MERGENS V. WESTSIDE COMMUNITY SCHOOLS AT TWENTY-FIVE AND *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*: FROM LIVE AND LET LIVE TO MY WAY OR THE HIGHWAY?

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I. INTRODUCTION

The United States Congress passed the Equal Access Act (EAA)[1] and forwarded it to President Ronald W. Reagan, who signed it into law on August 11, 1984.[2] The EAA was enacted in response to *Widmar v. Vincent*,[3] a 1980 Supreme Court case from higher education where the Justices ushered in a renaissance of sorts in religious liberty. In *Widmar*, treating religious expression as a subset of free speech,[4] the Court ruled that officials at a state university in Missouri could not deny a Christian group access to institutional facilities so long as the university permitted

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[1] This article uses the words "Equal Access Act" and the acronym "EAA" interchangeably.

[2] 20 U.S.C. § 4071 (1984). For an early commentary explaining key provisions of the act, see David S. Tatel & James G. Middlebrooks, *An Introduction to the Equal Access Act*, 21 EDUC. L. REP. 7 (1985).

[3] 454 U.S. 263 (1981).

[4] *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 396 (1993) (applying viewpoint neutrality, forbidding a public school board from denying a religious group's access to district facilities as long as they were available to other organizations); for a later commentary on this case, see Ralph D. Mawdsley & Charles J. Russo, *Lamb's Chapel Revisited*, SCH. BUS. AFF., VOL. 64, NO. 11, 44–45 (1998); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001) (reasoning that a board violated a religious club's rights to free speech by engaging in impermissible viewpoint discrimination in refusing to allow it to use school facilities to meet because of the religious content of its gatherings even though other groups could use facilities to address the same issues at their meetings albeit from secular perspectives); for a commentary on this case, see Charles J. Russo & Ralph D. Mawdsley, R.D. *An End to the Heckler's Veto: Good News Club v. Milford Central School*. 28 RELIGION & EDUC. 79 (2001).

other organizations to meet on their campus.[5]

Subsequently, Congress, via the EAA, expanded the reach of *Widmar's* rationale by mandating that officials in public secondary schools[6] receiving federal financial assistance must also allow non-curriculum related student groups[7] to meet during non-instructional time. Twenty-five years ago, in *Mergens v. Westside Community Schools*,[8] the Supreme Court upheld the constitutionality of the EAA. The Court found that Congress intended that insofar as most high school students could recognize that allowing religious clubs to function in public schools did not imply the endorsement of religion, the law should remain in place.[9] However, because only a plurality of Justices agreed that the EAA passed the Establishment Clause analysis, the Court left the door open to more litigation, leading to a line of cases considering the extent to which religious expression may be treated as a protected subset of free speech in school settings.[10]

A quarter of a century after *Mergens*, the EAA's status may be in doubt because the Supreme Court made a directional change regarding the rights of religious groups in public educational institutions. In *Christian Legal Society v. Martinez*,[11] the Court eroded the rights of members of religious clubs in higher education to select leaders who share their values. The *Martinez* Court ruled that administrators at a public law school in California had the authority to implement a policy requiring all student groups, including on-campus religious groups, to admit all comers from the student body. Under this policy, recognized campus groups had to admit "all comers," regardless of whether potential members and/or leaders agreed with the group's beliefs, as a condition of becoming a recognized student organization.[12] On remand, the Ninth Circuit re-

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[5] *Widmar*, 454 U.S. at 277.

[6] A federal trial court in Florida refused to extend the Act to a middle school in Carver Middle Sch. Gay-Straight Alliance v. Sch. Bd. of Lake Cnty., Fla., 2 F. Supp. 3d 1277, 1292 (M.D. Fla. 2014). For a commentary on the application of the EAA to students who are not yet in secondary school, see Todd Hagins, *Mother Goose and Father God: Extending The Equal Access Act to Pre-High-School Students*, 15 REGENT U. L. REV. 93 (2002–2003).

[7] While recognizing that a significant body of litigation has arisen regarding access by non-student groups to school facilities, including two cases that reached the Supreme Court, this article limits its focus to student groups under the parameters of the EAA.

[8] 496 U.S. 226 (1990).

[9] *Id.* at 251.

[10] *See, e.g.*, Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995). *See also* Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688 (2d Cir. 1991) (affirming that once a board opened its facilities, it could not deny access to a not-for-profit pro-life pregnancy counseling organization).

[11] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661 (2010).

[12] *Id.* at 697.

jected the group's remaining claim on the ground that its leaders failed to preserve their argument that law school officials selectively applied the policy for appeal.[13]

Even though the resolution of *Martinez* involved neither a K–12 setting nor the EAA, *Martinez* does not bode well for religious freedom in schools. *Martinez* provides one more tool for critics of religious speech, whether in K–12 or higher education, as they seek to deny faith-based groups the opportunity to select leaders who comport with organizational goals. Opponents of free speech, especially religious speech, have moved from a "live and let live" attitude, allowing religious clubs to act as they wish, to a policy of "my way or the highway," attempting to silence groups that refuse to comply with their dictates whether on membership requirements or even their very institutional missions.[14]

As discussed later in this article, in a growing number of disturbing incidents, campus officials have stood *Widmar* and the EAA on their ears by requiring Christian student groups in particular to face draconian choices. Campus officials, marching under the flags of diversity and equality, while eschewing their espoused ideal of diversity, require students, to compromise their values by accepting all comers as potential leaders, not just members, or else lose access to campus facilities and school funding.[15]

In light of EAA-related litigation over the twenty-five years since the Supreme Court upheld the Act, the remainder of this article is divided into four substantive sections. The first section reviews the history of the EAA, beginning with *Widmar*. The second section focuses on *Mergens* and later litigation involving the EAA in disputes over religious and non-religious clubs in K–12 schools. The third section examines related issues in higher education, as highlighted by *Martinez*. The fourth section reflects on the precarious status of religious speech in K–12 and higher education, in light of *Mergens* and *Martinez*. *Martinez* threatens freedom of religion in the educational setting insofar as *Martinez* apparently denies religious groups the right of self-determination by denying them the opportunity to select leaders who share organizational goals.

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[13] Christian Legal Soc'y v. Wu, 626 F.3d 483, 485 (9th Cir. 2010).

[14] An egregious incident admittedly beyond involving governmental over-reach in attempting to limit religious speech occurred in Houston, Texas, where the mayor sought to subpoena the sermons of Christian pastors allegedly for bias based on sexual orientation. *See, e.g., Texas: Subpoenas of Speeches Given by Houston Pastors Is Dropped*, N.Y. TIMES, Oct. 20, 2014 at 14, *available at* 2014 WLNR 30253741; Lisa Suhay, *Why the City of Houston Wanted the Sermons of Five Christian Pastors,* THE CHRISTIAN SCIENCE MONITOR, Oct. 15, 2014, pagination unavailable online, 2014 WLNR 28782074.

[15] *See* Timothy J. Tracey, *The Demise of Equal Access and a Return to the Early-American Understanding of Student Rights*, 43 U. MEM. L. REV. 557 (2013).

II. THE EQUAL ACCESS ACT: A PRE-HISTORY

A. Widmar v. Vincent

In *Widmar v. Vincent*,[16] the Supreme Court ushered in a new era of access to public educational facilities. *Widmar* resulted when members of an on-campus religious group at the University of Missouri in Kansas City challenged a rule forbidding their group from meeting in campus facilities even though over 100 other registered student groups were free to do so.[17]

The students unsuccessfully filed suit in a federal trial court in Missouri claiming that officials violated their rights to the free exercise of religion, freedom of speech, and equal protection.[18] The court upheld the rule on the grounds that officials never knowingly allowed any religious group to gather on campus and also that the Establishment Clause required such an outcome.[19] The Eighth Circuit reversed in favor of the students in treating the university's regulation as content-based discrimination against religious speech that was not justified by any compelling interest.[20] The court further pointed out that the Establishment Clause did not forbid a policy of equal access to university property by all student groups insofar as officials made the facilities generally available.[21] Dissatisfied with the outcome, university officials sought further review at the Supreme Court.

Relying on the framework of freedom of speech, in an eight-to-one judgment authored by Justice Powell, the Supreme Court affirmed the Eighth Circuit's reversal in favor of the students.[22] The Court pointed out that insofar as university officials created a forum that made facilities generally available for the exchange of ideas, they could not deny a religious group equal access to them solely due to the content of the speech of its members.[23] Finding that university officials created a limited public forum for student speech, the Court determined that they failed to demonstrate that the policy was narrowly drawn to achieve the compelling state interest of not violating the Establishment Clause.[24] At the same time, the Court distinguished *Widmar* from disputes involving reli-

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16 454 U.S. 263 (1981).

17 *Id.* at 265.

18 Chess v. Widmar, 480 F. Supp. 907 (W.D. Mo. 1979).

19 *Id.* at 910.

