STUDENT ORGANIZATIONS AND THE FIRST AMENDMENT: ANALYSIS OF NONDISCRIMINATION POLICIES

By

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To the wonderful women in my life for their support and inspiration to be more

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LIST OF TERMS

Academic Freedom	Right to teach as one sees fit, but not necessarily the right to teach evil. The term encompasses much more than teaching-related speech rights.
Affirm	To ratify, uphold, approve, confirm; to affirm a judgment, Decree, or order, is to declare that it is valid and right and must stand as rendered previously.
All-comers policy	Term used in *CLS v. Martinez*[1] to identify Hastings College of Law's nondiscrimination policy for student organizations.
Amicus curiae	Literally means friend of the court. A person with strong interest in or views on the subject matter of an action, but not a party to the action, may petition the court for permission to file a brief, on behalf of a party but actually to suggest a rationale consistent with its own views.
Appeal	Resort to a superior (i.e., appellate) court to review the decision of an inferior (i.e., trial) court or administrative agency.
Appellate court	A court having jurisdiction of appeal and review; a court to which causes are removable by appeal, certiorari, error or report.
Bill of Rights	First ten Amendments to the U.S. Constitution providing for individual rights, freedoms, and protections.
Brief	A written statement prepared by the counsel arguing a case in court. It contains a summary of the facts of the case, the pertinent laws and an argument of how the law applies to the facts supporting counsel's position.
Case Law	The law of a particular subject as evidences or formed by the adjudged cases, in distinction to statutes and other sources of law.
Certiorari	From Latin to be informed of. A writ of common law origin issued by a superior to an inferior court requiring the latter to produce a certified record of a particular case tried therein. The writ is issued in order that the court issuing the writ may inspect the proceedings and determine whether there have been any irregularities. It is most commonly used to refer to

[1] *Christian Legal Society Law v. Martinez et al.* 130 S.Ct. 2971 (2010).

	the Supreme Court of the United States, which uses the writ of certiorari as a discretionary device to choose the cases it wishes to hear.
Chief Justice	The presiding, most senior, or principal judge of a court.
Civil Rights	Personal, natural rights guaranteed and protected by the U.S. Constitution.
CLS	Christian Legal Society
Compelling state interest	One which the states is forced or obliged to protect. The term is used to uphold state action in the face of attack grounded on Equal Protection or First Amendment rights because of serious need for such state action.
Concur	To agree; in the practice of appellate courts, a “concurring opinion” is one filed by one of the judges or justices, in which he agrees with the conclusions or the result of another opinion filed in the case.
Constitutional	Consistent with the constitution; authorized by the constitution; not conflicting with any provision of the constitution or fundamental law of the state.
Courts of Appeals	Any court (state or federal) that hears appeals from trial courts or lower appeals courts. The court of appeals is usually the intermediate courts in most jurisdictions -- that is the courts positioned between trial courts and the courts of last appeal (usually the supreme court). The U.S. is divided into thirteen federal judicial circuits in each of which there is established a court of appeals known as the United States Court of Appeals for the circuit.
Dissent	An opinion from a judge that does not agree with the majority decision.
District Court	Each state is comprised of one or more federal judicial districts, and in each district there is a district court. The United States district courts are the trial courts with general Federal jurisdiction over cases involving federal laws or offenses and actions between citizens of different states.
Doctrine	A rule, principle, theory or tenet of the law.
Equal Protection Clause	The constitutional guarantee of “equal protection of the laws” means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other

	persons or other classes in like circumstances in their lives, liberty, property, and in their pursuit of happiness.
First Amendment	Amendment to the U.S. Constitution guaranteeing basic freedoms of speech, religion, press, and assembly and the right to petition the government for redress of grievances.
Forum	Specific area for speech activities.
Fourteenth Amendment	The Fourteenth Amendment of the Constitution of the United States recognizes a citizenship of the U.S., as distinct from that of the states; forbids the making or enforcement by any state of any law abridging the privileges and immunities of citizens of the U.S.; secures all “persons” against any state action which results in either deprivation of life, liberty or property without due process of law, or, in denial of the equal protection of the laws.
Freedom of Speech	Right guaranteed by First Amendment of the U.S. Constitution to express one’s thoughts and views without governmental restrictions.
Holding	Any ruling or decision of a court. The legal principle to be drawn from the opinion (decision) of the court.
Intermediate Scrutiny	
Judgment	The official decision of a court of justice upon the respective rights and claims of the parties to an action or suit litigated and submitted to its determination.
Judicial Review	Power of the courts to review decisions of another department or level of government.
Jurisprudence	The philosophy of law; the science of the law of which its function serves to ascertain the principles on which legal rules are based.
Legislation	The act of giving or enacting laws; the power to make laws.
Limited Public Forum	Free Speech that can be regulated based on the purpose of the forum
Narrowly Tailored	A concept related to the strict scrutiny standard, as a statute must meet this criteria in order to pass the test in determining whether the government has a compelling interest in creating the law. To be narrowly tailored is to be

	specific to the purpose of the implementation of the law and to not be overly broad in its implementation.
Opinion	A statement by a judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based. A majority opinion represents the principles of law which a majority of the court deem operative in a given decision; a concurring opinion agrees with the result reached by the majority, but disagrees with the precise reasoning leading to that result. A dissenting opinion disagrees with the result reached by the majority and thus disagrees with the reasoning and/or the principles of law used by the majority in deciding the case; a plurality opinion is agreed to by less than a majority as to the reasoning of the decision but is agreed to by a majority as to the result.
Plaintiff	A person who brings an action; the party who complains or sues in a civil action.
Precedent	An adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law.
Rationale	The reasoning behind the ruling or decision of a case. The explanation of how the court came to the judgment.
Reasonable Scrutiny	reasonable person standard
Remand	Refer back to a lower court for review.
Reverse	To overthrow, vacate, set aside, make void.
RSO	Registered Student Organization
Ruling	A judicial or administrative interpretation of a provision of a statute, order, regulation, or ordinance.
Statute	A formal written enactment of a legislative body, whether federal, state, city, or county.
Strict Scrutiny	Under this test for determining if there has been a denial of equal protection, burden is on government to establish necessity of the statutory classification. Measure which is found to affect adversely a fundamental right will be subject to the “strict scrutiny” test which requires the state/government establish that it has a compelling interest

	justifying the law and that distinctions created by law are necessary to further some governmental purpose.
Supreme Court	The U.S. Supreme Court comprises the Chief Justice of the United States and such number of Associate Justices as may be fixed by Congress. With the one Chief Justice, the U.S. S. Ct. is comprised of 9 Justices.
U.S. Constitution	The organic and fundamental law of the nation, establishing the character and conception of the government, laying the basic principles to which its internal life is to be formed.

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The Supreme Court in *Christian Legal Society v. Martinez* heard for the first time at the highest court a case involving student organizations in higher education and student First Amendment rights. Since 2010, scholars have debated the issues addressed and not addressed by the Court decision. Out of the post-decision rhetoric, this study identified four constants, or themes, that emerged from the case. The constants included Freedom of Religion, Freedom of Association, forum analysis and viewpoint neutrality, and status and belief.

The purpose of this study was examining the *CLS v. Martinez* decision and its effect on student organization policy development. The study used comparative analysis and legal research methods to identify four themes in the data. The research summarized the arguments and lower court decisions in *CLS v. Martinez* and reviewed higher education case law. A best practice policy for higher education student organizations resulted from the study and serves as a benchmark for institutions in crafting their own policies.

CHAPTER 1
INTRODUCTION

Freedom of speech, expression, and to associate in groups with similar interests, beliefs, and causes is a long-treasured right for post-secondary college students. Open discussion and dialogue with interesting debate have inspired many of the great thinkers of society on philosophy, science, and literature among other fields. Debate helps students hone their skills in supporting their ideas and beliefs and understanding the "what and why" behind their ideologies. Through challenges, growth is sometimes more immense for the college student. Some faculty members feel “students should enter the academy with the expectation of having some of their cherished beliefs questioned rather than affirmed.”[1] With this comes the support of allowing students to form groups around similar ideas to explore their beliefs further. Hence, the student organization was born.

First Amendment rights of students have been a subject of debate since the beginning of American higher education institutions. Educators today grapple with some of the same challenges the early college faculty faced. Students during college enjoy expanding and testing their freedoms politically, philosophically, and domestically. Examples of extracurricular or out-of-the-classroom activities are literary societies, religious groups, and greek letter social organizations. Student organizations in the past have been viewed by higher education and the courts as purely the business of the institution. It was up to the institution to determine appropriateness in light of the

[1] Roger Bowen, “The Assault on Academic Freedom in the Academy: Exploring the Intersectionalities of Race, Religion, and Gender in Higher Education: Exploring the Role of Religion,” 53 Loy. L. Rev. 157 (2007).

institution's mission and conduct of the students. In the present-day, student rights have evolved to the point that institutions are not just responsible for respecting students' rights, but also for students' safety and wellbeing.

Recently, legal cases filed by different chapters of the Christian Legal Society (CLS) were filed in various nation-wide circuit courts concerning student organizations' First Amendment rights.[2] Within the various circuit courts, each case was argued and decided on similar, yet differing, arguments. The First Amendment served as the link to specific arguments of freedom of religion, freedom of association, and freedom of speech. The Ninth Circuit case involving the Hastings College of Law chapter of the Christian Legal Society made it to the Supreme Court in 2009.[3]

In this study, the Supreme Court case *Christian Legal Society v. Martinez*[4] was analyzed and the application of an all-comers nondiscrimination policy at institutions of higher education are discussed. The decision of the court were addressed as well as the applicability of the First Amendment. Finally, a policy analysis for higher education institutions was presented with recommendations for student organization nondiscrimination policy development.

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[2] *Christian Legal Society v. Eck,* 625 F. Supp.2d 1026 (D. Mont. 2009); *Christian Legal Society v. Walker,* 453 F.3d 853 (7th Cir. 2006); *Christian Legal Society of Washburn University School of Law v. Farley*, No. 04-4120 (D. Kan. Sept. 16, 2004); *Christian Legal Society Chapter of the Univ. of Toledo v. Johnson,* No. 05-7126 (N.D. Ohio Jun. 16, 2005); *Christian Legal Society Chapter at Arizona State Univ. v. Crow,* No. 04-2572 (D. Ariz. Nov. 17, 2004); and *Christian Legal Society Chapter of the Ohio State Univ. v. Holbrook,* No. 04-197 (S.D. Ohio 2004).

[3] *Christian Legal Society v. Eck,* 625 F. Supp.2d 1026 (D. Mont. 2009), *docketed on appeal* No. 09-35581 (9th Cir. June 18, 2009).

[4] *Christian Legal Society v. Martinez et al.* 130 S.Ct. 2971 (2010).

First Amendment Debate in Higher Education

Students' First Amendment rights at higher education institutions have been interpreted differently over the years by both institutions and the courts. Colonial era colleges were responsible for both the intellectual and moral development of students. Faculty lived with and took care of the needs of the students. The parietal roles of institutions and faculty were termed *in loco parentis*; in place of parents. During this time, students had very few personal rights. Education was seen as a privilege, and all authority rested with the institutions.

As access to education expanded, so did the student body. Increased access created larger enrollments shifting faculty to focus primarily on academic issues. Parietal roles continued to be exercised on most campuses until the adaptation of the German model of higher education at the turn of the Twentieth Century. Students were left to their own devices for moral development while schools focused on intellectual instruction and research. This allowed students the opportunity to look for additional, termed extracurricular, experiences outside the classroom that would enhance their personal, social, and moral development.

While students and institutions interacted through parietal roles until the Twentieth Century, factors such as the implementation of the German model of higher education and World War II changed the relationship between institutions and students. Students were given more choice in their education and were expected to be responsible for their actions outside of the classroom. As students experienced more freedom and access to education, the previous concept of education as a privilege was now viewed by the newer generations as a right.

Student Rights in the Courts

Issues of student rights began to be seen in the courts in the 1960s, coinciding with social movements in the United States. Constitutional rights, specifically the First and Fourteenth Amendments, were used to affirm and support student rights in the courts. The Fourteenth Amendment ensured that no person should be denied equal protection of the law.[5] Beginning with *Dixon v. Alabama*,[6] the rights of students to higher education were viewed by the courts as a property interest. Students could not be removed from campus without due process of law, consisting of some type of notice and some type of hearing. In *Tinker v. Des Moines*[7] the court stated that students do not shed their rights at the schoolhouse gate, reaffirming that the Constitution applies to students in public education. Other cases have outlined associational and viewpoint rights of student organizations.[8] The courts have also defended students' right to free speech even when the speech is considered deplorable by the campus.[9] No matter the viewpoint, free speech is essential to academic inquiry and citizenship. Student organizations provide opportunities for students to explore ideas with other students and associate with like-minded individuals. Similarly, students learn opposing views from

[5] Title VII of the Civil Rights Act of 1964 as amended by 42 U.S.C. §1981.

[6] *Dixon v. Alabama*, 294 F.2nd 150, 158-159 (Fifth Cir., 1961).

[7] *Tinker v. Des Moines*, 393 U.S. 503 (1969).

[8] *Healy v. James,* 408 U.S. 169 (1972); *Widmar v. Vincent*, 454 U.S. 263 (1981); and *Rosenberger v. Rector & Visitors of the Univ. of Va*., 515 U.S. 819, 829 (1995).

[9] *Iota Xi Chapter of Sigma Chi v. George Mason Univ*., 773 F. Supp. 792 (E.D. Va. 1991). Fraternity members staged an "ugly woman" costume contest. Some of the costumes reflected racial stereotypes that the campus found offensive. The Court found that the fraternity was engaged in parody and that while in bad taste to many people, was protected speech by the First Amendment.

other individuals and groups with access to the forum. This experiential learning cannot be found in a classroom.

The Debate Over Student Organization Rights

At first glance, the evolution of student rights has developed linearly over time. However, the interpretation of these rights and subsequent practices and policies in support of student rights has been erratic. Many First Amendment issues stay within the perview of state and federal district courts of appeals and do not reach the Supreme Court. However, because state and federal jurisdictions may not overlap, inconsistency can exist between jurisdictions. Only Supreme Court decisions apply to all the jurisdictions in the United States. *CLS v. Martinez* is unique because it is a student organization case that came before the Supreme Court. While it may seem that the Court's decision, in this case, would bring some consistency and clarity to student rights, questions and confusion continue of what many scholars have identified as nuances of the First Amendment and its application to education and students.[10] The issues identified in the post-decision rhetoric regarding *CLS v. Martinez* include levels of scrutiny used in the decision; the role of religion; whether Hastings College of Law's

[10] Jennifer A. Abodeely, "Thou Shall Not Discriminate: A Proposal for Limiting First Amendment Defenses to Discrimination in Public Accommodations," 12 Scholar 585 (2010); Ashutosh Bhagwat, "Associations and Forums: Situating CLS v. Martinez," 38 Hastings Const. L.Q. 543 (2011); Alan Brownstein and Vikram Amar, "Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action." 38 Hastings Const. L.Q. 505 (2011); Michael R. Denton, "The Need for Religious Groups to be Exempt from the Diversity Policies of Universities in Light of Christian Legal Society v. Martinez," 72 La. L. Rev. (2012); John D. Inazu, "The Unsettling "Well-Settled" Law of Freedom of Association," 43 Conn. L. Rev. 149 (2010); Toni M. Massaro, "Christian Legal Society v. Martinez: Six Frames," 38 Hastings Const. L.Q. 569 (2011); Julie A. Nice, "How Equality Constitutes Liberty: The Alignment of CLS v. Martinez," 38 Hastings Const. L.Q. 631 (2011); Rebecca D. Ryan, "Why Non-discrimination Policies in Higher Education Require a Second Look: The Battle for First Amendment Freedom in the University Setting," 62 Cath. U. L. Rev. 575 (2014); Mark Strasser, "Leaving the Dale to be More FAIR: On CLS v. Martinez and First Amendment Jurisprudence," 11 First Amendment Law Review, 235-89 (2012).

nondiscrimination policy was an all-comers policy; and the development and formation of forums in institutions of public higher education. This study identified and utilized four constants to analyze the issues.

Constants of Study

Four constants emerge from data and provide a framework in which to examine the issues surrounding *CLS v. Martinez*. These constants included Freedom of Religion; Freedom of Speech; Freedom of Association; and Forum Analysis and Viewpoint Neutrality. The First Amendment of the United States of America states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.” [11] Each word of the First Amendment was carefully chosen by the Founding Fathers and ratified by Congress. The lens in which this study is conducted examined the main components of the First Amendment and applied them to *CLS v. Martinez.* The research then discussed the opinions, briefs, and lower court decisions as well as the current literature found in law reviews to broaden and complete the study.

Freedom of Religion: The Establishment and Free Exercise Clauses

The United States Constitution in the Bill of Rights declares explicitly that no state religion is to be created or enforced by the government. Freedom of religion was important to the formation of early America.[12] The Free Exercise Clause of the First

[11] U.S. Const. amend I.

[12] Thomas S. Kidd, *God of Liberty: A Religious History of the American Revolution* (New York: Basic Books, 2012), 6. Religious freedom gained political support during the formation of the early republic because of the diverse religious views of the American colonists. Unification under one religious ideal was not possible, so freedom of religion was the plausible solution for those seeking personal liberty. Steven Waldman, *Founding Faith: Providence, Politics, and the Birth of Religious Freedom in*

Amendment provides the basis for individual religious beliefs and practices and the formation of formal religious sects and doctrines. The ability to have a belief and to exercise it in public is fundamental to practicing a religion.

The Christian Legal Society (CLS) as an organization sought to create an association of students with similar beliefs. The arguments presented by CLS stated that the denial of recognition by the University was based on the group's religious viewpoints. The Free Exercise clause was addressed by the Supreme Court in their decision and also was discussed by many scholars in their analyses of the case. Freedom of religion and the free exercise thereof provides an important a framework in which to analyze the data from this study.

Freedom of Speech: Status and Belief

The right to free speech historically has been first thought of regarding political and liberty interests.[13] However, free speech in this study emerges as freedom of belief. A belief or viewpoint is protected by the First Amendment and enjoys a broad definition and application in the United States. The diversity of thoughts, ideas, and opinions is the cornerstone of First Amendment freedoms. A belief or viewpoint can be philosophical, political, theoretical, or religious. One issue raised by *CLS* was whether beliefs were protected by the First Amendment when those beliefs discriminate against another's civil rights. Specifically, the concern is whether the *CLS* religious views on

America (New York: Random House, 2008). Religious liberty was the new view of the role religion had in the new republic.

[13] Saul Cornell, "To Assemble Together for Their Common Good: History, Ethnography, and the Original Meanings of the Rights of Assembly and Speech," *Fordham Law Review* 84, no. 3, 915 (2015).

sexual immorality are discriminatory toward other students at Hastings College of Law that identify as gay, lesbian, bisexual, or transgender (GLBT). The broader legal and social issue becomes what is the more protected freedom; status as a GLBT person or freedom of religious belief for student organizations.

Freedom of Association

Freedom of Association guarantees the right for like-minded individuals to gather together under a common belief or interest. Similar to the Free Exercise Clause, Freedom of Association requires some action on the part of the individual. While a belief may be the basis of actions, beliefs are protected while some actions may lead to consequences. Because actions are the outward manifestations of beliefs, confusion and challenges occur. The issue then becomes how ideas that manifest into actions are perceived as or are determined to impede the rights of other citizens. While believing certain acts of sexual immorality are wrong is protected by the First Amendment, actively restricting students from a Hastings College of Law student organization was seen by the University as discriminatory.

