

Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action

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I. Background of the Case and the Court's Essential Reasoning

The lawsuit that resulted in the Supreme Court opinion in *Christian Legal Society v. Martinez*¹ originated when the Hastings College of the Law (“Hastings”) in San Francisco (a public law school that is separate from, but affiliated with, the University of California system) declined to grant official recognition as a Registered Student Organization (“RSO”) to the Hastings chapter of the Christian Legal Society (“CLS”), a national network of lawyers and law students devoted to upholding Christian ideals.

Hastings has a policy that, as written, requires all student groups seeking RSO status (a status that brings with it various benefits, including an opportunity for a small amount of monetary resources and the use of certain bulletin boards and email distribution channels) to agree to refrain from discriminating in accepting voting members and choosing officers “on the basis of [among other things] religion [and] sexual orientation.”²

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

2. *Id.* at 2979.

The policy was later explained by Hastings in the litigation to prohibit discrimination based on ideology as well, so that, in essence, officially recognized student groups must accept all comers. Hence, the policy became known as the “all-comers policy.” As Hastings put it, the policy requires that RSOs must “allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [his or her] status or beliefs.”³

CLS members at Hastings maintained that, despite this policy, they had a First Amendment right to receive RSO recognition and support, yet also to exclude non-Christians and practicing gays. The lower courts ruled in favor of Hastings.⁴ The Supreme Court affirmed the lower court decision by a five-four vote, with swing vote Justice Anthony Kennedy joining the more “liberal” wing of the Court.⁵ Justice Ruth Bader Ginsburg authored the majority opinion.

CLS argued two main points, both of them ultimately unsuccessful. First, CLS maintained that it had a right to exclude students, and still receive official recognition, because the inclusion of people whom CLS considered to be nonbelievers would impair CLS’s ability to convey its message.⁶ Put in its most basic terms, this argument suggested that CLS’s inclusion of persons who had a vision of Christianity or the role of sexual conduct within it different from CLS’s stance would undermine the viewpoint that CLS attempts to promote. Second, CLS argued that Hastings’s policy in effect discriminated against religious groups on the basis of their viewpoint, since religious groups tended to be the ones most likely to run afoul of the policy.⁷ The Court dispensed with both of CLS’s arguments by applying a single line of cases and a single judicially crafted test.

Because, wrote Justice Ginsburg, the relevant standard governing so-called “limited public forums”—as established by past Supreme Court cases—requires only that a government policy be “reasonable” and not overtly viewpoint-targeted, the law school’s program passed constitutional muster.⁸ As the Court pointed out, the

3. *Id.*

4. *See* Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Kane, No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. Apr 17, 2006); Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Kane, 319 Fed. Appx 645 (9th Cir. 2009).

5. *Martinez*, 130 S. Ct. at 2971.

6. *Id.* at 2992.

7. *Id.* at 2994.

8. *Id.* at 2991–94.

First Amendment framework erected by these past cases distinguishes between (1) “traditional” public forums (e.g., streets and parks); (2) “designated” public forums (which are not streets or parks, but are areas that the government has affirmatively opened up generally for expressive purposes, and that are therefore treated like traditional public forums); and (3) “limited” public forums, which are forums created for, and limited to, specific expressive purposes and speakers.⁹

Applying the more lenient test governing “limited public forums,” the Court found the Hastings policy to be reasonable because it advanced, at least to some nontrivial extent, Hastings’s goals in setting up the RSO program.¹⁰ And the policy was not viewpoint-based, the Court reasoned, because a “take all-comers” requirement, on its face, does not target any group, but rather requires all groups—regardless of their particular messages—to accept persons who may not agree with the group’s beliefs.¹¹

II. What the *Martinez* Case Illustrates About Limited Public Forum Doctrine in the University Context

What are we to make of this ruling? For starters, as in many First Amendment cases, the constitutional framing of the issue was crucial in resolving the case. The choice of the “reasonable” and viewpoint-neutral test—that is, the choice of the appropriate doctrinal box or category on the First Amendment case law flowchart—essentially dictated the result. If a different box had been chosen, a different (and more stringent) test would have applied, and a different result might have resulted. To see that point clearly, consider how the majority treated what CLS may have thought was one of its most helpful past cases, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*¹² In that case, the Court unanimously upheld the First Amendment right of a veterans group sponsoring a St. Patrick’s Day parade to be exempt from a state law prohibiting the exclusion of gay individuals who wanted to march in the parade with a banner celebrating their Irish background and their

9. *See id.* at 2984, n. 11.

10. *Id.* at 2988–93.

11. *Id.* at 2993–95.

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

sexual orientation.¹³ In rejecting the relevance of *Hurley*, the *Martinez* Court pointed out that “*Hurley* involved . . . the most traditional of public forums: the street. That context differs markedly from the limited public forum at issue here,” which is governed by a “lesser standard of scrutiny . . . compared to other forums.”¹⁴ Indeed, although the Court’s discussion of the various categories of forum analysis has not always been consistent—as recently as 2006, the author of a prominent Constitutional Law treatise concluded that the “test for limited public forums is the same as for [traditional] public forums; so long as the government opens the place for speech, it must meet the requirements for public forums”¹⁵—it now appears clear that the limited public forum box is one in which the government has a much easier time justifying its regulations. Indeed, the review of regulations restricting access to limited public forums is essentially the same deferential review applied to regulations restricting speech in nonpublic forums.

Was this choice of the limited public forum box inevitable? In the CLS dispute, one (although perhaps not the only) sufficient explanation of the Court’s crucial invocation of the *limited* public forum test is that CLS seemed to concede that test’s applicability at oral argument. Justice Ginsburg said this on behalf of the majority, citing to statements by the lawyers on both sides, “[T]he parties agree that Hastings, through its RSO program, established a limited public forum.”¹⁶

It is possible that CLS could have argued the case should be viewed through the prism of a designated public forum. A designated public forum is a generally available forum that the government creates for all speakers on all topics, and is treated like a traditional public forum as long as the designation remains in place. An example of a designated public forum might be the forum created by a public college’s decision to permit all students to engage in whatever non-violent, nondisruptive expressive and associational activities they choose, on a particular lawn or quad on campus. Had CLS been able to characterize Hastings’s RSO program as creating a designated public forum—one that was essentially created for the purpose of hosting unfettered and unstructured expression and association by

13. *Id.*

14. *Martinez*, 130 S. Ct. at 2989, n. 17.

15. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1138 (3d ed. 2006).

16. *Martinez*, 130 S. Ct. at 2984, n. 12.

students—CLS could have tapped into a higher level of judicial scrutiny.

The designated-public forum label might have been plausible because Hastings does not seem to limit the subject matter around which any RSO chooses to organize. Organizations may be formed and recognized “to pursue academic and social interests” and to further “education and [help] develop leadership skills.” Pursuing all “academic” and “social” interests is an objective that seems quite capacious. Indeed, Justice Kennedy’s separate writing in the case says that the Hastings policy operates “across a broad, seemingly unlimited range of ideas, views and activities.”¹⁷ A Christian group, a Democratic group, or even a Frisbee club or a co-ed fraternity-like group could all qualify, so long as each was limited to students, refrained from illegal activity, and took all comers.

That is to say, the fact that RSOs at Hastings do not have to involve any particular connection to the law, or legal education, or any other idea or set of ideas might have at least opened the door to a characterization that Hastings simply wants groups to exist and flourish for no specific purpose other than to express themselves. And if it had been proven that Hastings had only this generalized intent regarding its student groups, perhaps the groups, taken together, would have looked more like a designated, than a limited, public forum. But this avenue of argument and/or proof was foreclosed by CLS’s own use of the limited forum category.

Consider as well the other key stipulation that, according to the majority at least, CLS made in the litigation: Hastings’s policy really does require a group to do more than refrain from racial or religious or sexual-orientation discrimination because it requires a group to take all comers, regardless of belief or ideology.¹⁸ Most importantly, this stipulation seems to take much of the wind out of CLS’s claim that the policy is viewpoint discriminatory. According to the stipulation, the policy does not single out religion as the one kind of ideology that cannot be used to exclude RSO members and leaders. By its very nature, the “take all-comers policy” is not focused on religion or any other particular ideological basis of potential exclusion. Instead, the policy deals equally with all exclusionary actions, regardless of their ideological motivation. In light of these stipulated features of the policy, the Court indicated, it would be hard

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

18. *Id.* at 2981 (majority opinion).

to claim that Hastings harbored or implemented hostility to any particular ideology when it adopted the policy.¹⁹

Even without this concession-by-stipulation, CLS still might have lost in its bid to characterize the Hastings policy as viewpoint-based, either facially or in practice. As elaborated below in Part III, the concept of viewpoint discrimination in this context is complicated. But with the concession in place, CLS's argument about viewpoint discrimination fell particularly flat to the Justices in the majority.

