Articles

Amending *Christian Legal Society v. Martinez*: Protecting Expressive Association as an Independent Right in a Limited Public Forum

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Abstract

With limited acknowledgment of its dramatically different approach to expressive association, the Supreme Court in Christian Legal Society v. Martinez *upheld a public university's policy requiring all student organizations to give voting membership to all interested students, even if a student's beliefs conflicted with the expressive purpose of the organization. In concluding that this "all-comers" policy was both reasonable and viewpoint neutral, the Court analyzed a student organization's First Amendment expressive-association claim using the test for speech restrictions on government property constituting a limited public forum. This Article argues that the Court's merging of protections for speech and expressive association in a limited public forum is inadequate to protect associational rights that lie at the core of the First Amendment. After an introduction, Part II highlights the Court's prior expressive-association cases; Part III explores the ways in which* Martinez *departed from the approach of these cases; Part IV argues that the viewpoint neutrality test governing restrictions affecting speech in a limited public forum does not translate well as a means to safeguard associational rights, and proposes new tests for analyzing expressive association in a limited public forum; Part V contends that in a limited public forum expressive association should protect an organization's right to select members on the basis of voluntarily selected beliefs or conduct, but not based on immutable characteristics or status. This Article explores this status/belief distinction and addresses two opposing yet compelling criticisms of the distinction—that it does not sufficiently protect minority groups from discrimination, and, that it does not sufficiently protect expressive association.*

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("Hastings") desire to teach tolerance and foster communication among students with differing viewpoints seems like a laudable reason for creating an "all-comers policy."[4]

However, the reasoning employed by the majority in *Martinez* drastically altered the framework for analyzing expressive-association cases. First, and most importantly, the Court merged the expressive-association claim of the Christian Legal Society ("CLS") student organization with its speech claim, essentially negating independent protection for CLS's right to expressive association. The Court assessed the group's speech and expressive-association claims using the forum analysis applicable to cases involving speech restrictions on government property.[5] The Court held that a burden on a student organization's expressive association is constitutionally permissible if it is viewpoint neutral and reasonable in light of the purposes of the forum, using the test for speech claims in a limited public forum.[6] In doing so, the Court failed to appreciate that expressive association contains both speech and conduct elements that cannot be adequately safeguarded by applying the test applicable to speech rights alone.

Further, in analyzing whether Hastings's policy was reasonable, the Court gave Hastings added deference in defining its academic mission because the university provided student organizations with financial support and facilities.[7] The Court noted that CLS's ability to select members on the basis of belief would be constitutionally protected in society at large, but not when a university is lending the organization its

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[4] *Id.* at 2990 (noting that "the Law School reasonably adheres to the view that an all-comers policy, to the extent it brings together individuals with diverse backgrounds and beliefs, 'encourages tolerance, cooperation, and learning among students.'"). *But see* Alan E. Brownstein and Vikram D. Amar, *Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction between Debate Dampening and Debate Distorting State Action*, 38 HASTINGS CONST. L.Q. 505, 510 (2011) ("Does a policy that allows any group, formed around any set of ideas or activities, to exist—but also requires each such group to take all persons, even those who may vehemently disagree with those ideas or activities—make a lot of sense?").

[5] *Martinez*, 130 S. Ct. at 2975. Forum analysis determines the character of a forum affected by law in order to determine the free speech protections that attach. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 797 (1985) (holding that, before determining whether a speech regulation is permissible, the Court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic."). There are four major types of forums—the public forum, the designated public forum, the limited public forum, and the nonpublic forum—and different speech protections attach to each. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–47 (1983) (describing the different forums). The public forum designation, which attaches to places like parks or streets that "by long tradition or by government fiat have been devoted to assembly and debate," receives the highest First Amendment scrutiny. *Id.* at 45. Speech restrictions that occur in a limited public forum, the designation that attaches to student organizations, are constitutional if they are viewpoint neutral and reasonable in light of the purposes of the forum. *See Rosenberger*, 515 U.S. at 829 ("Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint." (citation omitted)).