In this case, the association rights of student organizations were discussed at length by both CLS and Hastings College of Law (Hastings). CLS argued that refusing the organization status as a student organization denied the group the right to association. However, Hastings' nondiscrimination policy stated that to be a student organization, membership must be open to all students. This policy of all-inclusive, termed all-comers by the Court, membership in student organizations was highly debated in the Court decision. The issue before the Court was whether the organization was denied the right to exist or to a subsidy granted to other student organizations by Hastings because of CLS' beliefs and viewpoints, which possibly could result in the

exclusion of GLBT students. Other scholars in their discussions of the Supreme Court decision take the stance that this case was more about the dwindling role of the freedom of association than free speech and religion. In *CLS v. Martinez*, the right of association and its possible impact on the ability of the organization to exist was thought-provoking as it related to the forum the College created and used as a constant in this study.

Forum Analysis and Viewpoint Neutrality

The Supreme Court uses forum analysis in its judgments of First Amendment court cases.[14] Forum analysis uses the location or environment in which the free speech activity takes place to determine if it is protected or unprotected speech. The definition of forum is not restricted to just physical locations. A forum can also be the designation of resources, time, and other benefits to those persons or groups in the forum. The registered student organization program was a forum in that Hastings College of Law provided space, funding, and access to resources such as student email lists. The purpose of the student organization forum was to supplement the educational experience of Hastings students by providing opportunities to come together under common interests. The registered student organization program was only open to Hastings students and required compliance with College policy to receive benefits.

While the right to association and freedom of religion seem to be the cornerstones of the case, forum analysis provides the most concrete framework in which the Court could base a decision. Both parties agreed during discovery that

[14] *Lambs Chapel v. Center Moriches Union Free Sch.* 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); and *Healy v. James*, 408 U.S. 169 (1972).

Hastings created a limited public forum with the registered student organization (RSO) program. They did not agree on the purpose of the limited public forum and the impact to CLS that denial to that forum might cause. Discussion of the Court's analysis of the student organization forum Hastings College of Law created constitutes a solid place in the post-decision rhetoric and is addressed in this study.

Viewpoint neutrality is a crucial component of forum analysis[15] and impacts understanding of the issues in *CLS v. Martinez*. CLS argued that Hastings denied recognition to the organization because of religious views in the required faith statement of CLS' constitution. Hastings' decision to deny CLS student organization status was not based on its viewpoint but instead focused on the conduct of excluding students based on sexual orientation. This action conflicted with the all-comers policy of the College. The balance of protecting beliefs and the permissible restrictions that are allowed in a limited public forum are discussed in this study.

Purpose of the Study

The purpose of this study was to examine *CLS v. Martinez*[16] and the current state of legislation to develop recommendations for best policy practice for colleges and universities in the United States related to nondiscrimination policies and student organizations. The study first reviewed the case law leading up to the Supreme Court decision in *CLS v. Martinez* and traces the arguments and lower court decisions. Then

[15] *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). In Rosenberger, the court found that denying funding to a religious newspaper was based on the viewpoint of the group and not permissible. *Widmar v. Vincent*, 454 U.S. 263 (1981). The court stated the institution erred in refusing to recognize a religious student organization because of a concern of supporting religious services. The court applied the Lemon Test and did not find any entanglement.

[16] *Christian Legal Society v. Martinez et al.* 130 S.Ct. 2971 (2010).

the study addressed information in state bills and legislation regarding nondiscrimination policies. Next, the study provided a review of college and university nondiscrimination policies at a range of public four-year universities and synthesized this information into a standard policy benchmark. Lastly, the study reviewed the policy rhetoric and case law to identify implications and issues not yet addressed by the courts and legislation.

Significance of the Study

After the 2010 decision of *CLS v. Martinez*, few higher education scholars took the opportunity to analyze nondiscrimination policies and student organizations' rights to select members. They produced moderate amounts of literature that were not consistent in interpretation on what *CLS* means to higher education. The topics addressed by these secondary sources include First Amendment protections,[17] Establishment Clause, Free Exercise Clause, Free Association, forum analysis, and viewpoint neutrality. This study examined these different analyses and applied them to a higher education student organization policy framework. Other inputs into this study include case law and state legislation that affects nondiscrimination protections supported by the states. By synthesizing this information, the study offered a best practice policy as a resource for institutions of higher education.

Method of the Study

Doctrinal legal research involves research and analysis of comprehensive sets of legal cases, statutes, rules, and regulations.[18] The foundation of law in the United States is based on common law taken from the English tradition. The doctrinal research

[17] U.S. Const. amend I.

[18] Terry Hutchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research," *Deakin Law Review*, 17, 84 (2013).

applies best to legal issues because of its search for context and meaning of decisions, arguments, laws, and other agency action within the context of the past, as in precedent, as well as within the context of the present. Legal research is important to develop themes and to create foreseeable new and emerging law. This study is firmly centered on the doctrinal restatement method as outlined by Minow in 2013. The first step is to organize and reorganize case law into coherent elements, categories, and concepts; second, acknowledge distinction between settled and emerging law; and third, identify difference between majority and "preferred" or "better" practice – ideally with some explanation for the criteria to be used.[19]

The key to legal research is to know what type of law will govern the research question and thus the research.[20] Using the known authority approach, this study examined *CLS v. Martinez* as the landmark case to analyze nondiscrimination policies and student organizations in higher education. The known authority approach starts the research process with a known case and uses it as a foundation for further investigation by utilizing footnotes and keywords.[21] The information then bourgeons into multiple primary and secondary sources that can be analyzed. The study examined *CLS v. Martinez* Supreme Court documents including the arguments, amicus briefs, and the final opinions for key issues and positions. Applicable case law that pertained to First Amendment issues from the case emerged through comparative analysis. First

[19] Martha Minow, "Archetypal Legal Scholarship: A Field Guide," *Journal of Legal Education*, 63, 65 (2013).

[20] Charles P. Nemeth and Hope I. Haywood, *Learning Legal Research: A How-To Manual* (Upper Saddle River, N.J.: Pearson Prentice Hall, 2005), 23.

[21] Nemeth and Haywood. *Learning Legal Research,* 17.

Amendment issues were applied to nondiscrimination policies at the federal, state, and university level, as the study examines current state legislation in response to the 2010 Supreme Court decision.

Data Analysis

Legal analysis is a two-part process and was utilized before and after research is conducted to narrow the research question. Research data was then applied to support or refute stated positions or to resolve a problem or issue.[22] While scholars have written at length about the First Amendment rights of individuals, little has been published on the rights of student organizations and groups such as discussed in *CLS v. Martinez*. Research and case law addressing students' rights to exercise their free speech exist;[23] however, students' rights to associate and choose membership related to their beliefs have not yet been well-researched or tested in the Supreme Court.

This study examines the Supreme Court decision in *CLS v. Martinez* and uses this case as the basis of research concerning student organizations' First Amendment rights to association. The study compared primary and secondary sources, giving most credence to case law and statutes. Secondary and tertiary resources were then used to explain the impact *CLS v. Martinez* had on legal scholarship. The next step identified the current status of First Amendment rights and those that may be emerging for student organizations. Lastly, the study compiled best practices for college and universities in crafting student organization nondiscrimination policies.

[22] *Id.,* 11.

[23] *Id.,* 159.

The Limitations

Doctrinal legal research depends upon the researcher's point of view in analysis and interpretation of data. Through independent observation, the researcher relies on her ability to identify and cross-reference themes. Cross-reference and comparing themes in data offer consistency in the analysis. Ensuring that all alternatives to the research question have been researched, addressed, and categorized supports the conclusion as being one of many that is the best practice or ideal policy. Other limitations include the challenge of locating student organization policy that is publicly published; the lack of a variety of case law that addresses the student organization issues; and the inability to predict the future. Determining if nondiscrimination policies enhance the diversity or satisfaction of students involved in student organizations is beyond the scope of this study.

The Delimitations

The scope of this study focused on *CLS v. Martinez* and used relevant case law and state legislation to suggest best practice in formulating higher education policy in public four-year institutions. The study only considers public institutions with a direct relationship to the government because of the First Amendment issues at the core of *CLS v. Martinez*. Four-year institutions' student organization policies were reviewed for comparison because of higher levels of consistency within the student bodies than two-year, proprietary, and graduate institutions. Particular attention was taken in having a balance of institutions from states with and without legislation concerning student organization freedom to select members without restrictions.

Organization of the Study

This study examined the 2010 Supreme Court case *CLS v. Martinez* and its effect on higher education policy-making concerning student organizations' right to choose their membership. The first chapter discussed the background of nondiscrimination policies; purpose and significance of the study; the methodology; the limitations; and the delimitations. The second chapter addressed the issues surrounding *CLS v. Martinez*. Chapter three revealed four constants identified from the post-decision rhetoric and how using the constants identifies areas for best practice. Chapter four addressed the *CLS v. Martinez* case directly and breaks down the arguments, lower court opinions, and the Supreme Court decision. The last chapter discussed the implications of the *CLS* decision on policy and themes that have emerged in the literature and state legislation since the 2010 decision and makes recommendations for college and university policy development.

CHAPTER 2
ISSUES SURROUNDING *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*

First Amendment issues in higher education cause trepidation for administrators in higher education. An institution has many factors to balance while creating the image, mission and educational curriculum of the college. Some of these factors are the benefits that students receive outside the traditional classroom. Students look for opportunities to socialize, network, advocate, and contribute to the community while enrolled. The right to free speech and assembly mentioned in the First Amendment is exercised for the first time for many students when they come to college. Colleges and universities not only have to work with the pressures facing academia, but also need to ensure the rights of individual students are protected. Institutions create student forums that support students in exercising, or stretching, their rights. However, the viewpoints of student organizations can be supportive or antithetical to the educational mission. This chapter discusses the historical significance of student organizations and the effect on students in higher education. It provides a brief summation of nondiscrimination policies and their applicability to post-secondary education and student organization policy. Also, the debate over student organization policy is discussed within the parameters of four-year public universities.

Historical Background of Student Organizations

Religion and education have been intertwined since the beginning of higher education in the United States. The first three colleges founded in the United States were all associated with a religious body. Harvard University was originally founded in 1636 by Calvinist Puritans. Calvinists also founded Yale in 1701 and the College of William and Mary by the Church of England in 1693. Education in early America

focused on moral as well as intellectual instruction, producing citizens that contributed to society rather than preparing students for careers. This mission naturally formed the partnership of education with religion, whether stated explicitly or implicitly. As time went on, many of these first institutions disassociated with religious roots in support of more academic and research pursuits. However, private education at religious institutions continued.

Student organizations started in the early colonial colleges as literary societies meant to supplement learning. These organizations, in reality, became opportunities for students to drink and socialize. Many greek-letter organizations began in the same way. Thomas Jefferson stated the challenge facing administrators in dealing with students outside the classroom in a letter sent in 1822. He declared that the "spirit of insubordination" was the biggest obstacle to students' education.[1] Concern over control and discipline of the student body became as important as the moral and educational instruction. Students needed to be taken care of and could not be trusted with their governance. The role taken by some colleges was to eliminate student organizations, and any effect involvement would have on the students. Many of these organizations then went underground and became secret societies such as the Flat Hat Club at William and Mary.[2]

[1] "The article of discipline is the most difficult in American education. Premature ideas of independence, too little repressed by parents, beget a spirit of insubordination which is the great obstacle to science with us and a principal cause of its decay since the Revolution."— Thomas Jefferson, Letter to Thomas Cooper, President of South Carolina College, Nov. 2, 1822, VII The Works of Thomas Jefferson 268 (1884).

[2] Christopher J. Lucas, *American Higher Education: A History* (New York: Palgrave Macmillan, 2006).

The doctrine of *in loco parentis*, in place of parents, during this time signified the relationship between the college administration and the students.[3] The faculty was in charge of not only the intellectual development of their students but also the moral and spiritual development. The purpose of education was to create gentleman of good moral fiber to contribute to society. Many of the students were landed gentry, younger sons of wealthy families, and those looking to enter into law or politics. Faculty lived with, ate with, and taught the students many times all in the same building. The focus on moral instruction created a paternalistic environment with restrictive rules on student behavior including curfews, chapel attendance, dress, and rules against alcohol and cavorting with women.[4] Student organizations were a welcome distraction from the overbearing and constant oversight of the faculty.

Student organizations developed and became more complex as institutions grew and became multifaceted campuses. Around the 1900s, college administration began to acknowledge the benefit to students that the outside activities could provide.[5] Student organizations and extracurricular activities became part of the campus and officially were recognized as part of the educational experience.[6] The inclusion of student organizations is not just extracurricular but considered co-curricular if meeting the expectations of the institution. Colleges and universities provide opportunities for

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[3] *Id.,* 181.

[4] *Id.,* 127.

[5] *Id.,* 211.

[6] Student Personnel Point of View, NASPA, 1949, https://www.naspa.org/images/uploads/main/Student_Personnel_Point_of_View_1949.pdf and Joint Statement on Student Rights and Freedoms, AAUP, http://www.aaup.org/file/joint-statement-on-rights-and-freedoms-of-students.pdf.

students via the creation of a limited public forum. Limited public forums are forums for expression that are controlled by the campus under a stated purpose or mission. Student organizations are those that are granted access to the forum after meeting certain criteria set by the institutions. Campuses recognize the benefit that student organizations can provide through complementing the mission of the institution. These benefits impact both the student and institution in numerous ways.

Benefits of Student Organizations

Astin states that involvement in college is associated with more significant changes, such as learning and development, in freshmen students. He further states that students tend to persist to graduation when they experience greater attachment to the campus community.[7] This is more evident at religious institutions with students possessing the same religion or belief.[8] The student can identify, connect and engage with outside the classroom experiences that translate learning into real-world practicality. The feeling of belonging and safety in his or her environment aids the student in creating a firm foundation for development.

Student involvement in organizations has been shown to influence skill building. The benefits of engagement in a student organization include a higher level of independence, critical thinking, leadership ability, and confidence in lifestyle choices.[9] Students are more likely to have satisfying interpersonal relationships and this, coupled

[7] Alexander W. Astin, “Student Involvement: A Developmental Theory for Higher Education,” *Journal of College Student Development,* 40, no. 5 (1999).

[8] Astin, “Student Involvement,” 525.

[9] Diane L. Cooper, Margaret A. Healy, and Jacqueline Simpson, "Student Development Through Involvement: Specific Changes Over Time." *Journal of College Student Development,* 35, no. 2 (1994).

with a connection to the institution through involvement, positively influences persistence to graduation.[10] Lastly, social involvement has been shown to contribute to the intellectual development of students.[11] Students are more likely to make meaning of their environment through interaction with peers and faculty outside the classroom, allowing students to use their frame of reference, background, and beliefs to aid them in discovery.

The benefits of student organization involvement are recognized by many college and university campuses, including Hastings College of Law. As a public institution, Hastings can create a forum for the expression of students and student groups. It is reasonable to think that Hastings would want to create a forum in which all students may participate. Hastings created a nondiscrimination policy as part of its registered student organizations (RSO) approval process requiring all organizations to be open to all Hastings students. While nondiscrimination policies are implemented to protect students and foster diversity, there has been debate about the need and impact of these policies. A brief overview of nondiscrimination policies is provided in the next section as background to this issue.

History of Nondiscrimination Policies

Federal Antidiscrimination Statutes

Higher Education in the United States of America is both an institution of higher learning and an employer of numerous persons in the community. With this dual

[10] David Powell and David Agnew, "Student Leader Preferences: What Students Want from Involvement in Student Organizations," *NACTA Journal* (2007).

[11] Ernest T. Pascarella and Patrick T. Terenzini, *How College Affects Students: A Third Decade of Research* (San Francisco: Jossey-Bass, 2005).

identity, state colleges and universities are under obligation to comply with federal statutes. Race discrimination in employment is prohibited by Title VII of the Civil Rights Act of 1964,[12] and by Executive Order 11246.[13] Sex discrimination is prohibited by Title VII,[14] by Title IX of the Education Amendments of 1972,[15] by the Equal Pay Act,[16] and by Executive Order 11246.[17] Age discrimination is outlawed by the Age Discrimination in Employment Act (ADEA).[18] Discrimination against employees with disabilities is prohibited by both the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973.[19] Discrimination on the basis of religion and national origin is outlawed by Title VII and Executive Order 11246.[20] Discrimination against aliens is prohibited indirectly under Title VII and directly under the Immigration Reform and Control Act of 1986.[21] Discrimination against veterans is covered in part by 38 U.S.C. § 4301.[22] Some courts have ruled that discrimination against transsexuals is sex discrimination, and thus

[12] Title VII of the Civil Rights Act of 1964 as amended by 42 U.S.C. §1981.

[13] Exec. Order No. 11246, 3 C.F.R. 339 (1965).

[14] Title VII of the Civil Rights Act of 1964 as amended by 42 U.S.C. §1981.

[15] Title IX of the Education Amendments of 1972, 20 U.S.C. §1681.

[16] Equal Pay Act of 1963 (EPA). 29 U.S.C. § 206 (1963).

[17] Exec. Order No. 11246, 3 C.F.R. 339 (1965).

[18] Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (2000).

[19] Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (2000). Section 504 of the Rehabilitation Act 29 U.S.C. § 701.

[20] Exec. Order No. 11246, 3 C.F.R. 339 (1965).

[21] Immigration Reform and Control Act of 1986 S. 1200; Pub.L. 99-603; 100 Stat. 3359.

[22] Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 et seq.

violates Title VII.[23] Other forms of discrimination, such as marital status discrimination or discrimination on the basis of sexual orientation or gender identity, are prohibited by the laws of some states.[24] These federal regulations apply to public colleges and universities outside of any sovereign immunity.

Nondiscrimination in the Courts

The case law examining nondiscrimination issues falls into three categories; discrimination in employment, discrimination in public services, and denial of civil rights. There is a vast dearth of cases involving employment, both public and private. However, with public higher education, the existence of state action obligates institutions to ensure the civil rights of students and employees are protected. Employees claiming a hostile work environment have sued for issues based on racist behavior,[25] sexual harassment, documented alien status, and anti-Semitic remarks by coworkers.[26] Each case showed how the Courts were trying to determine a safe work environment free of discrimination and retaliation. The cases regarding public services include institutionalized government discrimination through laws and policies,[27] denial of

[23] Title VII of the Civil Rights Act of 1964 as amended by 42 U.S.C. §1981.

[24] William A. Kaplin and Barbara A. Lee, *A Legal Guide for Student Affairs Professionals* (San Francisco, Calif: Jossey-Bass Publishers, 2009), 159.

[25] *See e.g. CBOCS West Inc. v. Humphries* 553 US 442 (2008); *Ricci v. DeStefano* 557 US 557 (2009); and *Lewis v. Chicago* 560 U.S. 205 (2010).

[26] *See e.g. Harris v. Mayor and City Council of Baltimore* 797 F.Supp.2d 671 (2011); *Chamber of Commerce v. Whiting* 131 S.Ct. 1968 (2011); and *Cutler v. Dorn* 915 A.2d 65 (2007).

[27] *Miller v. Johnson* 515 U.S. 900 (1995). A case involving Georgia's redistricting plan and how the effort to realign the congressional seats would have a biased impact on racial representation in the state. *Fleshner v. Pepose Vision,* 304 S.W.3d 81 (2010) brought forward the possibility of bias in a jury room regarding anti-Semitic remarks toward the defense witnesses.

medical treatment and healthcare,[28] and access to education.[29] These civil rights are looked at by the Courts as being a balance of the interests of the individual with the interests of the community, with a focus on access to public services such as education.

