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REVISITING *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*: REIMAGINING THE GOVERNANCE OF RELIGIOUS STUDENT ORGANIZATIONS THROUGH THE LENS OF THE CHURCH AUTONOMY DOCTRINE

Noah Manalo

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REVISITING *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*: REIMAGINING THE GOVERNANCE OF RELIGIOUS STUDENT ORGANIZATIONS THROUGH THE LENS OF THE CHURCH AUTONOMY DOCTRINE

Noah Manalo*

First Amendment rights came into conflict with nondiscrimination principles in the Supreme Court's 2010 decision in Christian Legal Society v. Martinez*. This Note explains the background of the case, developments of subsequent cases, and errors in the Court's reasoning. It then explains the proper way to resolve cases like* Martinez *is to apply the church autonomy doctrine to religious organizations in universities, leaving them to govern themselves. It concludes with an explanation of the church autonomy doctrine's application to this case, a dispelling of potential counterarguments against its application, and a call for the Court to overturn* Martinez*.*

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INTRODUCTION

The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1] As one television character quipped, "We're talking about freedom of speech [i.e., the First Amendment]! It's the amendment so important it's literally the first one they remembered to add!"[2] This amendment provides the basis of federal protections of freedom of speech, freedom of religion, freedom of assembly or association, and the like.[3] It has spawned a long line of interpretation that seeks to balance these freedoms with other issues. Universities lie at the heart of First Amendment issues, being important forums where free speech and debate take place.[4] One Supreme Court case remains an active area of litigation ripe for review: *Christian Legal Society v. Martinez*.[5]

About fifteen years ago, the Supreme Court of the United States confronted a First Amendment question related to student activities at public universities: "May a public law school condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students?"[6] This case presented an entanglement of free exercise of religion and free association of religious liberties, meshed in an analysis of UC Hastings School of Law's[7] student organizations as a limited public forum. The Supreme Court, in a narrow 5-4 majority, ruled in the affirmative for Hastings's "all-comers" policy, noting such a policy "is a reasonable, viewpoint-neutral condition on access to the student-organization forum."[8] However,

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[1] U.S. CONST. amend. I.

[2] COMMUNITY: *Basic Email Security* (Yahoo! streaming release Aug. 26, 2015) (quoting Britta Perry who is portrayed by Gilliam Jacobs).

[3] U.S. CONST. amend. I.

[4] *See, e.g.*, Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 227–30 (2000) (discussing the important role universities play as forums); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–32 (1995) (same).

[5] *See generally* Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661 (2010).

[6] *Id.* at 668.

[7] The law school is now UC Law San Francisco. *UC Hastings is now UC Law SF*, UC LAW SAN FRANCISCO, https://www.uclawsf.edu/ [https://perma.cc/N9Q8-QHTX] (last visited Apr. 14, 2025).

[8] *Martinez*, 561 U.S. at 669.

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"instead of being a clear declaration that nondiscrimination laws trump First Amendment rights, *Martinez* has a muddled and confusing legacy."[9]

This Note argues that the Supreme Court should overturn its holding in *Martinez*. Part I explains the background of the case, describes subsequent developments and two cases applying the *Martinez* doctrine, and notes that the pronounced litigation mainly impacts on religious organizations. Part I also explains the unworkability of the majority's reasoning in *Martinez*, arguing that adhering to this precedent fails to properly protect the First Amendment while incorrectly granting broader protection for nondiscrimination. Part II argues *stare decisis* principles run against keeping with *Martinez* and notes that, while superior to the majority's reasoning, the dissent's reasoning involves a much more complex level of analysis that should be simplified for religious student organizations. Part II also asserts that the proper way to solve the issue in *Martinez* is for the courts to apply the church autonomy doctrine to religious organizations in universities, leaving issues of their governance up to the organizations themselves. The proper path forward is to allow religious organizations to properly exercise religious and associational rights, while limiting the possible infringement on other categories of discrimination that go beyond doctrinal issues. Such an application could allow an "all-comers welcome" university policy, while simply providing an exemption for religious organizations, or it could take a stronger position for all associations and hold associational rights as more protected. The note concludes with a call for the Court to overturn *Martinez*, allow courts to apply the church autonomy doctrine to student organizational governance, and allow religious student organizations to operate within the forum with an ability to dictate certain aspects of its membership and leadership composition.

[9] William J. Baker, Note, *A Ticking Time Bomb:* Christian Legal Society v. Martinez *in the Federal Courts of Appeal*, 22 FIRST AMEND. L. REV. 260, 260 (2024).

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I. BACKGROUND[10]

A. Case Background: The Facts, History, and Procedure of Martinez

In September 2004, the UC Hastings School of Law (now UC Law San Francisco)[11] rejected an application for its Registered Student Organization ("RSO") program from a group applying as a student chapter of the Christian Legal Society ("CLS").[12] RSO status provided several benefits to those student organizations with school-approved status.[13] Benefits included: (1) the ability to seek financial assistance from the law school, which subsidized events using funds from a mandatory student-activity fee imposed on all students;[14] (2) the ability to use law school channels to communicate with students, such as putting announcements in a newsletter and advertising on campus; (3) the ability to participate in on-campus recruiting events; (4) the ability to apply for law school permission to use university facilities; and (5) the ability to use the law school's name and logo.[15] To be eligible for this status, organizations had to comply with Hastings's policies and regulations pertaining to college activities, organizations, and students.[16] One policy was the "Law School's Policy on Nondiscrimination (Nondiscrimination Policy)," which read as follows:

> [Hastings] is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, [Hastings]-owned student residence facilities and programs sponsored by [Hastings], are governed by this policy of

[10] I am greatly indebted to William J. Baker's article and Michael W. McConnell's (who litigated the case at the Supreme Court of the United States) article for articulating a worthwhile background on this case. *See id.*; *see generally* Michael W. McConnell, *Keynote Address: Freedom of Association: Campus Religious Groups*, 97 WASH. U. L. REV. 1641 (2020).

[11] Karen Sloan, *UC Hastings Is History as Law School Drops Controversial Namesake*, REUTERS (July 28, 2022, at 11:2 AM), https://www.reuters.com/legal/legalindustry/uc-hastings-is-history-law-school-drops-controversial-namesake-2022-07-28/ [https://perma.cc/QT86-NSEJ].

[12] *See Martinez*, 561 U.S. at 669.

[13] *See id.* at 669–70.

[14] *Id.* at 669. Although it is outside the scope of this note, another student note addresses the unconstitutionality of such mandatory fees and calls for universities to require students to affirmatively waive their right not to speak and opt not to pay such fees. *See* Falco A. Muscante II, Note, *Talk Should Be Cheap: The Supreme Court Has Spoken on Compelled Fees, but Universities Are Not Listening*, 61 DUQ. L. REV. 124, 124 (2023).

[15] *See Martinez*, 561 U.S. at 669–70.

[16] *See id.* at 670.

