University of San Francisco School of Law

University of San Francisco Law Research Paper No. 2011-07

HOW EQUALITY CONSTITUTES LIBERTY: THE ALIGNMENT OF CLS V. MARTINEZ

Julie A. Nice

Electronic copy available at: http://ssrn.com/abstract=1769863

How Equality Constitutes Liberty: The Alignment of *CLS v. Martinez*

by JULIE A. NICE*

Across the constitutional doctrines protecting individual liberty from governmental interference, judicial inquiry often focuses on the unequal infringement of liberty. Many of the most important individual rights have emerged from the synergy between equality and liberty.[1] At pivotal points in major constitutional pronouncements, the United States Supreme Court has acknowledged this linkage between liberty and equality.[2] But the Court has not yet provided any framework for understanding the various ways that liberty and equality interrelate. Neither has any consensus developed around any scholarly attempt to understand the relationship between liberty and equality.[3] Without any grand theory,

* Herbst Foundation Professor of Law, University of San Francisco School of Law. I offer my appreciation to the editors, the panelists, and other participants at the Hastings Symposium held on October 1, 2010.

1. The classic examples include the early Substantive Due Process decisions in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), which involved the government's interference with the rights of parents to raise their children by discriminating against their ability to educate children in parochial schools or in the German language, respectively. Similarly, the Equal Protection decision in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), effectively established constitutional protection of the liberty to procreate by invalidating the state's "clear, pointed, unmistakable discrimination" against procreation by armed robbers as compared to embezzlers. *Id*. at 541. In the contraception trilogy of decisions, the Court first used liberty to recognize a right to contraception in the privacy of the marital home in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and then used equality to extend this liberty to unmarried individuals in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and to minors in *Carey v. Population Services International*, 431 U.S. 678 (1977).

2. For example, in *Lawrence v. Texas*, the Court noted: "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." 539 U.S. 558, 575 (2003).

3. Some important recent attempts include Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99 (2007) and Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33

Electronic copy available at: http://ssrn.com/abstract=1769863

the search for understanding this important relationship is thus left to induction, as scholars examine one case at a time to glean both specific and general insights, resembling a sort of common law constitutionalism.[4] This common law approach has generated a variety of possibilities. To briefly summarize the major options, liberty and equality might be distinguished and treated as separate and independent infringements,[5] one might be incorporated or subsumed within the other,[6] one might sequentially generate the other,[7] the two might be combined or "stacked,"[8] they might be understood as interacting in a mutually constitutive manner,[9] and/or they simply might conflict with one another.

This article continues the inductive search for constitutional meaning, specifically exploring how the United States Supreme Court's recent decision in *Christian Legal Society v. Martinez* understands the linkage between liberty and equality in the context of expressive association.[10] Using a close examination of the *Martinez*

MCGEORGE L. REV. 473 (2002). My own modest prior effort explored the mutually constitutive nature of equality and liberty by examining how rights are effectively constituted in relation to the classes that do and do not hold them, and how classes are effectively constituted in relation to the rights they do and do not hold. *See* Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. ILL. L. REV. 1209 (1999).

4. For a provocative recent effort toward a grand theory of free speech doctrine, see Joshua P. Davis & Joshua D. Rosenberg, *The Inherent Structure of Free Speech Law*, 19 WM. & MARY BILL RTS. J. 131 (2010).

5. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

6. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954) *supplemented sub nom.* Brown v. Bd. of Educ., 349 U.S. 294 (1955).

7. See, for example, how the protection of liberty in *Griswold*, 381 U.S. at 484–86, generated protection of equality in *Eisenstadt*, 405 U.S. at 454–55, which resulted in greater protection of liberty.

8. *Compare, e.g.,* Emp't Div. v. Smith, 494 U.S. 872, 881 n. 1 (1990) (describing Wisconsin v. Yoder, 406 U.S. 205 (1972) as involving the hybrid combination of religious liberty and parental liberty).

9. For a co-constitutive analysis of equality and liberty based on constitutive theory developed by law and society scholars, see Nice, *supra* note 3, 1999 U. ILL. L. REV. at 1222-1226.

10. For a comprehensive analysis of issues involved in expressive association cases, see Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919 (2006). For a careful examination of concerns arising in the context of education; Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. DAVIS L. REV. 889 (2009); see also Douglas Nejaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J.L. & GENDER 303 (2009). For a recent critique against favoring anti-discrimination over group autonomy, see John D. Inazu, *The Unsettling 'Well-Settled' Law of Freedom of Association*, 43 CONN. L. REV. 149 (2010). For a call for more negotiation

Electronic copy available at: http://ssrn.com/abstract=1769863

opinions and related decisions, as well as some cross-doctrinal comparison, this article seeks to understand what was at stake in this particular controversy and to explore the implications of the decision.

In parts I, II, and III, the article considers what may have enticed CLS to pursue this claim to the Supreme Court, what doctrinal alternatives were available for framing the decision, and what specific choices the Justices made in analyzing the case. The article argues in part IV that, while *Martinez* cannot be understood without recognizing the factors of time, place, and money, these factors alone do not suffice to explain the decision within the body of relevant precedents. In particular, Part V reveals how some of the Justices switched to the opposite reasoning in *Martinez* as compared to a recent "sleeper" decision that upheld a state's action stripping the prior right of local government employees to direct payroll deductions for union political activity. Part VI explores why CLS did not receive the same doctrinal treatment as the private associations involved in a trilogy of sex-discrimination cases, while Part VII explores why CLS did not enjoy the same result as the associations involved in a duo of sexual orientation discrimination cases. Next in parts VIII and IX the article considers what *Martinez* reveals about how the Court treats the relationship between identity and ideology and about how the Court treats the relationship between equality and liberty. Finally, the article argues in part X that the *Martinez* decision is best understood as aligning the treatment of incidental effects on expressive association with the treatment of both incidental effects on free exercise and disparate impact within equal protection.

I. The Dispute and the Enticement to Litigate

Perhaps surprisingly, the constitutional dispute between the University of California, Hastings College of the Law ("Hastings") and the student chapter of the Christian Legal Society ("CLS") began in a mundane manner. Hastings, like nearly all law schools, imposed a standard nondiscrimination requirement on its recognized student organizations. Since the adoption of Hastings's nondiscrimination policy in 1990, no student organization requested an exemption prior to 2004.[11] The Christian law student organization at Hastings did not prohibit openly gay members or request an exemption from the

and accommodation between religion and sexual orientation, see Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?,* 48 B.C. L. REV. 781 (2007).

11. *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2980 (2010).

nondiscrimination policy until 2004,[12] when the national organization of the Christian Legal Society began requiring student chapters to prohibit "participation in or advocacy of" sexual relations outside of heterosexual marriage.[13] Following the CLS change in policy in 2004, only a smattering of CLS chapters challenged the policies in court, which in turn resulted in only a minimal circuit split between the Seventh and Ninth Circuit Courts of Appeals.[14] Even then, the circuit split was far from heated, especially in light of the fact that the Ninth Circuit panel resolved the dispute at Hastings in an unusual summary decision comprising only two sentences.[15] There was thus little percolation among the lower courts before the U.S. Supreme Court plucked this controversy for consideration from among the many vying for its attention.

When the Supreme Court announced its decision upholding the Hastings policy on June 28, 2010, the majority decision written by Justice Ruth Bader Ginsburg followed a rather technical path of reasoning. Justice Ginsburg focused heavily on the facts of the particular dispute as well as a careful parsing of First Amendment doctrine. Even her framing of the question was somewhat bland: "May a public law school condition its official recognition of a

12. *Id*. at 2990 n. 19 (describing testimony of CLS member who described an openly gay student as "a joy to have" as a member during the 2003-2004 school year).

13. *Id*. at 2980 (describing national CLS policy requiring CLS chapter members and officers to sign a "Statement of Faith" requiring adherence to the belief that sexual activity may not occur outside of marriage between one man and one woman, and that this requirement excludes membership by anyone who engages in "unrepentant homosexual conduct"; *id*. at 3001 (Alito, J., dissenting) (describing national CLS policy that "unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership").

14. *Compare* Christian Legal Soc'y v. Walker, 453 F.3d 853 (7th Cir. 2006) (granting preliminary injunction against Southern Illinois University School of Law's nondiscrimination policy based on "strong evidence" the policy was not applied in a viewpoint neutral manner) *with* Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, 319 Fed. Appx. 645 (2009) (upholding the University of California, Hastings College of the Law's nondiscrimination and all-comers policy as reasonable and viewpoint neutral). *See also* Christian Legal Soc'y v. Eck, 625 F. Supp. 2d 1026, 1033 (D. Mont. 2009) (upholding University of Montana School of Law's nondiscrimination and open membership requirements as "viewpoint neutral" and "not intended to single out or limit Plaintiffs' rights to free expression").

15. *Kane*, 319 Fed. Appx. at 645–46 (stating, in its entirety: "The parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable. *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649–50 (9th Cir. 2008).").

student-group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students?"[16]

Because the majority held CLS to its factual stipulation that Hastings required registered student organizations to allow any student to participate regardless of the student's status or beliefs,[17] the majority decision addressed only this "all-comers" policy. The majority accordingly rejected the attempt by CLS and the dissenting Justices to reach the question of the constitutionality of the nondiscrimination policy as written, which prohibited only specified categories of discrimination "on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation."[18] Justice Ginsburg selected forum analysis from the Court's speech cases to frame the dispute, and she distinguished both the association line of cases and the student recognition cases relied upon by CLS and the dissenting Justices.[19] She then conducted a detailed application of the constitutional standard to the specifics of the dispute and found the Hastings policy to be both reasonable and viewpoint neutral.[20] Along the way, Justice Ginsburg rejected CLS's contention that the Free Exercise Clause offered protection from the all-comers policy,[21] as well as their argument on appeal that the record raised the suspicion of "pretext."[22]

Justice Ginsburg's doctrinal journeywork clearly did not pacify Justice Samuel Alito, who wrote an impassioned dissent on behalf of Chief Justice John Roberts, Justice Antonin Scalia, Justice Clarence Thomas, and himself. Justice Alito's accusations in dissent revealed the heightened tension of this dispute among the Justices. Justice Alito charged the majority with resting its analysis on the principle of "political correctness."[23] He accused the majority of providing a

16. *Martinez*, 130 S. Ct. at 2978.

17. *Id*. at 2982.

18. *Id*. at 2979.

19. *Id*. at 2984–88.

20. *Id*. at 2988–95.

21. *Id*. at 2993 n.24 & 2995 n.27.

22. *Id*. at 2995 (explaining that the pretext issue was raised "in the first instance" before the Supreme Court and therefore might not have been preserved, but remanding to the Ninth Circuit to "consider CLS's pretext argument if, and to the extent, it is preserved").

