises some particularly troubling issues. Expressive associations are built on the very idea that one may associate with whomever one wishes. In practice, this means that members of an association may (and often do) exercise a certain amount of selectivity in choosing fellow members. When members select in ways that seem, first and foremost, consistent with the purpose of the association, and second, which do not impact protected classifications such as race, national origin, religion, sex or sexual orientation, their selectivity does not cause the rest of us much angst.¹

By contrast, when an association selects members based on a desire to exclude people who belong to a protected class, we do worry, and this time our worry is appropriate. The worry is that those selections are illegitimate—that they are invalid because they are exclusions made on the basis of animus and purely for the sake of excluding the disfavored.² As public benefits and burdens may not be distributed on the basis of animus, both federal and state nondiscrimination laws prohibit this kind of discrimination.³ Thus, if association is to be based on pure animus, it must remain exclusively private. That we do not want public funding or support of pure animus is not a difficult call to make.

The difficulty arises when an association selects members in a way that is consistent with the purpose of the association and that *also* impacts classifications protected under federal or state law. This is the problem posed by most expressive association cases—and it is also what makes them difficult. The difficulty is heightened when the expressive association—excluding for reasons that feel both legitimate and illegitimate—is a group of public university students on campus, who are

¹ For example, if a group called “Vegans United” wants to include vegans and vegetarians, but exclude carnivores, our instinct here probably is that the Vegans would be exercising appropriate selectivity. Excluding carnivores does not feel problematic; it does not feel discriminatory in a way that causes us to worry. Yet it is “discrimination” in the sense that the Vegans are being selective when choosing members—they are in that sense *discriminating* between two groups of eaters, preferring one and excluding the other. But, as carnivores are not a protected class under federal or state law, we usually would not worry that the Vegans’ discrimination is also constitutional discrimination; we chalk it up to appropriate selection. Many commentators have employed the vegan/carnivore hypothetical because of its illustrative power; thus it does not originate with me. *See, e.g.*, Joan Howarth, *Teaching Freedom*, 42 U.C. DAVIS L. REV. 889, 892 (2009).

² In contrast to the vegans excluding carnivores.

³ By this, I mean most state public accommodations laws and federal antidiscrimination laws, such as Title VII and Title IX.

associating in ways in which the university has invited and encouraged them to do, and those whom they excluding are their fellow student-citizens.

When university students' expressive association rights—which arguably entail a right to discriminate—run up against a state university's blanket nondiscrimination policy, two important values are placed in direct conflict. Which value ought to win out? Resolving this conflict requires a nuanced, careful analysis of all of the competing values and principles involved—of all of the pieces of what is in reality a highly complex, multifaceted nondiscrimination puzzle—but lately courts have been missing the complexity and oversimplifying the analysis.⁴ The Supreme Court's most recent encounter with this problem occurred last year in the well-known case of *Christian Legal Society v. Martinez (CLS)*.⁵ There, the Court considered the decision of the University of California Hastings College of Law to deny the school's Christian Legal Society official recognition on the grounds that group membership was limited to like-minded believers.⁶ Regrettably, the Court missed an opportunity to fully grapple with the difficult issues raised by most expressive association cases—that is, how to resolve the tension between two competing rights. Instead, as will be described below (and to no one's benefit), the Court took the easy way out.

Although the majority upheld the law school policy,⁷ neither the majority opinion nor the dissent offered a theoretically satisfactory analysis of the central dilemma of the competing rights puzzle.⁸ As this Article will show, the reason for the unsatisfactory result was the Justices' failure to recognize that the central dilemmas of a case like this are bound up in notions of campus citizenship.

The claim in *CLS* arose when Hastings College of Law asked a student group, the Christian Legal Society (CLS), to adhere to the school's nondiscrimination policy (dubbed an “all-comers” policy).⁹ To do so, the students of CLS would have been required to offer membership and open leadership to anyone who wished to join, which was contrary to the group's existing policy of restricting membership and leadership to like-minded believers.¹⁰ Notably, however, all of the group's meetings and events were open to everyone—open to “all comers.”¹¹ Yet, the students were unwilling to change their policy because membership and leadership entailed voting

⁴ See, e.g., *Christian Legal Soc'y v. Martinez (CLS)*, 130 S. Ct. 2971 (2010); see also *Alpha Delta Chi-Delta Chapter v. San Diego State Univ.*, No. 09-55299, 2011 WL 3275950, at *5 (9th Cir. Aug. 12, 2011) (applying the “limited public forum” test to decide whether the University's nondiscrimination policy was reasonable).

⁵ 130 S. Ct. 2971 (2010).

⁶ *Id.* at 2978.

⁷ *Id.* at 2995.

⁸ *Id.* at 2971.

⁹ *Id.* at 2980 (characterizing the policy as “all-comers” and noting that CLS sought an “exemption” from the policy, which was denied by the university).

¹⁰ *Id.* at 2979–80 (discussing the policies of the University's Registered Student Organization Program and the CLS).

¹¹ See *id.* at 2979–80.

rights, and the group (presumably) believed they should be able to restrict voting privileges to those who shared the group's beliefs and values.¹² Upon their refusal to give up the right to restrict membership in this way, the school denied the students the status of an officially recognized member of the campus community.¹³ In other words, the school denied them *campus citizenship*.

As will be discussed below, campus citizenship has two faces—the face of both the students being *excluded by* an exclusionary student group and of the students who make up the group which is then *excluded from* the campus community. Thus, prohibiting CLS from excluding fellow students from membership and leadership positions does not resolve the problem of student exclusion; rather, it only excludes other students, this time from the official campus community. The two faces of campus citizenship—representing the dual ends of equality in this context—make these cases unique and particularly complex.¹⁴

The Court, by a five-to-four vote, upheld the school's nondiscrimination policy.¹⁵ Unfortunately, the majority contented itself with a rather simplistic application of

¹² See *id.* at 2980–81 (discussing the religious nature of group).

¹³ *Id.* at 2980–81.

¹⁴ The two faces of campus citizenship shine a particularly bright light on what this Article calls the “nondiscrimination puzzle” posed by most expressive association cases—that is, as noted previously, expressive association cases often have unique nondiscrimination overtones to them. That associational rights conflict with nondiscrimination principles is not news, but what has not been surfaced—and what I think the notion of campus citizenship helps reveal—is that there are two analytically separate questions in these cases. Those questions are: (1) whether the Fourteenth Amendment and/or related federal and state statutory law *prohibits the association* from exercising selectivity in membership decisions because those decisions impact protected classifications; but also (2) whether the First Amendment right of expressive association *requires that the state permit* the association to exercise selectivity in membership decisions, even though those decisions impact protected classifications.

That said, only one legal test applies—which, as is described *infra* in Part III, is some version of the standard First Amendment balancing test. Procedurally, this can happen either if the association brings an action against the state for infringing on its First Amendment rights (as was the case both in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) and *Healy v. James*, 408 U.S. 169 (1972)), or if an excluded person brings an action against an association claiming that the group violated the state public accommodations law when it excluded that person (as in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2002)), in which case the First Amendment right of expressive association is raised as a defense. Either way, the competing claims of nondiscrimination and expressive association are “bundled” together in a First Amendment “case,” whether the First Amendment right of expressive association is the basis of the claim or the defense.

A large part of the thesis of this Article is that current First Amendment doctrine is inadequate to fully address these competing rights claims. In other words, when two equally important but analytically opposite questions have been posed, the First Amendment balancing test (whether applying close review or not) is not equipped for the job because, as set out this Article, First Amendment balancing tends to privilege the end of the state—to privilege the restriction.

¹⁵ *CLS*, 130 S. Ct. at 2995.

a modern free speech doctrine—the limited public forum analysis (LPF)¹⁶—and concluded that the state university could impose any reasonable and viewpoint neutral restriction on the students.¹⁷ The school’s policy easily met this low burden.¹⁸ The dissent objected to the application of the limited public forum jurisprudence, but also failed to see the import of citizenship and stigmatic injury.¹⁹

The Court’s approach is particularly unsatisfactory because these are particularly hard cases. They are hard cases because there is no easy path toward reconciliation of the two competing interests in equality. Hard cases require more than a simplistic side-stepping of the real issues. Moreover, even if the Court were inclined not to side-step, current First Amendment doctrine has not yet worked out a satisfactory approach to the dual-ends-of-nondiscrimination puzzle. The law is not yet up to the task.

The First Amendment doctrine is not up to the task for two reasons. First, the LPF test suffers from the shortcomings inherent in a deferential standard of judicial review: the deference embedded in the standard leaves important questions unasked, and so unanswered. Second, the traditional means-end analysis of any standard First Amendment speech test—whether it be strict, or “close,” scrutiny, or LPF—fully accounts for only one objective, or what this Article calls an “end.” Thus, in standard First Amendment speech doctrine, when courts check for a tight fit (or narrow tailoring) between the means used to restrict the speech and the end of that regulation, they focus on one end—the end of the regulator. This unitary focus fails to adequately account for the dual, and competing, ends—the two conceptions of equality—present in these cases.

Once these problems with current First Amendment doctrine have surfaced, two conclusions crystallize. First, applying the LPF framework to cases implicating dual ends is a mistake; deferential review cannot possibly account for the interests at stake, and therefore heightened review is essential. Second, courts must apply not just heightened review, but rather a heightened means-end analysis that accounts for the possibility of dual, competing, and similarly important ends.

It turns out that the Court’s own cases support abandoning the LPF approach,²⁰ which would solve the first problem. This Article asserts that the Court was closer to getting it right the first time it reviewed a university’s attempt to restrict student expressive association. In the 1972 case of *Healy v. James*,²¹ the Court considered a public university’s decision to ban a student group out of fear that the group might

¹⁶ See *id.* at 2985.

¹⁷ *Id.* at 2995.

¹⁸ See *id.* at 2985, 2993–95.

¹⁹ See *id.* at 3000, 3009 (Alito, J., dissenting).

²⁰ See generally *id.* at 2987–88.

²¹ 408 U.S. 169 (1972). The dissent in *CLS* argued strenuously that the *Healy* Court got it right when the Court failed to defer to the university’s justifications of its own restriction. *CLS*, 130 S. Ct. at 3008 (Alito, J., dissenting). The dissent did not surface the concerns of citizenship and stigmatic injury, however. *Id.*

incite violence.²² The Court did not defer to the state but instead closely reviewed the restriction.²³ Although *Healy* predates the LPF doctrine, it seriously considers students' associational rights.²⁴ This Article asserts that the *Healy* Court's approach of heightened review was closer to the right one, though for reasons not articulated in that opinion.

Close scrutiny is not enough, however. The second step in the correction is to add to heightened review an Aristotelian-inspired conception of means-ends analysis. Such an analysis would allow courts to account for dual ends. This analysis would, instead of focusing on a unitary end, require courts to reason toward a mean (and by this I mean a midpoint) between the competing ends. Under this way of thinking, the best resolution of such conflicts is often found by locating, and then adopting, the mean between two opposite extremes. As will be developed, a means-end analysis like this would better account for the rights of both nondiscrimination and expressive association.

Moreover, in the consideration of dual ends, close review would enable courts to more effectively sort out precisely which aspects or exercises of the right of expressive association are actually threatening to equality, and which are not. Indeed, there is a growing cadre of scholars who assert rather persuasively that sometimes the best way to teach students about equality is to let them make their own decisions about inclusion.²⁵ As it stands under the LPF test, courts can likely avoid asking this hard question, let alone answering it, as the state's restriction is presumptively valid under the low bar of reasonableness and viewpoint neutrality.

Neither the metaphor of campus citizenship, the effect of stigmatic injury, nor the limitations of the standard means-end analysis have been previously discussed in either the cases or the literature. Indeed, many of the commentators who have written in this area focus on the issue of viewpoint neutrality; others seem to have taken sides along political lines.²⁶ This Article does neither of those things.

²² *Healy*, 408 U.S. at 169–71, 174 & n.4.

²³ *Id.* at 185–94.

²⁴ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44–47 (1983) (defining the components of the limited public forum doctrine). Today, there are many critics of the LPF doctrine. *See, e.g.*, Norman T. Deutsch, *Does Anyone Really Need a Limited Public Forum?*, 82 ST. JOHN'S L. REV. 107, 108–09 (2008); Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299, 301 (2009); David A. Thomas, *Whither the Public Forum Doctrine: Has This Creature of the Courts Outlived its Usefulness?*, 44 REAL PROP. TR. & EST. L.J. 637, 641 (2010).

²⁵ *See, e.g.*, Howarth, *supra* note 1, at 890.

²⁶ As to viewpoint neutrality, scholars argue that a generally applicable nondiscrimination requirement will predictably and disproportionately burden religion-affiliated organizations whose faith compels them to embrace social positions that are not popular with liberal-minded political majorities (such as rejection of homosexuality). *See, e.g.*, Christina Trotta, *From God to Gab: Analyzing The First Amendment Rights of Religious Student Groups in an Age of Free Speech and Political Correctness* 4 (Feb. 16, 2007) (unpublished note, William & Mary School of Law), available at <http://ssrn.com/abstract=1025101>; *see also* Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional*

This Article proceeds as follows: in Part I, this Article takes a closer look at the dual ends presented by cases of discrimination and nondiscrimination. Part I also shows what campus citizenship means and how the concept of stigmatic injury is relevant to the notion of equality in competing ways.

In Part II, this Article describes the two lines of First Amendment doctrine that could possibly apply to these claims under existing law. First, there is what I call the *Healy/Dale* line, under which courts are to engage in an exacting, close review of the challenged expressive association restriction. As will be developed, close review is better than the LPF test, but even close review suffers from the problem of a unitary focal point—which precludes the Court from fully grappling with the competing ends in these cases. Second, there is the LPF line, under which courts engage in a limited, deferential review of the challenged speech restriction. As will be developed, this deferential level of review makes sense in some contexts, but not in the context of dual ends.

In Part III, this Article moves from general to specific and takes a close look at the Court's June 2010 opinion in *CLS*. This Part chiefly challenges the Court's application of the LPF doctrine, notwithstanding the fact that the claim did arise in a limited public forum. Perhaps in part to make it easier to resolve the "turf battle" between the two existing lines of doctrine, the Court framed the case as a challenge to a neutral and reasonable nondiscrimination policy,²⁷ instead of as an attempt at state interference with a historically strongly protected right of expressive association.²⁸ There was little analysis to justify this choice. The Court merely observed that, because the speech and expressive association claims overlapped to some extent, it was appropriate to apply the LPF doctrine.²⁹ I describe this as reasoning toward the "lowest common denominator." The lowest common denominator analysis was a mistake and Part III shows precisely why.

In Part IV, this Article rejects both existing approaches in favor of a dual means-ends analysis. The dual means-end analysis is based on insights from Aristotelian practical reasoning. This analysis takes a turn away from standard First Amendment

Conditions on 'Equal Access' for Religious Groups and Speakers, 29 U.C. DAVIS L. REV. 653, 662–64 (1995) (questioning the legitimacy of the government's role in setting anti-discrimination regulations on Christian student groups). The dissent in *CLS* also focused on this point. *CLS*, 130 S. Ct. at 3001, 3009–13 (Alito, J., dissenting) (arguing that Hastings's actions were not viewpoint neutral, but rather were viewpoint discrimination). As to taking political positions, see *infra* note 285.

²⁷ See *id.* at 2978.

²⁸ Is it a First Amendment speech case? A free exercise case? An establishment case? A quasi-equal protection case? An unconstitutional conditions case? The list goes on. Others have commented on this framing conundrum. See, e.g., Toni M. Massaro, *Christian Legal Society v. Martinez: Six Frames*, 38 HASTINGS CONST. L.Q. 569, 573 (2011).

²⁹ See *CLS*, 130 S. Ct. at 2985 ("[T]hree observations lead us to conclude that our limited-public-forum precedents supply the appropriate framework for assessing both *CLS*' speech and association rights.").

means-end analysis, which, as will be developed, suffers from the problem of a unitary focal point—meaning it accounts for only one end. By contrast, under an Aristotelian-inspired means-end analysis, courts will reason toward finding the mean between two competing ends. Finally, the Conclusion wraps up the analysis.

I. COMPETING INTERESTS AND DUAL ENDS

Expressive association is a difficult topic. Often, expressive association rights clash with rules or statutes designed to promote nondiscrimination.³⁰ Nondiscrimination is an extremely important social and constitutional norm, but so are the cultural and constitutional values of personal liberty, which undergird much of the First Amendment canon, including expressive association. Cases in which nondiscrimination and expressive association clash have proven particularly challenging to resolve.³¹

On campus, the clash surfaces in the domain of student groups. Some student groups—especially affinity groups—may have an interest in a certain degree of discrimination—in the sense of selecting their membership and leadership.³² This interest stems from the students' desire to maintain the group's core mission by limiting formal membership and voting rights. The university, by contrast, has its own interest—in nondiscrimination—which often takes the form of a blanket policy requiring all groups to open not just attendance of the group's meetings and events to all students, but also all membership/leadership positions in the group.³³ For this analysis, the important point is that these interests are both “ends”—the students desire expressive affiliation on their own terms, whereas the university desires a community of nondiscrimination. This Part explores these dual ends.

A. Of Campus Citizenship and Exclusion

For young adults who are “going away to college,” the prospect of living on campus can be a very special thing.³⁴ Many young adults move away from their par

³⁰ See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (regarding a clash between the Boy Scouts' policy of no homosexual membership/leadership and New Jersey's state anti-discrimination statute); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (regarding a clash between Jaycees' policy which reserves membership to males ages 18 and 35 and the Minnesota state antidiscrimination statute); *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006) (regarding a clash between CLS membership policy, which precludes members who engage in homosexual conduct, and Southern Illinois University's affirmative action/equal employment opportunity policy); see also *Healy v. James*, 408 U.S. 169, 193 (stating that a requirement imposed by the college to “affirm in advance its willingness to adhere to reasonable campus law” does not impose on students' associational rights).

