

Marketplace of Ideas 2.0: Excluding Viewpoints to Include Individuals

by ROBERT LUTHER III*

Introduction

What are the implications of the *Christian Legal Society v. Martinez*¹ decision? First, in ruling that public universities may require that all recognized student organizations permit any and “all comers”² to be eligible for all offices of the organization, the Court issued a narrow rule that is praiseworthy for its clarity but for little else. In the immediate aftermath of the Court’s narrow ruling, CLS asserted it would ultimately prevail on remand, alleging that Hastings selectively enforced its “all-comers” policy to CLS’s detriment,³ but

* Mr. Luther co-authored a brief filed as *amicus curiae* in support of the Petitioner on behalf of The Rutherford Institute, a Virginia-based civil liberties organization, in this case. Many of the ideas discussed herein are contained in the Institute’s brief; however, the remarks in this article are exclusively attributable to the author and do not reflect an official position of The Rutherford Institute or its affiliate attorneys. Comments are graciously received at <http://www.RobLuther.com>.

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

2. *Id.* at 2974.

3. *Id.* at 2995 (“Neither the District Court nor the Ninth Circuit addressed an argument that Hastings selectively enforces its all-comers policy, and this Court is not the proper forum to air the issue in the first instance. On remand, the Ninth Circuit may consider CLS’s pretext argument if, and to the extent, it is preserved.”). Specifically, CLS alleged that Hastings officials engaged in viewpoint discrimination against CLS by permitting another student group, La Raza, to restrict its voting membership to students of Latino or Mexican descent. *See* Joint Appendix 192, 319; *see also* David French, *CLS v. Martinez: Further Thoughts* (June 28, 2010), <http://blog.speakupmovement.org/university/uncategorized/cls-v-martinez-further-thoughts/> (“There is strong evidence that the university has, in fact, exempted other, favored, groups from their own policy, with the racial left advocacy group La Raza permitted to discriminate on the basis of ideology *and* race.”) (emphasis added); Ted Olsen and Trevor Persaud, *Christian Legal Society Loses in Supreme Court Case* (June 2010), <http://www.christianitytoday.com/ct/2010/juneweb-only/36-11.0.html> (“‘We believe we will ultimately prevail in this case,’ . . . ‘The record will show that Hastings law school applied its policy in a discriminatory way. . . . The Supreme Court did not rule that public universities can apply different rules to religious groups than

the U.S. Court of Appeals for the Ninth Circuit declined to explore CLS's allegations.⁴ In view of the now final disposition of the case, the decision's potential impact is ripe for consideration. With respect to the decision's immediate impact, one federal appellate circuit has already concluded that *Martinez* did not alter the Court's funding-access precedents.⁵ Second, and on the issue of precedent, it is worth noting that by ratifying Hastings' "all-comers"⁶ policy, the Court overlooked numerous precedents and historical facts that recognize the rights of students to associate with those of similar beliefs on campus and free of university-imposed burdens. Third, Justice Kennedy's harsh concurring opinion ascribes a startling sense of deference to public universities, which is likely to make future First Amendment challenges by students more difficult. Fourth, while the "subsidiaries" camp prevailed in this round of the "rights v. subsidiaries" terminology turf war, the dispute is sure to re-emerge in future First Amendment cases. Fifth, the immediate aftermath of the *Martinez* decision yielded thoughtful commentary on the impact of *Board of Regents of the University of Wisconsin System v. Southworth*⁷ on the Court's reasoning in *Martinez*. The *Southworth* case proves an able rival for comparison with *Martinez* in anticipation of future decisions on the speech and associational rights of students on public university campuses. Sixth, this case reflects an illiberal and regrettable trend by policy-makers to muzzle the First Amendment and exclude viewpoints simply to include individuals. This article will discuss these observations in turn.

I. A Narrow Rule?

In *Martinez*, the Court concluded that public universities may require that all recognized student organizations permit any and all comers to be eligible for all offices of the organization, and, if a university chooses to implement such a policy, it becomes unconstitutional in application if it is applied unequally to a student organization on the basis of the organization's status.⁸ As of the date of this Symposium, one federal court of appeals has addressed the

they apply to political, cultural, or other student groups.”) (quoting Professor Michael W. McConnell).

4. *Christian Legal Soc’y v. Wu*, 626 F.3d 483 (9th Cir. 2010).

5. *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 781 (7th Cir. 2010).

6. *Martinez*, 130 S. Ct. at 2974.

7. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

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

Martinez decision, and the opinion for that panel interpreted *Martinez* as having no impact on the Court's predecessor funding-access cases.⁹

In *Badger Catholic, Inc. v. Walsh*, a Catholic student group at the University of Wisconsin that had been denied "funding for prayer, proselytizing, or religious instruction" saw the Seventh Circuit affirm by a vote of 2-1 the district court's decision that struck down the university's selective funding policy.¹⁰ After acknowledging that the circuit had deferred judgment on its decision until after the Court released *Martinez*,¹¹ Judge Easterbrook's opinion for the divided panel rejected the university's argument that its restriction on funding these practices was a permissible content-based restriction because, in short, "Wisconsin has chosen to pay for student-led counseling, and its decision to exclude counseling that features prayer is forbidden under *Widmar* and its successors."¹²

With respect to *Martinez*'s implications on the decision, Judge Easterbrook concluded that "[t]here can be no doubt after *Christian Legal Society*" that *Badger Catholic* was entitled to funding because the university's policy was not viewpoint neutral under *Widmar* and *Rosenberger*.¹³ In dissent, Judge Williams initially remarked that the *Martinez* decision should have caused the panel more pause¹⁴ prior to concluding that the panel erred in holding that *Badger Catholic* was entitled to funding.¹⁵ By quoting the language and channeling the spirit of the *Martinez* opinions authored by Justices Ginsburg and Stevens,¹⁶ Judge Williams opined that the university's policy was

9. *Badger Catholic*, 620 F.3d at 781 ("We wanted to see whether the Court would modify the approach articulated in *Widmar*, *Rosenberger*, and *Southworth*. The Court left that approach in place and reiterated the norm that universities must make their recognition and funding decisions without regard to the speaker's viewpoint.").

10. *Id.* at 777, 782.

11. *Id.* at 781 ("We deferred action on this appeal while the Supreme Court had *Christian Legal Society* under advisement.").

12. *Id.* at 779.

13. *Id.* at 778–81.

14. *Id.* at 784 (Williams, J., dissenting) ("I cannot agree, however, with the panel's conclusion that 'there can be no doubt' that *Christian Legal Society* decides the issue here.").

15. *Id.* ("[N]ow, governmental entities can block access to a limited public forum as long as the neutral barrier is viewpoint neutral.") (citing *Martinez*, 130 S. Ct. at 2983).

