Texas Wesleyan Law Review

Volume 17 | Issue 3 Article 2

3-1-2011

Christian Legal Society v. Martinez: The Death Knell of Associational Freedom on the College Campus

Zachary R. Cormier

ARTICLES

CHRISTIAN LEGAL SOCIETY V. MARTINEZ: THE DEATH KNELL OF ASSOCIATIONAL FREEDOM ON THE COLLEGE CAMPUS

By Zachary R. Cormier[1]

I. INTRODUCTION

In *Christian Legal Society v. Martinez*,[2] the Supreme Court held that a public university may "condition its official recognition of a student group—and the attendant use of school funds and facilities—on the [student] organization's agreement to open eligibility for membership and leadership to all students[.]"[3] More specifically, that the Hastings College of Law (Hastings) could refuse official recognition of the Christian Legal Society (CLS) as a student organization on campus because CLS required its members to: (1) profess the Christian faith; and (2) agree that it was wrong for sex to take place outside of the marriage between a man and woman.[4] To many, the Court's

1. The Author, Zachary Cormier, is a practicing attorney at the law firm of Modrall, Sperling, Roehl, Harris, and Sisk, P.A. in Albuquerque, New Mexico. Mr. Cormier received his Juris Doctorate from the Pepperdine University School of Law.

2. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 S. Ct. 2971 (2010).

3. *Id.* at 2978.

4. *Id.* at 2978, 2980–81

> ([W]e reject CLS' First Amendment challenge. Compliance with Hastings' all-comers policy, we conclude, is a reasonable, viewpoint-neutral condition on access to the student-organization forum. In requiring CLS – in common with all other student organizations – to choose between welcoming all students and forgoing the benefits of official recognition, we hold, Hastings did not transgress constitutional limitations. CLS, it bears emphasis, seeks not parity with other organizations, but a preferential exemption from Hastings' policy. The First Amendment shields CLS against state prohibition of the organization's expressive activity, however exclusionary that activity may be.

DOI: https://doi.org/10.37419/TWLR.V17.I3.1

ruling will be remembered as a testament to the continuing social progress of the United States. A defense of that all too valuable principle purchased by the struggles of so many throughout various civil rights movements in history: a person should not have to endure the pains and costs of discrimination because of his or her religious beliefs or moral constitution. For just as many however, the *Martinez* opinion was the death knell of associational freedom on the college campus.

In practical terms, the *Martinez* decision stands for the proposition that whereas a public university may not discriminate against any one viewpoint in the student organization forum, it can certainly prevent the ability of a student group to form its viewpoint as intended by requiring it to extend membership (and even leadership positions) to those students that fervently disagree with the group's message. Essentially, a public university may destroy a viewpoint before it ever begins. Justice Alito, writing for the dissent, voices the concerns of many who believe that the Court's holding has grave implications for expressive freedoms under the Constitution:

> The proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate." . . . Today's decision rests on a very different principle: no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning
>
> . . .
>
> I do not think it is an exaggeration to say that today's decision is a serious setback for freedom of expression in this country. 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. Even those who find CLS views objectionable should be concerned about the way the group has been treated—by Hastings, the Court of Appeals, and now this Court. I can only hope that this decision will turn out to be an aberration.[5]

The crux of the *Martinez* holding was the convergence of First Amendment free speech and associational rights within the confines of a public university student organization program. It was the majority's treatment of this issue that allowed for the associational freedoms of CLS to be curtailed to the prerogatives of Hastings' "all-comers" policy. In essence, the glaring obstacle for affirmation of Hastings' "all-comers" policy was the Court's settled jurisprudence on associa-

---

But CLS enjoys no constitutional right to state subvention of its selectivity.").

