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The Need for Religious Groups to Be Exempt from the Diversity Policies of Universities in Light of *Christian Legal Society v. Martinez*

INTRODUCTION

“This is an environment of welcoming, so you should just get the hell out.”¹

The irony of the above statement is obvious. It is a tragedy, then, that the humor appears to have been lost on the Supreme Court of the United States. Now, a state law school’s policy that, under the guise of welcoming all comers, has told religious groups to effectively “get the hell out” has been given constitutional blessing.²

The case arose when a group of Christian students sought recognition at the University of California, Hastings College of the Law (Hastings).³ The group they wished to organize, the Christian Legal Society (CLS), would require all members and officers to affirm certain tenets of the Christian faith, as well as abstain from sexual conduct outside of marriage.⁴ This requirement meant that all homosexual activity was prohibited for CLS members and officers.⁵ Hastings, finding that these requirements violated its policy prohibiting students from discriminating on any basis, denied the group recognition.⁶ The CLS sued Hastings, arguing that the denial impaired the constitutional rights of the students to free speech, expressive association, and free exercise of religion.⁷ By a 5–4 majority, the Court ruled in favor of Hastings, finding that the “all-comers” policy Hastings had in place was content-neutral and that the burdens on students resulting from the need to organize without official school recognition were not overly burdensome.⁸

Although it is debatable how far-reaching the effects of this decision will be, the Court’s reasoning puts many collegiate religious groups in jeopardy of being denied recognition by their universities. By placing religious groups in such a position, the Supreme Court has unwisely endangered the nature of a university

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1. *The Office: Diversity Day* (NBC television broadcast Mar. 29, 2005).
2. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2978 (2010).
3. *Id.* at 2980.
4. *Id.*
5. *Id.*
6. *Id.* at 2981.
7. *Id.*
8. *Id.*

as a marketplace of ideas.⁹ In order to counteract these harms, the Supreme Court should overturn *Martinez* and allow religious groups to be exempt from the diversity policies of universities. Alternatively, state legislatures should be proactive and amend the diversity policies of state universities to allow student groups formed around the viewpoints of comprehensive religions to be exempt from such policies.¹⁰

This Comment is divided into four parts. Part I sets forth two lines of jurisprudence relevant to the *Martinez* decision: (1) the right of groups not to associate with particular persons, and (2) the rules regarding limited public fora. Part I also analyzes a factually similar case decided before *Martinez* that addressed a nondiscrimination policy using these lines of jurisprudence. In Part II, this Comment examines the reasoning of the *Martinez* majority, concurring, and dissenting opinions. Part III argues the *Martinez* Court erred by failing to apply analogous precedents in the jurisprudence regarding traditional public fora, by considering Hastings's policy to be viewpoint neutral, and by failing to provide protection for student groups with minority viewpoints. Finally, in Part IV, this Comment argues that religious groups are so important to university life that reasons of law and policy necessitate that either the Court or state legislatures act in order to preserve the existence of religious groups on college campuses. This Comment demonstrates that universities achieve authentic diversity through the protection of student religious groups.

I. THE JURISPRUDENCE BEFORE *MARTINEZ* REGARDING THE RELEVANT RIGHTS OF STUDENTS

Associations, particularly those on college campuses, had enjoyed favorable treatment from the Supreme Court in the jurisprudence leading up to *Martinez*. The Court had been protective of the right to associate and had allowed some groups to exclude members with opposing viewpoints.¹¹ Attempts by colleges to exclude groups, particularly religious ones, from campuses were constitutionally disfavored.¹² With this background, the Seventh Circuit found that a state school's attempt to deny recognition to a CLS chapter based on a nondiscrimination policy was

9. See *infra* Part IV.

10. Because the *Martinez* opinion relies on a distinction between "all-comers" policies and nondiscrimination policies, this Comment uses "diversity policies" as an umbrella term to refer to both types of policies.

11. See *infra* Part I.A.

12. See *infra* Part I.B.

unconstitutional.¹³ In order to determine what impact *Martinez* may have on the rights of students to form religious groups, it is necessary to first examine this background.

A. The Rights of Association and Non-Association

The Supreme Court has held that the freedom to associate has a “close nexus” to the freedom of speech in that effective advocacy of a viewpoint, including a religious one, is “undeniably enhanced by group association.”¹⁴ An implicit and necessary element of the freedom to associate is the freedom not to associate.¹⁵ This freedom is included in the “liberty” granted through the Due Process Clause of the Fourteenth Amendment.¹⁶

This right of “disassociation” is not absolute. In a line of cases, the Court has examined the right of groups to limit membership on the basis of sex. The seminal case in this line is *Roberts v. U.S. Jaycees*.¹⁷ In *Roberts*, a national civic organization for young men, the Jaycees, attempted to justify a policy limiting membership to males in spite of Minnesota’s Human Rights Act, which prohibited discriminatory practices based on sex.¹⁸ The Court upheld Minnesota’s act based on several factors. First, the Jaycees were a “large and basically unselective group.”¹⁹ Other than age and sex, there were no other requirements for members.²⁰ This kind of broad structure lacked the “small and selective” nature the Court found necessary to merit constitutional protection from sexual discrimination prohibitions.²¹ Second, the Court emphasized that the admission of women did not appear to threaten any alteration of the Jaycees’ viewpoints, noting that the Jaycees had already allowed women to participate in many Jaycee activities.²² This

13. *Christian Legal Soc’y v. Walker*, 453 F.3d 853 (7th Cir. 2006).

14. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). Thus, infringement upon one’s right to freely associate may also infringe upon one’s right to freely speak when the association is meant to promote a viewpoint. *Id.*

15. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

16. *Patterson*, 357 U.S. at 460.

17. This line also includes *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Association v. City of New York*, 487 U.S. 1 (1988). See Mark Andrew Snider, Note, *Viewpoint Discrimination by Public Universities: Student Religious Organizations and Violations of University Nondiscrimination Policies*, 61 WASH. & LEE L. REV. 841, 858–60 (2004).

18. *Roberts*, 468 U.S. at 612.

19. *Id.* at 621.

20. *Id.*

21. *Id.*

22. *Id.* at 627.

analysis suggested that the Court was not willing to be deferential to a group's self-definition and instead would examine a group to see if discrimination was in fact an element of a group's viewpoint.²³ That is, groups bore the burden of proving that admission of certain members would interfere with their expressive purposes when defending exclusionary policies.²⁴

The Court seemed to move away from this line of reasoning beginning with *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.²⁵ The case involved an Irish-American parade that, although allowing homosexuals to march in the parade, prevented a gay group from carrying a pro-homosexual banner.²⁶ The gay group sued, alleging a violation of the state public accommodation laws.²⁷ Under the analysis utilized in *Roberts*, this discrimination would likely fail the test for constitutional protection, as such a parade is unlikely to be "small and selective," nor does an Irish-American parade have an immediately apparent viewpoint that conflicts with homosexuality.²⁸ However, the Court did not use the *Roberts* analysis.²⁹ Instead, the Court allowed the group itself to decide whether a message promoting homosexuality was one it wished to express.³⁰ This suggested a subtle shift in the Court's approach. The Court deferred to the group's stated purposes rather than determining objectively what messages the group actually expressed.³¹ Indeed, the Court explicitly held that the right to speech includes the right to control the messages broadcast by one's group.³²

The Court continued to utilize the *Hurley* approach in *Boy Scouts of America v. Dale*.³³ In that case, the Boy Scouts of America (BSA) interpreted its values of "clean" and "morally straight" to require a prohibition of homosexuality and so dismissed a gay scoutmaster.³⁴ The scoutmaster, like the group in

23. Ryan C. Visser, Note, *Collision Course? Christian Legal Society v. Kane Could Create a Split over the Right of Religious Student Groups to Associate in the Face of Law School Antidiscrimination Policies*, 30 HAMLINE L. REV. 449, 466 (2007).

24. *Id.* at 466.

25. 515 U.S. 557 (1995).

26. *Id.* at 561.

27. *Id.*

28. See *supra* notes 19–22 and accompanying text.

29. See Visser, *supra* note 23.

30. *Hurley*, 515 U.S. at 569–70.

31. *Id.*

32. *Id.* at 573–74.

33. 530 U.S. 640 (2000).

34. *Id.* at 650.

Hurley, sued on the basis of public accommodation laws.³⁵ The Court found that, despite the public accommodation laws, it would be unconstitutional to compel the BSA to admit the gay scoutmaster. The Court again deferred to the BSA's own definition of its club. More importantly, the Court found that it was irrelevant that some members of the BSA disagreed with the BSA's view on homosexuality and that some members were unaware that views on homosexuality were even a part of the BSA's values.³⁶

These cases show considerable reluctance by the Court to determine whether a group's expressed viewpoints required membership exclusion because forced inclusion was so burdensome to the exercise of the right of association.³⁷ While these cases demonstrate a broadening of the Court's allowance for discrimination that is generally applicable to all groups, they were also decided in circumstances in which the groups were acting in traditional public fora.³⁸ In order to determine whether student groups could enjoy similar protections in the limited public forum of the university, this Comment now turns to the jurisprudence concerning the rights of groups in the university setting.

B. The University as a Limited Public Forum

Traditional public fora are characterized as being "immemorially . . . held in trust for the public" and "used for purposes of assembly, communicating thoughts between citizens and discussing public questions."³⁹ Either government or private entities can own traditional public fora.⁴⁰ Examples of traditional public fora include parks and sidewalks.⁴¹ However, when the government creates a forum, the government may place some restrictions upon its access just as a property owner could.⁴² These

35. *Id.* at 645.

36. *Id.* at 655–56. The Court argued BSA was free to decide to permit dissent within its ranks, but that 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." *Id.* The Court then noted that BSA did claim that it would not permit any person to become a member that did not agree with BSA's views on homosexuality. *Id.* at 655 n.1.

37. *Visser*, *supra* note 23.

38. *See supra* Part I.A.

39. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

40. *Id.*

41. *Id.*; *see also* *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Hill v. Colorado*, 530 U.S. 703 (2000).

42. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390–91 (1993).

fora must abide by the rules the government creates for them; that is, the rules must be applied consistently to all those who use or attempt to use the fora.⁴³ Programs for student groups on public college campuses are limited public fora according to Supreme Court jurisprudence.⁴⁴ Therefore, although universities are allowed to refuse recognition of student groups for legitimate reasons, this authority has constitutional limits.