16. *Martinez*, 130 S. Ct. at 2989 n.16 ("But determinations of what constitutes sound educational policy or what goals a student organization forum ought to serve fall within the discretion of school administrators and educators."); *id.* at 2993 ("It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept

reasonable and that “[t]he University has the discretion to decide that certain activities are worth funding over others, so long as its decision-making criteria is viewpoint neutral.”¹⁷

After reviewing the opinions in *Badger Catholic*, Professor Steven D. Schwinn noted the recurring Hobson’s choice courts face concerning the dueling characterizations of religious speech under current First Amendment doctrine:

Any content-based discrimination can be viewpoint discrimination by discussing the content from a particular viewpoint—here, e.g., by proselytizing (perhaps the most plausibly content-based classification among the three in the policy) from a religious viewpoint. This is not a new problem, and nothing in *Christian Legal Society* (or *Badger Catholic*) solves it.¹⁸

Perhaps the next case concerning funding of religious student organizations accepted for review by the Court will define with precision the scope of religious practices that universities can preclude from funding on the basis of content-based limitations—and those which exceed the scope of permissible restriction and cause universities to engage in viewpoint discrimination. Although *Widmar* and *Rosenberger* seemingly moved the Court beyond this ideological impasse long ago, *Martinez* has—at least in the mind of one judge in this case—breathed renewed interest into the pre-*Widmar* mode of analysis for resolving funding-access controversies.¹⁹ Time will tell whether this approach will regain traction or whether it will remain a relic rather than the rule.

all comers.”); cf. *Badger Catholic*, 620 F.3d at 788 (Williams, J., dissenting) (“That a state can *choose* to fund this category of speech does not create an obligation for it to do so.”); *Martinez*, 130 S. Ct. at 2992 (“[T]he *advisability* of Hastings’ policy does not control its *permissibility*.”); *Badger Catholic*, 620 F.3d at 786 (Williams, J., dissenting) (“There are not legal questions but policy questions; they are not for the Court but for the university to make.”) (citing *Martinez*, 130 S. Ct. at 2998 (Stevens, J., concurring)).

17. *Badger Catholic*, 620 F.3d at 786 (“Our task is merely to decide whether that decision was viewpoint neutral, and it was.”).

18. Steven D. Schwinn, *Funding Policy Discriminates Against Religion*, Seventh Circuit Rules (September 4, 2010), <http://lawprofessors.typepad.com/conlaw/2010/09/a-divided-panel-of-the-seventh-circuit-ruledlast-week-that-a-universitys-policy-of-declining-to-fund-student-group-worship-p.html>.

19. See generally *Badger Catholic*, 620 F.3d at 782–90 (Williams, J., dissenting).

II. The *Martinez* Decision Overlooked Precedent and History

As the *Martinez* decision and the post-*Martinez* decision of *Badger Catholic* both demonstrate, despite the Court's favorable ruling towards student religious groups thirty years ago in *Widmar v. Vincent*,²⁰ student religious groups have sought continued judicial intervention in the face of repeated First Amendment infringements by public school authorities.²¹ In an attempt to provide the Court with context for appreciating the freedoms enjoyed by students on public university campuses in the early days of the republic, The Rutherford Institute's brief as *amicus curiae* traced the historical development of religious practices at a similarly distinguished public university, the University of Virginia, which was chartered almost sixty years before Hastings, in 1819. Recognizing that "no other American of his generation did more to remove shackles from the mind"²² than the University of Virginia's founder, Thomas Jefferson, the Institute's brief reminded the Court of the prudential considerations abound in the longstanding traditions of intellectual freedom of speech and association on public university campuses, which historically have been guided by broadly drawn policies providing venues—or in this case, a forum—for expression of all viewpoints.²³ For example, there is significant evidence indicating that Jefferson specifically approved of regular religious meetings for worship and teaching by students of different denominations on the public grounds of the university.²⁴

20. *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, the Court vindicated the rights of a student religious organization denied access for meetings for worship and religious discussion in a public university classroom. *Id.* at 265–67. The Court held that the exclusion of the student group based on its religious speech violated the Free Speech Clause of the First Amendment. *Id.* at 273.

21. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 555 (1986) (Powell, J., dissenting); see also Mark W. Cordes, *Religion as Speech: The Growing Role of Free Speech Jurisprudence in Protecting Religious Liberty*, 38 *Sw. U. L. REV.* 235, 247 (2008) (“[These] cases had generally the same fact pattern, similar to that in *Widmar*.”).

22. 6 *DUMAS MALONE, JEFFERSON AND HIS TIME: THE SAGE OF MONTICELLO* 418, (Little, Brown and Company 1981).

23. Brief of *Amicus Curiae* The Rutherford Institute in Support of Petitioner, Christian Legal Soc. Chapter of Univ. of Cal., *Hastings College of Law v. Martinez*, 130 S. Ct. 2971 (2010) (No. 08-1371), 2010 WL 581623, at *6–*32.

24. With respect to the locale for student-worship on the university's grounds, “[i]n his plans, Mr. Jefferson himself suggested that there should be space for a building to be used for religious worship under what he called ‘impartial regulation.’ In the meantime

Today is no different from 1819 in that “the mission of colleges and universities includes not only the intellectual development of students, but also the physical, social, vocational, ethical, and cultural development as well.”²⁵ Moreover, “[u]niversities possess significant interests in encouraging students to take advantage of social, civic, cultural, and religious opportunities available in surrounding communities and throughout the country.”²⁶ Nevertheless, “these interests considered,” the university’s primary function continues to be the education of students and the aftermath of this case presents public university officials with an invitation to examine whether their institution’s policies promote practices that engage the “marketplace of ideas”²⁷ or whether their institution’s policies promote practices that subject students to censorship grounded in an ideology of political correctness. As Professor William Van Alstyne recognized forty years ago: “[w]holly apart from the legal compulsion which may support them, these principles [which promote wide-reaching venues for student academic and associational freedom] are surely no more than those that self-respecting institutions of higher learning should freely desire to secure as worthwhile in themselves.”²⁸

Unfortunately, not all “self-respecting institutions of higher learning”²⁹ have heeded Professor Van Alstyne’s sage advice. Though history has been and should continue to be a probative while not dispositive factor weighed in the constitutional decision making process, the Court’s ratification of Hastings’ “all-comers”³⁰ policy ignored history and its associated prudential value because the historical evidence unequivocally supports a broad range of rights for students on the public university campus, including the rights of students to associate with those of similar beliefs, free of university-

two of the best rooms in the main building were to be set apart for the purpose.” THE CENTENNIAL OF THE UNIVERSITY OF VIRGINIA 1819–1921 at 6–7 (John Calvin Metcalf ed., G.P. Putnam’s Sons 1922). Building complications later caused this plan to be foregone and Jefferson instead suggested that students and faculty hold worship services in a room in the Rotunda, which occurred until mid-1837. *Id.* at 8.