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> nondiscrimination. [Hastings's] policy on nondiscrimination is to comply fully with applicable law . . . [Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.[17]

There were over sixty RSOs that ranged across a number of different interests, including sports clubs, political clubs, clubs based on race or ethnic identity, and at least three religious clubs.[18] The CLS student chapter was the only group ever excluded from RSO status.[19] CLS was a small group, tasked primarily with organizing weekly Bible studies, speaker events, dinners, and transportation to church services.[20] All of its activities were open to all students, but its leadership and voting membership were limited to Christians, as required by members and leaders signing a Statement of Faith.[21] The organization from which CLS was created had been established as an RSO at Hastings for ten years.[22] However, the *Martinez* iteration of the group applied with a Statement of Faith that defined marriage as exclusively between one man and one woman and included a statement that sexual intimacy should be reserved for marriage.[23] For a student to be a leader or have voting rights, affirmation of this statement would be required.[24] CLS continued to welcome all students to organization events.[25] However, because of the Statement of Faith, Hastings rejected CLS's application for RSO status, interpreting the CLS Statement of Faith as violating Hastings's nondiscrimination policy by excluding on the basis of religion and sexual orientation.[26] Because CLS was the first group to be excluded as a RSO, it became the first group to ever apply for an exemption from the nondiscrimination policy.[27]

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[17] *Id.*

[18] *See* McConnell, *supra* note 10, at 1647.

[19] *Id.*

[20] *Id.*

[21] *See Martinez*, 561 U.S. at 673.

[22] *See id.* at 672.

[23] *See id.*; McConnell, *supra* note 10, at 1647–48.

[24] *See* McConnell, *supra* note 10, at 1647.

[25] McConnell, *supra* note 10, at 1647.

[26] *See Martinez*, 561 U.S. at 672–73.

[27] *Id.*

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CLS sued Hastings for violating its rights to free speech, free expressive association, and free exercise of religion.[28] CLS continued to meet, but it sacrificed many of the benefits of RSO status.[29] As one of the litigators eventually stated, "the precise content of that policy was the subject of great confusion in the litigation."[30] The language of the nondiscrimination policy barred only the standard categories of discrimination: race, color, religion, national origin, ancestry, disability, age, sex, or sexual orientation.[31] As Professor and former Judge McConnell, one of CLS's litigators before the Supreme Court, has stated, "The only one of these that related to an organization's *beliefs* was the prohibition on religious discrimination. All the other protected categories had to do with immutable characteristics like race, sex, disability, and sexual orientation."[32] In its interrogatories and answers, Hastings stated its policy "permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs."[33] Thus, in its complaint, CLS alleged that the Nondiscrimination Policy discriminates against religious groups because it prohibits those groups "from selecting officers and members dedicated to a particular set of religious ideals or beliefs" but "permits political, social and cultural student organizations to select officers and members

[28] *See id.* at 673; *see also* 42 U.S.§ 1983 (providing the legal mechanism for holding anyone liable for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws).

[29] Though Hastings purported to open their facilities to CLS, the access was never actually granted. CLS was also cut off from "the student e-mail list, the activities fair, newsletters that inform students of group activities, and the right to post notices." Reply Brief for Petitioner at 5, Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010) (No. 08-1371).

[30] McConnell, *supra* note 10, at 1648.

[31] *See Martinez*, 561 U.S. at 670; McConnell, *supra* note 10, at 1648.

[32] The Supreme Court has stated "sexual orientation is both a normal expression of human sexuality and immutable." Obergefell v. Hodges, 576 U.S. 644, 661 (2015). There remains debate on whether sexual orientation is truly an immutable characteristic. *See* Lisa M. Diamond & Clifford J. Rosky, *Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities*, 53 J. SEX RES. 363, 363 (2016). The question of sexual orientation as an immutable characteristic is beyond the scope of this Note. Moreover, one scholar noted, "[a]ccording to current doctrine, a trait is immutable if it is beyond the power of an individual to change or if it is fundamental to personal identity." Nicholas Serafin, *In Defense of Immutability*, 2020 BYU L. REV. 275, 275 (2020). Although case law does not extend this to religion, a strong argument exists that religion is immutable as it is fundamental to personal identity. At least in some Christian circles, salvation is not something that can be lost: "A born-again person cannot become dead, cannot be unborn again." John Piper, *Ask Pastor John: Can a Born-Again Christian Lose Salvation?*, DESIRING GOD (May 31, 2013), https://www.desiringgod.org/interviews/can-a-born-again-christian-lose-salvation [https://perma.cc/8A5M-W3NJ]. Moreover, for Jewish individuals, "it is almost impossible to distinguish between ethnic status and religious status." Johanna R. Collins-Wood, Note, *Religion: Individual Expression or Intertwined With Culture?: Free Exercise Jurisprudence in the United States and Great Britain*, 23 DUKE J. COMP. & INT'L L. 335, 351 (2013) (citation omitted).

[33] Joint Appendix at 93, Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010) (No. 08-1371).

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dedicated to their organization's ideals and beliefs."[34] Therefore, "[o]nly religious groups were denied this right, because 'religion' was the only viewpoint-related characteristics in Hastings's list of prohibited bases for discrimination."[35]

However, in the midst of discovery, Hastings declared for the first time that it actually had an unwritten policy that all student groups were required to accept all students (an "all-comers" welcome policy) and let them vote and participate in leadership—even if they did not share, or openly opposed, the purposes and beliefs of the group.[36] The "all-comers" welcome policy required all student groups to accept all students who wished to join.[37] Joint stipulations entered into by CLS and Hastings attested to the existence of both the written nondiscrimination policy and the "all-comers" policy.[38]

On its surface, it appeared that the "all-comers" welcome policy would violate the freedom of association of all student groups, not just CLS.[39] Although the First Amendment does not expressly protect a "freedom of association,"[40] the Supreme Court has recognized the right is "an indispensable means of preserving other individual liberties."[41] Such individual liberties can include the other First Amendment freedoms.[42] The Court considers it "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable

[34] *Id.* at 79.

[35] *See* McConnell, *supra* note 10, at 1648.

[36] The exact facts of *Martinez* are described in detail in Justice Alito's dissent. *Martinez*, 561 U.S. at 707–16 (Alito, J., dissenting).

[37] Kane Deposition at 49, *Martinez*, 561 U.S. 661 (No. 08-1371); Chapman Deposition at 29–31, *Martinez*, 561 U.S. 661 (No. 08-1371).

[38] *See* Joint Stipulations at 14–15, *Martinez*, 561 U.S. 661 (No. 08-1371) (providing written Nondiscrimination Policy); *id.* at 18 (stating All-Comers Policy).

[39] *See* Michael Stokes Paulsen, *Disaster: The Worst Religious Freedom Case in Fifty Years*, 24 REGENT L. REV. 283, 308 (2012).

[40] *See* U.S. CONST. amend. I.

[41] Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984) (holding Minnesota's state antidiscrimination law prohibiting a private organization from excluding a person from membership based on sex is constitutional, because the state had a compelling interest in prohibiting discrimination which outweighed the First Amendment right of freedom of association).

[42] *See* U.S. CONST. amend. I.