5. *Id.* at 3000, 3020 (Alito, J., dissenting) (citing United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

tional rights. If associational freedom as defined before this case was not restricted, then the "all-comers" policy could not stand. The majority's obstacle can perhaps best be understood by the clear expression of associational freedom by the Court in *Boy Scouts of Am. and Monmouth Council v. Dale*:

> In *Roberts* v. *United States Jaycees*, . . . we observed that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. *See ibid.* (stating that protection of the right to expressive association is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority"). Government actions that may unconstitutionally burden this freedom may take many forms, one of which is "intrusion into the internal structure or affairs of an association" like a "regulation that forces the group to accept members it does not desire." . . . Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, "[f]reedom of association . . . plainly presupposes a freedom not to associate." . . . . The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.[6]

Hastings' "all-comers" policy was exactly the type of infringement that the *Dale* Court had described as deserving of a strict scrutiny analysis.[7] Hastings would only grant CLS official recognition if CLS accepted members that it did not wish to accept.[8] CLS' reason for excluding those prospective members was for the very reason expressed by the *Dale* Court, namely that those members would "impair the ability of [CLS] to express those views, and only those views, that it intends to express."[9] CLS would not be able to form (and then express) its intended message at all. For all intentional purposes, it looked as if it would be difficult for the Court to do anything but strike the Hastings' "all-comers" policy.

---

6. Boy Scouts of Am. v. Dale, 530 U.S. 640, 647–48 (2000) (citing N.Y. State Club Ass'n., Inc. v. City of New York, 487 U.S. 1, 13 (1988); Roberts v. U. S. Jaycees, 468 U.S. 609, 622–23 (1984)).

7. *Id.* at 648 ("But the freedom of expressive association, like many freedoms, is not absolute. We have held that the freedom could be overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" (quoting *Roberts*, 469 U.S. at 623)).

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

9. *Dale*, 530 U.S. at 648 (citing *Roberts*, 469 U.S. at 623).

The majority found a way however—it would simply justify the complete removal of CLS' associational freedom from the limited public forum of the university. Despite CLS' well supported request that its free speech and associational freedom challenges be analyzed under their separate respective lines of jurisprudence,[10] the majority decided that it had the power to jam (and indeed hide) CLS' associational freedom rights underneath the weight of the limited public forum jurisprudence for free speech.[11] The result: CLS' associational freedoms quickly flattened and then seemingly vanished altogether. The majority would ignore CLS' separate right to be able to form (and then express) its viewpoint in its intended fashion, and instead would focus solely on determining whether Hastings' "all-comers" policy was "reasonable" and "viewpoint neutral" under free speech limited public forum analysis.[12]

Martinez was not a merger between free speech and associational rights, but rather a complete eradication of associational rights in deference to existing free speech analysis within a public forum. The majority's justification for this was based upon the assertion that these two separate rights were too entangled with one another in the case at hand to conduct a separate analysis.[13] As the majority put it, "*Who* speaks on its behalf, CLS reasons, colors *what* concept is conveyed. . . . It therefore makes little sense to treat CLS speech and association claims as discrete."[14] Under the limited public forum analysis of neutrality, Hastings' "all-comers" policy was of course rendered valid.[15] Indeed, if Hastings did in fact enforce an "all-comers" policy blindly upon every student group, there would be no viewpoint discrimination.[16]

The majority's failure was not in its relatively straightforward free speech analysis, but rather in its determination that CLS, and indeed every other student group at Hastings, was not due a distinctly separate associational freedom to form (and then express) its intended viewpoint. Free speech is essentially *the right to convey a message.* Associational freedom is the right to *form and eventually protect the intended message to be conveyed.*[17] Allowing the government to de-

10. *Martinez*, 130 S. Ct. at 2985.
11. *Id.*
12. *Id.* at 2984.
13. *Id.* at 2985.
14. *Id.*
15. *Id.* at 2993, 2995.
16. *See id.* at 3001–06 (Alito, J., dissenting). Justice Alito and the dissent based much of their argument upon facts which indicated that Hastings had not in fact applied an "all-comers" policy. Justice Alito further argued that even if there was such an "all-comers" policy in place, it was not applied equally across all of the student group applications. *Id.*
17. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 404 (1989) ("In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized

termine what manner of speech is appropriate for a public forum is entirely different than allowing the government to restrict a party's ability to form and express its intended message within the confines of that public forum. Indeed, prohibiting a public university from discriminating against viewpoints is certainly meaningless if the Constitution does not first protect the student group's right to form its intended viewpoint to begin with.

This analytical conflict between free speech and associational freedom within a public forum was likely only the manifestation of an underlying conflict between associational freedom and equal access in the mind of the Court. The facts of the case demanded that either the university had the absolute right to require free access to student groups or that the student groups had an absolute right to choose membership. The Court's decision to subject associational freedom to the free speech limited forum analysis was only the effect of a deeper decision to elevate equal access above associational freedoms.