25. Annette Gibbs, *The First Amendment and College Student Organizations*, 55 PEABODY J. EDUC. 131, 133 (1978).

26. *Southworth*, 529 U.S. at 234.

27. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (introducing the “marketplace of ideas” by suggesting that “the ultimate good desired is best reached by free trade in ideas”).

28. William W. Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290, 304 (1968).

29. *Id.*

30. *Martinez*, 130 S. Ct. at 2974.

imposed burdens. In reaching the contrary conclusion, the Court's disquieting opinion "succeeded in enshrining an oppressive political correctness as a central tenet in American society and in American university life undermining not only the freedom of association but the freedom of religion, as well."³¹

III. Justice Kennedy's Harshly Worded Concurrence

Scholars routinely indulge in Justice Kennedy's opinions due to his notable position in the Court's political center, but his concurrence in *Martinez* is particularly interesting when reviewed in the context of his earlier opinions in a number of cases involving religious expression in public life³² and his opinions for the Court in the homosexual rights cases of *Romer v. Evans*³³ and *Lawrence v. Texas*.³⁴ Unfortunately for religious liberty advocates, "[b]ecause of the critical importance of Justice Kennedy's vote, his brief concurring opinion is arguably the most important opinion in the case, and that opinion contains a poison pill for religious liberty."³⁵ Thus, while Justice Kennedy's brief concurring opinion is the shortest of the four delivered in this case, "[o]nce more the question echoes: What hath Justice Kennedy wrought?"³⁶

Justice Kennedy commences his concurring opinion by delineating the concomitant boundaries between the individual and the institution of higher learning by acknowledging that "[i]n the University setting . . . the State acts against a background and tradition of thought and experiment that is at the center of our

31. John W. Whitehead, *Doing Away with the Right to be Different: The Assault on Religious Freedom* (July 6, 2010), http://www.rutherford.org/articles_db/commentary.asp?record_id=663.

32. See, e.g., *Salazar v. Buono*, 130 S. Ct. 1803 (2010); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (Kennedy, J., concurring in part and concurring in the judgment); *Westside Sch. Dist. v. Mergens*, 496 U.S. 226 (1990) (Kennedy, J., concurring in part and concurring in the judgment); *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

33. *Romer v. Evans*, 517 U.S. 620 (1996).

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

35. David French, *Overstepping Their Boundaries: The Supreme Court Decides What's Best for Christians* (June 29, 2010), http://townhall.com/columnists/DavidFrench/2010/06/29/overstepping_its_boundaries_the_supreme_court_decides_what%E2%80%99s_best_for_christians.

36. See Hadley Arkes, *Carhart v. Gonzalez: What Hath Kennedy Wrought?*, 8 ENGAGE 22, 22 (2007).

intellectual and philosophic tradition.”³⁷ He then distinguishes the public university student religious organization access to funding case of *Rosenberger v. Rector and Visitors of the University of Virginia*³⁸ from the present case by reasoning that “[h]ere, the policy applies equally to all groups and views.”³⁹ However, after his unremarkable discussion of *Rosenberger*, the opinion loses grounding in First Amendment precedents and takes shape as an awkward hybrid of Justice O’Connor’s opinion in *Grutter v. Bollinger*⁴⁰ and his earlier opinion in *Lawrence v. Texas*.⁴¹ In *Martinez*, Justice Kennedy posits that: “[m]any educational institutions . . . have recognized that the process of learning occurs both formally in a classroom setting and informally outside of it.”⁴² Later in his concurrence, he returns to these earlier thoughts by noting that “[a] law school furthers [its] objectives by allowing broad diversity in registered student organizations. But these objectives may be better achieved if students can act cooperatively to learn from and teach each other through interactions in social and intellectual contexts. A vibrant dialogue is not possible if students wall themselves off from opposing points of view.”⁴³

Yet, after close examination, it does not appear that this language is applicable to the facts of this case. Ostensibly, as the *Grutter* opinion reasons, there are benefits to be gained by the “robust exchange of ideas”⁴⁴ in a classroom. But Justice Kennedy conflates his vision of the classroom situation with the student organization scenario by overlooking the fact that when students enroll in student-organized political or spiritual groups like Students

37. *Martinez*, 130 S. Ct. at 2998 (Kennedy, J., concurring) (quoting *Rosenberger*, 515 U.S. at 835).

38. *Rosenberger*, 515 U.S. 819.

39. *Martinez*, 130 S. Ct. at 2999 (Kennedy, J., concurring). Notably, Justice Kennedy does not state that the policy was *applied* equally, since that question remained open on remand. *See id.* at 3000 (“In addition to a circumstance, already noted, in which it could be demonstrated that a school has adopted or enforced its policy with the intent or purpose of discriminating or disadvantaging a group on account of its views, . . .”).

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

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

42. *Martinez*, 130 S. Ct. at 2999 (Kennedy, J., concurring) (citing *Southworth*, 529 U.S. at 233).

43. *Id.* at 2999–3000.

44. *Grutter*, 539 U.S. at 329 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312–13 (1978)); *see also* *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (“[D]ebate on public issues should be uninhibited, robust, and wide-open.”).

for a Democratic Society,⁴⁵ Wide Awake Productions,⁴⁶ the Boy Scouts of America,⁴⁷ and Hastings' chapter of CLS, they are actively looking to mingle with those who share a common ideology. To invite nonadherent student leaders into a situation where legitimate adherents are deceived into believing that they are sharing a faithful experience with other legitimate adherents chills (in the case of a religious organization) the Free Exercise of religion and the Free Association rights of the legitimate adherents. A group's choice of leaders matters because leaders' choices matter for the group. When public university officials meddle with this process, their conduct calls to mind the similar constitutionally infirm inquiry originated when, in the absence of "clear evidence of incitement or a conspiracy to engage in unlawful conduct,"⁴⁸ a state actor inserts a nonadherent into a church, synagogue, or mosque to obtain information on the members of that spiritual body.

To his credit, unlike the majority opinion that "emphasiz[es] the value of dissent within groups,"⁴⁹ as if to imply that it is appropriate for students to pursue actions or behaviors that subvert a group's common purpose, Justice Kennedy demonstrates an understanding of student purpose on the public university campus that is significantly more reasonable. For example, in *Southworth*, he observed that "[s]tudents enroll in public universities to seek fulfillment of their personal aspirations and of their own potential."⁵⁰ Yet, despite adhering to this optimistically libertarian outlook on student purpose, Justice Kennedy fails to apply the same libertarian logic and recognize that many, if not most, students enroll in university course offerings as the consequence of spontaneous order determined by a myriad of variables, such as the course requirements for a degree within a particular discipline, who is teaching, and/or the time of day it is offered. For freshmen students, course selection may be determined by an even more impersonal vehicle such as whether the

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

46. *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995).