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aspect of 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[43]

Although Supreme Court cases like *Roberts* weighed against associational rights and instead in favor of nondiscrimination that passes a strict scrutiny test,[44] the Court has held that "compelled association" can violate the First Amendment.[45] For example, the Court has held that laws can violate associational rights of members if persons are required to associate with other persons with whom they disagree on religious, political, or ideological matters, particularly if the laws interfere with an organization's message.[46] So, policies forcing any belief-based organization to accept any member would seem to contradict that group's rights.[47]

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[43] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (citation omitted). Legal scholars have debated whether the Court initially grounded this right of association in the First Amendment (applicable to the states through the Fourteenth Amendment) or in the Fourteenth Amendment's Due Process Clause. *See* John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485, 501–17, 530–33 (2010) (discussing these two constitutional arguments and the early legal commentary after *NAACP v. Alabama ex rel. Patterson*); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 624 (1980) (writing that before the Court's 1965 decision in *Griswold v. Connecticut*, "the notion of constitutional protection of the freedom of association was a First Amendment doctrine and little more."). Ultimately, the Court recognized two different strands of freedom of association, tying the freedom of expressive association to the First Amendment and the freedom of intimate association primarily to the Fourteenth Amendment. *See Roberts*, 468 U.S. at 617–18 (1984).

[44] Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 720 (2007) (finding that in order to satisfy strict scrutiny, one "must demonstrate that the [action] here under review is 'narrowly tailored' to achieve a 'compelling' government interest.").

[45] Special rules apply in the context of certain religious organizations. For example, the First Amendment protects a religious organization's freedom to select its own ministers to a greater degree than a secular organization's selection of its employees. The Supreme Court has explained that, although the "right to freedom of association is a right enjoyed by religious and secular groups alike," the First Amendment itself "gives special solicitude to the rights of religious organizations" through its Religion Clauses. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 189 (2012). We will return to the applicability of these special rules in Part II. *See infra* Part II.

[46] *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.").

[47] This can be limited to those belief-based boundaries that have non-religious, non-political, and non-ideological matters that do not have a basis in belief that contradicts an immutable characteristic category in association. For example, the *Roberts* case was a case on sex-based exclusion. *Roberts*, 468 U.S. at 618 (1984) (holding Minnesota's state antidiscrimination law prohibiting a private organization from excluding a person from membership based on sex is constitutional because the state had a compelling interest in prohibiting discrimination which outweighed the First Amendment right of freedom of association); *see also* United States v. Virginia, 518 U.S. 515 (1996) (holding that the Virginia Military Institute's exclusion of women from educational opportunities denies equal protection for women); *cf.* 20 U.S.C. § 1681 (providing several exceptions to prohibitions against discrimination on the basis of sex, including religious organizations, social fraternities or sororities, and other exemptions).

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Despite the well-established doctrines upholding free association and prohibiting compelled association, the district court and Ninth Circuit ruled for Hastings.[48] At the Supreme Court level, CLS's strategy shifted to an emphasis on a free speech viewpoint discrimination theory in place of an expressive association theory.[49] Judge Michael W. McConnell joined the CLS legal team to assist in the litigation.[50] Judge McConnell's free speech argument would be diluted by CLS's all-comers stipulation.[51] In a free association framework, the "all-comers" welcome policy would violate the First Amendment by depriving all student groups of their right to exclude students who do not share their beliefs.[52] In a free speech framework, the First Amendment free speech violation hinged on whether Hastings treated CLS's viewpoint differently than the viewpoints of other student organizations.[53]

Hastings's RSO program is a limited public forum, and some types of public forums only require that government restrictions be viewpoint-neutral, rather than content-neutral.[54] The "all-comers" welcome policy complicated any viewpoint discrimination arguments, since it purportedly and on its surface burdened every

[48] *See* Christian Legal Soc'y v. Kane, No. C 04-04484 JSW, 2006 U.S. Dist. LEXIS 27347 at *1 (N.D. Cal. Apr. 17, 2006); Christian Legal Soc'y Chapter. of Univ. of Cal. v. Kane, 319 F. App'x 645 (9th Cir. 2009).

[49] *Compare* Brief of Appellant at ii–iv, Christian Legal Soc'y v. Kane, 319 Fed. App'x 645 (2006) (No. 06-15956) (arguing the free speech theory as a second, shorter subpoint to the association theory), *with* Brief of Petitioner at iv–v, Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010) (No. 08-1371) (arguing the free speech theory before arguing the association theory and adding a sub-point addressing viewpoint discrimination).

[50] Reply Brief for Petitioner, *supra* note 29, at 1. Judge McConnell is a former federal judge for the United States Court of Appeals for the Tenth Circuit and is the Richard and Frances Mallery Professor of Law and Director of the Constitutional Law Center at Stanford Law School. *See Michael W. McConnell*, STAN. L. SCH., https://law.stanford.edu/directory/michael-w-mcconnell/ [https://perma.cc/NH5P-BTA9] (last visited Feb. 23, 2024).

[51] Judge McConnell had successfully argued the free speech avenue in *Rosenberger v. Rector*, 515 U.S. 819 (1995) (holding a university's denial of widely available funding to a religious student newspaper because of its religious content to be viewpoint discrimination).

[52] *See* Reply Brief for Petitioner at 5, 20–22, Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010) (No. 08-1371).

[53] *See* Petition for Writ of Certiorari at 30, Christian Legal Soc'y v. Newton, 561 U.S. 661 (2009) (No. 08-1371) (arguing Hastings's actions were unconstitutionally based on CLS's religious viewpoint on unrepentant sexual conduct).

[54] University student organization programs have been public forums since at least as early as *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that universities may not exclude religious groups based on the content of members' speech and that the University of Missouri's denial of a public university's meeting space violated both equal protection and free speech rights under the First Amendment).

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group equally and is at least "nominally neutral."[55] Because of the hurdle of the "all-comers" welcome policy, CLS first argued that the original "written" policy still controlled the meaning of Hastings's RSO program.[56] As CLS noted, if this "written" policy controlled, CLS's viewpoint discrimination argument would be more straightforward because only religious groups would be unable to restrict leadership and membership to those who shared common religious beliefs.[57] But CLS also argued the "all-comers" welcome policy was also viewpoint-discriminatory because "small and politically unpopular groups can be overwhelmed by a hostile majority, who need only 'join' and vote to change the group's message."[58]

CLS argued in front of the Supreme Court that the unwritten "all-comers" welcome policy flipped traditional forum analysis on its head.[59] Usually, groups are "entitled to their own voice" in a government forum, and the government must remain nondiscriminatory of all content and viewpoints.[60] The government can overcome viewpoint and content restrictions by satisfying strict scrutiny.[61] However, Hastings required the groups themselves to be inclusive of all viewpoints.[62] The inclusiveness undercut Hastings's stated purpose for the RSO forum: promoting diverse viewpoints among groups.[63] No viewpoint diversity can exist when groups are prevented from cultivating coherent beliefs through filtering membership and leadership.[64] Hastings countered that the "all-comers" welcome policy was reasonable because it provided equal access to school activities and avoided complicated line-drawing problems, arguing that the unwritten "all-comers" welcome policy was the policy the justices should consider.[65]

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[55] Christian Legal Soc'y v. Martinez, 561 U.S. 661, 695 (2010) (No. 08-1371).