Finally, consider how truly deferential the Court was in applying the limited public forum test to the facts of the Hastings case. Even under non-strict "limited" public forum scrutiny, the Hastings policy still had to be reasonable. But given its open-endedness, what purposes does the RSO policy really serve? Does a policy that allows any group, formed around any set of ideas or activities, to exist—but also requires each such group to take all persons, even those who may vehemently disagree with those ideas or activities—make much sense? What, precisely, does a policy that requires the Federalist Society (a conservative organization) to accept people who believe not in Federalist Society principles, but rather in the precepts of the American Constitution Society (a liberal organization), accomplish? The Court does not say very much about the plausibility of Hastings's policy.

To be sure, the Court downplays the fear that had been expressed by CLS that allowing persons who disagree with a group to join and run it permits the hijacking of the group.²⁰ But even if such fears of hijacking are exaggerated, the majority opinion never really explains why Hastings's policy permits the possibility of hijacking to exist at all.

Another way of putting the question is to ask why, for instance, a Jewish student would want to join CLS if the student and other prospective members deeply disagree about the virtues of Christianity? This question is especially relevant for groups such as CLS that are not "religion and" groups—that is, groups that seek to promote both religion and a nonreligious activity, like the (fictitious) Hindu Backpacking Club, or the (equally fictitious) Muslim Chess Club. In those "religion and" instances, members may want to join even if they disagree with some of the group's tenets. But that seems less true for groups like the CLS. If there is a weakness to the

19. *Id.* at 2996.

20. *Id.* at 2992.

majority opinion, it might be in defining precisely what goals Hastings is reasonably advancing in setting up its RSO policy the way it has.

The majority says, in this regard, only that “extracurricular programs are, today, essential parts of the educational process.”²¹ Fair enough, but what do vague statements like this really mean in the context of Hastings’s RSO program, which is so broadly defined?

Justice Samuel Alito’s dissent did identify one goal articulated by the Hastings policy—to “promote a diversity of viewpoints among registered student organizations.”²² But this goal would seem to argue in favor of organizational autonomy. For a diversity of viewpoints among organizations to exist, each organization must espouse one or more viewpoints, which means each must be free—if this particular goal is to be furthered at all—to define its own membership, based on distinctive beliefs and attitudes.

Now, perhaps Hastings’s goal is to promote diversity not just among organizations, but also within each organization, in order to force students of different ideologies and points of views to confront and deal with each other in a civilized way. Justice Kennedy’s separate writing hints at this intra-organizational diversity objective,²³ but it might have been useful for this idea to have been fleshed out more fully. The majority could have documented this objective more persuasively by giving examples of what Hastings actually said it is trying to promote, as shown in the record of its policy and in this litigation. When expressive activity is directly regulated, even the application of a mere reasonableness test under the First Amendment should perhaps require courts to look carefully at what the government was actually trying to accomplish. Until the specific, actual objective is isolated, it is impossible to make a judgment as to whether that objective is reasonably advanced.

Even if it were shown that this kind of intra-organizational diversity was Hastings’s objective, there would still be a question of the effectiveness of forcing students with significant disagreements into a single group in order to foster this goal. Opposing students would grapple and learn from each other, but they might also splinter off and form another group—until that group, too, is forced to admit students with whom they disagree. Unlike classrooms, where

21. *Id.* at 2989.

22. *Id.* at 3013 (Alito, J., dissenting).

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

students must be present if they are to receive their educations, membership in any student organization is completely voluntary.

One possibility is that the limited public forum test is always to be applied deferentially; a government entity's rationale for limiting the forum is to be inferred from the contours of the limits to the forum itself, and so long as a court can hypothesize a plausible, legitimate governmental goal to which the limitation is minimally rationally related, the government's position will be upheld. Certainly, the test is deferential if regulating what the Court calls limited public forums today is reviewed under the same test historically used for nonpublic forums.²⁴

Another possibility is that special deference applies in constitutional cases against universities. The *Martinez* majority itself suggested that "in various contexts [judges must] resist 'substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.'"²⁵ Granted, in the same breath, the Court does say that it owes "no deference" to universities in deciding the meaning of the First Amendment,²⁶ but it seems that resisting an impulse to substitute one's own notions for someone else's is precisely what deference requires.

In this regard, the *Martinez* case is reminiscent of *Grutter v. Bollinger*,²⁷ the case upholding race-based affirmative action at the University of Michigan, seven years ago. There, too, the Court tried—and, again, not entirely successfully—to straddle a line between respect for law-school policies and commitment to independent judicial decision-making. And there, the Court disclaimed deference to the University, but nevertheless did not seem to apply strict scrutiny with the same keen skepticism it has employed in other cases.

Technically, perhaps, as a logical matter, one could defer to Hastings on the question of "sound educational policy," yet still decide the legal First Amendment question of whether there is a constitutional violation *de novo* (that is, on a clean slate, without any deference at all to the school). But when the test under the First Amendment that the Supreme Court has crafted asks whether a policy is "reasonable," deferring to the educational institution on

24. For a lenient application of the nonpublic forum test, see *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).

25. *Martinez*, 130 U.S. at 2988.

26. *Id.* at 2988.

27. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

what makes for “sound” education seems awfully close to deferring to the university on the ultimate constitutional question; “sound” and “reasonable” are very close, if not identical, concepts.

Let us be clear: We are not arguing that deference to universities is necessarily wrong. Our only suggestion here is that we should appreciate that such deference may be doing the real work in many high-profile cases involving speech, equality, and related issues arising in the university setting. And if that is the case, this subterranean factor ought to be brought into the light of day, and acknowledged more directly in the Court’s opinions.

III. The Special Case of Associational Autonomy in a Limited Public Forum

In one important respect, the Court in *Martinez* confronted a constitutional issue of first impression: How should the Court evaluate a burden on a group’s freedom of association, rather than the group’s freedom of speech, in a limited public forum? Through a long line of cases, the Court has struggled to develop a framework for evaluating restrictions that control access to a limited public forum in the context of pure speech.²⁸ As noted earlier, if the speech regulation is viewpoint discriminatory, it will be reviewed under strict scrutiny.²⁹ If the regulation is content-discriminatory or content-neutral, the Court generally says it will be upheld as long as it is reasonable, a fairly lenient standard of review.³⁰

Yet this nuanced framework had never before been recognized to apply to freedom of association cases involving limited public forums where the regulation at issue is directed not at what the association says, but rather at its membership policies and procedures. All the Court’s earlier freedom of association cases evaluating regulations directed at or burdening the ability to associate or maintain associational autonomy focused on associations operating on private property or in traditional public forums.³¹ The Court rigorously reviewed restrictions on associational freedom in these

28. See, e.g., *Int’l Soc’y For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998).

29. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

30. See, e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985).

31. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

circumstances and locations.³² It had never before, however, addressed the question of how freedom of association claims should be evaluated when a group's membership decisions are the basis for denying it access to a limited public forum.

The Court's answer to this novel question in *Martinez* makes three points. First, the Court explained that in important ways, freedom of speech and freedom of association claims merge together.³³ Who people associate with, after all, will influence what those associated individuals will say. Second, the Court concluded the considerations that justify more lenient review of regulations of speech in a limited public forum, as opposed to a traditional public forum or private property, apply with equal force to regulations restricting associational freedom in a limited public forum.³⁴ Finally, the Court assumed with little supportive analysis that the same varying standards of review that apply to speech regulations in a limited public forum should apply to regulations of association as well.³⁵ Viewpoint-discriminatory restrictions will receive strict scrutiny.³⁶ Content-discriminatory and content-neutral regulations will be evaluated under a low level reasonableness standard of review.³⁷ Accordingly, because the Hastings "all-comers" policy applied to all student groups seeking to become a RSO at Hastings without regard to the group's viewpoint, the Hastings policy should be upheld as long as it is reasonable.³⁸ After lengthy discussion, the Court held that the policy satisfied this relatively modest standard of review.³⁹

While the Court's first two premises may be challenged on the grounds that freedom of association rights are distinct from free speech rights and should receive independent protection,⁴⁰ we accept these positions *arguendo* as adequately defended, at least for the

32. *Martinez*, 130 S. Ct. at 2984–85 (“[T]his Court has rigorously reviewed laws and regulations that constrain associational freedom.”).

33. *Id.* at 2985.

34. *Id.*

35. *Id.* at 2986.

36. *Id.* at 2984, 2988.

37. *Id.* at 2988.

38. *Id.* at 2993–94.

39. *Id.* at 2988–93.