Nondiscrimination Policies in Higher Education

The Supreme Court decisions since the 1990s have made clear that higher education's sovereign immunity and academic freedom does not preclude campuses from accountability. As stated previously, nondiscrimination policies are found most prevalent in situations concerning employment of individuals. Faculty, staff, and part-time student workers all expect a workplace free of harassment and hostile environments. Educational environments, in addition, should be safe for inquiry and discussion of subversive topics.[30]

Institutions of higher education are also accountable for students' civil rights when proof of state action between the school and the government exist. Examples of First Amendment student cases include *Tinker v. Des Moines*,[31] *Healy v. James*,[32] and *Bethel v. Fraser.*[33] These cases exhibited the Court's view that students and others on

[28] *Benitez v. North Coast Women's Care Medical Group, Inc*. 37 Cal.Rptr.3d 20 (2005) appealed 44 Cal.4th 1145 (2008) and *Catholic Charities v. Serio* 7 N.Y.3d 510 (2006). Healthcare issues in recent years have concerned the conflict between sexual health and contraception with religious beliefs. Whether this has been in denial of services, lack of coverage by insurance, or refusal to provide prescriptions, the Courts have had the challenge of addressing the rights of both the employer and medical provider and the end users of the services.

[29] Title IX of the Education Amendments of 1972, 20 U.S.C. §1681.

[30] *See e.g. Sweezy v. New Hampshire* 354 U.S. 234, (1957); *Perry v. Sindermann*, 408 U.S. 593 (1972); and *Edwards v. Aguillard* 482 U.S. 578 (1987).

[31] *Tinker*, 393 U.S. at 503.

[32] *Healy,* 408 U.S. at 169.

[33] *Bethel Sch. Dist. v. Fraser,* 478 U.S. 675 (1986).

campuses do not lose their First Amendment and Civil Rights just because they enroll at an institution of public education.

Discrimination Policies in Student Organizations

When coupled with the public university's obligation to protect all students' First Amendment rights, it is hard to understand how the institution can comply with the separation of church and state while at the same time recognizing the Fellowship of Christian Athletes and other student groups with varied, narrow, and specific missions. The responsibilities of the institution have been debated over the years as to how to support students' unique interests and needs while providing an open and discrimination-free environment. The courts' opinions on how to achieve this environment have been for institutions to create viewpoint-neutral policies that can be applied to any student group no matter what the message or mission, while supporting higher education's role to create a "marketplace of ideas."[34] This viewpoint neutral standard was essentially the test in *CLS v. Martinez*.[35] The issues involved in *CLS v. Martinez* did not just apply to separation of church and state as reflected in the Establishment Clause of the First Amendment (a macro-level issue), but also to viewpoint neutrality, public forums, right to association, freedom of religion, and free speech (micro-level issues to the individuals as private citizens). This complexity has left more questions than answers for college administrators in how to address these issues, whether at the cost of the institution or the student, and has not addressed the

[34] *Keyishian v. Board of Regents* 385 U.S. 589, 603 (1967).

[35] *CLS v. Martinez,* 130 S.Ct at 2971.

big question of what is the more critical government interest; freedom of belief (as in this case religious belief) or freedom from discrimination based on sexual orientation.

Statement of the Problem

Today it is difficult for one to determine where the relationship between student organizations and the institutions begin and end. The groups on campus have access to resources, funding, and even at times the use of the institution's name if associational criteria for registration has been met. This relationship, or perception of relationship, confuses the identities of the university and the organizations on campus to the common person. However, at issue in *CLS v. Martinez* is how and when limits to the resources on campus can be placed on student groups.

Interpretations of student organization rights pertaining to free speech have mostly been documented since the 1960s. However, if one were to look at the case law in its entirety, one would see that there is a minimal amount of student organization specific case law compared to other student First Amendment issues. The early cases such as *Widmar* and *Healy*,[36] involve the conflict between college administration and students and the break-away from parietal roles. The administration could no longer decide what is or is not appropriate for students in all situations, thus losing the ability for campus leadership to control the message. Later cases, such as *Rosenberger*,[37] narrowed the problem to viewpoint neutrality. Campuses during this period recognized the First Amendment rights of student groups but struggled with how to deal with offensive and extreme viewpoints. Colleges were and still are, faced with the difficult

[36] *Widmar v. Vincent*, 454 U.S. 263 (1981) and *Healy v. James*, 408 U.S. 169 (1972).

[37] *Rosenberger,* 515 U.S. *at* 829.

task of ensuring free speech on campus while creating an educational environment accessible to all students.

This study addressed the issue of a nondiscrimination policy requirement for student organizations that were legally sound and professional best practice. The recommendations for policy development were created by review of recent court decisions, legal research, and current policy at public universities. Since 2010, post-decision rhetoric focuses mainly on the theoretical implications of *CLS v. Martinez*. Synthesizing this information into a practical best practice for policy-making is not seen in the current literature. This study aimed to provide a practical framework for recognizing student organizations.

CHAPTER 3
CONSTANTS OF ANALYSIS

Freedom of Religion: The Establishment and Free Exercise Clauses

The right to associate with groups that share the same religious beliefs, ideas, or philosophies is linked to the Establishment Clause and Free Exercise Clause of the First Amendment[1] and the Due Process Clause of the Fourteenth Amendment.[2] The Establishment Clause states explicitly that Congress "shall make no law respecting an establishment of religion."[3] It was important to the early Americans that religion was not mandated or regulated by the government. On the other hand, nor did the founders want religion to have a direct influence on matters of government.[4] The Free Exercise Clause reaffirms that the government does not have the right to regulate beliefs or to deny rights to individuals based on those beliefs.[5] The facts before the Court in *CLS v. Martinez* regarded a religious student organization. Establishment and Free Exercise Clauses are used as the next lens to view *CLS v. Martinez*.

Constitutional Principles

The religion clauses of the First Amendment are more deeply complex than expected on the first read. The religion clauses are often simplified as "freedom of religion." This simplification overlooks what is actionable by the Free Exercise and

[1] U.S. Const. amend. I.

[2] U.S. Const. amend. XIV, § 1.

[3] U.S. Const. amend. I.

[4] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" First Amendment to United States Constitution. U.S. Const. amend. I.

[5] U.S. Const. amend. I.

Establishment Clauses. These Clauses exhibit the practicality and applicability of the Constitution and Bill of Rights to the people and sets the tone for the remaining Amendments.

The first ten amendments to the Constitution were requested by the states before ratification of the Constitution to protect individual liberties.[6] A government itself does not have rights, but duties and responsibilities.[7] The Bill of Rights is an outline of those duties and responsibilities. The religion clauses are prime examples. The Freedom of Religion clause addresses the right of a person to religious liberty; to believe and worship in a manner chosen by an individual. The Establishment Clause states that the government will not establish or mandate a religion for the country. The responsibility of the government in these clauses is to not establish a national church or religion, and the duty of the government is protecting religious liberty.

Case Law

While individual rights were important to protect, the government recognized the need to protect the nation, and the communities in that nation as well. In *Employment Division v. Smith*, the Court definitively said the Free Exercise Clause does not excuse people from obeying the law.[8] Using controlled substances, as in this case peyote, in practicing one's religious belief was not immune from enforcement of drug laws. However, in 2006, Chief Justice Roberts in *Gonzalez v. O Centro Espirita Beneficiente*

[6] http://www.billofrightsinstitute.org/founding-documents/bill-of-rights/ accessed 12/31/2017.

[7] Carl H. Esbeck, "Differentiating the Free Exercise and Establishment Clauses," 42 J. Church & St. 311 (2000).

[8] "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Employment Division v. Smith,* 494 U.S. 872, 879 (1990).

Uniao do Vegetal[9] wrote that there was a delicate balance between individual freedom claims and exceptions to generally applicable laws and reviewed in its context. While these decisions seem to conflict with one another, one must look at the nuances of each case and of the individual historical and cultural factors that apply.

Employment interests have also been examined in the courts. In *Sherbert v. Verner*, the court ruled that the state could not deny unemployment benefits to a person who for religious reasons refused to work on their Sabbath.[10] However, this right is only regarding government employees and does not extend to private employment.[11] In addition, nor could a person claim unemployment benefits for being dismissed for a violation of law, even if for religious reasons.[12]

The entanglement of government with religious association has been a focus of numerous court cases. In education, the cases have dealt with compulsory education requirements, funding for education, and curricular matters. In *Wisconsin v. Yoder*,[13] the Court stated that the interest in Amish students attending school until sixteen years of age was not enough to outweigh the individual right to free exercise of their beliefs. On the opposite pole, in *Locke v. Davey*,[14] the courts supported the denial of government funding for scholarships used for religious study. This allowed a state legislature to limit their entanglement with religious education. Again the courts are using the contextual

[9] *Gonzalez v. O Centro Espirita Beneficiente Uniao do Vegetal,* 546 U.S. 418 (2006).

[10] *Sherbert v. Verner*, 371 U.S. 938 (1963).

[11] *Thornton v. Caldor,* 472 U.S. 703 (1985).

[12] *Employment v. Smith* 494 U.S. at 872.

[13] *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

[14] *Locke v. Davey,* 540 U.S. 807 (2004).

factors of each situation to influence how institutions deal with First Amendment issues on campus.

The Establishment Clause protects the religious beliefs of individuals as well as protecting the government from the influence of religion in state affairs. Case law shows that the entanglement must be viewed within the context of a religious or secular purpose, a definitive relationship, and neither promotes nor inhibits religion.[15] The cases discussed have shown the courts' desire to balance the rights of the individual while protecting rights of the common good, whether the common good is a compelling state interest in eliminating discrimination or providing educational benefits to students.

State Action

The Fourteenth Amendment provides all the powers not listed in the Constitution as deferred to the States. State action in Establishment and Free Exercise Clause case law is viewed as government entanglement with religious groups and individuals, such as nondiscrimination, employment, and education law.[16] In many such cases, the Court attempts to distinguish if the religious activity is state action. Religious activity in this context is tantamount to religious conduct. The question is whether the state is involved in religious conduct. The State Action doctrine many times will be conflated with the Establishment Clause analysis and causes problems for consistency of case law regarding the religion clauses.[17]

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[15] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[16] *See e.g. Employment v. Smith* 494 U.S. at 872; *Engel v. Vitale,* 370 U.S. 421 (1962); and *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

[17] Nathan Chapman, "The Establishment Clause, State Action, and Town of Greece," 24 Wm. & Mary Bill Rts. J. 405, 7 (2015).

There is a disparity in treatment of groups versus private actors in Establishment and State Action cases. The conduct of the individual private actors and the impact the decision may have on them is lost in Establishment Clause analysis. State Action involves not only the involvement of government in religious conduct but also the distribution of religious liberty. State Action is not just what the government is involved in, but also what it will not do. Some scholars have referred to these as positive and negative rights.[18] Positive rights are those that are given and protected by law; life, liberty, and property. Negative rights are those that put limited powers on the government. Religious liberty belongs to private individuals. In applying the state action analysis, the private action of individuals (such as religious liberty) many times will be overlooked by the role the government may or may not play in the case, skewing the disparate treatment of individuals as minimal.

Scrutiny

The evaluation of State Action analysis vs. Establishment Clause analysis has a direct impact on the level of scrutiny a case is held to by the Court. Historically, the case law involving violations of the Equal Protection Clause of the Fourteenth Amendment was held to strict scrutiny. Religious liberty has slipped into a level of intermediate scrutiny over time for neutral laws of general applicability that substantially burden religious exercise.[19] Race in Equal Protection cases is evaluated under strict scrutiny. The Court saw race equality as a compelling state interest. However, religion has not

[18] Chapman, "Town of Greece," 405, 14; Steven G. Calabresi and Abe Salander, "Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers", 65 Fla. L. Rev. 909, 920 (2013).

[19] *Employment Division v. Smith,* 494 U.S. at 879.

held the same level of state interest. Because of the personal liberty involved in freedom of religion, many authors believe that applying strict scrutiny to free expression of religion cases would balance the individual liberties and provide more diversity in religious expression.

Religion Clause and the *CLS v. Martinez* Decision

The Free Exercise Clause surprised scholars by the limited attention it garnered by both CLS and Hastings College. In their brief, CLS only devotes two pages to the Free Exercise claim while the majority opinion dismisses the claim in a mere footnote.[20] Ginsburg in the majority opinion cites *Employment Division v. Smith* as precedent in regulating discrimination on the basis of religion is not the same as regulating religious beliefs.[21] In turn, Hastings College was not telling CLS what they had to believe to receive university benefits and funding, but it was just setting parameters for student organization conduct.[22]

Reyes states that the absence of rhetoric in both the Courts' documents and the statements made by both CLS and Hastings College concerning the Free Exercise clause shows the diminishing regard in the way the legal system looks at cases regarding religious discrimination. In the last two decades, the Free Exercise Clause has not presented itself as the primary Constitutional concern before the Supreme Court in a case but has been applied in a supporting role to free speech claims. The Free

[20] Rene Reyes, "The Fading Free Exercise Clause," *William & Mary Bill of Rights Journal*, 19 Wm. & Mary Bill of Rts. J. 725, 725 (2011).

[21] Richard A. Epstein, "A Big Year for the First Amendment: Church and State at the Crossroads: Christian Legal Society v. Martinez," 10 Cato Sup. Ct. Rev. 105, (2009) and Julie A. Nice, "How Equality Constitutes Liberty: The Alignment of CLS v. Martinez," 38 Hastings Const. L.Q. 631, (2011).

[22] Jennifer A. Abodeely, "Thou Shall Not Discriminate: A Proposal for Limiting First Amendment Defenses to Discrimination in Public Accommodations," 12 Scholar 585, (2010).

Exercise Clause no longer carries doctrinal weight based on its own merits. Reyes proposes a new application and reinvigoration of the Free Exercise Clause that would allow for exemptions for groups based on belief, both secular and religious. While on the surface the idea of exempting secular belief from some discriminatory practices would seem a logistical impossibility, and provide too wide a net for Constitutional provisions to cover, Reyes feels this would strengthen the Free Exercise Clause.[23] The balance of the test would be the denial of both liberty and equality to the group or individual. However, the Court has not found this to be a strong enough argument on its own merits. Until a successful case on the Free Exercise Clause is argued, the best strategy is to continue its partnership with Free Speech.

Freedom of Speech: Status and Belief

At the core of the issue in *CLS v. Martinez* is the role belief played in a group's association and free exercise of religion. The First Amendment of the United States Constitution protects the right of association and the free exercise of religion.[24] The First Amendment also established the separation of church and state through the establishment clause to ensure religious freedom.[25] As pointed out in the preceding sections, the Hastings College of Law as part of the University of California system was a public institution of higher education. Public institutions because of a relationship with the government through state action, such as funding and other benefits, were obligated to comply with federal regulations regarding nondiscrimination. The Civil Rights Act of

[23] Reyes, "The Fading Free Exercise Clause," 725.

[24] U.S. Const. amend I.

[25] U.S. Const. amend I.

1964 outlines that no person on the basis of race, creed, religion, and sex should face discrimination in employment or government programs.[26] One issue debated whether status, as in race, ethnicity, and religion or belief have greater protection under the First Amendment.

CLS v. Martinez quoting *Employment v. Smith*[27] agreed that regulating discrimination on the basis of religion is not the same as governing religious beliefs. Religious viewpoints do not allow citizens to disregard state, federal, and local laws[28]. These freedoms must be evaluated not only on surface labels, but broken down into the concepts of conduct, content, and ideological belief. The issue before the Court became the problem of distinguishing belief discrimination from status discrimination[29].

Belief and Conduct

Hastings College of Law's main argument for the all-comers policy was to ensure equal opportunity to all students, avoid excessive entanglement by the school in regulating motives and beliefs of student organizations, encourage tolerance and learning, and avoid subsidizing unlawful discrimination.[30] CLS saw the policy of Hasting as discriminatory toward religious viewpoints as well as conduct. The denial of CLS's right to have its members openly voice their beliefs through a faith statement targeted

[26] Title VII of the Civil Rights Act of 1964 as amended by 42 U.S.C. §1981.

[27] *Employment v. Smith,* 494 U.S. at 872.

[28] *Employment v. Smith,* 494 U.S. 872. *See also* Abodeely, "Thou Shall Not Discriminate," 585.

[29] Alan Brownstein and Vikram Amar, "Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action," 38 Hastings Const. L.Q. 505 (2011).

[30] Julie A. Nice, "How Equality Constitutes Liberty: The Alignment of CLS v. Martinez," 38 Hastings Const. L.Q. 631, n. 67 (2011).

current and future members based on their viewpoints.[31] The organization argued that the all-comer's policy unfairly burdened religious groups by being overly broad and that Hastings needed to make exceptions to protect students' religious freedoms. The organization saw the failure of Hastings to make accommodations for CLS's beliefs as a violation of its First Amendment right to free exercise of religion.[32]

Abodeely outlined three main arguments that supported CLS exception from the all-comer's policy.[33] The first was the freedom of religion argument. CLS was an organization formed by like-minded individuals around a common ideology and belief. Freedom of religion, as interpreted by CLS, included belief and exercise of that belief through conducting meetings and committing to statements of faith. The CLS's position was that belief without action was a violation of the free exercise of religion. The second argument was the right to assemble. The all-comers policy, while opening the organization up to all Hastings students, opened up the CLS to accept those that did not support both their beliefs and practice to attend its meetings. This would have a chilling effect on the group and its members to have persons at the CLS meetings who did not espouse to the full mission of CLS. The last argument was the free exercise of conscience. CLS was bound by its beliefs to stand up for the rights of the group and the individuals that make up that group. An exception to the all-comers policy would allow religious beliefs to be fully exercised by the CLS student organization and be in

[31] Brownstein and Amar, "Reviewing Associational Freedom Claims," 538.

[32] Toni M. Massaro, "Christian Legal Society v. Martinez: Six Frames," 38 Hastings Const. L.Q. 569 (2011).

[33] Abodeely, "Thou Shall Not Discriminate," 596.

compliance with the First Amendment. Any other action would be incongruent with the mission of the CLS organization.

Brownstein and Amar state that the CLS position raised three questions.[34] The first was why a freedom of association claim based on belief discrimination is different than one based on status discrimination. It was unclear if the CLS position was to liken belief to viewpoint discrimination in that content may be restricted, but viewpoints may not. Second, it was not clear how a rule allowing discrimination based on the belief in African American or female inferiority differs greatly in comparison to a rule allowing racial or gender discrimination. Practically, both would create an environment of discrimination. Last, if the Court were to distinguish between permissible belief-based discrimination and impermissible status-based discrimination, it was unclear how it would be possible to enforce. Hastings as an institution would have a difficult time determining if a student were excluded from an organization because of one's status or because of one's lack of belief in the organization's mission and principles.

The arguments in *CLS v. Hastings* could be easily simplified into a conduct versus speech regulation. This approach excluded the position that CLS was in violation of the all-comers policy because the organization required the act of professing a belief.[35] Many Christians espouse that belief is not divided from conduct; that living a Christian life is not merely an exercise of religion, but that the belief and action are

[34] Brownstein and Amar, “Reviewing Associational Freedom Claims,” 525.

[35] Massaro, “Six Frames,” 584.

inseparable.[36] The unclear lines of where belief and conduct converge and when both are seen as separate concepts was a question both parties posed to the Court.

According to Denton, the Courts have held that some conduct can be so inherently expressive that it cannot be separated from speech.[37] *Tinker v. Des Moines* was an example. In *Tinker* the Court stated that the armbands worn by the students were as close to "pure speech" as one can get.[38] The recognition that conduct can be speech further complicated the relationship between belief, status, and conduct. The task of the Court in *CLS v. Hastings* was to determine where these concepts intercepted and weigh whether belief, status, and conduct are indistinguishable or separate concepts with differing protections.