[56] Transcript of Oral Argument at 4–5, *Martinez*, 561 U.S. 661 (No. 08-1371).

[57] *See* Reply Brief for Petitioner at 9–12, 15, *Martinez*, 561 U.S. 661 (No. 08-1371).

[58] *Id.* at 28–29.

[59] Transcript of Oral Argument at 3, *Martinez*, 561 U.S. 661 (No. 08-1371).

[60] *Id.*

[61] *See, e.g.*, Fulton v. City of Philadelphia, 593 U.S. 522, 541 (2021) ("A government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests.").

[62] Transcript of Oral Argument at 3, *Martinez*, 561 U.S. 661 (No. 08-1371).

[63] *See* Joint Stipulation of Facts for Cross-Motions for Summary Judgement at 3, Christian Legal Soc'y v. Kane (N.D. Cal. Oct. 22, 2004) (No. C-04-4484-JSW) ("Hastings seeks to promote a diversity of viewpoints among registered student organizations").

[64] Transcript of Oral Argument at 12, *Martinez*, 561 U.S. 661 (No. 08-1371).

[65] *Id.* at 26, 51.

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The Supreme Court's divided majority opinion, written by Justice Ginsburg, followed Hastings's argument.[66] The Court held that CLS's stipulation allowed the Court to look only at the "all-comers" policy and to ignore any pretextual applications of the written nondiscrimination policy.[67] The majority merged CLS's expressive association and free speech arguments.[68] While expressive association claims warrant strict scrutiny, the limited-public-forum free speech claims only require reasonableness "in light of the purpose served by the forum" and viewpoint neutrality, a lower tier of scrutiny.[69]

Forums are sorted into four types. First, in traditional public forums, such as public streets and parks, "any restriction based on the content of . . . speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest."[70] "Second, governmental entities create designated public forums when 'government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose.'"[71] Speech restrictions in a designated public forum "are subject to the same strict scrutiny as restrictions in a traditional public forum."[72] Third, limited public forums exist when governments open property 'limited to use by certain groups or dedicated solely to the discussion of certain subjects.'"[73] In limited public forums, "a governmental entity may impose restrictions on speech that are reasonable and viewpoint-

[66] Justices Stevens, Kennedy, Breyer, and Sotomayor joined in the majority opinion, with Justice Stevens and Kennedy writing separate concurrences. Justice Alito dissented, joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas. *See* Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010).

[67] *Compare id.* at 675–76, *with id.* at 707 (Alito, J., dissenting) (noting in the dissent that the Court refused to address assertions of pretextual motivations to target religious groups, showing that the policy was not viewpoint neutral, because it conflicted with stipulated facts).

[68] *Id.* at 680 ("CLS would have us engage each line of cases independently, but its expressive-association and free-speech arguments merge: Who speaks on its behalf, CLS reasons, colors what concept is conveyed . . . . It therefore makes little sense to treat CLS's speech and association claims as discrete . . . .Instead, three observations lead us to conclude that our limited-public-forum precedents supply the appropriate framework for assessing both CLS's speech and association rights.") (citations omitted).

[69] *Martinez*, 561 U.S. at 679–80, 685; *see also, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995); Good News Club v. Milford Central School, 533 U.S. 98, 106–07 (2001); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 392–93 (1993); Perry Ed. Ass'n v. Perry Local Educators' Ass'n 460 U.S. 37, 46 (1983).

[70] *Martinez*, 561 U.S. at 679 n.11 (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009)).

[71] *Id.* at 679 n.11 (citing Pleasant Grove City, 555 U.S. at 469).

[72] *Id.* at 679 n.11 (quoting Pleasant Grove City, 555 U.S. at 469–70).

[73] *Id.* at 679 n.11 (quoting Pleasant Grove City, 555 U.S. at 470).

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neutral."[74] Fourth, government entities establish nonpublic forums, where access "can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'"[75] In *Martinez*, the majority settled on the RSO system being a limited public forum.[76] The majority reasoned that "[t]he same ground rules must govern both speech and association challenges in the limited-public-forum context, lest strict scrutiny trump a public university's ability to confine a speech forum to the limited and legitimate purposes for which it was created."[77]

Finally, when determining the reasonableness of Hastings's policy, the majority deferred to the school's justifications.[78] The majority found the unique detrimental effects that CLS alleged unpersuasive and stated, "It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers."[79] The majority was satisfied that the policy is "'justified without reference to the content [or viewpoint] of the regulated speech.'"[80]

B. Legal Doctrines in Martinez

At the broad strokes, we have a rule from *Martinez* that a public-university policy requiring registered student organizations to accept all comers is constitutionally reasonable and viewpoint neutral, satisfying judicial scrutiny.[81] RSO status can be denied if a student group has discriminatory membership requirements that run afoul of an "all-comers" welcome policy, even if they are religious beliefs.[82] Where First Amendment rights merge, a limited-public-forum analysis can be used

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[74] *Id.*

[75] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985).

[76] *Martinez*, 561 U.S. at 681.

[77] *Id.* (internal quotation marks and citations omitted).

[78] *Id.* at 687–91 (noting that the policy: (1) ensures opportunities to all students; (2) helps Hastings police the written terms of its policy without inquiring into an RSO's motivations for membership restrictions; (3) encourages tolerance, cooperation, and learning amongst Hastings students; and (4) subsumes California proscriptions on discrimination and public universities may advance state-law goals through educational endeavors so long as they do not contravene constitutional limits).

[79] *Id.* at 694. The majority analyzed any detrimental effects by noting that regulations that serve purposed unrelated are neutral, even if there are incidental effects on some but not others. The lack of targeting conduct based on its expressive content means acts are not shielded from regulation merely because they express a discriminatory idea or philosophy. *Id.* at 695–96.

[80] *Id.* at 696 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[81] *See Martinez*, 561 U.S. at 696.

[82] *See id.*

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and lower levels of scrutiny are usable and appropriate if the Court finds an unwritten "all-comers" welcome policy even where a written nondiscrimination policy exists.[83]

C. Subsequent Developments and Criticism

The majority affirmed and remanded the case to the U.S. Court of Appeals for the Ninth Circuit leaving it to potentially answer the issue preservation question of a potential selective enforcement from CLS that it left open at the end of its opinion.[84] The Ninth Circuit denied CLS's motion to remand because CLS failed to raise or preserve the issues of selective application or pretext the first time around and "is not entitled to 'a second bite at the appellate apple.'"[85] However, "[i]f going forward, Hastings applies its policy in a discriminatory way, CLS may be able to file a new lawsuit."[86]

In his dissent, Justice Alito reasoned that the written nondiscrimination policy, not the unwritten "all-comers" policy, controlled.[87] He noted the Court's treatment of the case is "deeply disappointing."[88] He takes an opposite reading of the majority: (1) that the Court addresses a different policy than the one initially invoked by Hastings; (2) that the Court does not address the constitutionality of the policy that it now purports to follow; and (3) that the Court ignores strong evidence that the "all-comers" policy is not viewpoint neutral and was a pretext to justify viewpoint discrimination.[89] Justice Alito points to the "only First Amendment precedent involving a public college's refusal to recognize a student group," which was *Healy v. James*.[90] Justice Alito noted *Healy* and *Martinez* were largely the same in the effect of their nonrecognition on the student organizations: denial of "the use of campus facilities, as well as access to the customary means used for communication among the members of the college community."[91] The Court in *Healy* held that the denial

[83] *See id.*

[84] *Id.* at 697–98.