40. While we take no position on this issue, Professor Ashutosh Bhagwat forcefully challenges the Court's merging of freedom of association and free speech rights in his article in this symposium issue.

purpose of this article. The third premise, however, is more problematic and requires additional explanation. Why exactly does the Court think that the way it has defined speech regulations and the distinctions it has drawn between viewpoint-discriminatory, content-discriminatory, and content-neutral speech regulations should apply without change or modification to the regulation of an association's membership criteria? Is the analogy strong enough between the nature of speech regulations and the nature of association regulations to justify applying speech regulation categories to freedom of association claims? The Court clearly thinks that it is. However, the Court does very little to explain why it thinks so or to justify this conclusion.⁴¹

Indeed, if the Court is going to borrow the free speech framework for limited public forums and make it applicable to freedom of association regulations, it would be helpful if the Court explicitly categorized the nature of the Hastings regulation at issue in this case. Obviously, the Court does not think the regulation is viewpoint discriminatory. But is it content discriminatory or content neutral? In her discussion of the allegedly discriminatory effects of the Hastings policy, Justice Ginsburg, writing for the majority, seems to suggest that the policy can be analogized to a content-neutral speech regulation.⁴² As such, the fact that it incidentally burdens some speakers or messages more than others would not undermine its constitutionality.⁴³

We are not fully persuaded by this suggestion, however. Suppose Hastings adopted a regulation prohibiting any RSO that published a periodical from discriminating against any article submitted for publication on the basis of the social, political, or religious beliefs expressed in its text. Essentially this would be an "all-beliefs" publication requirement that was intended to parallel the all-comers

41. The Court does argue that because the state has the power to draw distinctions and restrict the scope of a limited public forum for free speech purposes, it would be anomalous to prohibit it from exercising the same discretion under freedom of association requirements. *Id.* at 2985–86. That contention is accurate, but it presumes the answer to the question that it is trying to resolve. The open issue is what kind of restriction on freedom of association is comparable to and deserves to be subject to the same standard of review as content-neutral, content-discriminatory, or viewpoint-discriminatory speech regulations.

42. *Id.* at 2994 (explaining that the Court is satisfied that the Hastings "all-comers" policy "is justified without reference to the content [or viewpoint] of the regulated speech") (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (internal quotations omitted).

43. *Id.* at 2994.

membership requirement. While this speech regulation might be considered to be viewpoint neutral because it applies with equal force to all publications and all beliefs, we would certainly think it is a content-discriminatory rather than a content-neutral regulation. From this perspective, the Hastings “all-comers” policy might be more accurately analogized to a content-discriminatory regulation rather than a viewpoint-discriminatory regulation.

That conclusion would not require a change in the Court’s holding in *Martinez*. Content-discriminatory regulations along with content-neutral regulations in a limited public forum will still be upheld if they are reasonable. Our point is not simply that the Court may have been mistaken in analogizing the Hastings policy to a content-neutral speech regulation; it is that the transposition of the free speech doctrinal framework for reviewing speech regulations in a limited public forum to freedom of association cases is awkward and uncertain. More than quick and assumed analogies are necessary if the Court is going to persuasively justify its conclusions.

A. Looking Behind the Categories: Distinguishing Between Debate Distorting and Debate Dampening Regulations

A more in-depth analysis would look to the purposes of the Court’s free speech distinctions as opposed to presumptively adopting the categories themselves. If we move behind the conventional categories of speech regulation to identify the constitutional concerns that support the distinction between viewpoint-discriminatory, content-discriminatory and content-neutral laws, an extension of doctrine from freedom of speech to freedom of association can be explained more thoroughly and precisely. There are two related problems with viewpoint-discriminatory regulations. First, they distort debate in a way that games the system (here, the marketplace of ideas) to achieve a preordained goal: The rejection of one perspective in favor of the opposing point of view.⁴⁴ Second, it is hard to identify a state interest furthered by such regulations other than those that are derivative of one side of a debate being silenced or hampered. Thus, the state may have an interest in prohibiting bad

44. See, e.g., Geoffrey R. Stone, *Content-Neutral Regulations*, 54 U. CHI. L. REV. 46, 55 (1987) [hereinafter *Content-Neutral Restrictions*]; Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV., 81, 101 (1978) [hereinafter *Subject-Matter Restrictions*]; Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 U.C. DAVIS L. REV. 553, 590–91 (1996) [hereinafter *Rules of Engagement*].

speech because the speech will influence people to do bad things, but the utility of this kind of regulation is that it suppresses speech that the state believes is too dangerous to be communicated to the public. Because individuals and the community cannot be trusted to evaluate the competitive value of ideas, bad speech must be silenced.

Content-discriminatory and content-neutral regulations differ from viewpoint discrimination in both of these respects. These regulations limit the scope of debate and may make it more difficult for speakers to communicate their message to their intended audience, but they do not have the same propensity to distort debate. The burden on speech created by viewpoint-neutral regulations will, at least formally, fall in a more evenhanded way on competing speakers and ideas. Thus, a content-discriminatory ban on political speech prohibits both liberal and conservative messages, and a ban on leafleting restricts that manner of speech regardless of the message being communicated.⁴⁵ Moreover, there are often neutral, non-distorting and legitimate justifications for these kinds of regulations. Particularly in a limited public forum, the government may have a legitimate reason for restricting the subject matter of speech in order to focus the discussion on a topic of interest or value. Indeed, as the Court explained in *Martinez*, the legitimacy of such subject matter constraints underlies the very idea of a limited public forum, which by definition is open to some speakers and not others.⁴⁶ Of course, content-neutral time, place, and manner regulations are recognized to serve neutral and legitimate purposes such as noise control, order, tranquility, and residential privacy.⁴⁷

This does not mean that content-discriminatory and content-neutral regulations will never have disparate impacts on speakers or viewpoints. They often do.⁴⁸ Nor does it suggest that the dampening

45. See, e.g., *Subject-Matter Restrictions*, *supra* note 44, at 83; Martin Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 139 (1981); *Rules of Engagement*, *supra* note 44, at 591–92.

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

47. See, e.g., *Content-Neutral Restrictions*, *supra* note 44, at 74–76; *Rules of Engagement*, *supra* note 44, at 610–11.

48. See, e.g., *Subject-Matter Restrictions*, *supra* note 44, at 110; *Rules for Engagement*, *supra* note 44, at 592–96; Cass R. Sunstein, *Half Truths of the First Amendment*, 1993 U. CHI. LEGAL F. 25, 42 (1993). For examples of the propensity of content-discriminatory regulations to have viewpoint-discriminatory consequences, see *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998); *Hill v. Colorado*, 530 U.S. 703 (2000), a case upholding a statutory speech restricting buffer zone around medical clinics, is a strong example of a formally content-neutral speech regulation having predictable viewpoint-discriminatory results.

of debate resulting from such regulations imposes only limited burdens on speech. Viewpoint-neutral regulations can still substantially reduce speech opportunities.⁴⁹ They can make it extremely difficult to communicate messages to an intended audience. Notwithstanding these consequences, the Court has concluded that at least in a limited public forum, there is a free speech line requiring different standards of review between regulations that intrinsically distort debate and those that formally dampen debate or make speech more difficult (although they may have debate distorting consequences).

This distinction between regulations that distort debate and those that dampen debate can provide an analytic framework for evaluating state policies that restrict associational freedom in a limited public forum. The key question in cases like *Martinez* would be whether the regulation at issue reduces opportunities for debate or makes speech more difficult, or whether it distorts debate in a way that guarantees victory to one viewpoint over another. Here, there can be little doubt that controlling access to a limited public forum by regulating the criteria that groups may employ in choosing their members and leaders will make admission to that forum far less valuable to expressive groups than a policy that permitted groups to exercise greater freedom in selecting their members. The all-comers policy adopted by Hastings not only creates some marginal risk of a hostile takeover by those who oppose the group's ostensible purpose,⁵⁰ it also substantially increases the transaction costs that groups will incur in trying to express a message. The burden of having to continually deal with dissenters is time consuming, distracting, and debilitating. Justice Kennedy identifies but understates these costs when he states in his concurrence that, "the all-comers policy . . . [may make it more] difficult for certain groups to express their views in a manner essential to their message."⁵¹

49. For example, the viewpoint-neutral restrictions on speech within 100 feet of the entrance to a health care facility upheld in *Hill v. Colorado*, 530 U.S. 703 (2000), made it more difficult for anti-abortion protestors to speak to women visiting clinics to obtain abortions. Similarly, the prohibition against posting signs on utility poles upheld in *Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), limited the opportunities available to groups with little financial backing for communicating their message to the general public.

50. The dissenting Justices view this possibility as substantial. See *Martinez*, 130 S. Ct. at 3019 (Alito, J., dissenting).