1. The Constitutionality of Denying Recognition to Student Groups on the Basis of Viewpoint

In *Healy v. James*, a college president rejected the application of the Students for Democratic Society (SDS) because he found the viewpoints of the SDS conflicted with the views of the university.⁴⁵ This was not merely a philosophical objection; the president was concerned that the university's SDS would follow other chapters of the national SDS in promoting disruption of instruction and other university activities essential to the university's mission to educate its students.⁴⁶ Specifically, the SDS was found by the university to "openly repudiat[e]" the university's dedication to academic freedom and its status as an open forum for the exchange of ideas.⁴⁷

Despite these concerns, the Court ruled it was an impermissible basis upon which to deny recognition to the SDS.⁴⁸ The Court stated that, because a college campus is "peculiarly the marketplace of ideas," disagreements between the university and a group on basic principles of education are insufficient by themselves to justify a denial of recognition.⁴⁹ The Court also rejected the argument that allowing the SDS to meet off campus would make the university's decision constitutionally valid.⁵⁰ In doing so, the Court noted that a presence on campus is essential for any student group:

43. *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

44. *Id.* at 830.

45. 408 U.S. 169, 174-76 (1972). Although the Court framed its analysis in terms of the SDS's right to associate because the SDS was an expressive association, the case is applicable to speech rights as well. *See supra* note 14 and accompanying text.

46. *Healy*, 408 U.S. at 175.

47. *Id.* at 175-76.

48. *Id.* at 180.

49. *Id.* at 180, 187.

50. *Id.* at 183.

If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media from communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial.⁵¹

The Court noted that student organizations require the "customary media" to remain viable.⁵² Even though outside media provided means for the group's communication, alternatives lacked the kind of exposure to the campus that the students required because the group's viability is based "in [the] campus community."⁵³ This suggested that campus is the center of life for students.⁵⁴ The university is a distinct place in First Amendment analysis. If students cannot meet on the campus, quite often they are unable to function as a group or to dialogue with other campus groups.⁵⁵ Because of the unique nature of universities, the Court suggested that First Amendment protections may apply with greater force to universities than elsewhere.⁵⁶ Considering the university's role as a marketplace of ideas, the Court found this burden on student groups to be substantial.⁵⁷

The *Healy* Court, however, stated that it would allow the university to deny recognition if it could prove that the group was unwilling to be bound by "reasonable standards respecting conduct."⁵⁸ This allowance suggested a distinction between a university's disagreement with a group's conduct and disagreement with a group's beliefs or philosophy. This is a difficult distinction to apply, as beliefs often inspire conduct and conduct reflects belief.⁵⁹ Despite the problems this distinction may pose, the Court continued to expand the rights of student groups to receive recognition by establishing that a university may not deny recognition solely because a group is religious.⁶⁰

51. *Id.* at 181–82.

52. *Id.*

53. *Id.*

54. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 3007 (2010).

55. *Healy*, 408 U.S. at 181–83.

56. *Id.* at 180.

57. *Id.* at 183–84.

58. *Id.* at 193.

59. *See infra* Part III.B.1.

60. *See infra* Part I.B.2.

2. *The Constitutionality of Excluding Religious Groups Out of Fear of Violating the Establishment Clause*

The Court has been clear in several cases that, despite Establishment Clause concerns, the state may not deny access to a limited public forum to religious groups merely because they are religious.⁶¹ In *Widmar v. Vincent*, the Court rejected a university policy that denied the use of university facilities to groups wishing to meet for “purposes of religious worship or religious teaching.”⁶² The Court found that religious worship is a form of speech and is therefore protected by the First Amendment.⁶³ Although this does allow reasonable time, place, and manner regulations (such as those designed to preserve scarce resources) to be applied against religious groups, banning religion is a content-based regulation and fails a strict scrutiny test.⁶⁴ In a later case, the Court explained that allowing secular groups to speak about issues in the government forum while disallowing religious groups from speaking on those same issues in the same forum unconstitutionally disadvantages religious groups.⁶⁵

The Court has emphasized that this analysis does not merely protect the right to religious speech and association.⁶⁶ Instead, the Court stated that the presence of religious viewpoints adds greatly to the marketplace of ideas that is ideal for education in general and universities in particular.⁶⁷ In *Rosenberger v. Rectors and*

61. The “Establishment Clause” refers to the clause in the First Amendment prohibiting the government from making laws “respecting an establishment of religion.” U.S. CONST. amend. I. The concern of these schools is that by providing financial and other resources to religious groups, the government is in effect funding religion. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 270–71 (1981).

62. *Widmar*, 454 U.S. at 265.

63. *Id.* at 268.

64. *Id.* at 276–77.

65. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993). The case involved a group seeking the use of a classroom for the purpose of showing videos addressing family issues from a Christian perspective that was denied use of the classroom on the grounds that the school did not allow religious presentations. *Id.* at 387–89.

66. *See infra* notes 69–76.

67. *Id.* “Marketplace of ideas” refers to the theory, explicated by thinkers such as J.S. Mill, that by allowing all ideas to interact with each other through debate and critique, the weaker ideas would be rejected and the stronger ideas would rise to the surface. *See* J.S. MILL, ON LIBERTY (Longmans, Green, and Co., eds., 4th ed. 1869). This would allow our understanding to grow as weaker ideas were eliminated by being exposed and compared to better ideas. *See* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting);

Visitors of the University of Virginia, the Court addressed a funding restriction against religious speech.⁶⁸ The university set up a system whereby, if a group of students qualified under certain criteria, the university would reimburse the group for its printing costs.⁶⁹ However, the university refused to reimburse any costs for a publication that “primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality” out of a concern that such funding would violate the Establishment Clause of the First Amendment.⁷⁰ When one group published a Christian paper and the university did not reimburse it, the group filed suit.⁷¹

In finding this refusal unconstitutional, the Court noted that even though content discrimination “may be permissible if it preserves the purposes of that limited forum . . . , viewpoint discrimination . . . is presumed impermissible when directed against speech.”⁷² The Court rejected the idea that funding was distinguishable from the access to facilities at issue in *Lamb’s Chapel*.⁷³ Although religion is one area of inquiry, a ban of religious groups could be considered content discrimination as religion’s unique nature makes it a “specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.”⁷⁴ The Court recognized that religion often forms the basis of many viewpoints and perspectives.⁷⁵ It was clear to the Court that a ban on religious speech would result in the “suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”⁷⁶

In these cases, the Court took stances very favorable to religious student groups. The Court stated that the university is uniquely the marketplace of ideas; therefore, student groups would

Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (holding that “[t]he classroom is peculiarly the ‘marketplace of ideas’”).

68. 515 U.S. 819 (1995).

69. *Id.* at 824–25.

70. *Id.* at 823.

71. *Id.* at 827.

72. *Id.* at 830.

73. *Id.* at 820, 832–33.

74. *Id.* at 831.

75. *Id.* The Court pointed out that the ban at issue would also prohibit the funding of essays by such important thinkers as Plato, Spinoza, Descartes, Karl Marx, Bertrand Russel, and Jean-Paul Sartre had they been students. *Id.* at 836–37. Almost all renowned thinkers would have their writings rejected unless they submitted “articles disclaiming all connection to their ultimate philosophy.” *Id.* at 837.

76. *Id.* at 836.

be significantly burdened by not having access to the campus through the “customary media.”⁷⁷ The Court appeared very interested in allowing student groups of all kinds to participate in the marketplace of the university and so prevented universities from denying recognition even out of a concern for violating the Establishment Clause. The constitutional bar for universities to deny recognition to student groups appeared to be very high.⁷⁸

C. Christian Legal Society v. Walker and the Constitutional Protections for Student Groups Before Martinez.

Martinez did not mark the first time a chapter of the Christian Legal Society was denied recognition due to a diversity policy. The Southern Illinois University School of Law (SIU) had in place a nondiscrimination policy that listed certain bases upon which a campus organization could not discriminate, including sexual orientation and religion.⁷⁹ When someone complained about CLS violating that policy, SIU withdrew the group’s recognition.⁸⁰ This resulted in CLS being unable to reserve rooms for private meetings, to use the bulletin boards, to be shown on the school website, to have a faculty advisor, or to receive funds given to student organizations.⁸¹ As a result, CLS filed suit.⁸²

In reversing the district court and granting an injunction against SIU, the Seventh Circuit found that the university’s actions violated the group’s freedom of association and affected its ability to advocate “in a significant way.”⁸³ For these harms to be declared unconstitutional, CLS had to prove three things: (1) that CLS was an expressive association, (2) that “the forced inclusion of active homosexuals [would] significantly affect CLS’s ability to express

77. *Healy v. James*, 408 U.S. 169, 181–82 (1972).

78. Even though the Court has allowed the government to use funding to promote certain viewpoints, the Court has suggested that it would not allow the government to do so in a marketplace of ideas context, specifically the university. *See Rust v. Sullivan*, 500 U.S. 173, 199–200 (1991). The Court stated that the university “is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.” *Id.* at 200.

79. *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 858 (7th Cir. 2006).

80. *Id.*

81. *Id.* The group could meet in classrooms on campus, but “other students and faculty were free to come and go from the room.” *Id.*

82. *Id.*

83. *Id.* at 861 (quoting *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000)).

its disapproval of homosexual activity,” and (3) that CLS’s “interest in expressive association outweigh[ed] the university’s interest in eradicating discrimination against homosexuals.”⁸⁴ The university’s interest could not be “related to the suppression of ideas” or “[achievable] through a less restrictive means.”⁸⁵

As CLS clearly expressed a Christian viewpoint, CLS met the first prong of being an expressive association.⁸⁶ As for the second prong, which asks whether this forced inclusion would affect CLS’s ability to express its views on homosexuality, the Seventh Circuit stated that to “ask this question is very nearly to answer it.”⁸⁷ The court found that it “would be difficult for CLS to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct.”⁸⁸ On the final prong of the test, which weighs the state’s interests against the group’s, the court noted that the state “has an interest in eliminating discriminatory conduct and providing for equal access to opportunities.”⁸⁹ However, the only reason to force CLS to alter its membership policies was “to induce CLS to modify the content of its expression or suffer the penalty of derecognition.”⁹⁰ Therefore, the university likely unconstitutionally withdrew its recognition of CLS on the basis of its nondiscrimination policy.⁹¹

The Seventh Circuit’s opinion in *Walker* seemed to be supported by the majority of the jurisprudence. Courts were so unfavorable to universities’ attempts to enforce diversity policies in this context that, when religious groups pursued legal action, the university often capitulated and granted the religious groups an exception.⁹² Courts were highly critical of the arguments

84. *Id.* at 862 (citing *Dale*, 530 U.S. at 648–59).

85. *Id.* at 863 (citing *Dale*, 530 U.S. at 648).