³¹ See, e.g., *CLS*, 130 S. Ct. at 2977 (decided by a 5-4 decision); *Dale*, 530 U.S. at 642 (decided by a 5-4 decision).

³² See cases cited *supra* note 30.

³³ *Id.*

³⁴ When I use the phrase “living on campus,” I do not mean to limit my analysis to residential campuses; rather, the analysis applies to any institution of higher education. If any

ents for the first time and set up their entire lives somewhere other than in their parents' home. This fact is not lost on colleges and universities when the time comes to recruit students to fill the available seats in each class. Indeed, many colleges advertise, market, and even recruit heavily based on the quality of life that a student can expect to have on campus. Most institutions of higher education do this—holding themselves out as wonderful places not just for going to classes, but also for building a new life and a new world along the way to earning a college degree.

To ensure that students make campus their world, schools engineer multiple opportunities beyond the classroom for students to fully participate in collegiate life. This occurs at the level of student dining (meal plans), recreation (campus athletic facilities), cultural experiences (study abroad programs), pre-professional or identity-affiliation opportunities (student groups), social life (student unions, student social events), government (student government), religion (campus chapels and other religio-cultural centers), and journalism (campus newspapers). Colleges also intentionally try to generate institutional loyalty among their students—something akin to “university nationalism”—by encouraging student support for school teams, attending school sporting events, affirming “brand” loyalty through displaying school colors, and purchasing a whole variety of campus “swag,” including sportswear, pennants, mugs, blankets and even spare tire covers.³⁵ In sum, most universities are not simply purveyors of academic credit upon a student's completion of academic requirements; rather, the modern university has a stake in students feeling a significant degree of membership in a university-engineered campus community.³⁶ This community is academic, but can also be social, pre-professional, recreational, spiritual, and even political for the students who live in it.

The particular site at issue in cases like *CLS* is the student group.³⁷ Once students matriculate, the school encourages them to become active members of the campus community by joining student organizations. Many schools hold regular activity

particular institution either does not offer opportunities for student groups, or does not offer the “bells and whistles” of a collegiate program, then the state may well have stronger interests in restricting student expressive association. But when an institution has an ethos and history of encouraging expressive association, as the Court in *CLS* recognized was the case at Hastings, *see CLS*, 130 S. Ct. at 2978–79, then those interests are much lower.

³⁵ Ohio State's “Official Online Store,” for example, sells Ohio State-branded spare tire covers. *See* OHIO STATE BUCKEYES OFFICIAL ONLINE STORE, http://shop.ohiostatebuckeyes.com/COLLEGE_Ohio_State_Buckeyes/Ohio_State_Buckeyes_Black_Tire_Cover (last visited Nov. 29, 2011).

³⁶ Justice Ginsburg even recognized that the university is indeed a community in which the university encourages students to participate through activities like extracurricular associations, but drew no insight from that observation as to what the effect of non-recognition would mean for the students. *CLS*, 130 U.S. at 2978 (“Like many institutions of higher education, Hastings encourages students to form extracurricular associations that ‘contribute to the Hastings community and experience.’”) (citation omitted).

³⁷ *Id.* at 2978.

fairs where student organizations market themselves to students who might wish to join.³⁸ The schools often set up funding structures, communication channels, and faculty advising in order to assist student groups in their organization. Particularly poignant here is the notion that a school will officially recognize its student groups—which, at least in *CLS*, was referred to as granting the group “registered student organization” (RSO) status—and grant the group access to funding via a university-collected-and-distributed activity fee—named the “SAF” in *CLS*.³⁹

What comes along with all this engineering and encouragement is a sort of metaphorical citizenship within a campus community. The college has intentionally created a world, asked students to join it and live their lives there, created many opportunities for them to do just that, and encouraged them to take advantage of these opportunities. This entire alternative universe is presumably designed, at least in part, so that students feel such a strong sense of belonging to the college community that they will continue to support it economically, both as fans and political boosters, long after graduation. Thus, the university has not simply extended students an opportunity to attend classes—it has conferred campus citizenship.

It is important to stress that by campus citizenship I mean citizenship as a member of a student community—and not as a member of a participatory democracy.⁴⁰ Nor do I mean citizenship in a strict literal sense—as in the context of immigration, voting, or other critical fundamental rights of citizenship that we might recognize in other constitutional, or even First Amendment, contexts. Rather, I offer the concept of citizenship as a metaphor—one that sheds light on aspects of these campus expressive association cases not yet discussed in the literature or case law. My notion of citizenship is that which results from the process of being invited to join an entirely enveloping community and encouraged to be a full participant in it. The resulting

³⁸ See, e.g., *id.* at 2979 (noting that recognized student organizations are invited to “participate in an annual Student Organizations Fair designed to advance recruitment efforts”).

³⁹ *Id.* at 2979. Attributes of official recognition of student organizations at Hastings include being

eligible to seek financial assistance from the Law School, which subsidizes their events using funds from a mandatory student-activity fee imposed on all students. RSOs may also use Law-School channels to communicate with students: They may place announcements in a weekly Office-of-Student-Services newsletter, advertise events on designated bulletin boards, send emails using a Hastings-organization address, and participate in an annual Student Organizations Fair designed to advance recruitment efforts. In addition, RSOs may apply for permission to use the Law School’s facilities for meetings and office space. Finally, Hastings allows officially recognized groups to use its name and logo.

Id. (citations omitted).

⁴⁰ That said, many universities do provide the trappings of participation in governance by placing students on university committees.

regulation of nondiscrimination, at least of the social aspects of this community, is an example of what has been called the “‘constitutionalization’ of social life.”⁴¹

A pause to address possible critiques of the concept of campus citizenship is in order. One such critique is that different colleges and universities engage in different levels of social engineering on campus, and thus create different levels of expectations of citizenship in their students. Thus, the critique is that the approach offered here may need to vary depending on these different levels of engineering, and that these variations would detract from the administrative ease of the approach. The point is well-taken, but it need not end the discussion before it begins. The concept of citizenship is useful as a metaphor to surface a previously unrecognized problem in cases like these, which is that students who are denied official campus membership are themselves excluded from campus and thus denied full participation in the campus community. As will be set out more fully below, facing up to that complication requires at least close review of campus nondiscrimination policies. Close review, even strict scrutiny, does not mean that the nondiscrimination policy can or should yield to the interest in associational freedom in every case. Facts establishing low levels of affirmative social engineering (i.e., an online college which may lack a physical campus or a community college which may lack a robust extracurricular student life) would suggest that the interests in protecting associational freedom may well be less strong than on a residential campus where the school held itself out as a “home away from home.”

Another critique is that the extent of the ultimate nature of campus citizenship is undefined. How far do the claims made on the basis of citizenship extend? This is another point well-taken, but as I see it, it is not fatal. The simplest answer is that the claims made on the basis of citizenship extend as far as the metaphor. The metaphor surfaces the equality concerns inherent in removing certain students from membership in the community as a response for those students failing to open membership and leadership positions to “all comers.” The claim does not extend so far as to say a state must, as a privilege of state residency, pay for a university system in the first place, or provide opportunities for student groups at state universities, or even require the university to fund student groups at state universities. The claim is not about a vested entitlement. It is about surfacing an aspect of equality previously hidden—that is, if a university is genuinely concerned about harms to students that come from exclusion, then the university cannot, in the absence of constitutionally significant and justifiable reasons,⁴² pick and choose the students to whom it extends its protection.

Importantly, with the creation of a status of campus citizenship comes potential for the injury of stigma upon exclusion. While being careful to not overstate or dramatize this effect, it must be the case that being denied official recognition—being “kicked

⁴¹ Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, in *FREEDOM OF ASSOCIATION* 75, 78 (Amy Gutmann ed., 1998).

⁴² See discussion *infra* Part IV and accompanying notes.

off campus”—entails some sort of harm. It surely does not entail positive recognition. At bottom, the point is that exclusion *from* the community works the same type of dignitary harm as does exclusion from a group *inside* the community.⁴³

To see the harm entailed by denial of official campus recognition, imagine the sensation from the excluded student group’s perspective. In *CLS*, the student group formally requested an exemption from the law school’s nondiscrimination policy because it wanted to restrict voting membership to students who shared the group’s religious belief requiring a disavowal of homosexuality.⁴⁴ From the students’ perspective, being kicked off campus for adhering to certain religious principles is indistinguishable from being kicked off campus for failing to adhere to the school’s alcohol policy; the effect is the same.⁴⁵ The group is told that they have failed to live up to community standards and will therefore no longer be granted official recognition. To be kicked off campus is to be told that your group is a wrong-doer.⁴⁶ It is far from clear that, whatever one thinks of *CLS*’s principles of faith requiring a disavowal of homosexuality, *CLS* should be treated as a wrong-doer in this same way.

The trouble for courts adjudicating expressive association claims is that many restrictions on association take the form of some kind of antidiscrimination law—a public accommodations statute,⁴⁷ for example, or a campus nondiscrimination requirement.⁴⁸ Thus, inherent in many expressive association cases is a challenge in some form *to* the norm of nondiscrimination.⁴⁹ However, as previously noted, the equality aspect of these cases is complicated because it has two fronts. At stake is not just the equality of the person excluded from the group, which is the object of nondiscrimination laws, but also the equality of the group itself—the members of the group wish to exercise their rights of expressive association equally as other members of the community, free from state interference. As such, it should be plain that any expressive association test must be able to account for these complexities.

⁴³ On dignitary harms of discrimination in this particular context, see generally Rosenblum, *supra* note 41, at 88–89, 91, 95–96 (describing the relationship between exclusion and the accompanying feelings of inferiority, or, “second class citizenship”).

⁴⁴ *CLS*, 130 S. Ct. at 2980.

⁴⁵ *See id.* at 2979, 2981 n.1.

⁴⁶ *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (describing the harmful effects of discrimination and exclusion from places of public accommodation).

⁴⁷ *See, e.g., id.* at 614–15.

⁴⁸ *See, e.g., CLS*, 130 S. Ct. at 2979–81.

⁴⁹ There has been much written on this challenge generally. *See, e.g.*, David Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 85–86 (2001); Martha Minow, *Should Religious Groups be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 783 (2007); Anne K. Knight, Note, *Striking the Balance Between Anti-Discrimination Laws and First Amendment Freedoms: An Alternative Proposal to Preserve Diversity*, 30 T. JEFFERSON L. REV. 249, 249–51 (2007). There has also been some commentary written on the problem as it arises in the context of a public university. *See, e.g.*, Patricia A. Brady & Tomas L. Stafford, *Some Funny Things Happened When We Got to the Forum: Student Fees and Student Organizations After Southworth*, 35 J.C. & U.L. 99, 101 (2008); Howarth, *supra* note 1, at 889.

B. *The End of Equality*

From the university's perspective, a key aspect of the equality at stake is equality amongst its campus citizens. The university desires—in fact, it is required by federal law—to be a place where no one is denied university benefits solely on the basis of protected classifications, such as race, religion, or national origin.⁵⁰ It should not be otherwise. Moreover, the university has the discretion under the First Amendment itself to implement a pedagogy of inclusion.⁵¹ Thus, most universities, whether state or private, want to foster a community of inclusion. As should be abundantly clear, this is an important, even compelling, interest.⁵²

However, the same concerns about stigmatic injury resulting from exclusion of student groups from the community as a whole attend on the individual level as well. Indeed, anxiety over exclusion is a large reason why schools adopt antidiscrimination policies in the first place. No student at the university—no member of the campus community—wants to feel alienated at the school. Universities surely cannot prevent all students from feeling any alienation, but the university has a strong interest in not creating a community that is structured in a way that will necessarily exclude some students, especially on the basis of protected classifications.⁵³ Moreover, the university does not want its official imprimatur on the exclusion and resulting isolation, or even on the stigmatic injury resulting from exclusion. This is a noble and appropriate concern. It is a compelling interest and an end in and of itself.

Yet, the question in these cases is not whether this goal is a compelling interest. The question in these cases is, by contrast, to what extent may the university generally constitutionally interfere with students' right of expressive association in order to advance this end?

C. *The End of Expressive Association*

I have stated that part of *campus citizenship* is encouragement to engage in the community by joining student groups. As was recognized by the Supreme Court in

⁵⁰ 42 U.S.C. § 2000d (2006) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”). Additionally, state law may expand these protected classifications to include gender and sexual orientation. *See, e.g.*, William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 490 & n.16 (2011) (noting that a minority of states have antidiscrimination statutes that include sexual orientation or gender identity).

⁵¹ *See, e.g.*, Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461, 509 (2005).

⁵² *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 314, 318, 324, 328 (2003).

⁵³ *See, e.g., id.* at 329–30, 332 (discussing the value of diverse viewpoints in educational settings, as well as the importance of equal access to the benefits of higher education).

Healy and is explained more fully below, student groups on campus are recognized as an important way for students to exercise the protected right of expressive association.⁵⁴

In *Healy v. James*, the Court engaged in close scrutiny of a university's denial of officially recognized status to a student group and ultimately ruled for the students.⁵⁵ The Court first observed that student expressive association deserves the most "vigilant protection."⁵⁶ The Court wrote that "state colleges and universities are not enclaves immune from the sweep of the First Amendment,"⁵⁷ and expressly rejected the notion a school's authority in any sense trumps the First Amendment.⁵⁸ The Court added that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The college classroom . . . is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's declaration to safeguarding academic freedom."⁵⁹

That the vigilant protection of constitutional freedoms is equally vital on campus as well as off is still true today. Indeed, as Rick Garnett has recently observed, expressive associations themselves teach.⁶⁰ He wrote that "education is more than the transmission of data; it includes the inculcation of values, beliefs, and loyalties."⁶¹ Thus, according to Garnett, expressive associations on campus are somewhat in competition with the institution itself: associations are not simply ways for us to "express ourselves and shape our world by and through our association with others," but they also form and impact "our character and values . . ."⁶² "Thus, the freedom of association matters not only because it facilitates individuals' choices and expression, but also because associations . . . educate us," and as such, "[w]ithin this space, the expression of free and independent associations competes with the liberal state . . ."⁶³

In his writing on education and expressive association groups, Garnett makes the important point that association is necessary to human fulfillment.⁶⁴ Garnett notes the standard account of expressive association is that we join groups as an exercise of our self-expression, as an act of autonomy.⁶⁵ On this view, we choose to become

⁵⁴ See *infra* Part II.C and notes 55, 318–29 and accompanying text.

⁵⁵ 408 U.S. 169, 194 (1972) (remanding for further fact-finding to establish students' willingness to forgo violence and to abide by "reasonable campus rules and regulations" as an expressive association).

⁵⁶ *Id.* at 180 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

⁵⁷ *Id.*

⁵⁸ *Id.* ("Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.").

⁵⁹ *Id.* at 180–81 (citations omitted).

⁶⁰ Rick Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1856 (2001).

⁶¹ *Id.*

⁶² *Id.* at 1842.

⁶³ *Id.* at 1856.

⁶⁴ *Id.* at 1855–56.

⁶⁵ *Id.* at 1855.

affiliated with such associations precisely because they express a value or message with which we previously identified. Garnett acknowledges this aspect of group membership, but notes that it is “missing” something.⁶⁶

What is missing, according to Garnett, is a “crucial anthropological and moral fact about the human person, namely, that we are ‘intrinsically, not contingently, social. We are born to communion, to rationality,’ and to association.”⁶⁷ Important to the thesis of this Article, Garnett stresses the conception of association as a human end: “The point here is not only the obvious biological one—we are all the physical products of two others—but also a claim about our development, capacities, ends, and flourishing.”⁶⁸ To think of student associations as important to student flourishing on campus accords with *Healy*’s strong protection for student expressive associations.⁶⁹

There is no question that nondiscrimination is an important end of a university.⁷⁰ Further, there is no question that a university may validly implement a general pedagogy of inclusion, including in university admissions.⁷¹ The particular question here is whether a university may validly (i.e., constitutionally) require students to choose student group membership and leadership in a particular way in order to implement the university’s nondiscrimination policy.

This Article now returns to the critical question in these cases: to what extent may the university generally constitutionally interfere with some students’ rights of expressive association in order to protect other students from group membership discrimination? By uncritically applying the LPF doctrine in *CLS*, the Court made this seem like an easy question.⁷² As the next Part of this Article describes, however, it was not.

II. TURF BATTLES

Despite recognition that the student group’s interests implicated a more protective body of case law,⁷³ the Court in *CLS* applied the LPF doctrine to resolve the case for

⁶⁶ *Id.*

⁶⁷ *Id.* (quoting Jean Bethke Elshtain, *The Dignity of the Human Person and the Idea of Human Rights: Four Inquiries*, 14 J.L. & RELIGION 53, 57 (1999–2000)).

⁶⁸ *Id.* at 1855–56.

⁶⁹ *Healy v. James*, 408 U.S. 169, 181 (1972); *see Bd. of Regents v. Southworth*, 529 U.S. 217, 231–33 (2000) (discussing an institution’s interest in allowing students to participate in extracurricular organizations).

⁷⁰ *See, e.g.*, 42 U.S.C. § 2000d (2006).

⁷¹ *Christian Legal Soc’y v. Martinez (CLS)*, 130 S. Ct. 2971, 2988–89 (2010) (“A college’s commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process.”); *see also Horwitz, supra* note 51, at 509 (arguing that under *Grutter v. Bollinger*, 539 U.S. 306 (2003), a college may have discretion to implement speech codes in order to promote a particular pedagogy).