20 Chess v. Widmar 635 F.2d 1310 (8th Cir. 1980), *cert. granted*, 450 U.S. 909 (1981).

21 *Id.* at 1320.

22 Widmar v. Vincent, 454 U.S. 263, 277 (1981).

23 *Id.* at 267.

24 *Id.* at 275.

gious activities in public grade schools, explaining that facilities in those settings are generally not used as open fora and university students are less impressionable than young children.[25]

At the heart of its analysis, the Supreme Court applied the seemingly ubiquitous tripartite test from *Lemon v. Kurtzman*.[26] According to this test,

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[27]

In *Widmar* the Justices noted that both lower courts agreed that the forum policy issue that was created passed the first and third parts of the *Lemon* test because it had a secular purpose and avoided excessive government entanglement with religion.[28] As to the "primary effects" part of the *Lemon* test, the Court agreed that absent evidence demonstrating that religious groups would have dominated the university's open forum, providing equal access to the religious group did not have the primary effect of advancing religion.[29]

Presaging the endorsement test that the Court would enunciate in *Lynch v. Donnelly,*[30] the Court indicated that given the facts, officials could not have been perceived as endorsing religious speech because they would only have been providing the same benefit to the religious club that was available to other groups.[31] Rounding out its rationale, the

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[25] *Id.* at 274 n.14.

[26] 403 U.S. 602 (1971) (invalidating statutes from Pennsylvania and Rhode Island permitting various forms of aid to faith-based schools). When the Supreme Court applies the *Lemon* test in disputes over aid and religious activity, its failure to explain how, or why, it has become a kind of "one-size fits all" measure leaves lower courts, lawyers, commentators, and educators seeking clarity. Confusion emerges because the Court failed to offer clear explanations of how the prongs in the test fit together. The first two prongs originated in companion cases that invalidated prayer and Bible reading in public schools, *Sch. Dist. of Abington Twp. v. Schempp,* 374 U.S. 203 (1963). Meanwhile, the third prong emerged in a dispute that upheld New York State's practice of providing state property tax exemptions for church property used in worship services, *Walz v. Tax Comm'n of New York City*, 397 U.S. 664 (1970).

[27] *Lemon,* 403 U.S at 612–13.

[28] *Widmar*, 454 U.S. at 271–72.

[29] *Id.* at 274.

[30] 465 U.S. 668 (1984).

[31] *Id.* at 687–89 (O'Connor, J., concurring) (upholding the display of a crèche on public property). In addition to *Lemon*, the Court has applied two other tests. The "endorsement test" examines whether the purpose of a governmental action is to endorse or approve of a religion or religious activity. Justice O'Connor wrote that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Id.* at 687–88. She added that, "irrespective of government's actual purpose, [if] the prac-

Supreme Court reiterated that once officials created a limited open forum, they could not exclude religious groups from using meeting space.[32]

Justice Stevens concurred to highlight his concern that the Supreme Court may have threatened academic freedom by requiring officials to open campus facilities as they did.[33]

Justice White's dissent rejected the application of the Free Speech claims.[34] He argued that any burdens that campus officials placed on the religious group were minimal insofar as its meetings only would have had to move a short distance off campus.[35]

B. Post-Widmar

In the first post-*Widmar* case, the Supreme Court chose not to review a dispute from New York upholding a board's refusal to allow students to conduct voluntary communal prayer meetings in school immediately before the start of the academic day.[36] The Second Circuit had affirmed that the board did not infringe on students' rights to the free exercise of religion, speech, or equal protection because officials had a compelling interest to remove any indication of their sponsoring religious activities in public schools.[37]

The Supreme Court next declined to review a case from Texas wherein the Fifth Circuit invalidated a board policy of permitting students to gather at a school with supervision for voluntary religious meet-

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tice under review in fact conveys a message of endorsement or disapproval. . . . [a court] should render the challenged practice invalid." *Id.* at 690. For a commentary on this case, see Ralph D. Mawdsley, *Lynch v. Donnelly: A New Constitutional Standard in Establishment Cases?,* 18 EDUC. L. REP. 805 (1984). The Court articulated the "psychological coercion test" in *Lee v. Weisman,* 505 U.S. 577, 592 (1992) (disallowing prayer at a public school graduation); for a brief commentary on this case, see Charles J. Russo, *Lee v. Weisman*: *The Court Divines the Unconstitutionality of School Prayer*, 19 RELIGION & PUB. EDUC. 120–23 (1992)*; see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306–10 (2000) (primarily relying on endorsement to invalidate a board policy of allowing student-led prayer prior to high school football games); for an analysis of this case, see Ralph D. Mawdsley & Charles J. Russo, *Student Prayers at Public School Sporting Events: Doe v. Santa Fe Independent School District*, 143 EDUC. LAW REP. 415 (2000).

[32] *Widmar*, 454 U.S. at 277.

[33] *Id.* at 277 (Stevens, J., concurring).

[34] *Id.* at 282 (White, J., dissenting).

[35] *Id.* at 273–74.

[36] Brandon v. Board of Educ. of Guilderland Cent. Sch. Dist., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

[37] In a non-school case, *Heffron v. Int'l Soc'y for Krishna Consciousness,* 452 U.S. 640, 652–53 (1981), the Court refused to grant a religious organization "rights to communicate . . . superior to those of other organizations having social, political, or other ideological messages to proselytize" in rejecting a challenge to a regulation of a state fair in Minnesota which required all solicitations, sales, and/or distributions of material to be from fixed locations. For a later case reaching the same outcome at an airport, see *International Soc''y for Krishna Consciousness v. City of Los Angeles,* 764 F.3d 1044 (9th Cir. 2014).

ings close to the beginning or end of the day.[38] The tone of the court's analysis suggested that the policy implied recognition of religious activities and meetings as an integral part of the school's extracurricular program with the implicit approval of educators.[39]

III. THE EQUAL ACCESS ACT AND *MERGENS*

A. The Equal Access Act

Spurred on in large part by *Widmar*, in 1984 Congress enacted the Equal Access Act,[40] primarily to protect religious freedom in schools. Even so, as highlighted later in this paper, supporters of students who seek to establish gay-straight and related LGBT clubs have succeeded in extending the reach of the Act to cover their cause. This outcome fits squarely within the EAA's provisions.[41]

Pursuant to the EAA

> [i]t shall be unlawful for any public secondary school which . . . has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting . . . on the basis of the religious, political, philosophical, or other content of the speech at such meetings.[42]

The law proceeds to define "fair opportunity":

> (c) Fair opportunity criteria
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> Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—
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> (1) the meeting is voluntary and student-initiated;
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> (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
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> (3) employees or agents of the school or government are present at religious meetings only in a non-participatory capacity;
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> (4) the meeting does not materially and substantially interfere with

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[38] Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).

[39] *Id.* at 1044.

[40] 20 U.S.C. §§ 4071 *et seq.* (West 1984).

[41] *See* Regina Grattan, Note, *It's Not Just for Religion Anymore: Expanding the Protections of the Equal Access Act to Gay, Lesbian and Bisexual High School Students*, 67 GEO. WASH. L. REV. 577 (1999).

[42] 20 U.S.C. § 4071(a). The act further specifies that "[a] public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b)(2014).

> the orderly conduct of educational activities within the school; and
>
> (5) non-school persons may not direct, conduct, control, or regularly attend activities of student groups.[43]

Perhaps the most significant limitation of the Act,[44] noted in subsection (4), is that educational officials can exclude student-sponsored groups if their meetings materially and substantially interfere with the orderly conduct of school activities.[45]

In a case from Pennsylvania, initiated prior to the passage of the Equal Access Act, the Supreme Court avoided reaching a decision on the merits.[46] Students successfully filed suit when their school board denied the request of a Christian prayer group to meet, the only club so denied access to facilities.[47] In a five-to-four order, the Court held that a former school board member lacked standing to appeal the trial court's order recognizing the Christian club's right to conduct prayer meetings on public school grounds during regular class hours.[48] The trial court's reasoning was that the board policy created a student activity period open to any student club that contributed to the intellectual, physical, or social development of students.[49]

B. Board of Education of Westside Community Schools v. Mergens

High school students sued their school board for refusing to permit them to organize a Christian Bible study club pursuant to the Equal Access Act.[50] The federal trial court in Nebraska upheld the board's denial of access but the Eighth Circuit reversed in favor of the students on the ground that the presence of non-curriculum related clubs at the school created a limited open forum under the Act.[51] On appeal to the Supreme Court, the board raised two challenges: whether the school was a limited open forum within the meaning of the Act and whether the law violated

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[43] 20 U.S.C. § 4071(c).

[44] For a representative commentary on the EAA, see Aaron H. Caplan, *Stretching The Equal Access Act Beyond Equal Access*, 27 SEATTLE U. L. REV. 273 (2003).