86. *Id.* at 862.

87. *Id.*

88. *Id.* at 863.

89. *Id.* (citations omitted). It is important to note that while the Seventh Circuit found such an interest, it did not find it to be a “compelling” one. *Id.* at 863 (stating only that the “state has an interest”). The Supreme Court has also refrained from finding the prevention of discrimination against homosexuals to be a compelling state interest. See Daniel R. Garner, *Open Attendance—The First Amendment Implications of Fighting Discrimination Against Homosexuals in Law School Student Organizations*, 52 ST. LOUIS U. L.J. 1249, 1260 (2008).

90. *Walker*, 453 F.3d at 863.

91. *Id.* at 867. *Walker* only involved a preliminary injunction, and therefore the Seventh Circuit needed to only decide whether CLS was likely to win on the merits, not whether SIU’s policy was in fact unconstitutional. *Id.* at 859–60.

92. Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations*, 118 HARV. L. REV. 2882, 2883 n.8 (2005) (citing Burton Bollag, *Choosing Their Flock*,

universities were advancing in favor of diversity policies being used against Christian groups. Instead, the courts were more concerned with protection of the marketplace of ideas and the freedom of association. In *Martinez*, the Court was indifferent to these concerns.

II. *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*

A. *Facts of the Case*

Hastings is a public law school in the State of California.⁹³ For years, it has had a written nondiscrimination policy that, like the one used by SIU, names specific bases upon which groups may not discriminate.⁹⁴ This specifically includes religion and sexual orientation.⁹⁵ For a decade, there was a recognized Christian student group at Hastings.⁹⁶ In 2004, the leaders of this group decided to affiliate with the national CLS.⁹⁷ When the group affiliated, Hastings required it to turn in a new set of paperwork in order to be recognized by the school.⁹⁸ The paperwork contained the “Statement of Faith” that all members and officers of a CLS organization must sign.⁹⁹ This statement included an affirmation that Jesus Christ is the Savior, the Bible is inspired by God, and

CHRON. HIGHER EDUC., Jan. 28, 2005, at A33). Since 2000, there were at least 50 cases in which the university capitulated after a Christian group resisted the university’s attempts to enforce its nondiscrimination policies. *Id.* There does not appear to be a contrary case in which a court ruled in a favor of a university in this context before *Martinez*.

93. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2978 (2010).

94. *Id.* at 2979.

95. *Id.*

96. *Id.* at 2980.

97. *Id.* at 2980. There are no indications in the opinion why the group decided to make the change. It is possible that affiliation with CLS would bring many more resources. *See Law Student Resources*, CHRISTIAN LEGAL SOCIETY, <http://www.clsnet.org/page.aspx?pid=415> (last visited March 16, 2012). However, the majority does note that in the year preceding the decision to affiliate with CLS, a homosexual student became significantly involved with a Bible study the group was hosting. *Martinez*, 130 S. Ct. at 2990 n.19. It would have been interesting for the case if the group had sought affiliation in order to better advocate against the pro-homosexual views the group encountered in that Bible study or because of concern that if other practicing homosexuals joined the group, the group would no longer be able to advocate the views on sexual morality it had previously advocated.

98. *Martinez*, 130 S. Ct. at 2980.

99. *Id.*

other tenets of the Christian faith.¹⁰⁰ The chapter also adopted by-laws that require members and officers to conduct their lives in accordance with certain principles, including abstinence from sexual activity outside of marriage.¹⁰¹ The national CLS defined marriage as “between a man and a woman,” meaning that a practicing homosexual could never live within those principles.¹⁰² The national CLS interpreted these by-laws to exclude anyone who engages in “unrepentant homosexual conduct.”¹⁰³

Because of these exclusions, Hastings refused to recognize the CLS.¹⁰⁴ Although Hastings would allow the CLS to use facilities for meetings and bulletin boards for announcements, Hastings informed CLS that fees could be charged for use of the rooms.¹⁰⁵ Hastings would not provide any funding to the group.¹⁰⁶ Hastings’ decision also prevented the CLS from using the university logo and from participating in the Student Organizations Fair that allows groups to recruit new members.¹⁰⁷ Although the CLS was able to put on a few activities as an independent group, it eventually decided that the burdens caused by the denial of recognition were too great and filed suit against Hastings.¹⁰⁸ The CLS lost its case both at the district court and at the Ninth Circuit.¹⁰⁹ The Supreme Court granted a writ of certiorari.¹¹⁰

100. *Id.* at 2980 n.3.

101. *Id.* at 2980.

102. *Id.*

103. *Id.* This exclusion would allow someone who had a homosexual orientation to be a member. Even if one committed a homosexual act, that by itself would not seem to be enough. Instead, it would be the lack of repentance (i.e., the refusal to accept that the act was wrong) that would be the basis for exclusion. It is hard to imagine a group writing a policy more inclusive while maintaining a stance that homosexual acts are immoral.

104. *Id.* at 2980–81.

105. *Id.* at 3006 (Alito, J., dissenting).

106. *Id.* at 2981.

107. *Id.* at 2979. These fairs are very important for groups to regenerate membership. They give freshmen notice about the club and allow interested persons to seek the group out. Without the fairs, the group is tasked with identifying potential members and communicating the existence of the group to them. Even then, because many freshmen will have committed to organizations that were at the fair, these potential members may have already made too many time commitments to join the group.

108. These activities included weekly Bible studies, a few social activities, and a lecture. *Id.* at 2981. However, the CLS only had seven members during this time, making it difficult to argue that the group managed to flourish with its independent status. *Id.* at 3006 (Alito, J., dissenting).

109. The Ninth Circuit’s opinion disposed of the case in a mere two sentences. *See* *Christian Legal Soc’y v. Kane*, 2009 U.S. App. LEXIS 5654, at *1 (9th Cir. Mar. 10, 2009). Kane was the dean of Hastings Law School at the

There is one point crucial to the *Martinez* opinions and their approaches that must be explained. When both sides filed for summary judgment in the district court, the stipulated facts included a statement that Hastings's regulations required student organizations to allow *any* students to become members and officers.¹¹¹ Thus, CLS had to argue not against the nondiscrimination policy as written, but against the "all-comers" policy agreed to in the stipulation.¹¹² The distinction is substantial. Under a nondiscrimination policy, groups could discriminate on bases of belief (for example, the Republican group could exclude Democrats); that is not the case under an "all-comers" policy.¹¹³ If a group denied membership to any student for any reason (other than the student's qualifications, as in the case of the law review, for example), the denial would violate an all-comers policy.¹¹⁴

What made this case particularly difficult for the Court and observers alike to analyze is that it does not appear that Hastings in fact operated under such a policy.¹¹⁵ Several recognized groups may have limited membership to those who agreed with the positions the group wished to advocate.¹¹⁶ Therefore, it is hard to judge exactly what student groups operating under an all-comers policy actually looks like. This makes comparisons between the situations at Hastings and other universities using nondiscrimination policies problematic.

B. The Majority Opinion

The Court held that Hastings's "all-comers" policy was constitutional.¹¹⁷ The majority opinion, written by Justice Ginsburg, began the analysis by stating that the university's

time. When Leo P. Martinez became the Dean, the case name was altered to the present caption.

110. *Martinez*, 130 S. Ct. at 2982.

111. *Id.* The stipulation reads: "Hastings requires that registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs." *Id.*

112. *Id.*

113. *Id.* at 2979.

114. *See id.*

115. The written discrimination policy was written as a nondiscrimination policy. *Id.* at 3001 (Alito, J., dissenting). The evidence that Hastings operated under an all-comers policy only came in a deposition of the dean taken during the litigation. *Id.*

116. *Id.* at 3004. This included, among others, the Trial Lawyers of America, the Vietnamese American Law Society, and the Silenced Right. *Id.*

117. *Id.* at 2995.

student group program is a limited public forum; therefore, the Court would review the “all-comers” policy to see if the restrictions were reasonable and viewpoint neutral.¹¹⁸ In doing so, the majority emphasized that *Dale* and *Hurley* had limited application to the present case, as both of those cases involved traditional public fora.¹¹⁹ In those cases, the groups would have had no choice to “opt out,” whereas CLS could function as an independent organization outside the forum of the university.¹²⁰ The Court summarized this difference by stating that Hastings “is dangling the carrot of subsidy, not wielding the stick of prohibition.”¹²¹

The Court then proceeded to distinguish the case at hand from *Healy* by noting that *Healy* involved a college denying a group recognition explicitly because of the group’s viewpoints.¹²² Similarly, the cases of *Widmar* and *Rosenberger* were distinguished because those, too, involved exclusions of groups solely because of their religious viewpoint.¹²³ In this case, however, the majority stated that Hastings rejected CLS not because of its viewpoints, but because of its conduct—namely, the actions of preventing practicing homosexuals and non-Christians from membership.¹²⁴

Having separated itself from those precedents, the Court analyzed the reasonableness of the all-comers policy.¹²⁵ Stating that the judiciary ought to give a great deal of deference to college administrators, the Court found that it was reasonable for the administrators to find that the best educational experience is “promoted when all participants in the forum must provide equal access to all students.”¹²⁶ The majority found a significant fact in favor of that assessment was the student fees from which the funding would come.¹²⁷ The Court found that it was reasonable to ensure “that no Hastings student is forced to fund a group that would reject her as a member.”¹²⁸

118. *Martinez*, 130 S. Ct. at 2978. The other justices joining in the opinion were Justices Stevens, Kennedy, Breyer, and Sotomayor. *Id.* at 2977. Justices Stevens and Kennedy also wrote separate concurrences. *Id.*

119. *Id.* at 2986 & n.14.

120. *Id.* at 2986.

121. *Id.*

122. *Id.* at 2987.

123. *Id.* at 2987–88.

124. *Id.* at 2990.

125. *Id.* at 2988–93.

126. *Id.* at 2989.

127. *Id.*

128. *Id.*

Also troubling to the Court was the prospect of groups cloaking status-based discrimination in the “garb” of belief.¹²⁹ The Court used the example of a male chauvinist club that excluded a woman: would the exclusion be based on her sex or her belief in the virtues of women?¹³⁰ The majority noted this concern as heightened in the case of homosexuals, as previous jurisprudence has held that there is no distinction between discrimination against homosexual conduct and homosexual persons.¹³¹

The majority was confident that a lack of recognition would not be troublesome to the CLS.¹³² Hastings did allow CLS to meet on campus, as opposed to the facts of *Healy* in which the university prohibited the SDS from meeting on the campus entirely.¹³³ The Court also stated that “the advent of electronic media and social-networking sites reduces the importance of those channels.”¹³⁴ After all, if CLS had an Internet presence, “any student at the school with access to Google . . . could have easily found it.”¹³⁵

The Court then found that the all-comers policy was reasonable.¹³⁶ Noting that the reasonableness test is not one of “advisability,” the Court dismissed CLS’s objection that the “all-comers” policy would lead to groups sabotaging one another.¹³⁷ The majority argued that students “presumably will not endeavor en masse to join . . . groups pursuing missions wholly at odds with their personal beliefs.”¹³⁸

Finally, the Court considered the question of whether an “all-comers” policy is neutral.¹³⁹ The majority thought it would be

129. *Id.* at 2990.