[85] Christian Legal Soc'y Chapter of Univ. of Cal. v. Wu, 626 F.3d 483, 488 (9th Cir. 2010) (citation omitted).

[86] *Id.*

[87] *Martinez*, 561 U.S. at 741 (Alito, J., dissenting).

[88] *Id.* at 707 (Alito, J., dissenting).

[89] *Id.* (Alito, J., dissenting).

[90] *Id.* at 718 (Alito, J., dissenting). Other cases dealt with the First Amendment implications of schools refusing to fund student groups, which was another reason why CLS sued Hastings. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 819 (1995).

[91] *Martinez*, 561 U.S. at 719 (Alito, J., dissenting).

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of recognition "cannot be viewed as insubstantial" impediments to students' rights to freedom of association.[92] The *Healy* Court emphatically rejected the proposition that "First Amendment protections should apply with less force on college campuses than in the community at large."[93]

Justice Alito addressed the constitutionality of Hastings's nondiscrimination policy under the limited-public-forum analysis and reached an opposite conclusion from the majority, noting, "[w]e have applied [viewpoint neutrality] analysis in cases in which student speech was restricted because of the speaker's religious viewpoint, and we have consistently concluded that such restrictions constitute viewpoint discrimination."[94] Justice Alito noted:

> [The Hastings Nondiscrimination Policy] singled out one category of expressive associations for disfavored treatment: groups formed to express a religious message. Only religious groups were required to admit students who did not share their views. An environmentalist group was not required to admit students who rejected global warming. An animal rights group was not obligated to accept students who supported the use of animals to test cosmetics. But CLS was required to admit avowed atheists. This was patent viewpoint discrimination.[95]

Justice Alito went on to determine the all-comers policy is "not reasonable in light of the stipulated purpose of the RSO forum: to promote viewpoint diversity 'among[,]' not within[,] [RSOs]."[96] Justice Alito noted that there was a strong showing of selective application and pretext, observing Hastings's shifting policies, the timing of the new policies' revelations, the lack of documentation of the all-comers policy, and the nonenforcement of the policy all point to selective application and pretext.[97] He hopes the majority's decision will turn out to be an "aberration."[98]

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[92] Healy v. James, 408 U.S. 169, 182 (1972).

[93] *Healy*, 408 U.S. at 180.

[94] *Martinez*, 561 U.S. at 723 (Alito, J., dissenting).

[95] *Id.* at 724 (Alito, J., dissenting).

[96] *Id.* at 735 (Alito, J., dissenting) (citation omitted).

[97] *Id.* at 736–39 (Alito, J., dissenting).

[98] *Id.* at 741 (Alito, J., dissenting).

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Martinez has faced criticism by many legal scholars.[99] Among the complaints with the majority's opinion, some felt Justice Ginsburg put too much weight in the joint stipulation as determinative.[100] Professor, Judge, and one of the case's litigators, Michael W. McConnell, was "genuinely baffled where the Court came up with [the] idea."[101] He went on to note that "[i]n doctrinal terms, the Court held that the unconstitutional conditions doctrine does not apply to freedom of association."[102] The Court also had little precedent when "it collapsed the First Amendment protection for freedom of association into the protection for speech," subjecting an

[99] *See, e.g.*, McConnell, *supra* note 10; Luke C. Sheahan, *The First Amendment Dyad and* Christian Legal Society v. Martinez*: Getting Past "State" and "Individual" to Help the Court "See" Associations*, 27 KAN. J.L. & PUB. POL'Y 223, 233 (2018); Richard A. Epstein, *Church and State at the Crossroads:* Christian Legal Society v. Martinez, 2009–10 CATO SUP. CT. REV. 105 (2010). *See generally* Charles J. Russo & William E. Thro, *Another Nail in the Coffin of Religious Freedom?:* Christian Legal Society v. Martinez, 12 EDUC. L.J. 20, 27 (2011) ("[T]he Court placed another nail in the coffin of religious freedom because its rationale grants educational officials greater rights to impose restrictions on religious, and other, groups."); Erica Goldberg, *Amending* Christian Legal Society v. Martinez*: Protecting Expressive Association as an Independent Right in a Limited Public Forum*, 16 TEX. J. ON C.L. & C.R. 129 (2011); Jack Willems, *The Loss of Freedom of Association in* Christian Legal Society v. Martinez, 130 S. Ct. 2971 (2010), 34 HARV. J.L. & PUB. POL'Y 805 (2011).

[100] Epstein, *supra* note 99, at 114–15 (footnotes omitted) ("The impressive weight that Justice Ginsburg attaches to the stipulation is questionable in light of the surrounding circumstances. The stipulation is written in the timeless present tense; the key verb is 'requires.' That stipulation did not, in so many words, say that Hastings 'required'—past tense—all organizations to follow the all-comers policy at the time the critical decisions were made about CLS, before the all-comers policy had been formulated. Nor does the stipulation say that the actual decision in this case had been made pursuant to this all-comers policy, when clearly that was not possible. In addition, the statement does not take into account the wrinkle that this policy did not quite mean what it said. At the Supreme Court level, the implicit for-cause limitations available to common carriers to refuse service were built back into the record (saying that the policy 'does not foreclose neutral and generally applicable membership requirements unrelated to "status or beliefs"'), presumably to take into account the usual grounds that allow common carriers to refuse service. Finally, the stipulation clashes with the position that Hastings took in the answer to the complaint, by insisting that Hastings had no all-comers policy in place, but rather permitted 'political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs.' On issues of this importance, it seems most unwise to truncate the substantive examination by a stipulation that could be read more narrowly in ways that are more consistent with the record. Both versions of the policy raise real questions of principle, and it is to those issues that I now turn.").

[101] McConnell, *supra* note 10, at 1650 (the idea being that a litigant cannot bring two different constitutional claims arising from the same set of facts: i.e., expressive association and free speech).

[102] *Id.* at 1651. The "unconstitutional conditions" doctrine reflects the Supreme Court's repeated pronouncement that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.").