[45] This language is based on *Tinker v. Des Moines Indep. Comm. Sch. Dist.,* 393 U.S. 503, 509 (1969) (upholding student free speech rights by wearing black armbands) (internal citations omitted) ". . .where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."

[46] Bender v. Williamsport Area Sch. Dist., 563 F. Supp. 697, 698 (M.D. Pa. 1983), *rev'd,* 741 F.2d 538 (3d Cir. 1986), *vacated,* 475 U.S. 534 (1986).

[47] *Id.*

[48] Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 548–49 (1986).

[49] *Bender*, 563 F. Supp. 697, 709 (M.D. Pa. 1983).

[50] Bd. of Educ. v. Mergens, 496 U.S. 226, 226–27 (1990).

[51] Mergens v. Bd. of Educ. of Westside Cmty. Schs. (Dist. 66), 867 F.2d 1076 (8th Cir. 1989).

the Establishment Clause if officials created such a forum.[52]

Writing for the Court, in *Board of Education of Westside Community Schools v. Mergens*,[53] Justice O'Connor examined the history of the Act.[54] The Court relied on statutory interpretation, and eight members voted to uphold the Act in four different opinions.[55]

As an initial matter, the Supreme Court recognized that both sides agreed that the school was a public secondary institution receiving federal assistance within the meaning of the Act. Turning to another crucial matter, acknowledging that the Act failed to define "non-curriculum related," the Court thought it necessary to review the status of some student groups.[56]

Insofar as the majority agreed that the Act's legislative purpose was to extend the *Widmar* Court's reasoning of ending discrimination against religious speech to secondary schools, it found a "non-curriculum related student group" is "best interpreted broadly to mean any student group that does not *directly* relate to the body of courses offered by the school."[57] Such an approach, the Court reasoned, was in accord with congressional intent to provide a low threshold for triggering the Act.

In reaching its interpretation, the Supreme Court rejected the board's open-ended assertion that curriculum related clubs basically meant anything educators were willing to accept regardless of how tenuous a

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[52] *Mergens*, 496 U.S. at 273.

[53] *Id.* Parts of the analysis of *Mergens* rely on David L. Gregory & Charles J. Russo, *Let Us Pray (But Not 'Them!'): The Troubled Jurisprudence of Religious Liberty*. 65 ST. JOHN'S L. REV. 273 (1991).

[54] For representative commentary on *Mergens*, see, e.g., Lawrence F. Rossow, *Limits on Discretion in Applying the Equal Access Act: Mergens* v. Board of Education of Westside Community Schools, 56 EDUC. L. REP. 1 (1990); Marie Wilna Fleming & Ronald L. Peeler, *Mergens: The Beginning, Not the End, of Questions Arising Under the Equal Access Act*, 64 EDUC. L. REP. 1 (1991); Dena S. Davis, *Religious Clubs in the Public Schools: What Happened After Mergens?* 64 ALB. L. REV. 225 (2000).

[55] Justice O'Connor authored the plurality opinion and was joined in Part I (facts) and Part II (statutory construction) by Chief Justice Rehnquist and Justices White, Blackmun, Scalia, and Kennedy joining Part III (establishment clause analysis). Justice Kennedy, joined by Justice Scalia, concurred in part and concurred in the judgment. *Mergens*, 496 U.S. at 258. Justice Marshall, joined by Justice Brennan, concurred in the judgment. *Id.* at 263. Justice Stevens dissented. *Id.* at 270.

[56] In an Appendix the Court attached the Plaintiff's Trial Exhibit 63 which identified a wide array of organizations, some of which had a tenuous relationship to the school curriculum at best: band; chess club; cheerleaders; choir; class officers; distributive education; speech & debate; drill squad & squires; future business leaders of America; future medical assistants; interact; international club; Latin club (junior classical league); math club; student publications; student forum; dramatics; creative writing club; 20 photography club; orchestra; outdoor education; swimming timing team; student advisory board; intramurals; competitive athletics; Zonta club; subsurfers; Westside club; wrestling auxiliary; and National Honor Society. *Id.* at 253.

[57] *Mergens*, 496 U.S. at 239 (emphasis in original). Even Justice Marshall, concurred on this point. "I agree with the majority that 'noncurriculum' must be construed broadly to 'prohibit schools from discriminating on the basis of the content of a student group's speech." *Id.* at 262 (Marshall, J., concurring).

group's relationship was to academic matters.[58] The Court rebuffed the board's position as a ruse designed to hollow out the protection afforded religious groups, the very reason why the law was enacted.[59] Instead, the Court observed that insofar as a variety of the named clubs failed to demonstrate a close connection to the school curriculum, the prayer and Bible study club was entitled to meet in school.[60] The Court explained that if school officials created a limited open forum permitting non-curriculum related groups to meet during non-instructional time, then they were obligated to grant equal access to the student-sponsored Bible study club.[61]

The Justices ultimately disagreed, though, over whether the Equal Access Act violated the Establishment Clause.[62] Writing for the plurality, Justice O'Connor noted that in *Widmar* the Court upheld the principle of equal access under the *Lemon v. Kurtzman*[63] test. Maintaining that the Court's rationale from *Widmar* was applicable, Justice O'Connor reviewed each of *Lemon's* three prongs.[64]

First, Justice O'Connor found that the stated legislative purpose of the Act, to prevent discrimination against religious and other types of speech, was undeniably secular.[65] Moreover, she asserted that even if some members of Congress intended solely to protect religious speech, the Act had to be upheld because the Court's duty was to examine the Act's legislative purpose, not the subjective motives of the legislators.[66]

Second, Justice O'Connor rejected the school board's argument that the Act had the primary effect of advancing religion. Justice O'Connor engaged in three related analyses. First, she rebuffed the claim that a prayer club created a symbolic union between government and religion in the minds of students. She reasoned that high school students, comparable to their counterparts in higher education, are able to distinguish between a board's permitting a club that prays on campus from an official endorsement of prayer.[67] While conceding the risk of peer pressure,[68] Jus-

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[58] *Id.* at 265–66.

[59] *Id.* at 266.

[60] *Id.* at 287.

[61] *Id.* at 288–89.

[62] *Id.* at 275–76

[63] 403 U.S. 602 (1971).

[64] *Mergens*, 496 U.S. at 272–75.

[65] *Id.* at 248–49.

[66] *Id.* at 249.

[67] This thinking is consistent with the view of Congress, which relied on testimony that students are mature enough to perceive religious neutrality. *See* S. Rep. No. 357, 98th Cong., 1st Sess. 8 (1984). Congress also referred to, and was apparently influenced by, a Note in the Yale Law Journal, which argued that high school students possess sufficient maturity to perceive religious neutrality. *Id.* However, at least one empirical study casts doubt on the ability of high school students to perceive religious neutrality. *See* Lawrence F. Rossow & Nancy Rossow, *High School Prayer Clubs:*

tice O'Connor emphasized that because the meetings were permitted only during non-instructional time, participation by school officials at prayer club meetings could not create the impression of official endorsement.[69] Second, she maintained that if school officials make it clear that prayer clubs are on campus solely because students asked to create them, then others would not reasonably be able to infer endorsement of the clubs or religion.[70] Finally, she explained that insofar as the prayer club was only one of a wide variety of student-initiated voluntary organizations, pupils would have been unlikely to perceive it as an official endorsement. Thus, Justice O'Connor concluded that the Act, both on its face and as applied in *Mergens,* did not have the primary effect of advancing religion.[71]

As to the third and final prong of the *Lemon* test, Justice O'Connor rejected the argument that the club's presence in school resulted in excessive entanglement.[72] She noted that while the Act allows educational officials to assign supervisory personnel to ensure proper student behavior, it forbids monitoring, participation, or involvement by faculty or non-school personnel, as well as official school sponsorship of such clubs.[73] She warned that official efforts to deny prayer clubs opportunities to form and meet ran a greater risk of entanglement in light of the machinations in which officials would have to engage in deciding whether clubs could form and meet on school premises.[74]

Justice Kennedy, joined by Justice Scalia, agreed that the Act did not violate the Establishment Clause but would have eschewed the *Lemon* test.[75] Rather, he considered whether the Act gave such a direct benefit to clubs that it bordered on establishment or so coerced participation in activities infringing on the right to free exercise.[76]

In a lengthier concurrence, Justice Marshall agreed that the Act could withstand Establishment Clause scrutiny.[77] However, because he be-

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Can Students Perceive Religious Neutrality? 45 EDUC. L. REP. 475 (1988) (psychological data supports notion that high school students cannot perceive neutrality). Other studies indicate both that peers exercise a great deal of influence in high school and that levels of maturity among adolescents may vary greatly.

[68] Justice Kennedy later picked up on the notion of peer pressure, addressing it as coercion in *Lee v. Weisman,* 505 U.S. 577, 592 (1992).

