

## 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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## I. INTRODUCTION

At first blush, the holding in *Christian Legal Society v. Martinez*<sup>1</sup>—that a public university may require its student groups to accept all students as voting members, eligible to run for leadership positions, without running afoul of the First Amendment—seems unremarkable.<sup>2</sup> After all, as the Supreme Court held, a policy that applies equally to all student organizations is “paradigmatically viewpoint neutral.”<sup>3</sup> Moreover, the University of California, Hastings College of the Law’s

<sup>1</sup> *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971 (2010).

<sup>2</sup> *See id.* Public universities, established by the state and at least partially supported by state taxes, must comply with the federal Constitution. *See, e.g.,* *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 822 (1995) (“The University of Virginia, an instrumentality of the Commonwealth for which it is named [is] thus bound by the First and Fourteenth Amendments[.]”).

<sup>3</sup> *Martinez*, 130 S. Ct. at 2987 n.15.

(“Hastings”) desire to teach tolerance and foster communication among students with differing viewpoints seems like a laudable reason for creating an “all-comers policy.”<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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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<sup>4</sup> *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?”).

<sup>5</sup> *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)).

<sup>6</sup> *Martinez*, 130 S. Ct. at 2988.

<sup>7</sup> *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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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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<sup>8</sup> *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 constitutional right to state subvention of its selectivity.”).

<sup>9</sup> *Id.* at 2990 (rejecting CLS’s argument that “it does not exclude individuals because of sexual orientation, but rather ‘on the basis of a conjunction of conduct and the belief that the conduct is not wrong’” (citation omitted)).

<sup>10</sup> *Martinez*’s merging of speech and expressive conduct was largely motivated by the context in which the case took place—Hastings’s all-comers policy affected the “limited public forum” of student organizations. *See id.* at 2984–86. A limited public forum exists when the government opens up its property for the discussion of limited subjects, or to limited speakers. *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.”).

<sup>11</sup> *See infra* Part IV.B.

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 association. Part V argues that, contrary to the majority opinion in *Martinez*, expressive association should protect the right to discriminate based on conduct or belief, but not on status. This Article explores the distinction between status and belief, and addresses two compelling criticisms against it—that it does not sufficiently protect minority groups from discrimination, and, on the other hand, that it does not sufficiently protect expressive association.

## II. EXPRESSIVE ASSOCIATION AND COMPETING VALUES

According to the Supreme Court, “[w]hile the freedom of association is not explicitly set out in the [First] Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition.”<sup>12</sup> The right to form associations is fundamental to the important value of self-governance, which animates the First Amendment; indeed, one scholar has argued that “assembly, petition, and association are at least as central to the process of self-governance as is free speech and that assembly and petition were historically viewed as more fundamental to a politically functional society than speech.”<sup>13</sup> This is because of the important role associations have played in the creation and promotion of values and in the fomentation of political change.<sup>14</sup>

The Supreme Court's freedom of association cases focus on three distinct but interrelated themes: the right of the individual to join an organization,<sup>15</sup> the intersection of freedom of association and the political process,<sup>16</sup> and the rights of the organization as an autonomous entity.<sup>17</sup>

<sup>12</sup> *Healy v. James*, 408 U.S. 169, 181 (1972).

<sup>13</sup> Ashutosh Bhagwat, *Associational Speech*, 120 *YALE L.J.* 978, 981 (2011).

<sup>14</sup> *See generally id.*

<sup>15</sup> *See, e.g., Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982) (holding that state cannot impose public disclosure laws to require political party to disclose list of those receiving campaign disbursements); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 451 (1958) (deeming it unconstitutional for state to compel the NAACP to disclose its membership list). These cases protect the individual's ability to join an unpopular organization without fear of “threats, harassment, and reprisals” but also protect the organization as an entity, as disclosure requirements can “cripple a minor party's ability to operate effectively[.]” *Brown*, 459 U.S. at 97, 98.

<sup>16</sup> *See, e.g., Clingman v. Beaver*, 544 U.S. 581 (2005) (holding that state law mandating “semi-closed” primaries, where registered members of one party could not vote in another party's primary, did not severely burden associational rights); *Tashjian v. Republican Party*, 479 U.S. 208 (1986) (invalidating state law requiring “closed primaries,” prohibiting independents from voting in a party's primary); *Democratic Party of U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981) (invalidating state law compelling the Democratic Party to permit anyone to vote in its primary elections).

<sup>17</sup> *See generally* Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and*

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.<sup>18</sup> This includes a group's right to include members and its right to deny membership to individuals an association wishes to exclude.<sup>19</sup> 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."<sup>20</sup>

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 freedom of association, the exact origins of the right are murky.<sup>21</sup> However, most scholars agree that the specific right to expressive association was first articulated in *Roberts v. United States Jaycees*.<sup>22</sup>

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*the First Amendment*, 85 MINN. L. REV. 1483 (2001) (charting the progression of the freedom of association doctrine).

<sup>18</sup> See *id.* at 1504 (explaining that expressive association allows individuals to "join forces and communicate more effectively than they could separately . . . . People in a group can encourage each other's activities; to the extent that their expression is aimed at each other instead of outsiders, they may value the expression more because it is shared by other group members.").

<sup>19</sup> See Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. *Martinez*, 130 S. Ct. 2971, 2985 (2010) ("Freedom of association, we have recognized, plainly presupposes a freedom not to associate." (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984))).

<sup>20</sup> John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 201-02 (2010) (arguing that the primary value of expressive association is that it "permits dissent to manifest through groups" (emphasis added)).

<sup>21</sup> See John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485, 485-89 (2010) (tracing the history of freedom of association and arguing that most scholars have overlooked the fact that "[t]he Supreme Court's foray into the constitutional right of association began . . . with *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)").

<sup>22</sup> See, e.g., Barbara K. Bucholtz, *What Goes Around Comes Around: Legal Ironies in an Emergent Doctrine for Preserving Academic Freedom and the University Mission*, 13 TEX. WESLEYAN L. REV. 311, 336 n.131 (2007) (describing *Roberts* as the "seminal case that elaborated the current 'expressive association' doctrine"); Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 637 (2004) (explaining how the *Roberts* Court "subdivided the right [of association] into two related but distinct components: expressive association—the right to associate to engage in protected First Amendment expression—and intimate association—the right to associate to pursue private relationships"); Shawn M. Larson, *For Blacks Only: The Associational Freedoms of Private Minority Clubs*, 49 CASE W. RES. L. REV. 359, 366 (1999) ("The *Roberts* Court, in an opinion by Justice Brennan, established the framework for interpreting the freedom of association as being composed of two separate elements: the 'freedom of intimate association and [the] freedom of expressive association.'" (quoting *Roberts*, 468 U.S. at 618)).

In *Roberts v. United States Jaycees*,<sup>23</sup> the Supreme Court addressed “a conflict between a State’s efforts to eliminate gender-based discrimination against its citizens and the constitutional freedom of association asserted by members of a private organization.”<sup>24</sup> More directly, the Court addressed a conflict between the national United States Jaycees organization, whose bylaws permitted women to join only as non-voting “associate members,” and local Minnesota Jaycees chapters, who wanted to admit women as full voting members.<sup>25</sup> Wishing to revoke the local chapters’ charters, the national organization brought a declaratory judgment action to invalidate portions of the Minnesota Human Rights Act, which prohibited denying “any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex.”<sup>26</sup> The Jaycees, a young men’s private social and civic organization, was subject to this public accommodations law<sup>27</sup> because it offered goods and services and “solicit[ed] and recruit[ed] dues-paying members based on unselective criteria.”<sup>28</sup>

The Supreme Court, with Justice Brennan writing for the majority, ultimately upheld this law against two strands of freedom of association—freedom of “intimate association,” which preserves close, intimate relationships upon which “individuals draw much of their emotional enrichment[,]”<sup>29</sup> and the “right to associate for expressive purposes[.]”<sup>30</sup> Justice Brennan described freedom of expressive association, implicated by the Minnesota law, as necessary to safeguard the other freedoms expressly enumerated in the First Amendment:

An individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. According protection to collective effort on behalf of shared goals is especially

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<sup>23</sup> 468 U.S. 609 (1984).

<sup>24</sup> *Id.* at 612.

<sup>25</sup> *Id.* at 612–14.

<sup>26</sup> *Id.* at 614–15 (quoting MINN. STAT. § 363.03, subd. 3 (1982) (current version at MINN. STAT. ANN. § 363A.11 (West 2003))).

<sup>27</sup> For a deeper understanding of the history of public accommodations laws, see Andrea R. Scott, *State Public Accommodation Laws, the Freedom of Expressive Association, and the Inadequacy of the Balancing Test Utilized in Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000), 24 HAMLIN L. REV. 131, 145–46 (2000), and see generally Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996).

<sup>28</sup> *Roberts*, 468 U.S. at 613–14, 616 (citation omitted).

<sup>29</sup> *Id.* at 618–19. According to the Court, “[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.” *Id.* at 619–20.