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

48. Vikram David Amar & Alan Brownstein, *Is Monitoring Moslem Religious Services Without Particularized Suspicion Constitutional?*, FINDLAW'S WRIT (Dec. 4, 2009), <http://writ.news.findlaw.com/amar/20091204.html>.

49. David French, *CLS v. Martinez: My First Quick Take*, NATIONAL REVIEW ONLINE (June 28, 2010), <http://www.nationalreview.com/bench-memos/230398/i-cls-v-martinez-i-my-first-quick-take/david-french>.

50. *Southworth*, 529 U.S. at 231.

first letter of his or her last name is in the first or last half of the alphabet. Quite to the contrary of membership in a student organization, where ideology is often the purpose of the group's existence, when most students make the decision to enroll in a particular course in pursuit of obtaining a degree, they rarely take into consideration the ideologies of the students sitting in the desks around them.

As he progresses with this line of reasoning, Justice Kennedy goes on to assert that “[t]he Hasting [sic] program is designed to allow all students to interact with their colleagues across a broad, seemingly unlimited range of ideas, views, and activities.”⁵¹ Ignoring the fact that debates and co-sponsored events serve this function without infringing on a group's internal autonomy, he then quotes from Justice Powell's opinion for the Court in *Regents of the University of California v. Bakke*:

[A] great deal of learning . . . occurs through interactions among students . . . who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world.⁵²

Justice Kennedy's reference to *Bakke* here—in a case where the Court stonewalled multiple significant First Amendment “concern[s]”⁵³—paints a chillingly deferential picture of the future of politically disfavored groups on public university campuses. It is well-established that the *Bakke* case stands for three propositions. First, quotas based exclusively on racial criteria are unconstitutional in university admissions;⁵⁴ second, because academic freedom “long has been viewed as a special concern of the First Amendment,” university professors are entitled to pursue wide-ranging methods in the quest for truth; and third, as a corollary to the “special concern[s],”

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

52. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312, 313, n.48 (1978) (alteration in original; internal quotation marks omitted).

53. *Id.* at 312.

54. *Id.* at 289–90 (“Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status...The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.”).

surrounding the notion of academic freedom, university administrators are entitled to make their “own judgments as to education” including “the selection of its student body.”⁵⁵ However, just as the *Bakke* case recognized that the “judgments as to education”⁵⁶ made by public university officials to govern the internal operations of their schools may not come at the expense of students’ rights to Equal Protection under the law, *Bakke*’s “concerns” were—and continue to be—insufficient to confer upon public universities permission to enact policies that categorically exclude student members of a major world religion from access to resources available to all other student groups.

Upon the conclusion of his reference and related commentary on *Bakke*, Justice Kennedy reprises his familiar role as arbiter of the nation’s social conscience—played perhaps most definitively in *Lawrence v. Texas*, where his opinion for the Court struck down a state law criminalizing sodomy.⁵⁷ In this section of his *Martinez* concurrence, Justice Kennedy appears to draw some parallel between CLS’s required profession of faith and a “regime”⁵⁸ that mandated compelled disclosure of “private, off-campus behavior,”⁵⁹ in what projects as a not-so-subtle *Lawrence*-based criticism of CLS’s practices. Justice Kennedy concludes this section in what has been described as “both a disturbing misunderstanding of faith statements and an odd blurring of spiritual and political spheres,”⁶⁰ by proclaiming that “[t]he era of loyalty oaths is behind us.”⁶¹

Here, Justice Kennedy’s allusion to loyalty oaths is concernedly misplaced. *Martinez* is a far cry from the “loyalty oath[]”⁶² cases Justice Kennedy alludes to but fails to cite as authority to support his conclusion.⁶³ “Compulsion” was only an issue in this case to the

55. *Id.* at 312.

56. *Id.*

57. *Lawrence v. Texas*, 539 U.S. 558, 564–79 (2003) (holding that Texas statute criminalizing sodomy violates the Due Process Clause).

58. *Martinez*, 130 S. Ct. at 3000 (Kennedy, J., concurring).

59. *Id.*

60. Alec Hall, *Is the Christian Legal Society’s Loss a Loss for Everyone?*, CHRISTIANITY TODAY, July 7, 2010, <http://www.christianitytoday.com/ct/2010/julyweb-only/37-32.0.html>.

61. *Martinez*, 130 S. Ct. at 3000 (Kennedy, J., concurring); *but see* French, *supra* note 35 (“Didn’t each justice take an oath when they joined the Court?”).

62. *Martinez*, 130 S. Ct. at 3000 (Kennedy, J., concurring).

63. *See, e.g.*, *Gillette v. United States*, 401 U.S. 437 (1971) (not granting exemption from service in the armed forces to individual who objected to service in a specific military

extent that Hastings “compelled” CLS to associate with individuals who did not adhere to the group’s core values and beliefs. In response, CLS simply acted according to the tenets of its theological principles by exercising its First Amendment rights to be free from compelled association on campus.

Moreover, quite to the contrary of the quasi-Equal Protection analysis proffered by Justice Kennedy, *Bakke’s* nexus to this case stems exclusively from its discussion of academic freedom. As Justice Souter acknowledged earlier in *Southworth*, “[w]hile we have spoken in terms of a wide protection for academic freedom . . . we have never held that universities lie entirely beyond the reach of students’ First Amendment rights.”⁶⁴ On the contrary, the Court’s cases have left “no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”⁶⁵ Here, CLS’s academic freedom “concern[s]”⁶⁶ should have been acknowledged by both the university and the Court—as even the most recent Statement on Academic Freedom issued by the American Association of University Professors (“AAUP”) recognizes.⁶⁷ Ironically, as the initial

conflict); *Welsh v. U.S.*, 398 U.S. 333 (1970) (granting exemption to individuals who objected to service in the armed forces for reasons other than the belief in a “supreme being” so long as such “religious beliefs” parallel those of a God); *United States v. Seeger*, 380 U.S. 163 (1965) (granting same exemption as that in *Welsh*); *Speiser v. Randall*, 357 U.S. 513 (1958) (striking down California requirement that veterans swear oath not to advocate the overthrow of federal or state government in order to obtain property tax exemption); *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (reinstating public grammar school students expelled for failing to engage in flag salute). *Contra*, *Cole v. Richardson*, 405 U.S. 676 (1972) (upholding state hospital’s decision to discharge employee for failing to swear oath to uphold U.S. Constitution and oppose overthrow of U.S. government); *Garner v. Bd. of Pub. Works of L.A.*, 341 U.S. 716 (1951) (upholding validity of loyalty oath requiring employees to have ceased associating with groups advocating the overthrow of U.S. and California government within five years prior to obtaining city employment and requiring employees to execute an affidavit identifying whether and when, if ever, the individual had been a Communist); *American Commc’ns Ass’n v. Douds*, 339 U.S. 382 (1950) (upholding provision of Taft-Hartley Act requiring officers of labor unions to sign loyalty oath affidavits); *Gerende v. Bd. of Supervisors*, 341 U.S. 56 (1951) (upholding state law requiring candidates for municipal office to take loyalty oath prior to having names placed on the ballot).