130. *Id.*

131. *Id.*; *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

132. *Martinez*, 130 S. Ct. at 2991.

133. *Id.*

134. *Id.*

135. *Id.* (quoting *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 874 (7th Cir. 2006) (Wood, J., dissenting)). This seems to represent a significant shift from *Healy*. If simply being able to use the Internet to organize is a sufficient alternative channel, then it becomes difficult to imagine a case where the burdens placed on organizations on college campuses is too substantial. Although the Court pointed out that the presence of these alternative channels would not cure a policy that discriminated on the basis of viewpoints of its unconstitutionality, the opinion appears to reduce the test to merely require a content neutral policy. *Id.*

136. *See id.* at 2992.

137. *Id.* The objection is that an all-comers policy would allow students with antagonistic viewpoints to become members and take over the group, thereby preventing the group from effectively communicating its viewpoint. *Id.*

138. *Id.*

139. *Id.* at 2993.

“hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers.”¹⁴⁰ The Court then rejected the argument that, even if the “all-comers” policy was neutral on its face, it would be discriminatory in application, as only groups with exclusionary viewpoints would be affected.¹⁴¹ This argument failed because the Court found the purposes of the policy were unrelated to the content of expression; therefore, any disparate effects did not affect the policy’s neutrality.¹⁴² Having found that the “all-comers” policy was constitutional, the Court remanded the case to determine whether the policy was applied against CLS in a discriminatory fashion, as Hastings has only used the all-comers policy as the basis for denying recognition to CLS but had not denied recognition to other groups that may have had similar membership requirements.¹⁴³

C. Concurrences by Justices Stevens and Kennedy

1. Concurrence by Justice Stevens

In his concurrence, Justice Stevens argued that had the Court examined the nondiscrimination policy as written, such a policy would still have passed the constitutional tests.¹⁴⁴ This was true because the policy was not directed at “the substance of any student group’s speech,” but rather the organization’s activities.¹⁴⁵ Only those with discriminatory conduct, not discriminatory beliefs, would be denied recognition.¹⁴⁶ Stevens acknowledged that the policy “may end up having greater consequence for religious groups,” but because there was “no evidence that the policy was intended to cause harm to religious groups, or that it has in practice caused significant harm to their operations,” the policy did not discriminate against religion.¹⁴⁷

Instead, Stevens argued that the policy reflected a reasonable choice by the university to set the goals of its limited public forum.¹⁴⁸ It was a policy determination by the university of how to best utilize its resources, and courts should leave such

140. *Id.*

141. *Id.* at 2994.

142. *Id.* at 2994–95.

143. *Id.* at 2995.

144. *Id.* (Stevens, J., concurring).

145. *Id.* at 2996.

146. *Id.*

147. *Id.*

148. *Id.* at 2997.

determinations alone.¹⁴⁹ Although society has to “tolerate” groups that discriminate, it does not have to subsidize them or “grant them equal access to law school facilities.”¹⁵⁰

2. *Concurrence by Justice Kennedy*

Justice Kennedy’s concurrence largely repeated arguments made by the majority. Where he offered different analysis was in his view of the function of a university’s limited public forum. He noted that education occurs both inside and outside the classroom setting and that extracurricular activities are intended to “facilitate interactions between students, enabling them to explore new points of view, to develop interests and talents, and to nurture a growing sense of self.”¹⁵¹ Particularly for law schools, the goal is to teach students the skills of creating “arguments in a convincing, rational, and respectful manner and to express doubt and disagreement in a professional way.”¹⁵² This comes through a “vibrant dialogue [that] is not possible if students wall themselves off from opposing points of view.”¹⁵³

Justice Kennedy seems to have argued that groups that associate around any particular viewpoint are frustrating the goals of education by closing themselves off from opposite viewpoints.¹⁵⁴ This points towards a view of extracurricular groups as not representing different viewpoints but rather groups with varying viewpoints, though perhaps a common interest. An example of this would be a debate club that liked to meet to discuss issues of constitutional law, as opposed to the CLS or the Young Republicans.¹⁵⁵

149. *Id.* at 2998.

150. *Id.*

151. *Id.* at 2999 (Kennedy, J., concurring).

152. *Id.*

153. *Id.* at 3000.

154. *Id.* at 2999–3000. That is, when a student surrounds herself with those of the same viewpoint, she deprives herself of the enriched educational experience that accompanies interaction, both inside and outside the classroom, with students of different viewpoints.

155. In fact, if a group must admit members with different viewpoints and such members do come to extracurricular organizations, all groups would have varying degrees of resemblance to debate clubs.

D. The Dissent

Justice Alito wrote on behalf of the four justices who dissented.¹⁵⁶ Justice Alito criticized the Court for dismissing a claim of unlawful discrimination on the basis that “the effects of the discrimination were really not so bad.”¹⁵⁷ CLS had only seven members and was hardly flourishing.¹⁵⁸ Even if the discrimination did not harm CLS significantly, discrimination cases have not taken the approach that “a little viewpoint discrimination is acceptable,” and therefore Justice Alito believed that the majority’s attempts to downplay the burdens CLS suffered as a result of Hastings’s policy were misguided.¹⁵⁹

Justice Alito compared the majority’s opinion to the Court’s decision in *Healy*. In *Healy*, the SDS suffered effects similar to those suffered by CLS.¹⁶⁰ Yet, unlike the Court’s finding in *Martinez*, the *Healy* Court accepted the argument that, notwithstanding the SDS’s ability to conduct itself off campus or meet informally on campus, the university’s policy still constituted a substantial burden.¹⁶¹ Although the *Martinez* Court distinguished *Healy* on the grounds that the SDS was discriminated against because of its viewpoint while the CLS’s conduct was at issue in *Martinez*, Alito argued the distinction was irrelevant.¹⁶² CLS attempted to express its viewpoint through its membership requirement, and it was that viewpoint that conflicted with the university’s views.¹⁶³

Turning toward the line of cases holding that universities may not restrict speech on the basis of its religious nature, Justice Alito argued that the nondiscrimination policy as written would not pass constitutional scrutiny.¹⁶⁴ Although Hastings allowed “political,

156. These included Chief Justice Roberts and Justices Scalia and Thomas. *Id.* at 3000.

157. *Id.* at 3006 (Alito, J., dissenting).

158. *Id.* When CLS twice attempted to use Hastings’s facilities, both times the requests were ignored until after the date requested. *Id.* This did not appear to Justice Alito to be the actions of an institution striving to fairly apply its policies, particularly considering the presence of other groups at Hastings that were allowed to exclude members on the basis of viewpoints opposite to the viewpoints of the groups. *Id.*

159. *Id.*

160. *Id.* at 3007.

161. *Id.* at 3007–08 (citing *Healy v. James*, 408 U.S. 169, 181–82 (1972)).

162. *Id.* at 3011.

163. *Id.*

164. *Id.* at 3010. Justice Alito directed much of his argumentation against the university’s written nondiscrimination policy, as he believed that the Court was

social and cultural student organizations” to restrict membership to those who were dedicated to the ideals or beliefs of the organization, Hastings did not allow religious groups to impose the same restrictions.¹⁶⁵ Even though the majority attempted to distinguish between the beliefs and conduct of an organization, Justice Alito pointed out that the conduct at issue was the conduct of association, which “constitutes a form of expression that is protected by the First Amendment.”¹⁶⁶ In this case, the line between conduct and belief was a false one because the beliefs required the conduct.¹⁶⁷

Justice Alito then argued for what he believed to be a more sensible policy. Exclusion from a group on the grounds of religion or belief is generally not constitutionally-protected discrimination.¹⁶⁸ If religion is not relevant to a group’s expression or if the group is not expressive, then it is good policy to prohibit religion-based exclusions.¹⁶⁹ However, religious groups are inherently different. Justice Alito cited a coalition of Muslim, Christian, Jewish, and Sikh groups in stating, “[o]f course there is a strong interest in prohibiting religious discrimination where religion is irrelevant. But it is fundamentally confused to apply a rule against religious discrimination to a religious association.”¹⁷⁰ Justice Alito hypothesized that a nondiscrimination policy, while preventing a religious group that believes in traditional sexual mores from discriminating based on sexual orientation or religion, would simultaneously allow a “Free Love Club” to require members to reject traditional sexual morality and thus discriminate based on viewpoint.¹⁷¹

Justice Alito specifically addressed the constitutionality of the all-comers policy addressed by the majority.¹⁷² Because every limited public forum “must respect the lawful boundaries it has

unfairly construing a stipulation against CLS to mean that Hastings did in fact have an all-comers policy. *Id.* at 3012–13.

165. *Id.* at 3010.

166. *Id.* at 3011.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 3012 (quoting Brief for American Islamic Congress et al. as Amici Curiae Supporting Petitioner at 3, *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971 (2010) (No. 08-1371), 2010 WL 711180). That is, prohibitions against discriminating on the basis of religion is meant to protect religious believers; ironically, Hastings is construing these clauses in a way that hinders religious believers more than it aids them.

171. *Id.* at 3012.

172. *Id.* at 3013.

itself set,” Justice Alito looked to the rules governing Hastings’s extracurricular organizations.¹⁷³ Among the rules Justice Alito cited was a regulation that charged the Dean with “ensur[ing] an ongoing opportunity for the expression of a variety of viewpoints.”¹⁷⁴ This had led to many different types of organizations, including recreational ones, common interest clubs, and clubs promoting a viewpoint.¹⁷⁵ Even though Hastings attempted to open opportunities for leadership to all students through the all-comers policy, Alito believed that allowing even very small groups of students to form the organizations they want would have also allowed for growth in leadership opportunities.¹⁷⁶ Thus, in Justice Alito’s mind, prohibiting religious groups frustrated the goal of promoting leadership opportunities. Furthermore, Justice Alito argued that dialogue is promoted through groups that produce a “confident pluralism that . . . advances democratic consensus-building.”¹⁷⁷ The all-comers policy, by limiting religious groups, prevented the very goals it attempted to accomplish.