<sup>30</sup> *Id.* at 623.

important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.<sup>31</sup>

The Court then acknowledged that requiring the Jaycees to accept women as full voting members effectuated a great “intrusion into the internal structure or affairs of an association . . . [that] may impair the ability of the original members to express only those views that brought them together.”<sup>32</sup> However, the Court upheld the Minnesota law because it was “justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”<sup>33</sup> Eliminating gender discrimination and ensuring equal access to goods and services constituted a compelling state interest that was achieved through means that did not “impose[] any serious burdens on the male members’ freedom of expressive association.”<sup>34</sup>

By stating that admission of women as full members would not undermine the Jaycees’s ability to express its message, the Court took a first step towards drawing a line between a group’s desire to exclude members based on status (or immutable characteristics) and a group’s ability to select its membership based on chosen beliefs or conduct. According to the Court, the Minnesota law “requires no change in the Jaycees’ creed of promoting the interests of young men, and it imposes no restrictions on the organization’s ability to exclude individuals with ideologies or philosophies different from those of its existing members.”<sup>35</sup> Presumably, then, the Jaycees could exclude women who opposed the group’s philosophy of promoting the interests of only young men, but the Jaycees was not permitted to assume that women, based on their immutable characteristics, hold views that conflict with the organization’s purposes.<sup>36</sup>

In addition to distinguishing between status and belief, *Roberts* also took steps to erase the distinction between laws that penalize the exercise of associative rights and laws that simply deprive a group of benefits. According to *Roberts*, expressive association is implicated by laws that “impose penalties or withhold benefits from individuals because of their

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<sup>31</sup> *Id.* at 622 (citation omitted).

<sup>32</sup> *Id.* at 623.

<sup>33</sup> *Roberts*, 468 U.S. at 623.

<sup>34</sup> *Id.* at 626.

<sup>35</sup> *Id.* at 627.

<sup>36</sup> *Id.* at 628 (“In the absence of a showing far more substantial than that attempted by the Jaycees, we decline to indulge in the sexual stereotyping that underlies appellee’s contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization’s speech.”).

membership in a disfavored group[.]”<sup>37</sup> For this proposition, the *Roberts* Court cited the earlier case of *Healy v. James*,<sup>38</sup> 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.<sup>39</sup> The Court in *Healy* noted that it must strike a balance between “the mutual interest of students, faculty members, and administrators in an environment free from disruptive interference with the educational process” and “the equally significant interest in the widest latitude for free expression and debate consonant with the maintenance of order.”<sup>40</sup> The Court began its legal analysis by repudiating the notion that “because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”<sup>41</sup> These protections included “the right of individuals to associate to further their personal beliefs.”<sup>42</sup>

The case arose when students at Central Connecticut State College applied to form a local chapter of SDS to discuss left-leaning politics and serve as “an agency for integrating thought with action so as to bring about constructive changes.”<sup>43</sup> SDS chapters at other colleges had been responsible for instigating civil disobedience and violence, but the college’s president had no evidence that this local chapter would use violent tactics.<sup>44</sup> The Supreme Court concluded that because this denial of recognition abridged the First Amendment as a prior restraint, “the burden was upon the College administration to justify its decision of rejection.”<sup>45</sup> According to the Court, “[t]he College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.”<sup>46</sup>

In rendering its decision, the Supreme Court overturned the lower courts’ judgment that denial of recognition did not infringe upon SDS’s associational rights. The district court and the court of appeals had held that non-recognition “abridged no constitutional rights” because the group could still meet to express its views outside of campus.<sup>47</sup> Thus, according to the lower courts, SDS had been denied only the “college’s

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<sup>37</sup> *Id.* at 622.

<sup>38</sup> 408 U.S. 169 (1972).

<sup>39</sup> *Id.* at 181–82.

<sup>40</sup> *Id.* at 171.

<sup>41</sup> *Id.* at 180 (finding that the “vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools” (citation omitted) (internal quotation marks omitted)).

<sup>42</sup> *Id.* at 181.

<sup>43</sup> *Healy*, 408 U.S. at 172 (citation omitted) (internal quotation marks omitted).

<sup>44</sup> *Id.* at 171–73.

<sup>45</sup> *Id.* at 184.

<sup>46</sup> *Id.* at 187–88.

<sup>47</sup> *Id.* at 182.

stamp of approval.”<sup>48</sup> 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.”<sup>49</sup> Using logic that would later be discarded by the majority in *Martinez*, Justice Powell, writing for the majority, held that “the group’s possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President’s action.”<sup>50</sup>

The *Healy* Court determined that the denial of the ability to use university facilities was an indirect burden on associational rights, even if an organization could organize itself outside of campus, because it amounted to the denial of benefits.<sup>51</sup> According to the Court, there were permissible and impermissible bases upon which to deny these benefits.<sup>52</sup> *Healy* and *Roberts* approached the denial of a benefit as the same type of burden on associational rights as a direct punishment—in stark contrast to the majority’s analysis in *Martinez*.<sup>53</sup>

## B. Solidifying the Status/Belief Distinction

Several of the Supreme Court’s subsequent expressive-association cases solidified the principle that while the First Amendment protects an organization’s ability to limit its membership to those who share its ideology, this protection usually does not include the right to exclude potential members based on their immutable characteristics or status.

In *New York State Club Ass’n v. City of New York*,<sup>54</sup> the Supreme Court confronted a New York public accommodations law that applied to private clubs with 400 or more members,<sup>55</sup> similar to the one upheld in *Roberts*.<sup>56</sup> A consortium of 125 private clubs challenged the facial

<sup>48</sup> *Healy*, 408 U.S. at 181 (citation omitted) (internal quotation marks omitted).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 183. In *Martinez*, the Court held that Hastings’s all-comers policy is “all the more creditworthy in view of the substantial alternative channels that remain open for [CLS-student] communication to take place.” *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2991 (2010) (alteration in original) (citation omitted) (internal quotation marks omitted).

<sup>51</sup> *Healy*, 408 U.S. at 182–83.

<sup>52</sup> *Id.* at 185–86. An organization’s viewpoint was an impermissible basis upon which to deny recognition, but a concrete and reasonable fear that the organization would engage in violent activity could justify a denial of recognition. *Id.* at 185–92.

<sup>53</sup> See *infra* Part IV.

<sup>54</sup> 487 U.S. 1 (1988).

<sup>55</sup> *Id.* at 6.

<sup>56</sup> The New York law made it “an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement [to withhold benefits from an individual] because of the race, creed, color, national origin or sex of [that] person[.]” *Id.* at 4 n.1 (internal quotation marks omitted)

validity of the law.<sup>57</sup>

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.”<sup>58</sup> 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 who do not share the views that the club’s members wish to promote, the Law erects no obstacle to this end. Instead, the Law merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership. It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion. In the case before us, however, it seems sensible enough to believe that many of the large clubs covered by the Law are not of this kind. We could hardly hold otherwise on the record before us, which contains no specific evidence on the characteristics of *any* club covered by the Law.<sup>59</sup>

The necessary implications of this passage are twofold. First, although the Court found no constitutional infirmity with the New York law, its analysis would have been different if the law forbade private clubs from “exclud[ing] individuals who do not share the views that the club’s members wish to promote.”<sup>60</sup> Second, the Court might have found that the law, as applied to a particular club, violated the First Amendment if the group would “not be able to advocate its desired viewpoints nearly as effectively if it [could not] confine its membership to those who share

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(quoting Local Law No. 97 of 1965, N.Y.C. ADMIN. CODE § 8-107(2) (1986)).

<sup>57</sup> *Id.* at 8, 11.

<sup>58</sup> *Id.* at 14.

<sup>59</sup> *N.Y. State Club Ass’n*, 487 U.S. at 13–14 (citation omitted).

<sup>60</sup> *Id.* at 13.

the same sex, for example[.]”<sup>61</sup> Thus, even status-based discrimination might be protected by the First Amendment if a group could show that it was critical to its expressive advocacy.

Seven years later, in another case resembling *Martinez*, the Supreme Court confronted the distinction between an organization’s exclusion of gays and its right to reject a message that endorses gay rights.<sup>62</sup> In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*,<sup>63</sup> the Court upheld the right of the South Boston Allied War Veterans Council, an association of veterans who received a permit from the City of Boston to organize the annual St. Patrick’s Day parade, to exclude from participation an organization of gay, lesbian, and bisexual descendants of Irish immigrants who wished to express pride in both their Irish and their gay identities.<sup>64</sup> This organization, known as GLIB, sued the Council for denying its application to participate under Massachusetts law prohibiting discrimination in public accommodations.<sup>65</sup>

The Veterans Council had been given authority by the mayor in 1947 to conduct the parade, which drew up to one million spectators, and the city had for many years prior to the lawsuit allowed it to use its official seal, in addition to providing printing services and funding.<sup>66</sup> However, the lower courts had characterized the parade as purely private, and GLIB did not appeal this finding.<sup>67</sup>

Justice Souter’s majority opinion began its legal analysis by categorizing the parade as protected expressive activity and GLIB’s requested “participation as a unit in the parade [as] equally expressive.”<sup>68</sup> The Court also found that the Massachusetts public accommodations law, with its “venerable history” of eradicating discrimination in public life,<sup>69</sup> did not generally violate the First Amendment, as it “[did] not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.”<sup>70</sup> However, the Court could not countenance the law as applied to require the parade organizers to accept marchers with a particular message of gay pride and tolerance:

In the case before us, however, the Massachusetts law has been applied in a peculiar way. . . . Petitioners disclaim any

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<sup>61</sup> *Id.*

<sup>62</sup> The status/belief distinction as applied to gays and lesbians is not entirely satisfying as a matter of legal logic or the realities of the gay experience. *See infra* Part V.B.