⁷² *See CLS*, 130 S. Ct. at 2986.

⁷³ *Id.* at 2984–85 (“[T]his Court has rigorously reviewed laws and regulations that constrain associational freedom.”).

one simple reason: the place in which the dispute arose was a public university campus.⁷⁴ However, if CLS met anywhere other than a public university campus, the state could not so easily interfere with the group's right to define itself through exclusive membership and leadership requirements.⁷⁵ This is because, as will be developed,⁷⁶ off campus, under the current expressive association jurisprudence, "political, economic, religious or cultural"⁷⁷ associations enjoy a relatively strong right to constitute their membership free from state interference.⁷⁸ As the Court has noted multiple times: "[f]reedom of association . . . plainly presupposes a freedom not to associate."⁷⁹ Indeed, even the Court in *CLS* acknowledged that "this Court has rigorously reviewed laws and regulations that constrain associational freedom. In the context of public accommodations, we have subjected restrictions on that freedom to close scrutiny"⁸⁰

That said, exactly what close scrutiny requires of courts has never been easy to state with precision, but it is fair to say that, off campus, close scrutiny tolerates much *less* judicial deference to the state's asserted interest than does LPF review. Thus, as will be developed below, when the association is a student group meeting on a public university campus, the university receives more deference from the court than would the state regulator if the association met off campus.⁸¹ As such, an important first question in student associational rights cases is: should this fact of geography make such a difference?

A. *On vs. Off Campus*

To see how these cases, under current conceptions of First Amendment analysis, begin as battles over turf, assume that the group in question is not CLS, but is another affinity group—for example, the local chapter of the Pro-Israel Alliance (PIA). PIA opens its meetings to everyone, including students, alumni, and townspeople, but to become a voting member of the group, one must agree to profess an allegiance to the religious principle that the Israeli people, but not the Palestinian people, have an unqualified right to exist as its own state. The group meets weekly in a restaurant owned by a PIA member.

Jane is a student who is interested in PIA. She comes to a meeting and decides she wants to participate in the group more fully. She does so for over a year. She is

⁷⁴ See *id.* at 2984, 2986.

⁷⁵ See *id.* at 2985.

⁷⁶ See *infra* Part III.A.

⁷⁷ *NAACP v. Patterson ex rel. Alabama*, 357 U.S. 449, 460 (1958).

⁷⁸ See *id.* at 460–61.

⁷⁹ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2002) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). That said, some are beginning to question the meaning of this phrase. See Joseph Blocher, *Rights To and Not To*, 99 CAL. L. REV. (forthcoming 2012) (manuscript at 7–8), available at <http://ssrn.com/abstract=1926235>; *infra* note 269.

⁸⁰ *CLS*, 130 S. Ct. at 2984–85.

⁸¹ See *id.* at 2984.

a thoughtful person yet, even after a year, she has not yet decided whether, on balance, it is better for global peace to recognize this unqualified right. She nonetheless desires to become a member because she feels she identifies strongly with the group's overall pro-Israel stance. But, until she can affirm support for an unqualified statehood right, PIA will not offer her membership. Assume, for whatever reason, Jane sues PIA, challenging their membership policy under the state's public accommodations/nondiscrimination law.⁸² In response, assume PIA defends on the ground that it is entitled, under the First Amendment, to continue to exclude persons whose inclusion would fundamentally alter the group's message.⁸³

As long as the group is meeting either in a facility subject to the state public accommodations law or in a traditional public forum (assume a park),⁸⁴ this would be a different case than if it arose on campus.⁸⁵ The current—though not uniformly acclaimed, for reasons discussed more fully—test to be applied to a restriction on expressive association is set out in *Boy Scouts of America v. Dale*.⁸⁶ It is a balancing test. Courts must determine: 1) whether the group is an expressive association, 2) whether forced inclusion of the unwanted person would significantly affect its expression, and

⁸² Assume that Jane's disagreement with pro-Israeli, anti-Palestinian state principle is a religious one (though the broader issue is also, of course, political). To invoke the protection of the relevant state public accommodation law, Jane would have to fall within one of the state's protected classifications—here, assume that classification is religion. Thus, assume that Jane is a Unitarian and the trouble she is having affirming the principle of an unqualified right to statehood for Israel, but not for the Palestinians, is the Unitarian Universalist tenet affirming a “free and responsible search for meaning” for all. See *Our Unitarian Universalist Principles*, UNITARIAN UNIVERSALISTS: ASSOCIATION OF CONGREGATIONS (Sept. 14, 2011), <http://www.uua.org/beliefs/principles/>. Or, assume that she is a Muslim. Either way, Jane feels that her religion would be compromised by the group's stance, yet the group has told her she is unwelcome to join as a member unless she can affirm full religious support of the group's principles. Thus, assume that on these facts she is able to successfully state a claim under state law for discrimination on the basis of religion.

⁸³ See, e.g., *id.* at 648 (“The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.”).

⁸⁴ State public accommodations laws typically require that any establishment engaged in commerce to not deny to any person any benefit, etc., on basis of race, religion, creed, national origin, etc. See *Roberts*, 469 U.S. at 614–17 (reviewing a Minnesota public accommodation statute).

⁸⁵ See *Dale*, 530 U.S. at 658–59 (summarizing standards used in evaluating public accommodation laws against the rights of expressive association).

⁸⁶ *Id.* *Dale* certainly has its critics. See, e.g., Tobias Barrington Wolff & Andrew Koppelman, *Expressive Association and the Ideal of the University in the Solomon Amendment Litigation*, 25 SOC. PHIL. & POL'Y 92, 117 (2008) (criticizing the Court in *Dale* for not living up to the scrutiny it articulated was required, but rather by affording deference to “private prejudice and offensive stereotypes”). Yet, it also has its supporters. See, e.g., Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1515, 1517–18 (2001) (answering the question “Is *Dale* a disaster?” in the negative).

3) whether the state interests embodied in the law justify such a “severe intrusion” on the right of expressive association.⁸⁷

Here, the first question would be whether PIA is an expressive association. A group is expressive if it “engages in expressive activity.”⁸⁸ PIA’s organizing principle is expression of a particular religious-political message, and the group is not commercial, so the group should be found to be a protective expressive association.⁸⁹ Second, PIA would argue that forced inclusion of Jane would significantly affect its expression. Specifically, PIA would argue that inclusion of Jane would significantly burden its ability to promote its pro-Israeli, exclusive-statehood message. Like in *Dale* and *Hurley*, PIA would probably succeed on this prong because the Court has in the past been sensitive to the idea that “the choice of a speaker not to propound a particular point of view . . . is . . . beyond the government’s power to control.”⁹⁰ Once this finding is made, the Court would proceed to analyze the third prong, which is whether the state’s interest in nondiscrimination justifies the intrusion on PIA’s associational freedom.

In these cases, the state’s interest is nondiscrimination, which is known in our constitutional cannon to be a compelling state interest. Does nondiscrimination justify the state’s intrusion on associational freedom? This is the critical question in these cases and where the Court often focuses its analysis.

Under close review, cases have come out both ways, but the point is that, in contrast to the LPF test, the state has some work to do to justify the restriction on First Amendment rights. Indeed, given the Court’s expressive association cases, it seems that associational freedom is more likely to prevail off campus rather than on campus, unless the Court becomes skeptical of the association’s need for the exemption from the provision. For example, in *Dale*, the dissent questioned whether

⁸⁷ *Dale*, 530 U.S. at 659.

⁸⁸ *Id.* at 648, 650 (“The First Amendment’s protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.”).

⁸⁹ *See id.* at 648–49; *see also* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 635–36 (1984) (O’Connor, J., concurring in part and concurring in the judgment) (noting a distinction between commercial and non-commercial associations).

⁹⁰ *Dale*, 530 U.S. at 654 (quoting *Hurley v. Irish-Am. Gay Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 575 (1995)); *id.* at 653 (“That is not to say that an expressive association can erect a shield against anti-discrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here *Dale*, by his own admission . . . was . . . and remains a gay rights activist. *Dale*’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”). Indeed, the fact that James Dale was an “activist” on the subject of antidiscrimination vis-à-vis homosexuals seemed to be a key fact for the Court: it allowed the Court to assign to Dale the role of message-usurper, which is not permitted under the Court’s expressive association jurisprudence. *See id.* at 654.

the Boy Scouts in fact espoused the message it claimed in litigation.⁹¹ Similarly, in *Jaycees*, a majority of the Court questioned whether forced inclusion of women would in fact negatively impact the group's ability to continue to espouse a pro-men message.⁹² However, under the *Dale* framework, absent these or similar skepticisms, once a severe intrusion is found, the state must convince the Court that the restriction justifies the burdens on associational freedom. Here, absent these concerns, PIA should be able to make a good case for excluding Jane. As set out below, however, PIA would have a much harder time making its case under the LPF test, which is more deferential to the state's interest in nondiscrimination.

Thus, moving the meeting back on campus triggers a different analysis than if the same claim is brought off campus. Under the Court's current doctrinal framework, because of the fact of public ownership of the university's property, Jane's claim to be granted membership in PIA would be subject to the more deferential LPF analysis. It might also yield a different result.

On campus, moreover, after *CLS*, the school would not freely recognize PIA unless it altered its membership policy.⁹³ The complication is that students who join student groups of organizations, such as CLS (or PIA in this example), on public university campuses do not want to have to go off campus for their meetings. They want to be able to meet on campus like other student groups, such as the Campus Democrats, Campus Republicans, BLSA, and Hillel alike.⁹⁴ They want to be able to preserve the membership policies of the group—though those policies sometimes require the students to discriminate in choosing members and electing leaders because often, membership requirements reflect the core message and identity of groups like CLS.⁹⁵

⁹¹ For example, it was not at all clear from the record in the case that Dale intended to continue his activism or to conflate his role in the Boy Scouts with his personal life. *Id.* at 668–69 (Stevens, J., dissenting) (“It is plain as the light of day that neither one of [the Scouts’] principles—‘morally straight’ and ‘clean’—says the slightest thing about homosexuality.”). Also, it was not clear from the record that the Boy Scouts had *any* articulated message of anti-homosexuality; rather, the record arguably indicated that the Boy Scouts, in fact, preferred to not discuss sexuality, seeing that subject as one appropriate for parents to discuss with their children. *Id.* at 670 (Stevens, J., dissenting) (“In light of BSA’s self-proclaimed ecumenism, furthermore, it is even more difficult to discern any shared goals or common moral stance on homosexuality.”).

⁹² See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 627 (1984) (finding that although the group’s associational rights were burdened by the application of the state antidiscrimination law, that burden was justified in part because the organization could point to “no basis in the record for concluding that admission of women as full voting members will impede the organization’s ability to engage in . . . protected activities or to disseminate its preferred views”). In other words, the Court simply did not accept that the group’s men-oriented viewpoint would be necessarily compromised by admitting women as members. *Id.*

⁹³ See *Christian Legal Soc’y v. Martinez (CLS)*, 130 S. Ct. 2971, 2979 (2010).

⁹⁴ *Healy v. James*, 408 U.S. 169, 176 (1972) (noting the difficulties faced by a student group denied use of campus facilities).

⁹⁵ See, e.g., George B. Davis, Note, *Personnel is Policy: Schools, Student Groups, and the Right to Discriminate*, 66 WASH. & LEE L. REV. 1793, 1794–96 (2009).

B. A Tale of Two Tests, and the Problem with Each

The *Jane v. PIA* hypothetical is useful to show that under current First Amendment law, two different tests, which could arguably lead to different results, could apply depending solely on the fact of where the claim arose, whether on or off campus. That said, however, it is important to note that the thesis of this Article is that neither test as currently applied is up to the task of dealing with and sorting out the dual competing ends present when nondiscrimination and expressive-association rights clash.

To see this more clearly, return again to *Jane's* case. This Article made the point above that the state would have more work to do to justify its restriction on First Amendment rights under close review than under the LPF test.⁹⁶ However, that is not to say that close review is the answer. The reason is that, even under close review, the court eventually narrows its focus to one of the two competing ends in the case, the state's end. That is to say, the analysis requires the court to note the burden on associational freedom (*Dale's* second prong),⁹⁷ and then move on to the key question in the case: whether the state's interest in the restriction justifies that burden (*Dale's* third prong).⁹⁸ What is missing in this analysis is full consideration of the group's end, or, in other words, full consideration of why the association desired to restrict in the first place.

It is true that the court must, under the second prong of *Dale*, determine that associational freedom has been burdened.⁹⁹ In that sense, the court does consider the group's interest in expressive association. But the close review test as currently applied is really a note-and-compare test—the court merely notes the burden on expressive activity and then moves on to focus its analysis on the end of the state regulation, comparing the state interest in regulation to (previously noted) burden. Thus the end of the association's action—in other words, why the association wanted to restrict its membership and leadership policies in the first place—falls largely outside of the court's inquiry and into an analytic blind spot. This is a problem in a case that presents a clash between two important ends. Both ends should be fully considered by the court.

Thus, because the courts tend to focus the analysis on the state's ends, to the exclusion of full consideration of the association's ends, this Article asserts that even the close review standard of *Dale* is flawed. That said, under current law, the applicable doctrine is either the *Dale* test or the LPF test, and so this Article will now move to considering in more depth those two lines of cases.

In *CLS*, the Court chose to apply the LPF analysis to an expressive association claim arising in a limited public forum.¹⁰⁰ Under an LPF analysis, the burden the

⁹⁶ See *supra* Part II.A.

⁹⁷ See *Boy Scouts of Am. v. Dale*, 530 U.S.640, 653 (2002).

⁹⁸ *Id.* at 658–59.

⁹⁹ *Id.*

¹⁰⁰ *CLS*, 130 S. Ct. at 2986.

government must meet to justify its restriction is much lower than the burden under heightened, or close, scrutiny.¹⁰¹ As will be explained, the burden is so low that it is fair to say that the presumption actually favors the government restriction.¹⁰² In some circumstances, given certain concerns, this deference makes sense. But, as will be developed, it does not in the student expressive association context.

Reflecting the importance of the right of expressive association, the expressive association test (through multiple formulations over the years) requires courts' "closest scrutiny."¹⁰³ As will be established, seen in this light, the deference afforded by the LPF analysis to expressive association claims arising on campus makes no sense at all. To get a better handle on this idea, this Section sets out the two different tests and identify the theoretical and practical distinctions between them.

1. Closer Review: The *Healy/Dale* Line (Expressive Association Cases)

The *Healy/Dale* line of cases provides the applicable doctrine when a group challenges a state nondiscrimination law on expressive association grounds (as in *CLS*), or when an individual challenges his or her exclusion from a group under the state's public accommodations law (as in *Dale*).¹⁰⁴ Though it has been articulated differently in different cases, these claims require courts' "closest scrutiny."¹⁰⁵ This line of cases actually began, not under *Healy*, but sixteen years earlier in the seminal case of *NAACP v. Alabama ex rel. Patterson*.¹⁰⁶

In that case, the NAACP was subject to an order of civil contempt for failing to disclose its membership list as ordered by a state court.¹⁰⁷ Disclosure would have exposed the group's members to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."¹⁰⁸ The Court, through Justice Harlan, recalled that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."¹⁰⁹ The Court wrote that any "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."¹¹⁰

¹⁰¹ *Id.* at 2984–85.

¹⁰² *See infra* Part III.B.2.

¹⁰³ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958) ("[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.").

¹⁰⁴ *Healy v. James*, 408 U.S. 169, 181 (1972) (discussing the importance of the freedom to associate).

¹⁰⁵ *See CLS*, 130 S. Ct. at 2984–85; *Patterson*, 357 U.S. at 460–61.

¹⁰⁶ *Patterson*, 357 U.S. at 449.

¹⁰⁷ *Id.* at 451.

¹⁰⁸ *Id.* at 462.

¹⁰⁹ *Id.* at 460.

¹¹⁰ *Id.* at 460–61. Though the contempt order did not directly abridge the organization's freedom, the Court wrote that the order "must be regarded as entailing the likelihood of a

Fourteen years later, the “closest scrutiny” articulated in *Patterson* was applied to a claim of expressive association on campus.¹¹¹ In *Healy v. James*, the Court reviewed the university president’s decision to deny official recognition to a student group, Students for a Democratic Society (SDS), out of an ungrounded fear that the group would be insufficiently independent of the national organization, which was known to use violence.¹¹² Citing *Near v. Minnesota*, the Court noted that the university’s restriction on the students’ expressive association was in effect a prior restraint.¹¹³ The Court then closely reviewed both the students’ assertion that denial of official recognition burdened their constitutionally protected right of expressive association¹¹⁴ and the university’s proffered justifications.¹¹⁵ The students won,¹¹⁶ but it is not the result that is most notable about the *Healy* case; rather, it is the analysis.

In its analysis, the Court expressly grappled with the very question that continues to dog courts reviewing expressive association claims: how much deference to afford the regulator?¹¹⁷ In *Healy*, the regulator was a university, so the question was how much deference to afford to university officials in setting policy and pedagogy for the university.¹¹⁸ The Court noted that “state colleges and universities are not enclaves immune from the sweep of the First Amendment,”¹¹⁹ and expressly rejected the notion

substantial restraint upon the exercise by petitioner’s members of their right to freedom of association.” *Id.* at 461–62. After reviewing the State’s asserted interests in compelling disclosure, the Court concluded that “Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure . . . is likely to have.” *Id.* at 466.