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associational claim to a public forum analysis.[103] Even though the Court uses property as a clarifying tool for the outcome, "the crux of the issue is, and has always been, what substantive principles should govern the limitations on the property owner's right to exclude."[104] Indeed, Justice Ginsburg's Male-Superiority Club analogy[105] is laughable and ignorant of the Court's special view of religion, and reminds situational comedy fanatics of the fictitious and satirical men's rights group in an episode of *Parks and Recreation* that would appear a few years after the opinion was published.[106]

Scholars beyond Professor McConnell add critiques, with Professor Epstein writing that "in the instant context, judicial deference had the unfortunate consequence of letting Hastings run roughshod over a weak and defenseless religious organization under its banner of toleration, cooperation, and learning. It was not the Court's finest hour."[107] Professor Paulsen's analysis provides a path: governments may not prohibit, punish, or penalize speech or expressive conduct because of its message, content, or viewpoint.[108] Religious expression is a well-established corollary: "there is no 'religion exception' to freedom of speech."[109] Groups retain this right as well: "The right to free speech thus extends to group expression as fully as it extends to individual expression."[110] As Justice Alito noted, *Healy v. James* applies, and student groups have this right as well.[111] And associational rights include

[103] McConnell, *supra* note 10, at 1651. *But see* Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 300 (1981). The majority cited *Berkeley* for this proposition; however, it fails to explain why the Court found a violation in the merged rights in *Berkeley* but not in *Martinez*. *Martinez*, 561 U.S. at 680; *cf. Berkeley*, 454 U.S. at 300 ("A limit on contributions in this setting need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression.").

[104] B. Jessie Hill, *Property and the Public Forum: An Essay on* Christian Legal Society v. Martinez, 6 DUKE J. CONST. L. & PUB. POL'Y 49, 56 (2010).

[105] *Martinez*, 561 U.S. at 688.

[106] *Parks and Recreation: Pie-Mary* (NBC television broadcast Feb. 10, 2015).

[107] Epstein, *supra* note 99, at 107.

[108] Paulsen, *supra* note 39, at 287–88.

[109] *Id.* at 288.

[110] *Id.*

[111] *See Healy*, 408 U.S. at 181–82.

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the right to disassociate.[112] Thus, CLS would have the right to disassociate while still obtaining RSO status.[113]

Unfortunately, the majority went another way. Since then, the Supreme Court has cited *Martinez* eight times in the past almost fifteen years: five times in dissent, only twice in majority opinions, once in a concurrence, and exclusively by Democrat-appointed justices.[114] The treatment of *Martinez* in the lower appellate federal courts is outside the scope of this note.[115] However, two cases stand out. One Eighth Circuit opinion noted that the University of Iowa's Policy on Human Rights was reasonable and viewpoint neutral but had not been uniformly applied.[116] Another Ninth Circuit en banc opinion reversed a district court's denial of preliminary injunction, noting a university selectively enforced its nondiscrimination policy when it revoked recognition from Fellowship of Christian Athletes while student groups like the Senior Women Club remained recognized despite excluding male students by design.[117] Both cases, and indeed the litigation generally, seem to impact religious organizations more so than others.[118] In fact, *Martinez* hardly ended litigation over student group policies, and colleges do not remain immune to legal challenges to their policies on student groups.[119]

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[112] Paulsen, *supra* note 39, at 293–95; Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

[113] Paulsen, *supra* note 39, at 293–95.

[114] Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455 (2013) (opinion of Ginsberg, J.); Standard Fire Ins. Co. v. Knowles, 568 U.S. 588 (2013); Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802 (2019) (Sotomayor, J., dissenting); Iancu v. Brunetti, 588 U.S. 388 (2019) (Breyer, J., concurring in part and dissenting in part) (Sotomayor, J., concurring in part and dissenting in part); Cameron v. EMW Women's Surgical Ctr., P.S.C., 595 U.S. 267 (2022) (Sotomayor, J., dissenting); Marietta Mem'l Hosp. Emp. Health Ben. Plan v. DaVita Inc., 596 U.S. 880 (2022) (Kagan, J., dissenting); 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (Sotomayor, J., dissenting); Vidal v. Elster, 602 U.S. 286, 332 (2024) (Kagan, J., concurring).

[115] For an excellent treatment, *see generally* Baker, *supra* note 9 (providing an overview of the seventy-five published federal appellate cases citing *Martinez* at the time of its publication).

[116] *See* Intervarsity Christian Fellowship/USA v. Univ. of Iowa, 5 F.4th 855 (8th Cir. 2021) (deregistered groups voiced concern that fraternities and sororities were exempt and another student group, LoveWorks, was allowed to retain a gay-affirming statement of the Christian faith as other groups were deregistered).

[117] *See* Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ., 82 F.4th 664, 689 (9th Cir. 2023) (en banc).

[118] *See* Baker, *supra* note 9.

[119] Peter Schmidt, *Ruling Is Unlikely to End Litigation Over Policies on Student Groups*, THE CHRON. OF HIGHER EDUC. (June 30, 2010), https://www.chronicle.com/article/ruling-is-unlikely-to-end-litigation-over-policies-on-student-groups/.

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II. REINTERPRETING RELIGIOUS STUDENT GOVERNANCE UNDER A NEW RUBRIC: CHURCH AUTONOMY DOCTRINE

Martinez is a decision built on quicksand, waiting for another bite at the apple for the Court to overturn its ruling. *Martinez* should be relegated to the history books as faulty legal theory. However, rather than employ analysis that has been more eloquently stated by other scholars in Part I,[120] Part II presents a thesis that addresses Justice Ginsburg's Male-Superiority hypothetical[121] by giving the courts and universities an out for discriminatory practices of religious student groups: the Courts should give student organizations the same autonomy as churches under the church autonomy doctrine.

A. Stare Decisis

Preliminary, if this question of discrimination by student groups comes to the Supreme Court again, the Court must address the issue of *stare decisis*, the doctrine governing judicial adherence to precedent.[122] *Stare decisis* is not an "inexorable command."[123] There are several factors that should be taken into account: "the quality of [*Martinez*'s] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision."[124] As noted, *Martinez*'s reasoning is very poor, and it is sharply inconsistent with other Supreme Court precedent on free association cases and student group decisions.[125] It presents a nominally workable rule, but the rule seems to continually cut against student organizations.[126] It also presents the challenge to religious student groups to hunt for the bylaws of RSOs to see if they discriminate in their membership before initiating litigation against universities for selectively enforcing their "all-comers" welcome policies. Since the decision, "*Martinez*'s staying power is greatly threatened."[127] Reliance interests do not seem to carry much weight, as "it would be unconscionable to permit First

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[120] *See supra* Part I.

[121] Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 688 (2010).

[122] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 407 (2024).

[123] *Id.* (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

[124] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 917 (2018) (deciding these factors weighed against retaining Abood v. Det. Bd. of Ed., 431 U.S. 209 (1977)); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992), *overruled by*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[125] *See supra* Part I.

[126] *Id.*

[127] Baker, *supra* note 9, at 290.