CLS's position was that the Hastings all-comers policy only unfairly discriminated against religion because religion was the only part of the nondiscrimination policy that was based on belief or opinion.[39] CLS did not argue about other forms of discrimination based on status or belief. This left open questions and arguments about the application of the policy based on beliefs regarding race, ethnicity, and sexual orientation to name a few.[40] These questions were somewhat answered by CLS, albeit to only focus on a narrowly tailored position formed by their counsel. CLS frequently claimed that it harbored no animosity toward gays as a class and challenged only the part of the

[36] Michael R. Denton, "The Need for Religious Groups to be Exempt from the Diversity Policies of Universities in Light of Christian Legal Society v. Martinez," 72 La. L. Rev. (2012).

[37] Denton, "The Need for Religious Groups to be Exempt," 1077.

[38] *Tinker*, 393 U.S. at 508.

[39] Brownstein and Amar, "Reviewing Associational Freedom Claims," 529.

[40] Massaro, "Six Frames," 619.

Hastings policy prohibiting discrimination based on belief and that Hastings would remain free to prohibit discrimination based on status such as race.[41] CLS further argued that discrimination based on a person's status or other characteristics such as race and gender represented a different case that was not currently before the Court, thereby should not influence the Court's decision.[42] When CLS's counsel was asked by Justice Stevens if the belief that African Americans were inferior would also apply to CLS's argument, the counsel only reiterated their claim that freedom of belief regarding religion was their position.[43] Massaro went one step further by asking if religious groups were given the exception based on belief, then what would prevent the white supremacist group from qualifying for the same exception.[44]

In their briefs, CLS made the argument that the faith statement and membership requirements did not discriminate on others based on their status of being homosexual, but on their beliefs and any subsequent conduct related to those beliefs. Hastings' attorney illuminated parallels in history between racist and homophobic doctrine in the name of religious faith. CLS states that their belief that homosexuals are an abomination to God is at risk by such an all-comers policy, not that the status of homosexuals should be discriminated against. One example that the Court and scholars used was *Bob Jones University v. the United States*[45] in the 1980s involving a school

[41] Nice, "How Equality Constitutes Liberty," 670 and Brownstein and Amar, "Reviewing Associational Freedom Claims," 525.

[42] Brownstein and Amar, "Reviewing Associational Freedom Claims," 525.

[43] *Id*., 585.

[44] Massaro, "Six Frames," 569.

[45] *Bob Jones v. the United States*, 461 U.S. 574 (1983).

policy prohibiting interracial dating. Bob Jones' position was that allowing interracial dating, as conduct, would be against the Bible and God's teaching for Christian lives. This message to Bob Jones students reinforced the segregation of blacks and whites and created a lower status for those that mix races. As stated by Eskridge, "[s]tatus, conduct, and message have been the holy trinity of religion-based discrimination and subordination of both citizens of color and homosexual citizens."[46] As the importance of fighting racial discrimination has risen, so has the practice of discriminating on homosexuals based on religious views.

A new way to view the issues between religious groups like CLS and homosexual groups is not to look at their differences, but to focus on their similarities. On first look, it is apparent that religious and homosexual groups would fall on very different lines of the spectrum concerning a variety of issues. However, on closer inspection, one can see that they are searching for similar Constitutional protection and exemptions. Both seek out benefits without limit to access to government. They want to be able to enjoy all the benefits of other protected groups, such as race, while not having their status, belief, or message molested by the government. Each group is seeking equal status but see the other of pursuing "special rights."[47] Klein characterized the positions of both the religious and homosexual groups as a rights clash. To Klein, without interference from the courts, the result of the rights clash will be a win-or-lose situation for the groups. Scholars have debated the clash, and while they can

[46] William N. Eskridge, Jr., "Noah's Curse: How Religion Often Conflates Status, Belief, And Conduct to Resist Antidiscrimination Norms." 45 Ga. L. Rev. 657, at 206 (2011).

[47] Massaro, "Six Frames," 628.

appreciate the cases presented by both groups, many are in disagreement regarding the balance of whose rights outweigh the other.[48] One viewpoint is that gay rights should be weighed the same as other civil rights, such as race. Civil rights trump religious rights when balanced against each other[49]. On the other hand, others see that religion has a special place in the First Amendment that reinforces the need for special treatment concerning beliefs and practicing one's religious faith.[50]

Brownstein and Amar point out the difficulty in viewing the issue of status and belief as simply an issue of perspective. It is much more complex than that. First, they ask why there should be a difference in the freedom of association claim based on status or belief discrimination. It seems that conduct is the glue that holds together the link between status and belief that makes it difficult to separate the two. Another challenge is how an institution such as Hastings College would enforce such a policy benefiting one group to the detriment of the other.[51] This imbalance is similar to the rights clash mentioned by Klein. Religion itself has an element of conduct and is not just about beliefs and ideology. Religious persons pray, do good works, and proselytize. All are actions related to the religious beliefs of the person. Belief, status, and conduct cannot be so easily separated.

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[48] Laura K. Klein, "Rights Clash: How Conflicts Between Gay Rights and Religious Freedoms Challenge the Legal System," 98 Geo. L.J. 505 (2010).

[49] Massaro, "Six Frames," 593.

[50] Laura K. Klein, "Rights Clash: How Conflicts Between Gay Rights and Religious Freedoms Challenge the Legal System," 98 Geo. L.J. 505, 514 (2010).

[51] Brownstein and Amar, "Reviewing Associational Freedom Claims," 525.

The Supreme Court in recent decisions has redefined the legal parameters regarding that status of homosexuals. In *Lawrence v. Texas* regarding sodomy laws, the Court decided that all persons had a personal liberty interest in sexual relations free from state interference.[52] While this did not approach the issue of homosexual status directly, it bled into the issue by applying the same liberty interest to heterosexuals as well as homosexuals.[53] This phenomenon has enticed some scholars to see anti-gay-marriage views as the new platform for discrimination taking the place of sodomy laws and denial of civil rights.[54]

Background and Case Law

Reynolds v. United States[55] was an early case where the Court acknowledged that government does not have the authority to regulate belief, but does have the right to regulate actions, as in this case marriage. Likewise in *Cantwell v. Connecticut*,[56] the Court applied the freedom of belief derived from the Free Exercise Clause to extend to the states. This case reinforced the notion that there existed absolute freedom of belief beyond just the federal government that must be protected.[57] As stated in the *CLS v. Walker* and *Alpha Delta v. Reed*,[58] the belief itself is not the issue regarding First

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[52] *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

[53] Richard A. Epstein, "A Big Year for the First Amendment: Church and State at the Crossroads: Christian Legal Society v. Martinez," 10 Cato Sup. Ct. Rev. 105 (2009).

[54] Eskridge, "Noah's Curse," 657.

[55] *Reynolds v. United States*, 98 U.S. 145 (1879).

[56] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[57] *Id.,* at 304.

[58] *See e.g. Christian Legal Society v. Walker,* 453 F.3d 853 (2006) and *Alpha Delta Chi-Delta Chapter v. Reed* 648 F.3d 790 (2011).

Amendment rights, but the act of discriminating on membership moves the argument into asking the question, what is the compelling state interest at public institutions?

While the Courts have broached belief and conduct in regard to religious expression, status has held less attention. In *Bob Jones v. the United States*,[59] the Court stated that even though Bob Jones University was a private institution and held specific religious views on interracial relationships, the state had a compelling interest in eliminating racial discrimination.[60] Because Bob Jones received federal funding, they were not exempt from all reaches of the federal government. Specifically, if Bob Jones continued to receive funding, the university had to abide by federal statutes, even if a private entity.[61] This case focused on racial discrimination. However, the Courts have not granted the application of protected status based on sexual orientation. When the matter does come to light in the Courts, the decisions are narrowly based on technical grounds. No government action or Court decisions have been established to form a precedent for sexual orientation as a protected status.

Discussion from the Court

The Supreme Court in a 5-4 opinion found the all-comer's policy to be viewpoint neutral. The majority viewed this case as Hastings refusing to recognize CLS because of the organization's conduct, and not its beliefs. Justice Ginsburg speaking for the majority quoted both Justice Kennedy and Justice O'Connor's statements in *Lawrence*[62]

[59] *Bob Jones,* 461 U.S. 574.

[60] *Id., at* 604.

[61] *Id.,* at 574.

[62] *Lawrence,* 539 U.S. at 575.

as support for her direct rejection of CLS's attempt to distinguish between discriminating against gays based on their status and merely excluding gays based on conduct or belief.[63] It appeared that CLS did acknowledge the government interest in nondiscrimination against individuals based on status, identity, or conduct while still trying to create an argument that belief or ideology is one last remaining basis to protect discrimination against sexual orientation.[64] Kennedy in his concurrence stated that Hastings had a legitimate interest in seeking to teach law students to interact with students who do not share their beliefs and viewpoints. The all-comers policy addressed this concern by allowing any student to benefit from the limited public forum via the RSO program that Hastings created.[65] Regarding organizational sabotage that was proposed by CLS, Ginsburg characterized the task of determining motive and belief as daunting. One was not able to foresee that the all-comers policy would open CLS up to non-believers. She cited *Lawrence v. Texas*[66] rejecting the difference between status and conduct and then moved on. Hastings all-comers policy helped the institution remove itself from acting on issues of motive and belief and keeping it from engaging in viewpoint discrimination.[67]

[63] Nice, "How Equality Constitutes Liberty," 670.

[64] *Id*., 631.

[65] Ashutosh Bhagwat, "Associations and Forums: Situating CLS v. Martinez," 38 Hastings Const. L.Q. 543 (2011).

[66] *Lawrence*, 539 U.S. at 575.

[67] Nice, "How Equality Constitutes Liberty," 647.

Unaddressed Questions

As much as the Court did speak on issues of belief, status, and conduct, there was much left unaddressed. One such question was why the Court did not merge the issues of sexual orientation identity and ideological message of organizations in *CLS v. Martinez* as it did in *Hurley* and *Dale.*[68] *Hurley* and *Dale* were both compulsion cases, requiring the group to admit a person that would change the ideological message of the organization in the forum in which it existed. CLS was able to function as an independent organization outside the forum of the university[69]. Compulsion was not an issue in this case since there were other forums in which CLS could associate. The Court applied the more recent *Romer* and *Lawrence*[70] cases in finding that discrimination based on conduct is tantamount to discrimination based on status or identity. Specifically, in *Lawrence*, the Court found that one cannot expect a homosexual to not act on sexuality.[71] Without saying it, the Court implied sexuality as an identity. Whether this interpretation becomes a standard view of the Court has yet to be seen.

A second issue that not addressed in the Court decision was which First Amendment right warranted more protection; freedom of speech, freedom of association, or freedom of religion. CLS in its arguments appeared to seek out special rights for religious groups and not just equal treatment among all groups. CLS argued

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[68] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557 (1995); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). *See* Nice, "How Equality Constitutes Liberty," 662.

[69] Denton, "The Need for Religious Groups to be Exempt," at 1069.

[70] *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003).

[71] *Lawrence v. Texas*, 539 U.S. at 583.

because both religion and belief are tightly woven within the First Amendment, that religious groups required specific protection and exemption from nondiscrimination policies. What CLS does not consider is that beyond just First Amendment rights of free speech, nondiscrimination policies protect individual people regardless of speech based on factors that are more or less unmalleable, such as sex, race, ethnicity, and sexual orientation. The government in these instances have substantial, compelling interests in protecting these identities against discrimination. Less tangible is the protection of religion, mainly because of its broad definition and ability to evolve at a faster pace than identity. Belief, too, is a concept with little to no limits that the Courts have had difficulty weighing in First Amendment cases. The Court, as in many other Court cases from the past, decided *CLS v. Martinez* on the narrowest, most specific legal issues that were before the case. The Court focused on the policy itself and whether it was viewpoint neutral. While many persons hoped the Court would make a statement on which is the more considerable interest, status or belief, freed speech or religion, the Court continued to focus less on the philosophical and more on the practical application of the matter in front of it.

Freedom of Association

The right to associate with other persons that share one's views is essential to the physical manifestation of exercising one's First Amendment freedoms. The Courts have stated the "freedom to associate with organizations dedicated to the advancement of beliefs and ideas is an inseparable part of the Due Process Clause of the Fourteenth

Amendment."[72] This association is a vitally important tenet of the free speech of citizens and must be given the full due process of the law if this right is to be withheld.[73]

History of Court Opinions and Landmark Cases

Case law regarding association rights of both individuals and groups has shed light on the meaning of the Courts' application of due process. The first notable case to address associational issues was *Whitney v. California*.[74] The Court looked at the ability for a communist party member to associate with like-minded individuals as a right derivative of the Assembly Clause of the First Amendment and entirely separate from a speech issue. In *NAACP v. Alabama*,[75] the NAACP was asked by law enforcement for the membership rosters of the local chapters. Fearing retaliation toward its members, the NAACP refused. Alabama argued that in the preservation of safety and order in the community, this information was needed for a swift response by emergency personnel. The Court disagreed citing concern that giving up membership lists has the potential of suppressing speech.

Private organizations and their choice of members have also been examined in the Courts. In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*,[76] a lesbian, gay, and bisexual group sought entry into the annual St. Patrick's Day parade.

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[72] *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

[73] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[74] *Whitney v. California,* 274 U.S. 357 (1927).

[75] *NAACP v. Alabama*, 357 U.S. 449 (1958).

[76] *Hurley* 515 U.S. at 557.

They were refused entry by the organizers of the event and filed suit. The Court in the decision stated that private citizens organizing a public demonstration have the right to exclude groups whose message they do not agree with. Similarly, in *Boy Scouts of America v. Dale*,[77] a gay man sought to become a Scout Leader in the Boy Scouts. Dale was refused his request because of the Boy Scout organization not supporting gay Scout Leaders, citing conflict with its purpose and mission. The ruling of the Court supported the Boy Scouts of America's decision stating private organizations can discriminate on their membership and leaders based on the beliefs of the organization. These exclusions can be made even if these decisions were discriminating in the views of a public accommodation. The legislative and federal guidelines against discrimination did not apply equally to private organizations that lack public interest or entanglement with the government. This case was very similar in argument to *Moose Lodge v. Irvis*.[78] At question in *Moose Lodge v. Irvis*, was if private clubs and organizations can have discriminatory policies (in this case, based on race and religion). The plaintiff argued that because the Moose Lodge received liquor licenses and other endorsements from the state, there was a government relationship. The Court disagreed and stated that private clubs are free to implement discriminatory policies as long as they did not receive government funding.[79] Likewise, private mall owners may prohibit

[77] *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

[78] *Moose Lodge No. 107 v. Irvis,* 407 U.S. 183 (1972).

[79] *Id*.

demonstrations in their facilities since the First Amendment applies to public property only.[80]

While the First Amendment right to assembly has always been a federal interest, protection of the right to peaceful assembly was first addressed by the states in the 1937 case *Dejonge v. Oregon*.[81] Another such case was *Rotary International v. Rotary Club of Duarte*.[82] California had passed a state law requiring Rotary Clubs to accept women. The clubs filed suit, and the court decided the law was constitutional. Nowhere had the Rotary Club shown that allowing women to join would alter its mission or prevent the group from accomplishing their goals and objectives. Thus, the court, in this case, was of the view that the government interest in ending sexual discrimination

Case Law Applied to *CLS v. Martinez*

The First Amendment protects all citizens in four areas. These areas are freedom of speech, freedom of the press, freedom to assemble peaceably, and freedom to petition the government. CLS in its statements focused their case on issues of free speech and freedom of association. While one can see that the freedom of association is not listed in the First Amendment, one need only look into case law since the 1920s to understand that the Court has tied the right to associate into the Assembly Clause of the First Amendment.[83] For the next thirty years, the Court treated the rights of free speech, assembly, and association as three distinct rights treated equally. However, in

[80] *Lloyd Corporation v. Tanner,* 405 U.S. 1038 (1972).

[81] *Dejonge v. Oregon*, 299 U.S. 353 (1937).

[82] *Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

[83] John D. Inazu, "The Strange Origins of the Constitutional Right of Association," 77 Tenn. L. Rev. 485 (2011).

the 1950s and 1960s, a series of cases illustrated that the Court viewed freedom of association as not a right in of itself, but one that is derivative of free speech.[84] This is true in two cases already discussed, *Roberts v. United States Jaycees and Boy Scouts of America v. Dale*.[85] In *Roberts*, the Court stated that the inclusion of women would not change the group's views, thus not infringing on the group's right to free speech.[86] On the other hand, the Court stated in *Dale* that including gays into scout leadership would inhibit their message that they do not support homosexuals.[87] This decision was on the grounds of the group's message and not in their right to specifically associate around this message. The Court, instead of applying the two separately, lumped freedom of speech and association together, with speech being the deciding factor.

The Supreme Court in *CLS v. Martinez* repeated the same logic as in *Roberts* and *Dale*.[88] Justice Ginsburg in her majority opinion stated that the free speech and association rights were "closely linked" and one would be inclusive of the other. With this in mind, Justice Ginsburg and the majority opinion felt that the more strict scrutiny in applying expressive association review would not be applicable within the framework of a limited public forum. This, coupled with the recognition that freedom of association cases dealt with compelling group membership, made the Court view this issue at its

[84] *NAACP v. Alabama*, 357 U.S. 449 (1958); Inazu, "The Unsettling," 485.

[85] *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000). *See* Abodeely, "Thou Shall Not Discriminate," 585.

[86] Nice, "How Equality Constitutes Liberty," 631.

[87] *Dale*, 530 U.S. at 653.

[88] *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Dale*, 530 U.S. at 640.

heart was free speech.[89] Other authors believe the primary goal of CLS was not to communicate or to exercise its free speech but was to create a forum for their ideas and beliefs.[90] Their right to associate within their group around this ideology was their initial aim. By enacting the all-comer's policy, Hastings College required CLS to admit any Hastings student, regardless of their adherence to the group's ideology, to receive benefits of a registered student organization.[91]

Other characteristics of associations are that they can be public or private, and in order fulfill their purpose they need to be autonomous from the state. One glaring conflict between CLS and their association claim was the disparity of CLS' desire for recognition as a registered student organization and its need to freely associate and select its members. As one author put it, CLS seems to "want to have their cake and eat it too."[92] By accepting some subsidy, funding or sponsorship, a group no longer has the freedom to not associate with the supporting entity. In this case, Hastings College has asked that all organizations through registration will agree to certain terms and conditions for the organization to be part of the student organization forum that Hastings College has created. The conditions of an all-comer's policy to group membership directly affected CLS' message. However, as stated by the Court in the decision, the

[89] Nice, "How Equality Constitutes Liberty," 631.

[90] Abodeely, "Thou Shall Not Discriminate," at 146.

[91] *Id*.

[92] Brownstein and Amar, "Reviewing Associational Freedom Claims," 533.

requirement was not a mandate, and CLS did have the opportunity to opt out. However, CLS' position seemed to focus on the need for support from Hastings in order to exist.[93]

Cases regarding associational rights as discussed herein have illustrated a variety of court concerns. Paramount in the courts' decisions are the protection of associational rights of individuals. The courts have made it clear that infringing on associational rights of individuals must be held to the strictest scrutiny and be provided the most due process.[94] The right to associate or not associate is in of itself the act of exercising one's First Amendment rights. Because of the protected nature of the right to assembly, it is important to view how the strict scrutiny standard can be weighed in light of *CLS v. Martinez*.