This Article will explore the *Martinez* Court's decision to allow the public university to completely restrict the associational rights of its student groups in deference to its own prerogatives of equal access. First, this Article will describe the factual and procedural background of the case. Second, Justice Ginsburg's majority opinion, and more specifically the analytical decision to subject associational rights to public forum free speech jurisprudence, will be explained and analyzed. Third, a more comprehensive analysis will be provided as to why associational rights should not have been eliminated in the public forum, including implications for the public university environment in the future. Finally, the Article will provide a brief conclusion.

II. *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*

A. *Factual and Procedural Background*

Hastings is a member of the University of California public system.[18] As with most institutions of higher education, Hastings has established a "Registered Student Organization Program" (RSOP), an administrative program that encourages and manages student organizations of various kinds at the law school.[19] The main purpose of Hastings' RSOP is to add meaningful extracurricular activities for law students and to enhance the "Hastings community and experience."[20] One of the main goals of the RSOP "experience" is to "promote a diversity of viewpoints *among* registered student organizations, in-

message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974))).

18. *Id.* at 2978.

19. *Id.* at 2978–79.

20. *Id.* at 2978.

cluding viewpoints on religion and human sexuality."[21] It is even a special responsibility of the Hastings Dean to "ensure an ongoing opportunity for the expression of a variety of viewpoints."[22]

The most critical role of the Hastings RSOP administrative body is that of gatekeeper, as it has the sole power to decide which student group applications will receive "official recognition" by the school.[23] This "official recognition" is very important to a potential student group. In addition to providing the student group with an all too important legitimacy and formal connection with the school, the RSOP's "official recognition" also allows for the student group to receive "financial assistance,"[24] access to official law school channels of communication,[25] and use of law school facilities.[26]

As gatekeeper, the RSOP enforces Hastings' Nondiscrimination Policy upon a prospective student group by requiring that group to submit its bylaws to the RSOP for review.[27] In pertinent part, the Hastings Nondiscrimination Policy precludes any student group from discriminating against prospective or current members "on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation."[28] As such, RSOP-approved groups at Hastings must "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs."[29] Hastings labeled the policy as it applies to student groups as an "all-comers policy."[30]

In 2004, the Hastings chapter of the Christian Legal Society[31] sought a formal exemption from the "all-comers policy" as part of its

---

21. *Id.* at 3013 (Alito, J., dissenting).
22. *Id.*
23. *Id.* at 2979.
24. *Id.* The "financial assistance" provided by the Hastings RSOP includes funds that subsidize student group events. *Id.* These funds come from a "mandatory student-activity fee imposed on all students." *Id.*
25. *Id.* The law school channels of communication which come along with this "official recognition" include several meaningful tools, such as: (1) the opportunity to place announcements in "a weekly Office-of-Student Services newsletter;" (2) the ability to advertise its upcoming events "on designated bulletin boards;" (3) use of an official "Hastings-organization [e-mail] address" to send messages to members and prospective members of the law school; and most importantly (4) the ability to participate in the "annual Student Organization Fair designed to advance recruitment efforts." *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *See id.* at 2980. The Christian Legal Society is a national "association of Christian lawyers and law students" that actively "charters student chapters at law schools throughout the country." *Id.* The Christian Legal Society requires that its members sign a "Statement of Faith" and agree "to conduct their lives in accord with prescribed principles." *Id.* One of these principles is "the belief that sexual activity should not occur outside of marriage between a man and a woman." *Id.* As such, CLS sought an

application for "official recognition" from Hastings.[32] Hastings' RSOP declined to grant such an exemption, explaining that "[t]o be one of our student-recognized organizations . . . CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation."[33] CLS refused to change its bylaws and filed suit against "various Hastings officers and administrators under 42 U.S.C. Section 1983" for injunctive and declaratory relief, complaining that "Hastings' refusal to grant the organization official status violated CLS' First and Fourteenth Amendment rights to free speech, expressive association, and the free exercise of religion."[34]