[6] *Martinez*, 130 S. Ct. at 2988.

[7] *See* Brownstein & Amar, *supra* note 4, at 510 (arguing that the Court was "truly deferential" in its application of the limited public forum test in *Martinez*).

facilities.[8] For the first time, the Court imported the concept of "subsidies" into a case involving student organizations, affording Hastings unprecedented latitude in its treatment of student organizations.

Finally, in reaching its conclusion, the Court erased the distinction—critical to expressive-association analysis—between invidious discrimination based on status or immutable characteristics and discrimination based on chosen beliefs and conduct.[9] This distinction is critical because although there is usually little to no expressive value in discrimination motivated by animus and made on the basis of race, gender, sexual orientation, or the religion into which an individual is born, an organization's ability to select members based on commonly held beliefs central to the group's purpose is fundamental to the right of expressive association.

This Article argues that student organizations' right to expressive association at a public university must be preserved, even though student organizations operate within a limited public forum.[10] One way to safeguard expressive association in a limited public forum would be to apply a test that is slightly more deferential to the government than the "strict scrutiny" test applied to burdens on expressive association in society at large.[11] Another alternative is to modify the definition of viewpoint neutrality that applies in the speech context: Instead of simply assessing whether a university policy is viewpoint neutral from a speech perspective (i.e., whether it unconstitutionally targets certain viewpoints), courts must also examine whether a policy targets groups wishing to include or exclude those with a specific viewpoint.

The Article further explores how recognition of the distinction between status and belief or conduct should be imported into the conception of viewpoint neutrality when analyzing expressive-association cases in a limited public forum. Protecting a group's ability to select members based on ideology, but not on status, is a coherent way to distinguish constitutionally protected association from unprotected discrimination in a limited public forum.

The Article begins in Part II with a discussion of the Supreme Court's prior expressive-association cases that focuses on the Court's prior treatment of the status/belief distinction. Part III discusses the ways

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[8] *Martinez*, 130 S. Ct. at 2978 ("The First Amendment shields CLS against state prohibition of the organization's expressive activity, however exclusionary that activity may be. But CLS enjoys no ors 2ssive activc.18tqg0006 f Part D.00nju00

in which *Martinez* departed from the approach of these cases. Part IV argues that the majority's merging of free speech and expressive-association claims in a limited public forum, although possessing some appeal, is ultimately wrongheaded in the context of expressive association, and proposes amended tests to govern expressive

The Supreme Court's cases dealing with the autonomy of an organization are usually classified under the right to "expressive association," which safeguards group members' ability to associate with each other in order to engage in protected expression.[18] This includes a group's right to include members and its right to deny membership to individuals an association wishes to exclude.[19] The ability to join voices to engage in collective speech not only facilitates expression, but also permits minority views to flourish despite "majoritarian demands for consensus."[20]

The difficult expressive-association cases often pit a group's right to associate for expressive purposes against important social values like equality and open democracy. Until *Martinez*, the Court balanced First Amendment rights with these values by ensuring that a group's purpose was truly expressive and by distinguishing between status and belief.

A. The Early Cases

Perhaps because the Constitution does not explicitly enumerate

membership in a disfavored group[.]”[37] For this proposition, the *Roberts* Court cited the earlier case of *Healy v. James*,[38] perhaps the closest analogue to *Martinez* in the Court’s First Amendment jurisprudence.

In *Healy*, the Supreme Court held that the denial of recognition to the student organization Students for a Democratic Society (“SDS”) violated the associational rights guaranteed by the First Amendment because recognition conferred the ability upon SDS to use campus facilities and bulletin boards.[39] The Court in *Healy* noted that it must strike a balance between “the mutual interest of students, faculty

stamp of approval."[48] The Supreme Court, however, concluded that "[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes."[49] Using logic that would later be discarded by the majority in *Martinez*, Justice Powell, writing for the

validity of the law.[57]