64. *Southworth*, 529 U.S. at 238–39 (Souter, J., concurring).

65. *Widmar v. Vincent*, 454 U.S. 263, 268–69 (citing *Healy v. James*, 408 U.S. 169, 180 (1972)).

66. *Bakke*, 438 U.S. at 312 (“Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the *First Amendment*.”).

67. The most recent AAUP JOINT STATEMENT ON THE RIGHTS AND FREEDOMS OF STUDENTS (2006), available at <http://www.aup.org/AAUP/pubsres/policydocs/contents/stud-rights.htm>, provides, in pertinent part: “Campus organizations, including

beneficiaries of the academic freedom language contained in the *Bakke* decision, the University of California would have had the Court ignore the rationale for preserving academic freedom it previously adopted to suppress the First Amendment rights of a group whose members hold the diverse views Justice Powell endeavored to preserve on the University of California campus over thirty years ago.⁶⁸ It is equally ironic that Justice Kennedy would quote one of the seminal U.S. Supreme Court discussions of academic freedom as authority to subordinate CLS's numerous First Amendment and academic freedom concerns to a university inclusivity policy at odds with the very freedoms it purports to preserve.

In his final justification of the "all-comers policy," Justice Kennedy recognizes that "petitioner [] would have a substantial case on the merits if it were shown that the "all-comers" policy was either designed or used to infiltrate the group or challenge its leadership in order to stifle its views."⁶⁹ Yet given this language, and considering that one *amicus* brief filed in support of the university conceded that the nondiscrimination policy allowed students to "effect change from within,"⁷⁰ why did Justice Kennedy not conclude that CLS had a "substantial case on the merits"?⁷¹ As CLS attorney Michael McConnell noted, "if any hostile students actually take advantage of the policy, it would become unconstitutional."⁷² But how can a policy that passes constitutional muster on its face, that is not crafted with

those affiliated with an extramural organization, should be open to all students without respect to race, creed, or national origin, *except for religious qualifications which may be required by organizations whose aims are primarily sectarian.*" *Id.* at 275 (emphasis added). This statement not only affirms the AAUP's initial 1968 *Joint Statement*, but includes an additional footnote explicitly recognizing that the "obligation of institutions with respect to nondiscrimination, *with the exception noted above for religious qualifications*, should be understood in accordance with the expanded statement on nondiscrimination in n.3, above." *Id.* at 279, n.8 (referencing a broad nondiscrimination statement that includes sexual orientation). Notably, the AAUP filed a brief as *amicus curiae* in the U.S. Supreme Court in support of the University and in contradiction to its aforesaid guidance.

68. See generally *Bakke*, 438 U.S. 265 (1978) (opinion of Powell, J.).

69. *Martinez*, 130 S. Ct. at 3000 (Kennedy, J., concurring).

70. See Brief of *Amicus Curiae* Associated Students of the University of California, Hastings College of Law ("ASUCH") in Support of Respondents at 8–9, *Christian Legal Society v. Martinez*, No. 08-1371 (Mar. 15, 2010).

71. *Martinez*, 130 S. Ct. at 3000 (Kennedy, J., concurring).

72. Ted Olsen and Trevor Persaud, *Christian Legal Society Loses in Supreme Court Case*, CHRISTIANITY TODAY (June 28, 2010), <http://www.christianitytoday.com/ct/2010/junweb-only/36-11.0.html> (quoting Michael W. McConnell).

animus towards a protected class, “become unconstitutional”⁷³ when it is adhered to as it is written? Moreover, who should a dispossessed plaintiff sue in such a circumstance? Should he or she sue the “hostile”⁷⁴ students, university officials for having enacted the policy, both, or some other assortment of individuals and/or entities?⁷⁵

In sum, Justice Kennedy’s concurrence, like many if not most of his opinions, is crafted in a voice distinctly his own and replete with statements ripe for controversial discussions within the legal academy and the body politic at large.⁷⁶ But the reasoning behind his harshly worded criticism directed at CLS ultimately proves unpersuasive given the heterogeneity of mandatory class enrollment, the homogeneity of voluntary student organizations, and his otherwise strained attempt force-feed an Equal Protection component where none may be found.

IV. The Inevitable Debate Between Benefits versus Subsidies

Although the Court hangs its hat on its statement that “[i]t is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups accept *all* comers,”⁷⁷ in reality the analysis is not so simple, as the Court’s cases have long shown that policies of ostensible neutral application may not operate in a discriminatory manner to deny First Amendment freedoms.⁷⁸ In fact, courts

73. *Id.*

74. *Id.*

75. *Martinez*, 130 S. Ct. at 3019 (Alito, J., dissenting) (“Justice Kennedy takes a similarly mistaken track. He contends that CLS ‘would have a substantial case on the merits if it were shown that the all-comers policy was . . . used to infiltrate the group or challenge its leadership in order to stifle its views,’ but he does not explain on what ground such a claim could succeed. The Court holds that the accept-all-comers policy is viewpoint neutral and reasonable in light of the purposes of the RSO forum. How could those characteristics be altered by a change in the membership of one of the forum’s registered groups? No explanation is apparent.”) (internal citation omitted).

76. *See French*, *supra* note 35 (“Reading the entire concurrence, one gets the impression that Justice Kennedy simply did not like the Christian Legal Society at Hastings, viewing its effort to maintain doctrinal fidelity through a statement of faith with extreme suspicion if not disgust.”).

77. *Martinez*, 130 S. Ct. at 2977.

78. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 520-21 (1993) (striking down facially neutral law forbidding animal sacrifice because it was enacted with a discriminatory purpose and clarifying the holding of *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990) which held that “a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability”); *Larson v. Valente*, 456 U.S. 228, 255 (1982) (striking down facially neutral law requiring religious organizations that obtained over 50

typically, and for good reason, frown upon government demands that individuals or groups give up one constitutional right (in this case, the right of a group to impose limited election criteria on those who would serve as the group's leaders) in exchange for another (the right to be recognized on an equal basis with other groups),⁷⁹ and the Court has long-evidenced skepticism towards state conditioning of resources, benefits, and/or access to fora upon the religious beliefs of potential recipients.⁸⁰ Finally, the Court has been particularly sensitive to burdens placed on students by public school administrators in the context of the student/school administrator relationship.⁸¹ Yet despite the Court's past admonitions, that is what happened in this case. The university conditioned a group's access to resources on the relinquishment of First Amendment rights and the Court ratified its actions.⁸² By "inviting"⁸³ a student organization to

percent of their funds from nonmembers to report donations to Department of Commerce because the law was enacted with the purpose of "burden[ing] or favor[ing] selected religious denominations"); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking down facially neutral law requiring laundries operating in wooden buildings to obtain permit because the law was enacted with a discriminatory purpose).

79. See *Weise v. Casper*, 131 S. Ct. 7, 7 (2010) (Ginsburg, J., dissenting from denial of certiorari) ("[f]or at least a [half]-century, this Court has made clear that ... [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.") (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

80. See *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987) (holding that unemployment benefits could not be conditioned upon foregoing religious beliefs that were adopted after employment commenced); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981) (holding that unemployment benefits could not be conditioned upon the rejection of religious beliefs that compelled resignation upon knowledge that continued employment would require the production of parts used for construction of weapons); *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that the state of South Carolina had unconstitutionally conditioned a government benefit, unemployment benefits, on a Seventh Day Adventist's rejection of religious beliefs that prohibited her from working on a day of the week required for continued employment).

81. See Brief of Plaintiffs-Appellants at 54, *Westphal v. Wagner*, No. 10-5571 (9th Cir. July 12, 2010) ("But while there might be 'heightened concerns' with protecting elementary- and high-school students from religious coercion, no court has ever held the coercion test inapplicable to college students or adults."); see also *Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." (citations omitted)).

82. Adam Goldstein, *The Supreme Court's CLS Decision Sucker-Punches First Amendment*, THE HUFFINGTON POST (June 29, 2010), http://www.huffingtonpost.com/adam-goldstein/supreme-courts-cls-decisi_b_628329.html ("The Court's ruling basically amounted to an examination of the following question: does the First Amendment and its attendant rights of free speech and free association, permit a college to require a group to

abandon sincerely held religious beliefs as a condition to gain equal access to a forum, funding, and facilities, and then de-recognizing the group after it declined the invitation to negotiate, the university's conduct warranted judicial resolution in favor of CLS.⁸⁴ In arguing that government-provided benefits can be conditioned upon the relinquishment of group members' beliefs, or, in this case, group members' sincerely held religious beliefs, Professor Eugene Volokh reasons as follows:

The right to privately educate our children doesn't equal a right to government funding for private schools. The right to abortion doesn't obligate the government to allow abortions in county hospitals. The right to urge voters to elect a candidate doesn't entitle tax-exempt nonprofits to use tax-deductible (and thus subsidized) contributions to engage in such speech.⁸⁵

In other words, if a group desires access to a publically funded, university furnished forum—whether that forum be in the form of a classroom or email distribution list—it must be receptive to all those who apply.⁸⁶

While Professor Michael McConnell clearly disagrees with Professor Volokh regarding the disposition of this case, these gentlemen agree that:

[O]ne of the fundamental issues at stake here is what is considered a benefit or subsidy, and whether the right to speak on an equal basis in a public forum is a benefit or subsidy that

admit members that offend its religious ideology as a condition of access to limited public forum resources?"

83. See *Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane*, 2006 U.S. Dist. LEXIS 27347 at *12 (N.D. Cal., April 17, 2006) (as amended May 19, 2006) ("Hastings informed CLS that its bylaws did not appear to be compliant with the Nondiscrimination Policy, in particular the religion and sexual orientation provisions, and invited CLS to discuss changing them.").

84. *Nurre v. Whitehead*, 130 S. Ct. 1937, 1939 (2010) (Alito, J., dissenting from denial of certiorari) ("when a public school purports to allow students to express themselves, it must respect the students' free speech rights. School administrators may not behave like puppet masters who create the illusion that students are engaging in personal expression when in fact the school administration is pulling the strings.").

85. Eugene Volokh, *On Free Association the Court Makes the Right Call*, NY DAILY NEWS (June 29, 2010, 12:54 PM), http://www.nydailynews.com/opinions/2010/06/29/2010-06-29_on_free_association_the_court_makes_the_right_call.html.

86. Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1943 (2006).

the state can withhold on the basis of its approval or disapproval of a group's practices.⁸⁷

But here, the subsidy-based lens referenced by Professor McConnell (and applied by the Court) does not bring to mind *Southworth* so much as *Rust v. Sullivan*—a recurring bull-in-the-china-shop of First Amendment jurisprudence and bane to religious liberty.⁸⁸ Although both *Rosenberger* and *Southworth* rejected *Rust*'s applicability to fora,⁸⁹ echoes of *Rust* nevertheless ring throughout the *Martinez* opinion. For example, in concluding that Hastings need not supply “what is effectively a state subsidy”⁹⁰ the Court bites hook, line, and sinker into the rule from *Rust* that when the government chooses to fund speech, it “has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another.”⁹¹ The relationship between access and funding described by the Court here calls to mind the doctrine of “unconstitutional conditions,” which are comprised of “situations in which the government has placed a condition on the *recipient* of the subsidy rather than on a particular

87. Timothy Dalrymple, *You Cannot Be an Equal Participant in the Marketplace of Ideas*, PATHEOS (June 28, 2010), <http://www.patheos.com/Resources/Additional-Resources/You-Cannot-be-an-Equal-Participant-in-the-Marketplace-of-Ideas.html>.

88. This article does not mean to suggest that the government may not fund programs of its choosing subject to constitutional limitations. It merely intends to question whether the funding of government programs, should constitute “government speech” (as the U.S. Supreme Court’s cases have indeed so concluded). Moreover, even if challenges to the funding of government programs should appropriately be subject to analysis under the “government speech” doctrine, it seems reasonable that the standard for evaluating government program funding in the cases of *Rust v. Sullivan*, 500 U.S. 173 (1991) (abortion), *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) (legal aid services) and *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550 (2005) (promotion of beef consumption) be different than the standard applied in cases concerning individual religious practices more commonly associated with First Amendment rubric, such as legislative prayer or, in this case, religious student association on public facilities. See Robert Luther III & David B. Caddell, *Breaking Away from the ‘Prayer Police’: Why the First Amendment Permits Sectarian Legislative Prayer and Demands a ‘Practice Focused’ Analysis*, 48 SANTA CLARA L. REV. 569, 593–96 (2008) (arguing that legislative prayer should not be analyzed as “government speech.”).