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

These costs, however, are spread across all advocacy groups at Hastings. Indeed, they also apply to nonadvocacy groups that need a unified commitment from their members to achieve their goals. The “all-comers” policy disadvantages all expressive associations in essentially the same way. There is no convincing argument that it directly distorts debate in a way that disfavors some ideas or the groups that espouse them more than others. Even Justice Alito essentially concedes that the “all-comers” policy is formally neutral by focusing his dissent on the contention that the policy was adopted as a pretext in order to further a discriminatory purpose.⁵² Justice Alito assigned only one footnote to the argument that the “all-comers” policy was viewpoint discriminatory.⁵³

Of course, one may argue that in fact the all-comers policy will have more of an incidental impact on certain groups expressing certain messages than others. That may turn out to be the case. But that is also true for many content-discriminatory and content-neutral laws that are routinely subjected to lenient review notwithstanding their incidental, albeit highly predictable, viewpoint-discriminatory consequences. If we are going to use the limited public forum free speech template as the basis for evaluating freedom of association cases, the Court’s analysis should be grounded on the free speech precedent in this area. Thus, the question to be answered would be whether the Hastings “all-comers” policy has more of a debate-distorting effect than the content-discriminatory and content-neutral policies and regulations governing limited public forums that the Court has upheld under a deferential standard of review. That case law suggests that few incidental viewpoint-discriminatory consequences—no matter how predictable or substantial they may

52. *Id.* at 3016–19 (Alito, J., dissenting). Justice Alito does not cite any free speech cases to support his assertion that an otherwise constitutional, facially neutral law would be struck down as unconstitutional if plaintiffs demonstrate that the law was actually intended to further the discriminatory purpose of burdening a particular viewpoint or message. In fact, the case law suggests exactly the contrary. For First Amendment purposes, proof of discriminatory purpose will not justify subjecting a formally neutral law to the rigorous review reserved for facially discriminatory legislation. *See United States v. O’Brien*, 391 U.S. 367, 383 (1968) (rejecting the argument that the actual purpose of the law prohibiting draft card burning was to suppress speech because “[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive”); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558–59 (1993) (Scalia, J., concurring) (rejecting any attempt to evaluate laws under the First Amendment based on the motives or purposes of the legislature in adopting the law).

53. *Martinez*, 130 S. Ct. at 3016 n. 10 (Alito, J., dissenting).

be—should be able to convince the Court that heightened review is appropriate for formally neutral associational restrictions in a limited public forum.

Indeed, the Supreme Court has been remarkably sanguine about upholding content-discriminatory and content-neutral speech regulations in a limited public forum or nonpublic forum,⁵⁴ even when the viewpoint-discriminatory implications of the regulations are difficult to ignore. In *Perry Education Association v. Perry Local Educators' Association*,⁵⁵ for example, PLEA, a union competing with PEA—the union recognized as the collective bargaining representative of a school district's teachers—sought access to the school district's interschool mailboxes and delivery system. The interschool mail delivery system was open to teachers and administrators for personal and business messages, to various outside organizations such as church groups, the Cub Scouts and the YMCA, and, most importantly, to the union currently representing the teachers in the school district.⁵⁶

The Court concluded that the exclusion of the rival union was based on its status, not its viewpoint, and upheld the school district's decision to deny access to PLEA. PLEA had not been recognized as the collective bargaining agent of the teachers. PEA—the union which was permitted access to the interschool mail system—had been certified as the teachers' bargaining agent. As long as this status discrimination was reasonable, it would be upheld against a First Amendment challenge.⁵⁷

54. As discussed *supra*, there is little difference between a nonpublic forum and a limited public forum under the Court's free speech jurisprudence. In theory, speech regulations falling within the parameters of a limited public forum receive rigorous review while the parameters of a limited public forum itself are evaluated under the same lenient standard of review applied to speech regulations in a nonpublic forum. In practice, however, a court is relatively free to construe any challenged speech regulation as the latter rather than the former and, accordingly, to apply a lenient standard of review.

55. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

56. *Id.* at 40.

57. The Court in *Perry* rejected PLEA's argument that the District had created a limited public forum in its inter-school mail delivery system. *Id.* at 47. But it also explained that it would apply the same standard of review and reach the same result if it determined that the District had created a limited public forum. PLEA would not fall within the parameters of a limited public forum allegedly created by the District when it permitted groups like the Cub Scouts to use the system or when it had permitted both unions to use the system prior to PEA being designated the collective bargaining agent of the teachers. *Id.* at 48. As noted earlier, decisions like *Perry* render the distinction between limited public forums and nonpublic forums all but useless to a litigant challenging a speech restriction. There is no clear way to demonstrate that a challenged

As a technical matter, the Court may be correct that the school district's policy should be described as status discrimination. But in practical terms, there can be little doubt that the policy distorts debate. The existing bargaining agent is given a concrete advantage in distributing messages to its constituency. The rival union is denied that opportunity. Given the considerable likelihood that the two unions disagree on substantive matters and on the quality of the representation teachers are receiving from their recognized bargaining representative, the policy advantages one speaker by denying access to the forum to its critic.

In *Arkansas Educational Television Commission v. Forbes*,⁵⁸ the Court also upheld a discriminatory speech policy notwithstanding its blatant speech-distorting consequences. At issue was the decision of a state owned public television station to exclude an independent candidate “with little popular support” from a televised debate among the candidates for a local congressional seat.⁵⁹ After characterizing the debate as a nonpublic forum, the Court concluded that the exclusion of the third-party candidate was a viewpoint-neutral policy decision that served the legitimate purpose of promoting the primary purpose of the debate—the provision of an orderly opportunity for the public to evaluate and compare the positions of the viable candidates for office.⁶⁰

Whatever the goals of the public television station may have been, and however much the station's decision may have contributed to a meaningful dialogue between the major candidates, there is little doubt that the exclusion of a third-party candidate distorted the debate. No one in a debate between the candidates of the two major parties is going to raise the question of whether those parties have failed to advance the public interest or the need for a candidate outside of the mainstream parties' organizations to challenge current political orthodoxy. That voice has been eliminated from the discussion. The television station in *Forbes* may not have acted for the purpose of silencing this perspective, but its decision undeniably had such an effect.

regulation discriminates within a limited public forum as opposed to establishing the limited public forum's parameters—which will be evaluated as a speech regulation governing a nonpublic forum.

58. 523 U.S. 666

59. *Id.* at 669.

60. *Id.* at 680–83.

*Cornelius v. NAACP Legal Defense & Education Fund, Inc.*⁶¹ raises different issues from *Perry* and *Forbes*, but is also a case in which the Court upheld a speech regulation with disturbing debate-distorting implications in a nonpublic forum. At issue was an Executive Order⁶² that barred legal defense and advocacy groups from participating in the Combined Federal Campaign, the federal government's workplace charity drive. Applying a reasonableness analysis to what it described as a content-discriminatory but viewpoint-neutral regulation, the Court explained that it may be permissible to exclude controversial groups from a nonpublic forum on the grounds that their presence might be disruptive and might limit the effectiveness of the forum.⁶³

Again, whatever the merits of the Court's analysis, it is clear that the exclusion of controversial groups or speakers risks debate-distorting consequences. Almost by definition, controversial groups and speakers represent voices that challenge the status quo or offer unpopular solutions to public policy problems. Accepted orthodoxy and conventional mainstream perspectives are much less likely to be characterized as controversial. By accepting the elimination of controversial participants as a reasonable basis for limiting access to a nonpublic forum, the Court does not dampen debate generally. It upholds policies that distort debate by excluding more radical messages and ideas from a forum.

Finally, in *City Council v. Taxpayers for Vincent*,⁶⁴ the Court upheld a municipal ordinance that prohibited the posting of signs on utility poles to further the City of Los Angeles's aesthetic interests. Although the Court did not identify the nature of the forum at issue in the case with precision, its frequent references to *Perry* suggest that it recognized the poles to be a nonpublic forum.⁶⁵ While the challenged ordinance was neutral in form, it had a predictably disproportionate impact on some speakers as opposed to others. Signs on utility poles are an inexpensive medium used by those who lack the resources to purchase more costly means of communication such as radio, television, or newspaper advertisements. The Court noted this reality in a footnote when it suggested that it "has shown

61. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1984).

62. *Id.* at 794–95.

63. *Id.* at 809–10.

64. *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1983).

65. *Id.* at 814–15.

special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry,”⁶⁶ but it did not discuss the ordinance’s disparate impact any further, other than to note that the Court’s solicitude had limits.⁶⁷ To the extent that poorer groups may have distinctly different perspectives on some issues than their wealthier counterparts, it may be argued that *Taxpayers for Vincent* has debate-distorting as well as debate-dampening consequences.

Given the case law described above, CLS’s argument that the Hastings policy is unconstitutional because it impacts some associations more than others runs counter to a line of authority in which the Court has consistently rejected such arguments. Indeed, the Court’s decision in *Cornelius* presents a particularly difficult obstacle for CLS to overcome. Those groups which will be most burdened by the Hastings all-comers anti-discrimination policy will be advocacy groups who want to limit membership to those students who support the organization’s cause, ideology, or religion. But the Court in *Cornelius* held that excluding all advocacy groups from a forum is a viewpoint-neutral policy subject to relatively lenient reasonableness review.⁶⁸ If excluding all advocacy groups does not distort debate enough to warrant rigorous review, it is hard to understand why anti-discrimination requirements that burden the ability of advocacy groups to achieve their goals should be strictly scrutinized.