In holding that the New York law was not substantially overbroad, the Court deemed it significant that there was not yet a record of enforcement of the law and the consortium "ha[d] not identified those clubs for whom the antidiscrimination provisions [would] impair their ability to associate together or to advocate public or private viewpoints."[58] Although the Court upheld the law, the majority opinion penned by Justice White went even further than *Roberts* in distinguishing status-based discrimination, which was not constitutionally protected, from discrimination on the basis of ideology or conduct:

> On its face, Local Law 63 does not affect "in any significant way" the ability of individuals to form associations that will advocate public or private viewpoints. It does not require the clubs "to abandon or alter" any activities that are protected by the First Amendment. If a club seeks to exclude individuals

> intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of

of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day."[74]

The Court in *Hurley* approached the issue of whether excluding people with certain views would dilute an organization's message with significant deference to the organization and its conception of its message.[75] Two of the Court's most recent expressive-association cases confront the issue of dilution of message and the status/belief distinction with more precision and detail and with differing results.

C. Expressive Association and the Dilution of a Group's Message

In *Boy Scouts of America v. Dale*,[76] the Supreme Court again addressed a state's application of its public accommodations law against an expressive-association challenge. This time, the Court reversed the New Jersey Supreme Court's interpretation of the state's public accommodations law, which prohibited "discrimination on the basis of sexual orientation in places of public accommodation."[77] According to the lower court, this law compelled the Boy Scouts of America, which "assert[ed] that homosexual conduct is inconsistent with the values it seeks to instill[,]" to accept James Dale, an exemplary Boy Scout whose adult membership was revoked after he was quoted in a newspaper discussing the need for gay teens to have active role models.[78]

The Supreme Court, with Chief Justice Rehnquist penning the majority opinion, held that "[t]he 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."[79] In order to foster a diversity of views and protect minority expression, laws that infringe upon this freedom are subject to strict scrutiny, where a law may survive scrutiny only if it is "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[80]

The *Dale* majority found that the Boy Scouts engaged in

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[74] *Id.* at 574.

[75] *Id.* at 574–75. Although the Court was not certain as to why the Council wished to exclude GLIB, it held that "whatever the reason, 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." *Id*. at 575.

[76] 530 U.S. 640 (2000).

[77] *Id.* at 645, 661.

[78] *Id.* at 644, 646.

[79] *Id.* at 648 (citation omitted).

[80] *Id.* (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).

the parade organizers did not discriminate on the basis of gay status at all, the *Dale* Court relied on the fact that expressive association contains both speech and conduct elements, such that the mere presence of certain individuals may distort a group's message.[88]

As a result, the *Dale* majority refused to apply the more deferential test used in the free speech context for "expressive conduct" to the Boy Scouts' expressive-association claim.[89] In *United States v. O'Brien*, the Supreme Court

with" and provide some support services for those it wished to exclude.[93] In *Rumsfeld v. Forum for Academic & Institutional Rights*, the Court held that a coalition of law schools' expressive-association rights were not violated by the Solomon Amendment,[94] a federal law mandating that universities either allow military recruiters onto their campuses or forgo millions of dollars in federal funding, effectively compelling them to allow the military to recruit on their campuses.[95] The law schools argued that the Solomon Amendment infringed on their right against compelled speech and their right to expressive association because the military's practice of excluding gays meant that they could not enforce their nondiscrimination policies.[96] In this case, therefore, the entity invoking the First Amendment was also the entity championing values of equality.

A unanimous Court first rejected the law schools' claim that the Solomon Amendment unconstitutionally regulated the schools' speech

orientation discrimination could not be conveyed if the military was permitted access to campus was deemed insufficient by the Court.[103]

The Court's approach to expressive association, as evidenced by the cases in this section, has been deferential to a group's view of its own message and purpose when confronting regulations that affected a group's ability to select its membership. The Court has also been much more solicitous and protective of expressive association when an organization wished to exclude those who did not share its beliefs, beliefs around which groups must be permitted to organize, as opposed to when an organization excluded prospective members based on immutable characteristics.