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Amendment rights to be abridged in perpetuity in order to [prevent discriminatory practices] that will expire on their own in a few years' time."[128] The lack of strong Supreme Court citation to *Martinez* should have also put universities "on notice for years regarding [the] Court's misgiving about [*Martinez*]."[129] Although not directly analogous, the Court recently ruled that a state law that prevented students from using student aid to attend religious schools violated the Free Exercise Clause.[130] This seems to be enough for the Court to leave *Martinez* behind, as it has with many ill-reasoned precedents in recent years.[131]

B. Church Autonomy Doctrine and Religious Nonprofits and Student Organizations

So, what is the church autonomy doctrine? The church autonomy doctrine limits judicial power and protects the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[132] Under our system of government, "whenever the questions of discipline or of faith and ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them"—and civil courts have traditionally maintained that they exercise no "jurisdiction" over, or power to "inquire into," ecclesiastical decisions that are protected by the church autonomy doctrine.[133] While my discussion of the doctrine focuses on the Christian context, it is applicable to "protect the right of churches *and*

[128] *Janus*, 585 U.S. at 927 (deciding that contract provisions that will expire in a few years do not outweigh the perpetuity of free speech rights). Colleges and universities are only a short time. Moreover, unlike unions which are exclusive representatives of a bargaining unit, college and university students have the full gamete of other organizations to join or to create. Suppose a Muslim student wished to join a Christian organization (which would make no sense for their expressive association). They are free to join or start another Christian organization that does not have discriminatory practices.

[129] *Id.*

[130] *See* Carson v. Makin, 596 U.S. 767 (2022).

[131] *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024); *Dobbs*, 597 U.S. 215; *Janus*, 585 U.S. 878.

[132] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 186 (2012) (quoting Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952)); Our Lady of Guad. Sch. v. Morrissey-Berru, 591 U.S. 732, 732 (2020); *see, e.g.*, Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

[133] Watson v. Jones, 80 U.S. 679, 727–35 (1871); *see also Hosanna-Tabor*, 565 U.S. at 185–86. For an excellent recent discussion on the broad limits of the church autonomy doctrine, *see generally* Brandon Nestor, *Judicial Power and Church Autonomy*, NOTRE DAME L. REV. (forthcoming 2025).

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other religious institutions to decide matters 'of faith and doctrine' without government intrusion."[134]

The use of the doctrine in the university context is not perfect, but it is workable. College ministries are "[p]arachurch ministries, that is, Christian ministries that are not churches, [but] often do many of the same things as churches . . . ."[135] One religious writer was quick to note the good impact of parachurch ministries, but parachurch organizations should still "come alongside the local church."[136] Another affirms that notion by analogizing to a diaconal role of parachurch ministries.[137] Regardless, the church autonomy doctrine can still apply, as religious nonprofits often take on similar situations from the government's perspective.[138]

C. Usage in Martinez *and Similarly Situated Religious Student Organizations*

"Church autonomy protects the internal self-governance of religious organizations."[139] In the context of *Martinez*, the church autonomy doctrine would allow registered religious student organizations to decide discipline, faith, and leadership questions,[140] like the ones dealt with in *Martinez* on membership and

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[134] *Our Lady of Guad. Sch.*, 591 U.S. at 746 (emphasis added) (citations omitted).

[135] Greg Saffles, *The Church and the Parachurch*, SHORELINE CHURCH (Nov. 13, 2015), https://www.shorelineknox.com/blog/2016/2/24/the-church-and-the-parachurch [https://perma.cc/QNG3-3AM3].

[136] Jon Saunders, *The Place and Purpose of Parachurch Ministries*, THE GOSPEL COAL. (Aug. 31, 2015), https://www.thegospelcoalition.org/article/parachurch-ministry [https://perma.cc/QZQ7-QAQ8].

[137] Jon Bloom, *What Is a Parachurch Ministry?: Our Commitment to Love the Local Church*, DESIRINGGOD (July 21, 2020), https://www.desiringgod.org/articles/what-is-a-parachurch-ministry [https://perma.cc/QCF8-HUWG] ("I say that parachurch ministry can be understood as *analogous* to the deaconate, but I realize reality is never as neat as the categories we create. All of us can point to parachurch ministries that might function more like a local church than is ideal, some out of necessity and some in inappropriate ways. And even when a parachurch ministry is consciously and carefully seeking to serve Christ's church, some Christians might sadly choose to use the ministry as a church substitute."); *cf.* JONATHAN LEEMAN, CHURCH MEMBERSHIP: HOW THE WORLD KNOWS WHO REPRESENTS JESUS 62–63 (2012) ("A local church . . . is a group of Christians who regularly gather in Christ's name to officially affirm and oversee one another's membership in Jesus Christ and his kingdom through gospel preaching and gospel ordinances."). In a religious student organizational membership framework, this seems to perfectly fit Leeman's definition, at least for our purposes.

[138] *See, e.g.*, 26 U.S.C. § 501(c)(3) (treating corporations operated for exclusive religious purposes as tax exempt, among other things. Both churches and non-church organizations are similarly situated).

[139] Lael Weinberger, *The Limits of Church Autonomy*, 98 NOTRE DAME L. REV. 1253, 1258 (2023).

[140] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 185–86 (2012).

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leadership requirements under a "Statement of Faith."[141] Although the Court could go through the free association analysis stated in Part I,[142] which is likely constitutionally correct,[143] a church autonomy application allows the Court to circumvent a complicated associative expression and limited-public-forum analysis, which some consider "oxymoronic."[144] The church autonomy doctrine allows the courts to ask only two questions: (1) Is this a religious organization and (2) Is this related to a faith, discipline, or ecclesiastical issue.[145] If the answer is "yes" to both questions, the courts are deprived of jurisdiction over any discriminatory claims and the religious organization's decision stands.[146] If the answer is "no" to the first, as it would be for a political organization or for Justice Ginsburg's hypothetical Male-Superiority organization, then the church autonomy doctrine does not apply and the courts are free to follow an "all-comers" welcome policy from *Martinez*[147] or, preferably, to hold a violation of associational rights of those organizations.[148] However, the discrimination against religious organizations would not even need to arrive at that step. If the answer to the second question is "no," then it becomes a balancing test of non-discrimination against the need for distinction for an organization, either coming down on the side of *Roberts*[149] or *Dale*.[150] While this could get to religious organization's associational rights, it could help prevent religious organizations from shrouding discriminatory practices in something other than a religious doctrine belief and would help cabin fringe religious beliefs by

[141] *See* Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 672 (2010).

[142] *See supra* Part I.

[143] *See supra* text accompanying notes 109–14.

[144] Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1536 (1998); *see also* Norman T. Deutsch, *Does Anybody Really Need a Limited Public Forum?*, 82 ST. JOHN'S L. REV. 107, 150 ("The Court should abandon the distinction between limited public forums and nonpublic forums.").

[145] *See* Weinberger, *supra* note 139, at 1260.

[146] *Id.*

[147] *See* Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 669 (2010).

[148] *See id.* at 718–31 (Alito, J., dissenting).

[149] Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) (holding Minnesota's state antidiscrimination law prohibiting a private organization from excluding a person from membership based on sex is constitutional, because the state had a compelling interest in prohibiting discrimination, which outweighed the First Amendment right of freedom of association).

[150] Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.").