If, in light of this case law, the Hastings policy is properly construed to be a debate dampening rather than a debate distorting regulation in its form and operation, the argument for low-level reasonableness review has considerable force and support. It is irrelevant to argue, as Justice Alito does in his dissent, that the application of an all-comers law generally applicable to expressive associations operating in the private sector would violate the First Amendment.⁶⁹ Of course it would. But so would most content-discriminatory laws that are upheld as reasonable in a limited public forum or nonpublic forum. Outside of viewpoint-discriminatory and debate-distorting regulations, restrictions on speech defining a limited public forum are subject to much more lenient review. Pursuant to

66. *Id.* at 812 n. 30.

67. *Id.*

68. *Cornelius*, 473 U.S. at 797.

69. *Martinez*, 130 S. Ct. at 3014 (Alito, J., dissenting).

Martinez, a similar analysis applies to debate-dampening burdens on associational freedom.

Nor would the analysis change if it were presented as an argument about unconstitutional conditions. It is true that student organizations are being asked to waive their right to associational freedom in choosing their members and leaders in order to obtain access to the limited public forum that Hastings has created. However, that would also be true if Hastings enforced a content-discriminatory policy limiting access to its limited public forum to those student groups focusing their activities on the study of law. A student group establishing a fan club for the San Francisco Giants would have to waive their right to pursue their interest in discussing baseball in order to gain access to the Hastings forum. The question in both cases would be whether such a condition was a reasonable limit on access to a limited public forum.

B. The Reasonableness of the “All-Comers” Policy

Once the Court concluded that a reasonableness standard of review should be applied to the Hastings policy, the only remaining question was whether the “all-comers” policy satisfied this requirement. Many of the arguments here were relatively straightforward. The alleged benefits of the policy were that it promoted internal discussion and debate within groups, protected dissenters within a group who wanted their views considered without fearing expulsion, and guaranteed students whose fees subsidized RSOs that they would be permitted to join any group their student fees supported. The alleged costs were an increased risk that minority organizations would be taken over by the majority and the potentially high transaction costs RSOs must incur in having to deal with dissent among their members.⁷⁰

1. The Problem of Distinguishing Belief Discrimination from Status Discrimination

One other problem with a policy that allows student religious groups to discriminate on the basis of belief—the policy that would be constitutionally required under the analysis offered by CLS—deserves particular attention, however. Throughout the litigation, in its briefs and during oral argument, CLS maintained that it was only asserting a constitutional right to exclude potential members because

70. See *supra*, notes 49–51 and accompanying text.

of their beliefs.⁷¹ Discrimination based on a person's status or other characteristics, such as race or gender, CLS maintained, represented a different case which was not before the Court and, accordingly, should not influence the Court's decision regarding the Hastings policy. In oral argument, for example, CLS attorney Michael McConnell insisted that CLS challenged only the part of Hastings's policy prohibiting discrimination based on belief, and that Hastings would remain free to prohibit discrimination based on status, such as a student's race, if the Court ruled in CLS's favor.⁷² Yet when asked by Justice John Paul Stevens, "What if the belief is that African Americans are inferior?"⁷³ McConnell did no more than reiterate his position that a registered student group "can discriminate on the basis of belief, but not on the basis of status."⁷⁴ That distinction, however, would presumably allow a student club to limit its membership to only those African Americans who believe (and were willing to proclaim) that African Americans are inferior to other racial groups.

The CLS position raises three questions. First, why exactly is a freedom of association claim based on belief-discrimination different in kind from one that is based on status-discrimination? There is nothing in the Court's opinion in *Boy Scouts of America v. Dale*,⁷⁵ for example, that suggests that the Boy Scouts' freedom of association right to exclude individuals who engaged in homosexual conduct from its membership or leadership should be evaluated under a different standard of review than would be applied to the Scouts' decision to exclude girls and women from its organization.⁷⁶

Second, it is not clear that a constitutional rule allowing discrimination based on the belief in African-American or female inferiority differs markedly, in its real world effects, from a rule

71. CLS maintains that it does not discriminate on the basis of sexual orientation, but rather with regard to beliefs about the morality of extramarital sexual conduct. See, e.g., Brief for Petitioner at 5-7, 39, *Martinez*, 130 S. Ct. 2971 (2010)

72. Mr. McConnell stated "The stipulation is that they may not exclude based on status or beliefs. We have only challenged the beliefs, not status. Race, any other status basis Hastings is able to enforce." Transcript of Oral Argument at 9, *Martinez*, 130 S. Ct. 2971 (2010).

73. *Id.* at 10.

74. *Id.* Later in response to a question by Justice Breyer, McConnell reiterated that "our view is that the status half of that [Hastings policy] is perfectly constitutional and the belief half of that is not." *Id.* at 11.

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

76. While the Court frequently refers to the Scouts' contention that "homosexual conduct is inconsistent with the values it seeks to instill," *id.* at 654, there is nothing in the majority opinion that limits its scope exclusively to conduct discrimination.

allowing racial discrimination based on the color of a person's skin or gender discrimination based on a person's sex. A discriminatory membership policy excluding women who *believe* that they are entitled to serve as an officer of an association and a membership policy *prohibiting* women from serving as an officer of an association would both end up precluding a woman from becoming an officer of the association.

Third, if the Court was to accept the CLS position and draw a distinction between an association's protected and permissible belief-discrimination and its proscribable status-discrimination, how would a government entity, such as Hastings, be able to enforce a regulation prohibiting the latter kind of discrimination without jeopardizing the right to engage in the former kind of discrimination? Justice Ginsburg asks in the Court's opinion, "If a hypothetical Male-Superiority Club barred a female student from running for its presidency, for example, how could the Law School tell whether the group rejected her bid because of her sex or because, by seeking to lead the club, she manifested a lack of belief in its fundamental principles."⁷⁷ We can understand why CLS would want to avoid having to answer these questions because the offered responses may implicate problematic consequences. But avoiding these issues may have done little to persuade the Justices that these concerns could be successfully resolved in the real world by the officials required to do so if the Court ruled in CLS's favor.

2. *The Problem of Cabining the Scope of Belief-Discrimination*

The CLS position implicates other questions about its scope and consequences. One may reasonably ask, for example, whether the right to discriminate and exclude nonbelievers applies only to voting members and officers, or whether it should apply to any and all students interested in participating in a student group's programs. We understand that CLS at Hastings welcomed everyone to participate in its activities, so this issue is not directly applicable to the *Martinez* case. A ruling in favor of CLS would not have needed to determine whether its current welcoming approach is a discretionary choice which student groups can make or decline to make, or whether a university can require an open-door policy for participation in events as a condition to registration as a student group.

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

But a right to exclude individuals from becoming members of an association because they hold unacceptable beliefs could reasonably extend to placing exclusionary limits on attendance at an association's programs as well. If we followed Justice Alito's analysis in his dissent and asked whether off-campus religious congregations could exclude nonbelievers from their services and programs, the answer would almost certainly be in the affirmative, at least for privately funded activities. Indeed, the logic of recent Supreme Court cases, such as *Dale* and *Hurley*,⁷⁸ make it hard to explain why a student group's rights would be limited to excluding voting members. The practical arguments for such an extension track the arguments for permitting exclusionary membership policies. Attendance at an event by nonbelievers—say, an event involving the showing of a film and a discussion of its content—could arguably change the event and impair its usefulness to the organization.⁷⁹ The costs of the exclusionary policy to those denied the opportunity to participate in student fee-funded programs would increase significantly, however.

A final question is whether the same freedom of association claims that CLS asserted in *Martinez* should apply to what might be called “religion and” groups and activities. The campus groups at issue in such situations are ones that are organized around both their faith *and* some additional activity that is not intrinsically religious: a Catholic chess club, or a Lutheran math club, or a Presbyterian debating society. These kinds of generic clubs or societies are more likely to be organized at a high school or college rather than a law school, but it is not clear that the associational freedom principle advanced by CLS would apply differently to these various educational institutions.

The problem, of course, is that associational exclusivity in a “religion and” setting acts not only as a shield to protect the religious organization from interference, but also as a sword that may make it impossible for members of minority faiths to participate in a wide range of extracurricular activities. If extracurricular activities at a

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

79. In its brief, CLS describes the devastating consequences that would result “if non-Christians could walk in and insist on taking a turn leading one of CLS's weekly studies of the Bible.” Brief for Petitioner, *supra* note 71, at 30. But surely, a cohort of non-Christians attending the Bible study sessions and challenging every statement expressed by the person leading the group would be equally disruptive to the purpose of the meeting.

public high school, for example, may limit their membership to the dominant religions in the community, there may be far too few students adhering to other faiths to develop alternative programs that can match the activities available to the majority. In some ways, this is the converse problem to the one that Justice Alito highlights in his dissent. Justice Alito worries that under the “all-comers policy,” students holding minority beliefs will never be able to effectively organize an association to promote their own interests because their associations will be inundated by students holding majoritarian views who will wrest control of the association from the students who created it.⁸⁰ A policy permitting unrestricted belief-discrimination, however, risks leaving members of minority faiths excluded and isolated from the range of extracurricular activities enjoyed by students of more broadly based religions because the minorities lack the numbers necessary to create comparable programs solely for their own use.