¹¹¹ See *Healy v. James*, 408 U.S. 169 (1972); *Patterson*, 357 U.S. at 460–61.

¹¹² *Healy*, 408 U.S. at 173–76.

¹¹³ *Id.* at 184 (citing *Near v. Minnesota*, 238 U.S. 697, 713–16 (1931)).

¹¹⁴ *Id.* at 181–83 (reviewing the students’ claims of injury and burden).

¹¹⁵ *Id.* at 187–88, 191 (reviewing the university’s claimed interests in restricting the students’ association).

¹¹⁶ *Id.* at 194. The Court held that

[b]ecause respondents failed to accord due recognition to First Amendment principles, the judgments below approving respondents’ denial of recognition must be reversed We note, in so holding, that the wide latitude accorded by the Constitution to the freedoms of expression and association is not without its costs in terms of the risk to the maintenance of civility and an ordered society. Indeed, this latitude often has resulted, on the campus and elsewhere, in the infringement of the rights of others. Though we deplore the tendency of some to abuse the very constitutional privileges they invoke, and although infringement of rights of others certainly should not be tolerated, we reaffirm this Court’s dedication to the principles of the Bill of Rights upon which our vigorous and free society is founded.

Id.

¹¹⁷ *Id.* at 180–81.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 180.

that the school's authority in any sense trumps the First Amendment.¹²⁰ The Court wrote that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’ The college classroom . . . is peculiarly the ‘marketplace of ideas,’ and we break no new constitutional ground in reaffirming this Nation’s dedication to safeguarding academic freedom.”¹²¹ The *Healy* Court went on to explicitly state that on campus, the “denial of official recognition, without justification, to college organizations burdens or abridges . . . [their] associational right[s].”¹²²

After *Healy*, the Court took what is called a categorical approach to protecting expressive association rights.¹²³ It is called categorical because the Court presumed that, like political speech, the category of expressive association represented an extremely important right, and as such, deserved the highest level of judicial safeguarding.¹²⁴ As set out below, under this approach, the Court began to review restrictions on expressive association under the compelling government interest test.¹²⁵

As noted by various commentators, expressive association jurisprudence has followed neither a consistent theoretical nor doctrinal path.¹²⁶ One example of this is the Court’s inconsistent application of the compelling government interest test.¹²⁷ Commentators have noted that the same test was applied with more or less bite over the years before the Court finally settled on a balancing test in *Dale*.¹²⁸ During those

¹²⁰ *Id.* (noting that “the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large”).

¹²¹ *Id.* at 180–81 (citations omitted).

¹²² *Id.* at 181.

¹²³ See Bernstein, *supra* note 49, at 94–95.

¹²⁴ See Jennifer Greenblatt, *Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers are Created Equal*, 10 FLA. COASTAL L. REV. 421, 432, 434 (noting the compelling interest test for fundamental rights).

¹²⁵ See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625–26 (1984); *Democratic Party of the U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124–26 (1981).

¹²⁶ See, e.g., John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485, 485 (2010) (asserting that the doctrine was influenced by different theoretical, jurisprudential, and political factors, which served to lead the doctrine down incoherent paths); cf. Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 605 (2000) (commenting on the wrongness of the *Dale* decision and claiming that associational rights are individual rights: “[f]reedom of association is protected as a fundamental right because of the benefits it provides individuals, instrumentally in aiding their First Amendment activities and intrinsically because of the gains realized from being part of a group”); Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 647 (2002) (claiming that expressive association is not protected due to an association’s interest in expression, but rather “because associations represent instances of popular sovereignty”).

¹²⁷ See *infra* note 128 and accompanying text.

¹²⁸ See Bernstein, *supra* note 49, at 86–90 (tracing the evolution of the Court’s expressive association doctrine). Many commentators believe this turn away from close review, or heightened scrutiny, was a mistake. See, e.g., Chemerinsky & Fisk, *supra* note 126, at 614

intervening years, courts considered expressive association claims sounding in the right to control membership as well as the right to control messaging.¹²⁹ Courts seemed to treat membership as a stronger claim—perhaps warranting more “bite”—than messaging.¹³⁰ In membership cases, the Court often quoted the principle that the “[f]reedom of association . . . plainly presupposes a freedom not to associate.”¹³¹

An example of the strong protection afforded to membership claims are the cases championing the First Amendment associational rights of state political parties to resist state attempts to require open primaries.¹³² This muscular defense of the right to control membership reflects the strong liberal desire not to permit governments to tell a group with whom it may or may not (let alone must or must not) associate.¹³³ For students who assert an interest in expressive association contrary to the university’s interest in restricting that end, what is ultimately at stake is their ability to choose their own voting membership, which is not unlike the political party/primary cases.¹³⁴

Courts seem to have been more skeptical of expressive association cases grounded in the right to control a group’s message.¹³⁵ In these cases, groups argue that forced

(“We believe that laws that significantly interfere with the exercise of First Amendment freedoms should have to meet strict scrutiny.”). Compare Erwin Chemerinsky, *Victory for Equality*, L.A. DAILY J., July 7, 2010, at 1, 6 (noting the courts use of the limited public forum doctrine and, consequently, a “reasonable and viewpoint neutral” test, and saying, “the Court got it exactly right”) with Chemerinsky & Fisk, *supra* note 126, at 614 (“[T]he key question in *Boy Scouts of America v. Dale* should have been whether the government meets strict scrutiny in requiring that the Boy Scouts accept James Dale, and other gays, as scout leaders. We believe that the answer is clear: ending discrimination based on characteristics such as race, gender, religion, disability, and sexual orientation is an interest of the highest order.”).

¹²⁹ See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 558–59 (1995) (involving the right to control messaging); *La Follette*, 450 U.S. at 107–08 (involving the right to control membership).

¹³⁰ See *infra* notes 132–35 and accompanying text.

¹³¹ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

¹³² See, e.g., *Cal. Democratic Party v. Jones*, 530 U.S. 567, 569 (2002) (finding that voter-initiated “blanket primary” system, which eliminated parties’ ability to restrict primaries to members of a single party, violated political parties’ right of expressive association); *La Follette*, 450 U.S. at 126; see also Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1488–89 (2000) (discussing the political party membership definition line of expressive association cases).

¹³³ *La Follette*, 450 U.S. at 122 (“And the freedom to associate for the ‘common advancement of political beliefs,’ necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.”) (citations omitted).

¹³⁴ See *Jones*, 530 U.S. at 581–82.

¹³⁵ See *Bd. Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (“In this case, however, the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members’ ability to carry out their various purposes.”); *Roberts*, 468 U.S. at 621 (concluding that the because the “local chapters . . . are neither small nor selective,” the Jaycees “lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women”). Notably,

inclusion of the unwanted member would impermissibly compromise the group's message.¹³⁶ For example, both the Jaycees and Rotary Club defended against claims that their restrictive membership policies violated state antidiscrimination laws on this theory, but both lost.¹³⁷ In each case the Court seemed skeptical that the group's message actually needed the protection of an exclusionary membership policy (and many who think *Dale* was wrongly decided felt that there was no support in the record for the Boy Scouts' claim that the group espoused a message of affirmative hostility toward homosexual conduct, but more on *Dale* in a bit).¹³⁸

Another case worthy of discussion here is *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.¹³⁹ *Hurley* is worthy of discussion because, although it was unclear whether the basis of the Court's holding—in favor of the right of exclusion to protect the plaintiff's message—was speech or expressive association, the case seems to lay the groundwork for the balancing test that the Court eventually adopted in *Dale*.¹⁴⁰

In *Hurley*, a gay affinity group desired to march in a privately organized St. Patrick's Day parade, carrying a banner proclaiming a message antithetical to the organizer's ideology.¹⁴¹ When it was denied access to the parade, the group sued the parade organizers under a state law banning discrimination in public accommodations.¹⁴² The organizers contended that their message would be co-opted by the affinity group.¹⁴³ Ultimately, the Court agreed with the parade organizers and concluded that the organizers had a First Amendment right to exclude the plaintiffs from the parade.¹⁴⁴ The reason was that “it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.”¹⁴⁵

this is my own take on the Court's jurisprudence. Commentators have noted other trends and drawn different conclusions. *See, e.g.,* Farber, *supra* note 132, at 1501 (“As *Dale* indicates, expressive associations have at least some constitutional right to control membership decisions. They may also have some right to be free from interference with internal procedures and leadership prerogatives. The law in this area, however, is still in flux. *Dale* holds at least that expressive organizations have wide power to control the choice of their leaders.”).

¹³⁶ *See, e.g., Roberts*, 468 U.S. at 627–28.

¹³⁷ *Rotary Club*, 481 U.S. at 546–47; *Roberts*, 468 U.S. at 627–28.

¹³⁸ *See also* Chemerinsky & Fisk, *supra* note 126, at 600–01. Rather, they thought the record showed that BSA was silent on the issue and preferred not to say anything at all about sexuality, believing that to be the parents' prerogative. Thus, the criticism is that the Court was overly deferential to the position BSA asserted in its litigation papers, that the group espoused a message of hostility toward homosexuality. *See infra* note 159.

¹³⁹ 515 U.S. 557 (1995).

¹⁴⁰ *Compare Hurley*, 515 U.S. at 567, with *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–49 (2000). David Bernstein made this point originally. *See* Bernstein, *supra* note 49, at 118.

¹⁴¹ *Hurley*, 515 U.S. at 559.

¹⁴² *Id.* at 561.

¹⁴³ *Id.* at 562.

¹⁴⁴ *Id.* at 559 (“We hold that such a mandate [requiring inclusion of marchers ‘imparting a message the organizers do not wish to convey’] violated the First Amendment.”).

¹⁴⁵ *Id.* at 575.

Because the Court's explanation has strong speech overtones,¹⁴⁶ and because the Court did not specify the theory of the First Amendment on which it decided the case,¹⁴⁷ it is not clear if *Hurley* rests on associational or speech grounds.¹⁴⁸ Though the opinion in *Hurley* does not specifically answer that question, it does seem to embody the same sort of balancing test that the Court ultimately adopted—explicitly on expressive association grounds—in *Dale*.¹⁴⁹

The facts of *Dale* are well-known. James Dale, a long-time Boy Scout member and Eagle Scout, was excluded from the organization when the Scouts learned that Dale was both homosexual and an activist in the gay-rights movement.¹⁵⁰ Dale challenged his exclusion as a violation of the state public accommodations law.¹⁵¹ The Scouts defended their action on the basis of the First Amendment right of expressive association.¹⁵² Despite a strong disagreement between the majority and dissent as to what the record established about the message (if any) the Scouts actually intended to send on the issue of sexuality,¹⁵³ the Court found in favor of the Scouts.¹⁵⁴ The Court reached its conclusion under a three-part balancing framework.¹⁵⁵ Thus, although the *Dale* opinion has been criticized for being overly deferential—not to the regulator, but to the group itself—its text sets out a standard of heightened review.¹⁵⁶

The *Dale* balancing test is now the controlling framework for an expressive association claim.¹⁵⁷ First, the court must ask if the organization at issue is expressive.¹⁵⁸ Second, the court considers whether the regulation, usually some form of prohibition on the group's ability to discriminate in membership or leadership decisions, would burden the group's expression.¹⁵⁹ And third, if the answer to both of

¹⁴⁶ See, e.g., Inazu, *supra* note 126, at 560 n.574 (nothing that the Court “relied on free speech rather than free association principles” in its decision).

¹⁴⁷ See Bernstein, *supra* note 49, at 116 (“The Court [] implicitly disclaimed reliance on the compelling interest test . . .”).

¹⁴⁸ *Id.* at 118.

¹⁴⁹ See, e.g., *id.* at 87–88 (tracing the evolution of the Court's expressive association doctrine).

¹⁵⁰ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644–45 (2000).

¹⁵¹ *Id.* at 644.

¹⁵² *Id.* at 651.

¹⁵³ *Id.* at 668–69 (Stevens, J., dissenting) (starting to discuss the conflict over the level of deference to be afforded to BSA's asserted message as a substitution for gaps in the record on that point).

¹⁵⁴ *Id.* at 659.

¹⁵⁵ *Id.* at 655–56.

¹⁵⁶ *Id.* at 656.

¹⁵⁷ See Bernstein, *supra* note 49, at 126–27.

¹⁵⁸ *Dale*, 530 U.S. at 648.

¹⁵⁹ *Id.* at 653. Many commentators have criticized the *Dale* Court for being overly deferential to the Boy Scouts' litigation position that the forced inclusion of Dale would compromise the group's message. See, e.g., Wolff & Koppelman, *supra* note 86, at 102–03 (criticizing “*Dale* deference”). By contrast, the position I take here assumes, not for the purpose of ratifying the result in *Dale* but for purposes of identifying a test that applies after *Dale*, that the forced inclusion would in fact have had this effect. In other words, to the extent

those questions is yes, then the court must ask whether the state's interests justify that burden.¹⁶⁰

Of course, as noted, a public university has an equal-but-seemingly-opposite interest in equality, manifested in part through its nondiscrimination policy.¹⁶¹ In the case of campus organizations, the state has a genuine concern that leadership positions on campus be distributed without regard to protected classifications—such as race, religion, national origin, gender, and sexual orientation—and also that the broader community itself be one of inclusion.¹⁶² As has been elegantly noted, “every expansion of one form of equality implies the contraction of some other equality.”¹⁶³ While this Article contends that ultimately neither the *Healy/Dale* line as currently applied, nor the LPF line of cases, is up to task of resolving this complex and important tension, as set out next, the LPF test is particularly inadequate.

2. Deferential Review: The Limited Public Forum Doctrine

If the *NAACP-Healy-Dale* line of cases has the effect of courts at least semi-closely reviewing the state regulation (more or less effectively depending on one's view of the nature and theoretical justification for the expressive association right),¹⁶⁴ the LPF doctrine has the opposite effect.¹⁶⁵ The LPF doctrine gives the government substantial leeway to regulate speech occurring on public property when that property has been opened for some specific purpose.¹⁶⁶ This stands in sharp contrast to the government's limited ability to regulate speech in those public spaces which are—and have always been—traditionally held open for public use and enjoyment, such as streets and parks, and where content restrictions are generally never permissible and speech is afforded the highest level of judicial protection.¹⁶⁷ By contrast, in a limited public forum—public spaces opened precisely for some limited or designated purpose, such as airports, elementary schools, and post offices—different rules that are less protective of speech apply.¹⁶⁸

that *Dale* has been criticized as embodying a deferential standard in the clothing of more heightened review, I take the language of the opinion at face value and assume that the lesson of *Dale* is to apply heightened review, as captured by the language of the balancing test.

¹⁶⁰ *Dale*, 530 U.S. at 656, 658–59.

¹⁶¹ See *supra* text accompanying notes 50–59.

¹⁶² *Christian Legal Soc'y v. Martinez (CLS)*, 130 S. Ct. 2971, 2989–90 (2010) (reviewing Hastings Law School's justifications for the policy, including distribution of leadership benefits and campus-wide diversity).

¹⁶³ Kenneth Karst, *Religious Freedom and Equal Citizenship: Reflections on Lukumi*, 69 TUL. L. REV. 335, 345 (1994).

¹⁶⁴ See Bernstein, *supra* note 49, at 92–93.

¹⁶⁵ See, e.g., Deutsch, *supra* note 24, at 117.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 110–11.

¹⁶⁸ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799–800 (1985).

When the government dedicates its property to a particular public use, the government has a significant interest in restricting activity in the forum to avoid disruptions of the public's business—the purpose to which the forum is put.¹⁶⁹ In this sense the theoretical basis of the LPF doctrine is a concern over interlopers.¹⁷⁰ If the government opens property for a specific purpose, such as an airport, elementary school, or a post office, it is because there is public business that must be accomplished on this property—flights have to take off, children have to be educated, or mail must be handled. Interlopers who may wish to co-opt the property for their own speech would thus be interfering with the public's business. Preventing these kinds of interruptions is a purely instrumental concern.¹⁷¹

Notably, similar instrumental concerns attend when the state imposes neutral regulations on the basis of time, place or manner in a traditionally open forum. The instrumentalism at work here is best shown by an example. Consider the common-sense need for a state to be able to keep people from playing loud music over roving loudspeakers up and down the public streets at all hours of the night.¹⁷² The message being broadcast over the loudspeakers is irrelevant; what is relevant is the purely instrumental idea that people need to be able to count on the absence of roving loudspeakers out in the streets throughout the night.¹⁷³ This form of instrumentalism—also justifying a lower burden on the state's restriction than that applicable to a content-based restriction—is similarly absent from expressive association claims.

Viewed in this light, the lower burdens required to justify instrumental government regulations of speech in a traditional public forum on the basis of time, place or manner, or to keep interlopers from interfering with public business in a limited public forum, each make sense. As will be set out in Part III, however, these instrumental concerns are absent in an expressive association case. This is true even though an expressive association case can arise within a limited public forum.¹⁷⁴

III. ANALYZING SPEECH AND ASSOCIATION AS DISTINCT CLAIMS

Speech and association claims raise different theoretical and practical concerns. Therefore, it would seem to make sense to analyze them as different claims. Yet, the Court in *CLS* collapsed the students' speech and association claims under one rubric—the LPF doctrine—and as such effectively dropped the expressive association claim out of the case.¹⁷⁵ Curiously, the Court gave little analysis of this decision.¹⁷⁶ The three reasons given by the Court are each a variation on the same theme, which was because

¹⁶⁹ Thomas, *supra* note 24, at 720.

¹⁷⁰ See, e.g., Rohr, *supra* note 24, at 349.

¹⁷¹ *Cornelius*, 473 U.S. at 801–02.

¹⁷² See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 782 (1989).