Justice Alito pointed out that religious groups that cannot agree to admit those who do not share their beliefs will be marginalized.¹⁷⁸ In Justice Alito’s mind, this marginalization does not reflect the First Amendment’s commitment to robust public debate. Rather, it represents “a serious setback for freedom of expression in this country.”¹⁷⁹

III. THE THREE ERRORS OF THE *MARTINEZ* COURT AND THEIR EFFECT ON THE RIGHTS OF UNIVERSITY STUDENTS

The Court in *Martinez* erred in three ways. First, the Court erred in finding *Hurley* and *Dale* inapplicable in a limited public forum context. Second, even under the limited public forum analysis, the Hastings “all-comers” policy is not content neutral. Finally, the Court was wrong to ignore the harms such policies inflict upon student groups, particularly those organizations that attempt to promote a minority viewpoint.

173. *Id.* (quoting *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)).

174. *Id.*

175. *Id.* at 3013–14.

176. *Id.* at 3014–15.

177. *Id.* at 3016 (citing Brief for Gays & Lesbians for Individual Liberty as Amicus Curiae Supporting Petitioner at 35, *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971 (2010) (No. 08-1371), 2010 WL 530513).

178. *Id.* at 3019.

179. *Id.* at 3020.

A. Why Hurley and Dale Ought to Have Been Applied

The majority argued that *Hurley* and *Dale* were inapplicable to *Martinez* because those cases involved “the most traditional of public forums” rather than a limited public forum.¹⁸⁰ In making this distinction, the Court read too much into the difference between public and limited public fora. When the government creates a limited public forum, the government “is bound by the same standards as apply in a traditional public forum.”¹⁸¹ This means that the government can place reasonable time, place, and manner regulations on speech only if the regulation is narrowly tailored to serve a compelling state interest and is content neutral.¹⁸² While this would allow the government to place some restrictions on student extracurricular groups (such as budgetary restrictions or preventing non-students from using university resources), it does not follow that the university is so radically different from traditional fora that *Hurley* and *Dale* ought not apply. In fact, the Court itself has held that “the campus of a public university, at least for its students, possesses many of the characteristics of a public forum.”¹⁸³ Students require access to the means of communication of their university in order to fully participate in the marketplace of ideas, just as citizens require access to the town square.¹⁸⁴ An exclusion of a student group from a university is analogous to an exclusion of a group from a traditional public forum.

Therefore, the precedents of *Hurley* and *Dale* are analogous to the case presented in *Martinez* and ought to have been applied.¹⁸⁵ Under this analysis, the CLS has a clearer expressive viewpoint that requires exclusion of gay members than either the Irish-American parade or the BSA.¹⁸⁶ When one considers the Court’s trend in *Hurley* and *Dale* of giving deference to the group’s stated

180. *Id.* at 2986 n.14.

181. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

182. *Id.*

183. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).

184. *See Healy v. James*, 408 U.S. 169, 183 (1972).

185. Even though *Hurley* and *Dale* involved the right of association and this Comment has primarily addressed CLS’s right of free speech, because the association was found to be expressive in both *Hurley* and *Dale* the cases are applicable to speech cases as well as association cases. *See supra* Part I.A. In fact, the *Martinez* court acknowledged that *Hurley* could possibly be categorized as both an association and a speech case, though it did not direct the issue as it thought *Hurley* was irrelevant either way. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2986 n.14 (2010).

186. *See supra* Part I.B.

viewpoints, CLS's case under a traditional public forum analysis is even stronger.¹⁸⁷ With this in mind, the forced inclusion of gays into the group would deeply interfere with CLS's right to associate via non-association, and such interference would be unconstitutional.¹⁸⁸

B. The All-Comers Policy's Lack of Content-Neutrality

The Court ought to have found that the all-comers policy was not content-neutral. The Court found that Hastings was merely establishing a rule of reasonable conduct. This stance does not recognize that for Christians, there is no practical distinction between promoting Christian beliefs, including those regarding homosexuality, and the conduct of limiting membership on the basis of religion and sexual orientation.

1. Sometimes Belief Requires Conduct

The majority argued that the all-comers policy did not promote a viewpoint and was viewpoint neutral because it rejected only CLS's discriminatory conduct, not its beliefs.¹⁸⁹ The policy, in the Court's mind, targeted not religious or Christian groups, but all groups engaged in such conduct.¹⁹⁰ Because it was so broad, the majority found that it would be difficult for Hastings to have constructed a policy that was more viewpoint neutral.¹⁹¹

Supreme Court jurisprudence has held that not all conduct can be considered expressive speech under the First Amendment.¹⁹² However, the Court has also held that some conduct can be considered so inherently expressive that the conduct is inextricably linked with speech and therefore is protected.¹⁹³ Thus, an inquiry into whether a regulation is content neutral does not end when one determines whether the regulation targets belief or conduct. If the regulation targets conduct, the Court must then determine whether or not the conduct is indistinguishable from the beliefs such that a regulation against the conduct is really a regulation against the

187. *See supra* Part I.B.

188. *See supra* Part I.B.

189. *Martinez*, 130 S. Ct. at 2990.

190. *Id.*

191. *Id.* at 2993.

192. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

193. *Texas v. Johnson*, 491 U.S. 397, 404–06 (1989) (holding that burning the American flag was inherently expressive).

beliefs.¹⁹⁴ In the *Martinez* case, the inquiry is then whether CLS's beliefs regarding Christianity and homosexuality required the conduct of exclusion of non-Christians and practicing homosexuals.¹⁹⁵

2. Exclusion Allows Religious Groups to Effectively Communicate Their Viewpoints

It could be argued that the conduct of exclusion is not inherent in CLS's beliefs because those with opinions different from the group's beliefs could vote and perform many of the leadership functions of the group. Such a member would only need to abstain from advocating those positions at odds with the viewpoints promoted by the group. Although it might be reasonable for Christian groups to exclude non-believers, is it *necessary*? However, the silence of dissenting members and officers carries with it a number of problems: (1) it hinders the intellectual growth of the dissenting students, (2) it hinders the ability of the group to promote its viewpoints to the members of the group, and (3) it hinders the ability of the group to advocate its positions to students that are not in the group.

a. Students with Dissenting Views Do Not Prosper in Groups with Opposing Views

If a student cannot voice his dissenting opinions, then there is very little educational growth for that student. One would be hard pressed to argue that teaching students through habituation to be silent when the majority of their peers disagree advances the university's mission of teaching students to be active participants in their communities. If students are to have the courage to advance unpopular viewpoints in order to enrich the marketplace of ideas not only of the university but the country as well, it is bad policy to create an environment that encourages silence.¹⁹⁶

194. *Martinez*, 130 S. Ct. at 2990 (citing *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993)). Interestingly, the Court in *Martinez* recognized the need for this inquiry when it mentioned the example of a tax on wearing yarmulkes really being a tax on Jews. *Id.*

195. CLS argued that it was targeting not homosexuals but homosexual conduct, as its exclusion was for those who engaged in "unrepentant homosexual conduct." *Id.* at 2980. However, the Court rejected that distinction. *Id.* at 2990. Why the Court allowed the university to target conduct but not CLS is not clear.

196. If the student did speak out, then the group would certainly have a lot more difficulty promoting its viewpoints. *See infra* Parts III.B.2.b-c.

b. Dissenting Members Negatively Affect a Group's Ability to Communicate Internally

Second, the presence of a “quiet” unorthodox believer can have negative effects on the group’s ability to express its viewpoints both internally and externally.¹⁹⁷ Internally, studies have found that members of a religious group form a greater attachment to the religion if there is a greater amount of orthodoxy in the membership.¹⁹⁸ Introducing unorthodox members would then seem likely to reduce the amount of attachment believing members have not only to the group but to the faith itself. As most religious groups would be trying to help believers incorporate their faith into a larger part of their identity, this is a serious obstacle. Furthermore, while an unorthodox member could perform some duties within a religious group, a lack of belief would prevent him or her from performing others. For example, a non-believer could not fulfill any duties regarding worship. If the meetings of the CLS consisted of a Bible study followed by a session of “praise and worship” music, a non-Christian would find it difficult, to say the least, to carry out those activities as well as a Christian could. This problem intensifies when there are acts of worship that require the worshipper to be a believer, such as receiving the Eucharist for Catholics.¹⁹⁹ Not only would unorthodox members be unable to worship as devoutly as orthodox members in these cases, the unorthodox members would be totally unable to worship at all without deeply offending, if not desecrating, the religious practices and beliefs of the group.

Perhaps such leaders could abstain from performing worship duties as well, but then one must question how many exceptions the group can make before the member or leader is no longer truly a member. The leadership opportunities that Hastings attempted to provide via the all-comers policy would not be present if the “leader” could not carry out the tasks of leadership. If there are to be true leadership opportunities, there cannot be castes of members divided upon degrees of adherence to the viewpoints of the group, as this would seem to cause the very problems Hastings was attempting to solve through the “all-comers” policy.

197. This Comment uses the word “unorthodox” in this context to refer to those who do not share all of the viewpoints of the group.

198. See BENJAMIN BEIT-HALLAHMI & MICHAEL ARGYLE, *THE PSYCHOLOGY OF RELIGIOUS BEHAVIOUR, BELIEF & EXPERIENCE* 226–29 (1997).

199. CATECHISM OF THE CATHOLIC CHURCH ¶ 1388–1389 (1995) (describing under which conditions “the faithful” may receive the Eucharist). See also 1983 CODE c.915–916 (prohibiting reception of the Eucharist by those who have been excommunicated or have committed “grave sin”).

Notably this problem, at its surface, does not appear as prevalent when religious groups exclude practicing homosexuals as opposed to excluding non-believers. A practicing homosexual could (and many do) believe in the permissibility of homosexuality as well as the divinity of Jesus Christ.²⁰⁰ However, for many Christian groups, the views on homosexuality are but a small part of a larger set of beliefs.²⁰¹ For example, the Catholic Church teaches that sexuality has both a unitive and procreative aspect.²⁰² As homosexual acts cannot ever be procreative, they are prohibited.²⁰³ This same principle applies to many Catholic teachings, including birth control, the human body, and the purpose of marriage.²⁰⁴ This is a significant range of viewpoints that members practicing homosexuality would be unable to promote, as they would have to reject the principle underlying and justifying the group's viewpoints on those issues.