The U.S. District Court for the Northern District of California granted summary judgment in favor of Hastings, holding that Hastings' "all-comers" policy did not violate any of the constitutional rights which CLS claimed were at issue.[35] The Ninth Circuit Court agreed with the District Court and affirmed the District Court's holding in a two-sentence opinion which was similarly founded upon the blanket conclusion that the Hastings' policy was "viewpoint neutral and reasonable."[36] The Ninth Circuit apparently based its opinion upon the finding that the parties had stipulated to the fact 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."[37]

---

exemption from the RSOP all-comers policy because its bylaws would exclude any individual that: (1) "engages in 'unrepentant homosexual conduct;" or (2) holds "religious convictions" that differ from the Christian based "Statement of Faith." *Id.* The Hastings chapter of the CLS was actually formed from a different Christian organization that had been a recognized student group at Hastings "for a decade." *Id.* The exemption from the "all-comers policy" was not sought until the former group affiliated with CLS and submitted its new mandated bylaws. *Id.*

32. *Id.*

33. *Id.* at 2980–81. As part of its rejection, Hastings did offer to provide CLS with the opportunity to use its facilities upon request. *Id.* at 2981. Hastings further offered "access to chalkboards" and "generally available bulletin boards to announce its events." *Id.* As Justice Ginsburg put it, "Hastings would do nothing to suppress CLS' endeavors, but neither would it lend RSO-level support for them." *Id.*

34. *Id.*

35. *Id.* Specifically, the District Court did not find that Hastings' "all-comers" policy violated CLS' right to free speech because the RSOP was a premised upon access to a "limited public forum" and that the policy was "reasonable" and "viewpoint neutral." *Id.* Similarly, The District Court found that CLS' right to expressive association was not violated because the Hastings policy '"merely placed conditions on' the use of its facilities and funds" and did not impede upon CLS' "ability to meet and communicate as a group." *Id.* Finally, the District Court found the "all-comers" policy to have been "neutral" and generally applicable; therefore, not violative of the Free Exercise Clause. *Id.*

36. *Id.*

37. *Id.*

B. *Justice Ginsburg's Majority Opinion*

The U.S. Supreme Court affirmed the Ninth Circuit's judgment in a 5-4 decision written by Justice Ginsburg.[38] Based upon similar conclusions reached by the District Court, Justice Ginsburg and the majority found that Hastings' "all-comers" policy did not violate CLS' free speech or expressive association rights and that such a policy did not run afoul of the Free Exercise Clause.[39] In order to get to the constitutional analysis however, the majority was forced to first deal with a critical underlying issue in the case that had been highly contested by the dissenting Justices: what was the Nondiscrimination Policy that Hastings actually employed?[40]

1. The Hastings "All-Comers" Policy

CLS "urged" the Court to analyze the Hastings Nondiscrimination Policy as it was written within school regulations.[41] The purpose of this was that the Hastings regulation listed specific classes of protected groups such as "religion" and "sexual orientation," while leaving out many other categories of belief and status that comprised student groups at Hastings.[42] If the Court gave consideration to the regulation as written, it would be difficult for it to conclude that Hastings had a true "all-comers" policy since whereas a religious group was restricted from excluding members based upon religious belief, a political group for example was not restricted from a similar exclusion based upon political belief.[43] Similar to the Ninth Circuit Court, Justice Ginsberg avoided the question altogether by holding that CLS had precluded the Court from making such a distinction as the parties had agreed to a relevant stipulation on the issue while in the District Court.[44] Specifically, the parties had stipulated that "Hastings requires that registered student organizations allow any student to participate, become a member, or seek leadership positions regardless of [her] status or beliefs."[45] Whereas Justice Alito and the dissent argued vigorously for the Court to consider other procedural factors and factual contentions to the contrary,[46] Justice Ginsburg and the major-

38. *Id.* at 2978.
39. *Id.*
40. *Id.* at 2982.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* The parties' stipulation even noted the specific example that CLS was trying to argue hypothetically: "Thus for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization." *Id.*
46. *See id.* at 3005–06 (Alito, J., dissenting). Justice Alito argues that the stipulation did not truly resolve the issue of what policy was in effect at the time of CLS' denial. *Id.* at 3005 (Alito, J., dissenting). Justice Alito points out that the stipulation was written in the present tense as to what Hastings' policy was over a year after CLS

ity held that well settled law regarding the binding effect of stipulations resolved the issue.[47] Hastings had an "all-comers" policy for purposes of the Court's analysis.