¹⁷³ See, e.g., *id.* at 791.

¹⁷⁴ See *Christian Legal Soc'y v. Martinez (CLS)*, 130 S. Ct. 2971, 2986 (2010).

¹⁷⁵ See *Chemerinsky & Fisk*, *supra* note 126, at 596.

¹⁷⁶ See *CLS*, 130 S. Ct. at 2985–86.

the claims overlap a bit, they should be treated together under the more deferential LPF doctrine.¹⁷⁷ This Article asserts that this decision reflects a lowest common denominator theory of expressive association, and should be rejected in cases of dual ends. This Part explains why.

A. The Lowest Common Denominator Problem

The students in *CLS* raised two main claims: expressive association¹⁷⁸ and freedom of speech.¹⁷⁹ *CLS* argued that the Court should not aggregate the speech and association claims, but rather should analyze them independently.¹⁸⁰ *CLS* lost its disaggregation argument and consequently, the Court combined the speech and association claims.¹⁸¹ This analytic move allowed the Court to review *CLS*'s expressive association claim under the LPF *speech* doctrine, and apply the most deferential review.¹⁸²

At the outset of the opinion, the Court conceded that the two claims implicated two different lines of cases (with different levels of scrutiny).¹⁸³ Despite these differences, the Court decided that, because there was a relationship between “who” spoke for *CLS* (i.e., who became a *CLS* member and so could vote on the group’s leadership) and “what” message was spoken, it made no sense to engage “each line of cases independently” as *CLS* argued.¹⁸⁴ Rather, the Court concluded that it made more sense to drop the expressive association claim out of the picture and analyze the case as a “speech” case, thus warranting application of the public forum frame.¹⁸⁵

This justification is vastly overinclusive. In no expressive association case, when forced inclusion of unwanted members is an issue, will the idea of “who” speaks for the group not overlap with the idea of or affect the content of “what” is spoken.¹⁸⁶ Thus, under this line of reasoning, there can never be an independent expressive association claim arising in a limited public forum.¹⁸⁷ In other words, no expressive

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 2984–85.

¹⁷⁹ *Id.* at 2978. *CLS* originally argued a third claim based on free exercise, but lost that claim at trial and it was not discussed further on appeal. *See Christian Legal Soc’y v. Kane*, No. C04-04484 JSW, 2006 WL 997217, at *23–25 (N.D. Cal. May 19, 2006) (discussing *CLS*'s free exercise claim and ruling against *CLS* on the grounds of *Employment Division v. Smith*, 494 U.S. 872 (1990)).

¹⁸⁰ *CLS*, 130 S. Ct. at 2985–86.

¹⁸¹ *Id.* at 2986.

¹⁸² *Id.* at 2984, 2986–87 (describing the deferential review standard used in limited public forum cases and announcing that the Court would apply only the LPF analysis).

¹⁸³ *Id.* at 2984–85.

¹⁸⁴ *Id.* at 2985 (“*CLS* would have us engage each line of cases independently, but its expressive-association and free-speech arguments merge . . .”).

¹⁸⁵ *Id.*

¹⁸⁶ *See, e.g., id.*; *Davis, supra* note 95, at 1820–21.

¹⁸⁷ *See Davis, supra* note 95, at 1820–21.

association claim arising in such a forum will receive close scrutiny, which would otherwise apply if the claim arose outside that forum.¹⁸⁸ But the Court did not seem to see this problem.¹⁸⁹ Instead, it seems the Court saw an opportunity to resolve a complex framing problem by applying a single doctrine—one which reflected the lowest common denominator between the two claims—and took it.

The Court did offer three reasons in support of its decision to combine the speech and expressive association analyses.¹⁹⁰ As will be show below, none did any real analytical work.

B. Rejecting the Lowest Common Denominator: Three Reasons for Aggregation, None Good

1. Reason One: “Same Considerations”

The Court wrote that “the same considerations that have led us to apply a less restrictive level of scrutiny to speech in limited public forums as compared to other environments apply with equal force to expressive association occurring in limited public forums.”¹⁹¹ The Court essentially said that because speech restrictions are less protected in a limited public forum, associational rights should be as well.¹⁹² This does not make any sense primarily because, as set out above, the two rights are protecting both theoretically and practically distinct activities. The Court merely said, without any inquiry as to what was actually at stake in cases when the speech and association claims shared the “members/message” relationship as in *CLS*, that it would be “anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association.”¹⁹³

Why would it be anomalous if the tests are directed at protecting different activity? The LPF test is directed at protecting speech interlopers from interfering with the public business taking place in the forum.¹⁹⁴ The right of expressive association—especially when those associating have been invited to become a part of the forum, such as students who have been offered admission to a university and who have matriculated—does not pose that problem. As several commentators have recently written, the LPF doctrine was originally designed to deal with the state’s ability to regulate disorderly conduct.¹⁹⁵ Indeed, the very origins of the public forum doctrine

¹⁸⁸ *Id.* at 1819 (quoting *Truth v. Kent Sch. Dist.*, 551 F.3d 850, 853 (9th Cir. 2008) (Bea, J., dissenting from the denial of a petition for rehearing en banc)).

¹⁸⁹ *See CLS*, 130 S. Ct. at 2985.

¹⁹⁰ *Id.* at 2985–86.

¹⁹¹ *Id.* at 2985.

¹⁹² *See id.* (discussing associational rights in LPFs).

¹⁹³ *Id.* (citations omitted).

¹⁹⁴ *See, e.g., Rohr, supra* note 24, at 349.

¹⁹⁵ *See, e.g., Thomas, supra* note 24, at 641.

lie within the context of the legitimate exercise of the state's police power.¹⁹⁶ These concerns simply are not present on campus with respect to student groups.

In other words, this concern makes sense in the typical LPF case when the speakers who desire access to the forum are themselves utterly ancillary to the purpose of the forum.¹⁹⁷ For example, think of this paradigmatic LPF speech case: a private group, say the Boy Scouts of America, desires to use a public office building after hours for their meetings. Public office buildings are not primarily designed to host meetings of private organizations; instead, they are designed to hold offices where public officials can accomplish the business of government. Or, think of a private community church group that desires to use a public school building after hours. Again, a public school building is not designed to host community church groups; it is designed to host school students in the business of learning.

In each of these examples, the facts involve two common attributes: 1) the claimants desire physical access to government space, and 2) that space is entirely unrelated to either the members of the group or their reason for meeting as a group. The Boy Scouts have nothing to do with the government business conducted in the public office building, except that they would like to use an otherwise empty conference room after hours to hold a meeting. Similarly, the local private church members have nothing to do with public schools except for the fact that they want to use the rooms for meetings.

It should be plain to see that on a public university campus, vis-à-vis a student organization that has been encouraged and formed pursuant to a core purpose of the university, neither attribute (1) nor (2) is present. Instead, on a public university campus, student groups are not outside of the forum. Rather the students *are* the reason for the forum;¹⁹⁸ they are *of* the forum itself. Another way of putting this is that on campus, the access the students desire is not physical, because they already have such access (precisely because students are the reason for the physical spaces to exist). Rather, the access the students desire is metaphysical—access to “RSO status,”¹⁹⁹ or to the “student activity fund.”²⁰⁰

¹⁹⁶ See, e.g., *id.* at 639–41.

¹⁹⁷ See, e.g., *id.* at 685–86 and accompanying notes (offering examples of limited public fora and the speakers who sought access to them through the courts).

¹⁹⁸ This of course may be a bit of an overstatement at research universities, but the basic idea still holds.

¹⁹⁹ See *Christian Legal Soc’y v. Martinez (CLS)*, 130 S. Ct. 2971, 2979 (2010) (outlining the benefits of RSO status).

²⁰⁰ Notably, the Court in *CLS* seemed more focused on access to the activity fund and “campus bulletin boards.” Perhaps this is due to the fact that, under the LPF doctrine, access to “physical spaces” is usually at the heart of the claim. But, for reasons that will be developed, access to the physical space of “campus bulletin boards” was not really an issue for the *CLS* students, thereby making access to “Facebook,” as an “alternative avenue of communication,” rather irrelevant to the real issues at stake. See *infra* notes 251–57. Access to the student activity fund is also addressed below. See *infra* notes 227–44 and accompanying text.

Moreover, the fact that the limited public forum at issue here is a community unto itself introduces another distinction between considerations relevant to regulating speech in a limited public forum, on one hand, and regulating expressive association in the same forum, on the other. That is the problem of exit possibilities.²⁰¹

Groups who wish to, but are prohibited from, discriminating in membership policies under public accommodations laws sometimes assert that the application of the laws forces them into a position of “compelled association.”²⁰² Critics of this position assert that “anti-discrimination law [] does not affect whether an association is voluntary or non-voluntary.”²⁰³ The reasoning is that the individual members of the group may leave the group; they are not compelled to remain if the state requires them to admit into the group persons with whom they do not wish to associate.²⁰⁴

The same cannot be said of student members of student groups on campus who are put in a position of being denied official recognition upon application of an “all-comers” policy.²⁰⁵ Those students must leave not only the group, but also the community itself.²⁰⁶ Again, being careful not to overstate, the students are not banished physically from campus; they are not put in the quad and shamed. It is important not to dramatize, but the point of the citizenship metaphor is to show that the decision to deny these students official recognition is not costless to those students.²⁰⁷ They must, in a sense, relinquish a part of their claim to campus citizenship. For them, there is no way to leave the group without also leaving the community. For this reason alone, the Court should recognize special concerns raised by the context of associational freedom within a campus community and appreciate that standard speech concerns over interlopers are a distraction.²⁰⁸

²⁰¹ The Court in *CLS* recognized that exit possibilities take the sting out of compelled association claims, but did not consider whether the students here actually did have a meaningful exit possibility. *See CLS*, 130 S. Ct. at 2986 (noting, but not addressing, *CLS*'s compelled association argument).

²⁰² *See Mazzone, supra* note 126, at 761.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ ROBERT M. O'NEIL, *FREE SPEECH IN THE COLLEGE COMMUNITY* 101 (1997) (noting that “recognition is essential for a student group to achieve a meaningful place in a college community; without recognition, little can be done”).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 102 (“[G]ranting recognition to a student organization gives the group ready access to the student body and imparts at least some measure of credibility and stature.”).

²⁰⁸ It could be said that my critique does not take seriously the interference student groups could pose for government control of property. The idea may be that the student expressive associations “manage” their own members, removing these students from the university's influence as conduct-regulator. As such, expressive associations could present unique management problems for universities that individual speech acts do not: an interloper is relatively easy to control, even once the speaker is underway, but a student demonstration *en masse* initiated with neither prior notice to the university nor its approval is not. This may be true, but the appropriate remedy for the problem seems to be sanctions after the fact, rather than *ex ante* restrictions on associational freedoms.

These critical differences between the attributes of the members and forum in a case like *CLS*,²⁰⁹ as opposed to a traditional LPF case,²¹⁰ should have been meaningful to the Court, but they were not.

2. Reason Two: “Strict Scrutiny Would Invalidate the LPF”

The second reason the Court gave to justify the collapse of the speech and association claims was that, under expressive association law, strict scrutiny would be required, and the practical effect of strict scrutiny would be to “invalidate a defining characteristic of limited public forums—[that a state] may ‘reserv[e] [them] for certain groups,’” and that reasonable campus regulations may trump associational activities.²¹¹

Yet even assuming that preserving this characteristic of the limited public forum is a laudable goal,²¹² the Court’s conclusion does not follow logically from its premise. Close review, or even strict scrutiny, would not automatically require invalidation of the state restriction.²¹³ A detailed review would require a closer look at the issues raised by the restriction. And a closer look is what the Court’s expressive association jurisprudence has suggested is required, at least until the Court suggested that an expressive association claim could be swallowed up and dropped out of the case if that claim arose in a limited public forum.²¹⁴ Instead, expressive association is a core right worthy of the highest protection, like political speech.²¹⁵

Further, simply asserting that the state must be able to reserve its property for certain groups²¹⁶ only obscures the problem: which reservations of its property are necessary, and which are unconstitutional? Moreover, states and state universities

²⁰⁹ *Christian Legal Soc’y v. Martinez (CLS)*, 130 S. Ct. 2971, 2980 (2010) (describing the requirements for CLS membership).

²¹⁰ As opposed to a college campus, speech is often curbed in limited public forums because the speech would either interfere with the efficient operation of public business in a particular public forum (such as an airport or post office) or result in disorderly conduct. *See supra* notes 192–99 and accompanying text. Courts have found subway station platforms, public libraries, public plazas, and community centers to be limited public forums subject to reasonable regulations. Thomas, *supra* note 24, at 685–87 nn.218–21.

²¹¹ *CLS*, 130 S. Ct. at 2985–86 (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)).

²¹² For criticism of the limited public forum doctrine, see *supra* note 24 and accompanying text.

²¹³ Strict scrutiny does not automatically lead to invalidation of a given law; it merely requires the government to prove the constitutionality of a law or policy by showing that the law or policy’s ends and means are constitutionally legitimate. *See, e.g.*, Greenblatt, *supra* note 124, at 434.

²¹⁴ *CLS*, 130 S. Ct. at 2985. Further, as will be developed, because both citizenship and stigmatic injury are at stake, the students’ challenges to these restrictions *deserve* a closer look. *See infra* notes 227–38, 240–48 and accompanying text.

²¹⁵ *See Mazzone, supra* note 126, at 639 (arguing that expressive association should be protected because of/to the extent of the association’s political nature and influence).

²¹⁶ *CLS*, 130 S. Ct. at 2984.

can still reserve property for certain groups—depending on whether students’ ends are valid, as will be explained in Part IV of this Article.²¹⁷ If the students’ ends are invalid, the university can surely restrict their activity.²¹⁸ As will be developed, if the government is attempting to restrict students who are associating in a way that is inconsistent with the pedagogical goals of the forum,²¹⁹ then the restriction should survive judicial review under close scrutiny. By contrast, if the government is attempting to restrict students pursuing valid ends—valid in light of the purposes of the forum—then the restriction should fail strict scrutiny. Indeed, this is just what happened in *Healy*, as the Court there recognized this very principle and concluded that the student SDS group had the right to associate freely; it did not have the right to use violence toward that end.²²⁰

3. Reason Three: “It’s All About the Subsidy”

Finally, the Court asserted that the limited public forum and its deferential judicial review were appropriate in this context because, as it saw the case, CLS was just seeking a “subsidy.”²²¹ It is true that the university has a very serious interest in not subsidizing unconstitutional discrimination,²²² that is beyond doubt.²²³ But the subsidy frame should be rejected in this context; as will be developed below, in this case, “subsidy” is simply not a helpful lens through which to consider the issues raised by the conflict between competing rights. Indeed, seeing what is at stake as merely a subsidy is crabbed formalism and it is surprising that the Court adopted it. Notably, the dissent also objected to the subsidy argument, but for a different reason.²²⁴ The dissent opined that because there was such a small amount of money at issue, there was not much of a subsidy about which to worry.²²⁵ By contrast, and as will be set out below, a primary claim of this Section is that citizenship is not simply a subsidy.

²¹⁷ See *infra* Part IV.

²¹⁸ See *infra* notes 318–29 and accompanying text.

²¹⁹ Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 231 (2000) (“Students enroll in public universities to seek fulfillment . . . of their own potential.”).

²²⁰ *Healy v. James*, 408 U.S. 169, 194 (1972) (“Though we deplore the tendency of some to abuse the very constitutional privileges they invoke, and although the infringement of rights of others certainly should not be tolerated, we reaffirm this Court’s dedication to the principles of the Bill of Rights upon which our vigorous and free society is founded.”).

²²¹ *CLS*, 130 S. Ct. at 2986.

²²² See *id.* at 2988, 2990.

²²³ This is especially true when that funding could possibly expose the university to a claim of violation of the Establishment Clause, as here. But as long as the funding program (such as the SAF at Hastings) is viewpoint neutral, then after *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), those concerns are lessened.

²²⁴ *Id.* at 3006–07 (Alito, J., dissenting) (noting that CLS is not really seeking a subsidy because most of what they sought—such as “set[ting] up a table on the law school patio”—would be cost free).

²²⁵ *Id.* at 3007 (Alito J., dissenting) (“In fact, funding plays a very small role in this case.”).

As a first matter, the subsidy frame is not helpful because what is at stake in these cases is not access to a “benefit” to which students may or may not be entitled; rather, what is at stake is the very status of a student-citizen. The metaphor of citizenship is useful for this reason because it reveals that the students are asserting associational freedoms in pursuit of community membership as a primary matter, as a matter of equality, and not as benefit ancillary to some other right or entitlement.

As a second matter, it is true that, in addition to citizenship, some money is at stake in these cases. The SAF transfers some funding from the university to the students.²²⁶ If these students wish to use that money to support a group that discriminates, then the door is open to the “money as subsidy” argument.²²⁷ The existence of the money led the Court to characterize the SAF as the university “dangling the carrot of subsidy, not wielding the stick of prohibition.”²²⁸ Along these lines, everyone can accept that with official recognition, a group is entitled to draw from the SAF; without it, it is not.²²⁹ But this description of the world does not help answer whether any particular group is entitled to official recognition in the first place. The recognition-and-access question, therefore, must be resolved by some other principle.²³⁰

The principle cannot be the label of subsidy. Indeed, the frame of carrots and sticks obscures the critical and hard question of how to resolve the competing constitutional interests at stake in the case. The chief reason the subsidy frame should be set aside is that it only begs the question of who is—or rather, which students are—entitled to draw from the SAF in the first place. Indeed, the very question posed by these cases, though not as yet fully appreciated by courts, is not simply whether the group’s selection process (i.e., the group’s “discrimination”—but only in the sense of the action of *selecting*, not in the sense of the legal conclusion) is not just not unconstitutional, but whether the university’s action in restricting the group’s selection process is itself unconstitutional. In other words, is non-interference with the group’s membership selection process constitutionally *required*?²³¹ As described by Cass Sunstein, this is a problem of baselines.²³² Baselines can tell us who is entitled to a certain thing and who is not,²³³ but they should be set in a way that is not arbitrary.²³⁴

²²⁶ *Id.* at 2979.