<sup>63</sup> 515 U.S. 557 (1995).

<sup>64</sup> *Id.* at 561, 581.

<sup>65</sup> *Id.* at 561–62.

<sup>66</sup> *Id.* at 560–61.

<sup>67</sup> *Id.* at 566.

<sup>68</sup> *Hurley*, 515 U.S. at 570.

<sup>69</sup> *Id.* at 571–72.

<sup>70</sup> *Id.* at 572 (emphasis added).

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 GLIB as its own parade unit carrying its own banner. Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade. Although the state courts spoke of the parade as a place of public accommodation, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation . . . . But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.<sup>71</sup>

The Court thus found it significant that the Council was not seeking to exclude gays from marching in its parade. If that were the case, Massachusetts nondiscrimination law may have been constitutionally applied to prevent status-based discrimination.<sup>72</sup> However, applying nondiscrimination law to prevent the Council from discriminating on the basis of certain viewpoints meant turning the Council's speech (and not just its services) into a public accommodation—a result antithetical to the First Amendment.

In holding that Massachusetts could not apply its public accommodation law against the Council, the Court distinguished *New York State Club Ass'n* because, in that case, “although the association provided public benefits to which a State could ensure equal access . . . compelled access to the benefit, which was upheld, did not trespass on the organization's message itself.”<sup>73</sup> In contrast, forcing the Council to accept GLIB into its parade would distort the Council's expression, even if the Council's message was not entirely coherent. According to the Court, “[r]ather like a composer, the Council selects the expressive units

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<sup>71</sup> *Id.* at 572–73 (citations omitted).

<sup>72</sup> There is a great deal of evidence that sexual orientation is at least partially based on immutable, biological factors. See, e.g., Niklas Långström, Qazi Rahman, Eva Carlström & Paul Lichtenstein, *Genetic and Environmental Effects on Same-sex Sexual Behavior: A Population Study of Twins in Sweden*, 39 ARCHIVES SEXUAL BEHAV. 75 (2010); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (citing to evidence in scholarly and popular media substantiating the view that sexual orientation is immutable); Larry Gostin, *Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers*, AM. J. L. & MED. 109, 119 (1991); *US Researchers Find Evidence That Homosexuality Linked to Genetics*, THE GUARDIAN, Dec. 1, 2008, available at <http://www.guardian.co.uk/world/2008/dec/01/homosexuality-genetics-usa>.

<sup>73</sup> *Hurley*, 515 U.S. at 580 (referring to *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988)).

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."<sup>74</sup>

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.<sup>75</sup> 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*,<sup>76</sup> 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."<sup>77</sup> 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.<sup>78</sup>

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."<sup>79</sup> 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."<sup>80</sup>

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

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<sup>74</sup> *Id.* at 574.

<sup>75</sup> *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.

<sup>76</sup> 530 U.S. 640 (2000).

<sup>77</sup> *Id.* at 645, 661.

<sup>78</sup> *Id.* at 644, 646.

<sup>79</sup> *Id.* at 648 (citation omitted).

<sup>80</sup> *Id.* (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

expressive association because they sought to instill values through speech, and by example, in their members.<sup>81</sup> The Boy Scout mission statement explained that a Boy Scout should be “morally straight” and “do [his] duty to God and [his] country.”<sup>82</sup> Nowhere in the Boy Scouts’s mission statement was sexual orientation mentioned, but position statements promulgated by the Boy Scouts claimed that “homosexual conduct” is inconsistent with the Boy Scouts’s mission.<sup>83</sup>

In holding that the Boy Scouts’s expression would be altered by the forced inclusion of Dale, the Court focused on the fact that Dale is openly gay, and that the Boy Scouts are entitled to communicate certain messages through example, instead of directly addressing topics.<sup>84</sup> Chief Justice Rehnquist wrote:

We must then determine whether Dale’s presence as an assistant scoutmaster would significantly burden the Boy Scouts’ desire to not “promote homosexual conduct as a legitimate form of behavior.” As we give deference to an association’s assertions regarding the nature of its expression, we must also give deference to an association’s view of what would impair its expression. That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have “become leaders in their community and are open and honest about their sexual orientation.” Dale was the co-president of a gay and lesbian organization at college and remains a gay rights activist. Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.<sup>85</sup>

This portion of the Court’s opinion is significant because, as Dale alleged, the Boy Scouts do accept *heterosexual* members who vocally oppose the Boy Scouts’ policy on gay scout leaders.<sup>86</sup> Thus, the Court protected the right of the Boy Scouts to treat gays differently than heterosexuals, but only where prospective or current members from the LGBT<sup>87</sup> community also engaged in speech or conduct that would impair the Boy Scouts’ mission. Going further than *Hurley*, which stressed that

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<sup>81</sup> *Dale*, 530 U.S. at 649–50.

<sup>82</sup> *Id.* at 649.

<sup>83</sup> *Id.* at 652.

<sup>84</sup> *Id.* at 655.

<sup>85</sup> *Id.* at 653 (citations omitted).

<sup>86</sup> *Dale*, 530 U.S. at 655.

<sup>87</sup> LGBT is an acronym that refers to the broader lesbian, gay, bisexual, and transgender community.

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.<sup>88</sup>

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.<sup>89</sup> In *United States v. O'Brien*, the Supreme Court had used an intermediate level of scrutiny to determine the constitutionality of a statute that regulates conduct but has some effect on protected speech—a prohibition on the destruction of draft cards—and thus precluded the symbolic burning of a draft card for purposes of protest.<sup>90</sup> The *Dale* Court distinguished *O'Brien* and refused to apply its test because "[a] law prohibiting the destruction of draft cards only incidentally affects the free speech rights of those who happen to use a violation of that law as a symbol of protest. But New Jersey's public accommodations law directly and immediately affects associational rights . . ."<sup>91</sup>

This distinction is not entirely satisfying; the New Jersey law applied only to conduct on its face, and burdened associational rights only in specific instances.<sup>92</sup> By deeming *O'Brien* inapplicable, the Court, in essence, created a stricter standard applicable to expressive association than to expressive conduct. The Supreme Court may have recognized that rules regulating conduct have a more potent effect on associational rights than on speech rights, and thus the Court took measures to ensure that associational rights were not subject to the same tests for constitutionality as expressive conduct, like burning a draft card.

In contrast to the deference given to the Boy Scouts to exclude members in shaping its own message, in a later case the Supreme Court was less willing to accept that associational rights were infringed when a law did not control membership, but required law schools to "interact

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<sup>88</sup> *Dale*, 530 U.S. at 655–56 ("The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy.").

<sup>89</sup> *Id.* "Expressive conduct" is a term applicable to restrictions on conduct that impair an individual's ability to express him or herself. See *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968). Expressive conduct claims are analyzed within the ambit of free speech claims, not freedom of association claims. *Id.*

<sup>90</sup> See *O'Brien*, 391 U.S. at 376 ("This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.").

<sup>91</sup> *Dale*, 530 U.S. at 659.

<sup>92</sup> In a dissent joined by three other Justices, Justice Souter notes the applicability of *O'Brien* by arguing that the mere inclusion of Dale "sends no cognizable message to the Scouts or to the world. Unlike [the situation in *Hurley*], Dale did not carry a banner or a sign . . . [T]he mere act of joining the Boy Scouts. . . does not constitute an instance of symbolic speech . . ." *Id.* at 694–95. Justice Souter cites *O'Brien* for the proposition that "we cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.* at 695 (internal quotation marks omitted) (quoting *O'Brien*, 391 U.S. at 376).

with” and provide some support services for those it wished to exclude.<sup>93</sup> 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,<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup> 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 and expressive conduct.<sup>97</sup> Chief Justice Roberts distinguished *O’Brien* on the grounds that the act of excluding military recruiters did not communicate an obvious message, but became expressive only by speech accompanying that action.<sup>98</sup> According to the Court, “[t]he fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O’Brien*.”<sup>99</sup>

The Court also rejected the law schools’ expressive-association argument—that their ability to “express their message that discrimination on the basis of sexual orientation is wrong is significantly affected by the presence of military recruiters on campus and the schools’ obligation to assist them.”<sup>100</sup> It is important to note that, again, the Court used separate standards to assess the schools’ free speech/expressive-conduct claims and their expressive-association claim. In the context of the expressive-association claim, the Court distinguished *Dale* by holding that allowing military recruiters to visit a law school for a short time in order to hire students does not mean that the recruiters are actually “associat[ing]” with the law school or that the law school is being forced “to accept members it does not desire.”<sup>101</sup> According to the Court, citing to *Dale* “overstates the expressive nature of [the law schools’] activity and the impact of the Solomon Amendment on it[.]”<sup>102</sup> Because the law schools were not actually required to accept new members, the law schools’ self-determination that their message opposing sexual

<sup>93</sup> *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47, 69 (2006).

<sup>94</sup> 10 U.S.C. § 983 (2006).

<sup>95</sup> *Id.*

<sup>96</sup> *FAIR*, 547 U.S. at 52.