2. Combining the Freedom of Speech and Right of Association under a Limited Public Forum Analysis

The "novel" issue before the Court was expressed by Justice Ginsberg as the following: "May a public law school condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to pen eligibility for membership and leadership to all students?[48]" Although CLS provided three constitutional grounds for challenge under this question, the Court focused on only the free speech and associational Freedom violations which CLS asserted. Justice Ginsberg noted that CLS, like most litigants in prior cases, argued for an independent analysis of each of these freedoms under their respective bodies of case law.[49] Instead of following CLS down this traditional road of argumentation, Justice Ginsburg made a critical decision for the foundation of the Court's analysis by holding that the two freedoms overlapped in this case to such a degree that the two rights deserved to be analyzed only under the traditional free speech public forum analysis.[50]

Justice Ginsburg went on to list three "observations" which she felt justified the Court's decision to subject associational rights to tradi-

---

had been denied student organization status. *Id.* Indeed, the stipulation did not specify that Hastings had the stipulated policy in place at the time of denial. *Id.* Furthermore, Justice Alito argued that even if the stipulation did initially establish Hastings' "all-comers" policy, the stipulation was later amended by Hastings' answer to CLS' complaint where it stated that it "allowed 'political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." *Id.* at 3005–06 (Alito, J., dissenting).

From Justice Alito's perspective, Hastings had admitted that it only really enforces the "all-comers" policy on some student groups. *Id.* at 3005. Thus, an as-applied challenge was still possible. Justice Ginsburg addressed this argument by asserting that the contents of Hastings answer could not have thwarted the stipulation. *Id.* at 2983 n.8 (majority opinion). As Justice Ginsburg noted, "the parties' joint stipulation supersedes the answer, to the extent of any conflict between the two filings. *Id.* (citing Pepper & Tanner, Inc. v. Shamrock Broad., Inc., 563 F.2d 391, 393 (CA9 1977)).

47. *Martinez*, 130 S. Ct. at 2982–84. Specifically, Justice Ginsburg noted the unequivocal finality of stipulations for the purposed of appeal:

> [Factual stipulations are] binding and conclusive . . . , and the facts stated are not subject to subsequent variation. So, the parties will not be permitted to deny the truth of the facts stated, . . . or to maintain a contention contrary to the agreed statement, . . . or to suggest, on appeal, that the facts were other than as stipulated or that any material fact was omitted. The burden is on the party seeking to recover to show his or her right from the facts actually stated.

Id. at 2983 (quoting 83 C.J.S., *Stipulations* § 93 (2000)).

48. *Id.* at 2978.

49. *Id.* at 2985.

50. *Id.*

tional limited public forum analysis for free speech.[51] First, since free speech and associational rights are so "closely linked," it only makes sense that the "same considerations" that have led to a "less restrictive level of scrutiny to speech in limited public forums . . . apply with equal force to expressive association occurring in limited public forums."[52] Simply put, if speech can be limited in public forums, so can associational freedoms. Second, Justice Ginsburg explained that to differentiate between associational rights would deprive the government of a basic purpose for a limited forum in "reserv[ing] [them] for certain groups."[53] Justice Ginsburg supported this proposition by noting the almost universal restriction employed by university student organization programs in only allowing students to participate as members.[54] Third, Justice Ginsberg argued that limitation of associational rights is justified because a student group in this context is "effectively seeking a state subsidy" and may "exclude any person for any reason if it forgoes the benefits of official recognition."[55]

---

51. *Id.* at 2985–86.

52. *Id.* at 2985. Justice Ginsburg fails to analyze any of the significant differences between free speech and associational rights when coming to this conclusion. Indeed, Justice Ginsburg overplays the similarity and dependence between the two rights in generally protecting expression, while failing to devote even the slightest analysis to how each right protects such expression differently. Justice Ginsburg only notes that she feels it would be "anomalous" for a "restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as impermissible infringement of expressive association." *Id.* This indeed is the fundamental failure of the analysis; a failure to see the different impact an associational restriction will have on a viewpoint. Namely, that limiting the manner of free speech in a public forum does not affect the substance of the viewpoint, whereas limiting (or rather eliminating) associational freedom within that forum will directly affect the substance of the student group's viewpoint and message. *Id.*