²²⁷ *Id.* at 2979, 2986, 2990.

²²⁸ *Id.* at 2986.

²²⁹ *See id.* at 2979.

²³⁰ In this sense I agree with the argument made by Cass Sunstein that the unconstitutional conditions doctrine does not help answer the important question of when, consistent with constitutional imperatives, a state may condition receipt of public benefits and/or exact penalties/coerce action. Cass Sunstein, *Why the Unconstitutional Conditions Doctrine Is An Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 601–04 (1990); *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

²³¹ *See supra* note 14.

²³² *See* Sunstein, *supra* note 230, at 602–03.

²³³ *See generally id.* at 596, 603.

²³⁴ *Id.*

To avoid being arbitrary, entitlement to the SAF, or lack thereof, must be constitutionally justifiable.²³⁵

The baseline implicit in the subsidy argument in this context is that students have no right to SAF money and that access to the SAF is a benefit.²³⁶ If so, it follows that the university can set reasonable criteria for distribution of this benefit and that non-discrimination is a reasonable criteria. The critical question however, is what are the constitutionally justifiable reasons some students are entitled to draw from the SAF and some are not? It may very well be that some students at the university are constitutionally entitled to take from the SAF and some are not. It may well be that students intentionally discriminating in some activities at the university are not constitutionally entitled to use university money in support of those activities. Courts should engage with these questions. But merely labeling the SAF as subsidy²³⁷ and declining to subsidize students who discriminate²³⁸ allows courts to side-step the question of whether the group's selection process is constitutionally justifiable in this particular context. If that process is constitutionally justifiable, then non-interference is constitutionally required, instead of nondiscrimination. The subsidy frame does not engage with the core question of whether a particular action (i.e., whether restricting student group membership and leadership in certain ways) is constitutionally protected (i.e., whether the students' associational freedoms include the right to discriminate in this way). Instead, the subsidy frame allows courts to avoid this question altogether—to make it look easy when it is actually quite difficult.

This Article asserts that courts cannot escape grappling with the key, hard question in a case like this, which is how to solve the puzzle of two sets of students at odds with each other, who both have claims to citizenship, nondiscrimination, and equality. If CLS has a First Amendment right of expressive association to constitute its membership as it wished, then, in absence of constitutionally significant reasons to the contrary, it is entitled to be recognized as a citizen of the Hastings Law School community. If it is entitled to be a recognized member of the Hastings Law School community, then it is entitled to access the student activity fund. The subsidy frame does not get to these questions.

To see this point from a different angle, think of the question of access to a particular class. A school offers a variety of courses each term. Generally, a student may enroll in a course if the student has met certain eligibility requirements as set out by the university—such as being in good academic standing, having paid the last tuition bill, and having taken the appropriate prerequisites—assuming there is space in the

²³⁵ *Id.* at 595 (arguing that what is needed in place of the unconstitutional conditions test is “an approach that asks whether, under the provision at issue, the government has constitutionally sufficient justifications for affecting constitutionally protected interests”).

²³⁶ *See, e.g.,* *Christian Legal Soc’y v. Martinez (CLS)*, 130 S. Ct. 2971, 2978–79, 2986 (2010).

²³⁷ *Id.* at 2986.

²³⁸ *Id.* at 2990.

class.²³⁹ If so, the student is entitled to enroll in the class. No one would consider a student's ability to enroll in a class for which a student has met all the university's eligibility requirements and for which there is space (i.e., the course is not closed) a subsidy. This is because enrolling in classes is a valid end, a core pursuit, and an entitlement of students at a university.

It is important to see that this metaphor is built on the idea of questioning a student's eligibility for access to a particular course, not to classes generally. It is certainly true that the reason for the university must first and foremost be teaching. Thus, I am not saying that there is a question about what the baseline or core reason for a university is. What I am saying, by using the metaphor, is this: assuming a student is otherwise eligible for a *particular* course, no one would conclude that the act of the university giving that student a seat in that particular course is the equivalent of giving that student a subsidy. Thus, the question is not what is the core reason for a university (with the implication being that anything not core to the university involves a subsidy). Rather, the question is, given any particular activity of the university, when are students entitled to participate in that activity and when are they not, so that participation in that activity really is a subsidy?

Similarly, for a student organization that has met the university's (constitutional) requirements for student organizations, accessing the student activity fund is consistent with the group's valid functions within the forum: to associate for greater personal and pre-professional fulfillment.²⁴⁰ Indeed, the university has created a forum for expressive association and invited the students into it. In other words, both taking classes and being a part of official student groups are part of what any university envisions its students might (even encourages them to) do, these opportunities having been made available by the school to the students in the hopes that the students will avail themselves of them. The only thing that makes access to the student activity fund a subsidy is to assume that the student is not already entitled to it.

Turn again to the metaphor of taking classes. If a student is not entitled to take a particular class—for example, the student has not completed a prerequisite—one might consider this student's request to take that particular class as that student seeking a subsidy (here, a subsidy of qualification, not money). But, if the student is otherwise qualified for the class, then that student is not seeking a subsidy. It is no different for a student group seeking official recognition by the university, which, as the university has arranged, happens to come with access to the student activity fund.²⁴¹

²³⁹ See, e.g., *Degree Requirements*, EMORY UNIVERSITY SCHOOL OF LAW, <http://www.law.emory.edu/academics/academic-catalog/degree-requirements.html> (last visited Nov. 29, 2011) (stating that students must be in good academic standing to continue in the JD program); *Requirements for the JD*, WILLIAM & MARY LAW SCHOOL, <http://law.wm.edu/academics/programs/jd/requirements/> (last visited Nov. 29, 2011) (stating that students "must maintain good academic standing" to continue as a law student).

²⁴⁰ See *supra* Part I.C.

²⁴¹ For these reasons the "carrot and stick" metaphor, employed by the Court in justifying its conclusion that what is at stake is a mere "subsidy," is similarly unhelpful. *CLS*, 130 S.

As a third matter, it cannot be that because the dollar amount is small, and thus the pressure indirect, the subsidy analysis does not apply. This is the position taken by the dissent in *CLS*.²⁴² This quantitative position should be rejected in favor of a qualitative distinction. As set out above, campus citizenship, not resource allocation, is the real issue. If quantity matters, however, then indirect pressure, which is exerted in this context in the form of denying official recognition (i.e., taking away campus citizenship), should be similarly off-limits: “freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference.”²⁴³ The university should not be allowed to do indirectly what it cannot do directly. The hard question is whether the university is constitutionally justified in restricting a student group’s expressive association rights in the first place. The amount of money at stake should not be determinative.

In sum, framing the issue as a desire for a subsidy merely because official recognition entails access to dollars rests on a faulty premise and obscures what is really at stake in the case. As such, the argument over carrots and sticks should be inapposite. Like the LPF doctrine, the subsidy doctrine merely obscures the difficulty of the real questions.²⁴⁴

Ct. at 2986. One can only spot a “carrot” (subsidy) and a “stick” (a penalty) if one can identify for certain the relevant “baseline”—the exact point against which to measure deviations. *See* Sunstein, *supra* note 230, at 602–03. If there is no natural center, one cannot identify (let alone meaningfully measure) deviations. *Id.* The point is that identifying the baseline—the natural state of affairs against which deviations can be spotted and then measured (and then judged)—is itself inherently a judgment call. Thus, labeling a particular entitlement a “subsidy” is not helpful.

²⁴² *CLS*, 130 S. Ct. at 3006–07 (Alito, J., dissenting).

²⁴³ *Healy v. James*, 408 U.S. 169, 183 (1972) (quoting *Bates v. Little Rock*, 361 U.S. 516, 523 (1960) (rejecting the university’s argument that the student group at issue, SDS, could simply exist off campus, and thus the consequences of university non-recognition were slight)) (internal quotation marks omitted).

²⁴⁴ *See, e.g.*, Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1941–44 (2006) (discussing the application of the “unconstitutional conditions doctrine” to expressive association claims by students at universities, and concluding that a state university does have the right to condition access to such funds on the group’s meeting the university’s nondiscrimination requirements). Volokh writes,

While the government may generally place conditions on the use of benefits that it provides, it generally may not control the use of the recipient’s other assets as a condition of providing the benefit. We might call this the No Governmental Restrictions on Use of Private Funds Principle.

... Expressive association rights, though, don’t lend themselves to an easy distinction between ‘how government assets are used’ and ‘who uses the assets.’ Whenever a group with discriminatorily chosen decision-makers (officers or voting members) uses government assets, the government is helping distribute power and influence in discriminatory ways. If the government wants to avoid providing such assistance, it has to limit its benefit programs to groups whose members are chosen nondiscriminatorily.

Id. at 1942.

C. Is Facebook Really an Alternative?

Though campus citizenship is primarily social rather than political, exclusion from the officially recognized community and the resulting stigmatic injury are serious concerns.²⁴⁵ The Court in *Healy* expressly recognized this.²⁴⁶ In *Healy*, the university argued that all that was denied to the students was “the ‘administrative seal of official college respectability.’”²⁴⁷ The Court disagreed:

We do not agree with the characterization by the courts below of the consequences of nonrecognition. We may concede, as did Mr. Justice Harlan in his opinion for a unanimous Court in *NAACP v. Alabama ex rel. Patterson*, that the administration ‘has taken no direct action . . . to restrict the rights of [petitioners] to associate freely . . .’ But the Constitution’s protection is not limited to direct interference with fundamental rights. The requirement in *Patterson* that the NAACP disclose its membership lists was found to be an impermissible, though indirect, infringement of the members’ associational rights. Likewise, in this case, the group’s possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President’s action. We are not free to disregard the practical realities.²⁴⁸

However, in *CLS*, the Court expressed a much different attitude toward the “practical realities” of the effects of non-recognition.²⁴⁹ In *CLS*, the Court seemed

The problem with this conclusion is that it assumes access to the student activity fund is a “benefit,” and for the same reason I don’t see access to a class as a “benefit.” I don’t accept the “subsidy” point. To accept Volokh’s point would mean that the government could also restrict class enrollment to students who sign a nondiscrimination pledge, meaning that they could restrict the use of the “benefits” of attending any particular class to certain students who pledge to personally adhere to the university’s nondiscrimination policy. Though the university can go a long way to control the classroom environment and encourage its students to treat each other well, it cannot require students to rid themselves of all personal prejudices in order to take classes on campus. Indeed, universities try hard to recruit students with a variety of diverse viewpoints, and so presumably the university wants to fill its classrooms with students who hold different points of view. That some of those perspectives may not be ones the university administrators would personally adopt does not make those students ineligible for admission to the university.

²⁴⁵ See O’NEIL, *supra* note 205, at 101 (discussing the importance of official recognition from the campus community).

²⁴⁶ *Healy*, 408 U.S. at 182–83.

²⁴⁷ *Id.* at 182.

²⁴⁸ *Id.* at 183 (citation omitted).

²⁴⁹ *Christian Legal Soc’y v. Martinez (CLS)*, 130 S. Ct. 2971, 2981 (2010) (noting that despite the lack of official recognition, CLS was still able to invite students to religious

to think that relatively little was at stake for the members of the student group.²⁵⁰ The Court conceded that CLS students, being non-recognized members of campus, were therefore not entitled to many things, including using “[L]aw-School channels to communicate with students . . . plac[ing] announcements in a weekly Office-of-Student Services newsletter, advertis[ing] events on designated bulletin boards, send[ing] e-mails using a Hastings-organization address, and participat[ing] in an annual Student Organizations Fair designed to advance recruitment efforts.”²⁵¹ However, none of this mattered much to the Court because students today use email and Facebook, which the Court credited as alternative channels of communication:

The Law School’s policy is all the more creditworthy in view of the ‘substantial alternative channels that remain open for [CLS-student] communication to take place.’

. . . In this case, Hastings offered CLS access to school facilities to conduct meetings and the use of chalkboards and generally available bulletin boards to advertise events. Although CLS could not take advantage of RSO-specific methods of communication, the advent of electronic media and social-networking sites reduces the importance of those channels.²⁵²

The problem with this analysis is that even though Facebook may indeed be a perfectly viable alternative form of communication for students, the ability to communicate with each other is not the issue for the students in *CLS*; rather, it is the ability to expressively associate as an officially recognized member of the campus community.²⁵³ Yes, “[p]rivate groups, from fraternities [to] sororities . . . commonly maintain a presence at universities without official school affiliation,”²⁵⁴ but as those groups are most likely not expressive associations, they are arguably not entitled to the same First Amendment protection as CLS.²⁵⁵ Whether they communicate with each other in similar ways is simply not relevant.

This error springs from the same place as the Court’s first error: conflating expressive association with speech.²⁵⁶ As noted above, an alternative channel of communication is most important to the First Amendment analysis if the state is attempting

services, host social events like a beach barbecue and Thanksgiving dinner, and sponsor an academic lecture on Christianity and the legal profession).

²⁵⁰ *See id.*

²⁵¹ *Id.* at 2979.

²⁵² *Id.* at 2991 (citations omitted).

²⁵³ *Id.* at 2978–79.

²⁵⁴ *Id.* at 2991.

²⁵⁵ *See, e.g., Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 147–49 (2d Cir. 2007) (finding that the fraternity’s policy of not admitting women violated the state’s antidiscrimination law).

²⁵⁶ *CLS*, 130 S. Ct. at 2985.

to restrict the time, place or manner of a person's speech.²⁵⁷ These concerns arise from worries that a rogue speaker will interfere with the public's right of enjoyment or use of public property.²⁵⁸ This is why a group that wants to hold a parade on a public street may validly be required to obtain a permit for it first.²⁵⁹ By contrast, vis-à-vis citizenship, interference concerns are not relevant. As such, the Facebook "alternative channels of communication" point is misguided and unhelpful.²⁶⁰

IV. AN ARISTOTELIAN-INSPIRED MEANS-ENDS ANALYSIS

In this Part, I set out a new means-end analysis that should be applied in expressive association cases that implicate dual ends. It is an analysis inspired by the Aristotelian concept of reasoning toward the mean between two extremes.²⁶¹ This Article asserts that, under close review, a court using this kind of means-end analysis should be able to account for the dual ends that these cases present. Indeed, as many expressive association cases involve conflicts between First Amendment freedoms and nondiscrimination norms,²⁶² this is a large subset of cases. The result would be a much more satisfactory analysis of the real issues at stake in all of them.

A. The Problem with Unitary Means-End Analysis

A core principle underlying our First Amendment tradition of robust protection of speech generally is when a state desires to restrict a First Amendment right, the means of the restriction must be narrowly tailored to fit the end.²⁶³ Usually this is the end of the regulator.²⁶⁴ Thus, the single means-end conception works reasonably well when there is only one end. But, as set out above, in the student expressive association context—indeed, most expressive association cases—there are often dual ends: non-discrimination and expressive association.

²⁵⁷ See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (noting that a time, place and manner restriction must, among other attributes, leave open ample alternative channels of communication).

²⁵⁸ The government "ha[s] a substantial interest in protecting its citizens from unwelcome noise." *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1988) (citing *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984)).

²⁵⁹ See, e.g., *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (holding that municipalities can require permits and determine proper time, place, and manner restrictions for parades).

²⁶⁰ See *supra* note 252 and accompanying text.

²⁶¹ See *infra* notes 277–81 and accompanying text.

²⁶² See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (holding that an anti-hate speech ordinance was unconstitutional).

²⁶³ See, e.g., *Ward*, 491 U.S. at 791 (1988).

²⁶⁴ See, e.g., *R.A.V.*, 505 U.S. at 399 (White, J., concurring) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)) (noting that certain lewd, obscene, and profane speech may be banned when narrowly tailored).

When there are two ends to develop and consider, traditional First Amendment balancing is much less effective. Under traditional First Amendment balancing, the court first notes the fact that the restriction burdens associational rights. At this point, the court turns its attention more fully to the restriction: Is it sufficiently weighty to justify the (fact of the) restriction? Is it sufficiently narrowly tailored? All of the court's analytic work is thus focused on the restriction itself. Thus, in standard First Amendment balancing, the court focuses on the state restriction and the end of expressive association falls out of focus. The expressive association end falls into what this Article calls a blind spot, eclipsed by the court's inquiry into the justification of the state regulation.²⁶⁵

This is so despite the fact that when we think of balancing, we think of two sides of a scale. Any balancing requires "this" to be balanced against "that," and to that degree the burden on expressive association is indeed in front of the court. It is in front of the court to the extent that the court must compare the restriction to the burden in order to see if the restriction justifies the burden. But this comparison is not the equivalent of full consideration of both ends. Indeed, perhaps the term balancing is a misleading description of how the analytic process actually works in a case like this. The First Amendment right is merely noted and then falls to the side, while the state's interest in nondiscrimination is more fully developed.