This approach was drastically altered by the Court's recent decision in *Christian Legal Society v. Martinez*.[104] In *Martinez*, the Court with little fanfare or acknowledgement erased both the distinction between protections for free speech and protections for freedom of association, and the distinction between involuntary status and chosen beliefs or conduct.

III. MARTINEZ'S SUBTLE SHIFTS

The Court's most recent expressive-association case examined whether a university policy requiring all student organizations to allow all students to be voting members and to run for leadership positions violated the students' freedom of expressive association.[105] This issue was framed by the majority in *Martinez* as whether the University of California, Hastings College of the Law, a public law school, could "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 and leadership to all students[.]"[106] From the outset, the Court wished to distinguish this case as one involving university subsidization and sought to depart from its expressive-association jurisprudence.

A. Background

Martinez came to the Court after a decade of clashes between Christian student groups and their universities. Between 1999 and 2000,

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[103] *Id.* at 69, 70.
[104] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971 (2010).
[105] *Id.* at 2978.
[106] *Id.*

Christian groups at many universities were derecognized or threatened with derecognition because of the organizations' desire to limit membership to those who adhered to their beliefs and practiced their preferred conduct.[107] These clashes were sometimes resolved through litigation,[108] but never considered by the Supreme Court until the conflict between Hastings and its Christian Legal Society in *Martinez*.

between a man and a woman[,]" and CLS wanted to only elect leaders who espoused the views articulated in CLS's "Statement of Faith."[116] When its request for an exemption was denied, CLS sued Hastings, claiming that the denial of its recognition violated its rights to free speech, expressive association, and free exercise of religion.[117]

B. Importation of Forum Analysis

In analyzing CLS's claims, Justice Ginsburg first executed a major legal maneuver. Instead of analyzing CLS's free speech and expressive-conduct claims separately from its expressive-association claim, the *Martinez* majority conflated these claims. This conflation ignored the fact that, in prior cases, the Court explicitly analyzed an organization's speech claims and expressive-association claims independently, using separate lines of jurisprudence.[118] According to the Court, CLS's "expressive-association and free-speech arguments merge" because "*who* speaks on its behalf, CLS reasons, colors *what*

association claims merged, it assessed the all-comers policy's burden on expressive association using the forum analysis applicable to speech restrictions on government property.[124] Instead of applying strict scrutiny to burdens on expressive association, as articulated in *Roberts* and *Dale*, Justice Ginsburg applied the much more deferential level of review used for restrictions impacting speech in limited public forums.[125] A limited public forum is established when the government opens its property to a limited class of speakers or for discussion of specific topics to promote the exchange of ideas.[126] Speech restrictions in this type of forum are constitutional, so long as they are reasonable and viewpoint neutral.[127]

Applying the relatively deferential limited public forum test in an especially deferential way,[128] the Court upheld Hastings's all-comers policy, deeming it both viewpoint-neutral and reasonable.[129] In conducting its analysis, the *Martinez* Court imported another concept foreign to expressive-association jurisprudence, and also foreign to its cases involving limited public forums at universities—the idea that student groups have fewer First Amendment rights when a university lends them financial support or the use of its facilities.

C. Deferential Review for Universities Wielding Carrots

After merging CLS's speech and expressive-association claims, the Court further justified applying the deferential test relevant to limited public forums by stressing that *Martinez* involved the denial of benefits, including monetary support and the use of Hastings's facilities, instead

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[124] *Martinez*, 130 S. Ct. at 2984–85; *see also supra* note 5 (describing forum analysis).

[125] *Martinez*, 130 S. Ct. at 2985. According to the Court, "the strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums— the State may reserv[e] [them] for certain groups." *Id.* at 2985 (alterations in original) (internal quotation marks omitted) (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995)).

[126] *See Rosenberger*, 515 U.S. at 829 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.").

[127] *Id.* at 829–30. The requirement of viewpoint neutrality prohibits the government from "discriminating against speakers based on particular views, beliefs, or opinions[.]" Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273, 283–84 (2008). "[A] law suppressing political (or, say indecent) speech would be content-based but not viewpoint-based; a law suppressing *Republican* political (or indecent) speech would be viewpoint-based." *Id.* at 284.