[69] *Mergens*, 496 U.S. at 249–52.

[70] *Id.* at 278.

[71] *Id.* at 249–52.

[72] *Id.* at 252–53.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 258 (Kennedy, J., concurring).

[76] *Id.* at 258, 260–62 (Kennedy, J., concurring).

[77] *Id.* at 263 (Marshall, J., concurring).

lieved that school officials needed to take special care to avoid creating even the appearance of endorsing the goals of prayer clubs, he offered suggestions on how educators could sidestep such situations.

Arguing that Congress intended to create a narrower forum for student clubs, Justice Stephens' dissent would have rejected the EAA as unconstitutional without even reaching the Establishment Clause question.[78] He would have invalidated the law, contending that the high school setting in *Mergens* differed significantly from the higher education context in *Widmar*, and that the Act resulted in a "sweeping intrusion by the Federal Government into the operation of our public schools."[79]

Because only four Justices agreed that the Equal Access Act passed Establishment Clause analysis, the Supreme Court left the door open to more litigation in a line of cases that treat religious expression as a hybrid that protects the rights of religious groups to express their opinions as a form of free speech.[80]

1. Post-Mergens

a. K–12 religious clubs.

A case with a lengthy procedural history arose in Washington before *Mergens* reached the Supreme Court but was ultimately resolved in favor of students four years after the Justices upheld the EAA. After a federal trial court[81] and the Ninth Circuit[82] rejected student attempts to create a Christian prayer club, the Supreme Court summarily vacated in their favor.[83] Following another trial court order in favor of board officials who refused to allow students to form the club,[84] the Ninth Circuit ultimately reversed in the students' favor.[85] The court held that insofar as the EAA preempts state law, officials could not forbid a prayer club from meeting in one of the district's high schools.[86] The court further explained that a

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[78] *Id.* at 270 (Stevens, J., dissenting).

[79] *Id.* at 291.

[80] *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); *see also* Travis v. Owego–Apalachin Sch. Dist., 927 F.2d 688 (2d Cir. 1991) (affirming that once a board opened its facilities, it could not deny access to a pro-life pregnancy counseling organization).

[81] Garnett v. Renton Sch. Dist. No. 403, 675 F. Supp. 1268 (W.D. Wash. 1987).

[82] Garnett v. Renton Sch. Dist. No. 403, 865 F.2d 1121 (9th Cir. 1989), opinion amended and superseded by 874 F.2d 608 (9th Cir. 1989). For a commentary on this case at this early stage, see, Lawrence F. Rossow, *Equal Access Act:* Garnett v. Renton School District No. 403, 54 EDUC. L. REP. 391 (1989).

[83] Garnett v. Renton Sch. Dist. No. 403, 496 U.S. 914 (1990).

[84] Garnett v. Renton Sch. Dist. No. 403, 772 F. Supp. 531 (W.D. Wash. 1991).

[85] Garnett v. Renton Sch. Dist. No. 403, 987 F.2d 641 (9th Cir. 1993), *cert. denied*, 510 U.S. 819 (1993), 21 F.3d 1113 (9th Cir. 1994), on remand, 1994 WL 555397 (W.D. Wash. 1994) (granting declaratory judgment and awarding attorney fees to the plaintiffs).

[86] For commentaries on the tension between federal and state law in this area, see, e.g., Eugene C. Bjorklun, *The Equal Access Act and State Constitutions: The Final Chapter?* 86 EDUC. L.

provision in the EAA stipulating that it not be construed as requiring school officials to sanction otherwise unlawful meetings did not allow them to exclude religious groups on the basis that use of school facilities by such clubs violated the state constitution.

Circuit courts have extended the scope of the Equal Access Act. For example, the Second Circuit allowed students to select leaders who complied with their club's religious standards.[87] A majority of the court agreed that Club bylaws could require the President, Vice President, and Music Coordinator to accept Jesus Christ as Savior because these officers were expected to lead Christian prayers and devotions while safeguarding the "spiritual content" of the meetings.[88] However, a divided court, with one dissent, affirmed that the requirement could not be applied to the Club's Secretary and Activities Coordinator since their duties had little, if anything, to do with religion. Other circuits permitted clubs to meet during lunchtime[89] and during a morning activity period at which attendance was taken;[90] to enjoy access to funding and fund-raising activities, a yearbook, public address system, bulletin board, school supplies, school vehicles, and audio-visual equipment;[91] and to broadcast a video promoting a club during morning announcements.[92]

In a case from California, the Ninth Circuit initially upheld a school board's refusal to recognize a religious club in light of its proposed requirement that voting members express their faith in the Bible and in Jesus Christ because officials feared that it violated the district's non-discrimination policies.[93] On further review, though, an en banc panel reversed in favor of the organizers.[94] The Ninth Circuit found that although the board did not violate either the Equal Access Act or the club's First Amendment rights by applying its non-discrimination policy to the disputed provision, a question of fact was present as to whether educators acted appropriately in refusing to grant the club an exemption from the policy based on its Christian character or the content of the speech of its

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REP. 1 (1993); Larry D. Bartlett, *The Equal Access Act v. State Constitutions: The Supremacy Clause Question*, 71 EDUC. L. REP. 983 (1992).

[87] Hsu v. Roslyn Union Free Sch. Dist., 85 F.3d 839 (2d Cir. 1996), *cert. denied*, 519 U.S. 1040 (1996). For a commentary on this case, see Charles J. Russo & Ralph D. Mawdsley, *Hsu v. Roslyn Union Free School District No. 3: An Update on the Rights of High School Students Under the Equal Access Act*, 114 EDUC. L. REP. 359 (1996).

[88] *Hsu*, 85 F.3d at 858.

[89] Ceniceros v. Bd. of Tr. of the San Diego Unified Sch. Dist., 106 F.3d 878 (9th Cir. 1997).

[90] Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211 (3d Cir. 2003).

[91] Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002), *cert. denied*, 540 U.S. 813 (2003).

[92] Krestan v. Deer Valley Unified Sch. Dist. No. 97, of Maricopa Cnty., 561 F. Supp. 2d 1078 (D. Ariz. 2008).

[93] Truth v. Kent Sch. Dist., 499 F.3d 999 (9th Cir. 2007).

[94] Truth v. Kent Sch. Dist., 524 F.3d 957 (9th Cir. 2008).

members.[95]

On the other hand, at least one court rejected the claim that a school board in Mississippi created a limited open forum designed to permit members of a religious club to make announcements involving prayers and Bible readings before classes on a school's public address system.[96] The court did permit voluntary student prayer before school to continue.

In an emerging case from Colorado, students sued their school board alleging that officials allowed them to gather informally for activities during specified home room periods, but forbade them from meeting to pray, sing religious songs, or engage in discussion.[97]

b. Gay-Straight and LGBT Clubs.

Students who sought to form clubs related to LGBT issues experienced mixed success under the Equal Access Act.[98] In the first of three related cases from Utah, high school students with a gay-positive perspective challenged a board policy denying them an opportunity to meet at school during non-instructional time and to have access to school facilities.[99] The federal trial court interpreted the policy as violating the group's EAA rights because it denied the students the chance to meet when another non-curriculum-related student group was permitted to do so.[100] The same court later remarked that insofar as the plaintiffs failed to demonstrate how the policy had a disparate impact on their viewpoint, it did not have to examine the actual motives of board members regarding their allegations.[101]

In the third case, the court reviewed the standards governing access to the limited forum that the board created for curriculum-related student clubs at the high school when a club sought to examine the impact, experience, and contributions of gays and lesbians in history and current events.[102] The court granted the club's request for a preliminary injunction because there was substantial likelihood of success on the merits of its First Amendment claim that the school official who was responsible

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[95] *Id.* at 974.

[96] Herdahl v. Pontotoc Cnty. Sch. Dist., 933 F. Supp. 582 (N.D. Miss. 1996).

[97] Windebank v. Academy Sch. Dist. #20, Case 1:14-cv-03025 (D. Colo., filed Nov. 7, 2014); the complaint is *available at* http://www.adfmedia.org/files/WindebankComplaint.pdf.

[98] For representative commentary in the growing body of literature on the evolving issues associated with LGBT clubs and similar groups, see, e.g., Todd A. De Mitchell & Richard Fossey, *Student Speech: School Boards, Gay/ Straight Alliances, and the Equal Access Act*, 2008 BYU EDUC. & L.J. 89 (2008); Carolyn Pratt, Note, *Protecting the Marketplace of Ideas in the Classroom: Why the Equal Access Act and the First Amendment Require the Recognition of Gay/ Straight Alliances in America's Public Schools*, 5 FIRST AMEND. L. REV. 370 (2007).

[99] East High Gay/Straight Alliance v. Bd. of Educ., 81 F. Supp. 2d 1166 (D. Utah 1999).

[100] *Id.*

[101] *Id.* at 1199–1205.