In *CLS v. Martinez*, the equality and liberty interests were viewed by the Court as closely linked. Justice Ginsburg speaking for the majority stated that the expressive association and free speech claims of CLS merged. She cited three reasons to use limited public forum analysis rather than the expressive association angle. One argument is that it would be anomalous for the speech restriction to survive while being struck down by an associational claim. Applying strict scrutiny with the associational claim invalidates the limited public forum. Lastly, denial of a government subsidy is not equivalent to compelling a group to accept unwanted members with no other option. While the government has discriminated either intentionally or unintentionally, the Court refuses to apply stricter scrutiny unless there is proof that the government action was

[93] Brownstein and Amar, "Reviewing Associational Freedom Claims," 505.

[94] *Roberts*, 468 U.S. 609 (1984) and Kaplan and Lee, *A Legal Guide,* 38, "freedom of intimate association is protected by the Fifth and Fourteenth Amendment Due Process Clause" thus requires a higher level of scrutiny.

intentional.[95] Brownstein and Amar found this as an unacceptable mix of an association's liberty interest in being free from state interference with its membership decisions and its equality interest in being treated no differently than other expressive associations based upon its viewpoint.[96]

The CLS position raised some questions. The first was why a freedom of association claim base on belief discrimination different than one based on status discrimination. If this were to be an acceptable practice for Hastings and CLS, the school would have difficulty telling if the group rejected a person because of his or her status or because of a lack of belief in the fundamental principles of the organization.[97] This poses the question of whether access to the limited public forum is a right or a privilege. Bhagwat stated that cases such as this need to be viewed in a case-by-case approach on the foundation that access to public spaces for the purposes of association and assembly is a right, not a privilege.[98] This would cause by default the need for the higher scrutiny test. The majority opinion stated that denial of recognition was a denial of a subsidy to the organization and not a denial of the right of the organization to exist. However, denial of the privilege should not be regarded as compulsion so that the special protection for intimate associations recognized in *Roberts* and *Dale* merely is beside the point.[99]

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[95] Nice, "How Equality Constitutes Liberty," at 205.

[96] Brownstein and Amar, "Reviewing Associational Freedom Claims,"505 (2011).

[97] *Id*.

[98] Bhagwat, "Associations and Forums" 543 and Rebecca D. Ryan, "Why Non-discrimination Policies in Higher Education Require a Second Look: The Battle for First Amendment Freedom in the University Setting," 62 Cath. U. L. Rev. 575 (2014).

[99] Epstein, "A Big Year for the First Amendment," 105.

The Court stated there was limited impact on the ability for the CLS organization to continue to exist if recognition were denied. However, this statement ignored the effects that non-recognition can have on a student group. The ability to exist outside the campus forum does not lessen the debilitating impact that non-recognition can have on an organization.[100]

Universities have a valid educational interest and government prerogative in promoting diversity and nondiscrimination.[101] It seems reasonable for campuses to limit access to facilities to student groups. Campuses are forums only for the university community. That is both the purpose and the objectively defined use. Universities can adopt rules which recognize that campus spaces serve students and not the general public.[102] On a college campus it may well be that the government's managerial needs are greater than in other contexts because after all, the primary function of a university is education, not enabling student associations.[103]

Many scholars saw the Court's decision in *CLS v. Martinez* as being shortsighted. It was mentioned many times in the post-decision rhetoric that the constitutional principles the case was decided on were wrong. Justice Ginsburg for the majority opinion cited forum analysis as the appropriate test to view the case since Hastings College of Law sought to create a limited public forum. The arguments

[100] George B. Davis, "Personnel is Policy: Schools, Student Groups, and the Right to Discriminate," 66 Wash. & Lee L. Rev. 1793 (2009).

[101] Ryan, "Second Look," 575.

[102] Bhagwat, "Associations and Forums" 543.

[103] *Id*., 564.

included that the Court ignored the unconstitutional conditions doctrine,[104] focused the case on free speech rather than association using the forum analysis,[105] and did not view the case under freedom of association or free exercise of religion.[106]

CLS could not be CLS and also comply with the registered student organization conditions. They believed that the link between expressive association and group identity was stronger than a simple freedom of expression claim.[107] Special treatment was needed to place CLS on equal footing with the other student groups regarding expressive association and identity.[108] Massaro calls for expressive association exemptions upon request to student organizations to reconcile the conflict between the purpose of the limited public forum and the right for groups to associate around a common idea.

Associational Rights and *Dale*

The Supreme Court in *Dale*,[109] as well as *Roberts v. Jaycees*,[110] continued to describe the associational right as one derivative of free speech and protected only to the extent that it is necessary to permit free expression.[111] In *Dale*, the Court recognized that the Boy Scouts were an intimate association whereby government

[104] Epstein, "A Big Year for the First Amendment," 105.

[105] Bhagwat, "Associations and Forums" 546.

[106] *Id.,* 541.

[107] Massaro, "Six Frames," 569.

[108] *Id*., 572.

[109] *Dale*, 530 U.S. at 640.

[110] *Roberts*, 468 U.S. at 609.

[111] Bhagwat, "Associations and Forums" 551.

nondiscrimination policies could interfere with the group's viewpoint and message.[112] It was not a compelling state interest to require the Boy Scouts to include Dale as a scout leader.[113] *Martinez* was different than *Dale* in the Court's view of associational rights, suggesting that the power of association is weaker in a limited public forum.[114] The cases also differ in that CLS was looking for subsidy and sponsorship by a state actor in addition to access to physical space.[115] While policies on membership were affected by the all-comers policy, it was not compelling CLS to accept an intimate association or to not exist at all on campus.

Continuing with the trend of the court in recent years, the justices identified free speech as the primary constitutional issue in the CLS case, with associational rights being a derivative of free speech. Recasting CLS as an associational case substantially strengthens CLS' constitutional claims. CLS wanted the speech and association claims looked at separately.[116] The majority declined to analyze the claims separately, holding instead that CLS' associational claims should be covered into its public forum and free speech claim.[117]

Court has extrapolated a freedom of association from the enumerated portions listed in the text of the First Amendment thereby providing special judicial protections

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[112] Epstein, "A Big Year for the First Amendment," 117.

[113] Massaro, "Six Frames," 582.

[114] Mark Strasser, "Leaving the Dale to be More Fair: On CLS v. Martinez and First Amendment Jurisprudence," 11 First Amendment Law Review, 235-89 (2012).

[115] Bhagwat, "Associations and Forums" 554.

[116] Strasser, "Leaving the Dale," 287.

[117] Bhagwat, "Associations and Forums" 546.

when association is either intimate or expressive.[118] The court noted that the right of expressive association is not absolute, but that any interference might be justified by regulations serving a compelling government interest, unrelated to the suppression of ideas, which cannot be achieved through means significantly less restrictive of associational freedoms.[119]

The right to associate may necessitate the right to access and utilize public spaces. The right of groups to associate and to communicate their views and ideas to public entities many times will happen in public places, such as government-owned property, libraries, and schools. However, campuses can create forums only for the university community. Therefore, it would stand to reason that universities would have a managerial interest in limiting forums to student groups and allowing only those groups access to limited campus resources. If these boundaries were not set, the purpose of the institution as primary for education might be overridden by a barrage of First Amendment groups and events. The logistical nightmare of trying to organize and plan for every possible group may exhaust the campus resources.[120]

Forum Analysis and Viewpoint Neutrality

Forum Definition

A public forum is an area of campus that is traditionally or by official policy, available to students, the campus community, or the public for expressive activities.[121]

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[118] Nice, "How Equality Constitutes Liberty," at 52.

[119] *Id*., 152.

[120] Brownstein and Amar, "Reviewing Associational Freedom Claims," 505.

[121] Kaplan and Lee, *A Legal Guide,* 480.

Such spaces are those that are used for groups and individuals to exercise their right to Free Speech. There are three types of forum property; traditional, designated, and non-public. All others are considered non-forum property.[122] Designated public forums are those reserved for speech activities, such as physical space, bulletin boards, and posting areas, and space in print publications. Inner campus roads and sidewalks have been viewed by the courts as designated forums, whereas adjacent public through-ways are public forums.[123] Designated public forum locations can be open but also limited. A limited public forum is a forum that is reasonably regulated for the purpose for which it was designed.[124] The permissible regulation of a limited public forum consists of time, place, and manner restrictions. It cannot be based on the content of the speech but must be viewpoint neutral.[125] Non-public forums are similar to limited public forum restrictions, but not subject to strict scrutiny.

There is a long history of campuses being used as forums for free speech activities. Many institutions sought to support the intellectual inquiry of their students with discourse that was both challenging to views on the subject but also stretched students' cognitive skills. The courts have used forum analysis in balancing the rights of campuses as well as individuals in exercising their rights.

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[122] *Id.,* 481.

[123] *Bowman v. White,* 444 F.3d 967 (8th Cir. 2006).

[124] Kaplan and Lee, *A Legal Guide,* 482.

[125] *Widmar*, 454 U.S. at 935.

Forum Analysis

One constant that emerged from the literature was the question of what constitutes a forum. Forums can be physical places or can be opportunities set up for specific purposes, such as email lists or blogs. In the case law, the courts have tried to define forums by giving descriptions such as public and non-public forums, limited public forums, and designated public forums. Public forums are public property and therefore have the highest expectation of protection for free speech.[126] The only control of the public forum can be time, place, and manner restrictions, but must be applied within the context of the situation.[127] Traditionally, the non-public forum standards have been applied prevalently in classrooms among institutions of higher education.[128] Designated forums, or limited public forums, have been identified as speech areas by the owner or creator of the forum. The limited public forum exists when the government or managing entity puts restrictions on opening the forum for certain speakers, subjects, or events.

Because of the discrepancy in the definition and interchangeable terminology, many scholars have been confused by the decisions of the courts concerning forum analysis. At times, forum analysis complicates the issues in a case by introducing complex First Amendment case law into the discussion. Without a more precise understanding of the meaning of forum analysis, the courts have continued to be challenged by forum case law. The Court, as with *CLS*, has tried to use property as an

[126] Brownstein and Amar, "Reviewing Associational Freedom Claims," 505.

[127] *Id*.

[128] Aaron H. Caplan, "Invasion of the Public Forum Doctrine," 46 Willamette L. Rev. 647 (2010).

example to illustrate the complexities of First Amendment and freedom of association, but this application fails to meet the subtleties and nuances of the issues.[129]

State Action

The First Amendment and Equal Protection Clause provided the standard on which the government is obliged to maintain access neutrality to its property, at least when the property is characterized as a public or limited forum.[130] In a limited public forum, the state cannot sanction or limit the activity when done privately, and it cannot refuse to extend benefits to persons who engage in those activities in a limited public forum. Using this logic, if the state cannot punish private meetings of CLS, it cannot withhold benefits from them (which does not take into account the limited public forum and the right of the university).[131] No party argued this case as a state action case but did agree that the Registered Student Organization (RSO) program was established as a limited public forum.[132] The private action or state action argument was not addressed.

The more open the forum, the less likely state entanglement or endorsement into association and first amendment rights makes sense. The more strictly the government regulates the forum, the easier it is to declare the activities official.[133] Viewing the case through the state action lens is helpful in seeing when neutrality was an incomplete,

[129] Jessie B. Hill, "Property and the Public Forum: An Essay on Christian Legal Society v. Martinez," 6 Duke J. Const. Law & Pub. Pol'y 49 (2010).

[130] Massaro, "Six Frames," 569.

[131] Epstein, "A Big Year for the First Amendment," 105.

[132] Massaro, "Six Frames," 81.

[133] *Id*., 569.

often misleading measure of whether access conditions on government benefits or access to a forum was constitutional.[134] In the majority of past associational cases, the issue centered on access of a group to a traditional public forum where state action is a major player. In a limited public forum, the balance of state action and private action is more blurred affecting the amount of regulation of access that would be permissible.[135] The right of public institutions of higher education to set regulations in limited public forums that institutions have created has largely been untested in the past twenty years.

Lemon v. Kurtzman

Lemon v. Kurtzman involved a Pennsylvania state statute regarding reimbursing parochial schools for the salaries of teachers, textbooks, and other teaching materials. The Pennsylvania Nonpublic Elementary and Secondary Education Act of 1968 was passed to aid parochial schools in meeting educational standards during a time of financial crisis. The Act focused on the secular functions of the parochial schools. The legal question in *Lemon* was whether the Pennsylvania law violated the Establishment Clause of the First Amendment.[136]

Chief Justice Burger wrote the opinion of the court. To judge if the Act of 1968 violated the Establishment Clause, the Court evaluated the case based on a three-prong test. This test would later become the benchmark from which courts would judge issues of the Establishment Clause and religious First Amendment rights. The *Lemon Test* considers three conditions; does the Act have a secular purpose, the act must

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[134] *Id*.

[135] Brownstein and Amar, "Reviewing Associational Freedom Claims," 514.

[136] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

neither enhance nor inhibit religion, and does the Act result in an excessive entanglement of government and religion.[137] On the first prong, the Court did concede the Pennsylvania statute did serve a secular purpose by supplementing the budgets of schools to boost the secular teachings. To further educational instruction in the fields of math, science, and reading would benefit everyone. Considering the second prong, the Court concluded the Pennsylvania Legislature intended to further the educational achievement of students and not advance, nor inhibit religion. However, on the third prong, the Court found that looking at the Act in its entirety would show that enforcement of the Act would result in an excessive entanglement with religion. The Act itself would require extensive government regulation to ensure funds were going to secular instruction. This, in of itself, entangled government in the regulation of funds going to parochial schools and coupled with the religious purpose and activities of the schools, provided substantial evidence of entanglement.[138]

While the *Lemon* case involved primary and secondary institutions, the application of the Lemon Test has been adaptable to many cases regarding entanglement of government and religion. This has been the lasting impact of *Lemon v. Kurtzman* and its numerous references in cases such as *CLS v. Martinez*. The Lemon Test has been a useful tool for courts to judge the balance between government and religion but is not without its limitations. One issue is the definition of entanglement of religion used by individual courts. What one court sees as entanglement, another may view as inconsequential. This also applies to views of enhancing or inhibiting religion. It

[137] *Id.,* at 612-13.

[138] *Id*.

can be argued in *Lemon v. Kurtzman* that any funding, whether benefiting the students or parochial schools, would enhance the use of parochial education instead of public education. These decisions have been influenced somewhat by precedent, but also by individual courts' interpretation of the three-prong test. A better, and more applicable to higher education, analysis is to focus on forum analysis.

History of Court Opinions and Landmark Cases

Dale v. Boys Scouts, Hurley v. Irish, and Roberts v. Jaycees

As discussed previously, three cases, *Boy Scouts v. Dale, Hurley v. Irish,* and *Roberts v. Jaycees*,[139] dealt with issues surrounding adherence to nondiscrimination laws.[140] *Dale* and *Hurley* involved sexual orientation and *Roberts* concerned sex discrimination in admitting women to the organization. All three were decided in view of a traditional public forum.[141] *Dale* and *Roberts* concerned a public accommodation through association, while *Hurley* involved access to a public forum through a public street.[142] In *Hurley*, the Court established that a traditional public forum accessed by private actors could not be interpreted as speech endorsed by the state. The Court in *Dale* stated that compelling membership of a person that was antithetical to the organization's mission, purpose, and ideas without an option for exemption, was unconstitutional.[143] *Roberts* was decided quite differently in that while it was part of the mission and ideals of the Jaycees to limit the membership to men, they failed to

[139] *Dale*, 530 U.S. at. 640; *Hurley* 515 U.S. at 557; *Roberts*, 468 U.S. at 609.

[140] Nice, “How Equality Constitutes Liberty,” n. 64.

[141] Denton, “The Need for Religious Groups to Be Exempt.”

[142] Nice, “How Equality Constitutes Liberty,” at 174.

[143] *Dale*, 530 U.S. 640.

establish that admitting women into the organization would alter the Jaycees message.[144] These cases showcase the complexities of forum analysis. The courts have established in these decisions that private actors in a traditional public forum do not speak for the state, that compelling membership can violate the First Amendment, and that to qualify for an exception, one would need to show that the action would somehow change the group's mission, message, and viewpoints.

Healy v. James* and *Widmar v. Vincent

Two cases stand out as the seminal cases regarding student organizations at colleges and universities. *Healy v. James* and *Widmar v. Vincent*[145] both concern the denial of benefits to a student organization based upon the viewpoint of the group's mission. In these cases, the Court has illustrated the importance of the entire campus community having an opportunity to exercise their First Amendment rights and the role educational institutions have in supporting the marketplace of ideas.

In the fall of 1969, students at Central Connecticut State College sought to form a local chapter of Students for a Democratic Society. The 1960s and 1970s were a time of social movements, protests and civil unrest on many college campuses. The Students for a Democratic Society (SDS) in the 1960s had chapters forming on many college campuses. The national group was associated with radical viewpoints and extreme action that resulted in disruption to the community. SDS at Central Connecticut State petitioned to become an official student organization. They completed their application, and it was submitted to the Student Affairs Committee consisting of four students and

[144] *Roberts*, 468 U.S. at 609.

[145] *Healy*, 408 U.S. 169 and *Widmar*, 454 U.S. 263.

three staff. The committee voiced concerns over the affiliation with other SDS chapters and of the organization's reputation for campus disruption. The students provided information that while the primary ideas were the same between the organizations, the methods each group employed to further their ideas were different.

The committee after two meetings with the group recommended them for recognition. The decision was made based on the campus' need for diverse viewpoints and that "left-wing" students should have an organization within which to identify. The petition was then forwarded to the president of the college for final approval. The president denied recognition to SDS, citing the concern for the historical divisiveness of the national group, the unclear nature of the association with the national group, and that the group's philosophy was antithetical to the mission of the university. The Central Connecticut State College SDS decided to take the matter to court, and after a second hearing at the university and the loss of an appeal, the Supreme Court granted *certiorari*.[146]

The Court noted two main concerns regarding withholding official recognition from the Central Connecticut State College SDS. The first was the institution infringing on the SDS chapter’s right to association by denying them the use of facilities and message boards on campus. These were seen as actions important to the group’s ability to sustain membership and function according to their mission and goals. While the SDS could exercise their right to association off campus, the Court stated that groups should not “[be] stifled by more subtle governmental interference” in keeping

[146] *Healy,* 408 U.S. 169.

them from exercising their rights on campus.[147] The second issue was the burden of providing sufficient evidence for recognition resting on the organization, not on the institution. The Court stated that once the organization met the requirements for recognition and filled out the application, the burden was on the college or university to establish compelling arguments why recognition should be withheld.[148]

However, the Court did break down the four reasons for denial of recognition by the president based on their review of the case. The first was the relationship the local SDS chapter had with the national SDS organization. In this argument, the Court viewed that the Central Connecticut College SDS Chapter adequately answered that question from their materials submitted for recognition and their testimony claiming they would not be associated. The second was the concern with the philosophies and ideas of the group advocating violence and disruption. The Court refuted this argument by citing precedent that speech could not be suppressed just because the ideas and views were unpopular.[149] The third reason was that the SDS group would be disruptive to the campus community. The Court stated that the institution assuming ideas begat action was premature without supporting evidence.[150] The last reason was the unclear responses of the SDS chapter to the committee's questions regarding adherence to the rules and regulations of campus. The Court could see where the campus would be

[147] *Bates v. City of Little Rock*, 361 U. S. 516, 523 (1960).

[148] *Healy,* 408 U.S. 169.

[149] Justice Black, "I do not believe that it can be too often repeated that the freedoms of speech, press, petition, and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party v. SACB*, 367 U. S. 1, 137 (dissenting opinion) (1961) as stated in *Healy,* 408 U.S. 169.