[128] Brownstein & Amar, *supra* note 4, at 510–11 (describing how the Court gave Hastings a significant amount of deference in applying its limited public forum test). Brownstein argues that the Court did not say much about whether 'Hastings's policy was actually reasonable. Brownstein and Amar ask,"[G]iven its open-endedness, what purposes does the RSO policy really serve? Does a policy that allows any group, formed around any set of ideas or activities, to exist—but also requires each such group to take all persons, even those who may vehemently disagree with those ideas or activities—make a lot of sense?"

Id. at 510.

[129] *Martinez*, 130 S. Ct. at 2995.

of a direct regulation prohibiting membership limitations.[130] According to the majority,

> [T]his case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition. The expressive-association precedents on which CLS relies, in contrast, involved regulations that compelled a group to include unwanted members, with no choice to opt out.[131]

The Supreme Court's earlier expressive-association cases did not indicate that withholding benefits or "dangling the carrot of subsidy" should be distinguished from "wielding the stick of prohibition."[132] In fact, some of the Court's earlier expressive-association cases explicitly blurred the distinction between direct and indirect burdens on expressive association.[133] In *Roberts*, for example, the Court held that expressive association is burdened by laws that "impose penalties or withhold benefits from individuals because of their membership in a disfavored group[.]"[134] Yet the newfound emphasis on this distinction in *Martinez*—and the extra deference given to universities as a result—permeated the Court's application of the limited-public-forum test.

First, the Court found that Hastings's all-comers policy was reasonable in light of the purpose of the forum.[135] The Court determined that Hastings reasonably believed that "the . . . educational experience is best promoted when all participants in the forum must provide equal access to all students[,]"[136] and deferred to Hastings's view that student organizations are intended to promote "tolerance, cooperation, and learning."[137] Although these may be laudable values for a school to promote, the Court overlooked its categorization of the student organizational forum in prior cases as promoting and encouraging a diversity of viewpoints, especially minority viewpoints, to flourish.[138]

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[130] As Justice Alito notes in dissent, "funding plays a very small role in this case. Most of what CLS sought and was denied—such as permission to set up a table on the law school patio—would have been virtually cost free." *Id.* at 3007 (Alito, J., dissenting). Justice Alito disputes the majority's characterization of this case as involving a university subsidy, simply because a public university is lending its facilities. Much of a public university campus, especially for its students, is a public forum, where they eat, sleep, and converse outside of class. According to Justice Alito, "[i]f every such activity is regarded as a matter of funding, the First Amendment rights of students at public universities will be at the mercy of the administration." *Id.*

[131] *Id.* at 2986 (majority opinion).

[132] *Id.*

[133] *See supra* notes 23–53 and accompanying text (describing *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Healy v. James*, 408 U.S. 169 (1972)).

[134] Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

[135] *Martinez*, 130 S. Ct. at 2988–91.

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The Court also overlooked the contradiction inherent in establishing a forum for students to organize around shared interests and ideologies while prohibiting students from limiting their groups to those who subscribe to those interests and ideologies.[139] In fact, Justice Kennedy's concurring opinion recognized the tension between facilitating a diversity of viewpoints and promoting tolerance.[140] Kennedy acknowledged that "[b]y allowing like-minded students to form groups around shared identities, a school creates room for self-expression and personal development[,]" but nevertheless believed that this result undermined what Hastings described as its reason for creating the forum—to increase interactions between students of different beliefs.[141]

The Court, in analyzing the reasonableness of the all-comers policy, relied heavily on the fact that Hastings was "subsidizing" student organizations.[142] According to the *Martinez* majority, Hastings could reasonably "decline to subsidize with public monies and benefits conduct of which the people of California disapprove."[143] Yet the Supreme Court had never before, in a case involving student organizations, given added deference to universities because student organizations are subsidized.[144] Of course, the majority opinion acknowledged that Hastings could not similarly decline to subsidize organizations with *viewpoints* disapproved by California voters,[145] due to the *speech* protections afforded in the limited-public-forum test. But discrimination in selecting an organization's members constituted *conduct*, and the Court did not separately assess the constitutionality of this conduct using its expressive-association jurisprudence.[146] Had it done so, the Court t415.32 709.66 TD.7323 Tw[]Tw[Twa

overlooked the fact that forced exclusion or inclusion of members with beliefs antithetical to an organization—which constitutes conduct, not speech—is one of the paradigmatic burdens on expressive association.[155] Free speech protections cannot safeguard this conduct from governmental intrusion.