23. *Id.* at 3000 (Alito, J., dissenting).

"misleading portrayal" of the case,[24] "distort[ing] the record,"[25] and "straying" from relevant precedent.[26] He predicted that the consequence of having to comply with the all-comers policy will be "marginalization" of those religious groups who cannot "in good conscience" comply, and that the decision is "a serious setback for freedom of expression in this country."[27] More pointedly, Justice Alito insinuated that the majority's decision was based on "the identity of the student group"[28] and that the majority Justices, like Hastings and the Ninth Circuit, had "treated" CLS in a discriminatory manner.[29] While Justice Ginsburg saved most of her retorts for footnotes,[30] she refused to pull one punch from the text when she characterized one of Justice Alito's primary arguments as simply "beyond dissenter's license."[31]

In short, the gap between the majority's ordinary doctrinal analysis and the extraordinary potshots and retorts between the opinions revealed the heightened tension between the majority and dissenting Justices. No doubt the decision dealt a major blow to the hopes harbored by CLS that its expressive or religious freedom would trump the government's interest in nondiscrimination in this or other contexts.

---

24. *Id*. at 3001.

25. *Id*. at 3006.

26. *Id*. at 3007.

27. *Id*. at 3019–20. Justice Alito added his concern that the decision reflects international rather than domestic norms, which is surprising given that the majority did not cite to international sources. He wrote, "Our First Amendment reflects a 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . .' Even if the United States is the only Nation that shares this commitment to the same extent, I would not change our law to conform to the international norm. I fear that the Court's decision marks a turn in that direction." *Id*. at 3020 (internal citation omitted).

28. *Id*. at 3008.

29. *Id*. at 3020.

30. For example, Justice Ginsburg says the dissent "spills considerable ink," "indulges in make-believe," "relies heavily" on one precedent but "elides" its point, "mischaracterizes" the majority, "resists the import of [the limited public forum] cases," "fights the distinction between state *prohibition* and state *support*," and "presents a one-sided summary of the record evidence." *Id.* at 2982 n.6, 2983 n.9, 2987 n.15, 2989 nn.16–17, 2995 n.29 (majority opinion). She also characterizes one of Justice Alito's arguments as "desperate" and "warped." *Id*. at 2993 n.25.

31. *Id*. at 2991–92 ("It is beyond dissenter's license, we note again . . . constantly to maintain that nonrecognition of a student organization is equivalent to prohibiting its members from speaking.").

So why did CLS believe it could obtain a constitutional exemption from university policies prohibiting discrimination based on sexual orientation and religion? The challenges brought by CLS not only furthered the organization's advocacy against homosexuality but also reflected recent First Amendment decisions from the U.S. Supreme Court that favored discrimination against gays over nondiscrimination and thus might have been interpreted as having invited the claims of CLS. In particular, CLS might have been enticed to extend the Supreme Court's reasoning from its unanimous decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,[32] holding that Boston's St. Patrick's Day parade organizers could exclude an openly gay Irish group from marching so as to control the parade's message, as well as the 5-4 decision in *Boy Scouts of America v. Dale*,[33] holding that the Boy Scouts could exclude a gay scoutmaster so as to control the organization's message. Indeed, CLS specifically argued that who speaks on its behalf colors what concept is conveyed,[34] which seemed to be drawn directly from the logic of *Hurley* and *Dale*. Specifically relevant to the law school context, CLS also might have been encouraged by the Court's unanimous decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, holding that law schools do not have a First Amendment right to exclude military recruiters who discriminate against openly gay applicants in violation of the schools' nondiscrimination policies.[35]

II. The Doctrinal Alternatives

Reading these recent decisions simply as protective of anti-gay expression, however, would be to ignore the overlay of First Amendment doctrine that the Supreme Court has developed and relied upon to decide each specific dispute. This doctrinal framework for the regulation of expression provides an array of rules and precedents for examining what expression the government may regulate, where the government may regulate, whose expression the government may regulate, as well as how and when the government

32. Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston, 515 U.S. 557 (1995).

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

34. *Martinez*, 130 S. Ct. at 2985.

35. Rumsfeld v. Forum for Academic and Inst. Rights, Inc., 547 U.S. 47 (2006). While unanimous, only eight Justices joined the opinion of Chief Justice Roberts in *Rumsfeld* because Justice Alito did not participate in the decision.

may regulate such expression. Many of these judicial doctrines follow a general pattern of considering both the strength of the government's interests and the tailoring of the government's means to its interests. While the rule of content and viewpoint neutrality generally applies across free speech doctrines, some specific doctrines independently prohibit governmental regulations that discriminate based on viewpoint or relate to the suppression of ideas. The various First Amendment doctrines differ in important aspects, nonetheless, particularly regarding the burden of justification they place on the government, as a brief review reveals.

Regarding *what* expression the government may regulate, the general rule is that the regulation must be viewpoint neutral and also content neutral, with specific exceptions for certain content such as illegal advocacy,[36] fighting words,[37] obscenity,[38] defamation,[39] and communicative conduct.[40] Regarding *where* the government may regulate expression, the Court has developed its public forum doctrine, which distinguishes between what it now calls the traditional public forum, the designated public forum, and the limited public forum.[41] The Court also has developed specific rules pertaining to *who* may speak in particular contexts, such as government employees,[42] public school students,[43] military personnel,[44] and prison inmates.[45] Regarding *when* government may regulate speech, the Court has developed its prior restraint doctrine, generally prohibiting a prior restraint of expression unless the exercise of discretion is guided by narrow, objective, and definite standards.[46] Regarding *how* government may regulate speech, the Court takes into consideration the type and extent of infringement, including for example a criminal prohibition, a civil penalty, a compulsory mandate, or a condition on a benefit or subsidy. The Court generally prohibits the government

36. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).
37. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
38. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973).
39. *See, e.g.*, N.Y. Times v. Sullivan, 376 U.S. 254 (1964).
40. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968).
41. *See, e.g.*, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010).
42. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
43. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
44. *See, e.g.*, Brown v. Glines, 444 U.S. 348 (1980).
45. *See, e.g.*, Shaw v. Murphy, 532 U.S. 223 (2001).
46. *Compare* Walker v. City of Birmingham, 388 U.S. 307 (1967) *with* Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

from compelling expression and from imposing regulations that are too vague[47] or overbroad.[48] The Court sometimes applies a time, place, and manner doctrine, allowing a reasonable content-neutral time, place, and manner regulation if justified by a significant government interest and if ample alternative channels of communication are left open.[49]

In addition to the right of expression, the First Amendment also protects the rights of free exercise of religion,[50] freedom from establishment of religion,[51] press, assembly, and petition. Each of these rights has produced a series of doctrinal rules. Making matters even more complex, the Court has extrapolated a freedom of association from the enumerated protections listed in the text of the First Amendment, thereby providing special judicial protection when association is either intimate or expressive.[52]

The challenge in predicting and analyzing an outcome in any particular First Amendment dispute is that a typical dispute may involve more than one, if not many, of the doctrines for considering what, where, who, when, and how the government may regulate expression. This means the Court frequently may choose from among these various doctrines to frame and structure its analysis. Because some of these doctrines are more deferential to the government, while other doctrines are more suspicious of the government and thus subject it to a higher burden of justification, the selection of a doctrine to frame the dispute likely influences the Court's analysis and also tends to signal the likely result.

The *Martinez* case provides a textbook example. The Court could have focused on whether the nondiscrimination policy of Hastings was content based or viewpoint based. It could have focused on the nature of the public forum created by Hastings. It could have focused on the rights of student speakers in public university settings or on the public university's conditioning of the benefit of student group recognition. It could have focused on its cases prohibiting compelled speech or compelled association. Or it

47. *See, e.g.*, Baggett v. Bullitt, 377 U.S. 360 (1964).

48. *See, e.g.*, Schad v. Borough of Mount Emphraim, 452 U.S. 61 (1981).

49. *See, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000).

50. *Compare* Emp't Div. v. Smith, 494 U.S. 872 (1990) *with* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

51. *Compare* Lemon v. Kurtzman, 403 U.S. 602 (1971) *with* Larson v. Valente, 456 U.S. 228 (1982).

52. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

could have focused on either of the religion clauses, free exercise or freedom from establishment. Given the options available for framing the analysis, a pertinent question arises about whether the Court has been consistent in selecting which doctrine will frame its decision. Considering these questions requires a close examination of the Court's analysis in *Martinez*.

III. The Decision

Justice Ginsburg began by emphasizing the facts as established in the record, acknowledging the Hastings policy of categorical nondiscrimination as written but emphasizing the Hastings practice of requiring Registered Student Organizations ("RSOs") to allow all-comers to participate. Justice Ginsburg then strictly held CLS to its factual stipulation that Hastings interpreted its policy to require any student organization to allow all comers regardless of status or belief. She cited to excerpts from the record where CLS acknowledged that Hastings applied an all-comers policy.[53] She cited to local District Court rules that treat stipulated facts as "undisputed," to Supreme Court precedents that treat stipulated facts as "established,"[54] and to leading treatises describing them as "binding and conclusive" and "formal concessions."[55] On this issue, Justice Ginsburg criticized both the dissent for "rac[ing] away from the facts to which CLS stipulated" and CLS for its "unseemly attempt to escape from the stipulation and shift its target to Hastings' policy as written."[56]

Justice Ginsburg then framed the case as involving a "limited public forum," which is established when a governmental entity opens its property for limited use by certain groups or certain subjects.[57] Under existing doctrine, the government's restrictions on the use of such a forum must be reasonable and viewpoint neutral.[58] Justice Ginsburg next rejected the CLS argument that the case should be decided under the closer scrutiny required when government restricts associational freedom. She described the speech and expressive association rights as "closely linked" and "intertwined" and then concluded it would be "anomalous" for a restriction to survive speech

53. *Martinez*, 130 S. Ct. at 2982 n.5.
54. *Id*. at 2982 n.6 and 2983.
55. *Id*. at 2983.
56. *Id*. at 2983–84.
57. *Id.* at 2984.
58. *Id*.

review but not expressive association review.[59] She also argued that strict scrutiny would require invalidation based on the very characteristic that the Court uses to define a limited public forum.[60] She explained that she chose speech forum analysis rather than expressive association analysis because the association cases involved the compelled inclusion of unwanted members, whereas here CLS sought a state subsidy and therefore faced "only indirect pressure" rather than compulsion.[61]

Justice Ginsburg then compared the three prior cases in which the Supreme Court confronted conflicts between public universities and student groups seeking recognition and benefits: *Healy v. James*, *Widmar v. Vincent*, and *Rosenberger v. Rector and Visitors of the University of Virginia*.[62] She distinguished *Healy* on the basis that the university had banned Students for a Democratic Society ("SDS") because it found the group's views to be abhorrent.[63] She similarly distinguished *Widmar* and *Rosenberger* because those public universities engaged in viewpoint discrimination by singling out religious organizations for disfavored treatment.[64] Thus Justice Ginsburg effectively distinguished the other student recognition cases as involving *intentional* viewpoint discrimination, which she found absent in the Hastings record.