Similarly, other Christian groups base their opposition to homosexuality on their readings of the Bible.²⁰⁵ A gay person would approach the Bible very differently from these groups, not only regarding those passages that specifically discuss homosexuality, but all other passages as well.²⁰⁶ With such a vast area in which a gay person and a traditional Christian group disagree, it is difficult to expect the traditional Christian group to incorporate the gay person as a truly full member or leader without

200. See, e.g., Andrew Sullivan, *On Remaining Catholic, Ctd.*, THE ATLANTIC (Jan. 15, 2009, 12:53 PM), <http://www.theatlantic.com/daily-dish/archive/2009/11/on-remaining-catholic-ctd/194073/>.

201. This is not to deny that there are Christian sects that believe that homosexuality is compatible with Christianity. Instead, this section is meant to point out that for those traditional sects that find homosexuality incompatible with the tenets of a Christian faith, an inhibition on speaking about homosexuality also entails an inhibition on expressing many other viewpoints.

202. Pope Paul VI, *Humanae Vitae* § 12 (1968), available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html.

203. See *id.*

204. See Pope John Paul II, *Evangelium Vitae* § 13, 92 (1995), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html.

205. See, e.g., *Genesis* 19:24; *Leviticus* 20:13; *Romans* 1: 26–27; *1 Timothy* 1: 8–10 (condemning homosexual activity).

206. That is, if one accepted that the Bible only condemned homosexuality as the result of historical mores, it becomes significantly difficult to accept that Christianity is a timeless religion that contains truths applicable to all persons regardless of one's society. It also becomes difficult to accept that God inspired the Bible, as it would require an understanding that the Bible was teaching moral falsehoods at least in some places by condemning homosexuality.

diminishing the group's ability to express its viewpoints to the members of its own group.

c. Dissenting Members Negatively Affect a Group's Ability to Communicate Externally

Finally, such a scenario would hinder the group from expressing its viewpoints to non-members. A group will have trouble persuading others about the need to change their beliefs or conduct when some of the group's members have not done so. This difficulty is only heightened when the member is a leader of the group. If the leader of the Orthodox Jewish group does not keep kosher, why would anyone expect that group to value Jewish dietary restrictions? A group sends a much more powerful message when its members live in accordance with certain principles. Interestingly, Hastings recognized this as it did allow for groups to put in certain conduct conditions for membership into their bylaws.²⁰⁷ Very few groups want members who are unwilling to live up to the group's standards of conduct, whether it is the law review demanding academic excellence from its members, the football team demanding its members devote time to practice, or a Christian group requiring that its members and leaders live out the call to Christian virtue. When members act contrary to the values of the group, the message of the group is diluted or lost.

Therefore, exclusion is a necessary component for many religious groups at universities in order to properly convey their viewpoints both to their own members as well as those outside the group. Exclusion also prevents putting unorthodox students into situations where they must keep silent to retain their positions. Thus, the beliefs of these religious groups are inseparable from the conduct of exclusion.

Because *Martinez* failed to recognize that beliefs require the conduct of exclusion, the Court has effectively created a backdoor for universities to exclude many religious groups from campus.²⁰⁸

207. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 3004 (2010).

208. Judging by some of the amici briefs filed with the Court, particularly one that was composed by an alliance of Christian, Jewish, Muslim, and Sikh groups, this decision could affect the willingness of many religions to affiliate at universities. Brief for American Islamic Congress et. al. as Amici Curiae Supporting Petitioner, *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010) (No. 08-1371), 2010 WL 711180. In fact, at least one Muslim group has been denied recognition because it did not conform to a university's policy against discrimination on the basis of religion and sexual orientation. Brief for Foundation for Individual Rights in Education and Students for Liberty as

What the Court sought to avoid in *Widmar* and *Rosenberger* may very well have been made real by *Martinez*.

C. Distortion of the Marketplace by Depriving Minority Groups of Vital Protections

Finally, the Court's analysis in *Martinez* must be rejected because it changes the conception of the marketplace of ideas such that minority viewpoints will struggle and the marketplace itself will suffer as a result. The marketplace of ideas is achieved through having a multitude of groups representing various viewpoints.²⁰⁹ These groups help to educate members about the logic and reasoning behind the viewpoints of the groups, allowing students to better promote their viewpoints both inside and outside the classroom. Under this view, it is good to have both a Republican and a Democrat group, as these groups help their members develop their views so that when there is conflict, there is also fruitful debate and discussion. If the university funded the Republicans but not the Democrats, not only would the Democrats lack the resources to refine their arguments, but also the Republicans would lack the incentive to define their arguments.

This view explains why the Court in *Healy* rejected the idea that the SDS could simply exist off campus.²¹⁰ To be off campus is to be outside the self-contained world of the university, such that groups with conflicting views could ignore the SDS's views and have no incentive or opportunity to grow as a result of the exchange of ideas.²¹¹ In short, without CLS being on campus, or present in the marketplace, the discussion would not happen nearly as effectively as it should have, if it happened at all.

1. The Weaknesses of Diversity of Individuals Compared to Diversity of Groups

Although the majority opinion is less clear about this, Justice Kennedy's concurrence suggests that the Court's view of what the marketplace of ideas on a campus ought to look like has changed.²¹² Instead of interaction by different groups representing

Amicus Curiae Supporting Petitioner at 10, *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010) (No. 08-1371), 2010 WL 530519.

209. See *supra* note 67.

210. See *supra* notes 48–57 and accompanying text.

211. *Healy v. James*, 408 U.S. 169, 181–82 (1972).

212. See *supra* Part II.C.2.

different viewpoints, the marketplace is best achieved, in Justice Kennedy's view, through different students representing different viewpoints.²¹³ Justice Kennedy appears to denounce the previous structure of viewpoint-oriented groups as allowing students to isolate themselves from opposing viewpoints, thereby preventing the marketplace from truly existing.²¹⁴ Only if students associate with those of differing viewpoints will the university's goals be truly achieved, which makes the "all-comers" policy quite laudable.²¹⁵ This marks a radical shift in the previous uses of the extracurricular program forum. Instead of groups organized around viewpoints, groups would now likely be organized around different subjects or interests, becoming debate clubs or something similar.²¹⁶ While Hastings presumably could have allowed the old structure to remain, it chose to alter the goals of its limited forum to produce this kind of marketplace.²¹⁷

Even if these changes are really enacted with the goal of maximizing the marketplace, the opposite result is sure to occur. It is important to interact with people of different viewpoints, but students already do this in the classroom setting, where peers of many viewpoints discuss the issues of the class. Extracurricular organizations are supposed to supplement the curriculum by providing what is not possible in the classroom.²¹⁸ It is true that extracurricular activities under an "all-comers" policy would provide a more intimate environment for discussing issues than the classroom and thus would probably encourage students to express their viewpoints. However, the dynamics of the discussion would be identical to that of the classroom and so would not provide a significant supplement for the university.

In contrast, groups rallied around a viewpoint enrich the marketplace in ways that organizations under an "all-comers" policy cannot. Students with a minority viewpoint can find comfort in associating with others who share their viewpoint, allowing them to feel more confident in their views and thus better able to promote their viewpoints in the various settings of the

213. *Id.*

214. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 3000 (2010) (Kennedy, J., concurring).

215. One wonders whether under Justice Kennedy's argument a simple non-discrimination policy, which allows groups to discriminate based on adherence to the group's belief, would be permissible.

216. Under a nondiscrimination policy, a university could have both viewpoint based groups as well as non-viewpoint based groups. Under an all-comers policy, non-viewpoint based groups are exclusively permitted.

217. *Martinez*, 130 S. Ct. at 2997 (Stevens, J., concurring).

218. *Id.* at 2999 (Kennedy, J., concurring).

university.²¹⁹ Indeed, Americans traditionally form groups when they wish to promote a viewpoint.²²⁰ Moreover, groups promoting a minority viewpoint help make other students aware of the viewpoint. Just by existing, a group calls attention to its viewpoint and grants it a kind of legitimacy that a student acting as an individual could not achieve. Finally, groups rallied around a viewpoint are more interested in their viewpoint being presented well. Often, groups will host events designed to help students formulate and articulate their arguments and more fully understand the issue.²²¹ This in turn allows the student to learn the skills of advocacy and be a better participant both on group issues and other issues. Thus, these groups provide strong value to the educational mission of all universities and law schools in particular.

2. The Survival of Groups with Minority Viewpoints Under an All-Comers Policy

Even if the “all-comers” policy is not so radical and viewpoint-based groups continue, minority groups will still be greatly hindered from forming. Although the Court dismisses the prospect of students with opposing viewpoints joining groups, this is a rather naïve view of the maturity of college-aged students that places minority groups at significant risk. Majority groups may have a desire to prevent minority groups from preaching against the views of the majority, and taking over the minority group is an excellent method to achieve that objective.

It should be emphasized that this is not an implausible hypothetical; in fact, takeovers have already occurred on college campuses with “all-comers” policies.²²² For example, at the University of Nebraska, the College Republicans attended the elections of the Young Democrats.²²³ Being in the majority, the College Republicans elected members of the College Republicans

219. This is particularly true considering the psychological evidence that religious groups tend to incorporate the religion as a greater part of their identity if they are able to associate with like-minded individuals. *See supra* note 199 and accompanying text.

220. This phenomenon has been complimented as a unique strength of American democracy. *See* ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 489–92 (Harvey C. Mansfield & Delba Winthrop trans. & eds., Univ. of Chi. Press 2000) (1840).

221. For example, one of the activities CLS wanted to conduct on Hastings’ campus was to bring in a guest speaker. *Martinez*, 130 S. Ct. at 3006 (Alito, J., dissenting).

222. Note, *supra* note 92, at 2885 n.20 (2005).

223. *Id.*

as officers in the Young Democrats.²²⁴ At Central Michigan University, students who believed the Young Americans for Freedom (YAF) promoted hateful viewpoints began a group on Facebook.com that called for students to go to the YAF elections and elect anti-YAF students as officers.²²⁵ Various students attended YAF meetings and disrupted the meetings.²²⁶ Before the elections were held, Central Michigan University decided to change its policy.²²⁷ These examples show that the minority groups need the ability to limit membership to those who share their viewpoints in order to protect against the very real threat of being taken over by students of the majority viewpoint.

Ironically, homosexuals, as a minority group, have enjoyed great benefits from excluding others based on sexual orientation. Some homosexual groups in the early 1900s feared being revealed as gay if non-gays were admitted and so limited membership to only homosexuals.²²⁸ This exclusion applied to bisexuals as well.²²⁹ As the gay rights movement progressed, homosexual groups relied heavily on the freedom of association in order to protect their rights to meet at universities, particularly the freedom espoused in *Rosenberger*.²³⁰ Without these rights, the movement for gay equality may not have enjoyed the increased “public visibility” that has helped its viewpoint gain popularity.²³¹ Had homosexual groups at universities been denied the ability to exclude, the groups may not have formed at all because of fear of retribution by the majority. This demonstrates just how important the ability to exclude can be for a group espousing a minority viewpoint.