Free speech protections also do not recognize the distinction, critical to protecting expressive association, between discriminating on the basis of involuntary status and limiting membership to students of chosen beliefs or conduct. The Court rejected CLS's argument that a policy would be constitutional if it permitted "exclusion because of *belief* but forb[ade] discrimination due to *status*."[156] According to Justice Ginsburg, "that proposal would impose on Hastings a daunting labor . . .

and expressive-association claims in a limited public forum,[167] the test affords no independent protection for the right of expressive association. To properly respect both expressive association and the boundaries of a limited public forum, the Court should preserve separate tests for speech and association claims.

A. The Nullification of Associational Rights

According to the majority in

The viewpoint-neutrality test governing restrictions affecting speech in a limited public forum does not translate well as a means to safeguard associational rights. Viewpoint neutrality, as applied to pure expression, serves a speech-protective function. In the free speech context, safeguarding viewpoint neutrality ferrets out impermissible governmental motives in restricting speech.[173] As some scholars have argued, the purpose of viewpoint neutrality is to prevent the government from "distort[ing] debate in a way that games the system (here, the marketplace of ideas) to achieve a preordained goal: The rejection of one perspective in favor of the opposing point of view."[174] When pure speech is involved, viewpoint neutral regulations protect minority viewpoints from being targeted by the government, and "[t]he burden on speech created by viewpoint-neutral regulations will, at least formally, fall in a more evenhanded way on competing speakers and ideas."[175]

However, the test for viewpoint neutrality does not protect the right of expressive association in a meaningful way. For example, Hastings's all-comers policy, though upheld as a viewpoint-neutral regulation, essentially nullifies the expressive-association rights of all student groups. Hastings's all-comers policy permits student groups to select members based on "neutral, generally applicable" membership criteria, like requiring members "to pay dues, maintain good attendance, refrain from gross misconduct, or pass a skill-based test[.]"[176] But student groups are forbidden from limiting membership to those who share their views or requiring members to conform their behavior to the group's values.[177] The ability to select members based on ideology in order to promote a group's expression, one of the primary purposes of the right to expressive association, is entirely eroded by Hastings's policy, viewpoint neutral or otherwise.[178]

Further, the viewpoint-neutrality test, which allows the government to set up a forum for speech on certain subjects without manipulating the

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of student organizations and government subsidies in a later section.

[173] *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) [illegible]

viewpoints expressed in this forum, does not equally protect student groups from the state manipulating their right to expressive association, and, in so doing, undermining their speech. A university policy denying funding to organizations with liberal views would be viewpoint discriminatory from a speech perspective and therefore unconstitutional. However, a university policy requiring that all student groups elect a Republican student to a leadership role is technically viewpoint neutral because it applies to all student groups regardless of each group's

cannot be merged with speech protections is that expressive association contains both speech elements (the expression of the group and its

restrictions on student groups that target the *inclusion* or *exclusion* of certain viewpoints. For example, a nondiscrimination policy preventing organizations from selecting their members based on shared religious beliefs (i.e., one which prohibited discrimination on the basis of religion) would be unconstitutional because it targets groups who wish to limit membership to specific religious views, thus affecting their expressive purposes.[188] A university policy prohibiting student organizations from excluding members who belong to particular political ideologies would also be infirm.[189] Thus, a policy mandating that students not exclude, for example, students with particularly liberal views would certainly be aimed at a viewpoint-based exclusion and therefore unconstitutional. However, a nondiscrimination policy preventing organizations from selecting members on the basis of race or gender would be constitutional under this framework because race and gender are not particular viewpoints that can be targeted or suppressed through laws burdening expressive association.[190]