Justice Ginsburg then applied the limited public forum test, which allows restrictions of expression so long as they are viewpoint neutral and reasonable in relation to the purpose served by the forum.[65] She emphasized that the circumstances here involved an educational context, and then she rejected deferring to the university's view of the constitutionality of its actions but insisted on giving "decent respect" to the university's decisions about sound educational policies including its student group policy.[66] Justice

59. *Id.* at 2985.

60. *Id*.

61. *Id*. at 2986.

62. Healy v. James, 408 U.S. 169 (1972); *Widmar v. Vincent*, 454 U.S. 263 (1981); Rosenberger v. Regents of the Univ. of Va., 515 U.S. 819 (1995).

63. *Martinez,* 130 S. Ct. at 2987.

64. *Id*. at 2987–88.

65. *Id.* at 2988.

66. *Id*. at 2988–89. Underscoring how context matters, Justice Ginsburg specifically endorsed the view that First Amendment rights "must be analyzed in light of the special characteristics of the school environment." *Id*. at 2988 (quoting Widmar v. Vincent, 454 U.S. 263, 268 n.5 (1981)). The Fifth Circuit Court of Appeals quickly cited this passage from *Martinez* in rejecting an Establishment Clause challenge brought by a former

Ginsburg considered the four purposes Hastings offered in defense of its all-comers policy. In essence, Hastings argued that the policy ensures equal opportunities to all students, avoids involving the school in policing motives and beliefs, encourages tolerance and learning, and avoids subsidizing unlawful discrimination.[67] Justice Ginsburg concluded that these justifications were "surely reasonable."[68] Bolstering her finding of reasonableness, she underscored the "substantial alternative channels" of communication left open to CLS, including access to facilities, chalk and bulletin boards, and electronic media,[69] and she squarely rejected any hypothetical concern about saboteurs facilitating hostile takeovers of student groups.[70] She then described the all-comers policy as "textbook viewpoint neutral" and therefore constitutional even if it had a differential impact on groups wishing to exclude members.[71] Finally, she rejected the suggestion that the Free Exercise Clause requires an exemption from nondiscrimination policies for religious groups, citing the holding of *Employment Division v. Smith* which allows enforcement of neutral laws of general applicability that incidentally burden religious practice.[72]

The two concurrences extrapolated on two particular points. Justice John Paul Stevens took on the task of replying to the dissent's assertion that the categorical nondiscrimination policy as written would be "plainly" unconstitutional,[73] which Justice Ginsburg had refused to entertain.[74] Justice Stevens argued that the nondiscrimination policy merely refused to support discrimination, was content and viewpoint neutral, regulated only conduct rather than expression or belief, and was designed to promote religious freedom. He insisted there was "no evidence" that the policy was designed to target religious individuals or groups or to suppress or

employee of the Texas Education Agency ("TEA") who was terminated for publicizing an event critical of teaching creationism because doing so violated the TEA's neutrality policy that prohibited staff from taking positions on curriculum issues. Comer v. Scott, 610 F.3d 929, 934 (5th Cir. 2010).

67. *Martinez,* 130 S. Ct. at 2989–91.

68. *Id*. at 2991.

69. *Id*.

70. *Id*. at 2992.

71. *Id.* at 2994.

72. *Id.* at 2993 n. 24 and 2995 n. 27.

73. *Id*. at 2995.

74. *Id*. at 2984 n. 10.

distort their views.[75] He emphasized that disparate impact alone does not constitute viewpoint discrimination, nor does it provide a sufficient reason to be skeptical about the policy.[76] He defended the categorical policy as a "reasonable choice" to safeguard students from invidious discrimination and to advance pedagogical objectives.[77] Notably, however, he distanced himself from the wisdom of the categorical approach.[78]

Justice Anthony Kennedy added a separate concurrence to "support the analysis" provided by Justice Ginsburg,[79] which is to say that he separately defended his *Martinez* vote by distinguishing it from his opinion for the majority in *Rosenberger v. Rector and Visitors of the University of Virginia*, which invalidated a university's refusal to subsidize religious speech by a student group.[80] Justice Kennedy suggested that a limited forum could exclude speakers based on content but not based on hostility to views or beliefs. But he nonetheless emphasized that the Hastings policy was not content based in "its formulation or evident purpose."[81] He left open the possibility of considering actual disparate impact on groups whose exclusion of members is "essential to their message," but he emphasized that exclusion here would undermine the pedagogical purpose for having the limited forum,[82] which he generally described as facilitating respectful, cooperative, and professional interactions among students in a free, open, and vibrant dialogue in which students learn from and teach one another.[83] Justice Kennedy emphasized that more facts would be required to show that the intent, purpose, design, use or effect of this policy was to stifle the group's viewpoint.[84]

Justice Alito's opinion for the four dissenting Justices resembled a functional analysis typically associated with more liberal holdings.

75. *Id*. at 2996 (Stevens, J. concurring).

76. *Id*. at 2996–97.

77. *Id*. at 2997.

78. *Id*. at 2997 (noting the categorical approach "may or may not be the wisest choice" and arguing that, "even if ill-advised," it is designed to prevent religious discrimination).

79. *Id*. at 3000 (Kennedy, J., concurring).

80. Rosenberger v. Regents of the Univ. of Va., 515 U.S. 819 (1995).

81. *Martinez,* 130 S. Ct. at 2998 (Kennedy, J., concurring).

82. *Id*. at 2999.

83. *Id*. at 2999–3000.

84. *Id*. at 3000.

His description of the factual background highlighted particular facts among the sequence of events in support of his argument that Hastings actually applied three different incarnations of its nondiscrimination policy: first, the written categorical nondiscrimination policy, second, the all-comers policy described by the dean in her deposition, and third, the some-comers policy, which allowed some conduct requirements for group membership.[85] He emphasized that the Joint Stipulation of Facts did not specify whether the all-comers policy existed when the school denied recognition to CLS.[86] Justice Alito suggested that the denial of recognition had a harmful effect on CLS as evidenced by their loss of priority access to facilities, their difficulty in reserving campus space for an "advice table" and for a guest speaker, and the small size of their membership the following school year.[87] With regard to the argument that Hastings merely declined to fund CLS activities, he replied that much of what CLS sought would have been "virtually cost free" and that, for university students, "the campus is their world" much like a town square outside of campus.[88] He complained that the majority refused to follow *Healy v. James,*[89] and argued that distinguishing *Healy* could be based only on "the identity of the student group."[90] Here he dropped one of his primary arguments in a footnote, where he asserted that the denial of recognition under the Nondiscrimination Policy was because of the viewpoint CLS sought to express through its membership requirements.[91]

Justice Alito then conceded that he was "content" to address the constitutionality under the limited public forum line of cases.[92] Focusing first on the Nondiscrimination Policy, he trained on the viewpoint neutrality requirement of the limited public forum cases and argued that those cases treat religion as a viewpoint and therefore that enforcing nondiscrimination based on religion and

85. *Id*. at 3001–04 (Alito, J., dissenting).

86. *Id*. at 3005.

87. *Id*. at 3006.

88. *Id*. at 3007.

89. Healy v. James, 408 U.S. 169 (1972) (invalidating the university's refusal to recognize SDS based on disagreement with the group's philosophy).

90. *Martinez,* 130 S. Ct. at 3008 (Alito, J., dissenting).

91. *Id*. at 3009 n.2. Justice Alito treats the exclusion as expression, which is somewhat different than his subsequent quotation from Dale that allowing exclusion only where admission would significantly affect the group's ability to advocate its viewpoint. *Id*. at 3012.

92. *Id.* at 3009.

sexual orientation is itself viewpoint discrimination.[93] Specifically with regard to religion, he asserted, without any citation, that Hastings required only religious groups to admit students who did not share their views. He reasoned that religious groups are different than secular groups because religion is uniquely relevant to their expression.[94] Specifically with regard to sexual orientation, he noted that CLS expresses a particular viewpoint on sexual morality and conduct.[95]

Turning to the all-comers policy, Justice Alito argued that it was neither reasonable nor viewpoint neutral.[96] He endorsed the same governmental goal of promoting diversity of viewpoints which was emphasized by Justice Kennedy, noted that Hastings's student group program replicated the outside world's broad array of organizations, and argued that the First Amendment prohibits the government from requiring religious organizations to include unwanted members whether inside or outside the university campus.[97] After rejecting each of the justifications offered by Hastings, Justice Alito interpreted the purpose of the Hastings program quite literally, emphasizing that Hastings sought to promote a diversity of viewpoints *among* registered student organizations, not *within* such organizations.[98]

The details of the opinions reveal the different lenses through which the Justices viewed this dispute. Where Justice Ginsburg and the majority saw textbook neutrality, Justice Alito and the dissenters saw obvious pretext. What factors might explain this disagreement and justify the decision? The first candidates include time, place, and money.

IV. Time, Place, and Money

While it may seem self-evident, it bears noting that *Martinez* clearly reflects this moment in time regarding society's consideration of gay rights. The *Martinez* decision might have been perceived to be especially ground breaking if *Romer v. Evans*[99] and *Lawrence v.*

93. *Martinez,*130 S. Ct. at 3010.
94. *Id*. at 3012.
95. *Id*.
96. *Id*. at 3013.
97. *Id*. at 3013–14.
98. *Id*. at 3016.
99. Romer v. Evans, 517 U.S. 620 (1996).

Texas[100] had not already been decided. Justice Kennedy's decision on behalf of the majority in *Romer* marked the first time the Supreme Court applied the Equal Protection Clause to invalidate discrimination against gays as a group. The Court reasoned that Colorado's voter-approved constitutional amendment prohibiting the state or local governments from protecting gays from discrimination was "born of animosity" and had no rational relation to any legitimate governmental interest.[101] In *Lawrence*, the other major gay rights decision, Justice Kennedy again wrote the majority opinion for six justices and this time invalidated Texas's criminalization of same-sex sodomy based on Substantive Due Process, reasoning that gays "are entitled to respect for their private lives" and concluding again that the state's law furthered no legitimate state interest.[102] Neither of these decisions grappled with whether gays should be recognized as a suspect class or whether they should enjoy any particular fundamental right. Both decisions were unusual in holding that each state's targeting of gays failed to advance any legitimate government interest sufficient to pass the Court's lowest level of scrutiny: rationality review. Moreover, the Court's language of respect and protection reflected a sea change in its treatment of gays. As Justice Kennedy emphasized, contemporary legal developments indicated an "emerging awareness" that liberty protects private decisions pertaining to sexuality. Specifically, both Justice Kennedy's majority opinion and Justice Sandra Day O'Connor's concurring opinion in *Lawrence* noted that targeting the conduct of gays is tantamount to targeting gays as a class of persons.[103]

The important point is that, at this particular moment in the nation's history, the Court now treats gays as a class to be deserving of ordinary constitutional protection. This constitutional inclusion of gays remains remarkable considering the Court's perfunctory

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

101. *Romer*, 517 U.S. 620.