However, even if the Court is right in stating that most people would not be interested in joining groups that advocate viewpoints other than their own, then the question of what these policies

224. *Id.*

225. Foundation for Individual Rights in Education, *Victory for Freedom of Association at Central Michigan University: Reversal of Policy Forbidding Student Groups from ‘Discriminating’ on the Basis of Politics* (April 3, 2007), <http://www.thefire.org/article/7888.html>.

226. *Id.*

227. *Id.*

228. See Dale Carpenter, *The Freedom of Expressive Association: Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1528–29 (2001). This was not an unreasonable fear. One of the first leaders of a gay group was arrested and lost his job. *Id.* at 1529–30. The FBI for a period of time infiltrated homosexual groups and documented their members. *Id.* at 1530.

229. *Id.* at 1529.

230. *Id.* at 1532–33.

231. *Id.* at 1532.

accomplish arises. If no one who believes in the acceptability of homosexuality is interested in joining a traditional Christian group, why would universities be inclined to ban traditional Christian groups because they refuse to admit those who will not join? Such a ruling not only seems petty, but it also seems to distort the values of real diversity.²³²

Regardless of the form an “all-comers” policy takes, the marketplace of ideas that once existed in the university will diminish considerably. As the Court has time and time again sought to protect this nature of education through constitutional analysis, it is disgraceful that the Court allowed a university to distort its extracurricular forum as Hastings did.

D. Would a Nondiscrimination Policy as Applied Against Religious Groups be Constitutional under Martinez?

The national CLS has argued that *Walker*, which focuses on the constitutionality of nondiscrimination policies, continues to be good law.²³³ It is an issue, then, whether the reasoning of *Martinez* can be applied to only those institutions with an all-comers policy, or if *Martinez* changed the analysis such that even schools with a nondiscrimination policy would be affected.²³⁴ In order to determine just how much impact *Martinez* will have on the free speech rights of university students, it must be determined whether *Martinez* has left *Walker* largely untouched.

Walker had three prongs in its analysis of determining whether CLS’s ability to advocate was harmed in a significant way.²³⁵ The first prong, whether the group is expressive, is not altered by the *Martinez* decision, as the majority in *Martinez* found CLS to be expressive as well.²³⁶ The second prong asked whether or not admitting homosexuals would affect the CLS’s ability to advocate against homosexuality.²³⁷ While the Seventh Circuit thought that to “ask the question is very nearly to answer it,” the Supreme Court

232. See Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. DAVIS L. REV. 889, 923–25 (2009) (arguing that meaningful diversity does not require homosexuals to be admitted into groups that do not desire them).

233. Christian Legal Society, *CLS v. Martinez: Some Thoughts on the Recent Supreme Court Decision*, <http://www9.clsnet.org/law-students/cls-v-martinez-some-thoughts-recent-supreme-court-decision>.

234. Recall that *Martinez* dealt with an all-comers policy, which prohibits exclusion on any basis, and not a nondiscrimination policy, which prohibits exclusions on specified bases. See *supra* Part II.A.

235. See *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 862 (7th Cir. 2006).

236. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2985 (2010).

237. *Walker*, 453 F.3d at 862.

disagreed.²³⁸ In *Martinez*, the Court assumed it was possible for the CLS to admit dissenters as members while proclaiming its message.²³⁹ On the third prong, weighing the interest of the group against the interest of the university, the *Walker* court held that although the university has an interest in protecting homosexuals from discrimination, this interest is related to the suppression of viewpoints and therefore impermissible.²⁴⁰ However, this seems to rest upon the assumption that by forcing groups with viewpoints against homosexuality to admit homosexuals, the university is engaging in viewpoint discrimination, i.e., is not being viewpoint neutral. The Court in *Martinez* rejected this reasoning.²⁴¹

To be sure, the *Martinez* Court was impressed that the all-comers policy applied to any kind of belief and so was easily viewpoint and content neutral.²⁴² A nondiscrimination policy would not have the same advantage, as it applies only to certain areas of discrimination, while an all-comers policy prohibits discrimination on any basis.²⁴³ Although the majority opinion does not address what it would have said about nondiscrimination policies, Justice Stevens argued that they would also be viewpoint neutral because they would apply to all groups seeking to discriminate.²⁴⁴ On the other hand, Justice Alito argued that due to the discriminatory motive he believed Hastings to have exhibited in denying recognition only to the CLS and due to the disproportionate impact on religious groups, a nondiscrimination policy would be unconstitutional.²⁴⁵

Although it is a difficult task to predict what the Supreme Court would do, it is also difficult to imagine that the Court would find a nondiscrimination policy anything but viewpoint-neutral under *Martinez*'s reasoning. If acceptance of homosexuality was not a viewpoint when Hastings expressed it through the "all-comers" policy, it seems unlikely that its expression in a narrow nondiscrimination policy would make it a viewpoint.²⁴⁶ Additionally, the disparate impact on religious groups did not affect the Court's judgment in *Martinez* and so would not likely persuade the Court that a nondiscrimination policy is not viewpoint

238. *Id.* at 862.

239. *Martinez*, 130 S. Ct. at 2992–93.

240. *See Walker*, 453 F.3d at 863–64.

241. *See Martinez*, 130 S. Ct. at 2993.

242. *Id.*

243. *Id.* at 2979.

244. *Id.* at 2995–96 (Stevens, J., concurring).

245. *See id.* at 3012 (Alito, J., dissenting).

246. *See id.* at 2993.

neutral.²⁴⁷ Most importantly, much of the negative consequences of being banned from campus, including the lack of access to the normal channels of communication, were minimized in *Martinez*, so that groups will face the difficult if not impossible task of showing that they have been burdened significantly when the university denied their use of campus facilities.²⁴⁸

Although the Court in *Martinez* was concerned about whether Hastings seemingly selected out the CLS for enforcement, if a college does enforce a nondiscrimination policy against all groups equally, the policy is likely to stand.²⁴⁹ Thus, even at campuses without an “all-comers” policy, religious groups are likely to be left without constitutional protection from diversity policies if the Court continues to use the reasoning employed in *Martinez*.

IV. WHY RELIGIOUS GROUPS SHOULD BE GRANTED AN EXEMPTION FROM UNIVERSITIES’ DIVERSITY POLICIES

Because the beliefs of religious groups often require exclusion of those with opposing beliefs, many religious groups will be unable in good conscience to comply with diversity policies.²⁵⁰ In order to prevent universities from losing the diversity these religious groups contribute, the Court ought to overturn *Martinez* and grant religious groups an exemption from diversity policies. However, because this seems unlikely in the short term, state legislatures and other organizations in charge of setting diversity policies for state universities must create exemptions for groups who promote the beliefs of a comprehensive religion.

A. *The Value of Comprehensive Religions to Universities*

Even in secular universities, religion can greatly assist in the interaction and communication between disciplines. Although the definition of religion is difficult to determine for theologians and lawyers alike, the Third Circuit Court of Appeals attempted to synthesize Supreme Court jurisprudence to come up with a three part-definition.²⁵¹ The three parts are: (1) if the alleged religion considers “ultimate” questions such as life and death or good and evil; (2) if the religion is a comprehensive belief system; and (3) if

247. *See id.*

248. *See supra* notes 132–35 and accompanying text.

249. *See Martinez*, 130 S. Ct. at 2995.

250. *Id.* at 3019.

251. Stephanie R. Tumbiolo, *Intimately Linked: Examining Religious Protection for Student Expressions of Sexual Abstinence*, 48 J. CATH. LEGAL STUD. 117, 131 (2009).

the religion has the “defining structural characteristics of a traditional religion, such as ‘ceremonial functions, the existence of clergy, [and so forth].’”²⁵² The Supreme Court has been clear that this does not protect purely secular beliefs, i.e., those that are “philosophical and personal.”²⁵³

Although there are some disagreements about this definition’s appropriateness, the second prong is particularly important.²⁵⁴ Religion can be “comprehensive,” which by definition means the religious faith affects every aspect of the adherent’s life.²⁵⁵ There is nothing that a believer could do in which religion would not provide guidance or influence.²⁵⁶ In fact, many faiths require their followers to integrate their beliefs into every aspect of their lives.²⁵⁷

The pervasiveness of religious faith in the lives of believers has previously led to conflict with governmental policies. In these situations, an exception for religious expression is not a new concept; schools have employed this exception before in the area of uniform regulations.²⁵⁸ Although this can sometimes create

252. *Id.* (quoting *Africa v. Pennsylvania*, 662 F.2d 1025, 1031–35 (3d Cir. 1981)).

253. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

254. For an example of this discussion, see Karen Sandrik, *Towards a Modern Definition of Religion*, 85 U. DET. MERCY L. REV. 561 (2008). Sandrik rejects the definition that includes comprehensiveness. However, the definition she offers seems incompatible with many religious groups, such as many Christian sects, that believe in predestination. It thus seems ill-suited for the needs of American universities that must frequently interact with Christian students.

255. This is not meant to address the debate regarding the proper definition courts ought to use when determining whether a group is religious. Instead, it is to say that groups that express the viewpoints of a comprehensive religion have particular needs for an exemption from diversity policies that non-comprehensive religious viewpoints do not.

256. A glance at the many things for which the Catholic Church provides patron saints shows just how extensive this can be. For example, St. Arnulf of Soissons is the patron saint of brewing beer.

257. For example, Pope Benedict XVI has argued that “[d]evelopment, social well-being, [and] the search for a satisfactory solution to the grave socio-economic problems besetting humanity” require the truths of faith that enable genuine sacrificial love. Pope Benedict XVI, *Caritas in Veritate* § 5 (2009), available at http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html.

258. See Tumbiolo, *supra* note 252, at 130–33. Courts have stated that a wrist tattoo signifying servitude to Ra, the Egyptian god of the sun, can be religious expression protected against uniform regulations at public schools. *Id.* Although some courts have imposed an “intricately-linked” standard for religious expression to be exempted, this standard forces courts, which are often outsiders to the faith, to make determinations that are far outside their competence. *Id.* at 138–46.

difficulties as students attempt to justify fashion preferences as religious expression, it establishes that courts are willing to undertake such difficult inquiries in order to protect the First Amendment rights of the speaker.²⁵⁹

When religion is comprehensive, it has a particular value to the university that non-comprehensive viewpoints lack.²⁶⁰ The modern university is anything but universal; often disciplines conduct themselves in isolation from each other.²⁶¹ Although this increases the efficiency of research, it prevents a true understanding of reality in which disciplines are not artificially separated as they are in a university. What has resulted is “a place in which certain questions go unasked or rather, if they are asked, it is only by individuals and in settings such that as few people as possible hear them being asked.”²⁶² With so much disunity, the need for comprehensive belief systems cannot be understated.