Full consideration of both ends would look very different than note-and-compare balancing. To begin, full consideration would ask more questions about the associational right burdened than standard First Amendment balancing asks. For example, a key question not asked in the balancing test is, given that the exclusion impacts a protected classification, why does the group want to exclude this population? The reason why the group desires to exclude could be a key to determining whether the group's selection process is just a proxy for animus, or whether there is a legitimate associational concern motivating the exclusion. Yet, when we begin the balancing process from the premise that "non-discrimination is the highest government interest,"²⁶⁶ we are assuming that the selection process—i.e., the "discrimination"—is indeed invidious. In other words, we are assuming the conclusion—that the selection is discriminatory in the constitutional sense, not merely in the sense of the process of selection. Thus, and this is critical to see, when that state's end is nondiscrimination, then the legal analysis starts from a premise that privileges the state's end. In other words, of course nondiscrimination is compelling. But whether nondiscrimination is compelling is not the critical question raised by these cases.

Instead, the critical question in this context is whether the association's selection process is invalid discrimination in the first place. In any given case, the answer

²⁶⁵ I have written about single-end analytical approaches produce blind spots before. See Chapin Cimino, *Virtue and Contract Law*, 88 OR. L. REV. 703 (2009). Others have as well. See, e.g., Oliver Williams & Patrick Murphy, *The Ethics of Virtue: A Moral Theory for Marketing*, 10 J. OF MACROMARKETING 19, 23 (1990) (using the term "blind spot" to describe the effect of applying a single-end analytic approach, that of deontological reasoning, to a sensitive marketing problem).

²⁶⁶ See *supra* note 128.

might be yes and the restriction should then be upheld. This would likely be true if the answer (the real answer, not the litigation posture) to the question of “why are you excluding this population” can only be explained by animus.²⁶⁷ But in any given case, the answer might be no; there might be a real reason, one not based on animus, that the association desires to limit membership selection to a particular population. That said, if we undertake the balancing test from a position that assumes the conclusion, then the state’s end has been privileged by the analysis and the associational right is never fully developed or considered—that in an associational rights case the *associational right* cannot be fully developed, and thus cannot be fully considered, is the real failure of current law.

This particular blind spot may, at first blush, not seem troubling in part because in our constitutional canon, we are so keenly accustomed to understanding that nondiscrimination is a compelling, if not the most compelling, government interest. Similarly, we are now accustomed to the idea that there is no difference (at least in the Fourteenth Amendment context) between invidious and benign discrimination.²⁶⁸ Thus it seems entirely natural that when a protected classification is impacted by an association’s membership restrictions, the reviewing court remains focused on the state’s interest in nondiscrimination.

A problem is that this notion runs counter to the basic precept of First Amendment jurisprudence, which requires that government be neutral as between positions it favors and those it does not. A critical point here is that the government may legitimately prefer nondiscrimination in the Fourteenth Amendment context but perhaps it may not in the First Amendment context. Whether there is such a thing as benign discrimination in the First Amendment context is an open question at this point²⁶⁹—but courts will never truly see or appreciate that question unless and until they appreciate the dual ends presented by these cases and take both more seriously than current First Amendment doctrine allows.

Thus, under standard First Amendment balancing, but more egregiously under the LPF analysis, the end of nondiscrimination presumptively prevails.²⁷⁰ This is because, under the LPF’s deferential standard of review, the restriction on association

²⁶⁷ Of course no group will admit to this. This evidentiary challenge should not stop the court from asking the question, if the answer is legally relevant under the appropriate test. Many tests in constitutional law seek to root out proxies and insincerity.

²⁶⁸ See *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

²⁶⁹ If the First Amendment right of association includes a right of non-association, there must be some conceptual space in the First Amendment for benign discrimination. By contrast, if all association that also impacts protected classifications is also constitutional discrimination, then the right of association is actually quite limited. To my knowledge, no court or commentator has expressly analyzed this question, though some are starting to inquire more deeply on the question of whether right to associate does include a right not to associate. *Cf.* Blocher, *supra* note 79.

²⁷⁰ See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995) (distinguishing content discrimination from viewpoint discrimination in LPFs).

(here, the university's blanket nondiscrimination policy) is subject only to review for reasonableness and viewpoint neutrality.²⁷¹ Nondiscrimination is unquestionably reasonable and, as the policy applies to all groups without regard to any distinction, there is at least an argument to be made that it is viewpoint neutral as well.²⁷² Thus, under the unitary-end LPF test, it is as if the university has license to say to the students: "Along the way to your own end, students, keep in mind that you must conform your ends to our policy." As such, the LPF test ends up elevating the regulation over the expression, accounting for only one of the two competing ends.²⁷³

The result is a weak protection of expressive association.²⁷⁴ The *Healy/Dale* line of cases probably does a better job, but still suffers from the defect of a unitary focal point. This is contrary to another basic First Amendment doctrine, in which it is usually desirable for the government to restrict as few First Amendment rights as necessary.²⁷⁵ Indeed, if we think that government should be neutral as to the composition of associations, as well as to the content of speech, we must take this concern seriously. The next Section offers an alternative means-ends analysis which, under close scrutiny,²⁷⁶ will solve this problem and better account for both the end of equality and the end of expressive association.

B. The Missing Piece of the Nondiscrimination Puzzle: Reasoning Between Competing Ends

In contrast to the unitary focus of traditional means-end analysis, an Aristotelian-inspired analysis would require courts to account for both ends implicated in this context.²⁷⁷ In other words, instead of focusing on the singular question of whether the

²⁷¹ See *Christian Legal Soc'y v. Martinez (CLS)*, 130 S. Ct. 2973, 2984 (2010).

²⁷² Though controversy continues over whether an "all-comers" policy is in fact viewpoint neutral. See *supra* note 26 and accompanying text.

²⁷³ And the test does not do so terribly well: it is not even clear that equality is promoted by the blanket nondiscrimination policy. Close review might reveal that such a policy restricts too much association, even in the name of promoting equality. See *infra* notes 295–306 and accompanying text.

²⁷⁴ See William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of Christian Legal Society v. Martinez*, 261 EDUC. LAW REP. 473, 484 (2010) (noting that "groups must now make the difficult choice between compromising their membership standards and foregoing access to a limited public forum").

²⁷⁵ See, e.g., *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 812 (2000) (noting that "[l]aws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment Principles").

²⁷⁶ Adding the dual means-end analysis to the heightened review balancing test of *Dale* should solve the "*Dale* deference" problem. The term "*Dale* deference" was coined in the course of the *FAIR v. Rumsfeld* litigation. See Horwitz, *supra* note 51, at 522 (discussing the Third Circuit's opinion in *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004)); see also Wolff & Koppelman, *supra* note 86, at 117.

²⁷⁷ See ARISTOTLE, THE NICOMACHEAN ETHICS BOOK II 107 (E. Capps et al. eds., H. Rackham trans., 1934).

state's restriction on associational freedom serves the state's end of nondiscrimination (the third prong of the *Dale* framework), courts would be directed to ask whether the state's restriction serves the state's larger goal of promoting equality for all its student-citizens. This question in turn would require the court to recognize that equality has two fronts: that some of the university's student-citizens are pursuing the end of nondiscrimination from group selection decisions, and some of its student-citizens are pursuing the end of associational freedom and self-definition. Thus, as a first matter, an Aristotelian-inspired analysis would begin from the premise that there are two possible "right" answers, and would require the court to reason between these two competing possibilities.²⁷⁸

In practice, this would mean that, at the third prong of the *Dale* analysis, a reviewing court would have to determine explicitly whether the group's selection criteria involved constitutionally suspect discrimination, or not. One of the insights of this Article is that under current law, the conclusion to this question seems to be assumed. Under current law, it seems that, as long as the selection criteria impacts a suspect classification, then that criteria is presumed to be constitutionally suspect discrimination, and the only question is whether the state's restriction prohibiting such discrimination justifies the burden it imposes on the group. Under the dual-ends analysis this Article is proposing, the conclusion to this question would not be assumed; the question would have to be explicitly analyzed.

To analyze this question, the court would have to explicitly inquire into (and so the litigants would have to prepare a fact record that addresses) questions such as: to what end is the group exercising selectivity in membership decisions? For example, is the selectivity related to the exercise of associational freedom? If so, how so? A weak answer to this question could suggest that the selectivity is not related to the exercise of First Amendment rights, but rather a proxy for animus. Animus is the kind of illegitimate selection criteria we worry about, and that would suggest that the state's restriction does indeed justify the burden it imposes. However, a strong answer to this question could reveal that there is no illegitimate animus behind the selection criteria, and then the state's interest in nondiscrimination would not be as strong and would not justify the burden it imposed. The point is that, in contrast to either the LPF or note-and-compare balancing of current law, this new, dual-ends analysis would require courts to take seriously the notion that a group's selection criteria might, in fact, be a form of constitutionally valid, not suspect, discrimination. Only when that possibility is explicitly surfaced can we be sure that courts can adequately account for both ends implicated in these cases.

The inspiration for this concept is Aristotle's conception of the mean between two extremes as representing the virtuous choice.²⁷⁹ Aristotle wrote, "[t]here are then

²⁷⁸ See *id.*; see also Minow, *supra* note 49, at 781, 783, 844–46 (applying a virtue-ethics approach to the tension between religious group rights and antidiscrimination laws, and advocating negotiated solutions that mediate between extremes).

²⁷⁹ Colin Farrelly & Lawrence B. Solum, *An Introduction to Aretaic Theories of Law*, in *VIRTUE JURISPRUDENCE 1–3* (Colin Farrelly & Lawrence B. Solum eds., 2008).

three dispositions—two vices, one of excess and one of defect, and one virtue which is the observance of the mean; and each of them is in a certain way opposed to [] the others.²⁸⁰ This writing has come to stand for the idea that, as between two extremes, the middle (or mean) usually represents the better conception.²⁸¹ The extremes are vices; the middle point is usually virtuous.²⁸² The virtuous choice is usually the best choice.²⁸³ This is a decidedly practical concept.²⁸⁴ Making the best choice in this conception of reasoning does not entail following some sort of “cardinal rule” or single overriding principle, but rather it requires practical reasoning about competing alternatives.²⁸⁵

Practical reasoning, unlike deductive reasoning, takes seriously the notion that there could be two possible right answers, yet recognizes that a choice between them must be made. This Article has been built on the idea that these cases require a difficult choice between two possibly right answers. That is to say, when a group forms an expressive association and seeks to select members based on criteria which are relevant to the organization, but which also impact protected classifications, a difficult choice must be made: whether to uphold the nondiscrimination rights of the excluded, or the associational freedom rights of the group. They are both right answers. How should courts reason? I suspect that most who think about this area would agree that, no matter which right earns their political sympathy,²⁸⁶ the approaches courts have followed to date have not offered a theoretically or practically satisfactory way of resolution.

²⁸⁰ ARISTOTLE, *supra* note 277, at 107.

²⁸¹ See Cimino, *supra* note 265, at 714–16; Farrelly & Solum, *supra* note 279, at 1–3.

²⁸² Cimino, *supra* note 265, at 714–16.

²⁸³ ARISTOTLE, *NICOMACHEAN ETHICS*, reprinted in ARISTOTLE: SELECTIONS 372 (Terence Irwin & Gail Fine, trans., 1995) (“In everything continuous and divisible we can take more, less and equal, and each of them either in the object itself or relative to us; and the equal is some intermediate between excess and deficiency.”); Cimino, *supra* note 265, at 714–16.

²⁸⁴ See STAN VAN HOOFT, UNDERSTANDING VIRTUE ETHICS 17 (2006) (“[W]hereas duty ethics conceives of moral motivation or practical necessity as obedience to rules, virtue ethics conceives of moral motivation or practical necessity as responsiveness to values. An honest person values truth and if she finds herself in a situation where she might tell the truth or tell a lie to advantage herself, she will respond to the value that the truth holds for her.”).

²⁸⁵ ARISTOTLE, *supra* note 277, at 371–72 (“It should be said, then, that every virtue causes its possessors to be in a good state and to perform their functions well”); see also PETER BERKOWITZ, VIRTUE AND THE MAKING OF MODERN LIBERALISM 8 (1999) (“In general, then, Aristotle understood virtue as a condition or state of a thing that enabled it to perform a designated task well.”); Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 510–11 (2005) (describing the virtue of *phronesis*, or “practical wisdom,” in constitutional adjudication).

²⁸⁶ Most, but not all, of this scholarship in this area “takes sides” in what is shaping up to be a debate largely (though not conclusively) between conservative-leaning scholars advocating for stronger protection of associational rights, and progressive-minded scholars advocating to continue privileging nondiscrimination. Compare Paulsen, *supra* note 26 (setting out the “conservative” approach), with *supra* note 128. One notable exception is Joan Howarth, *supra* note 1, at 892 (giving a “progressive” account for valuing students’ associational rights).

Other legal scholars have noted the applicability and usefulness of practical, rather than purely deductive, reasoning to the problem of making difficult choices between competing alternatives. For example, in writing about applying Aristotelian ethics to private law, James Gordley notes that

to found ethics on deductive logic might suggest the same choices are always either right or wrong like the conclusion of mathematics. While prudence indicates that some choices are right or wrong, the same choices are not always right or wrong for everyone. People are different and so are their circumstances.²⁸⁷

The point this Article is making here is similar. Sometimes an expressive association will be selecting for constitutionally illegitimate reasons and sometimes it will not. But to presume that, like a mathematical conclusion, whenever an expressive association's selection criteria, though validly related to the purpose of the association, is unconstitutional because it also impacts persons belonging to a protected classification fails to take seriously the reason for the association in the first place or its status as an expressive activity protected by the First Amendment. Courts (and maybe even litigants, at least prospectively) would likely prefer a set of predictable deductive rules that could work in simpler cases. But such a deductive solution, which, as I have described it, entails a one-way, unitary-focal point type of balancing, has so far failed to work here.

This kind of dual-end analytic approach, based on practical reasoning, is not entirely inconsistent with more mainstream views of the First Amendment. For example, Daniel Farber and Philip Frickey have written about the wisdom of jettisoning a "foundationalist" concept of First Amendment theory, in which all questions are said to be decided by a single, foundational principle, in favor of a more flexible, practical approach.²⁸⁸ Farber and Frickey contend that, instead of attempting to ground all First Amendment theory on a single "foundational brick," a better normative conception of the First Amendment is to think of freedom of speech as "part of a web of mutually reinforcing values."²⁸⁹ The notion of foundationalism is similar to the problem of unitariness, as this Article has identified it—it requires a hierarchical prioritization of rights because there can only be one right at the front of a linear line.²⁹⁰ Yet, both our popular and constitutional conceptions of rights do not allow for such linear

²⁸⁷ JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT* 7 (2006).

²⁸⁸ Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 *UCLA L. REV.* 1615, 1639–40 (1987) (critiquing standard First Amendment theories and noting that one weakness they all share is that they are "foundational"—rooted in a single, foundational premise—which means they are each unable to account for divergences from their foundation).

²⁸⁹ *Id.* at 1640.

²⁹⁰ *Id.* at 1617.

prioritization.²⁹¹ Farber and Frickey capture the problem with this approach best when they write:

In short, we don't have a tower of values, with free speech somewhere in the middle, and more basic values [such as self-realization or democracy] underneath. Instead, we have a web of values, collectively comprising our understanding of how people should live. Foundationalism errs in seeking to reduce the complex relationships among our values to a linear arrangement in which a few values have privileged status as fundamental.²⁹²

Farber and Frickey recognize that the unitary approach simply does not work for the complexities of many First Amendment problems, let alone problems that require consideration of competing ends.²⁹³ If there was one accepted hierarchy between the competing values represented by the each of the competing ends, then there might be a better way of choosing a single end upon which to focus. But here, as there is no broadly accepted constitutional hierarchy among the values of equality and expression,²⁹⁴ such hierarchical ranking is not possible. Nor is there a way to adequately account for both in a system that narrows courts' focus to only one. Instead, there are arguably two right answers.

A related concept is that Aristotelians believe it is not enough to do the right thing in the end; rather, it must be done for the right reasons and at the right time.²⁹⁵ As is hopefully apparent, the goal of nondiscrimination (in the sense of constitutional equality) in the community is the right goal.²⁹⁶ But the blanket "all-comers" policy is not the right way of achieving the end of nondiscrimination, as it ends up excluding members of its own community.²⁹⁷ There is another way of achieving equality

²⁹¹ *Id.* at 1640–41.

²⁹² *Id.* at 1641.

²⁹³ *See id.*

²⁹⁴ Indeed the current Court can be otherwise hostile to the value of equality in education, at least from the perspective of affirmative action designed to include traditionally excluded and disadvantaged racial minorities. *See, e.g.,* *Parents Involved v. Seattle Sch. Dist.*, 551 U.S. 701, 711 (2007) (striking down student assignment plans using race as an important factor). Moreover, other commentators have recognized the difficulties inherent in attempting to rank these values. *See, e.g.,* Minow, *supra* note 49, at 846 (noting the need for "practical accommodation" of "plural goods").

²⁹⁵ *See, e.g.,* Cimino, *supra* note 265, at 716 (explaining that various choices exist along a spectrum, and the virtuous choice will depend upon a particular set of circumstances). My thanks to Tabatha Abu El-Haj for pointing this out.

²⁹⁶ *See Parents Involved*, 551 U.S. at 835 (Breyer, J., dissenting) (noting with approval a Seattle school district policy that "[sought] not to keep the races apart, but to bring them together").

²⁹⁷ *See Christian Legal Soc'y v. Martinez (CLS)*, 130 S. Ct. 2971, 3000–01 (2010) (Alito, J., dissenting); *Every Nation Campus Ministries at San Diego State Univ. v. Achtenberg*, 597

that is also consistent with the Aristotelian ideal of reasoning to the mean between two extremes and does not end up excluding the very students that make up the community itself.