102. *Lawrence*, 539 U.S. at 578. Justice Sandra Day O'Connor concurred separately to join the court in overruling the Texas statute based instead on the Equal Protection Clause. *Id*. at 579.

103. *Id.* at 575 ("[W]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination."); *id.* at 583 (O'Connor, J., concurring) ("[W]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual.").

exclusion of gays from constitutional protection in *Bowers v. Hardwick* less than twenty-five years ago.[104]

Writing for the majority in *Martinez,* Justice Ginsburg quoted both Justice Kennedy's and Justice O'Connor's statements in *Lawrence* as support for her direct rejection of CLS's attempt to distinguish between discriminating against gays based on their status (which CLS denied doing) and merely excluding gays based on conduct and/or belief (which CLS defended).[105] Justice Ginsburg addressed this key point of her analysis within a section of her opinion responding to the justification proffered by Hastings that its all-comers policy helped the school avoid inquiring into motive and belief. Justice Ginsburg simply characterized the task of determining motive and belief as "daunting," raised questions about hypothetical scenarios, cited to *Lawrence* for the rejection of a distinction between status and conduct, and then moved on.[106]

In addition to the importance of this moment in time regarding gay rights, the *Martinez* decision depends heavily on the place of the dispute. Early in the doctrinal analysis of her opinion for the majority, Justice Ginsburg selected the limited public forum line of cases from the Court's speech cases to frame the decision, rather than using the expressive-association framing. Justice Ginsburg explained that the expressive-association right is closely linked to, and effectively derives from, speech rights, both generally and in this particular dispute.[107] She also argued that applying the strict scrutiny used for expressive association would invalidate the defining characteristic of limited public forums, namely that they are limited to

104. Bowers v. Hardwick, 478 U.S. 186 (1986) (rejecting any Substantive Due Process right to engage in same-sex sexual relations and upholding Georgia's sodomy law). Although the Court's rejection of the liberty claim in *Bowers v. Hardwick* was perfunctory in the sense of appearing superficial and mechanical, I do not mean to imply that the opinions were lacking in passion. Indeed, the concurring opinion by Chief Justice Warren E. Burger, characterizing Michael Hardwick's liberty claim as "at best, facetious" might be better characterized as expressing moral outrage at the audacity of even suggesting that gays might be protected by Substantive Due Process. *Id*. at 194.

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

106. *Martinez,* 130 S. Ct. at 2990. Justice Ginsburg also cited a comparative quotation from *Bray v. Alexandria Women's Health Clinic*. 506 U.S. 263, 270 (1993) ("[A] tax on wearing yarmulkes is a tax on Jews."). She also cited the Brief submitted by Lambda Legal Defense and Education Fund, Inc., et al. as Amici Curiae at 7–20. *Martinez*, 130 S. Ct. at 2990 (citing Brief for Lambda Legal Defense and Education Fund, Inc., et al. as Amici Curiae Supporting Respondents, *Martinez*, 130 S. Ct. 2971 (2010) (No. 08-1371)).

107. *Martinez,* 130 S. Ct. at 2985.

certain groups of speakers.[108] This aspect of Justice Ginsburg's analysis is important because the practical effect was to apply more lenient scrutiny rather than closer scrutiny to decide the case.

The third factor that weighs heavily in explaining *Martinez* is the issue of subsidy. Justice Ginsburg's majority opinion noted that CLS was seeking a state subsidy when it requested RSO status with accompanying benefits. According to Justice Ginsburg, the Hastings nondiscrimination policy was "dangling the carrot of subsidy, not wielding the stick of prohibition."[109] Emphasizing the indirect pressure resulting from a denial of subsidy in *Martinez* (as compared to the direct compulsion to include unwanted members in both *Hurley* and *Dale*) provided the basis for Justice Ginsburg to distinguish these otherwise similar precedents. The denial of a subsidy also affected her understanding of the appropriate baseline, as Justice Ginsburg emphasized in her repeated characterization of CLS as seeking "not parity with other organizations, but a preferential exemption from Hastings' policy."[110]

Justice Ginsburg's analysis thus situated *Martinez:* (1) as consistent with the respectful treatment of gays in both *Romer* and *Lawrence*: (2) as involving only a limited public forum; and (3) as involving only indirect pressure not to discriminate against gays rather than compulsion to include them as in *Hurley* and *Dale*. This third factor regarding subsidizing or conditioning benefits raises the perpetually troubling issue of the Court's inconsistency about when such governmental conditions are unconstitutional.

V. Selectivity and the Sleeper Comparison

One of the problems with a constitutional decision involving strings attached to government benefits is the Court's overall inconsistency in how it considers this factor. The general problem is that the Court may choose between two logical but opposing doctrines to frame such cases. The first doctrine is the greater power includes the lesser power.[111] In this case, because Hastings had the

108. *Id.*

109. *Id*. at 2986.

110. *Id.* at 2978. Justice Ginsburg later described Hastings as denying CLS recognition not to silence the organization's viewpoint "but because CLS, insisting on preferential treatment, declined to comply with the open-access policy applicable to all RSOs." *Id.* at 2987 n.15.

111. *E.g., see Rust*, 500 U.S. at 196-198 (applying the greater power includes lesser power logic: because Congress has the greater power not to fund family planning at all, it

greater power not to provide student recognition at all, it arguably had the lesser power to condition student recognition on nondiscrimination. This doctrine could be used to justify the Hastings policy, as the majority decided. On the other hand, the unconstitutional condition doctrine posits that the government may not do indirectly (through conditions on benefits) what it may not do directly (through compulsion).[112] This doctrine could be used to invalidate the Hastings policy, as the dissent urged. While neither side invoked either of these doctrines expressly, the majority effectively applied the logic of the greater power includes the lesser while the dissent applied the logic of an unconstitutional condition.[113]

Much ink has been spilled generally about the inconsistent application of these doctrines and specifically regarding under what circumstances conditioning a benefit comprises a constitutional infringement.[114] The unconstitutional condition doctrine has been addressed in some major progressive decisions, such as *Speiser v. Randall*,[115] and *Legal Services Corp. v. Velazquez*,[116] as well as

has the lesser power to insist that federal family planning funds not be spent to support abortion). Also, while the criminalization of sodomy was constitutional, this logic was followed to oppose rights for gays, see, e.g., *Romer*, 517 U.S. at 642 (Scalia, J., dissenting) ("If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.").

112. *E.g., see Rust*, 500 U.S. at 207 (Blackmun, J., dissenting) (applying the unconstitutional conditions logic: because Congress may not directly suppress content or viewpoint, it may not indirectly suppress content or viewpoint by imposing conditions on family planning funds).

113. While the Supreme Court majority did not use the language of the unconstitutional condition doctrine, the doctrine was expressly invoked by the majority panel decision by the Seventh Circuit Court of Appeals invalidating a similar nondiscrimination policy applied to deny recognition of the Christian Legal Society at Southern Illinois University School of Law. Christian Legal Society v. Walker, 453 F.3d 853, 864 (2006) ("[S]IU may not do indirectly what it is constitutionally prohibited from doing directly."). The Seventh Circuit expressly rejected the district court's reliance on the reasoning that the greater power to deny the benefit includes the lesser to condition the benefit. *Id.* at 867 (rejecting the district court's belief "that CLS was not being forced to include anyone, but was simply being told that if it desires the benefits of recognized student organization status, it must abide by SIU's antidiscrimination policy").

114. Classic articles on this topic include, for example, Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989); Richard A. Epstein, *The Supreme Court, 1987 Term–Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5 (1988); Cass Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990).

115. Speiser v. Randall, 357 U.S. 513 (1958) (invalidating a loyalty oath as a condition of receiving a property tax exemption for veterans).

conservative decisions, such as *Rust v. Sullivan*.[117] While the doctrine has been defended by more liberal scholars and criticized by more conservative scholars, the doctrine does not inherently favor liberal causes, nor is it favored only by liberal justices, as conservative justices have invoked the logic of the doctrine in cases other than *Martinez*. One such case factually similar to the dispute between CLS and Hastings was *Rosenberger v. Rector of the University of Virginia*.[118]

Rosenberger involved a university's student funding program similarly designed to encourage diversity among student speakers. There Justice Kennedy writing for the majority invalidated the University's refusal to fund religious publications as content-based and viewpoint-based discrimination.[119] It should have come as no surprise that Justice Kennedy concurred separately in *Martinez* to distinguish *Rosenberger*. Unlike the *Rosenberger* policy which expressly prohibited funding for religious publications, Justice Kennedy believed the Hastings policy was not shown to be content-based "either in its formulation or evident purpose,"[120] nor was it shown that the "purpose or effect of the policy was to stifle speech or make it ineffective."[121] In Justice Kennedy's view, because there was no evidence of facial or intentional discrimination based on either content or viewpoint, the Hastings policy was constitutional.[122] Justice Kennedy thus treated the Hastings policy as, at most, involving merely incidental effect or disparate impact, and thus he applied a lower level of scrutiny.

While emphasizing that funding played "a very small role" in *Martinez*, the dissenting Justices nonetheless insisted that the denial

116. Legal Serv. Corp. v. Velasquez, 531 U.S. 533 (2001) (invalidating a restriction prohibiting federally funded legal services lawyers from challenging welfare reform).

117. Rust v. Sullivan, 500 U.S. 173 (1991) (upholding a restriction prohibiting federally funded medical providers from counseling a patient about abortion).

118. Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 834 (1995).

119. *Id.*

120. *Martinez*, 130 S. Ct. at 2999 (Kennedy, J., concurring).

121. *Id.* at 3000.