<sup>97</sup> *Id.* at 65–66.

<sup>98</sup> *Id.* at 66.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 68.

<sup>101</sup> *FAIR*, 547 U.S. at 69 (citations omitted) (internal quotation marks omitted).

<sup>102</sup> *Id.* at 70.

orientation discrimination could not be conveyed if the military was permitted access to campus was deemed insufficient by the Court.<sup>103</sup>

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*.<sup>104</sup> 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.<sup>105</sup> 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[.]"<sup>106</sup> 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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<sup>103</sup> *Id.* at 69, 70.

<sup>104</sup> *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971 (2010).

<sup>105</sup> *Id.* at 2978.

<sup>106</sup> *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.<sup>107</sup> These clashes were sometimes resolved through litigation,<sup>108</sup> but never considered by the Supreme Court until the conflict between Hastings and its Christian Legal Society in *Martinez*.

Officially recognized student groups at Hastings can seek financial assistance from the law school to hold events, and are also permitted to use campus facilities, bulletin boards, e-mail lists, and Hastings's name and logo.<sup>109</sup> To receive these benefits, student groups must abide by Hastings's policies, including its nondiscrimination policy.<sup>110</sup> Like many public accommodations laws, including California's,<sup>111</sup> this policy prohibits student groups from discriminating "on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation."<sup>112</sup> According to the Supreme Court, both parties stipulated that Hastings applied this nondiscrimination policy as an "all-comers policy," meaning that all student groups were required to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs."<sup>113</sup>

The Christian Legal Society, an association of Christian law students, was denied recognition based on Hastings's all-comers policy because, according to Hastings, CLS's bylaws "barred students based on religion and sexual orientation."<sup>114</sup> CLS sought an exemption from Hastings's nondiscrimination policy so that it could limit its group to those whose beliefs reflected the group's core ideology.<sup>115</sup> Specifically, CLS believed that "sexual activity should not occur outside of marriage

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<sup>107</sup> These colleges included Arizona State University, Ball State University, Boise State University, California State University (several campuses), Cornell University, Gonzaga University, Harvard University, Milwaukee School of Engineering, Ohio State University, Pace University, Pennsylvania State University, Purdue University, Rutgers University, Shippensburg University of Pennsylvania, Southern Illinois University, State University of New York at Oswego, Texas A&M University, Tufts University, University of Florida, University of Georgia, University of Idaho, University of Iowa, University of Mary Washington, University of Minnesota, University of Montana, University of New Mexico, University of North Carolina at Chapel Hill, University of North Dakota, University of Toledo, University of Wisconsin (several campuses), Washburn University, and Wright State University. For information on these individual cases, see [www.thefire.org](http://www.thefire.org).

<sup>108</sup> See *infra* Part V.A.

<sup>109</sup> *Martinez*, 130 S. Ct. at 2979.

<sup>110</sup> *Id.* (citation omitted).

<sup>111</sup> *Id.* at 2990. According to the majority, "Hastings' policy . . . incorporates—in fact, subsumes—state-law proscriptions on discrimination[.]" *Id.*

<sup>112</sup> *Id.* at 2979.

<sup>113</sup> *Id.* (alteration in original) (citation omitted). CLS contended that the university actually applied its nondiscrimination policy, not this stipulated-to all-comers policy, but the Court rejected this argument. *Id.* at 2982–84. Justice Alito argued in dissent that the all-comers policy was created in response to this litigation, and that the law school actually consistently applied and invoked its nondiscrimination policy, even when denying recognition to CLS. *Id.* at 3001–02 (Alito, J., dissenting).

<sup>114</sup> *Martinez*, 130 S. Ct. at 2980.

<sup>115</sup> *Id.*

between a man and a woman[.]” and CLS wanted to only elect leaders who espoused the views articulated in CLS’s “Statement of Faith.”<sup>116</sup> 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.<sup>117</sup>

## 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.<sup>118</sup> According to the Court, CLS’s “expressive-association and free-speech arguments merge” because “*who* speaks on its behalf, CLS reasons, colors *what* concept is conveyed[.]”<sup>119</sup> Therefore, it “makes little sense to treat CLS’s speech and association claims as discrete.”<sup>120</sup> This reasoning, however, could apply to any organization’s expressive-association claim.

The Court cited only one case to support its conflation of speech with expressive association—*Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*.<sup>121</sup> Protective of the First Amendment, the Court held that certain regulations may infringe on both the right to expression and the right to association because these rights are interrelated.<sup>122</sup> The *Berkeley* Court concluded that a California ordinance limiting contributions to organizations formed to support or oppose ballot initiatives “plainly contravenes both the right of association and the speech guarantees of the First Amendment.”<sup>123</sup> However, *Berkeley* never held or implied that speech and associational rights cannot also be analyzed separately, as the Court had done in its line of expressive-association cases, and never speculated about whether a regulation can infringe upon freedom of association without impairing freedom of speech.

Once the *Martinez* Court determined that CLS’s speech and

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 2981.

<sup>118</sup> See *supra* notes 93–103 and accompanying text (discussing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006)).

<sup>119</sup> *Martinez*, 130 S. Ct. at 2985.

<sup>120</sup> *Id.*

<sup>121</sup> 454 U.S. 290 (1981).

<sup>122</sup> *Id.* at 300 (“A limit on contributions in this setting need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression.”).

<sup>123</sup> *Id.*

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.<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup> Speech restrictions in this type of forum are constitutional, so long as they are reasonable and viewpoint neutral.<sup>127</sup>

Applying the relatively deferential limited public forum test in an especially deferential way,<sup>128</sup> the Court upheld Hastings's all-comers policy, deeming it both viewpoint-neutral and reasonable.<sup>129</sup> 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

<sup>124</sup> *Martinez*, 130 S. Ct. at 2984–85; see also *supra* note 5 (describing forum analysis).

<sup>125</sup> *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)).

<sup>126</sup> 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.”).

<sup>127</sup> *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.

<sup>128</sup> 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.

<sup>129</sup> *Martinez*, 130 S. Ct. at 2995.

of a direct regulation prohibiting membership limitations.<sup>130</sup> 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.<sup>131</sup>

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."<sup>132</sup> In fact, some of the Court's earlier expressive-association cases explicitly blurred the distinction between direct and indirect burdens on expressive association.<sup>133</sup> 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[.]"<sup>134</sup> 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.<sup>135</sup> 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[.]"<sup>136</sup> and deferred to Hastings's view that student organizations are intended to promote "tolerance, cooperation, and learning."<sup>137</sup> 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.<sup>138</sup>

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<sup>130</sup> 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.*

<sup>131</sup> *Id.* at 2986 (majority opinion).

<sup>132</sup> *Id.*

<sup>133</sup> 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)).

<sup>134</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

<sup>135</sup> *Martinez*, 130 S. Ct. at 2988–91.

<sup>136</sup> *Id.* at 2989 (alteration in original) (citations omitted) (internal quotation marks omitted).

<sup>137</sup> *Id.* at 2990.

<sup>138</sup> See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (noting that

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.<sup>139</sup> In fact, Justice Kennedy's concurring opinion recognized the tension between facilitating a diversity of viewpoints and promoting tolerance.<sup>140</sup> 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.<sup>141</sup>

The Court, in analyzing the reasonableness of the all-comers policy, relied heavily on the fact that Hastings was "subsidizing" student organizations.<sup>142</sup> According to the *Martinez* majority, Hastings could reasonably "decline to subsidize with public monies and benefits conduct of which the people of California disapprove."<sup>143</sup> Yet the Supreme Court had never before, in a case involving student organizations, given added deference to universities because student organizations are subsidized.<sup>144</sup> Of course, the majority opinion acknowledged that Hastings could not similarly decline to subsidize organizations with *viewpoints* disapproved by California voters,<sup>145</sup> 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.<sup>146</sup> Had it done so, the Court would have examined the burden placed on CLS's associational rights by a policy affecting its membership. Specifically, it would have denied CLS the ability to restrict its group to members who share a common belief

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student organizations with minority views must be "treated with the same respect" as those with majority views); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 840 (1995) (describing how, in funding student organizations, a school's purpose is "to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life").

<sup>139</sup> There was significant evidence that Hastings's all-comers policy was actually created as a pretext for penalizing groups with certain disfavored viewpoints. See *Martinez*, 130 S. Ct. at 3001–04 (Alito, J., dissenting) (cataloguing various "student groups with bylaws limiting membership and leadership positions to those who agreed with the groups' viewpoints").

<sup>140</sup> *Id.* at 2999 (Kennedy, J., concurring).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 2990.

<sup>143</sup> *Id.* (citations omitted) (internal quotation marks omitted).

<sup>144</sup> See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 832–33 (1995) (rejecting university's argument that it deserves greater latitude to craft policies implicating the use of its facilities, which are "scarce resources"); *Widmar v. Vincent*, 454 U.S. 263 (1981) (overturning university regulation prohibiting student organizations from using its facilities for religious purposes); *Healy v. James*, 408 U.S. 169, 180 (1972) (overturning university president's derecognition of student group).

<sup>145</sup> *Martinez*, 130 S. Ct. at 2994 n.26 ("Although registered student groups must conform their conduct to the Law School's regulation by dropping access barriers, they may express any viewpoint they wish—including a discriminatory one.").

