

# Associations and Forums: Situating *CLS v. Martinez*

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## Introduction

In *Christian Legal Society v. Martinez*,<sup>1</sup> the Supreme Court held that the University of California, Hastings College of the Law (“Hastings”), a public law school, could deny registration as an officially recognized student group to a group of law school students called the Christian Legal Society (“CLS”). CLS refused, for religious reasons, to permit either homosexual students or students who did not share their religious beliefs to join their club. The decision generated a passionate dissent joined by four Justices,<sup>2</sup> culminating with the fulmination that the *Martinez* “decision is a serious setback for freedom of expression in this country.”<sup>3</sup> What exactly was at stake in the *Martinez* decision, as a factual matter and as a matter of legal principle? And did the decision represent an unwarranted weakening of “freedom of expression?” This article will argue that, in fact, the answers to those questions are far more complex than either the majority or dissenting Justices in *Martinez* acknowledged. Indeed, this article will argue that the *Martinez* Court focused on the wrong facts and the wrong law, asked the wrong questions, and so unsurprisingly provided answers which had little to do with what was actually at stake in the case.

For the Court, *Martinez* was a case about free speech and funding. Both the majority and the dissent referred primarily to the

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1. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971 (2010).
2. *Id.* at 3000 (Alito, J., dissenting).
3. *Id.* at 3020.

Court's free speech jurisprudence, and analyzed the *Martinez* case by reference to previous decisions regarding the restrictions that the government may impose when funding speech.<sup>4</sup> However, *Martinez* is not truly a case about speech at all. Building on other work,<sup>5</sup> I argue in this article that *Martinez* is a case centrally about the right to freedom of association. In particular, it is a case that critically turns on the *relationship* between associations of citizens and the state, and the ways in which the Constitution constrains those relationships. *Martinez* implicates two different kinds of questions about the relationship between associations and the state: first, regarding government sponsorship and funding of associations; and second, the exclusion of private associations from government physical property.

Part I briefly summarizes the *Martinez* decision, focusing in particular on certain facts and certain aspects of the opinions in the Supreme Court that have otherwise been underemphasized. Part II discusses the First Amendment right of association, its role in *Martinez*, and its general place in the Court's First Amendment jurisprudence. Part III analyzes the problem of association and state sponsorship, a question raised to the fore by the efforts of the Christian Legal Society to register as an official student organization at Hastings. Finally, Part IV considers the practical impact on CLS of Hastings's denial to them of official status, and considers whether CLS might have been able to make alternative arguments regarding the associational rights of even unofficial student groups which might have ameliorated that impact.

## I. The *CLS v. Martinez* Decision

### A. The Facts

Hastings administers a "Registered Student Organization" ("RSO") program which permits student groups—made up exclusively of Hastings students—to be recognized as official student organizations. RSOs receive certain benefits from Hastings, including the right to use the Hastings name and logo, very limited funding derived from a mandatory student activity fee, access to certain communications channels including a weekly newsletter and the campus-wide email system, and (crucially) free, preferred access to

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4. The primary decision, discussed extensively by both the majority and dissent, is *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995).

5. See Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978 (2011).

physical spaces on campus including classrooms and other meeting spaces.<sup>6</sup> As conditions for RSO status, Hastings insists that RSOs be noncommercial and limited to students, and that RSOs agree to abide by Hastings's Nondiscrimination Policy, which forbids discrimination on a number of grounds, including religion and sexual orientation. Pursuant to a stipulation between the parties, the Supreme Court majority understood this policy, as applied by Hastings to RSOs, to require RSOs to accept *all* students as members, regardless of their status or beliefs—what the parties and the Court called the “all-comers” policy.<sup>7</sup> In the Supreme Court, CLS disputed this understanding of the policy. Similarly, the dissent raised doubts about whether the all-comers policy was in fact Hastings's official policy, and whether it was evenhandedly enforced.<sup>8</sup> For the purposes of this paper, I will assume the facts as stipulated by the parties and understood by the majority, though (as I discuss later) it makes little difference, given my analysis, whether the actual Hastings policy was the all-comers policy or the written Nondiscrimination Policy.

This litigation arose when, in September of 2004, CLS submitted an application to Hastings for RSO status, accompanied (as required) with a copy of the CLS bylaws. Those bylaws required members and officers of CLS to sign a “Statement of Faith” setting forth certain tenets of Christian faith, and was interpreted by CLS to require the exclusion of anyone who engages in “unrepentant homosexual conduct.”<sup>9</sup> Hastings rejected the CLS application on the grounds that its bylaws were inconsistent with the Hastings Nondiscrimination Policy, and refused CLS an exemption from that policy when it was requested (CLS in turn refused to amend its bylaws). Litigation then commenced. After discovery and the entry of a joint stipulation of facts, the District Court upheld Hastings's policy as a reasonable, viewpoint-neutral restriction on free speech, and the Ninth Circuit affirmed.<sup>10</sup> The Supreme Court then granted certiorari.<sup>11</sup>

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6. *Martinez*, 130 S. Ct. at 2979.

7. *Id.*

8. *Id.* at 3003–06, 3016–19 (Alito, J., dissenting).

9. *Id.* at 2980 & n.3 (majority opinion).

10. *Christian Legal Soc'y v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009).

11. *Martinez*, 131 S. Ct. at 2982.

**B. Majority Opinion**

Justice Ruth Bader Ginsburg wrote an opinion for a five-Justice majority, affirming the Ninth Circuit's decision. The majority described the plaintiff's challenge to Hastings's RSO policy as drawing upon two different strands of the Court's First Amendment jurisprudence: A line of free speech cases setting forth the limits that the government may impose on speech in government property constituting "limited public forums," including funding programs; and a line of cases analyzing whether associational freedom can be constrained by antidiscrimination laws.<sup>12</sup> The majority, however, declined to analyze the claims separately, holding instead that CLS's associational claim should be subsumed into its public forum/free speech claim. The primary reason it gave for this decision was that the two claims "merge" because "[w]ho speaks on [CLS's] behalf . . . colors *what* concept is conveyed."<sup>13</sup> In addition, the majority argued that it would be "anomalous" for it to grant greater protection to the associational than to the speech claim because the two claims were "intertwined," and granting such protection would undermine the government's presumed right to exclude selected speakers and groups from a limited public forum, so long as it is on a viewpoint-neutral basis.<sup>14</sup> Finally, the majority concluded that the associational cases were inapplicable, because they involved direct regulation and not the withholding of benefits.<sup>15</sup> As we will see, this decision by the Court to merge the associational claim into a free speech claim was a critical step—I will argue the critical misstep—in its analysis; but it nonetheless went unremarked on by the dissent.