[102] East High Sch. Prism Club v. Seidel, 95 F. Supp. 2d 1239, 1240 (D. Utah 2000).

for evaluating its application misapplied the appropriate standards or added a new one.[103] Further, the Eighth Circuit,[104] along with federal trial courts in California,[105] Florida,[106] Indiana,[107] and Kentucky,[108] agreed that educational officials could not deny Gay/Straight Alliance clubs the opportunity to use school facilities under the EAA.

On the other hand, a federal trial court in Texas upheld a board's rejection of a gay-straight student association's requests that members be permitted to post and distribute fliers about it at a high school, to use the school's public address system for announcements, and to be recognized as a student group with the right to meet on campus.[109] The court maintained that educators' investigation of the association's Web site, which led to the discovery of sexually explicit postings, was reasonable and nondiscriminatory pursuant to the First Amendment.[110] Insofar as the Equal Access Act includes exceptions for avoiding disruption and preserving order in schools to protect student well-being, the court thought educators acted lawfully in denying the association's requests.[111] In addition, a Gay/Straight Alliance Club in Colorado failed to procure a preliminary injunction ordering officials to recognize the group.[112] In an unreported opinion, the federal trial court concluded that the school's policy of officially recognizing only "curricular" clubs did not violate the Equal Access Act.[113]

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[103] *Id.* at 1251.

[104] Straights and Gays for Equal. v. Osseo Area Sch.Dist. (No. 279), 540 F.3d 911 (8th Cir. 2008).

[105] Colin ex rel. Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135 (C.D. Cal. 2004).

[106] Gay–Straight Alliance of Yulee High Sch. v. Sch. Bd. of Nassau Cnty., 602 F. Supp. 2d 1233 (M.D. Fla. 2009); Gonzalez v. Sch. Bd. of Okeechobee Cnty., 571 F. Supp. 2d 1257 (S.D. Fla. 2008). For the history of this case, see Gay–Straight Alliance of Okeechobee High Sch. v. Sch. Bd. of Okeechobee Cnty., 483 F. Supp. 2d 1224 (S.D. Fla. 2007).

[107] Franklin Cent. Gay/Straight Alliance v. Franklin Twp. Cmty. Sch. Corp., No. IP01-1518 C-M/S, 2002 WL 32097530 (S.D. Ind. Aug. 30), *reconsideration denied*, 2002 WL 31921332 (S.D. Ind. Dec. 26, 2002).

[108] Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd Cnty., Ky., 258 F. Supp.2d 667 (E.D. Ky. 2003). This case spawned litigation in which the student sought to be excluded from diversity training that focused on diversity and equity issues including discussion of anti-gay harassment. *See* Morrison v. Bd. of Educ. of Boyd Cnty., 521 F.3d 602 (6th Cir. 2008), *cert. denied*, 555 U.S. 1171 (2009) (affirmed a grant of summary judgment in favor of the board because the student failed to demonstrate how a favorable judgment might have redressed what it described as his purported injury and that he lacked standing to claim that the policy chilled his right to free speech).

[109] Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp.2d 550, 571–72 (N.D. Tex. 2004). For a commentary on this case, see Sarah Orman, Note, *"Being Gay in Lubbock": The Equal Access Act in Caudillo*, 17 HASTINGS WOMEN'S L.J. 227 (2006).

[110] Caudillo *ex rel.* Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550, 561 (N.D. Tex. 2004).

[111] *Id.* at 570.

[112] Palmer High Sch. Gay/Straight Alliance v. Colo. Springs Sch. Dist. No. 11, 2005 WL 3244049, *5 (D. Colo. 2005).

[113] For a conceptually related case, *see* Hatcher *ex rel.* Hatcher v. DeSoto Cnty. Sch. Dist.

IV. *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*

A. History

Even in conceding that the underlying dispute was set in higher education, the status of the Equal Access Act may be in some doubt in light of the Supreme Court's analysis in *Christian Legal Society v. Martinez* ("Martinez").[114] At issue in *Martinez* was a disagreement that occurred on the campus of Hastings College of the Law, an institution in the University of California system, over its policy governing official recognition to on-campus student groups. Recognized student organizations ("RSOs") at Hastings are granted access to the use of the institutional name and logo along with access to funds, facilities, and channels of communication. In return, RSOs must comply with the college's nondiscrimination policy, which, consistent with California state law, forbids discrimination on an array of criteria including religion and sexual orientation. Hastings officials interpreted this policy as requiring RSOs to accept "all comers," meaning that they must allow all students to join and seek leadership positions regardless of their status or beliefs, even when these might be inconsistent with organizational goals.

The dispute giving rise to the litigation in *Martinez* arose at the start of the 2004–05 academic year when the Hastings campus branch of the Christian Legal Society elected to affiliate with the national group. In affiliating with the national organization, the campus group adopted its bylaws including the requirement that members and officers sign a "Statement of Faith" directing members to comply with its principles such as the belief that sexual activity should not occur outside of marriage between a man and a woman, whether heterosexual or homosexual. The national Society interprets its bylaws as excluding individuals from affiliation with it for engaging in "unrepentant homosexual conduct" or for having religious convictions different from those specified in its Statement of Faith.

Hastings officials rejected the Society's application to acquire status

Bd. of Educ., 939 F. Supp. 2d 1232 (M.D. Fla. 2013), *aff'd* ex rel. Hatcher v. Fusco, 570 F. App'x 874 (11th Cir. 2014) (rejecting a principal's motion for summary judgment where a student filed suit after she was denied permission to organize a rally and participate in the "National Day of Silence" at her high school to call attention to harms associated with bullying and harassment of those who are lesbian, gay, bisexual, and transgender where issues of fact remained over whether he violated her rights, but rejecting the student's speech claims against the board and the principal alleging that he violated her right to equal protection absent evidence she was treated differently than others who were similarly situated).

[114] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661 (2010). For a much more detailed analysis commentary on this case, see Charles J. Russo & William E. Thro, *Another Nail in the Coffin of Religious Freedom? Christian Legal Society v. Martinez*, 12 EDUC. L. J. 20 (2011).

as an RSO because its organizational bylaws differed from the school's "all-comers" policy by excluding students based on religion and sexual orientation. Officials thus prohibited the Society from meeting on campus and using school resources. The Society sought to enjoin enforcement of Hastings' policy, alleging that compliance would have violated its rights to speech, association, and religion.

In refusing to enjoin the policy, a federal trial court in California, decreed that the "all-comers" condition was a reasonable, viewpoint neutral policy that neither impermissibly impaired the Society's right to expressive association nor was it unacceptable because it did not require the group to admit members or limit speech.[115] The court posited that, if anything, the policy merely placed conditions on the use of school facilities and funds.[116]

On appeal, the Ninth Circuit affirmed that the "all-comers" policy was reasonable and viewpoint neutral.[117] Because the Ninth Circuit's judgment in *Martinez* directly conflicted with a case from Indiana in which the Seventh Circuit, in *Christian Legal Society v. Walker*,[118] upheld the rights of another campus branch of the Society to apply its membership rules, the Supreme Court agreed to hear an appeal to resolve this split.

B. Supreme Court Analyses

1. Majority

In a five-to-four judgment, the Supreme Court upheld the constitutionality of the "all-comers" policy.[119] Writing for the majority, Justice Ginsburg was joined by Justices Stevens, Kennedy, Breyer, and Sotomayor. The majority initially seemed reluctant to deny access to campus facilities to student groups based on their viewpoints.[120] The Court acknowledged that it faced a novel question and framed the issue as whether "a public law school [may] condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership

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[115] Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *13–14 (N.D. Cal. Apr. 17, 2006), *aff'd sub nom.* Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez, 561 U.S. 661 (2010).

[116] *Id.* at 51.

[117] Christian Legal Soc'y v. Kane, 319 Fed. Appx, 645, 646 (9th Cir. 2009).

[118] Christian Legal Soc'y v. Walker, 453 F.3d 853 (7th Cir. 2006). For a commentary on this case, *see* Charles J. Russo & William E. Thro, *The Constitutional Rights of Politically Incorrect Groups: Christian Legal Society v. Walker as an Illustration*, 33 J.C. & U.L. 361 (2007).

[119] Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez, 561 U.S. 661 (2010).

[120] *Id.* at 667.

and leadership to all students?"[121]

Treating access to facilities as a subsidy, the Supreme Court began its analysis by combining the Society's freedom of speech and association claims in light of the Court's limited public forum jurisprudence.[122] In this regard, the Court failed to provide sufficient detail for those who were less familiar with this area of the law.