<sup>146</sup> See *supra* notes 104–06, 118–23 and accompanying text.

and would have determined whether that burden was justified by governmental interests.

The Court also gave considerable deference to Hastings in the face of CLS's argument that an all-comers policy left student organizations susceptible to "hostile takeovers," whereby those opposing a group's message will join the group in order to undermine the group's speech or fulfillment of its mission.<sup>147</sup> According to the Court, "[i]f students begin to exploit an all-comers policy by hijacking organizations to distort or destroy their missions, Hastings presumably would revisit and revise its policy."<sup>148</sup> The import of this statement is unclear, but it appears that the Court simply trusted Hastings to protect minority viewpoints in the face of any potential developments—a remarkable display of deference given the First Amendment rights at stake.<sup>149</sup> This extraordinary level of deference and solicitude also impacted Justice Ginsberg's analysis when CLS questioned the viewpoint neutrality of the all-comers policy and in the Court's blurring of the distinction between status and belief.

#### D. Viewpoint Neutrality and the Status/Belief Distinction

The Court found Hastings's all-comers policy to be viewpoint neutral under the speech test for viewpoint neutrality in a limited public forum. As the *Martinez* majority noted, the all-comers policy applied to all student groups regardless of their views.<sup>150</sup> Groups are free to express discriminatory *views* so long as they do not engage in discriminatory *conduct*.<sup>151</sup> Applying the free speech test associated with "expressive conduct,"<sup>152</sup> the Court also found that the all-comers policy was "justified without reference to the content [or viewpoint] of the regulated speech."<sup>153</sup> Under these tests, created for the free speech context, Hastings's policy is viewpoint neutral.<sup>154</sup> The Court, however,

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<sup>147</sup> *Martinez*, 130 S. Ct. at 2992.

<sup>148</sup> *Id.* at 2993.

<sup>149</sup> In other cases involving student organizations, the Court has carefully scrutinized a university's motives for enacting its policies and given special solicitude to minority views. See *Rosenberger*, 515 U.S. at 823 (overturning university policy denying funding to student publications that "primarily promote[] or manifest[] a particular belief in or about a deity or an ultimate reality" based on a suspicion that the university would not apply this policy evenhandedly); Gregory B. Sanford, Note, *Your Opinion Really Does Not Matter: How the Use of Referenda in Funding Public University Student Groups Violates Constitutional Free Speech Principles*, 83 NOTRE DAME L. REV. 845, 851 (2008) (arguing that the *Rosenberger* Court "demonstrated that it is willing to look beyond assertions that restrictions [upon student groups] are content-based to find that the restriction actually discriminates based on viewpoint").

<sup>150</sup> *Martinez*, 130 S. Ct. at 2993.

<sup>151</sup> *Id.* at 2994.

<sup>152</sup> Expressive conduct is implicated when conduct, like burning a draft card, is unquestionably expressive. See *supra* notes 90–92 and accompanying text.

<sup>153</sup> *Martinez*, 130 S. Ct. at 2994 (alteration in original) (internal quotation marks omitted) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

<sup>154</sup> See *id.*

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.<sup>155</sup> 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*."<sup>156</sup> According to Justice Ginsburg, "that proposal would impose on Hastings a daunting labor . . . . [of] determining whether a student organization cloaked prohibited status exclusion in belief-based garb[.]"<sup>157</sup> Yet in the expressive-association context, the Supreme Court had never before concerned itself with the difficulty of policing the distinction between status-based and belief-based selection, and, indeed, has hinged its opinions on this distinction in the past.<sup>158</sup> The Court's assertion that "[o]ur decisions have declined to distinguish between status and conduct" cites to Fourteenth Amendment rights of substantive due process and equal protection.<sup>159</sup> These cases are profoundly distinct because, in the Fourteenth Amendment context, the state is the entity criminalizing belief-based behavior that may be a pretext for discriminating on the basis of status.<sup>160</sup> In the expressive-association context, private groups, who are not prohibited from discriminating by the Constitution and who do not possess the power of the state, often wish to select members who share their core values for the purposes of expression, not discrimination.

After denying CLS's expressive-association claim, the Court left open for review the question of whether Hastings applied its all-comers policy in an unconstitutionally selective way to penalize certain groups. According to CLS, "[t]he peculiarity, incoherence, and suspect history of the all-comers policy all point to pretext."<sup>161</sup> The *Martinez* majority remanded this issue for the lower courts to address in the first instance.<sup>162</sup>

<sup>155</sup> See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, '[f]reedom of association . . . plainly presupposes a freedom not to associate.'" (alteration in original) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984))).

<sup>156</sup> *Martinez*, 130 S. Ct. at 2990.

<sup>157</sup> *Id.*

<sup>158</sup> See *supra* Part II.B.

<sup>159</sup> *Martinez*, 130 S. Ct. at 2990.

<sup>160</sup> *Id.* ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." (internal quotation marks omitted) (quoting *Lawrence v. Texas*, 539 U.S. 558, 575 (2003))); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

<sup>161</sup> *Martinez*, 130 S. Ct. at 2995 (alteration in original) (citation omitted) (internal quotation marks omitted).

<sup>162</sup> *Id.* On remand, the Ninth Circuit held that CLS had not preserved this issue for review and declined to address it. See Docket in *Christian Legal Soc'y v. Kane*, No. 06-15956, 2006 WL

The Court's ultimate holding—that Hastings's all-comers policy was reasonable and viewpoint neutral—is defensible if one accepts that Hastings applied the policy equally to all student groups, and grants Hastings its contention that the purpose of student organizations is to promote “tolerance, cooperation, and learning.” However, there is a strong argument that it is unreasonable to establish a forum for expression but not protect an organization's ability to safeguard its expression when choosing members. As scholars have argued, it defies logic to establish a forum where student groups can have particular religious or political identities but then cannot select members or leaders based on those identities.<sup>163</sup> The Court overlooked the inherent contradictions in fostering expressive associations through an all-comers policy.

Moreover, to reach its holding that Hastings's policy was reasonable and viewpoint neutral, the Court essentially negated CLS's freedom of expressive-association claim by treating it as coterminous with a free speech or expressive-conduct claim. The Court also gave added deference to universities by focusing heavily on the university's provision of facilities and official recognition,<sup>164</sup> and further erased the distinction between status and belief. The next section examines these choices and their implications for expressive association.

#### IV. THE DANGER OF MERGING SPEECH AND EXPRESSIVE ASSOCIATION IN A LIMITED PUBLIC FORUM

As detailed in the previous section, the major legal development in *Martinez* was the Court's decision to merge its analysis of speech and expressive-association claims when made by participants in a limited public forum. The decision to apply the “more lenient test governing ‘limited public forums’” to CLS's expressive-association claim was likely outcome-determinative,<sup>165</sup> yet was accompanied by scant authority or explanation of how the expressive-association doctrine will be affected.<sup>166</sup> Although there are legitimate reasons for merging speech

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997217 (D. Cal. May 19, 2006).

<sup>163</sup> See Brownstein & Amar, *supra* note 4, at 510.

<sup>164</sup> Although courts must afford “a degree of deference to a university's academic decisions, within constitutionally prescribed limits,” *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003), the *Martinez* Court relied on the fact that the university was providing its facilities and “subsidizing student organizations” as an unprecedented reason to give Hastings deference. *Martinez*, 130 S. Ct. at 2990–91; see also *supra* Part III.C.

<sup>165</sup> Brownstein & Amar, *supra* note 4, at 507 (quoting *Martinez*, 130 S. Ct. at 2988-93). “The choice of the ‘reasonable’ and viewpoint-neutral test—that is, the choice of the appropriate doctrinal box or category on the First Amendment case law flowchart—essentially dictated the result.” *Id.*

<sup>166</sup> See *Martinez*, 130 S. Ct. at 2985–86; Brownstein & Amar, *supra* note 4, at 515 (“Is the analogy strong enough between the nature of speech regulations and the nature of association regulations to justify applying speech regulation categories to freedom of association claims? The Court clearly thinks that it is. However, the Court does very little to explain why it thinks so or to justify this

and expressive-association claims in a limited public forum,<sup>167</sup> 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 *Martinez*, when the “intertwined rights” of free speech and expressive association both arise in a limited public forum, “it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association.”<sup>168</sup> Further, “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.”<sup>169</sup> Perhaps the Court is correct to distinguish between burdens on expressive association in a limited public forum and those relevant to the public sphere, or a traditional public forum.<sup>170</sup> But even accepting that forum analysis is applicable to expressive-association claims,<sup>171</sup> it does not follow that a restriction that is constitutional as a matter of free speech principles cannot unconstitutionally burden expressive association. By merging CLS’s speech and expressive-association claims, the Court left the right of expressive association with no independent protection in a limited public forum.<sup>172</sup>

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conclusion.”).

<sup>167</sup> See *Martinez*, 130 S. Ct. at 2984–85; Brownstein & Amar, *supra* note 4, at 514.

<sup>168</sup> *Martinez*, 130 S. Ct. at 2985.

<sup>169</sup> *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 822 (1995)).

<sup>170</sup> See *supra* note 5 for an explanation on the different forums.