Having decided to analyze the case under its limited public forum doctrine, the question posed to the Court was whether Hastings's RSO rules were reasonable and viewpoint neutral. The majority concluded easily that they were. Deferring somewhat to Hastings on this point, the Court found the all-comers policy reasonable because it ensured that all students may gain access to programs funded by their fees, because it enabled Hastings to enforce its policy more easily, and because it advanced the pedagogical goal of bringing diverse students together.<sup>16</sup> The majority also emphasized

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12. *Id.* at 2984–85.

13. *Id.* at 2985.

14. *Id.* at 2975.

15. *Id.* at 2985–86.

16. *Id.* at 2988–90.

that denial of RSO status to CLS left substantial other channels of communications open to CLS, including use of chalkboards and some bulletin boards to advertise events, and the use of off-campus resources such as social networking sites to communicate within the group.<sup>17</sup> Finally, the majority found the policy viewpoint neutral because it applied to *all* groups, and so by definition was not discriminating based on viewpoint. Any differential impact that the policy might have on religious groups such as CLS, the majority concluded, was purely incidental.<sup>18</sup> Because the all-comers policy satisfied both prongs of the Court's limited public forum test, the Court found that it did not violate the First Amendment.

### C. Concurring Opinions

Two members of the majority, Justices John Paul Stevens and Anthony Kennedy, also wrote concurring opinions. Justice Stevens's concurrence addressed a question ignored by the majority but highlighted by the dissent, which was whether application of Hastings's *written* Discrimination Policy (as opposed to the all-comers policy) to CLS would violate the First Amendment. Justice Stevens argued that the Nondiscrimination Policy was a neutral regulation of conduct, not a viewpoint-based regulation of speech, and that it applied neutrally as well, prohibiting religious discrimination regardless of the ideological motive for it. He also emphasized differences between the campus context and other, traditional public forums (what he calls "the public square"), concluding that those differences justified greater limits on who may participate in forums such as the RSO program.<sup>19</sup>

Justice Kennedy also filed a concurring opinion. Responding to the dissent's critique of the all-comers policy, Justice Kennedy emphasized the pedagogical and other benefits of the policy. In particular, Justice Kennedy emphasized that the policy was formulated and enforced neutrally by Hastings, and that Hastings has 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 advances these interests, he argued, by ensuring that RSOs do not become enclaves of like-minded thinkers.<sup>20</sup>

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17. *Id.* at 2991.

18. *Id.* at 2993–94.

19. *Id.* at 2995–98 (Stevens, J., concurring).

20. *Id.* at 2998–3000 (Kennedy, J., concurring).

#### D. Dissenting Opinion

Justice Samuel Alito, writing for four Justices, wrote a vehement dissent. Much of the dissent is dedicated to challenging the majority's reading of the record and the facts, arguing that the all-comers policy is not (contrary to the parties' stipulation) the true policy enforced by Hastings, and also arguing that Hastings had enforced its nondiscrimination policies selectively against CLS. More to the point, the dissent also disagreed with the majority about the impact on CLS of being denied RSO status. Justice Alito read the record as demonstrating that the loss of access to campus communications devastated the organization, and that the loss of RSO status, in practice, also deprived CLS of the access to Hastings's physical spaces, including classrooms. Because, he said (quoting CLS), "[t]o university students, the campus is their world," the practical impact of this physical exclusion was to destroy CLS.<sup>21</sup>

Reaching the merits, the dissent largely accepted the majority's doctrinal framework, including in particular the requirements of reasonableness and viewpoint neutrality.<sup>22</sup> The dissent did seem to emphasize CLS's associational rights more than the majority, but that emphasis did not shift the dissent's doctrinal framework any, since the dissent appeared to accept the limited public forum doctrine as the appropriate law to apply to CLS's claim.<sup>23</sup> The dissent's key legal disagreement with the majority was on the question of viewpoint neutrality. Justice Alito argued that as applied to *religious* groups, but no one else, Hastings's written Nondiscrimination Policy was viewpoint based because it precluded religious groups, but no others, from excluding members based on their beliefs. This violated the First Amendment, Justice Alito argued, because requiring CLS to admit members who did not share its beliefs "interfere[d] with the group's ability to convey its views."<sup>24</sup> The dissent thought that nonreligious groups could be barred from religious discrimination, because admitting members without regard to religion would not interfere with their ability to express their views.<sup>25</sup> For CLS, however, the dissent argued that application of the written policy violated the First Amendment.

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21. *Id.* at 3007 (Alito, J., dissenting).

22. *Id.* at 3009.

23. *Id.* at 3010–12.

24. *Id.* at 3011.

25. *Id.* at 3012.

The dissent also thought that the all-comers policy could not be applied to CLS. Most significantly, the dissent thought the policy unreasonable because it homogenizes student groups and so suppresses the sort of dialogue among diverse student groups that the RSO policy was (according to the dissent) designed to foster. Finally, the dissent thought that the all-comers policy as applied by Hastings also was not viewpoint neutral, because it had not been applied neutrally to RSOs other than CLS.

In short, despite the general agreement among the Justices regarding the doctrinal framework to be applied in *Martinez*, the Court split sharply on how those legal principles played out in the case itself. Much of the disagreement centered on the factual question of whether the all-comers policy was a genuine, neutrally applied policy; but there were also legal disagreements among the Justices regarding what viewpoint neutrality means in the context of conduct regulations such as the Nondiscrimination and all-comers policies. In the next part, I will argue that these disagreements are rooted in a profound confusion, shared by all the Justices, about the real legal interests at stake in cases like *Martinez*.