In essence, a viewpoint-neutral policy affecting expressive association would ensure that groups are not targeted for having a particular expressive purpose. Hastings's all-comers policy, at issue in *Martinez*, might still be considered viewpoint neutral. The policy prevents exclusion of all viewpoints equally, save for the substantial evidence that it was enacted to prevent groups like CLS from limiting membership to those who share its religious views.[191]

Crafting a test to apply to expressive association in a limited public forum allows for independent protection of associational rights. However, not everyone believes that associational rights deserve independent protection in a limited public forum. Professor Eugene Volokh, in an article cited by the majority in *Martinez*, argues against

is one dedicated to the promotion of a diversity of views,[198] and the Court has unequivocally considered student organizations to engage in *private* speech.[199] Although universities may expend resources, they do not "sponsor" student organizations in any meaningful way. Especially given that student organizations comprise an array of diverse and conflicting views, it would be inconceivable to attribute all of these views to the university. Too often, the term *subsidy* is conflated with the concept of *sponsorship*.

Using the term "subsidy" to describe the modest provision of facilities and funding provided by universities led the *Martinez* Court, and especially Justice Stevens in concurrence, to incorrectly conflate

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right to expressive association, but impermissible for a university to decline to "subsidize" groups whose speech the university finds objectionable.[205]

No other Supreme Court case addressing student organizations has considered them "subsidized" by universities or used this term to give deference to universities when analyzing the constitutionality of university policies.[206] Further, as one scholar commented, in any limited public forum, "[c]onditions on benefits and fora do *not* differ as sharply from direct regulation of private conduct as the 'carrots v. sticks' dichotomy implies."[207] Given that universities cannot condition access to their facilities in ways that manipulate the viewpoints expressed by their student organizations, a university should also be precluded from burdening expressive association as a way of limiting unpopular expression.

Citing Professor Volokh's article entitled *Freedom of Expressive Association and Government Subsidies*,[208] the *Martinez* Court noted that "[s]chools, including Hastings, ordinarily, and without controversy, limit official student-group recognition to organizations comprising only students—even if those groups wish to associate with nonstudents."[209] But Volokh attempts to derive too much from this argument; acknowledging that universities may constitutionally preclude nonstudents from joining student groups does not in turn mean that all burdens on freedom of expressive association are constitutional. Instead,

jurisprudence between discrimination on the basis of status and selection on the basis of belief.[211] This distinction is critical, however, to

argument, Chief Justice Roberts, who joined the dissenting opinion, stressed the difference between protected and unprotected forms of discrimination.

> [G]ender or race is fundamentally different from religious [belief]. Gender and race is [sic] a status. Religious belief—it has to be based on the fundamental notion that we are not open to everybody. We have beliefs, you have to subscribe to them. And we've always regarded that as a good thing. That type of exclusion is supported in—in the Constitution. The other types of exclusion are not.[217]

Chief Justice Roberts propounded the view that a private organization's selectivity on the basis of belief is a positive quality, something to be promoted, even if it may be framed under the rubric of discrimination on the basis of religion.[218] Selectivity on the basis of belief allows groups to organize around a coherent viewpoint, and enables minority views to survive despite majoritarian pressure.[219] Associating with like-minded individua

"heterosexual persons who do not participate in or condone heterosexual conduct outside of marriage may become CLS members[.]"[225] The

individuals who are ethnically Jewish, an easy way to accomplish this would be to target conduct associated only with those who are Jewish, for example wearing yarmulkes. In *Bray*, however, the Supreme Court rightly noted that when the state or an individual chooses an irrational object for disfavor, such as a tax on yarmulkes, it can be assumed that the disfavor is motivated by status-based animus.[233] When performed by the government, this type of irrational, animus- or status-based classification is prohibited by the Fourteenth Amendment's Equal Protection Clause.[234]