In reviewing First Amendment claims, the Justices have identified three different types of forums: traditional public forums, non-public forums, and limited open forums.[123] The government's regulatory power is most restricted in traditional public forums such as parks, streets, and sidewalks;[124] but this analysis was inapplicable in *Martinez*. Further, the Court found that the non-public forum doctrine, the second forum, typically applicable in classrooms that are "not by tradition or designation a forum for public communication," was equally inapplicable.[125]

As to the third forum, akin to the limited open forum under the Equal Access Act, the Supreme Court held that the appropriate standard was that of a "limited public forum," property that the state, *qua* Hastings, opened for public use as a place for expressive activity.[126] The Court recognized that officials at public institutions can create such fora either by express policy or practice.[127] Following its review of cases in which the majority applied this analysis, the Court interpreted the "all-comers" policy as reasonable for two reasons: first, the Justices were of the view that insofar as they ordinarily granted deference to educational leaders, school officials had the authority to establish such a policy.[128] Second, the Court decided that the reasons Hastings officials advanced for adopting the policy, namely providing leadership opportunities for students, forbidding discrimination based on status, and bringing individuals of all types together, were constitutional as legitimate and non-discriminatory.[129]

The Supreme Court determined that the policy was reasonable because of the off-campus alternative channels that were available to the Society after it lost its status as an RSO.[130] The Court next rejected the

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[121] *Id.* at 668.

[122] *Id.* at 679.

[123] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[124] *Id.*; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (discussing forum analysis).

[125] *Perry Educ. Ass'n,* 460 U.S. at 46.

[126] *Martinez*, 561 U.S. 690–91.

[127] *Id.* at 699.

[128] *Id.* at 685–88.

[129] *Id.* at 688–90.

[130] *Id.* at 665.

Society's concerns "as more hypothetical than real" [131] that if it had to comply with the policy there would be no diversity of perspectives on campus and that individuals who were hostile to it could infiltrate its ranks in order to subvert its mission. The majority held that insofar as the policy allowed clubs to condition eligibility for membership and leadership positions on such qualifications as attendance at meetings, dues payment, and other neutral criteria, the Society's concerns were unfounded.[132]

Having upheld the "all-comers" policy as constitutional, the Court remanded *Martinez* for further consideration. The Justices indicated that insofar as the lower courts failed to address whether Hastings officials selectively enforced the "all-comers" policy, the Ninth Circuit had to consider the extent to which the Society's argument may have still been viable.[133]

2. Concurrences

Justices Stevens and Kennedy concurred separately. Justice Stevens authored a brief opinion in which he sought to rebut Justice Alito's dissent.[134] He responded that while the Society had the right to limit membership off campus, the First Amendment does not require Hastings' policy to permit such limitations while granting the Society official recognition.[135]

Justice Kennedy agreed that law school officials and the Society stipulated that there was no evidence of viewpoint discrimination in the policy.[136] Still, he observed that the result may have been different had the Society been able to prove that the "all-comers" policy was designed or used to infiltrate its membership or challenge its leadership in an attempt to stifle its perspective, an issue that may arise in future litigation.[137]

3. Dissent

Justice Alito, joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas, dissented.[138] At the outset of his lengthy dissent, Justice Alito remarked that the Court imposed a significant restriction on reli-

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131 *Id.* at 692.
132 *Id.* at 863–64.
133 *Id.* at 697–98.
134 *Id.* at 698 (Stevens, J., concurring).
135 *Id.* at 698–703 (Stevens, J., concurring).
136 *Id.* at 703 (Kennedy, J., concurring).
137 *Id.* at 706 (Kennedy, J., concurring).
138 *Id.* at 706 (Alito, J., dissenting).

gious freedom, especially since law school officials had not relied on the "all-comers" policy until the Christian group initiated its claims.[139] Alito added that the policy unreasonably infringed on the rights of those active in the organization because it placed a substantial burden on *their* religious free exercise rights but no other group in a limited open forum that was supposed to be viewpoint neutral.[140]

C. Remand

On remand, the Ninth Circuit rejected Society's remaining claims that Hastings officials violated their right to religious freedom.[141] The court refused to permit the case to proceed, because its leaders failed to preserve their argument that university officials selectively applied the policy.[142] The court thus contended that the Society was not entitled to "a second bite at the appellate apple."[143]

D. Reflections

Post *Martinez,* and notwithstanding the Equal Access Act and *Mergens,* the status of religious speech and expression—not to mention association— in K–12 or higher public education institutions is at grave risk.[144] As demonstrated by *Martinez*, it is increasingly difficult for faith-based groups on campuses and other environments that are hostile to ideas that differ from perceived politically correct norms. This is particularly true when dealing with matters involving human sexuality as organizations seek to preserve their membership rules and values grounded in their sincerely held religious beliefs while in the "marketplace of ideas."[145]

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[139] *Id.* at 711–12 (Alito, J., dissenting).

[140] *Id.* at 720 (Alito, J., dissenting).

[141] Christian Legal Soc'y v. Wu, 626 F.3d 483, 488 (9th Cir. 2010).

[142] *Id.*

[143] *Id.* (quoting Kesselring v. F/T Arctic Hero, 95 F.3d 23, 24 (9th Cir. 1996) (per curiam)).

[144] Parts of this analysis plays off of Charles J. Russo, *Religious Freedom in the United States: "When you Come to the Fork in the Road Take It,"* 38 U. DAYTON L. REV. 363 (2013).

[145] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831–32 (1995) (applying viewpoint neutrality in holding that a policy permitting university officials to authorize payment for printing the publications of student organizations applied to a Christian journal, because its speech was protected by the First Amendment:

> The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are si-

It is curious that leaders in public educational institutions who value diversity in terms of such privileged personal characteristics as race, [146] gender, ethnicity, and sexual orientation, are increasingly intolerant of other types of ideological diversity. This intolerance is often led by "many on the political left . . . [who] have taken to calling themselves and their causes 'progressive,'"[147] purportedly operating under the banner of openness to all. Yet, many of these self-proclaimed "progressives" are adamantly closed to views that do not comport with prevailing politically correct flavors of the day. These individuals essentially undercut the very diversity of opinion they supposedly speak of by "casting a pall of orthodoxy"[148] in schools and on campuses.

Some critics of a Christian[149] worldview[150] often demonize or ridicule those with whom they differ.[151] Such an approach is consistent with the

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lenced is simply wrong; the debate is skewed in multiple ways. *Id.*).

[146] *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (declaring that insofar as diversity is a compelling governmental interest, officials at the University of Michigan Law School could use race as a factor in admissions decisions pursuant to its race conscious admissions policy since the criteria were sufficiently narrowly tailored to achieve the compelling state interest of having a racially diverse student body); for a commentary on this case, *see* William E. Thro & Charles J. Russo, *The Constitutionality of Racial Preferences in K–12 Education After Grutter and Gratz*, 211 EDUC. L. REP. 537 (2006). However, in Fisher v. Univ. of Tex. at Austin, the Supreme Court invalidated a race conscious plan as insufficiently narrowly tailored, 133 S. Ct. 2411 (2013), but the Fifth Circuit upheld it on remand in Fisher v. Univ. of Tex., 758 F.3d 633 (5th Cir. 2014), meaning that the case may well be headed back to the High Court. For a commentary on the Supreme Court's judgment, see Charles J. Russo. *Fisher v. University of Texas*: *The Beginning of the End or the End of the Beginning of Race Conscious Admissions Plans in Higher Education in the United States?* 14 EDUC. L. J. 284 (2013).

[147] Michael Allan Wolf, *Looking Backward: Richard Epstein Ponders The "Progressive" Peril*, 105 MICH. L. REV. 1233, 1245, n.50 (2007).

[148] Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967).

[149] *See, e.g.*, CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING (2007) (while examining other faiths, singling out Judeo-Christian beliefs as the primary targets of his vindictiveness); RICHARD DAWKINS, THE GOD DELUSION (2005).

[150] The entertainer Elton John displayed evidence of growing intolerance for religion in an interview: "I think religion has always tried to turn hatred towards gay people. From my point of view, I would ban religion completely . . . Organized religion doesn't seem to work. It turns people into really hateful lemmings and it's not really compassionate." *Elton John says religion leads to homophobia*, GLOBE AND MAIL (Toronto) R2, *available at* 2006 WLNR 19665613.