## **II. *Martinez*, Free Speech, and the Right of Association**

To summarize the argument of this part briefly, the key error made by *all* the Justices in *Martinez* was to treat the case as one primarily about the right of free speech, rather than about freedom of association. That error was profound, and it led the Court into a frankly nonsensical analysis; but it was also unsurprising. The Court's miscues in *Martinez* are rooted in half a century of jurisprudence in which the Court has essentially eviscerated the First Amendment's right of association. This part begins by discussing the Court's historical treatment of the association right and its relationship to free speech. It then discusses why *Martinez* is at its heart a case about association, not speech, and how a nuanced understanding of the association right clarifies the issues in *Martinez*.

**A. Free Speech and Association: A Misunderstood Relationship**<sup>26</sup>

The First Amendment to the United States Constitution reads as follows:

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.<sup>27</sup>

Putting aside the first two clauses regarding freedom of religion, the Amendment protects four distinct rights: freedom of speech, freedom of the press, freedom to peaceably assemble, and freedom to petition the government. The Court has also long held that the First Amendment protects an implicit right to associate with fellow citizens to pursue common political and social goals.<sup>28</sup> Yet it is fair to say that aside from the religion clauses, First Amendment case law and scholarship overwhelmingly focuses on the free speech clause, essentially ignoring the rest of the Amendment. This neglect of other First Amendment protections, especially of association, has substantially distorted the Court's First Amendment analysis. In other work, I have described in detail how the Court's treatment of the associational right became distorted over the past century, and what a revived associational right might look like.<sup>29</sup> I briefly summarize my arguments here.

Like the free speech clause, sustained attention to the association right in the Supreme Court began in the post-World War I era. In particular, the first sustained attention to association by the Court was in *Whitney v. California* in 1927,<sup>30</sup> in which both the majority opinion and Justice Louis Brandeis's famous concurring opinion appeared to recognize at least a potential constitutional right on the part of Anita Whitney to assemble with or associate with (the Court appeared to consider the concepts interchangeable) the Communist

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26. See Richard A. Posner, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1992).

27. U.S. CONST. amend. I.

28. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958).

29. See Bhagwat, *supra* note 5, at 983–94. The discussion in this section draws heavily upon this piece.

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



Labor Party. Significantly, both the majority and Justice Brandeis treated the right as a distinct right, separate from free speech, and appeared to root that right in the Assembly Clause of the First Amendment.<sup>31</sup> In the three decades following *Whitney*, the Court applied these assembly/association rights in a series of cases,<sup>32</sup> consistently treating them as independent rights which are “cognate to those of free speech and free press and . . . equally fundamental.”<sup>33</sup> During this period, then, the Court considered freedoms of association and assembly to be interchangeable rights, it treated those rights as co-equal and “cognate” to other First Amendment rights, and it considered those rights to be firmly rooted in the text of the First Amendment.

Then, a critical change occurred in the Court’s treatment of association. The key case was the Court’s 1958 decision in *NAACP v. Alabama ex rel. Patterson*.<sup>34</sup> While the *NAACP* Court upheld an associational claim, it fundamentally changed its treatment of the relevant right in two ways. First, the Court began to emphasize “association” rather than “assembly” as the relevant right. Second, the Court described association not as an *independent* right but as a right derivative of free speech, the primary significance of which was as a means to facilitate free speech.<sup>35</sup> The freestanding, textually rooted right of the early cases has been lost. Furthermore, since *NAACP* the Court has adhered to its reinterpretation of the association right. Most significantly, the Court’s two most important modern association cases, *Roberts v. United States Jaycees*<sup>36</sup> and *Boy Scouts of America v. Dale*,<sup>37</sup> 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. In *Roberts* the Court rejected the Jaycees’ claim of an associational right to refuse to admit women as members because it concluded that including women would not interfere with the organization’s ability to express its views.<sup>38</sup> And while in *Dale* the Court did recognize the Boy Scouts’

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31. See *id.* at 371 (majority opinion); *id.* at 372 (Brandeis, J. concurring).

32. See *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Thomas v. Collins*, 323 U.S. 516 (1945); and *Am. Comm’ns Ass’n. v. Douds*, 339 U.S. 382 (1950).

33. *DeJonge*, 299 U.S. at 364.

34. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958).

35. *Id.* at 461.

36. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

37. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

38. *Roberts*, 468 U.S. at 626–27.

associational right to exclude a gay assistant scoutmaster, it was only because of its conclusion that inclusion of Dale as a scoutmaster interfered with the Scouts' ability to express a message of hostility to homosexuality.<sup>39</sup> In short, since 1958 the Court has consistently subsumed the association right into the free speech right, to the detriment of associational freedoms. In this respect, the *Martinez* Court's failure to give serious consideration to CLS's associational claim is entirely consistent with recent practice.

The final piece of the puzzle is to understand that both historical scholarship and First Amendment theory strongly support the view that the Court's original treatment of association and assembly as independent, important rights was more faithful to the text and purposes of the First Amendment than its modern approach. A spate of recent scholarship has clearly demonstrated the deep, historical roots of the rights of assembly and association (as well as the related right to petition the government) and their significance in pre-Revolutionary England and in the early years of the American Republic.<sup>40</sup> That scholarship also reveals that these rights, though independent, were also closely interrelated and often exercised in tandem.<sup>41</sup>

Moreover, neither the independent significance of the assembly/association right nor the relationship between the various rights protected by the First Amendment should be surprising when viewed through a theoretical lens. I begin with the presumption that the primary purpose of the First Amendment, perhaps other than the Religion Clauses, is to protect and effectuate democratic self-governance.<sup>42</sup> Critically, however, it is not just free speech that contributes to democracy. Assembly, association, and petitioning also contribute directly and critically to self-rule, by permitting citizens to organize themselves independently of the state, develop their thoughts and values collectively, and communicate their views to public officials. These activities are no less fundamental to self-

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39. *Dale*, 530 U.S. at 650–51, 653.