122. *Id*. at 2999–3000. Justice Kennedy several times noted that it would have been a different case if it had been shown that the Hastings policy was facially or intentionally content based or viewpoint based or was intentionally designed to stifle speech or make it ineffective. Interestingly, however, Justice Kennedy went to some length to explain that allowing students groups to require what he called "loyalty oaths" would undermine the purpose and value of a law school's limited forum designed to facilitate "rational," "respectful," "professional," "free," and "open" discussion and learning. *Id.*

of recognition and denial of equal access to facilities and customary media burdened the constitutional rights of CLS and constituted unconstitutional viewpoint discrimination.[123] Chief Justice Roberts and Justices Scalia and Thomas joined Justice Alito's opinion. This same conservative line-up, with the addition of Justice Kennedy, followed the opposite reasoning in a recent case with opposite political connotations, *Ysursa v. Pocatello Education Association*.[124] *Ysursa* involved a free speech challenge brought by labor unions. The conservative majority, joined in part by Justice Ginsburg and Justice Stephen Breyer, applied only rational basis review and upheld Idaho's stripping of a government employee's ability to direct payroll deductions for political activities.[125] Rather than focusing on the unconstitutionality of the condition as in the *Martinez* dissent, the conservative Justices in *Ysursa* applied the logic of the greater power includes the lesser, emphasizing that "the parties agree that the State is not constitutionally obligated to provide payroll deductions at all" and that "Idaho is under no obligation to aid the unions in their political activities."[126] The conservative majority reasoned that the State's decision not to aid the unions is not an infringement of the unions' speech and that the unions remain free to engage in speech but have no right to enlist the State to support their speech.[127] Because the State was free not to support the unions' speech, the majority rejected strict scrutiny and applied only rational basis review.[128] The Court then found that the State's stripping of the ability to direct payroll deductions was justified by the State's interest "in avoiding the reality or appearance of government favoritism or entanglement with partisan politics."[129]

---

123. *Martinez,* 130 S. Ct. at 3007–08 (Alito, J., dissenting).

124. Ysursa v. Pocatello Educ. Ass'n, 129 S. Ct. 1093 (2009) (applied rational basis review and upheld state's stripping of right to direct payroll deductions from local government employees).

125. *Id*. at 1098–99.

126. *Id*. at 1098.

127. *Id*. at 1098 n.10 ("While publicly administered payroll deductions for political purposes can enhance the unions' exercise of First Amendment rights, a State is under no obligation to aid a union in its political activities. And a State's decision not to do so is not an abridgement of the unions' speech; it is free to engage in such speech as it sees fit. It is simply are barred from enlisting the State in support of that endeavor."). Not only was the denial of payroll deductions not an infringement of speech, but it also was not a suppression of speech. *Id*. at 1099 ("Idaho does not suppress political speech but simply declines to promote it through public employer checkoffs for political activities.").

128. *Id*. at 1098.

129. *Ysursa*, 129 S. Ct. at 1098.

One possible distinction between the more conservative Justices' reasoning in *Ysursa* and their *Martinez* dissent might involve the degree of government funding. In other words, the more conservative Justices might have believed that more state funding was involved in Idaho's administration of payroll deductions than in Hastings's administration of student groups. However, such a distinction would be inapposite because *Ysursa* involved the state's ban as applied to local government employers, which received no subsidy from the state in the administration of local payroll deductions.[130] Although no state subsidy was provided to local government employers, the conservative majority nonetheless reasoned that local government entities are subordinate governmental subdivisions subject to state regulation and that the state's interest in separating government from partisan politics applied to all public employees at whatever level of government.[131]

Both Justices Ginsburg and Breyer concurred with upholding the ban based solely on the technical point that local governments are creatures of the state and therefore are subject to state regulation.[132] But Justice Stevens issued a vigorous dissent,[133] which followed a path of reasoning different from that which he endorsed in *Martinez*, much like the flip-flop by the conservative majority in *Ysursa* (excepting Justice Kennedy). Justice Stevens began with a baseline point, arguing that payroll deductions are routinely remitted in both the public and private sectors. He then argued that Idaho intended to make it more difficult for unions to finance their political speech and

130. *Id*. at 1097. The District Court in *Ysursa* upheld the State's refusal to subsidize payroll deductions at the state level but invalidated the state ban on payroll deductions as applied to local government employers because the State had failed to identify any subsidy it provided to such local government employers. *Id*. at 1097 (citing Pocatello Edu. Ass'n v. Heideman, 2005 WL 3241745 *2 (D. Idaho, Nov. 23 2005)). The State appealed the invalidation of the law as applied to local government employers and the Ninth Circuit Court of Appeals agreed with the District Court that no state subsidy was involved at the local government level. *Ysursa*, 129 S. Ct. at 1097 (citing 504 F.3d 1053, 1059 (9th Cir. 2007)).

131. *Id.* at 1100.

132. *Id*. at 1101–02.

133. *Id*. at 1108–09 (Souter, J., dissenting). Justice Souter also dissented arguing that the circumstances suggest viewpoint discrimination but, because the union did not appeal the ban on payroll deductions as applied to the state, the Court could not reach the real "elephant in the room" and thus should have dismissed certiorari as improvidently granted. *Id*. Because Justice Souter had resigned from the Court, he did not participate in deciding the *Martinez* dispute between CLS and Hastings.

therefore he would have invalidated the law in all its applications.[134] Justice Stevens gleaned discriminatory intent from the statutory context as well as from the statute's substantial over and under inclusiveness. He emphasized that the ban on payroll deductions was part of a group of statutory provisions that were directed at union fundraising.[135] He noted that the ban on payroll deductions was over-inclusive in reaching private employers, although the State conceded that the application of the provision to private employers was unconstitutional.[136] He also argued that the statute was under-inclusive in failing to ban payroll deductions for charitable purposes, which he argued "often present a similar risk of creating an appearance of political involvement."[137] Justice Stevens also noted his disagreement with the majority's assertion that the question of state funding was immaterial because local governments are creatures of the state.[138] He urged instead that the Court should have examined whether the State was acting in its capacity as regulator or proprietor.[139]

In *Ysursa*, Justice Stevens looked beyond the face of the payroll deduction, which applied to all political deductions, and gleaned from the context a governmental intent to discriminate against the political expression of unions. Contrast this with his concurring opinion in *Martinez*, in which he was satisfied that Hastings's nondiscrimination policy, as written, was content and viewpoint neutral[140] and that there was "no evidence that the policy was adopted because of any reason related to the particular views that religious individuals or groups might have, much less because of a desire to suppress or distort those views."[141] Although he acknowledged in *Martinez* that disparate impact on religious groups might occur, he found no evidence or reason to be skeptical of the nondiscrimination policy. He instead cited a greater danger, concluding: "Other groups may exclude or mistreat Jews, blacks, and women—or those who do not share their contempt for Jews, blacks, and women. A free society must tolerate

134. *Ysursa* 129 S. Ct. at 1104–05 (Stevens J., dissenting).

135. *Id*. at 1105.

136. *Id*.

137. *Id*. at 1106.

138. *Id*. at 1107.

139. *Id.* at 1107. For an extended discussion of the importance of the government's role, see Davis & Rosenberg, *supra* note 4.

140. *Martinez,* 130 S. Ct. at 2996 (Stevens, J., concurring).

141. *Id*.

such groups. It need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities."[142]

Comparing *Martinez* with *Ysursa*, it appears that the conservative group of four, Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito, as well as the more liberal Justice Stevens, contradicted their own prior reasoning. Important factual distinctions typically can be used to save justices from a charge of inconsistency. But the pattern of inconsistency is not limited to the issue of subsidy, as revealed by a comparison of the sex discrimination and sexual orientation discrimination cases within the context of expressive association.

VI. The Sex Discrimination Trilogy

Why didn't the Court treat the challenge brought by CLS in the same doctrinal manner as the challenges brought by the Jaycees[143] and the Rotary Club,[144] especially considering that the Court reached similar results in siding with the government's imposition of nondiscrimination in membership for these organizations? In other words, why did the Court insist on applying the more lenient scrutiny used for limited public forum cases rather than the higher scrutiny used for burdens on expressive association?

Similar to *Martinez*, the Court's analysis of the right of association in *Roberts v. United States Jaycees* examined an amendment to a state's nondiscrimination law and addressed most of the same constitutional concerns. In 1973 Minnesota's state legislature amended its state statute to prohibit discrimination on the basis of sex in public accommodations.[145] The next year, the Minneapolis and St. Paul chapters of the Jaycees began admitting women, in apparent defiance of the national organization's prohibition on full membership of women.[146] The national organization imposed various sanctions on the members of these chapters, including denying their eligibility for state or national positions, awards, or voting privileges at conventions. When the national organization threatened to revoke the local charters in 1978,

142. *Id*. at 2998.

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

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

145. *Roberts*, 468 U.S. at 624.

146. *Id*. at 614.

protracted litigation began which culminated in the Supreme Court's decision in 1984 upholding the state's nondiscrimination laws.[147]

The *Jaycees* Court clarified that the freedom of association encompasses a right to intimate association that "receives protection as a fundamental element of personal liberty" and also a right to expressive association that is "an indispensable means" for "engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[148] After rejecting the intimate association claim as inapplicable, the Court turned to the Jaycees' claim that the First Amendment implicitly protects its expressive association.[149] The Court then separated claims where the government imposes penalties or withholds benefits because it disfavors the group from claims where the government interferes with the internal organization or affairs of a group.[150] In separating these two types of violations, the Court in effect separated the equality and the liberty interests at stake. The Court then explained that there "could be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."[151] In other words, the Court did not treat the state's nondiscrimination law as interfering with the Jaycees' equality interest but instead treated it as interfering with their liberty interest.

With regard to the level of scrutiny, 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, that cannot be achieved through means significantly less restrictive of associational freedoms.[152] In a series of arguments that easily could have been applied by analogy in *Martinez,* the *Jaycees* majority held that the state has a "compelling interest" in eradicating discrimination against women and "removing the barriers to economic advancement and political and social integration that have historically plagued

147. *Id*. at 614–17 (describing various proceedings and decisions of the Minnesota Department of Human Rights and the federal court, as well as a question certified to the state supreme court).

148. *Roberts*, 468 U.S. at 618.

149. *Id.* at 622.

150. *Id.* at 622–23. The Court also noted a third type of claim where government is requiring disclosure of membership in a group seeking anonymity.

151. *Id.* at 623.

152. *Id.*

certain disadvantaged groups, including women."[153] The Court effectively accepted protection of equality as a justification for an infringement of liberty, finding that equality concerns about using "archaic and overbroad assumptions about the relative needs and capacities of the sexes" that "often bear no relationship to their actual abilities" are "strongly implicated" with respect to gender discrimination in public accommodations.[154]

Regarding the impairment of the group's message, the *Jaycees* decision directly addressed the issue of deference to the group in determining the group's message and the burden on the group. The Court did not defer to the Jaycees, which had resisted allowing women to participate as full voting members over the course of the six-year litigation battle. Instead, the Court repeatedly stated that there was no basis for concluding that including women as full members would "impede," "impair," or "change" the group's message.[155] Absent a "more substantial" showing of impairment, the Court simply refused to engage in "sexual stereotyping."[156] The Court further rejected concern about any incidental effect on the Jaycees' expression, and thus found the law to be sufficiently tailored, in part based on the Court's rather broad assertion that "invidious discrimination" in publicly available benefits is not entitled to any constitutional protection.[157]

The *Jaycees* decision, while framed as within the First Amendment's protection of freedom of expressive association, apparently enforced equality over liberty. The *Jaycees* Court first looked to whether the government violated equality norms by disfavoring the group and whether it violated liberty norms by interfering with the group's activities. The Court apparently found no unequal treatment by the government, as it did not analyze that type of violation. Instead, the Court examined the government's interference with the group's liberty. Applying the heightened scrutiny associated with expressive association, the Court nonetheless found that the government's actions were justified because they served to protect the equality of women, which in effect trumped the Jaycees' liberty. In other words, the government did not treat the

153. *Roberts*, 468 U.S. at 624, 626.