<sup>171</sup> Even in the speech context, however, forum analysis has been widely criticized for generating confusion and clouding assessment of First Amendment values. See, e.g., Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1223 (1984) (“Even when public forum analysis is irrelevant to the outcome of a case, the judicial focus on the public forum concept confuses the development of first amendment principles.”); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1718–19 (1987) (chronicling examples of public forum criticism); Robert L. Waring, Comment, *Talk is Not Cheap: Funded Student Speech at Public Universities on Trial*, 29 U.S.F. L. REV. 541, 556 (1995) (explaining that the imprecise tests for determining the nature of a particular forum have “generated tremendous confusion and controversy”).

<sup>172</sup> Professor Eugene Volokh, in an article cited by the *Martinez* Court, appears to argue that expressive association does not deserve independent protection in a limited public forum because the government does not have a “duty to subsidize” the exercise of constitutional rights. Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1920–23 (2006) (arguing that a governmental “exclusion based on a group’s exercise of its expressive association rights is not barred by the No Governmental Viewpoint Discrimination exception” to the “No Duty To Subsidize” principle). This Article addresses Volokh’s understanding

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.<sup>173</sup> 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.”<sup>174</sup> 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.”<sup>175</sup>

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[.]”<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup>

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.

<sup>173</sup> 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) (“First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives.”); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 227 (1983) (arguing that the Court has “tended increasingly to emphasize motivation as a paramount constitutional concern”).

<sup>174</sup> Brownstein & Amar, *supra* note 4, at 516.

<sup>175</sup> *Id.* at 517. Brownstein and Amar compare viewpoint-neutral restrictions to content-neutral restrictions, which restrict speech based on their subject matter or topic. See Ammori, *supra* note 127, at 283–84. “The requirement that the government be content-neutral in its regulation of speech means that the government must be both viewpoint neutral and subject matter neutral.” Erwin Chemerinsky, *The Fifty-Fifth Cleveland-Marshall Fund Lecture: The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 202–03 (1994).

<sup>176</sup> *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2980 n.2 (2010).

<sup>177</sup> *Id.* (“Hastings’ open-access policy, however, requires . . . that student organizations open eligibility for membership and leadership regardless of a student’s status or beliefs.”).

<sup>178</sup> The majority in *Martinez* also blithely overlooks the fact that groups most needing First Amendment protection—those with minority or unpopular views or with the most determined enemies—will be most vulnerable to “hostile takeovers.” See *id.* at 2992.

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 viewpoint. Yet, it is clear that the expressive-association rights of those with a specific viewpoint (such as student groups with views aligned with the Democratic Party or political liberals) are particularly targeted, and that their speech would suffer as a result.

Similarly, a nondiscrimination policy prohibiting student organizations from limiting membership on the basis of religious beliefs is viewpoint neutral from a speech perspective, as it applies to all groups. However, this policy limits the expressive association only of groups with a particular viewpoint—religious groups.<sup>179</sup> As a matter of free speech law, a university policy that denies funding to student organizations whose publications “primarily promote[] or manifest[] a particular belief in or about a deity or an ultimate reality” is considered viewpoint discriminatory.<sup>180</sup> The Supreme Court deemed such a university policy unconstitutional, even though it applied to speech from an atheistic perspective, because religion provides “a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.”<sup>181</sup> It seems perverse then, that universities can target the *associational* rights of student groups with a religious perspective (atheist or deist), whose *speech* they cannot burden, by mandating that student organizations cannot select their members on the basis of a particular religious perspective.

Just as “Hastings’ all-comers requirement draws no distinction between groups based on their message or perspective[,]”<sup>182</sup> a university policy affecting the membership requirements of all student groups can be considered viewpoint neutral from a speech perspective while offering no protection from policies that undermine the expressive-association rights of groups with only certain viewpoints.<sup>183</sup>

The primary reason that protections for expressive association

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<sup>179</sup> See Volokh, *supra* note 172, at 1931–33.

<sup>180</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 823, 825, 831 (1995) (citation omitted) (internal quotation marks omitted).

<sup>181</sup> *Id.* at 831.

<sup>182</sup> *Martinez*, 130 S. Ct. at 2993.

<sup>183</sup> In the speech arena, a viewpoint-neutral regulation that has a disparate impact on certain speech is constitutionally permissible, so long as the regulation was not intended to suppress a particular viewpoint or distort debate. See Brownstein & Amar, *supra* note 4, at 517–23. Applying this concept to expressive association is misplaced, however, because viewpoint neutrality, as understood in the speech context, does not protect associational rights. Once an amended understanding of viewpoint neutrality is established for expressive association, regulations that are viewpoint neutral but have a disparate impact would also be constitutionally permissible. See *infra* Part IV.B.

cannot be merged with speech protections is that expressive association contains both speech elements (the expression of the group and its members) and conduct elements (the act of excluding or including members in order to promote that expression). Thus, the viewpoint-neutrality test governing speech restrictions in a limited public forum must be modified in recognition of the hybrid nature of expressive association.

### B. An Independent Test for Expressive Association

When assessing a student organization's free speech claim, the limited-public-forum test can remain intact. As in *Martinez*, a regulation affecting speech would be upheld if it is viewpoint neutral and reasonable in light of the purposes of the forum.<sup>184</sup> To protect a student organization's right to expressive association, however, a separate standard is needed that appreciates the differences between speech rights and associational rights.

One way to preserve expressive association as an independent right in a limited public forum would be to revive the jurisprudence from cases like *Roberts* and *Hurley*, but apply a greater degree of deference to the government (and less scrutiny to its regulation) in a limited public forum. Burdens on expressive association in a limited public forum could be upheld if a university policy is justified by a substantial reason, unrelated to the suppression of ideas, and is narrowly tailored to achieve the university's reasonable goal. This test borrows language from "intermediate scrutiny" tests applicable to other constitutional rights.<sup>185</sup>

The all-comers policy in *Martinez* is susceptible to invalidation under this test—the reasons justifying the policy appear, to some scholars, dubious and incoherent,<sup>186</sup> and the policy is not a narrowly tailored way of achieving the university's nebulous goals of tolerance and cooperation. The all-comers policy is also extremely burdensome to expressive association, and the university's goals could be achieved in a much less onerous way.<sup>187</sup>

Another alternative is to follow the *Martinez* Court's lead in using the test applicable to speech claims in a limited public forum, but modify the definition of viewpoint neutrality when assessing an expressive-association claim. In this context, viewpoint neutrality should prohibit

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<sup>184</sup> *Martinez*, 130 S. Ct. at 2988.

<sup>185</sup> See generally Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 315–22 (1998).

<sup>186</sup> See, e.g., Brownstein & Amar, *supra* note 4, at 540–41.

<sup>187</sup> See *Martinez*, 130 S. Ct. at 3013–14 (Alito, J., dissenting) (discussing how the all-comers policy is "antithetical" to encouraging a diversity of viewpoints, and "no legitimate state interest could override the powerful effect that an accept-all-comers law would have on the ability of religious groups to express their views.").

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.<sup>188</sup> A university policy prohibiting student organizations from excluding members who belong to particular political ideologies would also be infirm.<sup>189</sup> 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.<sup>190</sup>

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.<sup>191</sup>

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

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<sup>188</sup> See *supra* notes 173–83 and accompanying text for a discussion on how regulations targeting those who believe in an “ultimate reality,” even if the regulation applies to deist and atheist groups equally, is considered viewpoint based. Because religion, even defined broadly, is considered a viewpoint by the Court, prohibiting exclusions based on religious beliefs would be unconstitutional under this proposed test.

<sup>189</sup> It is unclear whether a regulation targeting political speech, or targeting the associational rights of those who wish to exclude or include political views, would be considered content discriminatory or viewpoint discriminatory. Content-discriminatory regulations are permissible in a limited public forum, whereas viewpoint-discriminatory policies are not. See *supra* note 127 (explaining the difference between content-neutral and viewpoint-neutral restrictions on speech). That said, following the test in *Martinez*, a school would also need a legitimate pedagogical reason to burden “political speech,” and thus, modifying the test in *Martinez* to protect associational rights, should similarly need a legitimate pedagogical reason to burden the expressive association of groups who wish to select members on the basis of shared political views.

<sup>190</sup> For further elaboration on this point and the distinction between status and belief/conduct, see *infra* Part V.