40. See Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009); John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565 (2010) [hereinafter Inazu, *Forgotten Freedom*]; John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010) [hereinafter, Inazu, *Right of Association*]; Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639 (2002).

41. See, e.g., Mazzone, 77 WASH. L. REV. at 722–23.

42. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 121–65 (1993).

governance than speech and publication. Moreover, these rights operate in tandem, each facilitating the exercise of other rights of self-governance. This is what the Court's early description of the key First Amendment political liberties as "cognate" means.<sup>43</sup>

### **B. Association in *CLS v. Martinez***

The above discussion helps to clarify the analytic failures that underlay both the majority and dissenting opinions in *CLS v. Martinez*. Following recent precedent, the Justices considered the primary right at issue in *Martinez* to be free speech, treating association as a minor and derivative right, relevant only insofar as intrusions into CLS's associational autonomy interfered with the organization's ability to express itself. This, however, is clearly incorrect. The primary goals of CLS as an organization were not communicative, they were to provide a forum in which similarly thinking individuals could share and reaffirm their values and worship together. Moreover, the primary burden imposed by Hastings was not on CLS's ability to communicate; rather, it was on its ability to select its members—in other words, on CLS members' choice to associate with whomever they want. In this regard, the dissent's arguments that CLS sought to express a viewpoint through its membership requirements, and that imposing nondiscrimination requirements interfered with its ability to express its opinions, are deeply unconvincing (and have no factual basis in the record).<sup>44</sup> Nothing in the all-comers policy stopped CLS from adhering to and expressing its thoughts, insofar as it desired to do so.<sup>45</sup> This was a case about association.

Moreover, recasting *CLS v. Martinez* as an associational case substantially strengthens CLS's constitutional claims. As a matter of free speech doctrine, CLS's claims based on stipulated facts before the Court were quite weak, for all of the reasons given by the majority.<sup>46</sup> The all-comers policy was obviously a neutral regulation of conduct (absent proof of pretext), and any impact on CLS's ability

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43. For a fuller discussion of these ideas, see Bhagwat, *supra* note 5, at 995–99.

44. *Martinez*, 130 S. Ct. at 3009 n.2, 3011 (Alito, J., dissenting).

45. One caveat is necessary here. If, in fact, the all-comers policy subjected CLS to a "hostile takeover" by unfriendly students as posited by the dissent, *id.* at 3019 (Alito, J., dissenting), such interference might exist. Such a takeover seems extraordinarily unlikely however, and there was no evidence in the record of such a takeover *ever* occurring at Hastings. *Id.* at 2992 (majority opinion).

46. *Id.* at 2988–95.

to speak was surely incidental.<sup>47</sup> Analyzing CLS's argument through the lens of association, however, complicates the analysis. This is because Hastings's regulation of RSO membership, whether through the all-comers policy or the written Nondiscrimination Policy, is a direct intrusion on the freedom to choose with whom one wishes to associate, which is surely at the heart of the associational right. The impact of those rules on association is thus not incidental; it is direct, raising core constitutional concerns. Moreover, with respect to the written Nondiscrimination Policy, while application of that policy might not discriminate on the basis of speech viewpoint, it does represent a substantive, governmental preference limiting the associational freedoms of citizens. Such restrictions are highly problematic from the perspective of self-governance and must be carefully scrutinized. Without the ability to select its own members, associations of citizens cannot effectively formulate, identify, and communicate their views on cultural and political questions or otherwise provide a vehicle for citizens to exercise their sovereign authority over the state. This is also why the Court's decision in *Boy Scouts of America v. Dale*—upholding the Boys Scouts' right to discriminate in the selection of their leadership—was probably correct, no matter how lacking the Court's reasoning.<sup>48</sup>

*Martinez*, however, is not *Dale*. *Dale* involved a flat regulation of associational membership and so was a relatively easy case. *Martinez* involves the questions of government sponsorship and subsidies for associations, as well as access by associations to the government's physical property. The Court, unsurprisingly, given its modern denuding of the association right, has not previously given serious consideration to these questions and failed to do so again in *Martinez* because of its dismissal of the association claims. Properly understood, however, these questions lie at the heart of the *Martinez* litigation, and it is to them that we now turn.

### III. State Sponsorship of Associations

The prior section of this paper established that contrary to the mode of analysis in a series of modern Supreme Court cases, the right of association should be understood as an important, independent

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47. CLS's free speech challenge to the written Nondiscrimination Policy, not considered by the majority, was also frankly quite weak. See generally Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919 (2006).

48. See Bhagwat, *supra* note 5, at 1001–02.

liberty implicitly guaranteed by the First Amendment, which derives primarily from the Assembly Clause of the First Amendment. Furthermore, once the properly reinvigorated scope of the association right is accepted, it becomes clear that application of nondiscrimination rules to associations such as CLS raise serious First Amendment concerns. This is not because such rules incidentally impact CLS's ability to speak, but because such rules directly limit the right of CLS members to define the boundaries of their association. Therefore, if the State of California sought to directly regulate CLS's choice of members, either flatly through an all-comers rule *or* on specific, limited grounds through the enforcement of nondiscrimination laws, there seems little doubt that CLS could make out a valid First Amendment claim.

Yet *CLS v. Martinez* is not a case about direct regulation. Instead, it is a case about state support, sponsorship, and recognition. Recall that Hastings never *required* CLS to admit any members. What it said was that CLS must comply with Hastings's policies if CLS wanted RSO status.<sup>49</sup> CLS remained free to reject such status and continue to enforce any membership rules it pleased. The question raised by the *Martinez* case, then, is what restrictions the First Amendment places on the power of the state to condition official sponsorship and subsidies on compliance with rules of conduct which would otherwise violate the Constitution. And at a broader level, the case raises the question of what the appropriate relationship is between democratic associations such as CLS and the government.

Seen through this lens, it becomes apparent that there is a fundamental contradiction at the heart of CLS's claim. To understand why, it is necessary to consider the nature and purposes of the associational right protected by the First Amendment. As discussed above, the fundamental function of freedom of association, like all of the political (i.e., nonreligious) liberties protected by the First Amendment, is to enable self-governance. In particular, the assembly and association rights enable groups of citizens to gather, whether in an ad hoc assembly or in more permanent associations,<sup>50</sup> in order to share their views and, in the original language of the Assembly Clause, "consult for the common good."<sup>51</sup> The democratic

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49. *Martinez*, 130 S. Ct. at 2986.