154. *Id.* at 625.

155. *Id*. at 627.

156. *Id*. at 628.

157. *Id*.

Jaycees unequally. It infringed their liberty so as to protect the equality of women, a historically disadvantaged group. Enforcing or protecting equality for women was a sufficient reason for interfering with the Jaycees' liberty.

The *Rotary Club* Court engaged in a more cursory examination of the nondiscrimination law's tailoring. There the Court similarly found no evidence of significant infringement of the Rotary Club's service activities caused by California's prohibition of excluding women, and also similarly found California's nondiscrimination statute to be facially neutral with regard to the organization's viewpoint.[158] With regard to any incidental effects on the Rotary's Club's expressive association, the Court simply repeated that such "slight infringement" is justified because the law "plainly serves" the state's compelling interest in eliminating discrimination against women.[159] The Court gave no further consideration to whether this interest could be served by means significantly less restrictive than compelling the inclusion of women as full members.

Both the *Jaycees* and *Rotary Club* decisions were issued without any dissenting opinion. In the *Jaycees* decision, Justice O'Connor wrote a thoughtful concurring opinion, distinguishing between primarily commercial and primarily expressive organizations,[160] while then-Justice William Rehnquist merely concurred in the judgment without an opinion.[161] Following Justice Rehnquist's example, Justice Scalia similarly concurred in the *Rotary Club* judgment without an opinion.[162]

A third less well-known decision, *New York State Club Association v. City of New York,*[163] grappled directly with the intersection between identity and expression. In this decision, again

158. *Rotary Club*, 481 U.S. at 548–49.

159. *Id*. at 549.

160. *Jaycees*, 468 U.S. at 631–40 (O'Connor, J., concurring) (explaining that she found the Court's analysis to be "overprotective" of predominantly commercial associational activities which are undeserving of constitutional protection but also "underprotective" of truly expressive associational activities). Notably, Justice O'Connor raised the question that would soon confront the Court in the *Hurley* and *Dale* decisions when she queried whether the Court's analysis would "be different if, for example, the Jaycees membership had a steady history of opposing public issues thought (by the Court) to be favored by women?" *Id.* at 633.

161. *Id.* at 631 (O'Connor, J., concurring). Chief Justice Burger and Justice Harry Blackmun took no part in the decision. Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

162. *Rotary Club,* 481 U.S. at 550. Justices Blackmun and O'Connor took no part in the decision. *Id.*

163. N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988).

without a dissenting opinion,[164] the Supreme Court for the third time considered whether a law prohibiting sex discrimination in public accommodations infringed the right of organizations to expressive association. The City Council of New York amended its Human Rights Law in 1984 to apply to organizations with more than four hundred members but exempted those incorporated under laws regulating benevolent orders or religious corporations.[165] The City Council expressly found that "the public interest in equal opportunity" outweighed "the interest in private association asserted by club members," and that the amendment would regulate private club activities only so far as "necessary to ensure that clubs do not automatically exclude persons . . . on account of invidious discrimination."[166]

The New York State Club Association immediately brought a constitutional challenge, and the Supreme Court again sided with the government's nondiscrimination law. Justice Byron White's majority opinion described the city's law as preventing an association from using "specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership."[167] Notably, however, Justice White's opinion left open the possibility that organizations may exclude those who do not share its views or who would reduce how effectively the organization could

164. Justice O'Connor filed a concurring opinion in which Justice Kennedy joined, *N.Y. State Club*, 487 U.S. at 18–20 (O'Connor, J., concurring), and in which she agreed with upholding the law because "[p]redominantly commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the anti-discrimination provisions triggered by the law." *Id.* at 20. Justice Scalia also concurred in the judgment and concurred in part. *Id*. at 20–21 (Scalia, J., concurring in part and concurring in judgment). Interestingly, Justice Scalia disagreed with the majority's reasoning in the Equal Protection part of the decision because he believed the majority had interpreted the rational basis test too leniently. Specifically, he disagreed that it was rational to exempt benevolent orders merely because they are "unique." *Id*. at 20 (Scalia, J., concurring in part and concurring in judgment). Instead, and interestingly, he argued: "As forgiving as the rational-basis test is, it does not go that far. There must at least be *some plausible connection* between the respect in which they are unique and the purpose of the law." *Id*. at 20 (Scalia, J., concurring in part and concurring in judgment) (emphasis added). He reasoned instead that the law was rational because the clubs at issue, "lodges and fraternal type organizations," were not likely to be venues "where men dine with clients and conduct business." *Id*. at 21 (Scalia, J., concurring in part and concurring in judgment).

165. *N.Y. State Club*, 487 U.S. at 6–7.

166. *Id*. at 6.

167. *Id*. at 13.

advocate its desired viewpoints.[168] Nonetheless, because the claim was brought as a facial challenge, the Court held that the law could be applied constitutionally to many large clubs not organized for specific expressive purposes and that any individual association whose expression might be impaired could bring a subsequent as-applied challenge.[169]

In this sex discrimination trilogy within the expressive association context, the Court clearly refused to presume that the mere presence of women would interfere with these organizations' messages. Of course, while each of these organizations adamantly defended their right to discriminate based on sex, none of them directly claimed, nor was the Court willing to presume, that their messages expressed discrimination against women or the superiority of men over women or any other sex-based message. Would an organization overtly or presumably expressing discriminatory messages fare any differently? This issue emerged more directly in the controversies over excluding gays from the Boston St. Patrick's Day parade and the Boy Scouts, as the next section examines.

VII. The Sexual Orientation Duo

Why did the Court treat CLS differently than the Boy Scouts and organizers of the Boston St. Patrick's Day parade? Justice Ginsburg's answer for the majority relied on forum analysis and subsidy analysis. She explained that *Hurley* involved a traditional public forum, the streets (as compared to the limited public forum in *Martinez*) and that *Dale* involved the compulsion of unwanted members with no opt-out (as compared to the mere refusal to subsidize in *Martinez*).[170] Distinguishing these two sexual orientation cases based on the subsidy and forum factors does not suffice to explain *Martinez*, considering that both of these factors were present in *Rosenberger* where the Court invalidated the university's refusal to subsidize a religious student publication in a limited public forum.[171] Moreover, in *Rosenberger*, the Court concluded that the government singled out

168. *Id.*

169. *Id.* 14–15.

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

171. *Rosenberger*, 515 U.S. at 829 (applying the limited public forum test) and 832–37 (rejecting the university's argument that it was merely exercising its discretion in allocating scarce funds).

the student group because of its religious point of view,[172] which is precisely what CLS and the dissenters argued Hastings had done in *Martinez*.

Putting the *Rosenberger* comparison to the side for the time being, the task remains to understand why *Martinez* upheld application of the nondiscrimination policy whereas *Hurley* and *Dale* invalidated application of the nondiscrimination policies. In all three sexual orientation cases—*Hurley*, *Dale*, and *Martinez*—the government actors were applying nondiscrimination laws that prohibited discrimination based on sexual orientation.[173] Granted, the place where those prohibitions were applied was different, as *Hurley* involved the traditional public forum of the street, *Dale* involved an organization considered to be a public accommodation, and *Martinez* involved a university's limited public forum. While it is possible that the place was determinative, it seems highly unlikely given that the extensive reasoning of each decision relied heavily on factors other than location.[174]

One possible key to understanding the Court's divergent reasoning was the Court's finding that forcing speakers to include gays would impair their messages in *Hurley* and *Dale,* whereas the Court found no such impairment in *Martinez*. So how does the presence of a gay person impair the message of the St. Patrick's Day parade and the Boy Scouts, but not the message of fundamentalist Christians?

In *Hurley*, the Court noted that the group wanted to march in the St. Patrick's Day parade, as they had once done, behind "a shamrock-strewn banner with the simple inscription 'Irish American Gay,

172. *Id*. at 831 ("[T]he University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.").

173. For a consideration of the implications of *Martinez* regarding nondiscrimination based on religions, see 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).

174. Justice Ginsburg noted that *Hurley* might be read as either a speech case involving a traditional public forum or an expressive association case. The Court recently appeared to reject any general rule that the government may never discriminate with regard to speech in a traditional public forum such as a street or park in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009), which held that it is constitutionally permissible for the government to discriminate in a traditional public forum when the government itself is speaking.

Lesbian and Bisexual Group of Boston.'"[175] What message does the presence of openly gay Irish people convey?[176] The Court stated such a contingent would "at least bear witness to the fact that some Irish are gay, lesbian, or bisexual," and "the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals."[177] Similarly, in *Dale*, the Court reasoned that Dale's presence would force the Boy Scouts to send a message that it accepts homosexual conduct as a legitimate form of behavior,[178] which "would significantly burden the organization's right to oppose or disfavor homosexual conduct."[179]

Justice Stevens's dissent in *Dale*, joined by Justices Souter, Ginsburg, and Breyer, argued that the only explanation for the majority's holding was singling out an openly gay individual for different First Amendment treatment by presuming that his mere presence "communicates a message that permits his exclusion wherever he goes."[180] Of course, the four dissenting Justices were hampered in *Dale* because they all had joined the Court's unanimous decision in *Hurley,* which rested upon a similar analysis. The *Dale* dissenters resorted to factual distinctions between the cases, arguing that Dale had not carried a banner or otherwise expressed any intent to convey a message, as had the group in *Hurley*.[181]

While it otherwise might be tempting to distinguish *Martinez* as merely denying benefits to student organizations whereas *Hurley* and *Dale* involved compelling the inclusion of unwanted members, recall that *Rosenberger* treated the denial of benefits to student

175. *Hurley,* 515 U.S. at 570.

176. For many years my students have endured the hypothetical "A.G.A.G.A." question: would it be constitutional for the St. Patrick's Day parade organizers to exclude a group known as Ashamed Gays Against Gay Acceptance or A.G.A.G.A.?

177. *Id.* at 574. One year after *Hurley*, Justice Scalia went much further in stereotyping gays in his dissent in *Romer*, 517 U.S. at 645–46 (Scalia, J. dissenting) ("The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.") (citations omitted).

178. *Dale*, 530 U.S. at 653.

179. *Id*. at 659.

180. *Id.* at 696 (Stevens, J., dissenting).