CLS noted correctly in its brief that this issue was much more pronounced in *Dale* than in this case, because, unlike the Boy Scouts, CLS is an exclusively expressive association.⁸¹ But the problem remains an open and troubling one nonetheless. Because the Court in *Dale* failed to adequately explain how the relevant standard of review was actually applied in that case, we have no basis for even beginning to address this issue today. Because CLS argued that their case did not raise this issue, a victory for CLS in *Martinez* would probably have left this issue clouded and unresolved as well.

In *Martinez*, CLS attempted to define the issue before the Court as narrowly as possible, and to describe the broad range of issues implicated by a ruling in CLS’s favor as different disputes that need not be adjudicated in the present case. That strategy may have been an error. The range of first amendment claims opened by a holding protecting the associational freedom to discriminate in a limited public forum without any meaningful discussion of how these auxiliary claims might be resolved may have discouraged the Court from ruling in CLS’s favor. It may not have been enough to suggest that status-discrimination, exclusion from events as well as membership, and “religion and” exclusionary associations raise different and presumably more difficult questions than the claim

80. *Martinez*, 130 S. Ct. at 3019 (Alito, J., dissenting) (fearing that “[a] true accept all-comers policy permits small unpopular groups to be taken over by students who wish to change the views that the group expresses”).

81. Brief for Petitioner, *supra* note 71, at 45.

presented by CLS in *Martinez*. Perhaps some attention should have been directed to explaining how the Court and public universities and high schools could respond to these claims, and others that almost surely would arise, if the Court declared prohibitions against belief-discrimination by students groups to be unconstitutional.

IV. Was the Original Written Hastings Policy Unconstitutional?

Justice Alito's dissenting opinion, building largely upon CLS's brief, argued that the original Hastings policy codified in writing constituted viewpoint discrimination prohibited by the Free Speech Clause of the First Amendment.⁸² Both Justice Alito's dissent and the CLS brief on which it appears to have been based have serious analytic weaknesses. More importantly, both arguments are dangerous to the cause of religious liberty and equality.

In its brief, CLS claimed that the written Hastings anti-discrimination policy was viewpoint discriminatory in two respects. First, CLS argued that in Hastings's list of bases on which discrimination was forbidden, sexual orientation (which Hastings interpreted to include sexual activity as well as sexual identity) "[was] the only forbidden ground based on conduct."⁸³ All groups (other than groups that have a problem with homosexuality) were "permitted to insist that [their] leaders conduct themselves in accordance with the group's stated beliefs."⁸⁴ Only groups opposed to certain sexual activities that Hastings categorized as sexual orientation were burdened by this policy. This, CLS insisted, was viewpoint discrimination.⁸⁵

Justice Alito described this viewpoint-discrimination argument in slightly different terms. CLS espoused the viewpoint that sexual conduct outside marriage (defined in a particular way that was consistent with its religious beliefs—here, between a man and a woman) is wrongful.⁸⁶ Hastings's prohibition against discrimination based on sexual orientation prevented CLS from discriminating against sexually active gays and lesbians who did not view their sexual relationships as wrongful. However, Justice Alito explained, a Free

82. *Martinez*, 130 S. Ct. at 3010–12 (Alito, J., dissenting).

83. Brief for Petitioner, *supra* note 71, at 39.

84. *Id.*

85. *Id.* at 39–40.

86. *Martinez*, 130 S. Ct. at 3012 (Alito, J., dissenting).

Love Club could reject as members students who support a traditional view of marriage. Alito concluded that “[i]t is hard to see how this can be viewed as anything other than viewpoint discrimination.”⁸⁷

Both of these arguments have serious flaws. The argument CLS expressed in its brief is simply wrong on the facts. Sexual orientation is not the only forbidden ground that is based on conduct in Hastings’s written policy. Does anyone doubt that Hastings would find that discrimination against interracial marriages, dating, or friendships would fall under the prohibition of race discrimination in its policy? But interracial relationships also involve conduct. CLS is simply wrong when it says that anti-gay groups are the only ones that must tolerate unwanted conduct of prospective members.

Indeed, religion itself has a conduct element and is not simply about beliefs. One of us is Jewish. That means he holds certain beliefs. But it also means he engages in certain conduct and activities. He practices Judaism. Assume a registered nonreligious student group at Hastings told a Jewish student, “Look, we are not discriminating against you because of your beliefs. We are discriminating against you because you do Jewish things—you worship the way Jews worship.” We have absolutely no doubt that Hastings would find this conduct-based discrimination to be religious discrimination and thus prohibited under its policy. Accordingly, we see little in fact or law to support the argument that Hastings is engaged in viewpoint discrimination because sexual orientation is singled out and only groups that oppose gay conduct (as opposed to any other kind of conduct) are distinctly regulated.

Justice Alito’s argument is broader and even more troubling. Taken to its logical conclusion, it would undermine the constitutionality of any anti-discrimination principle protecting individuals or groups defined by their conduct. Consider the prohibition against anti-miscegenation exclusions mentioned above. Suppose a student group will only allow interracial married couples to be members of the association if they acknowledge the wrongfulness of all interracial marital relationships including their own. If a public university concludes that the student group’s decision violates its policy prohibiting racial discrimination, it would be held to have engaged in prohibited viewpoint discrimination. Why? Because other student groups would be permitted to reject a student seeking

87. *Id.*

membership if he espoused the belief that interracial marriages were immoral. In essence, anti-discrimination policies prohibiting the exclusion of people engaged in interracial or inter-ethnic relationships are viewpoint discriminatory unless they also prohibit discrimination against racists and ethno-centric bigots. An anti-discrimination policy protecting married students from discrimination would run afoul of a similar analysis. If a student club would be barred from refusing to admit married students unless they acknowledged the immorality of their relationship, the university would be held to have engaged in viewpoint discrimination unless it also barred discrimination against those who believed that marriage is immoral.

The second variant of CLS's viewpoint-discrimination argument is also problematic. CLS argued in its brief that among the list of categories that Hastings protected against discrimination, religion was "the only forbidden ground that is based on belief or opinion."⁸⁸ According to CLS, this singling out of religious students for protection from discrimination also constituted viewpoint bias. Why? Because "of all the various opinion-based organizations at Hastings, religious groups [were] the only ones stripped of their right to control their message by controlling their leadership."⁸⁹ Since the "environmentalist club" could have discriminated against "climate change skeptics," it was viewpoint discriminatory to prohibit CLS from discriminating against non-Christians.⁹⁰ Justice Alito echoed this analysis and even used the same environmentalist club example in his dissent.⁹¹

The authors of the CLS brief recognized, however, that there had to be some limit to their contention that prohibiting religious discrimination is viewpoint discrimination. After all, prohibiting religious discrimination is generally thought to be a good thing for universities to do, and a good thing for religious persons in general and members of minority faiths in particular. In recognition of this reality, the CLS brief stated that, "the prohibition on religious discrimination is untroubling, indeed commendable, as applied to governmental institutions, businesses, and even nonreligious clubs. But when applied to groups that are organized around shared religious beliefs, this prohibition is unfair, counterproductive,

88. Brief for Petitioner, *supra* note 71, at 36.

89. *Id.* at 37.

90. *Id.*

91. *Martinez*, 130 S. Ct. at 3010 (Alito, J., dissenting).

disabling, and unconstitutional.”⁹² There was, tellingly, no citation to authority to support this point in the CLS brief.

This argument simply won’t work, and indeed, it ultimately collapses upon itself. The constitutional prohibition against viewpoint discrimination is not so easily cabined or limited. CLS contended that it was viewpoint discrimination to treat student organizations based on religious belief differently and less favorably than student organizations based on secular beliefs. But if that is so, why is it not equally viewpoint discriminatory to treat students who hold and espouse secular beliefs less favorably than students who hold religious beliefs. Freedom of expressive association, after all, is derivative of freedom of speech and freedom of religion.⁹³

Under the policy that CLS appears to endorse, students who hold secular beliefs would receive no protection against discrimination by religious student groups under a permissible anti-discrimination policy (religious student groups would be permitted to discriminate against members of other faiths and those who reject all religious beliefs). Yet religious students would be protected from discrimination on the basis of their beliefs by secular student groups. If religion is to be considered another viewpoint of speech, no different than any other political, social, or cultural belief or message, as CLS seems to argue, why would it ever be permissible to treat persons who hold religious beliefs and express religious messages differently and more favorably than other persons who hold and express other political, social, or cultural beliefs or messages?