50. *See generally* Inazu, *Right of Association*, *supra* note 40 at 491.

51. *See* Inazu, *Forgotten Freedom*, *supra* note 40 at 571–73 (discussing drafting history of the Assembly Clause, and the eventual omission of the phrase "consult for the common good" from the final draft).

function of associations is not, however, limited to just speaking or “consulting.” Associations also play a critical role in value formation by providing structures within which citizens can share and shape their political and cultural values, a process with only a tenuous connection to speech, as such.<sup>52</sup> It is all of these functions in combination that establish the significance of association and assembly to self-governance.

A critical assumption underlying this analysis is that for associations to play their democratic role, they must be autonomous from the state. At the core of the American experiment is the concept of popular sovereignty—that here the People rule, and rulers are ultimately subservient to the People. For that principle to retain meaning—for self-governance to have substance—citizens, the sovereign People, must be able to form their values, develop their opinions, speak, print, and petition their officials jointly and free from state interference. This need for autonomy is fundamentally at odds with attempts to seek state sponsorship or approval—such a relationship is fundamentally inconsistent with the principle that citizens, not rulers, constitute the ultimate authority in our system of government. But the RSO status that CLS was seeking was essentially a plea for state sponsorship and recognition, indeed a plea for state subsidization. It is difficult to see, however, how a state-sponsored association can play the democratic role that the First Amendment envisions for associations. Such an association is necessarily beholden to, or even a part of, the state’s apparatus. But if that is the case, necessarily the association cannot provide a space for citizens to gather free from the state, or a place where they exercise their ultimate sovereign power.

The underlying contradiction in CLS’s quest for state recognition is this: Any system of state sponsorship, recognition, or subsidization for associations necessarily will require *some* rules of conduct and even belief. Even if Hastings had had an obligation to grant RSO status to CLS, *no one* believes that Hastings has an obligation to recognize and fund, say, a student chapter of the Ku Klux Klan, or the Nazi Party.<sup>53</sup> Hastings could also, presumably, limit its RSO program to groups whose objectives the school considered sufficiently related

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52. For a discussion of the role of associations in value formation, see Seana Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 840–41, 865–66, 869 (2005).

53. See, e.g., Reply Brief of Petitioner at 10, *Christian Legal Society v. Martinez* 130 S. Ct. 2971 (2010) No. 08-1371, 2009 U.S. S. Ct. Briefs LEXIS 2093.

to its program of legal education. Yet once the concession is made that Hastings possesses the power to regulate the membership, activities, and objectives of RSOs, the game is lost from a democratic perspective. Such associations have inevitably surrendered the autonomy that a democratic association requires under the First Amendment.

A further point might be made here, about the relationship between this principle of autonomy and the Supreme Court's free speech jurisprudence. The Court has held that under certain circumstances (in particular, when the government has created a metaphysical "forum"), the government has an obligation to fund the free speech of groups, including student groups, without regard to the viewpoints expressed in the subsidized speech.<sup>54</sup> Even if the Court is correct in this regard (about which serious doubts might be raised), there are good reasons to treat association differently from speech. It may be possible to envision a truly neutral, one-time or episodic program of governmental funding for speakers which might maintain those speakers' autonomy, and so their contributions to self-governance as envisioned by the First Amendment. Associations, however, are complex, internally structured, and durable institutions. Indeed, it is precisely their longevity and internal structure that permits them to participate in self-governance effectively, in contrast to ad hoc assemblies, which while necessary, cannot alone provide a sufficient basis for citizen participation in government.<sup>55</sup> But it is precisely this permanence that makes state sponsorship so dangerous to associations and suggests that it would undermine their democratic functions. A long-term relationship with the state, with ongoing oversight and regulation and repeated requests for funding (with the opportunities for influence that that entails) creates an intolerable risk that the autonomy of an association will be undermined over time as a product of state sponsorship and funding.<sup>56</sup> And

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54. The prime example is *Rosenberger v. Rectors and Visitors of University of Virginia*, 515 U.S. 819 (1995). Cf. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (upholding restrict on funding, but only because it was not found to discriminate based on viewpoint).

55. A contrast might be drawn here between the Tea Party Movement, obviously a democratic association (or group of associations), and Glenn Beck's "Restoring Honor" rally in Washington, D.C. on August 28, 2010. Surely the Tea Party has greater significance for self-rule than a one-time rally.

56. The sort of state sponsorship or financial support I describe here does not include such generally available, non-intrusive benefits as nonprofit, tax-exempt status, which pose little or no risk to associational autonomy. *But see* *Regan v. Taxation with Representation*

concomitantly, because an association which relies upon state sponsorship or funds for its existence is essentially abdicating its democratic role, there can be no First Amendment right to such sponsorship since the resulting association is no longer within the protections of the First Amendment. This is not to say that the government may not voluntarily sponsor associations such as RSOs, and associations may not voluntarily accept state sponsorship or funds, but the First Amendment has little or nothing to say on this subject.<sup>57</sup>

Applying this reasoning to the facts of *Martinez*, the implications are clear. CLS does not, and by its nature cannot, have a First Amendment right to sponsorship, recognition, or funding from Hastings. Any such right flies in the face of the First Amendment's structural functions, and so is self-contradictory. It is only because of the mistaken invocation by both the majority and the dissent of free speech doctrine that CLS's claim had any credence at all. From an associational perspective, which is surely the correct perspective in this case, CLS's claim is incoherent.