181. *Id*. at 694–95.

organizations as a constitutional infringement, thus weakening the valence of that difference as a persuasive distinction. Recall also that both *Rosenberger* and *Martinez* were treated as limited public forum cases. The crux of the cases seems to be whether the government engaged in unequal treatment of the student group. According to the majority decisions, the unequal treatment in *Rosenberger* was intentional and overt, whereas it was merely an incidental effect in *Martinez*. For such an incidental effect to constitute an infringement of expressive association, the Court would have had to treat the pressure to include gays as pressure to change the group's ideological message. In other words, the Court would have had to conflate identity and ideology.

VIII. The Relationship Between Identity and Ideology

How does the Court treat the relationship between identity and ideology?[182] The Court sometimes distinguishes between identity and ideology. For example, consider the Court's equal protection decision in *James v. Valtierra*.[183] The Court upheld a voter initiative that amended the California constitution to prohibit the building of affordable housing unless approved by a majority of local voters. Although it might seem self-evident that such a requirement would disparately impact impoverished persons, the Court refused to treat the law as discrimination against individuals or families based on their impoverished status and insisted instead that the law affected the entire class of "persons advocating low-income housing."[184] The Court then proceeded to apply only rational basis review and upheld the disparate ideological impact. Applying the logic of *James* to *Martinez*, one might argue that the Hastings policy similarly did not directly target Christians or fundamentalist religious adherents, that any disparate impact would merely affect the entire class of persons advocating against homosexuality, and that such advocacy or ideology does not receive any special constitutional protection.

The Supreme Court also has distinguished between identity and ideology within the First Amendment context, for example, in the sex-discrimination trilogy. In the *Jaycees* decision, the Court

182. For a provocative defense of distinctions based on ideology rather than on identity, see Jessica Knouse, *From Identity Politics to Ideology Politics*, 2009 UTAH L. REV. 749 (2009).

183. James v. Valtierra, 402 U.S. 137 (1971).

184. *Id*. at 142.

expressly held that the state's nondiscrimination law required no change in the Jaycees' creed of promoting the interests of young men and imposed no restriction on its ability to exclude individuals with ideologies different from the Jaycees.[185] The Court instead chastised the Jaycees for discriminating based solely on identity, specifically for relying on "unsupported generalizations" and "sexual stereotyping" regarding the putative perspectives of men and women.[186] Similarly, in the *New York State Club* decision, the Court expressly distinguished between discrimination based on identity and discrimination based on ideology.[187] While the *Rotary Club* decision did not address the distinction explicitly, the Court noted that the organization focused on service activities and did not even take positions on public or political questions and, therefore, held that requiring Rotary to admit women would not significantly affect or infringe their expressive association.[188]

Sex is generally not a hidden characteristic, and society thus has no equivalent vocabulary for being "openly female." In the sex

185. *Jaycees*, 468 U.S. at 627 ("[T]here is, however, no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views. The Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members. Moreover, the Jaycees already invites women to share the group's views and philosophy and to participate in much of its training and community activities. Accordingly, any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best.") (citations omitted).

186. *Id*. at 627–28 ("In claiming that women might have a different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations, or that the organization's public positions would have a different effect if the group were not 'a purely young men's association,' the Jaycees relies solely on unsupported generalizations about the relative interests and perspectives of men and women. Although such generalizations may or may not have a statistical basis in fact with respect to particular positions adopted by the Jaycees, we have repeatedly condemned legal decisionmaking that relies uncritically on such assumptions. In the absence of a showing far more substantial than that attempted by the Jaycees, we decline to indulge in the sexual stereotyping that underlies appellee's contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech.") (citations omitted).

187. *N.Y. State Club*, 487 U.S. at 13 ("[I]f a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end. Instead, the Law merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership.").

188. *Rotary Club*, 481 U.S. at 548–49.

discrimination expressive association cases, the Court recognized that seeing or knowing an individual's sex reveals nothing about an individual's interests, perspectives, or abilities. Yet the Jaycees and the Rotary Club argued, all the way to the Supreme Court, that sex mattered. They vigorously sought to protect their right not to include females as members of their organizations, arguing that including women as members would alter their all-male membership and thus alter their expressive association. But the Court disagreed. It simply refused to treat sex as ideologically message-laden or to make any presumptions about the likely viewpoints of women.

Compare the sex cases to *Hurley* and *Dale*, where the Court held that the mere presence of an openly gay person sends a message that the individual demands acceptance.[189] Here the Court conflated an openly gay identity with an ideological perspective. What if, instead, being gay is merely a descriptive fact to an individual, just as being female is a fact? What if some individuals are simultaneously gay and also adherents of Christianity, family values, ethical norms, moral principles, and so forth?

The *Hurley* and *Dale* courts conflated gay identity with an ideology, which is precisely what they had refused to do with regard to women. So why didn't the Court conflate sexual orientation identity and ideological message in *Martinez,* as it did in *Hurley* and *Dale*? Has the understanding of sexual orientation changed that much in the fifteen years since *Hurley* and the ten years since *Dale*? Perhaps it has. Without trying to measure the overall effect of societal changes, a focus on changes in constitutional doctrine may illuminate.

At this moment in time regarding the constitutional treatment of sexual orientation, the Court now has made clear in *Romer* and *Lawrence* that government may not rely on animosity or moral disapproval of same-sex sexuality as a legitimate governmental interest. The *Martinez* Court further underscored what the *Lawrence* Court also made clear, namely that discrimination based on same-sex conduct is tantamount to discrimination based on same-sex status or identity.[190] As a result, the loophole that CLS and the dissenting

189. *See Hurley*, 515 U.S. at 574 (describing the presence of the openly gay Irish marchers as claiming "unqualified social acceptance"); *Dale*, 530 U.S. at 653 (describing the presence of a known gay scoutmaster as sending the message that the Boy Scouts "accept homosexual conduct as a legitimate form of behavior").

190. *Martinez*, 130 S. Ct. at 2990 (citing to both Justice Kennedy's majority opinion and Justice O'Connor's concurring opinion in *Lawrence*).

Justices hoped to exploit—the possibility of protection of ideological expression left open in the sex discrimination trilogy—appears to have been closed, albeit indirectly, by *Romer* and *Lawrence*. In effect, the argument made by CLS and defended by Justice Alito in dissent—that nondiscrimination based on sexual orientation is itself discrimination against a particular viewpoint regarding sexual morality[191]—had been foreclosed by the logic of *Lawrence* especially.

Both CLS and Justice Alito's dissenting opinion in *Martinez* claimed that the Hastings nondiscrimination policy constituted viewpoint discrimination. Justice Ginsburg turned the accusation back against CLS, however, endorsing the argument from the Hastings brief that CLS was confusing its own viewpoint discrimination (against nondiscrimination laws) with viewpoint discrimination against it. Justice Ginsburg went even further in using the conduct/expression distinction against CLS when she reasoned that Hastings required only that CLS conform its conduct to the nondiscrimination policy regarding access to membership but that the group could continue to express its own discriminatory viewpoint because the Constitution protects expression even of "the thought that we hate."[192]

In addition to the change in constitutional treatment of sexual orientation, consider the possibility that the Court was entrenching a broader norm with regard to how it handles incidental effects or disparate impact claims across constitutional doctrines.

IX. The Relationship Between Liberty and Equality

Much of the work done to lay the foundation for upholding the Hastings nondiscrimination policy occurred in a brief section in which Justice Ginsburg argued that the expressive-association and free-speech claims of CLS "merge."[193] Although CLS asked the Court to examine the claims separately, the organization had argued nonetheless that *who* speaks on its behalf colors *what* concept is

191. Justice Alito's dissenting opinion specifically characterized the Hastings nondiscrimination policy as discrimination "on the basis of viewpoint regarding sexual morality" and argued the CLS requirement that its members "foreswear 'unrepentant participation in or advocacy of a sexually immoral lifestyle'" "should qualify as a conduct requirement." *Id*. at 3012 (Alito, J. dissenting).

192. *Id.* at 2994 (majority opinion) (citing the Court' conduct-speech distinction made in *Rumsfeld*, 547 U.S. at 60, as well as Justice Alito's dissenting quotation of Justice Holmes' dissent regarding protecting expression of "the thought that we hate.").

193. *Id*. at 2985.

conveyed.[194] Citing this argument, Justice Ginsburg reasoned that it would not make sense to treat the claims as discrete because the rights are indeed "closely linked."[195] This is quite similar to Justice Kennedy's decision for the majority in *Lawrence v. Texas,* reasoning that equality and liberty are intertwined in important ways.[196]

Justice Ginsburg proceeded to cite three reasons for applying limited public forum analysis rather than the expressive association line of cases: (1) it would be "anomalous" for a speech restriction to survive only to be struck down as an association violation; (2) applying the strict scrutiny required by the expressive association line of cases would invalidate the defining characteristic of the limited public forum; and (3) the denial of a governmental subsidy is not equivalent to compelling a group to include unwanted members with no choice to opt out.[197] Justice Ginsburg offered some reassurance to CLS in footnote 13, however, which emphasized that the limited public forum doctrine, like the subsidy cases, prohibits viewpoint discrimination.[198]

The key point is that both lines of cases prohibit viewpoint discrimination, which is presumably why Justice Alito was "content" to use the limited public forum line of cases as well.[199] That both the limited public forum and subsidy cases prohibit viewpoint discrimination underscores the Court's concern with ensuring equal treatment, which arguably does the heaviest lifting in many First Amendment doctrines. Rarely does the government infringe the liberty of all. Rather, in making its various legal classifications, the government frequently discriminates, either intentionally or incidentally. Therefore, the constitutional violation is frequently the government's unequal treatment of expression.

If it is unequal governmental treatment that concerns the Court, the *Martinez* decision makes more sense because it effectively aligns the incidental effects cases in the context of expressive association with the incidental effects cases in the context of free exercise of religion as well as the disparate impact cases in the context of equal protection. In other words, across these constitutional doctrines the

194. *Id*.
195. *Id*.
196. *Lawrence,* 539 U.S. at 575.
197. *Martinez,* 130 S. Ct. at 2986.
198. *Id*.
199. *Id.* at 3009 (Alito, J., dissenting).