53. *Id.*

54. *Id.* at 2985-86. Justice Ginsburg's example completely ignores the most critical point at issue: can a university force student groups to accept members that alter the group's intended message? Of course it makes sense to only allow students to be members of a student group at the university. This is a distinction based upon the forum and not upon the message or viewpoint involved. Indeed, if Justice Ginsburg and the majority capped the ability of a university to restrict associational rights of student groups at this point there would be no real obstacle for a student group to form and express its intended message. Justice Ginsburg's holding allows universities to go much farther however, rendering such an example irrelevant to the real implications at stake. Simply put, there is a tremendous gap in Justice Ginsburg's logic. The university's ability to close the forum to students does not somehow justify the leap to allowing the university to tear down the walls which protect a student group's intended viewpoint within the forum.

55. *Id.* at 2986. As Justice Ginsburg explains, Hastings is "dangling the carrot of subsidy, not wielding the stick of prohibition." *Id.* Whereas Justice Ginsburg's other justifications seem to be flawed because of a failure to view the actual effect of allowing such a restriction upon associational rights, this ""observation" is premised upon a failure to view Court precedent as controlling. Apart from the all-important legitimacy and campus connection that embodies "official recognition," the basic denials in this case were the use of school facilities and basic means of communication.

As Justice Alito points out in dissent, the *Healy* case clearly held that such a denial "burdened the students' rights to freedom of association." *Id.* at 3007–08 (Alito, J.,

With these three "observations" in place, Justice Ginsburg would proceed to subject CLS' associational rights to existing public forum free speech analysis. Questions about the practical effect this decision would have on the intended viewpoint of a student group would never be asked. Instead, Justice Ginsburg would focus, or rather limit, her analysis to the reasonableness and neutrality of Hastings' "all-comers" policy.

3. Hastings "All-comers" Policy Deemed "Reasonable" and "Viewpoint Neutral"

With CLS' associational rights pinned tightly beneath limited public forum analysis, it took little effort for Justice Ginsburg and the majority to uphold Hastings' "all-comers" policy. As a foundational matter, Justice Ginsburg found that the four justifications presented by Hastings supported the notion that the "all-comers" restriction was "reasonable."[56] First, Hastings' independent judgment as an experienced administrative body should be given deference.[57] This "deference" was the conclusion that "educational experience is best promoted when all participants in the forum must provide equal access to all students."[58] Second, the "all-comers" policy allows for Hastings to avoid the tricky practical distinction between regulating based upon conduct and belief.[59] Third, by requiring student groups to accept members that have different beliefs, the "all-comers" policy would encourage "tolerance cooperation, and learning among students."[60] The result would be the "development of conflict-resolution skills, toleration, and readiness to find common ground."[61] And fourth, the "all-comers" policy "subsumes" state-law goals to proscribe discrimination.[62]

---

dissenting) (citing Healy v. James, 408 U.S. 169 (1972)). The *Healy* court did not attempt to label access to campus facilities and basic forms and means of communication as some kind of subsidy, but rather an important piece of the student group's basic right of expression and association within the public forum. *Id.* Justice Ginsburg's shift on this perspective cuts squarely against *Healy* and in effect creates a stark conflict between the two decisions. As Justice Alito notes, "funding plays a very small role in this case. Most of what CLS sought and was denied—such as permission to set up a table on the law school patio – would have been virtually cost free. If every such activity is regarded as a matter of funding, the First Amendment rights of students at public universities will be at the mercy of the administration." *Id.* at 3007.

56. *Id.* at 2989–91 (majority opinion).

57. *Id.* at 2989.

58. *Id.*

59. *Id.* at 2990.

60. *Id.*

61. *Id.*

62. *Id.* at 2990–91. Justice Ginsburg supplements these reasons with the rather cold conclusion that CLS' other channel of communication on campus was operating as an unrecognized student group. *Id.* at 2991. Despite the dissent's findings to the contrary, and the clear holding of *Healy* that access to school facilities and means of communication were a foundational aspect of a student group's expressive rights, *id.* at 3007 (Alito, J. dissenting), Justice Ginsburg found that there were still plenty of

Justice Ginsburg devoted very little time to her analysis of the "all-comers" policy's neutrality, as she explained that it was "in short, . . . textbook viewpoint neutral."[63] Justice Ginsburg's enforcement of the parties' stipulation essentially cemented this point. Indeed, it is difficult to argue for any partiality or pretext in a policy that has been accepted by the Court as having been a universally applied regulation for the complete acceptance of any and every prospective member. This may or may not have actually been the case; regardless, there was no escaping its effect.