[151] The Catholic Church is by no means alone in being singled out for criticism for its beliefs. For instance, the Southern Poverty Law Center has apparently demonstrated broadly anti-Christian attitudes without regard to particular denominations within Christianity in light of its difference of opinion with regard to a variety of issues. *See* Matt Barber, *Bloody Hands: The Southern Poverty Law Center*, TOWNHALL.COM (Feb. 11, 2013), http://townhall.com/columnists/mattbarber/2013/02/11/bloody-hands-the-southern-poverty-law-center-n1509321/page/full/11, 2013, ("'The Southern Poverty Law Center has a long history of maliciously slandering pro-family groups with language and labels that incite hatred and undermine civil discourse,' said Mat Staver, founder and chairman of Liberty Counsel."). *See also* Katie Yoder, *Networks Ignore FRC Shooter's Use of SPLC 'Hate Map,'* MEDIA RESEARCH CENTER (Feb. 7, 2013), http://www.mrc.org/articles/networks-ignore-frc-shooters-use-splc-hate-map (detailing how the mainstream media failed to report that the map a man used to locate the headquarters of the Family Research Center in Washington, D.C., where he shot and injured a guard, was created at the

approach promoted by Saul Alinsky, intellectual patron of President Barack Obama,[152] whose administration has not been friendly to religious freedom.[153] Mr. Alinsky explicitly described his Rule 5 as "Ridicule is man's most potent weapon,"[154] promiscuously using such labels as racist and homophobe rather than engage in rational discourse. These critics apparently fail to recognize that those with whom they disagree are not necessarily evil, but ought to be accorded the same respect and civil treatment they expect for themselves. In like manner, proponents of dominant perspectives ought not to be permitted to preclude others from being allowed to engage in peaceful expressions[155] of their differing points of view.[156] In this regard, the Supreme Court has, as noted, protected religious expression as a subset of First Amendment free speech,[157] including speech that can be viewed as offensive.[158]

SPLC; the map also identified the locations of the offices of groups with which the SPLC disagreed); Charlotte Allen, *King of Fearmongers: Morris Dees and the Southern Poverty Law Center. Scaring donors since 1971*, THE WEEKLY STANDARD, April 15, 2013, at 18.

[152] For a discussion of the link between Obama and Alinsky, *see* Peter Dreier, *Organizing in the Obama Era: A Progressive Moment or a New Progressive Era?* 42 J. MARSHALL L. REV. 685 (2009).

[153] Two cases in particular highlight the antipathy of the Obama administration to religious freedom. In the first, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunities Comm'n*, 132 S. Ct. 694 (2012), the Court unanimously reversed an order of Sixth Circuit and EEOC, both supported by the Obama administration, that the EEOC, not religious officials, had the right to decide who qualifies as a minister; for a commentary on this case focusing on its application to higher education, see Charles J. Russo & Paul E. McGreal, *Religious Freedom in American Catholic Higher Education*, 39 RELIGION & EDUC. 116 (2012). In the second case, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) the Justices rebuffed the administration's attempt to impose the contraceptives mandate in the Affordable Health Care Act, commonly known as Obama Care, to a for-profit closely held corporation, reasoning that it was unconstitutional as a substantial burden on the owners' free exercise of religion.

[154] SAUL D. ALINSKY, RULES FOR RADICALS: A PRACTICAL PRIMER FOR REALISTIC RADICALS 128 (1971).

[155] Certainly, absent a reasonable forecast of material and/or substantial disruption, language cited in the EAA, the fact that opponents disagree with an organization views is an insufficient basis on which to restrict groups that may be unpopular. *See, e.g.*, East High Gay/Straight Alliance v. Bd. of Educ., 81 F. Supp.2d 1166, 1197–98 (D. Utah 1999); Straights and Gays for Equality v. Osseo Area Schs., 540 F.3d 911, 915–16 (8th Cir. 2008) (allowing clubs consisting of students who are straight and gay to meet in public schools during non-instructional hours).

[156] Lee v. Weisman, 505 U.S. 577, 637–38 (1992) (Scalia, J., dissenting) (internal citations omitted), disagreeing with

> [t]he Court's notion that a student who simply *sits* in 'respectful silence' during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous. . . . [S]urely 'our social conventions,' have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence. . . . It is fanciful enough to say that 'a reasonable dissenter,' standing head erect in a class of bowed heads, 'could believe that the group exercise signified her own participation or approval of it.' It is beyond the absurd to say that she could entertain such a belief while pointedly declining to rise.

[157] *See* Widmar v. Vincent, 454 U.S. 263, 277 (1981); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 845 (1995); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001); for a related

In protecting peaceful speech, such as pro-life demonstrators[159] who typically seek to protect the sanctity of life based on their religious beliefs,[160] the Supreme Court has recognized that neither individuals nor groups may be discriminated against simply because others disagree with the content of their messages. If anything, consistent with Justice Scalia's dissent in *Lee*,[161] there are no better places than educational settings, whether K–12 or higher education, as the very places purportedly open to the pursuit of knowledge, to afford all sides opportunities to speak freely and without recrimination. Such settings provide genuine diversity of opinion in pursuit of knowledge and understanding.

Of course, matters dealing with group identity and leadership qualifications present a different issue that ought to provide organizational leaders with freedom and self-determination so that they can operate as they deem fit, as long as they are acting consistent with their deeply held religious beliefs as in *Martinez*. Yet, recent examples of campus intolerance toward religion abound as people of faith seek to preserve their identities in increasingly hostile environments. For instance, some religious institutions face the loss of accreditation if they fail to toe the line of progressive demands.[162] The California state system[163] and individual

commentary, *see* Thomas B. McKernan III, *Religious Clubs and Non-secondary Public Schools: Expanding the Scope of The Equal Access Act After Good News Club*, 10 RUTGERS J. L. & RELIGION 14 (2009).

[158] *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207 (2011) (affirming that insofar as the speech of church members who picketed near the funeral of a soldier who was killed in Iraq based on their desire to communicate their belief "that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military" was of public concern, it was entitled to special protection under the First Amendment).

[159] *See, e.g.*, Madsen v. Women's Health Care Ctr., 512 U.S. 753, 754 (1994) (invalidating provisions of an injunction establishing a 36–foot buffer zone on private property, banning observable images, establishing a 300 foot no-approach zone around an abortion clinic, and establishing 300–foot buffer zone around staff residences burdened peaceful speech more than necessary to serve governmental interests).

[160] In re U.S. Catholic Conference, 885 F.2d 1020 (2d Cir. 1989) (affirming that a pro-abortion group lacked standing to challenge the tax exempt status of the Roman Catholic Church based on its pro-life teachings).

[161] *Lee*, 505 U.S. at 631–46.

[162] *See, e.g.*, Mary Moore, *Accreditation board gives Gordon College a year to review policy on homosexuality*, BOSTON BUS. J., Oct. 26, 2014, *available at* 2014 WLNR 26828093. A similar situation occurred in British Columbia, Canada, involving Trinity Western Law School, Christian institution that was denied accreditation and may be unable to open on time due to its stance on same sex unions. *See, e.g.*, Ian Mulgrew, *Province rethinking Trinity Western law school,* VANCOUVER SUN, Nov. 20, 2014 at A 11, *available at* 2014 WLNR 32621829. Initially, the school had been granted accreditation. Andrea Woo, *Trinity Western law school approved in B.C. despite gay-rights dispute*, GLOBE AND MAIL (Toronto), April 11, 2014 (pagination unavailable online), *available at* 2014 WLNR 9840784.

[163] *See, e.g.,* Andrew Walker, *Intervaristy Christian Ministry in Trouble for Acting Christian*, (Sept. 9, 2014), http://www.firstthings.com/web-exclusives/2014/09/intervarsity-christian-ministry-in-trouble-for-acting-christian (reporting that the California State University System is withdrawing official recognition of the InterVarsity Christian Fellowship at its 23 campuses because

institutions of higher education threaten to discriminate against Christian groups due to their religious beliefs. At Tufts University, opponents attempted to deprive a Christian group of its campus status because its rules require group leaders to adhere to "basic biblical truths of Christianity" and reject gay lifestyles.[164] While university officials subsequently reversed course and allowed faith-based student groups to retain the religious requirements for their leaders,[165] similar controversies are likely to continue. Months earlier, fourteen out of thirty Christian groups at Vanderbilt University left campus over the same issue,[166] prompting members of Congress to ask officials to exempt faith-based organizations from the institutional "all-comers policy" on the basis that it discriminates against religious beliefs.[167] To date, the legislatures in Ohio,[168] Tennessee,[169] and Virginia[170] have taken the lead in protecting religious freedom by banning discrimination by officials in public institutions against faith-based student organizations.[171]

The intolerance fomented on public campuses is consistent with Justice Ginsburg's[172] opinion in *Martinez*, reflective of the larger issue, as

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the organization limits leadership roles to those who affirm their belief in its traditional Christian Doctrinal Basis, *available at* http://intervarsity.org/about/our/our-doctrinal-basis). *See also* Sarah Eekhoff Zylstra, *Will InterVarsity Losing Cal State Standoff Be Tipping Point for Campus Ministries Nationwide? America's largest university system withdraws recognition from 23 student groups for not allowing non-Christian leaders*, CHRISTIANITY TODAY (Sept. 8, 2014), http://www.christianitytoday.com/ct/2014/september-web-only/will-intervarsity-losing-cal-state-standoff-be-tipping-poin.html?utm_source=ctdirect-html&utm_medium=Newsletter&utm_term=9504661&utm_content=299683109&utm_campaign=2013.