[150] *Healy,* 408 U.S. 169.

concerned about order and that with compelling evidence could see where the health and safety of the community would outweigh the rights of the group.[151]

Widmar v. Vincent involved a religious group being denied access to facilities based on their religious activities.[152] In 1972, the Board of Curators for the University of Missouri adopted a regulation barring religious worship and religious teaching from using campus facilities. The students filed suit claiming their right to free exercise of religion, equal protection, and free speech were violated. The District Court decided in favor of the University, citing the importance of separation of church and state. However, the appellate court reversed in favor of the students stating that the denial of access to facilities was not made in a viewpoint-neutral framework and focused on religious beliefs and activities. The Supreme Court granted *certiorari* citing than any denial of First Amendment rights must be made in light of a compelling state interest and accomplished through the least amount of action necessary.[153]

In *Widmar*, the University of Missouri argued that the policy was in compliance with the Establishment Clause of the First Amendment. The idea was by allowing no religious activities or meetings on campus, it would create an environment that does not endorse any one religion. However, the Court found that the University created an open forum by allowing groups on campus access to facilities for free speech activities. The Court stated, “[w]e are satisfied that any religious benefits of an open forum at UMKC

[151] *Healy,* 408 U.S. 169.

[152] *Widmar*, 454 U.S. 263.

[153] *Id*.

would be "incidental" within the meaning of [this case]."[154] The forum created by the University was open to religious and non-religious organizations alike. As such, this forum does not create an expectation of endorsement or entanglement of the University in each group that forms on campus.

In his concurring opinion, Justice Stevens stated, "[a] university legitimately may regard some subjects as more relevant to its educational mission than others. But the university, [sic], may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted."[155] Here the Court is reaffirming the concept that campuses do have the right to time, place, and manner restrictions in the name of safety and the educational mission, but must make those decisions content-neutral and not discriminate against organizations based upon their viewpoint.

Alpha Delta v. Reed

In *Alpha Delta v. Reed*, a Christian sorority and fraternity, Alpha Delta Chi and Alpha Gamma Omega, brought suit against San Diego State University because they were denied recognition as a student organization.[156] Both groups required its members to believe in Jesus Christ as his or her Lord and Savior and commit to similar faith statements and acts of service. San Diego State refused the groups' applications for

[154] *Id*.

[155] *Id*.

[156] *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F. 3d 790 (9th Cir. 2011).

recognition for twelve years.[157] The group brought suit in the Ninth District Court just as the *CLS v. Martinez* case was being brought before the Supreme Court.

The *Alpha Delta v. Reed* case is important due to its relationship to *CLS v. Martinez*. The District Court found no difference in the issues presented by the Christian fraternity and sorority and the Christian Legal Society at Hastings College of Law. Both cases involved a religious organization being denied recognition because of not adhering to the university nondiscrimination policy. The Court found that the institution under its mission of providing an open forum free to ideas can establish an "all-comers" policy for membership in the organizations it recognizes. The analysis used included 1) was the action reasonable based on the type of the forum and 2) was the action viewpoint neutral.[158] Because the court determined the institution created a limited public forum and provided support as to why this was an important interest to the institution, the Court found the action reasonable. As for being viewpoint neutral, the actions of the institution were seen to be neutral in that the nondiscrimination policy for student organizations did not compel the organizations to admit all persons to their groups, but just withheld benefits of recognition.[159] This consistent application of viewpoint neutrality is important to the way the courts understand the relationship between First Amendment rights of individuals and the type of forum that exists at institutions of higher education.

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[157] *Id*.

[158] *Id*.

[159] *CLS v. Martinez,* 130 S.Ct. 2986.

CLS v. Walker

Prior to the *CLS v. Martinez* Supreme Court decision in 2010, the *CLS v. Walker* case was addressed in the 7th District Court of Appeals.[160] The CLS chapter at the Southern Illinois University at Carbondale was recognized by the law school and enjoyed the benefits of access to facilities, message boards, listservs, and funding. In 2005, a complaint was made to the University that the CLS chapter was discriminating against the sexual orientation of the student body by requiring members to sign a faith statement affirming that the only appropriate sexual relationship is between a man and a woman. This faith statement was in violation of both Southern Illinois University's (SIU) affirmative action/equal employment opportunity policy and the nondiscrimination policy passed by the Board of Trustees stating that no student organization shall be recognized "unless it adheres to all appropriate federal or state laws concerning nondiscrimination and equal opportunity."[161]

The Seventh Circuit Appellate Court decided in favor of CLS and directed the trial court to issue a preliminary injunction reestablishing CLS on the Southern Illinois University campus. Their conclusion was made primarily on the fact that SIU did not show that the University created a limited public forum. Because of this, the Court used public forum analysis of strict scrutiny to determine if CLS was being excluded based on their viewpoint. Strict scrutiny would require SIU to demonstrate a compelling interest in nondiscrimination and sexual orientation over the First Amendment freedom of religion

[160] *CLS v. Walker*, 453 F.3d at 853.

[161] *Id*.

and freedom of association. The Court determined SIU did not meet this standard and based on the information provided the CLS should be reinstated.[162]

CLS v. Walker is an important case in student organization First Amendment rights because of the treatment of the forum analysis.[163] The Seventh District Appellate Court stated that if it could be determined that either a non-public forum or limited public forum was applicable in this situation, the outcome may have been different because of the lower level of scrutiny in which to balance the institution's interest in maintaining a diverse environment. While some of the same issues and tests are discussed in both *CLS v. Walker* and *CLS v. Martinez*, it is interesting to note that the Seventh District and the Supreme Court came to different conclusions.

Forum Analysis as Applied to *CLS v. Martinez*

Both CLS and Hastings agreed on discovery that Hastings through its RSO program created a limited public forum. This agreement on the type of forum set the stage for the type of analysis the court would use in determining the appropriate level of action that could be taken by Hastings. Traditional public forum cases have been held to strict scrutiny in favor of first amendment protections. Courts needed a compelling state interest to set regulations on speech in a public forum.[164] These compelling interests have usually been in the interest of safety, security, and the inability for business, schools, and other entities to operate as usual. Limited public forum cases have a lesser level of scrutiny that must be met. A lower standard allows for the consideration

[162] *Id*.

[163] *Id*.

[164] *Widmar*, 454 U.S. 263.

of the purpose of the forum that was created. As stated previously, limitations can be time, place, and manner, as long as applied in a viewpoint-neutral way.

The acknowledgment by both parties that Hastings created a limited public forum with its registered student organization program greatly influenced the Court's opinion. A limited public forum analysis is held to reasonable scrutiny if found to be viewpoint neutral. If CLS had argued Hastings RSO program was a designated public forum, then the case would have been held to the higher standard of strict scrutiny, offering the highest protection for First Amendment rights.[165] However, because in their briefs both CLS and Hastings agreed that it was a limited public forum, the Court did not debate the type of forum that was created. When the limited public forum test was then applied, the Court found that the Hastings policy passed both prongs.[166]

Justice Ginsburg in the majority opinion cited three reasons to use forum analysis rather than other analyses. First, it would be inconsistent for a speech restriction to survive only to be struck down by an associational claim. Second, viewing the case through the associational lens would necessitate applying strict scrutiny, thus invalidating the purpose of the limited public forum. Lastly, the denial of government subsidy was not the same as compelling membership or forced inclusion.[167] The view presented by Ginsburg suggests that the Court sees the freedom to associate as

[165] *Widmar*, 454 U.S. at 263. Restricting a limited public forum on the basis of content is subject to a reasonableness test rather than to "the most exacting scrutiny."

[166] Bhagwat, "Associations and Forums" 543; Brownstein and Amar, "Reviewing Associational Freedom Claims," 505. Limited public forums are reviewed with a two-prong test: is the regulatory action viewpoint neutral and is it reasonable. Viewpoint neutrality is held to strict scrutiny; Ryan, "Second Look," 575. It is necessary to review the policy not just as viewpoint neutral as written, but also as applied.

[167] Nice, "How Equality Constitutes Liberty," 640-641.

secondary to the free speech claim. However, what the court did was view the associational and free speech claims together and apply the forum analysis to address what appeared to be a group's ability to access a forum to further their message or viewpoints.[168]

The Role of Viewpoint

As discussed, the only control an institution can have in a limited public forum must be reasonable and viewpoint neutral. All justices, including those in dissent, appeared to accept the limited public forum doctrine as the right framework to apply to CLS' claims.[169] The dissenting justices differed from the majority in how they saw the role of viewpoint neutrality being applied to the case.

In a limited public forum, the Court has held free speech claims to a reasonableness standard. The Court established that the viewpoint neutrality test is appropriate in First Amendment evaluation of student organizations in a limited public forum. The only exception to viewpoint neutrality was expression deemed as illegal advocacy, such as fighting words, defamation, or obscenity.[170]

CLS v. Martinez is complicated not just because it involves free speech, but because it involves free speech of a religious group wanting to associate in a limited public forum. In order to conform to viewpoint neutrality, the institution would have to prohibit discrimination based on both religious and secular beliefs or decline to prohibit

[168] Strasser, "Leaving the Dale," 235-89.

[169] Bhagwat, "Associations and Forums" 548.

[170] Nice, "How Equality Constitutes Liberty," 631, n. 39.

discrimination based on either belief system.[171] Hastings College of Law adopted a nondiscrimination policy requiring all student organizations as part of the Registered Student Organizations program must be open to all Hastings students. It is referred to as the "all-comers policy."

Interpretation of viewpoint neutrality because of the complexities of the case became a significant point of debate. CLS argued that Hastings engaged in viewpoint discrimination by treating student organizations based on religious belief differently and less favorably than student organizations based on secular beliefs.[172] The loyalty oath CLS required officers of the organization to sign stated that the only proper sexual relationships were between a man and a woman. The administration interpreted the beliefs and mission of CLS in conflict with the all-comers policy. The organization was excluding any student that identified as gay or lesbian. CLS argued that the belief was central to their mission and admitting any Hastings student would alter the group's purpose.

There was much discussion on whether the all-comers policy was neutrally applied policy or an issue of pretext. The majority found the policy viewpoint neutral because it applied to all groups and ostensibly was not discriminating based on viewpoint.[173] Stevens argued that the nondiscrimination policy was a neutral regulation of conduct, not a viewpoint based regulation of speech. It was applied neutrally,

[171] Brownstein and Amar, "Reviewing Associational Freedom Claims," 533.

[172] *Id*., 505.

[173] Bhagwat, "Associations and Forums" 547.

prohibiting religious discrimination regardless of the ideological motive for it.[174] More information would be required to show that the intent, purpose, design, use or effect of this policy was to silence the group's viewpoints.[175] Just because the policy adversely affects some groups more than others does not render it viewpoint specific.[176] The all-comer's policy by the majority in *CLS v. Martinez* remarked that the policy was textbook viewpoint neutral.[177]

Viewpoint Neutral Case Law

Justice Ginsburg distinguished the other student recognition cases as involving intentional viewpoint discrimination which she found absent in *Hastings*.[178] Other cases support the courts' deference to educational institutions in making their policies. In *Alpha Delta v. Reed*,[179] the court reviewed the University's handbook, mission, and policies. It found the nondiscrimination policy to be universally applicable and did not target any specific groups. However, the Court did remand it back to the lower court to review if it was equally applied.[180] In *Truth v. Kent*,[181] the court relied on forum analysis

[174] Bhagwat, "Associations and Forums" 543.

[175] Nice, "How Equality Constitutes Liberty," 631, 84.

[176] Massaro, "Six Frames," 582.

[177] "[I]t is hard to imagine a more viewpoint-neutral policy than one requiring all student groups to accept all comers." Ryan, "Second Look," 588.

[178] Nice, "How Equality Constitutes Liberty," 631, 64; *See also Healy v. James,* 408 U.S. 169 (1972); *Widmar v. Vincent,* 454 U.S. 263 (1981); and *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819 (1995).

[179] *Alpha Delta Chi-Delta Chapter v. Reed* 648 F.3d 790 (2011).

[180] Ryan, "Second Look," 592.

[181] 551 F.3d 850 (2008).

to determine the school's nondiscrimination policy was viewpoint neutral and reasonable in light of the purpose of the forum.[182]

In *CLS v. Martinez*, the dissenting justices saw the exclusion of CLS as viewpoint discriminatory. By denial of full participation in the program, it shows the negative effects that neutrality can have on religious groups.[183] Justice Alito comes close to stating that religious groups may be a suspect class, deserving of more constitutional protections. He also interpreted the Hastings RSO program quite literally. He stated that Hastings sought to promote a diversity of viewpoint among registered student organizations, not within such organizations. The groups should be the focus of the policy, not the individuals that make them up.[184]

Summary

The case law discussed herein provides a strong foundation for understanding the issues in *CLS v. Martinez*. Looking at past precedent regarding public forum analysis as well as the Lemon Test, one can surmise the influence this may have on the *CLS v. Martinez* decision. The right to association is a right protected by the courts as fundamental to exercising one's First Amendment rights. This coupled with campuses' concern over creating diverse institutions safe for intellectual inquiry must be balanced by viewing the situation in its unique historical and cultural context. A campus and the individuals that make up the faculty, staff, and students all have interests and perspectives that add to the arguments. While the courts have used these cases as

[182] Davis, "Personnel Is Policy," 1793.

[183] Massaro, "Six Frames," 594.

[184] Nice, "How Equality Constitutes Liberty," 631, n. 98.

precedent in analyzing cases, the one thing that many of these cases do acknowledge is the sole responsibility higher education has in determining its educational purpose, mission, and pedagogical concerns. The importance of the educational role of institutions should not be ignored or taken lightly when viewing First Amendment freedoms.

CHAPTER 4
THE *CHRISTIAN LEGAL SOCIETY V. MARTINEZ* DECISION

History of the Christian Legal Society

The Christian Legal Society of the University of California, Hastings School of Law had been a part of the campus since the 1994-1995 academic year.[1] During this time, the Christian Legal Society had been a registered student organization and received all the benefits of recognition by the Hastings School of Law.[2] The bylaws mandated by the group included that voting members and organization leaders were asked to sign a statement of faith. Over the next decade, CLS had many bylaw changes that did and did not have faith statements."[3] By 2002, the organization did not discrimination its membership or leadership based on religion or sexual orientation. The bylaws changed again for the 2004-2005 academic year when Hastings CLS decided to align itself with the National Christian Legal Society. The national organization required all those affiliated with it to adopt a specific set of bylaws. These bylaws required each member of Hastings CLS to sign a statement of faith.[4] While voting members and those

[1] *Christian Legal Society Chapter of the Univ. of Cal. v. Kane*, 2006 U.S. Dist. LEXIS 27347. (N.D. Cal., Apr. 17, 2006).

[2] *CLS v. Kane*, 2006 U.S. Dist LEXIS 27347. These benefits include the use of the law school's name and logo, use of certain bulletin boards, eligibility for a Law School organization email address, eligibility to send out mass emails, eligibility for a student organization account with fiscal services at the Law School, eligibility to apply for student activity fee funding, eligibility to apply for limited travel funds, ability to place announcements in the Hastings Weekly newsletter, eligibility to apply for permission to use limited office space, eligibility for the use of organization voice mailbox for telephone messages, listing on the Office of Student Services' website and any hard copy lists, including admissions publications, participation in the annual Student Organizations Faire, use of the Student Information Center for distribution of organization materials, permission to use meeting rooms and audio-visual equipment.

[3] While the 2001-2002 bylaws did require a statement of faith, there is no evidence of Hastings School of Law or the organization enforcing those bylaws. For the 2002-2003 and 2003-2004 years, Hastings CLS operated under another set of bylaws that stated the organization "welcomes all students of the University of California, Hastings College of Law." *CLS v. Kane*, 2006 U.S. Dist LEXIS 27347 at *83.

[4] *CLS v. Kane*, 2006 U.S. Dist LEXIS 27347 at *8. This statement reads: trusting in Jesus Christ as my savior, I believe in one God eternally existent in three persons, Father, Son and Holy Spirit, God

in a leadership position must adhere to the statement of faith and to a standard of conduct, including promising to not engage in “unrepentant homosexual conduct,” Hastings CLS programs and activities were committed to be open to all students regardless of their religion or sexual orientation.[5] This created a conflict with the nondiscrimination policy that the Hastings College of Law administration decided to enforce.

On September 17, 2004, Hastings CLS submitted its student organization registration form and a set of its current bylaws to the Office of Student Services along with a request for travel funds to attend the National Christian Legal Society conference. At this time, Hastings CLS was notified it was in non-compliance with the institution’s nondiscrimination policy and was asked to review them with an administrator. During this time, Hastings CLS was told they would need to open their membership to all Hastings students to receive registered student organization status.

On October 22, 2004, Hastings CLS filed a complaint stating that Hastings violated their Freedom of Association, Freedom of Speech, the Establishment Clause of the First Amendment, the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.[6] On April 12, 2005, the Court dismissed Hastings CLS' establishment, due process, and equal protection claims. The Court gave Hastings CLS the opportunity to amend its equal protection claim, which it

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the Father Almighty, maker of heaven and earth. The deity of our Lord, Jesus Christ, God's only Son conceived of the Holy Spirit, born of the Virgin Mary; His vicarious death for our sins through which we receive eternal life, His bodily resurrection, and personal return; The presence and power of the Holy Spirit in the work of regenerations; The Bible as the inspired Word of God.

[5] *CLS v. Kane*, 2006 U.S. Dist LEXIS 27347 at *9.

[6] *Id*.

did on May 3, 2005.[7] Hastings CLS and Hastings College of Law both filed petitions for summary judgment. On April 17, 2006, the Court granted summary judgment in favor of Hastings College of Law.[8]

On September 27, 2006, Hastings CLS filed an appeal to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit made an unpublished two-sentence decision on March 17, 2009, stating that Hastings College of Law's Nondiscrimination Policy addressed conduct, not speech and cited *Truth v. Kent School District*.[9] Hastings CLS filed petition for writ of certiorari on May 5, 2009. The Supreme Court granted the petition on December 17, 2009, agreeing to hear the case. Oral arguments were made on April 19, 2010, by both parties. The final decision by the Supreme Court was made on June 28, 2010.

Arguments Submitted to Supreme Court

One issue discussed in the merit petitions submitted to the Supreme Court by both parties was whether Hastings College of Law had created a public forum or limited public forum for its registered student organizations. In Hasting CLS' opening brief, the introduction makes it clear that they regard the college as an open forum.[10] An open forum provides an avenue for free speech in which no group can be discriminated against having equal access to that forum. A limited public forum is a forum where regulations can be made as long as there is viewpoint neutral, reasonable, and use the

[7] *Christian Legal Society Chapter of the Univ. of Cal. v. Kane*, 2005 U.S. Dist. LEXIS 41851.

[8] *CLS v. Kane*, 2006 U.S. Dist LEXIS 27347.

[9] *Truth v. Kent,* 542 F. 3d 634, 649-50 (9th Cir. 2008).

[10] Brief for Petitioner at 1, *Christian Legal Society Chapter v. Martinez*, 2009 U.S. LEXIS 8842 (U.S., Dec. 7, 2009).

least amount of action permissible to attain the desired effect.[11] Further, Hastings College has created a forum for speech by subsidizing student group activities but has set parameters on who may engage in the forum. These parameters were that groups must be non-commercial, limited to students, and must permit any Hastings student to become a member.[12]

The second issue discussed in the Supreme Court documents was whether the Hastings College of Law's Nondiscrimination Policy is a written policy or an all-comers policy in practice. There has been much debate from both sides regarding when the all-comers policy went into effect. Hastings CLS argued that the written policy itself is invalid and violates groups' First Amendment rights. However, during depositions and statements made in rebuttal, Hastings College of Law described an all-comers policy that denoted that all student groups were required to admit any Hastings student into their organizations. Specifically, the interpretation of the nondiscrimination policy is that organizations must "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs."[13] Hastings CLS argued that the written policy did not explicitly state that organizations were required to take all students and that it had never said that in the past twenty years. It goes on to state that the shift in Hastings College of Law's views in depositions from the written to all-comers policy was evidence that the written policy was constitutionally

[11] *Rosenberger*, 515 U.S. at 829.