Religions bring disciplines into dialogue with each other that would otherwise not interact in the modern university. For example, in the mind of a religious person, ethics has considerable relation to science; law has considerable relation to sociology in order to care for the poor.²⁶³ Even though some philosophies could theoretically bring various subjects together, they are not comprehensive like religion and therefore cannot unite disciplines the same way religion can.²⁶⁴ The presence of religion on a campus best enables a university or any other educational body to bring together various disciplines. Thus, religion’s comprehensive nature

259. There is a recent case of a student justifying a nose piercing because she and her mother are part of the “Church of Body Modification.” See *Teen: School Ban on Piercing Violates Religion*, CBSNEWS (Sept. 16, 2010, 11:05 AM), <http://www.cbsnews.com/stories/2010/09/16/national/main6872106.shtml>.

Although this claim may have some merit, others do not. See *Brown v. Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977), *aff’d*, 589 F.2d 1113 (unpublished table decision) (5th Cir. 1979) (rejecting a man’s claim that eating cat food was religious in nature). This demonstrates why the “comprehensive” requirement is so important. Instead of claiming that “x is a religious belief,” an adherent to a religion would have to prove that “x” is a belief that is a part of a comprehensive religion. This prevents students simply wishing to curtail school rules from making up religions to justify their behavior.

260. This is not to say that universities ought not encourage groups that express no viewpoint and are more like a debate club. Such a policy would be consistent with a marketplace of ideas model, as it does not suppress viewpoints.

261. ALASDAIR MACINTYRE, *GOD, PHILOSOPHY, UNIVERSITIES: A SELECTIVE HISTORY OF THE CATHOLIC PHILOSOPHICAL TRADITION* 174 (2009). MacIntyre suggests that modern universities would be more accurately called “multiversities” due to the disjointed nature of their curricula. *Id.*

262. *Id.*

263. See *id.* at 177–78.

264. *Africa v. Pennsylvania*, 662 F.2d 1025, 1031–35 (3d. Cir. 1981).

aids the university greatly in its mission of educating its students about the world as a whole. Therefore, universities must operate under diversity policies that contain exemptions for religious groups in order to best fulfill their charge of educating students.

B. The Need for Well-Formed Religious Viewpoints in the Marketplace of Ideas

Another important mission of education is to expose students to a wide variety of ideas as the university is uniquely the “marketplace of ideas.”²⁶⁵ It is hard to imagine a thriving marketplace in the United States that does not have religious viewpoints well represented.²⁶⁶ Not only do many people pronounce religious beliefs, but comprehensive religions, by their definition, proclaim ideas on almost every subject. If it is essential for the university and its students to grow in knowledge and approach truth by having as many ideas as possible interact with each other, it is also essential for religion to be well represented in the university.

For example, a discussion in a constitutional law class about *Griswold v. Connecticut* requires a student to determine why the Court believed an individual’s interest in privacy and autonomy outweighed the state’s desire to ban contraceptive use.²⁶⁷ This discussion will be rather dull if everyone accepts that laws against contraception are silly and that use of contraception presents no moral problems. However, if there is someone from a Catholic viewpoint who is well-versed in Catholic teaching (or any other religion that prohibits use of contraception), a purely academic discussion changes to an actual conflict of competing values. Such a discussion represents more closely the debate that the Connecticut Legislature and the Supreme Court addressed.²⁶⁸ Exposure to such discussions would greatly increase a student’s understanding of the decision.

The need for exposure to religion is particularly true of those religions that are not merely unpopular, but largely unknown by the general American public. For example, an understanding of the

265. See *Healy v. James*, 408 U.S. 169, 180 (1972) (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

266. Although the numbers have been declining, 78% of Americans still associate themselves with the Christian faith. See Frank Newport, *This Christmas, 78% of Americans Identify as Christians*, GALLUP (Dec. 24, 2009), <http://www.gallup.com/poll/124793/this-christmas-78-americans-identify-christian.aspx>.

267. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

268. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 421 (16th ed. 2007).

differences and disputes between Sunni and Shia sects within Islam would be vital in a class dealing with issues of the Middle East.²⁶⁹ Another example would be an understanding of the Sikh traditions that mandate that Sikhs must always wrap their hair and wear a small curved sword.²⁷⁰ This may enrich a discussion about the appropriateness of government regulations on uniforms in schools or in the military.²⁷¹ Allowing the formation of groups that promote the viewpoints of those religions that are not familiar to many Americans would give students a much greater opportunity to learn about these faiths that play important roles in policy decisions both home and abroad.²⁷²

Religion is important even in topics that do not directly concern religion. Religion has played such a tremendous role in philosophy, science, and law that it is impossible to imagine a useful education that does not effectively address religion.²⁷³ Much of the legal and philosophical precepts used by the modern Western world came to it through religion.²⁷⁴ Without an understanding of religion, much of the terms used in the modern world lack context and would be only fragments detached from the source of their significance.²⁷⁵ If a university is to promote understanding, religion is indispensable. This understanding is not limited to only religious ideas, but includes religious (and non-religious) persons themselves.²⁷⁶ By growing in understanding

269. See generally Mike Shuster, *Iraq War Deepens Sunni-Shia Divide*, NPR (Feb. 15, 2007), <http://www.npr.org/templates/story/story.php?storyId=7411762>.

270. See *The Khalsa*, SIKHS.ORG, <http://www.sikhs.org/khalsa.htm> (last visited Mar. 15, 2012).

271. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 512 (1986).

272. For example, an American would be a much better voter on the issue of rebuilding Iraq if she understood why the different religious factions are fighting each other. If an American groups all these factions as just Muslims out of ignorance, it is less likely that the voter will support a proper rebuilding plan, i.e., one that accounts for these differences.

273. See ALASDAIR MACINTYRE, *GOD, PHILOSOPHY, UNIVERSITIES* 173–80 (2009).

274. *Id.*

275. ALASDAIR MACINTYRE, *AFTER VIRTUE 2* (2d ed. 2007) (discussing the problems which occur when the language of morality is separated from their original context). For MacIntyre, this has already occurred with disastrous results in our understanding of “rights” and “virtue.” *Id.* at 68–69, 121–243. For a vivid metaphorical illustration of a world stripped from context, see WALTER M. MILLER, JR., *A CANTICLE FOR LEIBOWITZ* (1959). In it, monks in a post-apocalyptic world venerate diagrams of electrical circuits because they lack understanding of what the diagram actually represents. *Id.*

276. Meira Levinson, “*Getting Religion*”: *Religion, Diversity, and Community in Public and Private Schools*, in *WRESTLING WITH DIVERSITY* 94, 95–97 (Sanford Levinson ed., 2003).

both of religious persons and religious ideas, the student is not only better equipped to act within a democratic environment that requires an actor to interact with religion, but the student also has more information from which to choose her own ideas, thus making her more autonomous.²⁷⁷ By limiting the ability of religious groups to express their viewpoints, universities are diminishing the opportunities of their students to gain the valuable education that comes from religious groups robustly promoting their ideas.

It is true that because the definition of religion is nebulous, some groups may be able to clothe hate speech under religious garb, even under a comprehensiveness requirement. Indeed, many totalitarian ideologies, such as fascism and Nazism, appropriated religious guises to further their causes.²⁷⁸ However, under marketplace principles, it is better to let these groups out in the open than remain hidden. If a university has a sizable minority of racists, it is better to spend the minimal costs of recognition so that the group is out in the open where their racist or otherwise deplorable views can be defeated (and ideally their minds changed) than to allow the students to graduate with their erroneous views intact. Not only will the university have failed to provide students with a proper education, but it also will have to suffer the consequences of alumni representing the university very poorly.

An on-campus group thus greatly increases the expression of religious ideas, and it is better to have these ideas than not. In fact the Court has held that diversity is valuable for both students and society.²⁷⁹ Diversity promotes virtues of tolerance and respect for those with differing viewpoints and also helps students gain a greater sense of autonomy as they define themselves through interactions with those of a different perspective.²⁸⁰ This applies to

277. *Id.*

278. See MICHAEL BURLEIGH, SACRED CAUSES: THE CLASH OF RELIGION AND POLITICS, FROM THE GREAT WAR TO THE WAR ON TERROR 38–123 (2007).

279. *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265, 313 (1978); see also *Grutter v. Bollinger*, 539 U.S. 306, 328–33 (2003). Although both of these cases involved racial diversity, religious diversity is just as, if not more, important than race. One of the purposes of affirmative action in achieving racial diversity is “to select those students who will contribute the most to the ‘robust exchange of ideas.’” *Grutter*, 539 U.S. at 329 (citing *Bakke*, 438 U.S. at 313). Religion is more directly associated with ideas than race, as to be religious involves certain beliefs whereas to be of a particular race does not. Therefore, a diversity of religious viewpoints more directly leads to a diversity of ideas than does racial diversity.

280. Levinson, *supra* note 276, at 107.

religious diversity as much, if not more, as it applies to racial or sexual diversity.²⁸¹

Therefore, if universities are going to achieve the benefits of diversity, universities must secure religious diversity. Because the presence of religious groups greatly aids in allowing a multitude of religious perspectives to be promoted in the university, it is essential that universities secure the existence of religious student groups by exempting religious groups from diversity policies. Ironically, the only way to preserve true diversity is to exempt religious groups from a diversity policy.

CONCLUSION

A world of diversity and education is not achieved when religious groups are excluded from the table. Members of different religious beliefs must learn how to properly dialogue with one another. The *Martinez* opinion prevents that from happening and so marks a step backwards for students who seek truth. To counter this effect, the Court or state legislatures should act positively to create exceptions in diversity policies for religious groups.

It has been said that “[f]aith and reason are like two wings on which the human spirit rises to the contemplation of truth.”²⁸² With religious groups on campus, believers and non-believers alike have their educational experiences deeply enriched. In a misguided attempt to either protect homosexuals from discrimination or to create a truly secular education, universities, with the constitutional blessing of the *Martinez* court, have clipped one of these wings from their students. Education has suffered a grievous loss, but if exemptions to diversity policies are granted to religious groups, students can regain their wings and resume their ascent in truth and learning.

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281. *See id.* at 107–120.

282. Pope John Paul II, *Fides et Ratio* (1998), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_151019_98_fides-et-ratio_en.html.

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