<sup>191</sup> *Martinez*, 130 S. Ct. at 3002–03 (Alito, J., dissenting). At oral argument, Justice Scalia noted that, “one reason why I am inclined to think this [all-comers policy] is pretextual is that it is so weird to require the -- the campus Republican Club to admit Democrats, not just to membership, but to officership. To require this Christian society to allow atheists not just to join, but to conduct Bible classes, right? That’s crazy.” Transcript of Oral Argument, at 34, *Martinez*, 130 S. Ct. 2971 (No. 08-1371), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-1371.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1371.pdf).

independent protection for associational rights in a limited public forum.<sup>192</sup> Volokh appreciates that, even in a limited public forum, the government may not refuse to fund an organization based on its viewpoint (even if that viewpoint is racist, sexist, or anti-gay), but contends that a university may refuse to fund or provide facilities to organizations that exercise their associational rights in ways objectionable to the school (i.e., CLS's exclusion of those who refuse to disavow premarital sex).<sup>193</sup>

Volokh's argument hinges upon this idea that there is generally "no duty to subsidize" the exercise of constitutional rights, with one of the few exceptions being that the government may not establish a forum for speech and then discriminate against a speaker based on his viewpoint.<sup>194</sup> His article explores the issue of whether "courts should develop an analogous exception barring the government from discriminating based on a group's expressive association decisions[,] but ultimately concludes, without much analysis, that this analogous exception should not be recognized."<sup>195</sup>

Contrary to Volokh's conclusion, an analogous exception should be recognized. Because speech and expressive association are so intimately intertwined, a university could undermine a group's speech without violating free speech protections by targeting the group's ability to select like-minded members.<sup>196</sup> Moreover, in the student organizational context, the Court has never considered a university's lending of its facilities or funding to be a governmental subsidy in the same way it has in other contexts, and for good reason. When a university sets up a forum for speech, that speech is considered entirely private and not attributable to the school. Especially in this context, a student organization's right to expressive association merits protection, just as much as its right to free speech.

### C. Debunking the Subsidies Myth

It is undeniable that universities like Hastings, in establishing student organizations, provide facilities and often some modicum of funding to student groups. Moreover, the student organizational forum is considered to be a limited public forum, and First Amendment restrictions are subject to less exacting scrutiny than in a traditional public forum.<sup>197</sup> The forum created for student organizations, however,

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<sup>192</sup> Volokh, *supra* note 172, at 1923.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 1924–28.

<sup>195</sup> *Id.* at 1923, 1938–41.

<sup>196</sup> In fact, this was the contention in *Martinez*. See *Martinez*, 130 S. Ct. at 3004 (Alito, J., dissenting).

<sup>197</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

is one dedicated to the promotion of a diversity of views,<sup>198</sup> and the Court has unequivocally considered student organizations to engage in *private* speech.<sup>199</sup> 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 subsidy with sponsorship and believe that the university’s imprimatur is placed on student groups.<sup>200</sup> This confusion afforded universities greater latitude in controlling student groups.<sup>201</sup> Even scholars have difficulty viewing CLS’s speech as purely private due to the university’s provision of facilities and funding.<sup>202</sup> According to the *Martinez* Court, one reason that Hastings’s all-comers policy is reasonable is because “Hastings’ policy, which incorporates—in fact, subsumes—state-law proscriptions on discrimination, conveys the Law School’s decision to decline to subsidize with public monies and benefits conduct of which the people of California disapprove.”<sup>203</sup> Yet the Court, invoking the concept of subsidies in order to give the university more deference,<sup>204</sup> never explains why it is permissible for a university to create an all-comers policy and thereby decline to “subsidize” an organization’s exercise of its

<sup>198</sup> See *id.* at 840 (describing the purpose of funding student organizations as “to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life”).

<sup>199</sup> See *id.* at 841–42 (“The University has taken pains to disassociate itself from the private speech involved in this case. The Court of Appeals’ apparent concern that Wide Awake’s religious orientation would be attributed to the University is not a plausible fear, and there is no real likelihood that the speech in question is being either endorsed or coerced by the State[.]”).

<sup>200</sup> According to Justice Stevens, a “free society” must tolerate organizations that “exclude or mistreat Jews, blacks, and women—or those who do not share their contempt for Jews, blacks, and women[.]” but this society “need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities.” *Martinez*, 130 S. Ct. at 2998 (Stevens, J., concurring). This contention seems to imply that universities do not have to “sanction” groups whose ideology involves hate or bigotry, a contention that even the majority in *Martinez* rejects. See *id.* at 2994 n.26 (majority opinion) (“Although registered student groups must conform their conduct to the Law School’s regulation by dropping access barriers, they may express any viewpoint they wish—including a discriminatory one.”).

<sup>201</sup> Justice Stevens wrote quite explicitly that, contrary to the Supreme Court’s earlier understanding of the student organizational forum, “[i]t is not an open commons that Hastings happens to maintain. It is a mechanism through which Hastings confers certain benefits and pursues certain aspects of its educational mission.” *Martinez*, 130 S. Ct. at 2998 (Stevens, J., concurring). Further, the university “could not remain neutral—in determining which goals the program will serve and which rules are best suited to facilitate those goals.” *Id.*; see also *supra* Part III.

<sup>202</sup> See Toni Massaro, *Christian Legal Society: Six Frames*, 38 HASTINGS CONST. L.Q. 569 (2011). Massaro, analyzing the issue of subsidies and state action, argued that, although the school’s speech was not so entangled with CLS’s speech as to render its exclusion of certain students a state action, “[t]he school was involved in a way that it would not have been if no funding, no imprimatur, and no conditions were involved.” *Id.* at 589.

<sup>203</sup> *Martinez*, 130 S. Ct. at 2990 (citation omitted) (internal quotation marks omitted).

<sup>204</sup> See *supra* Part III.B

right to expressive association, but impermissible for a university to decline to “subsidize” groups whose speech the university finds objectionable.<sup>205</sup>

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.<sup>206</sup> 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.”<sup>207</sup> 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*,<sup>208</sup> 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.”<sup>209</sup> 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, the constitutionality of a university’s burden on expressive association should be tested using a modified viewpoint-neutrality test that permits universities to place limitations on student organizations without targeting the inclusion or exclusion of certain viewpoints.<sup>210</sup>

## V. THE NECESSARY DIFFICULTIES OF THE STATUS/BELIEF DISTINCTION

As explained in the previous sections, the *Martinez* majority erased the previously recognized distinction in the expressive-association

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<sup>205</sup> In *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), the Supreme Court held that a public university must allocate the funds to student organizations from its mandatory student activities fee in a viewpoint-neutral fashion. *Southworth*, 529 U.S. at 233–34. Thus, a university cannot fund a pro-life group but not a pro-choice group simply because it is providing university facilities. Student organizations of all ideologies deserve the same chance to be funded, so that “minority views are treated with the same respect as are majority views.” *Id.* at 235.

<sup>206</sup> See *Southworth*, 529 U.S. at 217; *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>207</sup> Massaro, *supra* note 202, at 583 (emphasis added).

<sup>208</sup> See Volokh, *supra* note 172.

<sup>209</sup> *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2985 (2010) (citation omitted).

<sup>210</sup> See *supra* Part IV.B.

jurisprudence between discrimination on the basis of status and selection on the basis of belief.<sup>211</sup> This distinction is critical, however, to preserving the right to expressive association in a limited public forum, where private organizations should be entitled to limit membership to those who share their views.<sup>212</sup> As a matter of policy, society should also recognize the difference between truly invidious forms of discrimination, based on immutable characteristics, and discrimination on the basis of shared values, a central feature of associational rights. The final section of this Article explores the status/belief distinction and address the criticisms of this distinction.

### A. “Good” and “Bad” Forms of Discrimination

In its pre-*Martinez* cases, the Supreme Court struck a delicate balance between liberty interests protected by the Constitution and society’s interest in equality and ensuring equal access to goods and services. These cases emphasized that a private organization’s exclusion of those who oppose the group’s views should be constitutionally protected because it preserves the expressive purposes of the organization.<sup>213</sup> In contrast, exclusion of individuals based on immutable characteristics, or status, is typically not necessary to safeguard expressive association.<sup>214</sup> The distinction between selection based on belief or conduct rather than status separates a “good” kind of discrimination from the kind that should be the target of antidiscrimination laws—that on the basis of qualities that cannot be altered, such as race, gender, ethnicity, or sexual orientation.

Hastings’s all-comers policy wished to “allow any student to participate, become a member, or seek leadership positions, regardless of [her] status or beliefs,”<sup>215</sup> as if beliefs are an immutable trait upon which it would be unfair to deny a student membership. The *Martinez* majority seized upon this conflation in order to uphold Hastings’s laudable desire to promote tolerance and cooperation among its students.<sup>216</sup> But, in oral

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<sup>211</sup> See *supra* Part III.

<sup>212</sup> See Charles Morris, *Association Speaks Louder Than Words: Reaffirming Students’ Right to Expressive Association*, 19 GEO. MASON U. C.R. L.J. 193, 196 (2008) (“[T]he Supreme Court and lower courts have consistently held that organizations may exclude potential members whose ideologies and values are fundamentally opposed to the groups’ collective ideology and values.”).

<sup>213</sup> See *supra* Part II.

<sup>214</sup> See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (“[D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.”).

<sup>215</sup> *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2979 (2010) (alteration in original) (citation omitted) (internal quotation marks omitted).

<sup>216</sup> *Id.* at 2990. Justice Ginsburg even claimed that “[o]ur decisions have declined to distinguish between status and conduct in this context[.]” but failed to cite to any cases involving expressive

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.<sup>217</sup>

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.<sup>218</sup> Selectivity on the basis of belief allows groups to organize around a coherent viewpoint, and enables minority views to survive despite majoritarian pressure.<sup>219</sup> Associating with like-minded individuals to exchange views and amplify one’s voice, which necessarily involves some form of “discrimination,” is at the heart of expressive association.<sup>220</sup>

Hastings initially denied recognition to CLS for discriminating not only on the basis of religion, but also on the basis of sexual orientation, an immutable characteristic.<sup>221</sup> In fact, a pre-*Martinez* case from the Seventh Circuit, which upheld the expressive-association claim of a CLS chapter at Southern Illinois University School of Law,<sup>222</sup> found that the University’s CLS group did not discriminate based on sexual orientation, but only on the basis of belief.<sup>223</sup> According to the Seventh Circuit, CLS “interprets its statement of faith to allow persons ‘who may have homosexual inclinations’ to become members of CLS as long as they do not engage in or affirm homosexual conduct.”<sup>224</sup> Moreover, only

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association. *Id.*; see also *supra* notes 118–27 and accompanying text.