#### IV. Associations and the Public Forum

The above analysis might seem to suggest that none of CLS's claims had any weight and were properly denied across the board. In fact, however, the truth is more complex. The reason for this is that the denial by Hastings of RSO status did not just deprive CLS of state sponsorship and recognition—i.e., the right to use the Hastings name—and state funding; it also deprived CLS of some very tangible benefits, including notably access to campus communications systems (including email) and free use of on-campus meeting spaces. None of the Justices considered this aspect of the case separately, though admittedly the dissent does emphasize that the primary impact of the loss of RSO status for CLS was lack of access to campus space, not loss of funding.<sup>58</sup> Presumably this was because the parties posed the issue in the case as the availability of RSO status alone, without differentiating between the benefits which accrued to RSOs. For that

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of Washington, 461 U.S. 540, 544 (1983) (treating tax-exempt status as equivalent to a direct subsidy). The Hastings RSO program, however, went well beyond tax-exempt status by providing positive sponsorship and financial support for participants' activities.

57. I say "little or nothing" because it may be that the First Amendment should be read to create barriers to the state's cooptation of existing, private associations; but that is a topic beyond the scope of this paper.

58. *Martinez*, 130 S. Ct. at 3006–07 (Alito, J., dissenting).



reason, the Court was probably right not to consider the question of access to campus space separately. But what if CLS had made the argument that even if CLS was properly denied RSO status, Hastings could not deprive unofficial student groups like CLS of access to campus communications and physical spaces? Such a claim, it turns out, poses a far more difficult question than a claim to state sponsorship and funding.

The question of what First Amendment rights private individuals or groups have to access government-owned property is governed by the Supreme Court's "public forum" doctrine.<sup>59</sup> Unsurprisingly, however, given the content of the rest of the Court's nonreligion First Amendment cases, the public forum doctrine has in modern times been understood as concerning *free speech* rights on public property, not other First Amendment liberties.<sup>60</sup> Thus its application to claims of association and assembly is far from clear. Moreover, even with respect to free speech, the public forum doctrine is notable for its incoherence and malleability. For example, the *Martinez* majority describes the public forum doctrine as dividing government property into three categories: Traditional public forums, designated public forums, and limited public forums.<sup>61</sup> In the former two categories, the government is severely restricted in its power to limit speech, but in the latter it may limit both the content of speech and the identity of speakers, so long as the limits are reasonable and viewpoint neutral.<sup>62</sup> Oddly, however, in earlier decisions the Court had described the third category of less protected property as "nonpublic forums,"<sup>63</sup> and described limited public forums as a species of designated forums, subject to greater access rights.<sup>64</sup> More to the point for our purposes, outside of the category of traditional public forums (which has been strictly limited to public streets and parks), the Court has granted the government almost unlimited discretion to define property as it

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59. See, e.g., *Hague v. Comm'n. for Indus. Org.*, 307 U.S. 496 (1939); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *United States v. Grace*, 461 U.S. 171 (1983); *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992).

60. See *Martinez*, 130 S. Ct. at 2984 (describing public forum doctrine as determining "when a government entity, in regulating property in its charge, may place limitations on *speech*" (emphasis added)); *Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989) (discussing limits public forum doctrine places on government's power to regulate "expression" and "speech").

61. *Martinez*, 130 S. Ct. at 2984 n.11.

62. *Id.*

63. See, e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985).

64. *Id.* at 803.

desires and therefore to deny property forum status by fiat.<sup>65</sup> The net result of such decisions is that except on occasion, the modern public forum doctrine does not provide robust protection for speech rights in public spaces.

Whatever the merits of the public forum doctrine as applied to free speech, there are powerful reasons to think that a different approach is needed when assembly and association rights are at stake. The modern Court has utterly ignored the problem of associational access to public spaces, subsuming association and assembly claims under free speech. It should be noted that this was not always so; the Court's first important public forum case, decided during the same period that the Court was first recognizing assembly and association rights, explicitly recognized the right of citizens to *assemble* in public places and consult with each other, as well as to express their views.<sup>66</sup> The modern subsuming of assembly and association claims into the speech right has caused the Court to miss an important point, which is that the claim that associations and assemblies have for access to public space is *stronger* than the claim of speakers alone. The reason for this, quite simply, is that while speech and publication are undoubtedly facilitated by the use of public spaces, public assembly simply cannot occur without public spaces. Where else, after all, are citizens to gather except on commonly held lands, or in public buildings? Certainly during the Framing era, but even today, the paucity of private spaces capable of holding significant citizen assemblies means that assembly, almost by definition, means assembly on public property. This in turn means that the textually protected right of assembly necessarily presumes a right to use public spaces, and so access to such spaces cannot be at the discretion or whim of the very state officials that assemblies are meant to exercise control over. That is the insight which led the Court to create the public forum doctrine in the first place.<sup>67</sup>

The relationship between association and public spaces is slightly more complex, but in the end no more basic. An association of individuals can of course exist wholly in private, since associations constitute longstanding relationships. However, for an association to have meaning and perform its democratic functions of consultation and value formation, members must be able to gather together and

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65. See *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998).

66. *Hague*, 307 U.S. at 513–16.

67. *Id.* at 515–16.

communicate with each other. During the Framing era, given limited communications technologies and the expense associated with publication, gathering often had to be face-to-face. And again, except for the smallest associations, that required access to public spaces—indeed, the fact that associations did and do assemble in person is why the association and assembly right are so deeply intertwined. Today, it is true, associations can exchange communications, and even virtually “gather,” using electronic communications. Notwithstanding the power of resources such as social networking sites, however, there is still enormous value to face-to-face meetings. Such gatherings strengthen bonds, permit individuals to reaffirm their common values and commitments, and may provide an essential means to communicating an association’s views to public officials, in a way that online exchanges cannot accomplish.<sup>68</sup> Thus, as with assembly, an aspect of the right of association is a right of access to public spaces.