Analogously, if a student organization excluded students for an arbitrary reason usually associated with a particular status—*with no indication of how this exclusion would affect the group's ability to organize around a coherent ideology*—this exclusion could be considered status-based and therefore not protected by expressive association under the First Amendment. Further, discrimination against an individual based on the religion into which he or she was born, in contrast to selecting individuals based on their current beliefs, would be considered unprotected status-based discrimination. For instance, if Jews or Muslims were excluded from a group due to their ethnicities, a university's application of nondiscrimination policy to prevent this type of discrimination should withstand constitutional scrutiny.[235]

Religious "discrimination" presents a relatively easy case for discerning the difference between status-based and belief-based exclusions. Although some may argue that religion confers a "status,"[236] individuals are free to discard their religious or atheistic views at any point. Thus, CLS's desire to limit its membership to those who subscribe to its statement of faith represents a belief-based exclusion, which should be protected by expressive association, just as if a campus environmentalist group wished to limit its membership to those who acknowledge global warming.

A more difficult case involves private organizations' exclusion of those who engage in homosexual conduc

permissible to 'be' gay, but not permissible to engage in gay sex."[237] Another scholar explained that "[t]he love, intimacy, and affectio

Moreover, contrary to the *Martinez* Court's assertion, it would not be unduly burdensome to discern whether a religious organization excluded those who engage in homosexual conduct as a pretext for excluding gays.[242] If the Christian Legal Society truly wished to exclude gays, this status-based discrimination would become apparent when a religious LGBT student who believed that homosexuality is a sin attempted to join the group. In addition, there are complex problems inherent in administering a policy like the all-comers policy, which does not distinguish between status and belief. A university administering an all-comers policy presumptively takes on the responsibility of policing all student groups, from political newspapers to religious groups to advocacy groups, in order to ensure that they are not in some way discouraging people hostile to their message from joining. Asking expressive organizations not to "discriminate" on the basis of their expressive purpose runs contrary to their raison d'être, and it will be difficult to monitor compliance with this policy. For instance, what if a libertarian publication allows all students to join, but never gives any editing responsibility to non-libertarian students? This denies certain students the benefits of membership enough to consider them essentially excluded.

On the other side of the spectrum, some might argue that the status/belief distinction is not protective enough of expressive association. In a limited public forum, removing protection for status-based discrimination might impede some organizations' ability to promote their views, especially if these organizations wish to use status-based exclusion to exemplify their beliefs.[243] The inability to discriminate on the basis of status might leave, for example, an orthodox Jewish student group that wanted only men to lead prayer services unprotected.[244]

However, at least for the purposes of a limited public forum, safeguarding an organization's right to select members based on a shared ideology respects a core aspect of freedom of association—the ability to exclude those of differing views. Specifically, it allows the government, or a public university, to place limitations on private organizations while adhering to a viewpoint-neutral test. This may cause the derecognition of student groups that seek to exclude members based on status, but it preserves a balance between associational rights in a limited public forum and the important societal interest in equality.

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VI. CONCLUSION

The Supreme Court's dramatically different approach to expressive association in *Christian Legal Society v. Martinez* failed to protect the rights of student groups that wish to select members on the basis of shared ideology. Merging speech and expressive-association claims essentially nullifies associational rights in a limited public forum, where the resources the government provides to set up a platform for expression are at times minimal. The *Martinez* majority's dramatic legal maneuver was executed with little support or fanfare, and the majority failed to acknowledge that expressive association contains both speech and conduct elements that cannot be adequately protected using the viewpoint-neutrality test applicable to speech rights in a limited public forum.

This Article proposes alternative ways to analyze a student organization's challenge to a university policy that burdens its expressive-association rights. In crafting these alternatives, this Article attempts to respect the constraints of a limited public forum and society's interest in equality while providing a framework that safeguards expressive association. Expressive association should be recognized as separate from speech, even in a limited public forum, because it is so fundamental to the preservation of speech and minority viewpoints. The courts must find a way to afford the government greater deference to implement policies that burden expressive association in a limited public forum, while ensuring that both the essential qualities of the right are preserved and that the government does not act with an impermissible motive.