[12] Brief of Respondent-Intervenor Hastings Outlaw at 16, *Christian Legal Society Chapter v. Martinez*, 2009 U.S. LEXIS 8842 (U.S., Dec. 7, 2009).

[13] Brief of Respondent-Intervenor Hastings Outlaw at 5, *Christian Legal Society Chapter v. Martinez*, 2009 U.S. LEXIS 8842 (U.S., Dec. 7, 2009).

indefensible.[14] Hastings CLS goes on to argue that an all-comers policy infringed upon the rights of all groups to associate and to form their beliefs, philosophies, and messages. They point out that the college's defense for enacting such a policy was an attempt to diversify the student body, but feel that by not allowing groups to form around their beliefs and ideas, the college was thus stifling diversity of viewpoints.[15] Hastings CLS further argues that the all-comers policy marginalizes the groups it claims to support. The smaller groups with, the more unpopular viewpoints will still have the harder time finding support for their objectives if asked to admit all students regardless of their support for the mission or ideas.

The Supreme Court in oral arguments on April 19, 2010, was also concerned about the effect of the all-comers policy on the free speech of students. Justices Scalia, Sotomayer, and Breyer asked pointed questions to both the petitioner and respondent on the issue of the all-comers policy and the role it played in this case.[16] Justice Stevens went as far to ask the parties that for the Court to decide this case, would the Court need to decide on the constitutionality of the all-comers policy. Both parties' counsel replied yes.

Related to the Hastings College's stated purpose of the all-comers policy was the issue of diversity within and among groups. Hastings College in its brief to the Supreme Court stated that the idea behind the all-comers policy was to foster diversity not just

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[14] Brief for Petitioner at 58, *Christian Legal Society Chapter v. Martinez*, 2009 U.S. LEXIS 8842 (U.S., Dec. 7, 2009).

[15] Brief for Petitioner at 50, *Christian Legal Society Chapter v. Martinez*, 2009 U.S. LEXIS 8842 (U.S., Dec. 7, 2009).

[16] Oral Arguments at 33, *Christian Legal Society Chapter v. Martinez*, 2009 U.S. LEXIS 8842 (U.S., Dec. 7, 2009).

among the different types of groups that were at the college, but also to foster diversity among the groups and individuals with whom the students interact.[17] Hastings College saw an opportunity for growth and development among students with divergent viewpoints being a part of a group. Hastings CLS responded in a reply brief that diversity within and among causes an amalgamation of neutrality with no real challenge of viewpoints. Hastings CLS has also argued that such a policy opened the door for outliers and opponents of the group's message to sabotage and take over the organization.[18] Hastings College replied to this concern by stating that no such event has ever happened at the Hastings campus and the incidents listed by the petitioner were extreme cases.

The last issue that both parties discussed was whether Hastings' Nondiscrimination Policy focused on belief or conduct. Hastings College from the beginning stated that the policy intended to ensure that registered student organizations at the college did not engage in discriminatory practices. The District Court and Ninth Circuit Court both agreed that Hastings College was not trying to regulate thought or beliefs, but instead tried to control conduct they thought was contrary to their mission and educational purpose.[19] Hastings CLS, however, argued that the term religion in the Nondiscrimination Policy was the only classification mentioned that targets beliefs and not status. With this, CLS argued that the policy should not apply to religious groups

[17] Brief of Respondent-Intervenor Hastings Outlaw at 1, *Christian Legal Society Chapter v. Martinez*, 2009 U.S. LEXIS 8842 (U.S., Dec. 7, 2009).

[18] Brief for Petitioner at 28, *Christian Legal Society Chapter v. Martinez*, 2009 U.S. LEXIS 8842 (U.S., Dec. 7, 2009).

[19] Brief of Respondent-Intervenor Hastings Outlaw at 1, *Christian Legal Society Chapter v. Martinez*, 2009 U.S. LEXIS 8842 (U.S., Dec. 7, 2009).

and thus CLS should be able to determine membership based on their beliefs and support of the organizational faith statement.[20] The District Court and Ninth Circuit Court found no evidence that Hastings made a decision not to recognize Hastings CLS as an organization based on its beliefs, but rather because CLS would not agree to abide by the Nondiscrimination Policy.

Another, more subtle issue, was the assumption by CLS that Hastings College was forcing the hand of Hastings CLS into allowing members and leaders into the organization that does not support the purpose of the organization. Hastings College had never claimed that they were forcing Hastings CLS to do anything or to admit any student to their group. What Hastings College has done was set parameters that groups need to adhere to in order to be recognized as a registered student organization. Hastings CLS was still free to meet on campus and to operate, just not with the benefits that come with being a registered student organization.

The U.S. Supreme Court Decision

Majority Opinion: Justice Ginsburg

The decision of the Supreme Court was made on June 28, 2010, with Justice Ginsberg writing the majority opinion of the Court, Justices Stevens and Kennedy concurring, and Justice Alito dissenting. The key question the court had to answer was whether a public law school could set parameters on recognition regarding the use of school funding and facilities contingent on the organization's agreement to open eligibility for membership. The Court found that Hastings did not violate CLS' First

[20] Brief for Petitioner at 6, *Christian Legal Society Chapter v. Martinez*, 2009 U.S. LEXIS 8842 (U.S., Dec. 7, 2009).

Amendment rights and had applied the regulations of recognition and access to the limited public forum in a viewpoint-neutral manner.

The Court's first point in assessing the issue was determining that Hastings CLS argued against points that were already included in the joint stipulation and summary documents submitted to the District and Ninth Circuit Court.[21] The documents submitted to the Court stated that they agreed the all-comers policy was in place, whether it was a written policy or policy in practice. The Court would not entertain whether the policy was in place or not at the time of Hastings withdrawing recognition from CLS, but focused on the whether the all-comers policy was Constitutional.

The Court summarized prior case precedent that informed its decision. Concerning a limited public forum, the Supreme Court has consistently stated that any exclusion from that forum must be viewpoint neutral and reasonable.[22] The Court addressed the infringement of associational freedoms stating that restrictions were permitted if they served a compelling state interest and were unrelated to suppressing speech. The action taken must be the least restrictive conditions necessary to serve the interests of the state. In *Boy Scouts of America v. Dale*, the Court recognized the freedom not to associate as well. By forcing an organization to admit unwelcomed members, it "directly and immediately affects associational rights."[23]

The Court in its analysis of the limited public forum, discussed three points it weighed in its decision. The first was that CLS in its briefs tried to separate the free

[21] *CLS v. Martinez,* 130 S.Ct. 2971 (2010).

[22] *Healy*, 408 U.S. 169.

[23] *Dale*, 530 U.S. at 659.

speech claim from the freedom of association claim. The Court saw that the two issues were closely linked and "arise in the same context."[24] Second, the strict scrutiny standard held to other freedom to associate cases would invalidate the purpose of the forum in the first place; to reserve them for specific groups. The Court, therefore, confirmed that a lesser standard was appropriate in balancing the interests of the state and individual rights. Third, CLS was not being compelled to admit members, just being denied benefits of recognition (which the court viewed as an indirect pressure) if they did not admit all students.[25]

CLS felt differently. In their arguments and court documents, CLS cited case law that involved situations where a group was compelled to admit unwanted members. CLS errored in applying such cases which were not similar to their own. As the Supreme Court stated "Hastings… is dangling the carrot of subsidy, not wielding the stick of prohibition."[26]

The Supreme Court has three times before decided cases on student recognition and benefits concerning colleges and universities. In *Healy v. James*, the Court held a public educational institution overstepped its authority when it "restricts speech or association simply because it finds the views expressed by any group to be abhorrent."[27] The *Widmar v. Vincent* decision was made in strict scrutiny because the University singled out religious groups for disadvantaged treatment based on the

[24] *CLS v. Martinez* 130 S.Ct 2971 (2010).

[25] *Id.,* at 2986.

[26] *Id*.

[27] *Healy*, 408 U.S. at 187-188.

pretense that the University was trying to keep the policy in accordance with separation of church and state.[28] *Rosenberger* involved student activity fees being withheld from a recognized organization to print a newsletter discussing Christian materials. The Court ruled that the University engaged in viewpoint discrimination by restricting speech of a recognized student group in a forum they created.[29]

The Court found the action by Hastings College of Law to be reasonable within the educational context in which it existed. As stated in *Tinker*, “First Amendment rights must be analyzed in light of the special characteristics of the school environment.”[30] The Court has also recognized the limited scope of expertise they have in educational manners and defer to educational institutions to be the authority.[31] The Supreme Court stated learning was not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process and a “significant contributor to the breadth and quality of the educational experience.”[32] Justice Kennedy in his concurring opinion, states that students were influenced as much by their peers as by their teachers and that extracurricular activities “facilitate interaction between students,

[28] *Widmar*, 454 U.S. 263.

[29] *Rosenberger*, 515 U.S. at 829.

[30] *Tinker*, 393 U.S. at 506.

[31] "We have cautioned courts in various contexts to resist "substituting their notions of sound educational policy for those of the school authorities which they review." *Board of Ed. Of Hendrick Hudson Central School Dist. Westchester Cty. v. Rowley,* 458 U.S. 176, 206 (1982). “[N]oting… that the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.’” *Healy,* 408 U.S. at 180.

[32] *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls,* 536 U.S. 822, 831, n. 4, 845 (2002).

enabling them to explore new points of view, and to develop… a new sense of self."[33] In summary, institutions should control policies that govern students and student organizations to meet the purposes of the forum it creates. To further illustrate this point, the Court surmises that if a hostile takeover of the organization were to happen as hypothesized by CLS, then Hastings would revise and revisit its policies.[34]

The all-comers policy was designed to ensure that all students had access to organizations that Hastings College of Law decided to recognize and subsidize with funding. The Court finds that the all-comers policy helped Hastings enforce the Nondiscrimination Policy while not overly investigating each student group's purpose, goals, and message. The Court further stated that allowing exclusions will unduly burden Hastings in trying to discriminate belief from status concerning religious organizations. Hastings in statements has said they made their decisions based on the conduct of CLS in not admitting all students; not on the beliefs of the group that homosexual orientation and homosexual conduct was wrong. CLS argued that because it was a core belief of the group, Hastings was stifling the freedom to associate with the organization. The Court stated that it refuses to distinguish between status and conduct in regards to homosexual conduct citing *Lawrence v. Texas*.[35] The Court recognizes that being a homosexual more than likely includes engaging in homosexual conduct.

[33] *CLS v. Martinez* 130 S.Ct at 2999.

[34] *Id.,* at 2971.

[35] *Lawrence v. Texas*, 539 U.S. 558, 575.

When policies, and in this case state statutes, make it so homosexual conduct was impermissible, and it opened the door to discriminate against homosexuals in general.[36]

Overall, the Supreme Court found that Hastings' all-comers policy was viewpoint neutral and reasonable in light of the forum created. The Court stated that Hastings' policy "draws no distinction between groups based on their message and perspective" and sees this as the very definition of a viewpoint-neutral policy.[37] Further, the Court believed the policy focuses on the act of excluding students from membership in organizations and not the reasons and beliefs motivating the exclusion.

Concurring Opinions: Justice Stevens and Justice Kennedy

Justices Stevens and Kennedy concurred with the majority opinion and stated that the Hastings' Nondiscrimination Policy focused on conduct rather than the belief of the student organization. Stevens went on to say that even though the First Amendment protects "CLS's discriminatory practices…, it does not require a public university to validate or support them."[38] Stevens goes on to state that the university should not be compared to a public square; that universities have a right to ask students and organizations to "abide by certain norms of conduct when they enter an academic community."[39] Further, Stevens supported the idea that these decisions were policy questions that were best handled by college and university administration to ensure alignment with the goals, mission, and educational philosophy of the institution. Justice

[36] *Id.*

[37] *CLS v. Martinez* 130 S.Ct at 2993.

[38] *Id.,* at 2996.

[39] *Id.,* at 2997 (dissent).

Kennedy warned in his concurring opinion that allowing exceptions to the all-comers policy or groups to exclude members in discriminatory ways jeopardizes the educational purpose of the limited forum institutions have created. Limited forums serve a purpose, and the creator of the forum can set parameters for speech in that forum as long as it is viewpoint neutral and reasonable.

Dissenting Opinion: Justice Alito

Justice Alito wrote the dissenting opinion on the understanding that Hastings' Nondiscrimination Policy and the all-comers policy were two separate policies, there existed a pretext issue, and that by not considering religion a belief and status, the Court erred in finding the all-comers policy not in violation of CLS' freedom to associate. Alito contended that such an all-comers policy made available marginalization of groups with unpopular views by the institution hoping to preserve "political correctness."[40] Alito also stated the policy had evolved into an accept all-comers policy to a some-all-comers policy, allowing some political, social, and cultural student groups to limit membership to a particular set of ideas or beliefs.

The Court did not decide on the issue of pretext argued by CLS regarding the inconsistency of application and the existence of the all-comers policy. The Court stated that neither the District Court nor the Ninth Circuit Court addressed issues of pretext and sent the issue to remand for the lower court to decide.[41] However, Alito argued that by not reviewing the issue of pretext, the Court is allowing viewpoint discrimination. Alito further stated that lack of documentation of the all-comers policy and the shifting of the

[40] *Id.,* at 3000 (dissent).

[41] *Id.,* at 2995.

Nondiscrimination Policy to the all-comers was the definition of pretext. While the Court remanded the pretext issue to the Ninth Circuit, Alito saw very little opportunity for CLS to argue the pretext issue since none of the courts thus far had addressed the matter.[42]

Post-Decision Policy Rhetoric after *CLS v. Hastings*

Years after the decision in *CLS v. Martinez* was published, numerous articles have attempted to analyze and discuss the implications of the decision to First Amendment case law and higher education institutions. Many authors stressed that what the Court wrote in their decision was not as telling as what was omitted or not discussed at all. As with any decision the Court makes, there are ample opportunities to rethink the Court's opinion and to infuse their own views (and perhaps agendas) into their analysis. The themes that emerge from the law reviews include issues with forum analysis, first amendment speech versus freedom of association, the exclusion of the free exercise clause in the Supreme Court's decision, and the underlying subtext of belief, status and conduct. These issues were reflected in Chapter Three as part of the analysis constructs.

[42] *Id.,* at 2971 (dissent).

CHAPTER 5
CONCLUSION

Issues Identified in the Research

Both CLS and Hastings College can make persuasive arguments regarding positions in the case. CLS can argue that religious diversity is as important as race and ethnicity to any law school. Hastings can propose that anti-homosexual sentiments are similar to racial segregationist policies of the past.[1] The rights clash noted by Klein is more reality today than one would like to admit. Because of the clash, both groups seem to cancel each other and muddle the individual issues each group has with the conflict of their opposing ideologies.

The discussion regarding *CLS v. Martinez* is far from unified. What one side of the debate sees as an undue hardship, the other sees as a reasonable application of viewpoint neutrality. The point that comes into focus as a result of the discussion is the numerous ways to interpret and to apply legal precedents and case laws to First Amendment issues. The first debate involves the inconsistent application of forum analysis and the difficulties in defining types of forums. The lack of a structured framework in which to examine a court's decision is problematic when trying to predict or cite decisions that may be applicable to a case at hand. The second challenge is the lack of utilizing the Free Exercise Clause in religious viewpoint cases. Since this clause has within the last century lost its doctrinal value, many scholars feel the free speech provision of the First Amendment is too overly broad in order to address specific religious issues. Similarly, the third issue that comes out of the case is the lack of

[1] William N. Eskridge, Jr., "Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive," 57 UCLA L. Rev. 1333 (2010).

viewing this case at its base as a Freedom of Association issue. The last debate was the contrast of belief, status, and conduct. In the decision, the Supreme Court paid little attention to this issue in their decision, causing one to feel that it was of little importance to the legal issue presented or a problem that the Court is not ready to address at this time. Here, what is not said, or avoided altogether, is very telling in what the Court is ready to go on the record for.

The commentary regarding this case has mentioned many times what each wished the court would have done. This would include discussions as to addressing each point argued by CLS, which decisions would be improbable and inadvisable, and directions to institutions in dealing with similar First Amendment issues. However ambitious these authors have been, it has been short-sighted. Higher education institutions as well as students are very unique and come with their own individual skills, needs, and viewpoints. Similarly, as one can see with the case review and with some of the recent discussion, First Amendment issues are just as diverse and cannot be addressed with one-size-fits-all litigation. Time will only tell if the Court will provide any clearer indications on how institutions should address First Amendment issues. Until then, it would not be wise to speculate and wait, but to work with various campus constituents, legal counsel, and students in order to come up with policies that meet the needs of the individual campuses.

Policy Implications

There are numerous applications of the decision of the Supreme Court in C*LS v. Martinez*. First is the reinstatement of the definition of the limited public forum and the unique environment the Court sees educational institutions creating. Of great significance is the deference and expertise the courts give college and universities in

establishing polices, mission, and expectations without interference from the courts. The responsibility given to educational institutions is a challenge. It reinforces the role educators play in educating the whole student in class and out of class while downplaying governmental intervention.

Another way in which the decision affects institutions is in implementation and interpretation of policy. Most importantly, the Court determined that an all-comers policy was constitutional when tied directly to the mission, purpose, and environment of the institution. Equal access to organizations within the limited public forum created a space that anyone in that forum had opportunity to participate. The concern being addressed by Hastings College of Law was limiting the act of discrimination, not the suppression of speech. CLS and many groups that supported their position argued that this regulation infringed on the rights of associational membership in the organization. The Court acknowledged that groups may form over goals and ideas and that reasonable limitations could be put on organizations within the spirit of an all-comers policy. The Supreme Court in its decision stated guidelines of what they thought were in line with how a recognized student organization could limit membership within the scope of an all-comers policy. These include attendance, the payment of dues, or other neutral requirement designed to ensure that students join because of their commitment to the group's goals.

The Ninth District Court and Supreme Court both were concerned with the direction in which CLS' arguments were originating. CLS did not demonstrate how admitting homosexual students would impair its mission. *Kane* stated that CLS confused the analysis by focusing on the reasons for CLS actions, not the reasons

underlying Hastings Policy (what was really on trial). Hastings was not directly ordering CLS to admit certain students; CLS was free to terminate its participation and admit who it wanted.[2] The debate between compulsion and inconvenience was seen as negligible by the courts.

Another concern with the decision involves the balancing of the burden either toward the student organization's First Amendment freedom or the state's compelling interest. Using *Dale* as a test in this regard did not further outline how to balance government interest, leaving courts to assume the burden is always on the organization's interest.[3]

One issue the opinion of the court does not address is the difference between religion as status and religion as belief. Although religion may certainly imply a status, such status is often originally derived from, based upon, and intractably interwoven in essential beliefs.[4] Opponents of the Ninth Circuit court's decision state, "…although the fact that religion is both an identity and a belief system complicates the question courts should recognize that denying only faith-based student groups the ability to constitute themselves based on core belief is viewpoint discrimination."[5] The *Hsu* court required recognizing that religion is a belief or ideology in addition to being a status. [6] With the

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[2] Ryan C. Visser, "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 Law Review 449 (2007).