To put the point another way, if it is viewpoint discriminatory to allow the environmentalist club to discriminate against climate change skeptics, while prohibiting CLS from discriminating against non-Christians, why is it not equally viewpoint-discriminatory to allow CLS to discriminate against environmentalists (if it believes that environmentalists’ beliefs are inconsistent with its statement of faith) while prohibiting the environmentalist club from discriminating against Christians? Yet CLS seems to suggest that there is no problem with a policy that prohibits non-religious clubs from

92. Brief for Petitioner, *supra* note 71, at 36–37.

93. Indeed, Justice Alito’s dissent focuses on the freedom of speech dimension of this case. What is most problematic about the Hastings policy to Alito is that it punishes unpopular ideas. Of course, the Hastings policy is directed at the CLS membership policy, but that is important because of its impact on a group’s ability to communicate its message. “The First amendment protects the right of ‘expressive association’—that is, ‘the right to associate for the purpose of speaking.’” *Martinez*, 130 S. Ct. at 3010 (Alito, J., dissenting) (citation omitted).

discriminating on the basis of religion while permitting religious clubs to discriminate against those who do not hold religious beliefs.

Basically, we think that in this section of its brief, CLS wants to have its cake and eat it too. CLS argued that it is viewpoint discrimination to prohibit religious organizations from discriminating on the basis of religious belief while permitting secular political organizations to discriminate on the basis of nonreligious belief. But it is not viewpoint discrimination to prohibit secular political organizations from discriminating on the basis of religious belief while permitting religious organizations to discriminate on the basis of secular beliefs. Religious student organizations receive more associational autonomy than their secular counterparts and religious students receive more protection for their beliefs than students who hold secular beliefs. Unfortunately for CLS, that is not the way free speech doctrine works. The prohibition against viewpoint discrimination is, and has to be, fiercely even-handed. If religion is going to be construed as a viewpoint of speech in freedom of association cases, it is difficult to see how anti-discrimination policies can treat religion differently than secular belief systems or religious groups differently than those that adhere to secular beliefs. To conform to viewpoint neutrality, government would have to prohibit discrimination based on both religious and secular beliefs or decline to prohibit discrimination based on either belief system.

Justice Alito attempted to escape this implication of the CLS viewpoint-discrimination argument in his dissenting opinion. He argued that allowing religious groups to discriminate against prospective members who do not share the group's beliefs would not undercut prohibitions against religious discrimination in other circumstances.⁹⁴ Freedom of expressive association would only protect a group's membership decisions against state anti-discrimination regulations if admitting the excluded persons would significantly impact the group's ability to express its message.⁹⁵ Because of that limitation to associational freedom, fraternities and sororities would still have to abide by state regulations prohibiting religious discrimination, as would groups dedicated to secular, political or ideological goals. In both circumstances, Justice Alito argued, admitting religious individuals to the group would not impair its ability to carry out its expressive functions.

94. *Martinez*, 130 S. Ct. at 3012 (Alito, J., dissenting).

95. *Id.*

This argument is disingenuous at best. In *Dale*, the Court took an extraordinarily deferential approach to its evaluation of expressive association claims.⁹⁶ Put simply, under the analysis the Court employed in *Dale*, any association that is engaged in expressive conduct of any kind will be recognized as expressive for constitutional purposes even if many of its activities are non-expressive in nature.⁹⁷ The goal of disseminating a particular message need not have anything to do with the association's purpose or the reason why people join it.⁹⁸ Further, the association's explanation of its expressive mission will be accepted without review and regardless of whether there is evidence to support its claims as to the content of its message.⁹⁹ Finally, the association's message can be communicated through its conduct as well as through conventional means of expression. Thus, in *Dale*, the Boy Scouts communicated their anti-gay message in part by their decision to exclude gays from the association.¹⁰⁰

96. *Dale*, 530 U.S. at 650.

97. *Id.* In *Dale*, the Court explained that “the First Amendment’s protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.” *Id.* at 648. It is difficult to imagine any group not fitting within such an expansive definition. Later, the Court noted that any group seeking to transmit values is engaged in expressive activity even if it is doing so through conduct such as camping trips or survival training. *Id.* at 650.

98. *Id.* at 655. The Court stated that “associations do not have to associate for the ‘purpose’ of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection.” *Id.*

99. In determining the Boy Scouts’ position on homosexuality, the Court noted that the Boy Scouts asserted in their brief to the Court that the Scouts teach that homosexuality is not morally straight and should not be promoted as a legitimate form of behavior. Without further analysis, the Court stated: “We accept the Boy Scouts’ assertion. We need not inquire further to determine the nature of the Boy Scouts’ expression with regard to homosexuality.” *Id.* at 651.

100. In discussing whether the presence of an openly gay assistant scout master “would significantly burden” the Scouts’ anti-homosexual message, the Court insisted that it was not suggesting that “an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.” *Id.* at 653. The Court’s subsequent analysis, however, comes perilously close to holding that the exclusion of members of a particular group by an association constitutes a protected message that would be impaired by allowing the group’s members to join the association. The Court notes that it will “give deference to an association’s view of what would impair its expression.” *Id.* at 653. It also maintains that an association may communicate its message “by example”—that is, by its leaders not being members of the excluded group. *Id.* at 655. Finally, an association can choose to communicate its anti-homosexual message by refusing to allow openly gay men to be

With *Dale* as precedent, all of Justice Alito's arguments fall apart. A fraternity or sorority need only assert that it is trying to instill or promote the ideals of Christian fellowship or Judeo-Christian sisterhood or any other religious value to receive constitutional protection for its exclusionary membership policies. Once the fraternity's or sorority's expressive goal is accepted, as it almost has to be after *Dale*, it is only a short step to argue that its message would be impaired if it were required to admit students of a particular faith or no faith. Under the authority of *Dale*, the fact that the fraternity or sorority holds an annual Christmas and Easter party would probably be enough to allow it to discriminate against Muslims and Jews.

The argument is even easier for an ideological association. An association's decision to exclude religious individuals or members of a particular faith need not be rational, persuasive, or internally consistent.¹⁰¹ Thus, the association need only insist that it stands for the proposition that the actions or beliefs of a particular religious faith are inconsistent with the association's values and goals. After *Dale*, it would not be appropriate or relevant for Justice Alito—or any other Justice, judge, or court—to determine whether an association's asserted expressive goals actually reflect the values it instills or promotes in its ongoing activities. When associations have open-ended discretion to define their expressive mission during litigation, it is very difficult, if not impossible, for a court to conclude that the association's membership policies are not logically or reasonably relevant to the group's ability to express its message. *Dale* effectively forecloses any attempt to substitute a court's conclusions as to an association's membership policies and message for the conclusions of the association itself.

Of course, a fraternity or ideological group may erroneously attribute certain beliefs or conduct to the members of religious community. A sorority or political club, for example, may mistakenly generalize the attitudes of some members of a religion to all those who profess a particular faith. However, freedom of speech and association is not limited to the wise or knowledgeable. To take an

assistant scoutmasters even if it allows Scout leaders to publicly challenge the Scouts' discriminatory policies. *Id.* at 655–56. If these three arguments are taken seriously, it is difficult to imagine how forcing a group to accept unwanted members could be found not to impair the group's message.

101. In *Dale*, the Court states that an association's expressive values must be protected even if the court finds them to be irrational or internally inconsistent. *Id.* at 651.

easy example, a group supporting same-sex marriage might refuse to admit Mormons to its association on the grounds that they believe the Mormon Church strongly supported Proposition 8 in California and opposed legal recognition of same-sex marriages.¹⁰² The fact that some Mormons opposed Proposition 8 would be irrelevant to the constitutional analysis. The group supporting same-sex marriage would be free to believe that members of the church are morally tainted by the views of the church hierarchy and cannot be trusted to work for gay and lesbian rights. After *Dale*, it is hard to imagine why such an association's policy excluding Mormons as members would not be constitutionally protected.

One cannot escape this analysis by emphasizing the relative magnitude of the burden on associational freedom experienced by religious and secular groups resulting from anti-discrimination policies. Attempting to do so would inappropriately mix an association's liberty interest in being free from state interference with its membership decisions and its equality interest in being treated no differently than other expressive associations because of its viewpoint. Even modest interference with associational freedom that does not significantly impact a group's ability to express its message will be unconstitutional if it is imposed only on groups that express a particular viewpoint. From a liberty perspective, Justice Alito may be correct that a prohibition against religious discrimination may be substantially more burdensome to many religious organizations than it would be to many secular organizations. But for speech equality purposes, if we are going to insist that religion is a viewpoint of expression in evaluating anti-discrimination policies, then regulations that distinguish between religious and nonreligious associations with regard to their membership criteria must be subject to rigorous scrutiny. A policy that prohibits secular organizations from discriminating on the basis of religion while permitting religious organizations to discriminate on the basis of religion is viewpoint discriminatory on its face, and as such, it must be justified under strict scrutiny review. Such a policy would also be viewpoint discriminatory as applied. It is hard to explain how a regulation that permits religious student associations to exclude same-sex married couples as members (because the couples' beliefs and conduct conflict with

102. *California and Same-Sex Marriage*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (June 30, 2008), <http://beta-newsroom.lds.org/article/california-and-same-sex-marriage>; see also COALITION FOR MARRIAGE AND FAMILY, <http://www.coalitionformarriage.org/> (last visited Jan. 21, 2011).

religious commitments), but prohibits gay rights organizations from excluding students whose religion rejects same-sex relationships as an abomination, could be characterized, to use Justice Alito's words, as "anything other than viewpoint discrimination."¹⁰³

Justice Alito's attempt to limit the consequences of his argument for all laws and policies prohibiting religious discrimination is not only unavailing and unpersuasive, but also fails to recognize the full extent of the danger to religious liberty that his analysis creates. If prohibitions against religious discrimination are going to be rigorously evaluated under the free speech framework invalidating viewpoint discrimination, the future of such prohibitions may be very bleak indeed. After all, if religion is first and foremost a viewpoint of speech, it is difficult to explain why any anti-discrimination law that protects individuals (and groups) espousing religious beliefs more vigorously than it protects individuals (and groups) who espouse secular beliefs is not itself presumptively invalid viewpoint discrimination.