[164] *See* Katherine Landergan, *Group of Evangelicals at Tufts Fights a 'De-recognizing' Effort*, THE BOSTON GLOBE, Oct. 27, 2012, *available at* 2012 WLNR 22802278 (reporting on efforts to de-recognize an evangelical student group because opponents objected to its religious views).

[165] Peter Schworm, *Tufts Shifts Course, Grants More Leeway to Student Religious Groups*, THE BOSTON GLOBE, Dec. 7, 2012, *available at* 2012 WLNR 26033344.

[166] Andy Sher, *Social Issues Stole the Spotlight This Year in the Tennessee Legislature*, CHATTANOOGA TIMES, May 6, 2012, *available at* 2012 WLNR 9587648.

[167] Elizabeth Bewley, *Members of Congress Target Vanderbilt Policy*, TENNESSEAN, May 8, 2012, *available at* 2012 WLNR 9663350 (noting that the legislature of Virginia enacted a law designed to ban all-comers policies, allowing campus groups to grant membership only to those who share their beliefs and missions).

[168] OHIO REV. CODE ANN. § 3345.023 (2011) (religious student group benefits).

[169] TENN. CODE ANN. § 49-6-1805 (2014) (religious student groups; access to school facilities).

[170] VA. CODE ANN. § 23-9.2:12 (2013) (student organizations; rights and recognition). *See also Va. Passes Ban on Campus 'All-Comers' Policy*, CBN NEWS (Feb. 26, 2013), http://www.cbn.com/cbnnews/us/2013/February/Va-Passes-Ban-on-Campus-All-Comers-Policy/ (noting that Virginia's legislature enacted a law designed to ban all-comers policies, allowing campus groups to grant membership only to those who share their beliefs and missions).

[171] For a news story on this issue, see Harry Painter, *The Supreme Court endangered Christian student groups, but some states are coming to the rescue*, POPE CENTER (Oct. 1, 2014), http://www.popecenter.org/commentaries/article.html?id =3077#.VFVEYfnF93U.

[172] For a more detailed critique of Ginsburg's position, see GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE (2012) (detailing how the cul-

she blithely ignored the fact that more than sixty campus RSOs existed at Hastings, many of which "were and are dedicated to expressing a message."[173] Yet, as pointed out in Justice Alito's dissent, Justice Ginsburg joined Hastings officials in misrepresenting the position of the Society, claiming that all RSOs were obligated to accept all comers. Yet, CLS was "the only student group whose application for registration has ever been rejected."[174]

Equally disappointing was Justice Ginsburg's summary dismissal of CLS's fears that individuals hostile to its mission might engage in what was described as a hostile takeover. Ginsburg wrote that this possibility was "more hypothetical than real,"[175] because no such efforts had been made to date with religious groups.[176] In allowing a Christian organization to be singled out for ostracism, Justice Ginsburg and the Court did not even deem it appropriate to consider the fears of the group that was subject to a rule that was not imposed on any other RSO, or perhaps suggest that opponents were free to form their own organizations in which they were free to establish their own membership guidelines.

At the same time, an argument can be made that seeking to require religious groups, Christian or other, to accept possible leaders who do not share their values may well be a form of compelled speech[177] (and association) by allowing a lower court ruling hostile to a Christian photographer to stand. Such anomalous situations can occur by obligating organizations to accept individuals with whom they have little or nothing in common for no logical purpose other than meeting some vague notion of being open to "all comers." Where such a policy is selectively applied, the constitutional problems are compounded. In this regard, how much sense would it make to direct members of a college Democrat Club to have to elect a Republican as its leader or to obligate an LGBT group to have a neo-Nazi at its helm? Clearly, because it would make no sense to dictate such an outcome, why impose one on Christian groups?

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ture of censorship present on most campuses has resulted in the failure of institutions of higher learning to promote critical thinking in students).

[173] *Martinez*, 130 S. Ct. at 706 (Alito, J., dissenting).

[174] *Id.*

[175] *Id.* at 692.

[176] Such takeovers have occurred, however, in non-religious group cases such as the Young Republicans taking over the Young Democrats. *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations,* 118 HARV. L. REV. 2882, 2885 n.20 (2005).

[177] The Supreme Court refused to intervene in a case alleging compelled speech n the brief filed by the petitioners in Elane Photography v. Willock, 309 P.3d. 53, 80 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) (requiring Christian photographers to offer their services to a lesbian couple entering a same sex union). Elane Photography, LLC'S Petition for Writ of Certiorari Pursuant to Rule 12-502 NMRA , 2012 WL 3923883 at *5 (N.M.) (Appellate Brief).

What the courts have thus far refused to address, let alone answer, is why Christian groups must be singled out to ignore their deeply held religious beliefs under the guise of "tolerance" and "openness" when, in practice, this turns out to be a one-sided request? Why is it that so-called progressives are unwilling to allow those with whom they disagree to "live and let live"?

In an example full of unintentional irony, the concurring opinion in a judgment directing a Christian photographer to take pictures at a same sex union wrote that

> the [plaintiffs] have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do . . . In short, I would say to the Huguenins, with the utmost respect: it is the price of citizenship.[178]

Where is this very same tolerance for Christians?[179] While conceding that this case was not directly involving schools, why are individuals whose values differ from those of Christians seeking forced accommodations when undoubtedly others would be able to offer their professional services? More to the point, will school officials soon be treating religious clubs and students as pariahs if they do not pledge allegiance to the politically correct ideologies of the day? Can it be that the free exercise of religion is doomed in public educational institutions? Would it not be better for those opposed to Christian groups to form their own clubs in order to share their values or join in and participate peacefully rather than seek to disrupt?

This article neither calls for nor supports the notion that religious groups should be permitted to engage in self-segregating practices by limiting membership to those who are like-minded. Certainly, in an open society, all must have the option of joining the organizations of their choice even if they are ineligible to serve as leaders. Yet, it is unclear why campus officials and progressives seek to bludgeon religious groups into submission by seeking *Martinez* to prevent them from engaging in

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[178] *Id.* at 80 (Bosson, J., concurring).

[179] While conceding that such protesters represent a fringe minority and constitute particularly egregious examples of disrespect for Christian, specifically Roman Catholic, beliefs and sensitivities, it is still important to note that the following incident occurred. On December 10, 1989 members of the AIDS-awareness group ACT-UP chained themselves to pews in St. Patrick's Cathedral and shouted down Cardinal O'Connor at a Sunday Mass before others pretending to "receive" the Eucharist spat it out, desecrating the Sacrament by stepping on the consecrated hosts. Mike Dorning, *Religion, Gays, Politics Turn Parade Into Battle*, CHI. TRIB. 1 (Mar. 15, 1993), *available at* 1993 WLNR 4062014.

self-determination when selecting leaders.

The Second Circuit, in an Equal Access Act involving high school students in New York discussed earlier,[180] although arguably of dubious precedent post-*Martinez*, offered cogent food for thought. The court ruled that high school students retained the right to select leaders who complied with their club's religious standards, thereby respecting the members' right to religious freedom. Moreover, the court's reasoning implies/suggests that those who disagreed with the group's beliefs were free to form their own organization or clubs. It is perplexing to say that such thinking is not taking place in educational institutions of higher learning. As cynical as it may seem, it could be that such opponents are more concerned with their desire to assert their will over those with whom they disagree rather than actually becoming active members of organizations with which they share little in common.

V. CONCLUSION

It is imperative for educational institutions in the United States to remain open to the notion of a world in which all points of view are welcome. Restricting the presence of competing ideals even where individuals and groups maintain respectful differences, disagreeing with one another without being disagreeable, contradicts the very nature of education in a free and democratic society. It is thus unclear why progressive proponents of the school and campus orthodoxies of the day should be granted free rein to shut down those with whom they disagree, more often than not using a heckler's veto[181] to drown out or exclude religious perspectives that have long been welcomed and granted equal access as an essential voice in the American public square.

As former President Dwight Eisenhower presciently observed, we must remain aware of differing points of view: "the virtues of our system will never be fully appreciated by us and our children unless we understand the essentials of opposing ideologies."[182] Yet, as American educational institutions face the future, particularly after *Martinez*, the outlook for religious freedom could be less than bright if the unwillingness of some to respect the long and sincerely held religious beliefs of others grows into a general tend. If the United States is to remain true to its

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[180] *Hsu*, 85 F.3d at 839.

[181] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001) (Thomas, J., dissenting) (permitting a religious group to use public school facilities). Justice Thomas made this point in warning that the Court is unwilling "to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what . . . members of the audience might misperceive."

[182] TRAVIS BEAL JACOBS, EISENHOWER AT COLUMBIA 97 (2001).

founding principles enshrined in the Bill of Rights, then all interested in preserving the rights of believers to express their views openly in educational settings (and elsewhere) must step to the fore to allow people of faith to continue to live and let live in the public marketplace of ideas.