89. See *Southworth*, 529 U.S. at 229 (2000) (“If the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker. That is not the case before us.”); *Rosenberger*, 515 U.S. at 833 (“[In *Rust*,] the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program.”).

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

91. *Rust*, 500 U.S. at 174.

program or service.”⁹² In this case, CLS sought access to the university’s forum; therefore, the Court determined that if CLS wished to retain access, its members were required to adhere to a system of beliefs and practices approved by the university’s administrators.⁹³ Not surprisingly, the flaw inherent in this understanding of the relationship between access and funding was exposed in the *Wall Street Journal* the day following the Court’s decision:

Government may “own” the roads, but that doesn’t mean it can say citizens can only drive if their associations meet government approval. Just because private schools and churches receive the “subsidy” of tax exemptions doesn’t mean the government can say they must accept all comers.⁹⁴

Given the Court’s conclusion, perhaps it is time to reconsider whether the receipt of benefits or, in the Court’s vocabulary, “subsidies”, should remain a viable test for whether the university retains control of the speech offered through its fora, or perhaps a heightened state interest should be advanced when a university seeks to restrict resources to a student group. Justice Alito seems to suggest that heightened review may be advisable in future university student funding cases through his observations that “funding plays a very small role in this case” and “[i]f every such activity is regarded as a matter of funding, the First Amendment rights of students at public universities will be at the mercy of the administration.”⁹⁵ This point has been further argued that “. . . the vast majority of campus

92. *Id.* (emphasis in original).

93. Nevertheless, both *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000) and *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 (1995) indicate that student activity fee monies are *not* public money or a state subsidy. See *Southworth*, 529 U.S. at 222 (“The fee is segregated from the University’s tuition charge.”); *Id.* at 229 (“If the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker. That is not the case before us.”); *Rosenberger*, 515 U.S. at 841 (“But the \$14 paid each semester by the students is not a general tax designed to raise revenue for the University.”) (citations omitted); *Id.*, 515 U.S. at 851 (O’Connor, J., concurring) (“Unlike monies dispensed from state or federal treasuries, the Student Activities Fund is collected from students who themselves administer the fund and select qualifying recipients only from among those who originally paid the fee. The government neither pays into nor draws from this common pool”).

94. *The Supreme Court’s ‘Subsidies’*, WALL ST. J., July 1, 2010, at A18.

95. *Martinez*, 130 S. Ct. at 3007 (Alito, J., dissenting).

ministries regard such fees to be an irrelevant side show. What really counts is having access to students, facilities, and communications on par with secular student groups.”⁹⁶ Still, Professor Volokh concludes that this case is “all about the money”: “where government funding isn’t involved, both religious groups and secular ideological groups have a constitutional right to exclude prospective members who don’t share their views. But where the government chooses to provide subsidies, it may impose nondiscrimination conditions on those subsidies.”⁹⁷ However, his argument does not address the language from *Rosenberger* and *Southworth* which implies that student activity fee monies are not public money or a state subsidy.⁹⁸

V. The *Martinez* Decision was Wrongly Decided Notwithstanding the Disposition in *Southworth*

No discussion of “subsidies,” funding, resources, and/or access to fora with respect to student organizations on public university campuses would be complete without reference to the Court’s decision in *Board of Regents of Wisconsin System v. Southworth*.⁹⁹ In *Southworth*, the Court considered a First Amendment challenge from a student who sought an exemption from a university policy that required all students to contribute a set sum to a communal student activities fund accessible to all registered student organizations.¹⁰⁰ In rejecting the student’s challenge, the Court noted that “[w]hile [earlier] precedents identify the interests of the protesting students, the means of implementing First Amendment protections adopted in those decisions are neither applicable nor workable in the context of extracurricular student speech at a university.”¹⁰¹ In distinguishing earlier precedents, which had struck down a regulation both requiring nonunion teachers to pay a service fee equivalent to union dues for funding political speech¹⁰² and which had permitted mandatory bar dues to fund political speech,¹⁰³ the Court nevertheless permitted the California bar to require its member to fund activities “germane” to

96. Alec Hill, *Is the Christian Legal Society’s Loss a Loss for Everyone?*, CHRISTIANITY TODAY, <http://www.christianitytoday.com/ct/2010/julyweb-only/37-32.0.html>.

97. Volokh, *supra* note 85.

98. *See supra* note 93.

99. *Southworth*, 529 U.S. at 217.

100. *Id.* at 223.

101. *Id.* at 230.

102. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

103. *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

the association's mission of "regulating the legal profession and improving the quality of legal services."¹⁰⁴ Because the payment of bar dues to improve the quality of legal services was "germane" to the association's mission of regulating the legal profession, the Court concluded that the University of Wisconsin's student funding requirement, which was "for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students"¹⁰⁵ was equivalently "germane." Thus, in view of the fact that a student activity fund is germane to the purposes of a university's mission, and all students had access to funding, the *Southworth* decision seems quite appropriately within the scope of the Court's earlier funding decisions in *Aboud* and *Keller*.

The body text of the majority opinion in *Martinez* cites the *Southworth* decision only once and that citation was not for substantive support but with respect to a procedural matter.¹⁰⁶ Perhaps surprisingly, significant criticism has been directed at *Southworth* in the wake of the *Martinez* decision. This criticism has suggested that the "all-comers"¹⁰⁷ policy is "fruit of the poisonous tree" of *Southworth*.¹⁰⁸ It further contends that, in the mind of the Court, because *Southworth* failed to grant a student an exemption from paying his student activities fee, no student should be restricted in his or her ability to run for any office in any registered student organizations on campus.¹⁰⁹ In other words, because the student paid

104. *Southworth*, 529 U.S. at 231 (quoting 496 U.S. at 13–14).

105. *Id.* at 229.

106. *Martinez*, 130 S. Ct. at 2983 ("This Court has accordingly refused to consider a party's argument that contradicted a joint 'stipulation [entered] at the outset of th[e] litigation.'") (citing *Southworth*, 529 U.S. at 226). Although the opinion of the Court revisits the *Southworth* decision in a later footnote, the clear purpose of this footnote is merely to respond to allegations made in Justice Alito's dissent. *Martinez*, 130 S. Ct. at 2993 n.25. It therefore seems a stretch to attribute substantial credit to the opinion of the Court with respect to *Southworth*'s impact on the disposition in *Martinez*.

107. *Id.* at 2978.

108. Dalrymple, *supra* note 87 (quoting David French) ("I read the decision as basically this—and this is something I just wrote in National Review Online: in many ways (and I'm going to get into legal wonkery here) I see this case as the fruit of the poisonous tree of an earlier bad Supreme Court decision. That previous bad Supreme Court decision is the Board of Regents of the University of Wisconsin System v. *Southworth*. In that case, the Supreme Court ruled that they can force students to pay money into a pool that is then used to fund student organizations that may have views that other students abhor. In other words, you are forced to fund speech that you abhor.").