Court refuses to apply higher scrutiny unless the Court is persuaded that the government's discrimination is intentional.[200]

In *Martinez*, the Court refused to apply the higher scrutiny used in expressive-association cases, which places the burden on the government to show that it has a compelling interest, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.[201] Instead, the Court employed the more lenient scrutiny used in limited public forum cases, which requires merely that any access barrier be reasonable and viewpoint neutral.[202]

Similarly, in the context of free exercise, *Employment Division v. Smith* requires only that the government have a rational basis for a neutral law of general applicability that has an incidental effect on free exercise of religion.[203] The Court reserves higher scrutiny for situations where the government has targeted religious exercise.[204]

In the doctrinal context of equal protection, the Court also reserves higher scrutiny for cases of intentional or overt discrimination, but uses only rational basis review for cases involving only disparate impact.[205] Justice Scalia recently emphasized this point: "without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional."[206] He argued that this is especially so when the class complaining of disparate impact is "not even protected."[207] Justice Scalia then compared his list of classifications that do not involve protected classes under the Fourteenth Amendment with the First Amendment's not requiring an exception for "religious objectors to neutral rules," citing *Smith*.[208] It is worth noting that Justice Scalia did not include sexual orientation on his list of classifications that do not involve protected classes.[209]

200. One rare departure from this pattern is found in the Court's doctrinal treatment of dormant commerce clause claims where evidence of *either* discriminatory purpose or effect is sufficient to heighten judicial scrutiny.

201. *Jaycees,* 468 U.S. at 623.

202. *Martinez,* 130 S. Ct. at 2984.

203. *Smith*, 494 U.S. 872.

204. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

205. Washington v. Davis, 426 U.S. 229, 245–48 (1976); Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979).

206. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 207 (2008).

207. *Id.*

208. *Id.* at 208.

209. In addition to "religious objectors to neutral rules," Justice Scalia listed other classifications that do not trigger constitutional protection, including disability (citing City

In *Martinez*, Justice Alito came very close to suggesting that religious adherents might be a suspect class deserving of heightened protection. In a footnote criticizing Justice Stevens' reference to religious "status" as opposed to belief, Justice Alito suggests that reference to "the religion into which a person was born or the religion of a person's ancestors" would involve "immutable characteristics" that cannot be reduced to viewpoint.[210] He commented subsequently that not all Christians agree with the CLS viewpoint on sexual morality and suggested that it is only those who share this sexual morality viewpoint who are threatened with "marginalization."[211] While this sense of fundamentalist Christians or fundamentalist religious adherents as a suspect class permeates the logic of Justice Alito's dissenting opinion, he nonetheless stopped short of arguing directly that fundamentalist Christians are a suspect class deserving of heightened judicial protection.

X. The Equal Burden to Prove Invidious Intent

If the Court is aligning its treatment of incidental effects or disparate impact across doctrines, then this suggests a path for CLS and other groups who feel they have been subjected to unequal treatment. In short, they simply must prove intent. They must attempt to prove what Justice Alito's dissenting opinion repeatedly alleged, that the government's purported non-discriminatory interests

of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)), and age (citing Gregory v. Ashcroft, 501 U.S. 452 (1991)). He also listed poverty (citing Harris v. McRae, 448 U.S. 297 (1980), *reh'g denied*, 448 U.S. 91 (1980)). As I have argued elsewhere, while the Court in *Harris* boldly asserted that the Court had "held repeatedly that poverty, standing alone, is not a suspect classification," *Harris,* 448 U.S. at 323, the Court cited as support for this proposition only James v. Valtierra, 402 U.S. 137 (1971). However, it hardly seems fair to interpret *James* as involving a classification discriminating against poor persons when the Court explicitly *rejected* Justice Marshall's dissenting argument that the voter initiative amending California's constitution to require local majority voter prior to construction of low-rent housing discriminated against poor persons. Instead, the Court in *James* upheld the amendment based on the majority's insistence that it discriminated only against "persons advocating low-income housing." *James*, 402 U.S. at 142. Other major cases relating to poverty similarly did not involve facts requiring the Court to determine whether poor people are a suspect class or whether poverty is a suspect classification, such as Dandrige v. Williams, 397 U.S. 471 (1970), which involved discrimination between larger and smaller families, and San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), which involved poorer and wealthier school districts. *See* Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URBAN L.J. 629, 645–49 (2008).

210. *Martinez,* 130 S. Ct. at 3011, n.5 (Alito, J., dissenting).

211. *Id.* at 3019.

were merely a pretext for discriminatory purpose. Presumably they might accomplish this using any of the methods available to plaintiffs alleging disparate impact in an equal protection context, as outlined in *Village of Arlington Heights v. Metropolitan Housing Development Corp*.[212] For example, they might show that the discrimination was facial or overt, such as the discrimination against religious content in *Rosenberger* or the hostility to the SDS in *Healy*.[213] They might show that the discrimination was unexplainable on grounds other than invidious discrimination or animosity or prejudice, such as the pattern of denying permits to Chinese laundries in *Yick Wo v. Hopkins*,[214] or the sweeping prohibition of all governmental protection of gays in *Romer v. Evans,*[215] or the pattern of allowing high density occupancy buildings except when requested by a disabled group home in *City of Cleburne v. Cleburne Living Center*.[216] Or they might show that the intent was evident from the record, such as the legislative statements expressing the desire to prevent "hippie communes" from receiving food stamps in *U.S. Department of Agriculture v. Moreno*.[217] Finally, they might show that the government departed from normal procedural practices or substantive considerations in developing or applying the policy, which might be gleaned from circumstantial evidence, as the dissent argued in *Martinez*.

Failing to prove that the discrimination was intentionally invidious seems to be where CLS lost this case. Justice Alito made a vigorous attempt to argue that Hastings had changed its policy so as to discriminate against fundamentalist Christians. The fact that it was CLS that had changed its own policy in 2004 probably didn't help his cause. Nonetheless, the conservative dissenters needed only to persuade Justice Kennedy, as their potential fifth vote, that the public

212. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) (identifying various factors relevant to determining the government's intent, including the impact of the government's action, the historical background of the action and the sequence of events leading to the action, any departures from regular procedure or normal substantive considerations, and any evidence in legislative or administrative record).

213. *Healy,* 408 U.S. at 169.

214. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

215. *Romer*, 517 U.S. at 620.

216. *Cleburne,* 473 U.S. at 432.

217. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973). In addition to the antipathy toward hippies, the *Moreno* Court also rejected the government's "wholly unsubstantiated assumptions" about food stamp fraud being more likely in households of unrelated persons. *Id.* at 535.

law school adopted its nondiscrimination policy, not only to further diversity and tolerance, but also to discriminate against those who believe same-sex conduct is immoral. This they simply failed to do.

Reconsider that CLS might have been enticed to pursue its challenge to the Hastings policy all the way to the Supreme Court by the Court's lines of decisions protecting anti-gay expression in *Hurley*, *Dale*, and *Rumsfeld,* as well as those protecting religious expression in educational settings, exemplified by *Rosenberger*. CLS easily might have deduced from these decisions that changing its policy—to make the exclusion of those who are gay and those who defend gays integral to its expressive association—would provide the necessary factual predicate for constitutional protection by the Court. If so, CLS teetered on a very tight rope. Here, and in a variety of related contexts, CLS and its conservative allies frequently claim they harbor no animosity toward gays as a class, and specifically disclaim any discrimination based on status or identity. Presumably this argument is strategically important so as to ensure that any law discriminating against gays will not be deemed to be based on animosity and thus will not be subject to invalidation under the logic of *Romer*. Now add *Lawrence* to the mix and its reaffirmation in *Martinez* that discriminating against same-sex conduct constitutes discrimination against gays as a class of persons. A refrain seems to be emerging that governmental discrimination against gays based on status, identity, or conduct is not allowed. It should come as no surprise then that CLS attempts to carve out belief or ideology as one last remaining basis to protect discrimination against same-sex sexuality. Unfortunately for CLS, *Martinez* effectively foreclosed this last path for using the Constitution to protect moral disapproval of homosexuality. Thus, should CLS complain that the government's decision to afford equal treatment to gays has trumped its liberty to receive governmental support for moral disapproval of gays, it would appear to be right.

Conclusion

Justice O'Connor, in her classic pragmatic and wise manner, cautioned against "reliance on categorical platitudes" when bedrock constitutional principles conflict.[218] Writing a concurrence in *Rosenberger*, Justice O'Connor insisted that resolving such difficult disputes "instead depends on the hard task of judging—sifting

218. *Rosenberger,* 515 U.S. at 847 (O'Connor, J., concurring).

through the details" and sometimes drawing "quite fine" lines.[219] This is an apt reminder of the Court's responsibility to take great care in making reasoned judgments. The challenge, especially heightened in First Amendment cases, is that both the facts and the doctrines provide an array of options for framing and deciding any particular dispute.

The Court framed *Martinez* as involving only indirect governmental pressure via conditions on subsidies to ensure non-discrimination by student organizations in a university's limited public forum. This combination of factors provided the basis for the Court to distinguish the case from precedents otherwise similar with regard to one factor or another. The Court did not order the university to subsidize religious exercise as it had in *Rosenberger*. The Court did not apply the higher scrutiny it had used for infringements of expressive association in the sex discrimination trilogy, *Jaycees*, *Rotary Club*, and *New York State Club*. It did not perpetuate its prior presumption that displaying an openly gay identity somehow inherently expresses an ideological message, nor did it allow CLS to exclude gays to protect its message, as it had in the sexual orientation duo, *Hurley* and *Dale*.

But *Martinez* is no outlier. Time and again, from among the array of options, the Court's constitutional decisions turn not merely on the nature and extent of infringement of an individual or group's liberty, but more specifically on whether the government's regulation has infringed liberty in an intentionally discriminatory manner. As *Martinez* demonstrates, however, one Justice's neutrality is another Justice's pretext. Discrimination is often in the eye of the beholder. Moreover, a comparison of the line-up of Justices in *Martinez* as compared to *Ysursa* revealed that the reasoning followed by any particular Justice may fluctuate depending on the specific facts and context as well.

The crux of *Martinez* seems to be that CLS simply failed to persuade a majority of the Court that Hastings enacted or applied its nondiscrimination policy for recognition of student groups at least in part because of its adverse effect on fundamentalist Christians. *Martinez* thus effectively brings cases involving incidental effects on expressive association into the broader equality fold, requiring proof of intent before such incidental effect or disparate impact will raise the Court's suspicion and its scrutiny. Whether or not this general

219. *Id.*

rule is sufficiently protective of liberty or equality,[220] at least the Court is tending toward greater consistency by aligning expressive association with the other constitutional doctrines protecting equality.

Finally, rather than perceiving *Martinez* as merely about equality trumping liberty, consider that the decision may have the effect of enhancing liberty as well. *Martinez* appeared to end the Court's prior conflation of gay identity with gay-rights ideology by refusing to perpetuate the presumption that the mere presence of an openly gay member in the Christian Legal Society necessarily would alter the organization's message. By effectively refusing to conflate openly gay identity with any ideological expression, *Martinez* enhances liberty, making space for an individual to embrace any religious ideology regardless of his or her sexual orientation.

220. For a broader critique of the Court's Equal Protection jurisprudence, see Julie A. Nice, *Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach*, 85 CORNELL L. REV. 1392 (2000).