CLS attempted to make the only argument it essentially could in this spot; namely, that even though the "all-comers" policy is neutral in form, its impact is more harshly felt by groups with controversial viewpoints.[64] Justice Ginsburg was quick to deflate this argument, as she upheld the rather clear proposition from *Ward v. Rock Against Racism*[65] that a "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[66] "Finding Hastings' open-access condition on" official recognition status to be "reasonable and viewpoint neutral," Justice Ginsburg "reject[ed] CLS' free-speech and expressive association claims."[67]

a. Analysis

The Court's failure in subjecting associational rights to free speech public forum jurisprudence was essentially a failure to observe, or more likely respect, how associational rights protect a speaker's viewpoint. In order for a student group to be able to form and eventually communicate its intended message, it must be composed of members that are committed to that message. If a student group cannot control who forms its message, then inevitably the group's originally intended message will be altered and communicated differently to some degree. Thus, if a student group loses its ability to control membership, it loses

---

opportunities for CLS to participate on campus even without such guarantees. *Id.* at 2991 (majority opinion). Justice Ginsburg also argued that the hypothetical situation of a group of students joining a group with the sole intent of disbanding the group's message was not realistic. *Id.* at 2992. These "hostile takeovers," as Justice Ginsburg asserted, were "more hypothetical than real." *Id.*

63. *Id.* at 2993.

64. *Id.* at 2994.

65. *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781 (1989).

66. *Martinez*, 130 S. Ct. at 2994 (citing *Ward*, 491 U.S. at 791).

67. *Id.* at 2995. The Court's only mention of CLS' Free Exercise claim came in the form of a one paragraph footnote in the shadows of its limited public forum holding. *Id.* at 2994, n.27. Justice Ginsburg summarily dismissed the Free Exercise claim as she explained that the "all-comers" policy was generally applicable and only incidentally burdened CLS' religious conduct. *Id.* Again, the stipulation was critical here as it prevented CLS from arguing the text of Hastings' policy or bringing any kind of as-applied challenge.

its ability to form and communicate its intended message. It loses control of its viewpoint.

This is very different from the right of free speech. A university's limitation on the manner of free speech allowed in a public forum cannot directly affect the substance of a viewpoint. The student group may not be able to communicate freely as to the time, place, or manner of its message, but such a restriction will not affect the substance of the message itself. This difference is critical. In allowing public universities to completely remove the associational rights of student groups, the Court is giving these schools the power to directly affect the substance of a student group's viewpoint for the first time. This power was never intended within public forum jurisprudence.

In leading public forum restriction cases like *Ward v. Rock Against Racism*[68] and *Hill v. Colorado*,[69] the Court's focus was on the government's right to make time, place, and manner regulations regarding speech within the forum. These time, place, and manner restrictions did not cut to the substance of a speaker's message, only the manner in which that message was expressed within the forum. The basic idea was to allow the government to set up reasonable controls over its property, while also providing protection for the individual's right to communicate its point of view. With this foundational context in place, the *Ward* court explained that:

> [T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[70]

The basic test that came from these holdings was that the government can restrict speech in a limited public forum such as a university so long as the restriction is "reasonable" and "viewpoint neutral."[71] This test made sense in the context from which it came, namely that a time, place, and manner restriction could not by its nature impact the viewpoint of the speaker's message, only the appropriate means of its communication. The only way that such a regulation could conceivably affect the substance of a viewpoint was if it was specifically tailored against a viewpoint or subject matter. The Court accounted for this measure however through the "viewpoint neutral" rule. Essentially, the Court was satisfied that the heart of the right of expression was generally protected within the public forum's allowed restrictions

68. Ward v. Rock against Racism, 491 U.S. 781 (1989).

69. Hill v. Colorado, 530 U.S. 703 (2000).

70. *Ward*, 491 U.S. at 791.

71. *See Martinez*, 130 S. Ct. at 2984, n.11 (citing Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1132 (2009)).

because the viewpoint or substance of the speaker's message was unaltered by the government's regulation.