[3] *Id*.

[4] *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

[5] Joan W. Howarth, "Teaching Freedom: Exclusionary Rights of Student Groups," 42 U.C. Davis L. Rev. 889, 893 (2008-2009).

[6] *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 858-59 (2d Cir. 1996). *See also* Howarth, "Teaching Freedom," 889.

exclusion of any discussion by the majority opinion, it is unclear where similar cases may fall in future decisions regarding religion as status or belief.

Recommendation for Policy Development

Public higher education institutions have a responsibility to protect students' First Amendment rights. This study highlights key case law to point out the responsibilities of both the institution and the student organization. The RSO program at Hastings College of Law was deemed by the Court as being a reasonable way to regulate access to their limited public forum. As institutions continue to be challenged by free speech and First Amendment issues, it is important for administrators in public higher education to be aware of the legal parameters governing student organization policy development. As stated previously, this study outlined four constants; forum analysis and viewpoint neutrality, Freedom of Religion, Freedom of Association, and belief and status. The first three are discussed at length in the rhetoric of the Court decision in *CLS v. Martinez*. However, belief and status was a constant that the Court did not address. Recommendations for policy development therefore will only address three out of the four constants as part of creating a best-practice policy.

Determine the Type of Forum

The first step is to determine if the institution were a forum or wants to create a forum. State action obligates public colleges and universities to allow speech activities from outside the campus. Speech from outside the campus is allowed in public areas of campus and adjacent streets and sidewalks. If the institution allows spaces and venues to be reserved by outside groups, then those spaces become accessible to the public. If the institution were private, the relationship between the college and the student is contractual in nature. Private schools in higher education are governed by what is

published as policy and procedures. Examples of this include manuals, handbooks, letter, emails, and websites.

The second step is to consider what type of forum is present. As stated previously, public forums at public institutions exist automatically because of state action. Non-public forums historically include classrooms, labs, and libraries. However, public institutions are not obligated to provide a limited public forum for students. Many campuses extend this right as a benefit after criteria to access the forum has been met. Conditions for access to the forum include registration of the student group or organization, submitting a constitution, or attending financial management training.

Identify the Purpose of the Forum

Chapter Two discussed the benefit that student involvement in organizations can have on students. The co-curricular experience supplements the teaching in the classroom for students. Creation of a limited public forum allows for students to become involved in clubs and organizations related to their academic program or personal pursuits. Colleges and universities also see the benefit of a limited public forum in that the institution has some regulation of the student organizations. Whatever reason for the forum, the institution should be clear what type of relationship the student organizations will have with the school. Some issues to determine would be access to campus spaces, room reservations, email lists, and use of the institution's logo/mascot. Funding is a large motivator for many student organizations to register in a limited public forum, such as the RSO program at Hastings College of Law.

Access to the Forum

If the institution creates a limited public forum, access to the forum should be clearly communicated to the campus community. Public forum access has been

discussed at length. The limited public forum access is governed by the institution by policies and procedures. Students are the main audience for the limited public forum. Many institutions require student organizations to register or affiliate with the institution in order to receive access to the forum. The limited public forum may also be accessible to other constituents such as staff, faculty, alumni, or parent groups as granted by the institution's policies. If the institution decides to not create a limited public forum for student organizations, there still exists the perception of association some de facto student groups have with the institution. Clear expectations for legal liability may be necessary.

Viewpoint Neutrality

The access to the limited public forum must be regulated in a viewpoint neutral manner. Institutions may regulate circumstances, but not content or viewpoints. Typical circumstances are time, place, and manner restrictions. That is why it is important to be clear of the purpose of the forum and to clearly communicate expectations. In crafting nondiscrimination policies for student organizations, it is important for the institution to consider what reasonable expectations are in regard to the forum created. Non-discrimination policies are challenging to implement in a limited public forum. The student organizations form around viewpoints and ideas, so creation of a specific policy regarding nondiscrimination can be problematic. Institutions can create all-comers policies, where every group in the limited public forum must allowed access to all students. However, the purpose of the forum and the mission of the institution should be consulted in creation of a nondiscrimination policy for student organizations. Also important is to consult the institution's nondiscrimination policy. The policies should not be in conflict with one another. A last step is to always consult with legal counsel. Each

state has varying statutes regarding nondiscrimination policies and should be followed by the institution.

Recommendations for Further Research

There is a need to reassess past jurisprudence in limited public forum cases. The current case law and court decisions have left more questions than answers. The role of state action with private associations should be explored. More attention should be paid to what type of association is sought by student groups in the limited public forum. It is still uncertain at what point one has an intimate association or expressive association in a limited public forum. Until the Supreme Court makes a clearer definition in a future case, the matter will continue to be unresolved. As stated in this study, the Court's record does not make a resolution likely in the near future.

It remained unclear if the Hastings College of Law policy was indeed an all-comers policy or a nondiscrimination policy. The impact and purpose of a nondiscrimination policy is gauged on the equity and consistency in which it is applied. As stated, CLS argued the policy put their organization at a disadvantage to other organizations because of its unique beliefs. The all-comers policy was deemed content neutral. The question remains, are institutions rephrasing, excluding, and disavowing viewpoints in a desire to include individuals.

One may wonder if these decisions are being made judicially, legislatively, or privately. Many state legislatures in response to cases like *CLS v. Martinez* are passing statutes to ensure religious freedom at public higher education institutions. The role of government control over the institution can be seen with the recent laws regarding restroom patrons, protection of religious freedom of student organizations, and the right to carry firearms on college and university campuses. Some people may believe religion

is dictating policy and politics. However, at this time in history, people have a vast amount of information at their fingertips. It could be possible that people feel they have a voice in government and regulation of schools. Conversely, all the access to information could be having the opposite effect and citizens may feel more protective of “their rights” and the status quo. Still other people recognize that decisions are more often made and influenced by money and those people, organizations, and businesses that have it. Whatever the reason may be, the Supreme Court has been consistently inconsistent with interpreting the nuances of the First Amendment.

REFERENCES

Case Law

Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987).

Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790 (2011).

Alpha Delta Chi-Delta Chapter v. Reed, 132 S.Ct. 1743 (2012).

Bates v. City of Little Rock, 361 U. S. 516, 523 (1960).

Benitez v. North Coast Women's Care Medical Group, Inc., 37 Cal.Rptr.3d 20 (2005) appealed 44 Cal.4th 1145 (2008).

Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

Board of Ed. Of Hendrick Hudson Central School Dist. Westchester Cty. v. Rowley, 458 U.S. 176, 206 (1982).

Board of Ed. Of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822, 831, n. 4 (2002).

Board of Regents of the University of Wisconsin System v. Southworth, 529 U.S. 217 (2000).

Bob Jones v. the United States, 461 U.S. 574 (1983).

Bowman v. White, 444 F.3d 967 (8th Cir. 2006).

Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

Cantwell v. Connecticut, 310 U.S. 296 (1940).

Catholic Charities v. Serio, 7 N.Y.3d 510 (2006).

CBOCS West Inc. v. Humphries, 553 US 442 (2008).

Chamber of Commerce v. Whiting, 131 S.Ct. 1968 (2011).

Christian Legal Society Chapter at Arizona State Univ. v. Crow, No. 04-2572 (D. Ariz. Nov. 17, 2004).

Christian Legal Society Chapter of the Univ. of Cal. v. Kane, 2005 U.S. Dist. LEXIS 41851.

Christian Legal Society Chapter of the Univ. of Cal. v. Kane, 2006 U.S. Dist. LEXIS 27347. (N.D. Cal., Apr. 17, 2006).

Christian Legal Society Chapter of the Univ. of Cal. v. Kane, 319 Fed. App'x. 645 (9th Cir. 2009).

Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez et al., 130 S.Ct. 2971 (2010).

Christian Legal Society Chapter of the Ohio State Univ. v. Holbrook, No. 04-197 (S.D. Ohio 2004).

Christian Legal Society v. Eck, 625 F. Supp.2d 1026 (D. Mont. 2009).

Christian Legal Society v. Walker, 453 F.3d 853 (2006).

Christian Legal Society of Washburn University School of Law v. Farley, No. 04-4120 (D. Kan. Sept. 16, 2004).

Christian Legal Society Chapter of the Univ. of Toledo v. Johnson, No. 05-7126 (N.D. Ohio Jun. 16, 2005).

Cutler v. Dorn, 915 A.2d 65 (2007).

Dejonge v. Oregon, 299 U.S. 353 (1937).

Dixon v. Alabama, 294 F.2nd 150, 158-159 (Fifth Cir., 1961).

Edwards v. Aguillard, 482 U.S. 578 (1987).

Employment Division v. Smith, 494 U.S. 872 (1990).

Engel v. Vitale, 370 U.S. 421 (1962).

Evans v. City of Berkeley, 129 P.3d 394 (2006).

Fleshner v. Pepose Vision, 304 S.W.3d 81 (2010).

Good News Club v. Milford Central School, 533 U.S. 98 (2001).

Gonzalez v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418 (2006).

Harris v. Mayor and City Council of Baltimore, 797 F.Supp.2d 671 (2011).

Healy v. James, 408 U.S. 169 (1972).

Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 858-59 (2d Cir. 1996).

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995).

Iota Xi Chapter of Sigma Chi v. George Mason Univ., 773 F. Supp. 792 (E.D. Va. 1991).

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

Lambs Chapel v. Center Moriches Union Free Sch., 508 U.S. 384 (1993).

Lawrence v. Texas, 539 U.S. 558, 575 (2003).

Lemon v. Kurtzman, 403 U.S. 602 (1971).

Lewis v. Chicago, 560 U.S. 205 (2010).

Lloyd Corporation v. Tanner, 405 U.S. 1038 (1972).

Locke v. Davey, 540 U.S. 807 (2004).

Miller v. Johnson, 515 U.S. 900 (1995).

Moose Lodge No. 107 v. Irvis, 407 U.S. 183 (1972).

Perry v. Sindermann, 408 U.S. 593 (1972).

Reynolds v. United States, 98 U.S. 145 (1879).

Ricci v. DeStefano, 557 US 557 (2009).

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

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

Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

Sherbert v. Verner, 371 U.S. 938 (1963).

Sweezy v. New Hampshire, 354 U.S. 234, (1957).

Thornton v. Caldor, 472 U.S. 703 (1985).

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

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

Whitney v. California, 274 U.S. 357 (1927).

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

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

Constitutions, Codes and Statutes

Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (2000).

Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (2000).

Equal Pay Act of 1963 (EPA). 29 U.S.C. § 206 (1963).

Exec. Order No. 11246, 3 C.F.R. 339 (1965).

Immigration Reform and Control Act of 1986 S. 1200; Pub.L. 99-603; 100 Stat. 3359.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701.

Title IX of the Education Amendments of 1972, 20 U.S.C. §1681.

Title VII of the Civil Rights Act of 1964 as amended by 42 U.S.C. §1981.

U.S. Const. amend. I.

U.S. Const. amend. XIV, § 1.

Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 et seq.

Court Documents

US Supreme Court certiorari granted by Christian Legal Society Chapter v. Martinez, 2009 U.S. LEXIS 8842 (U.S., Dec. 7, 2009).

Brief for Petitioner, *Christian Legal Society Chapter v. Martinez*, 2009 U.S. LEXIS 8842 (U.S., Dec. 7, 2009).

Brief of Respondent-Intervenor Hastings Outlaw, *Christian Legal Society Chapter v. Martinez*, 2009 U.S. LEXIS 8842 (U.S., Dec. 7, 2009).

Brief of Hastings College of the Law Respondents. *Christian Legal Society Chapter v. Martinez*, 2009 U.S. LEXIS 8842 (U.S., Dec. 7, 2009).

Reply Brief for Petitioner, *Christian Legal Society Chapter v. Martinez*, 2009 U.S. LEXIS 8842 (U.S., Dec. 7, 2009).

Scholarly Works

Abodeely, Jennifer A. “Thou Shall Not Discriminate: A Proposal for Limiting First Amendment Defenses to Discrimination in Public Accommodations.” *The Scholar: St. Mary's Law Review on Minority Issues*, 12 SCHOLAR 585 (2010).

Astin, Alexander W. “Student Involvement: A Developmental Theory for Higher Education.” *Journal of College Student Development,* 40, no. 5 (1999).

Bhagwat, Ashutosh. “Associations and Forums: Situating CLS v. Martinez.” *Hastings Constitutional Law Quarterly*, 38 Hastings Const. L.Q. 543 (2011).

Bowen, Roger “The Assault on Academic Freedom in the Academy: Exploring the Intersectionalities of Race, Religion, and Gender in Higher Education: Exploring the Role of Religion.” 53 Loy. L. Rev. 157 (2007).

Brownstein, Alan, and Vikram Amar. “Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action.” *Hastings Constitutional Law Quarterly*, 38 Hastings Const. L.Q. 505 (2011).

Calabresi, Steven G. and Abe Salander. “Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers.” 65 Fla. L. Rev. 909 (2013).

Caplan, Aaron H. “Invasion of the Public Forum Doctrine.” 46 Willamette L. Rev. 647 (2010).

Chapman, Nathan. “The Establishment Clause, State Action, and Town of Greece.” 24 Wm. & Mary Bill Rts. J. 405 (2015).

Cooper, Diane L., Margaret A. Healy, and Jacqueline Simpson. "Student Development Through Involvement: Specific Changes Over Time." *Journal of College Student Development,* 35, no. 2 (1994).

Cornell, Saul. "To Assemble Together for Their Common Good: History, Ethnography, and the Original Meanings of the Rights of Assembly and Speech." *Fordham Law Review* 84, no. 3 (2015).

Davis, George B. “Personnel is Policy: Schools, Student Groups, and the Right to Discriminate.” *Washington and Lee Law Review*, 66 Wash. & Lee L. Rev. 1793 (2009).

Denton, Michael R. “The Need for Religious Groups to be Exempt from the Diversity Policies of Universities in Light of Christian Legal Society v. Martinez.” *Louisiana Law Review*, 72 La. L. Rev. (2012).

Epstein, Richard A. “A Big Year for the First Amendment: Church and State at the Crossroads: Christian Legal Society v. Martinez.” *Cato Supreme Court Review*, 2009-10 Cato Sup. Ct. Rev. 105 (2009).

Esbeck, Carl H. “Differentiating the Free Exercise and Establishment Clauses.” *Journal of Church and State,* 42 J. Church & St. 311 (2000).

Eskridge, Jr., William N. “Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms.” *Georgia Law Review*, 45 Ga. L. Rev. 657 (2011).

Eskridge, Jr., William N. “Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive.” *UCLA Law Review*, 57 UCLA L. Rev. 1333 (2010).

Hill, Jessie B. “Property and the Public Forum: An Essay on Christian Legal Society v. Martinez.” *Duke Journal of Constitutional Law & Public Policy*, 6 Duke J. Const. Law & Pub. Policy 49 (2010).

Howarth, Joan W. “Teaching Freedom: Exclusionary Rights of Student Groups.” 42 U.C. Davis L. Rev. 889 (2008-2009).

Hutchinson, Terry and Nigel Duncan, “Defining and Describing What We Do: Doctrinal Legal Research,” *Deakin Law Review* 17 (2013).

Inazu, John D. “The Strange Origins of the Constitutional Right of Association.” *Tennessee Law Review*, 77 Tenn. L. Rev. 485 (2011).

Inazu, John D. “The Unsettling "Well-Settled" Law of Freedom of Association.” *Connecticut Law Review*, 43 Conn. L. Rev. 149 (2010).

Kaplan, William A. and Barbara A. Lee, *A Legal Guide for Student Affairs Professionals.* San Francisco, Calif: Jossey-Bass Publishers, 2009.

Kidd, Thomas S. *God of liberty: A Religious History of the American Revolution.* New York: Basic Books, 2012.

Klein, Laura K. “Rights Clash: How Conflicts Between Gay Rights and Religious Freedoms Challenge the Legal System.” *Georgetown Law Journal*, 98 Geo. L.J. 505 (2010).

Lucas, Christopher J. *American Higher Education: A History*. New York: Palgrave Macmillan, 2006.

Luther, III, Robert. “Marketplace of Ideas 2.0: Excluding Viewpoints to Include Individuals.” *Hastings Constitutional Law Quarterly*, 38 Hastings Const. L.Q. 673 (2011).

Massaro, Toni M. “Christian Legal Society v. Martinez: Six Frames.” *Hastings Constitutional Law Quarterly,* 38 Hastings Const. L.Q. 569 (2011).

Minow, Martha. “Archetypal Legal Scholarship: A Field Guide.” *Journal of Legal Education*, 63 (2013).

Nemeth, Charles P. and Hope I. Haywood. *Learning Legal Research: A How-To Manual*. Upper Saddle River, N.J.: Pearson Prentice Hall, 2005.

Nice, Julie A. “How Equality Constitutes Liberty: The Alignment of CLS v. Martinez.” *Hastings Constitutional Law Quarterly*, 38 Hastings Const. L.Q. 631 (2011).

Pascarella, Ernest T. and Patrick T. Terenzini. *How College Affects Students: A Third Decade of Research*. San Francisco: Jossey-Bass, 2005.

Phillips, James C. "All of the Blood and Treasure: The Founders on Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez.” *Mississippi College Law Review*, 30 Miss. C. L. Rev. 15 (2011).

Powell, David and David Agnew. "Student Leader Preferences: What Students Want from Involvement in Student Organizations." *NACTA Journal*. 2007. HighBeam Research. (September 13, 2014). http://www.highbeam.com/doc/1P3-1310156011.html.

Reyes, Rene. “The Fading Free Exercise Clause.” *William & Mary Bill of Rights Journal*, 19 Wm. & Mary Bill of Rts. J. 725 (2011).

Ryan, Rebecca D. “Why Non-discrimination Policies in Higher Education Require a Second Look: The Battle for First Amendment Freedom in the University Setting.” *Catholic University Law Review*, 62 Cath. U. L. Rev. 575 (2014).

Strasser, Mark. “Leaving the Dale to Be More FAIR: On CLS v. Martinez and First Amendment Jurisprudence.” 11 First Amendment Law Review, 235-89 (2012).

Thelin, John R. *A History of American Higher Education*. Baltimore: Johns Hopkins University Press, 2011.

Thompson, Jay. “Christian Legal Society v. Martinez and Religious Freedom In South Carolina Public Schools and Universities.” *South Carolina Lawyer*, 22 S. Carolina Lawyer 23 (2010).

Visser, Ryan C. “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 Law. Review. 449 (2007).

Waldman, Steven. *Founding Faith: Providence, Politics, and the Birth of Religious Freedom in America*. New York: Random House, 2008.

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JoCynda Hudson is the associate director of housing for residence life and education at the University of Florida. She received her Master of Education degree in student affairs in higher education from Texas A & M University in 2002 and her Bachelor of Arts in political science at Georgetown College in 1999. She has worked in housing as an assistant director of residence life at Vanderbilt University and a residence director at Northern Arizona University. During her tenure at the University of Florida, she has had the opportunity to teach undergraduate courses in introduction to student affairs and for the higher education master's students a course in higher education law.

JoCynda has presented at conferences on topics such as legislative issues, mental health concerns, conflict coaching, and training of housing conduct officers. In 2015 and 2016 JoCynda served as professional faculty at the Association of Student Conduct Administrators Gehring Academy intensive training program. She has published with colleagues for a qualitative study on female graduate student perceptions of well-being in the *International Journal of Doctoral Studies* as well as a chapter and forthcoming book for the Association of College and University Housing Officers International due in summer of 2018.