1. Promoting Equality While Protecting Expressive Association

Under close review, after a court determines that a group is an expressive association, the court must identify whether the state restriction burdens the group's expression. If so, the court proceeds to ask if the state's interests justify those severe burdens. At this point, this Article has said that a court should apply a dual-end means-end analysis. In other words, when weighing the state's interests against the group's burden, courts should consider not only the end of the regulation, but also the end of the group or association. Expanding the means-end analysis in this way will allow courts to better account for dual ends.²⁹⁸

For purposes of this Article, it goes without question that a university has a compelling interest in promoting equality on campus.²⁹⁹ That said, a common assumption underlying many discussions of these issues is that the more "non-discriminatory" a school's nondiscrimination policy is, the better it must be at promoting equality.³⁰⁰ However, not everyone shares this assumption.³⁰¹

Recently, a number of progressive commentators have written against the university's policy at issue in *CLS* (both before and after the litigation).³⁰² These writers do not believe nondiscrimination norms are served by such an "all-comers" policy.³⁰³ For example, Joan Howarth takes the position that equality is better promoted by principled recognition of the right of some groups to discriminate in some ways than it is in the application of a blanket, no-exception "treat everyone alike" nondiscrimination policy.³⁰⁴ Though it is true that an "all-comers" nondiscrimination policy is easier to

F. Supp. 2d 1075 (S.D. Cal. 2009) (upholding state university's nondiscrimination policy despite its exclusionary effect on plaintiffs' First Amendment rights).

²⁹⁸ This test may answer Sunstein's call for a doctrine that asks whether the government has offered constitutionally justifiable reasons for restricting constitutionally significant freedoms. See Sunstein, *supra* note 230, at 595.

²⁹⁹ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (holding that public university law schools have a compelling interest in creating diverse student bodies).

³⁰⁰ See *id.* at 333–34.

³⁰¹ See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831–32 (1995) (noting that blanket denials of individual expression could constitute hostility to certain groups in violation of the First Amendment).

³⁰² See, e.g., Howarth, *supra* note 1, at 895–96.

³⁰³ *Id.*

³⁰⁴ *Id.* at 923–24; see also Rosenblum, *supra* note 41, at 86–87 (explaining that the challenge is to identify which interests are constitutionally compelling, and not conflate "second class membership" with "second class citizenship"). Of course, others disagree. See, e.g., Erwin Chemerinsky, *supra* note 128, at 1, 6 (focusing on one particular risk to associational freedom in cases like *CLS*, that of "takeover," and concluding that the Court's opinion in

administer, it is not unanimous that such a policy is best at promoting the goal it espouses: to encourage students to treat each other from a place of substantive, not just formal, equality.³⁰⁵ Others outside of higher education who are directly impacted by discrimination on the basis of sexual orientation agree.³⁰⁶

That said, might the university have a legitimate pedagogical prerogative to prohibit all students from any discrimination, no matter what the basis?³⁰⁷ In other words, might not the university have formal nondiscrimination, rather than substantive equality, as a legitimate pedagogical goal?³⁰⁸ As noted previously, Hastings Law School made this argument in *CLS*.³⁰⁹

Under an Aristotelian-inspired means-ends analysis, such as the one proposed here, a court should conclude that although a school has a compelling interest in equality, that interest does not justify directing how student groups must select members or voting officers.³¹⁰ The reason would be that there is a more narrowly tailored way to achieve equality among student groups than via the blanket nondiscrimination policy. As noted, a blanket nondiscrimination policy requires that all student groups open their group entirely—including to the level of voting membership—to anyone.³¹¹ The state's asserted interest is in promoting a variety of viewpoints on campus and providing a variety of leadership positions to students on campus.³¹²

Yet, both of these interests can be achieved by a more narrowly tailored regulation; that is, the university can require student groups to open all meetings and events to everyone but leave the question of membership, at least as far as membership entails

CLS “reflects a willingness to accept the risk to associational freedom in order to achieve greater equality for all students”).

³⁰⁵ See generally Howarth, *supra* note 1, at 897.

³⁰⁶ Carpenter, *supra* note 86, at 1516–18. Professor Carpenter's article begins with the question: “Is *Dale* a disaster?” *Id.* at 1515. His answer is no, it isn't:

This Essay attempts to reclaim the freedom of expressive association from both its harshest critics [i.e., the gay rights movement] and its most ardent libertarian cheerleaders, arguing that *Dale* will not have the revolutionary consequences that either camp predicts.

. . . .

Using gay experience as a guide, I conclude it is wrong to see an inherent tension between associational freedom and equality for despised groups.

Id. at 1516–18 (footnote omitted).

³⁰⁷ See, e.g., RODNEY A. SMOLLA, *THE CONSTITUTION GOES TO COLLEGE: FIVE IDEAS THAT HAVE SHAPED THE AMERICAN UNIVERSITY* 68 (2011) (discussing the pedagogical prerogatives of the public university).

³⁰⁸ *Id.* at 68–69.

³⁰⁹ *Christian Legal Soc'y v. Martinez (CLS)*, 130 S. Ct. 2971, 2992 (2010) (noting the dissent's agreement with this position).

³¹⁰ Chemerinsky and Fisk would presumably agree as to strict scrutiny, but would disagree as to my application and conclusion.

³¹¹ *CLS*, 130 S. Ct. at 2779–80.

³¹² *Id.* at 2778–79 (noting that universities encourage students to form associations that enhance the college experience).

voting privileges, to the groups themselves. In this way, no citizen of the community is excluded from the group's activities but, at the same time, no student members of the group in the community must choose between losing citizenship or altering their own constitution. Moreover, the groups would be ensured the same right of self-definition through selection of membership and leadership positions as if they met off campus. As none of the instrumental concerns identified above as relevant to limited public forums are present on campus,³¹³ there is no reason *not* to afford the students the same rights of expressive association on campus as off.

Recall that this is the policy that CLS had voluntarily adopted.³¹⁴ Such a limited requirement would be sufficiently narrowly tailored to serve the compelling interests in equality and inclusion because it would be all the inclusion a school could constitutionally require without taking away the students' right of self-definition. In other words, reframed under *Dale's* balancing test,³¹⁵ although the association might be burdened by an open-meetings requirement, that burden is not so severe as to override the university's strong interest in non-exclusion at the level of open meetings.

Further, under this policy, a campus can be host to a variety of different organizations, each with the discretion to define its own membership and choose its own leadership. The result will be a campus full of associations expressing different messages and viewpoints. The same right at stake for CLS members is at stake for Pro-Israel Alliance members,³¹⁶ the Black Law Students Association, the Justinian Law Students Association, ACS, the Federalist Society, OUTLAW, and the Campus Evangelicals alike.

Moreover, within this diversity of associations there will be a variety of leadership positions available. A campus could not, under this approach, become filled with groups of exclusively male membership and leadership. It is simply not realistic that, under close review of *both* the state's interest in nondiscrimination and the group's interest in membership restrictions, *all* groups on campus could justify such restrictions. Leadership positions will remain plentiful around campus and will be available to students in a variety of different organizations.³¹⁷

³¹³ See *Cornelius v. NAACP*, 473 U.S. 788, 802 (1985).

³¹⁴ Indeed, the dissent took the position that this was all that Hastings's nondiscrimination policy actually required until midway through the litigation, when the school changed its interpretation of its own policy to the "all-comers" version cited and discussed throughout this Article. See *CLS*, 130 U.S. at 3001–06 (Alito, J., dissenting) (arguing that until midway through the litigation, the policy actually in place at Hastings allowed "political, social and cultural student organizations to select officers and members dedicated to their organization's ideals and beliefs" but did not permit the same of CLS, which would have been a clear violation of the requirement of viewpoint neutrality).

³¹⁵ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648–53 (2000).

³¹⁶ The inspiration for this hypothetical group is a real one—the Israel Alliance, at Pennsylvania State University. See PENN STATE HILLEL, <http://pennstate.hillel.org/home/studentlife/alliance.aspx> (last visited Nov. 29, 2011).

³¹⁷ See Garnett, *supra* note 60, at 1862 (noting that "[g]overnment is, of course, free to promote, and even to require, nondiscrimination in truly public contexts, but it cannot

In sum, close review would allow a court to consider both the ends of nondiscrimination and association. Under this dual means-end analysis, it is likely that schools do have the discretion to require all student groups to open their meetings and other events to “all comers”—on the theory that the university has the pedagogical discretion to foster a community of inclusion—but for the reasons identified above, that discretion does not extend to the level of directing how the student groups choose membership.

2. Restricting Invalid Student Ends

This Article has said that under close review, after a court determines a group is an expressive association, the court must identify if the state restriction burdens the group’s expression. If so, the court proceeds to ask if the state’s interests justify those severe burdens.

In this context, a truly compelling interest may justify a university’s restriction on expressive association. What kinds of interests might be sufficiently compelling to justify these severe burdens? Under the thesis developed in this Article, restrictions that prevent students from pursuing invalid ends would be sufficiently compelling.

This proposition raises the question of how to determine if particular student ends are invalid. This question is a legitimate, but not an overly difficult, one. As noted above, the simple question of *membership* in an expressive association is the easiest question to resolve: as universities encourage students to form expressive associations—being religious, political, cultural, or economic³¹⁸—then membership in such associations is a presumptively valid end. This would be true whether or not the state agreed with the particular viewpoint or message advocated by the group.³¹⁹ As for groups asserting controversial positions, such as a hypothetical “Pro-Drug Club,”³²⁰ the question would become whether the viewpoint is political or not. If it is, the group should be considered an expressive association, which presumptively entails protection of its membership and voting policies.³²¹

A harder question might arise out of the campus activities that such an organization might want to engage in. If the Pro-Drug Club wants to organize a “smoke-in” in which all students attending smoke illegal drugs on campus at the same event, then the students are pursuing an invalid end. But what if CLS wants to hand out proselytizing

homogenize civil society by pressing into service the expression of mediating associations”) (footnotes omitted).

³¹⁸ See, e.g., *Healy v. James*, 408 U.S. 169, 171–72 (1972).

³¹⁹ *CLS*, 130 S. Ct. at 3009–10 (Alito, J., dissenting) (finding viewpoint discrimination in Hastings’s policy).

³²⁰ See, e.g., *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 650 (9th Cir. 2008) (finding that a high school’s nondiscrimination policy was viewpoint neutral, and using the hypothetical of a “pro-drug” club to illustrate the point) (citing *Morse v. Frederick*, 551 U.S. 393 (2007)), *cert. denied*, 129 S. Ct. 2889 (2009).

³²¹ *Carpenter*, *supra* note 86, at 1557–58.

flyers in the student union? Or, what if a student group of Holocaust deniers wants to hold an ideological rally outside of the campus Hillel? Here, the question of valid versus invalid ends gets a little trickier.

The test I propose is as follows: if students are doing the things that the university encourages them to do—taking classes, joining teams, work study, joining groups—then this Article asserts that their ends should be found to be presumptively valid. However, not all student activity on campus is conclusively valid just because the activity is undertaken by a student who has been invited to join the campus community. At one level, invalidity can be determined by routine campus conduct regulations—prohibitions on cheating, underage drinking, hazing, harassment, and the like.³²² In other words, invalid ends can be contrasted with valid ends which the state institution would recognize.³²³ The Pro-Drug Club’s “smoke-in” is invalid for these reasons. The Holocaust-deniers rally, if it targets a particular population, probably is invalid as well under campus rules prohibiting harassment.

One might legitimately raise questions of institutional competence: Are courts equipped to administer such a test? How would this practice work at the university itself? In other words, what are the activities that a university encourages students to do, and what are the corresponding limits that a university could impose?

As to the courts, nuanced consideration of multiple ends under heightened scrutiny is surely more challenging than a standard of highly deferential review, but are surely not outside of courts’ institutional competence. As long as litigants prepare a sufficiently thorough fact record, courts will not have to speculate about groups’ intentions or sincerity. Further, university administrators must be similarly capable of drafting thoughtful, nuanced campus conduct policies and many likely already do. For example, a university could encourage students to join a fraternity, but not to haze or abuse alcohol. It could encourage students to join a team, but not to consider team membership a license of exemption from class attendance policies.

Similarly, it must be possible (either by a university or a court) to distinguish between a cultural group such as the Justinian Law Students, or a political group such as the Campus Tea-Partiers, meeting to explore a unique and particular viewpoint, versus those same groups meeting to organize activity that would harass, intimidate or target fellow students. Exploring viewpoints is a legitimate and valid end; harassment, intimidation, or targeting are not.³²⁴ Arguably, the fictional Campus Holocaust Deniers meeting to express, debate and discuss their own point of view is consistent with what the university envisions for student groups, but holding a rally that particularly targets a single population is not. The latter feels much more like an attempt at harassment or

³²² See *Healy*, 408 U.S. at 193 (holding university can require groups to adhere to reasonable standards of conduct).

³²³ See, e.g., *CLS*, 130 S. Ct. at 2993 (holding an institution may permit student associations to express diverse viewpoints while simultaneously prohibiting exclusionary membership policies).

³²⁴ See *Healy*, 408 U.S. at 191 (holding that violence is not a legitimate end of a student group).

intimidation, and the university likely already has some sort of campus-conduct policy that prevents this kind of behavior under which such conduct could be enjoined.

In sum, it should be possible to identify illegitimate activities arising out of legitimate campus associations and prevent the former while still allowing the latter to thrive. That the difference may not always be apparent at first blush to the university (or to the courts) does not mean that the difference cannot be identified and sorted out. The university must permit the former; it does not have to permit (and may in many circumstances be under an obligation to prohibit) the latter.³²⁵ Courts must think critically case-by-case instead of reflexively applying a series of overly simplified, inapposite, but familiar doctrines.

An idea similar to this was first put forth nearly thirty-five years ago in a relatively influential article. In *Discrimination and the Right of Association*,³²⁶ William Marshall advanced a theory of expressive association that included a right to “cultural association.”³²⁷ Anticipating the objection that a particular “cultural association” may be a cover for an organization that had no other unifying purpose or function other than to discriminate—to exclude a certain group or groups for no greater reason than exclusion itself—Professor Marshall proposed that a court could identify “purposes and practices . . . that affirmatively promote [] identity and community.”³²⁸ In that way, a court could ferret out groups that were essentially hiding behind the cover of a cultural association but in reality just wanted to exclude for the sake of exclusion.³²⁹ The same line of thinking applies here. It is entirely possible that a court, on a well-developed factual record, will be able to tell the difference between a valid and invalid student end.³³⁰

CONCLUSION

There is more at stake for university student groups who are under pressure from their institutions to adopt membership policies that permit no restrictions than simply access to campus bulletin boards, or even access to the student activity fee

³²⁵ See *id.* at 193.

³²⁶ William Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 90–92 (1986) (discussing right of cultural association and determining whether the activities of a claimed cultural organization are in fact “central to the purposes and [the] practices . . . that affirmatively promotes identity and community”); *id.* at 75, 90–91 (contrasting between “a fellowship society that admits only Jews and is dedicated to maintaining a Jewish community,” and an “all-Christian” country club, whose “principal activities are golf, tennis and swimming”).

³²⁷ *Id.* at 90.

³²⁸ *Id.* at 90–91.

³²⁹ *Id.*

³³⁰ See generally *Chi Iota Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 139 (2d Cir. 2007). There, the Second Circuit opinion is fairly read to establish the point that a purely social group, limited to men only, was formed in order to exclude women. *Id.* at 143–47. The court seemed to conclude that the problem really was that the club was all but expressly found to have no other purpose other than exclusion. *Id.* This was not justifiable under the First Amendment right of expressive association. *Id.*

for that matter. Instead, this Article has, using the metaphor of citizenship and the concept of dual ends, surfaced concerns that attend these cases, but have yet to be recognized by either courts or commentators. Further, standard First Amendment doctrine does not adequately account for these concerns; rather, it tends to privilege the end of the regulator.³³¹

This Article has asserted that, to better account for the real issues of student members of affinity groups, and to correct the fundamental shortcomings of unitary focal point balancing, speech and association claims should be disaggregated and analyzed independently. In a case like *CLS*, the speech claim could be subject to the LPF test, but the association claim should be reviewed under a “pure” associational rights analysis in which courts would apply close scrutiny.

Then, under close scrutiny, courts should be able to account for the dual ends of these cases. Under the third prong of the *Dale* balancing test, a court must ask whether the state’s interests justify the severe restriction on associational rights.³³² At this point, courts should, in the tradition of Aristotelian practical reasoning,³³³ determine whether the restriction serves *all* the compelling interests in the case, not just those of the regulator. The key is to put both ends—both potentially “right” answers—explicitly before the court. If, after a more thorough dual-end analysis, the court concludes that the association is in no way selecting on the basis of animus, then the restriction may be too broad; it may restrict more association than is necessary. If so, then the state’s restriction should be determined to be unconstitutional. If the association is selecting on the basis of animus, however, then the restriction should be upheld.

Even more importantly, many expressive association cases, not just student-campus cases, have dual ends.³³⁴ As long as the source of the restriction on associational freedom is a law or norm of antidiscrimination, there are most likely multiple ends in the case. Under the theory advanced in this Article, any of those cases should be subject to close review and a broadened means-end analysis. That there are two possibly right answers in these cases is simply unavoidable. Getting courts to confront this explicitly is the missing piece of the nondiscrimination puzzle.

³³¹ See *supra* Part II.B.2.

³³² *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000).

³³³ See generally Farrelly & Solum, *supra* note 279, at 1–3.

³³⁴ See, e.g., *Dale*, 530 U.S. at 648 (noting competition between an individual’s right to expression and a group’s interest in espousing heterosexual ideals).