In order to fully appreciate the seriousness of this problem, it may be helpful to consider Title VII's prohibition against religious discrimination in hiring.¹⁰⁴ Under current law, this anti-discrimination requirement has been amended so that it does not apply to any employment decision by nonprofit religious organizations.¹⁰⁵ This amendment was upheld against an establishment clause challenge in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*¹⁰⁶ in 1987.

Suppose, however, Congress was to repeal this religious accommodation. Then, all religious organizations would be prohibited from taking religious belief into account in making their employment decisions. It is easy to imagine and explain a Free Exercise, Establishment Clause, or Freedom of Association claim being brought to challenge this requirement.¹⁰⁷ Indeed, it seems

103. *Martinez*, 130 S. Ct. at 3012 (Alito, J., dissenting).

104. 42 U.S.C. § 2000e-2(a) (2006).

105. 42 U.S.C. § 2000e-1(a) (2006).

106. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

107. See generally *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (Free Exercise); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F. 2d 1164 (4th Cir. 1985) (Establishment Clause); MICHAEL W. MCCONNELL, JOHN H. GARVEY, AND THOMAS C. BERG, *RELIGION AND THE CONSTITUTION* 308 (2006).

absurd to suggest that federal law could prohibit a church from discriminating on the basis of religion in hiring clergy or other employees that perform religious functions.

Under the position argued by CLS in *Martinez* and adopted by Justice Alito, however, a law like Title VII without a religious accommodation provision could also be successfully challenged on the grounds that it discriminated on the basis of viewpoint in violation of the Free Speech Clause of the First Amendment. Religious discrimination is prohibited by the statute, but political discrimination is not. Thus, Title VII would prohibit religious organizations from discriminating on the basis of religion, but would not prohibit political organizations from discriminating on the basis of political beliefs. To the *Martinez* dissenters, that is viewpoint discrimination. If they are correct, every anti-discrimination statute that prohibits religious discrimination, but not political discrimination, is in peril of being challenged as prohibited viewpoint discrimination.

This argument is without precedent. Certainly, the Court never intimated in the *Amos* decision that the Title VII amendment it upheld might be necessary to avoid a claim of viewpoint discrimination. Moreover, it is clear that Title VII on its face would not be treating religious organizations differently than nonreligious organizations. All organizations would be prohibited from discriminating on the basis of religion in hiring staff. The argument would have to be that the incidental effect of a law protecting religious individuals from discrimination in hiring burdens the speech and association rights of religious organizations far more than it burdens their secular counterparts. Looking beyond the facial neutrality of a law in order to classify it as viewpoint discriminatory because of its effects is a significant extension of free speech doctrine.

But that is not the only problem with this analysis. Title VII is not really facially neutral with regard to viewpoints of speech. On its face, Title VII provides important protection against employment discrimination to individuals who believe and espouse religious beliefs, but provides no comparable protection to individuals who believe and espouse secular beliefs (that, after all, is precisely what a prohibition against religious discrimination mandates). As noted earlier, however, if religion is going to be generally construed as a viewpoint of speech, this formal difference in treatment would seem to be a fairly glaring example of viewpoint discrimination. Indeed, this argument may be unavoidable if the CLS/Justice Alito position on viewpoint discrimination is accepted. It cannot be that the incidental impact of a Title VII-type ban on religious discrimination

in hiring would be held to constitute viewpoint discrimination against religious organizations, but the facially explicit protection provided only to religious individuals would not be found to constitute viewpoint discrimination against individuals holding secular beliefs.

Ultimately, both CLS's and Justice Alito's arguments about viewpoint discrimination suffer from the same defect. They attempt to extend the Court's access to public forum decisions holding that discrimination against religious activities constitutes viewpoint discrimination¹⁰⁸ when, in fact, these cases already reach too far and have a problematic foundation. In our judgment, the Supreme Court has moved a long way down a treacherous path by continually equating discrimination against expressive religious activities as viewpoint discrimination prohibited by the Free Speech Clause of the First Amendment, rather than reviewing these issues under the religion clauses of the First Amendment.¹⁰⁹

The Court seems oblivious to the fact that from a free speech perspective there is no basis for treating religious beliefs, expression, or expressive assemblies and associations as unique and distinctive or deserving of any special constitutional respect or recognition. Continued adherence to this viewpoint-discrimination approach will increasingly render discretionary religious accommodations subject to challenge under the Free Speech Clause of the First Amendment. At the end, it may even support the conclusion—already portended by the CLS and Justice Alito arguments in *Martinez*—that prohibiting discrimination on the basis of religion is intrinsically viewpoint discriminatory and unconstitutional as well. Fortunately, the Court did not take that step in *Martinez*. Religious groups, such as CLS, and Supreme Court Justices like Alito who support religious liberty, should think more than twice about the wisdom of continuing down this ill-fated doctrinal path.

108. Justice Alito emphasized that his argument about viewpoint discrimination is predicated on this line of authority. He writes, "In an unbroken line of decisions analyzing private religious speech in limited public forums, we have made it perfectly clear that '[r]eligion is [a] viewpoint from which ideas are conveyed.'" *Martinez*, 130 S. Ct. at 3009 (Alito, J., dissenting) (quoting *Good News Club v. Milford Cent. Sch.*, 553 U.S. 98, 112 & n. 4 (2001)).

109. See generally, Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119 (2002); Alan Brownstein, *Why Conservatives, and Others, Have Trouble Supporting the Meaningful Enforcement of Free Exercise Rights*, 33 HARV. J. L. & PUB. POL'Y 925 (2010).

Conclusion

We believe that CLS raised important constitutional questions in the *Martinez* case. However, we have serious misgivings about the arguments CLS provided to answer these questions. We agree with CLS that the Hastings policy imposes serious burdens on associational freedom. If that policy is constitutional, it is because neither speech nor association receives substantial protection in a limited public forum. But our sympathy with CLS on this issue is not limited to religious groups. It also extends to other nonreligious speakers and associations whose access to public property for expressive or associational purposes can be restricted without serious review under the Court's current forum analysis.

Because prior Supreme Court cases so frequently concluded that the exclusion of religious groups from nonpublic or limited public forums constituted viewpoint discrimination, which is subject to strict scrutiny review,¹¹⁰ religious organizations and speakers have not experienced the full brunt of the Court's decisions in this area. While restrictions on the access of secular speakers received lenient review and were often upheld, the exclusion of religious expressive activities was rigorously reviewed and struck down. The *Martinez* decision is notable because it provides the same very limited protection to religious speakers that secular speakers have received for the last two decades. Now, for the first time, religious and nonreligious speakers are in the same leniently protected expressive boat.

Perhaps as a result of *Martinez*, it is time for religious groups take up the fight that they have previously been able to avoid. The appropriate doctrinal response to *Martinez* may be to call for increasing the rigor of review applied to both content-discriminatory speech regulations and debate dampening constraints on associational freedom that determine the parameters of a limited public forum. That change in doctrine would benefit speakers and associations across the board, not just those promoting religious beliefs.

We also have some sympathy for the argument suggested by CLS and the dissenting Justices in *Martinez* that there are some circumstances in which religious individuals and organizations should receive additional protection against discrimination than is provided to their secular counterparts. We believe it is a mistake, however, to

110. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lambs Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

attempt to manipulate free speech doctrine to achieve that result. Attempts to force religious discrimination issues into the free speech prohibition against viewpoint discrimination are internally contradictory. They attempt to protect the distinctive nature of religious expressive activities by arguing that religious association, speech, and belief are no different than secular association, speech and belief.

The incoherence of the CLS and dissenting Justices' viewpoint-discrimination arguments does not mean that there is no constitutional basis for providing religion the constitutional protection it requires and deserves. Free speech doctrine is simply the wrong place to seek a constitutional shield for religious autonomy and practice. The proper constitutional location for arguments grounded on the distinctive nature of religion is the Free Exercise or Establishment Clause of the First Amendment.¹¹¹ It is long past the time when courts and proponents of religious freedom should cast aside their reliance on free speech doctrine and recognize that reality.

111. See *supra* text accompanying note 109.