Of course, no right to access public spaces can be absolute. The government uses its property for many purposes, and must have some authority to balance its managerial needs against the needs and desires of citizens, even when citizens act in their sovereign capacity pursuant to the First Amendment. In modern times, as noted earlier, the balance the Court has drawn between the government and free speech rights has veered decisively in the government’s favor. That choice has been strongly criticized, not least by members of the Court itself.<sup>69</sup> Perhaps the Court has drawn this balance because, in modern times and especially with the advent of electronic communications, speech and publication are less dependent on use of the public space than they once were. In any event, that question is beyond the scope of this paper. With respect to assembly and association, however, the above analysis indicates that the balance must draw more favorably to the First Amendment, because assembly and association remain, for practical purposes, highly dependent on public spaces. As such, granting the state the power to dictate access to its property by fiat is essentially the power to denude these rights, a result surely forbidden by the First Amendment. And this in turn indicates that the modern public forum doctrine, which grants public officials essentially unlimited discretion to control access to public spaces other than the narrowly defined “traditional” public forums, should not be carried

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68. For a discussion of the relationship between public gatherings and the First Amendment petition right, see generally Ronald Krotoszynski, Jr. & Clint Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239 (2008).

69. See *Krishna Consciousness*, 505 U.S. at 693–703 (Kennedy, J., concurring).

into the assembly and association arenas.<sup>70</sup> A new approach is needed.

This is not the time to attempt to formulate a fully formed set of rules governing associational access to public spaces. At a minimum, however, it seems clear that the Court's current, three-tiered public forum doctrine, with its emphasis on categorizing and blunt rules,<sup>71</sup> is not up to this task. Instead, a more nuanced, case-by-case approach, which takes seriously the proposition that access to public spaces for the purposes of association and assembly is a *right*, not a privilege doled out by public officials, seems at least a good starting point. Consider now Hastings, or any public university or college campus. Students typically spend their entire day on campus. If they live in a dormitory, as many students do, they may live, eat, sleep, work, and play on campus—spending their entire lives for weeks on end almost completely on university property. As Justice Alito put it, for “students, the campus is their world.”<sup>72</sup> University students, who are indeed adults, presumably enjoy full First Amendment rights, including rights of association and assembly. If they are to exercise those rights, however, it often would be on campus. Where else can student associations meet, and how else can they seek out others to associate with, if not on campus greens, through campus communications, and in campus classrooms? Considered from the perspective of a meaningful associational right for students, some right of access to campus spaces is clearly required by the First Amendment.

The implications of this conclusion for *CLS v. Martinez* seem fairly straightforward. While Hastings was justified in declining to give CLS the use of its name, or access to its funds, it was not free to effectively force CLS off campus. Whether or not Hastings actually did so is in fact disputed—the dissent suggests that it did,<sup>73</sup> but the majority asserts otherwise.<sup>74</sup> What is clear, however, is that at a minimum CLS's access to meeting space on campus was substantially

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70. *See id.* at 695–96 (Kennedy, J., concurring) (recognizing this point and explicitly linking access to the public forum with the assembly right).

71. *See supra* notes 59–65 & accompanying text.

72. *Martinez*, 130 S. Ct. at 3007 (Alito, J., dissenting) (quoting Reply Brief for Petitioner 13, *supra* note 53); *see also* *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (recognizing that “the campus of a public university, at least for its students, possesses many of the characteristics of a public forum”).

73. *Martinez*, 130 S. Ct. at 3006 (Alito, J., dissenting).

74. *Id.* at 2991 (majority opinion).

curtailed, if not eliminated, when it was denied RSO status. Furthermore, it is undisputed that CLS's access to certain campus communications systems, including notably campus email, a weekly newsletter, and a Student Organizations Fair, was cut off by that denial.<sup>75</sup> These facts raise serious First Amendment concerns.<sup>76</sup> At a minimum, the First Amendment would seem to give student associations, even (perhaps especially) unrecognized ones, some right to meet on campus, to use campus rooms and open spaces.<sup>77</sup> Hastings's concession that CLS could use campus spaces on the same terms as "community groups . . . [and] sometimes on a pay basis" was inadequate to meet its obligations in this regard.<sup>78</sup> Similarly, CLS's exclusion from campus communications seems too broad, even though (as with campus spaces) some regulation of access is surely permissible to guard against misuse. On-campus bulletin boards and the Student Organizations Fair are physical spaces to which reasonable access must be permitted. An email system is not, of course, an actual physical space. Given its communicative functions, however, and the fact that it is generally open to student use, it seems reasonable to analogize campus email systems to a "virtual public space" to which access must be granted, again with reasonable restrictions. Of course, universities have no obligation to actually fund or maintain an email system or bulletin board, any more than cities have an obligation to maintain parks. But if such spaces (virtual or real) are created, student associations must be given access to them. Finally, and contrary to the majority,<sup>79</sup> the existence of private electronic communications media such as social-networking sites does not obviate the obligation of access. For one thing, the majority substantially exaggerates the utility of such media in accomplishing an association's goals,<sup>80</sup> especially in recruiting *new* members or communicating an association's views to the broader community (as

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75. *Id.* at 2979.

76. It should be reiterated that CLS did *not* litigate a right of access to campus facilities separately from its claim to RSO status. The discussion in the text considers only what a reviewing court should have done if such separate claims had been brought.

77. The need for access to classrooms and other meeting spaces, not just campus greens resembling parks, is accentuated by the facts of this case. Because Hastings is an urban campus, it possesses essentially no open spaces. As such, denial of access to rooms, assuming this occurred, would have been essentially the equivalent of denial of access to the campus itself.

78. *Id.* at 3007 (Alito, J., dissenting).

79. *Id.* at 2991 (majority opinion).

80. *Id.*

opposed to communicating within the membership). Second, and more generally, the existence of some private spaces useful to associations cannot and should not eliminate the right of access to public spaces if associational freedoms are not to suffer death by a thousand cuts.

Of course, the right of access to public spaces cannot be an unlimited one—as I began by noting, such access must be balanced against the government’s legitimate, managerial needs. Moreover, 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.<sup>81</sup> Rules governing access to classrooms can, of course, prioritize actual classes, and limits can also be set on the sending of all-campus emails, including perhaps even preclearance requirements, to avoid jamming inboxes. The key, however, is to ensure that school officials are not limiting access by diktat. To quote Justice Kennedy’s separate writing in an earlier public forum case, “the inquiry must be an objective one, based on the actual, physical characteristics and uses of the property.”<sup>82</sup> School officials must be able to demonstrate that any rule which places significant limits on student groups’ access to campus spaces (including email) is reasonably necessary to manage the use of its property, or to guard against a realistic threat of misuse, and is applied neutrally. The alternative approach, encapsulated in the Court’s current public forum doctrine, gives officials virtually unreviewable discretion to limit access, subject only to a viewpoint-neutrality requirement. Whatever the merits of this approach for speech, it goes too far in permitting limits on association and assembly.<sup>83</sup>

Finally, some attention should be given to what sorts of associations enjoy a First Amendment right of access to campus

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81. See *Widmar*, 454 U.S. at 267 n.5 (“A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.”).