<sup>217</sup> Transcript of Oral Argument, at 46–47, *Martinez*, 130 S. Ct. 2971 (No. 08-1371).

<sup>218</sup> It is important to note that this discrimination on the basis of belief should be considered only a “good” thing when exercised by private organizations, in order to promote expressive association. This Article does not wish to disturb nondiscrimination laws as they apply to the employment context, where First Amendment protections are not as salient. See generally Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385 (2009).

<sup>219</sup> See *supra* notes 18–20 and accompanying text.

<sup>220</sup> However, discrimination on the basis of the religion into which an individual is born, if he or she no longer practices that religion, represents discrimination on the basis of an immutable status, and presumably would not be sanctioned by Chief Justice Roberts.

<sup>221</sup> *Martinez*, 130 S. Ct. at 2974 (“Hastings rejected CLS’s application for [registered student organization] status on the ground that the group’s bylaws did not comply with Hastings’ open-access policy because they excluded students based on religion and sexual orientation.”).

<sup>222</sup> The Christian Legal Society is a nationwide organization, with chapters on campuses across the country. *Id.* at 857–58.

<sup>223</sup> *Christian Legal Soc’y v. Walker*, 453 F.3d 853 (7th Cir. 2006).

<sup>224</sup> *Id.* at 860 (citation omitted) (granting a preliminary injunction against application of a university’s nondiscrimination policy to a CLS chapter on expressive association grounds).

“heterosexual persons who do not participate in or condone heterosexual conduct outside of marriage may become CLS members[.]”<sup>225</sup> The Seventh Circuit acknowledged the importance of the status/belief distinction.<sup>226</sup> It held that “CLS’s membership policies are thus based on belief and behavior rather than status,” and enjoined the application of Southern Illinois University School of Law’s nondiscrimination policy against the group.<sup>227</sup>

Professor Eugene Volokh, in his article cited by the *Martinez* majority, also argued that a group’s exclusion of individuals who refuse to condemn homosexuality does not constitute status-based sexual orientation discrimination.<sup>228</sup> According to Volokh, this exclusion would instead be “based on holding a certain viewpoint that secular people could hold as well as religious ones.”<sup>229</sup> Of course, the group would have to exclude both heterosexuals “who disagree with [certain religious] teachings on this issue” and “practicing homosexuals,” or else the group “would be engaging in prohibited sexual orientation discrimination, not permitted religious discrimination.”<sup>230</sup>

Many scholars and courts, however, find the status/belief distinction problematic, particularly when applied to sexual orientation. In contrast to a characteristic like gender, where identification as male or female does not necessarily dictate specific beliefs or behavior, the distinction between immutable sexual orientation and sexual conduct is less clear. In the final section, this Article addresses criticisms of the status/belief distinction.

## B. Objections to the Status/Belief Distinction

A major, compelling objection to the status/belief distinction is that it does not adequately protect certain individuals from status-based discrimination in cases where status and belief (or conduct) are intertwined. The *Martinez* majority highlighted this concern when it quoted *Bray v. Alexandria Women’s Health Clinic*,<sup>231</sup> an equal protection case, for the proposition that “[a] tax on wearing yarmulkes is a tax on Jews.”<sup>232</sup> It is true that if the government wished to discriminate against

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* This nondiscrimination policy mandated that Southern Illinois University will “provide equal employment and education opportunities for all qualified persons without regard to race, color, religion, sex, national origin, age, disability, status as a disabled veteran of the Vietnam era, sexual orientation, or marital status.” *Id.* at 858 (citation omitted) (internal quotation marks omitted).

<sup>228</sup> See Volokh, *supra* note 172, at 1938.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> 506 U.S. 263, 270 (1993).

<sup>232</sup> *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (internal quotation marks omitted) (quoting *Bray v. Alexandria Women’s*

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.<sup>233</sup> When performed by the government, this type of irrational, animus- or status-based classification is prohibited by the Fourteenth Amendment's Equal Protection Clause.<sup>234</sup>

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.<sup>235</sup>

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,”<sup>236</sup> 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 conduct. As scholars have forcefully argued, there is something “disingenuous” in “tell[ing] someone it is

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Health Clinic, 506 U.S. 263, 270 (1993)).

<sup>233</sup> *Bray*, 506 U.S. at 270 (“Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed.”).

<sup>234</sup> See generally Cass R. Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (discussing the invalidation of statutes motivated by animus towards gays and African Americans).

<sup>235</sup> It is also important to note that a far greater societal injustice occurs when the government classifies individuals on the basis of immutable characteristics than when private organizations, who are not subject to the Fourteenth Amendment, engage in exclusionary practices.

<sup>236</sup> See Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 104 (2006) (“I have the same reaction to those who blithely assume a religious person can easily disengage her religious belief and self-identity from her religious practice and religious behavior. What do they think being religious means?”). Professor Feldblum incorrectly conflates immutable characteristics, like race or sexual orientation, with religious identity and beliefs, which are voluntary. *Id.*

permissible to ‘be’ gay, but not permissible to engage in gay sex.”<sup>237</sup> Another scholar explained that “[t]he love, intimacy, and affection that lesbian, gay, and bisexual people share with their same-sex partners is indeed a crucial element in sexual orientation, and insofar as the status/conduct distinction denies that reality, it pollutes the theoretical discourse on homosexuality.”<sup>238</sup> *Being* gay and actively loving someone of the same sex are much more deeply and inextricably intertwined than, for example, being female and having certain views, or engaging in certain conduct.<sup>239</sup>

These arguments against the status/belief distinction as applied to sexual orientation have great purchase, especially when analyzing *governmental* discrimination or criminalization of conduct associated with LGBT individuals.<sup>240</sup> When the government criminalizes homosexual conduct, for instance, it prohibits gays from engaging in behavior intimately connected with who they are.<sup>241</sup> However, private organizations exist to promote a diversity of views, and gays can continue to champion equality in, or simply become a member of, organizations that support, or are neutral about, gay rights. Further, organizations that accept those who identify as LGBT but practice abstinence (or condemn homosexual acts) cannot be categorized as excluding members who engage in homosexual conduct as a pretext for excluding all gays. Sexual orientation may be immutable, but sexual conduct is certainly voluntary. As disadvantageous as that recognition is for gay rights and important societal interest in equality, it cannot be ignored in the context of private organizations exercising their rights to expressive association. Recognizing the difference between sexual orientation and sexual conduct does not “pollute the discourse.” In fact, it seems that those who wish to mandate that Christian groups accept gays as members seek to manufacture an artificial version of tolerance through coercion.

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<sup>237</sup> *Id.*

<sup>238</sup> Teresa M. Bruce, Note, *Doing the Nasty: An Argument for Bringing Same-Sex Erotic Conduct Back Into the Courtroom*, 81 CORNELL L. REV. 1135, 1170–71 (1996).

<sup>239</sup> See Diane H. Mazur, *The Unknown Soldier: A Critique of “Gays in the Military” Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223, 225 (1996) (“The status/conduct distinction . . . denies the importance of normal human intimacy.”); Roderick M. Hills, Jr., *Is Amendment 2 Really a Bill of Attainder? Some Questions About Professor Amar’s Analysis of Romer*, 95 MICH. L. REV. 236, 249–50 (1996) (“[G]ays and lesbians are not interested in merely ‘being gay’ (whatever that means): they are interested in conduct: making love, forming relationships, dating, displaying photos of partners in the workplace, wearing wedding rings, living together in rental units, holding hands in public, and otherwise expressing desire, affection, and commitment.”).

<sup>240</sup> See *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (“Our decisions have declined to distinguish between status and conduct in this context.”). *Martinez* quoted *Lawrence v. Texas*, 539 U.S. 558, 575 (2003), for the proposition that “[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination.” *Martinez*, 130 S. Ct. at 2990; see also *Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring) (“While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.”).

<sup>241</sup> *Martinez*, 130 S. Ct. at 2990.

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.<sup>242</sup> 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.<sup>243</sup> 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.<sup>244</sup>

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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<sup>242</sup> *Id.* ("CLS proposes that Hastings permit exclusion because of *belief* but forbid discrimination due to *status*. But that proposal would impose on Hastings a daunting labor. How should the Law School go about determining whether a student organization cloaked prohibited status exclusion in belief-based garb?" (citation omitted)).

<sup>243</sup> See *supra* notes 76–87 and accompanying text (discussing *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000)).

<sup>244</sup> See Transcript of Oral Argument, at 45–46, *Martinez*, 130 S. Ct. 2971 (No. 08-1371) (Alito, J.) ("If an orthodox Jewish group or a Muslim group applied for recognition and the group said part of our beliefs is—one of our beliefs is—that men and women should sit separately at religious services, would Hastings deny registration to that group?").

## 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.