109. *Id.* ("In Ginsburg's opinion, under the 'all comers' policy, no student can be excluded from a group they are forced to fund. So you see the direct line of thinking from *Southworth*. You take a bad decision, which is to force students to fund groups that they

for it, he or she cannot be kept out. Consequently, the Court concluded that Hastings' "all-comers" policy passed constitutional muster.

But ultimately the Court's opinion in *Southworth* may not be as much a boon to First Amendment jurisprudence as has been averred.¹¹⁰ While the facts of the Court's funding-access cases differ, the constitutional substance of these cases can be distilled to the question of whether an individual or group has been denied funding or access on the basis of its religious viewpoint.¹¹¹ For that reason, the *Southworth* decision is correct, because although the Court held that the student could not obtain an exemption from paying the activity fee, the student was not denied an opportunity to access activity funds either, as the Wide Awake group was in *Rosenberger*, as CLS was in this case by Hastings' requirement that the group compromise its core values to obtain access to funding, and as Badger Catholic was in the Seventh Circuit's recent post-*Martinez* decision.¹¹² Additionally, in the wake of *Martinez*, it has been argued that the Court adopted a rule without considering the "practical considerations"¹¹³ of enforcing the policy. Indeed, the university will have future burdens to bear if it chooses to continue to enforce this policy, but in acknowledging the future burdens to be borne by universities, one should note that if *Southworth* had been decided to the contrary, universities a decade

find abhorrent. Then you say, we will have a regulation that requires everyone to be able to join groups they are forced to fund.").

110. French, *supra* note 49 ("This forced-funding regime is unique to student organizations on our nation's campuses. In virtually no other context are citizens directly forced to fund expression they may abhor. Such a requirement exerts a powerful distorting effect on university jurisprudence, has spawned significant additional litigation, and directly influenced the outcome of the *Martinez* case.").

111. See *Martinez*, 130 at 3009 (Alito, J., dissenting) ("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.'" (citing *Good News Club v. Milford Cent. Sch.*, 533 U. S. 98, 112, and n.4 (2001) (declaring unconstitutional public school board decision to deny middle school students access to use school facilities immediately after school hours for religious activities); *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 831 (1995) (declaring unconstitutional public university decision to withhold funding from student religious publication); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U. S. 384, 393-94 (1993) (declaring unconstitutional public school board decision to deny religious organization access to use school facilities after school hours for religious purposes); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (declaring unconstitutional public university action prohibiting religious group from access to university classroom for worship and religious discussion)).

112. *Luther & Caddell*, *supra* note 88 at 591 ("the constitutional concern arises when another party is denied an *opportunity* to offer his or her prayer.") (emphasis added).

113. Dalrymple, *supra* note 87 (quoting David French).

ago would have been tasked with similar administrative hassles like those being raised as the consequence of the *Martinez* decision. This point does not attempt to validate the Court's opinion in *Martinez*, but should mute the criticism directed at *Southworth*. As alluded to above, the Court's student-funding cases are more akin to its access cases than to its exemption cases. Thus, when no students are denied access to funds to start their own associations, no concrete constitutional injury exists, and when no constitutional injury exists, none may be attributed to the university or the student groups.¹¹⁴

It may even be argued that the *Southworth* decision supported CLS's claims. For example, since under *Southworth*, students may not obtain exemptions from being required to fund "thought that [they] hate"¹¹⁵ why then would that line of logic not require the activities fund to permit funding of "hate[d] thought"¹¹⁶ in CLS's case as well? The issue boils down to how the constitutional right at issue is framed.¹¹⁷ Because the heart of the issue in this case is the right to associate with a group of individuals who share similar ideological worldviews, the *Southworth* case is right and the *Martinez* case is wrong.¹¹⁸

VI. Excluding Viewpoints to Include Individuals

It was once considered a timeless maxim of the U.S. constitutional tradition that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."¹¹⁹ Only a decade ago, the high Court reinforced this maxim by affirming that "protecting expressive associations from antidiscrimination laws 'is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps

114. Luther & Caddell, *supra* note 88 at 582 n.82 ("By failing to focus on the prayer opportunity, the court found four sectarian prayers unconstitutional—not because someone had suffered a legitimate constitutional injury by being denied the opportunity to pray—but simply because all the prayers were Christian.").

115. *Martinez*, 130 S. Ct. at 3000 (Alito, J., dissenting) (quoting *United States v. Schwimmer*, 279 U.S. 644, 654–55 (Holmes, J., dissenting)).

116. *Id.*

117. Dalrymple, *supra* note 87 ("It goes back to this initial question of what is the right at stake. If you have a free association right here, then CLS has a constitutional right that exists independently of anything else, to reserve its membership and leadership for people who share its values.") (quoting David French).

118. *Id.*

119. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

unpopular ideas.”¹²⁰ Unfortunately, the *Martinez* decision calls the timelessness of these First Amendment ideals into question. Today, the “right to be different”¹²¹ is under siege. The corollary question poised to inflict damage on First Amendment jurisprudence is whether policy-makers will continue to “rephrase their desire to exclude viewpoints as a desire to include individuals.”¹²² Regrettably, in the aftermath of the *Martinez* decision, “. . . the true marketplace of ideas exists by permission (or, more likely, apathy) of the majority.”¹²³

Fortunately, enforcement of this distorted perception of the “marketplace of ideas”¹²⁴ carries with it significant political burdens poised to stall this voyage, and if additional universities choose to adopt an “all-comers”¹²⁵ policy, the Constitution obligates them to apply the policy equally to all student groups on campus. Presuming additional universities attempt to employ the “all-comers”¹²⁶ policy to student bodies *en masse*, they are likely to learn in short order that members of Christian student organizations are not so unique in their First Amendment convictions after all.

120. Steven H. Aden & Stanley W. Carlson-Thies, Ph.D., *Catch or Release? The Employment Non-Discrimination Act's Exemption for Religious Organizations*, 11 ENGAGE 4 (September 2010) (quoting *Boy Scouts of America v. Dale*, 530 U.S. 640, 647–48 (2000) (upholding the right of Boy Scouts to dismiss a homosexual scoutmaster notwithstanding anti-discrimination law).

121. Whitehead, *supra* note 31 (observing that “[t]he Court’s 5-4 ruling against CLS reeked of anti-religious prejudice.”).

122. Goldstein, *supra* note 82.

123. French, *supra* note 49.

124. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (introducing the “marketplace of ideas” by suggesting that “the ultimate good desired is best reached by free trade in ideas”).

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

126. *Id.*