82. *Krishna Consciousness*, 505 U.S. at 695 (Kennedy, J., concurring).

83. Indeed, arguably the Court’s decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), implicitly recognizes this point. *Widmar* struck down a campus rule granting access to campus facilities to student groups, but excluding religious groups, on the dubious reasoning that such a restriction was viewpoint based. Perhaps the better reading of the case is that the Court was recognizing, implicitly, that access to meeting places is the *sine qua non* for the vitality of associational life for *all* groups, especially on college campuses. See also *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (applying holding of *Widmar* to grade schools).

spaces. First and foremost, it should be clear that only associations which further the goals of the First Amendment—in other words, those whose functions are relevant to self-governance—enjoy such a right. For reasons that I have explored in more detail elsewhere,<sup>84</sup> this means at a minimum that associations with primarily commercial goals are clearly not the sorts of associations protected by the First Amendment, and so not entitled to access to campus spaces. In other words, students have no right to use campus facilities or email to sell things, or otherwise advance their economic interests. In addition (though this is hardly likely to be an issue on college campuses), organizations whose goals or methods are primarily criminal are also not entitled to protection.<sup>85</sup> Finally, it seems reasonable for campuses to limit access to their facilities to *student* groups, meaning associations organized by and composed of students.<sup>86</sup> This is not because student associations are, as an abstract matter, entitled to greater constitutional protection than nonstudent or mixed associations. It follows rather from the nature of a university campus. Unlike a park or a street, which are forums open to, and held for the benefit of, the public generally, campuses are forums only for the university community. That is both their purpose, and their objectively defined use. Moreover, even university employees are in a different position from students, because they are far less likely to be as thoroughly tied to the campus as a student—in other words, the campus is not typically *their* world (much less is it the world of the general public).

Put differently, if rules governing access to public places may and indeed must take account of context and the general use to which that property is put, universities can adopt rules which recognize that campus spaces serve students, not the general public. However,

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84. Bhagwat, *supra* note 5, at 999–1001. It should be noted that the range of associations whose goals are relevant to self-governance is *not* limited to associations which engage in either political activities or expression. Rather, this term encompasses a wide range of social, religious, or other associations.

85. *See id.* at 39–40.

86. A difficult question is raised by an association formed by students and composed primarily of students, but which has a few nonstudent members. That Hastings refused to grant RSO status to such groups, *Martinez*, 130 S. Ct. at 2985–86, is surely permissible. It is less clear whether Hastings or other universities should be permitted to deny such groups any access to campus spaces, but it may be that a bright-line rule limiting access to student-only groups is permissible, in order to avoid the inevitable line-drawing problems raised by any other approach. For a good discussion, see Volokh, *supra* note 47, at 1940–41.

contrary to what the *Martinez* majority argued,<sup>87</sup> the fact that universities are permitted to limit access to their property to student groups does *not* mean that any and all other restrictions on *which* student groups may be granted use of university facilities is permitted, so long as the minimal requirement of viewpoint neutrality is met. A rule limiting access to student groups is justified by the nature of the public space that is a university campus. Other rules restricting access must be similarly justified, and must be shown not to impose excessive obstacles to student associations and assemblies.

### Conclusion

This article makes a number of points regarding the *CLS v. Martinez* decision and more generally about current First Amendment law. First, it argues that the Supreme Court erred in analyzing *Martinez* as a case about free speech. *Martinez* is a case about the right of association. The Christian Law Society is an association which sought to define the bounds of its association, not particularly to speak. Second, this article argues that current First Amendment doctrine inadequately protects the right of association. In the modern era, the Supreme Court has departed from the historical understanding of the association right and from the Court's own early case law on association and assembly, both of which treated association as an independent First Amendment liberty linked to and derived primarily from the Assembly Clause of the First Amendment. The modern Court, however, has treated association as a right derivative of, and subsidiary to free speech. This approach profoundly under-appreciates the significance of, and under-protects, the First Amendment right of association. Third, this article argues that when the *Martinez* case is analyzed from an associational lens, it becomes clear that CLS's primary claim, for official recognition by Hastings including the use of the Hastings name and access to funds from Hastings, cannot stand. The First Amendment protects democratic associations which are independent of and autonomous from the state. This principle cannot be reconciled with the sort of official sponsorship sought by CLS. Finally, however, the article concludes that if CLS had separately sought access to Hastings's campus facilities, including meeting space and use of communications media such as email (which it did not), it would have had a much more powerful claim—in short, had it sought that access, CLS would

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87. *Martinez*, 130 S. Ct. at 2985–86.



probably have been entitled to half a pie. The nature of the association right, and the assembly right from which it derives, necessarily encompasses some right to use public spaces. Furthermore, that right should extend to university campuses, not just traditional public forums such as streets and parks. Current law, in the shape of the public forum doctrine, focuses narrowly on the right of free speech, and as a result fails to adequately protect the right of assemblies and associations to gather in public spaces. This is a grave error because it denies democratic associations such as CLS the independence and autonomy that they require.

Of course, none of the above analysis rests on current law. Furthermore, the evisceration of both the associational right and the public forum doctrine seem quite entrenched in the Supreme Court's decisions at this stage. Hopefully, however, in the coming years a rethinking will occur. Just as in the wider world, so also in the university and law school settings, democratic associations and assemblies play a fundamental role in the process of self-governance through which citizens, the sovereign People, exercise control over their government. Access to government property is the lifeblood of such associations and assemblies. The First Amendment therefore *must* be read to protect the autonomy of such associations, and their right to access public places, if the Amendment is to continue to play its fundamental role in our constitutional system.

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