The problem with the holding in *Martinez* was that the nature of the regulation was completely different. Hastings was not promulgating a time, place, or manner restriction, or some other similar regulation connected to the forum itself, but rather a rule that prohibited student groups from freely selecting their members. This restriction had nothing to do with the manner of communication in the forum itself, but rather the school's prerogative in preventing what it considered to be discrimination.

The basic public forum test for time, place, and manner type restrictions was simply not built to handle this kind of regulation. Hastings' "all-comers" policy, by its very nature, affected the ability of its student groups to form and express their intended viewpoints even though it was entirely neutral. Furthermore, this affect was not indirect or justified by reasonable forum related purposes. It was an entirely different type of regulation, occurring for very different purposes, deserving of a distinct analysis. Associational rights did not belong within the Court's free speech public forum jurisprudence as it existed before this case.

As explained above, the reason Hastings' regulation could be neutral and yet still alter and dilute viewpoint was because it was a restriction of associational rights and not speech. There is simply no getting around the fundamental difference between the protections these two rights provide and the entirely different effects that a restriction will have upon each of them. Although Justice Ginsburg and the majority gave several reasons in an attempt to support the decision to subject associational rights to free speech public forum analysis, it was clear that the majority's decision really came down to a fundamental balancing of the principles of freedom of association and equal access.

Behind the words of the Court's holding was the decision that it would rather entirely remove associational rights from the public forum than allow for a student group to discriminate against prospective members. This was the fundamental friction of the case. Indeed, the facts of the case demanded that either the university had the absolute right to require free access to student groups or that the student groups had an absolute right to choose membership. Whereas Justice Ginsburg never came out and explicitly said as much, her opinion made it more than apparent that the majority had come to this conclusion. It took very little foresight to see what the outcome would have been had associational rights been jammed into the public forum analysis for free speech as it had existed before the case. The decision to subject associational rights completely to the deference of the public university was essentially the Court's roundabout statement that equal access outweighed associational freedom in this context.

This was a judgment call, one that many agreed with. Admittedly, it was a decision with significant merit at least in principle, as equal access is in most contexts a critical part of our free society. This author however believes that the price of such equal access in this context was simply too high. Through the ugliness of what Hastings' viewed as discrimination came the opportunity for a forum to exist which truly provided for the convergence of diverse ideas and points of view. The goal of diversity simply cannot exist in an environment where viewpoints are diluted and the opposing idea is never formed or communicated. Instead of a forum where those that oppose CLS' viewpoint would form their own student group to communicate a different message and encourage a healthy debate, Hastings will instead have only one student group that communicates a highly diluted message, or no message at all. The public university forum will not be a breeding ground for new and converging ideas and beliefs, but rather an incubator of political correctness and student groups with schizophrenic, if not completely contradictory, viewpoints.

The right of association exists within broader society to prevent this exact result. The Court provided no compelling reason to justify why the public university should not be this same kind of environment. Perhaps associational freedom should be even more stringently protected within the confines of the university since the institution's very purpose is to support the birth of new ideas and the convergence of opposing ways of thinking. The Court disagreed with this notion and instead felt that it was better that school administrators decide how much associational freedom its students should enjoy. Whereas the *Martinez* case was a monumental victory for equal access, it was indeed the death knell of associational freedom on the college campus.

III. CONCLUSION

In *Martinez*, the Court held that a public university may limit the associational freedoms of student groups by means of an "all-comers" policy.[72] The Court reached this holding by deciding to subject the Constitutional right of freedom of association to the limited public forum analysis for free speech. This decision was a failure to observe, or perhaps respect, how associational rights protect a speaker's viewpoint. This failure was perhaps not so much an error of analysis as it was a decision to elevate principles of equal access over the right of association in a public forum. Whereas equal access will surely be promoted by the Court's decision, the very real implication of this

72. *Supra* note 2. It is important to remember however that the Court upheld an "all-comers" policy and not a policy which names specific types of classes which cannot be the bases of a membership decision. *Martinez* does not prevent the future argument that a policy which specifically prohibits student groups from making decisions based certain classifications such as religion or sexual orientation runs afoul of Equal Protection.

case is that the public university forum will no longer be a place where the ideas of student groups can be freely formed or expressed.