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encouraging mainstream religions that have doctrinally-based discrimination from being similarly discriminated against.[151] Although the Becket Fund's amicus brief in *Martinez* made some allusions to the church autonomy doctrine, their brief failed to articulate a clear application of church autonomy principles for religious organizations in universities, and thus the majority and dissent largely ignored its arguments.[152]

D. Religious Pluralism and Balancing Rights: What About the Establishment Clause?

At least one question remains. The First Amendment's Establishment Clause prohibits the government from making any law "respecting an establishment of religion."[153] There may be no establishment nor any unduly preferential treatment of religion over non-religion or vice versa. Respectfully, Establishment Clause jurisprudence has been described as "in disarray" and a "hot mess" by a few notable jurists, with the former term being used by Justice Thomas.[154] If the church autonomy doctrine applies, is the university seeking its application for themselves, particularly if it faces discriminatory claims for allowing religious organizations to obtain RSO status? It appears that is not the case. Much of the recent Establishment Clause decisions have moved away from a strict separation toward a broader trend of prioritizing free exercise.[155] Therefore, the Court will likely give more weight to the

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[151] *See, e.g.*, Weinberger, *supra* note 139, at 1312 ("There are reasons that all of these points are implausible as theological positions within the mainstream of Christian orthodoxy and many other major religious traditions. But that said, it is still the case that sects *could* claim to believe these things, and a court would have a hard time telling whether it's true or not. (While sincerity should, I think, be required, it's still often hard to judge.")).

[152] *See generally* Brief for American Islamic Congress et al., as Amici Curiae Supporting Petitioners at 15–29, Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661 (2010) (No. 08-1371) (arguing the Supreme Court has long protected the rights of religious organizations to govern their own affairs).

[153] U.S. CONST. amend. I.

[154] Noah C. Chauvin, *Unifying Establishment Clause Purpose, Standing, and Standards*, 50 U. MEM. L. REV. 319, 321 (2019).

[155] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022) (deciding a public school's attempt to avoid Establishment Clause claims by forbidding a coach from praying with students during and after a game violates the coach's free speech and free exercise rights); Carson v. Makin, 596 U.S. 767 (2022) (holding a state law prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious instruction violates the Free Exercise Clause of the First Amendment); Shurtleff v. City of Boston, 596 U.S. 243 (2022) (holding a city's refusal to fly a private religious organization's flag, which depicts a cross, on a city flagpole violates the organization's First Amendment rights).

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individual's or organization's (or in this hypothetical, a university's) First Amendment Free Exercise rights rather than any Establishment Clause claim.

Another reason the Court could circumvent any Establishment Clause claim is because of its leaning toward religious (or nonreligious) pluralism. Indeed, as the U.S. Court of Appeals for the Tenth Circuit noted nearly a decade ago, "The trend of the [United States Supreme] Court appears to be that greater and more equal accommodation of all ideas (pluralism and diversity), including religious discourse, in public fora does not threaten the private religious freedom the Establishment Clause was meant to protect."[156] Such a trend should continue, opening up spaces for ideas and dialogue.

E. Limitations: What About Thinly Veiled Religious Discriminatory Practices?

One additional problem remains: who can say what a religious belief is? Justice Ginsburg's Male-Superiority Club is easily dispersed under the church autonomy doctrine.[157] However, what if that Male-Superiority Club was part of a larger religious movement? On the original meaning of "religion" in the First Amendment, one scholar writes:

> Scholars make this effort [to find another line that includes *more* belief systems than theism, but not *all* belief systems] because religion cannot include all or nearly all belief systems for both theoretical and practical reasons. Theoretically, the concept of religion would lose its distinctiveness if it included all belief systems, which is implausible. Americans in particular, and human cultures of all sorts, employ the concept of religion as a distinct form of belief system. Practically, the relatively robust protections our legal system affords religious beliefs and practices would apply very broadly if non-theistic belief systems were included, leading to negative consequences, such as undermining the rule of law.[158]

[156] Summum v. City of Ogden, 297 F.3d 995, 1011 (10th Cir. 2002) (*abrogated by* Pleasant Grove City v. Summum, 555 U.S. 460, 466 (2009)).

[157] *See* Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 668 (2010).

[158] Lee J. Strang, *The Original Meaning of "Religion" in the First Amendment: A Test Case of Originalism's Utilization of Corpus Linguistics*, 2017 BYU L. REV. 1683, 1690–91 (2017).

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Taking the narrow theistic definition of religion could still produce a religious belief of Male-Superiority, so long as it is theistic.[159] In fact, sex-based discrimination, a distinct doctrinal issue from that present in *Martinez*, is present in some Christian denominations by preventing women from having teaching or priesthood roles.[160] Unfortunately for Justice Ginsburg, "you can't always get what you want."[161] The free exercise and free association rights trump under the religious belief rubric. Luckily for Justice Ginsburg, the religious pluralism format permits a plurality of religious associations to exist at universities.[162] This is the proper path: *Martinez* should go and church autonomy should give religious student organizations their exception.

CONCLUSION

This Note argues that the Supreme Court should overturn its holding in *Martinez*. Part I explained the background of the case, explained subsequent developments and cases applying the *Martinez* doctrine, and noted that the pronounced litigation mainly impacts religious organizations. Part I explained the unworkability of the majority's reasoning in *Martinez*, identified the problems with the *Martinez* doctrine, and argued that staying consistent with this precedent is incorrect. Part I also noted how the case fails in a proper protection of First Amendment free religion and free association rights while improperly placing nondiscrimination as needing greater protection. Part II argued that *stare decisis* principles run against keeping with *Martinez* and noted that while superior to the majority's reasoning, the dissent's reasoning involves a much more complex level of analysis that should be simplified for religious student organizations. Part II also argued the proper way to solve the issue in *Martinez* is for the courts to apply the church autonomy doctrine to religious organizations in universities, leaving issues

[159] There are many significant case examples. *See, e.g.*, Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890); Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145, 162–63 (1878).

[160] *1 Timothy* 2:11–12 ("A woman should learn in quietness and full submission. I do not permit a woman to teach or to assume authority over a man; she must be quiet."). This is one verse that provides the basis for such discrimination in mainline Christian denominations. *See, e.g.*, Zelda Caldwell, *Pope Francis Explains to America Magazine Why Women Cannot Be Ordained Priests*, THE CATH. TEL. (Nov. 28, 2022), https://www.thecatholictelegraph.com/pope-francis-explains-to-america-magazine [https://perma.cc/S8HF-WYWA].

[161] THE ROLLING STONES, *You Can't Always Get What You Want*, on *Let it Bleed* (London Recs., July 4, 1969).

[162] For example, women are ordained in the United Methodist Church. *See Timeline of Women in Methodism*, UNITED METHODIST COMMC'NS, https://www.umc.org/en/content/timeline-of-women-in-methodism [https://perma.cc/K9QF-MC3W] (last visited Feb. 24, 2025).

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of their governance up to the organizations themselves. The proper path forward is to allow religious organizations to properly exercise religious and associational rights, while limiting the possible infringement on other categories of discrimination that go beyond doctrinal issues. Such an application could still fit into an "all-comers" welcome university policy, while simply providing an exemption for religious organizations, or it could undo *Martinez* completely in favor of free association. This Note concluded with a call for the Court to overturn *Martinez* and allow courts to apply the church autonomy doctrine to student organizational governance and allow religious student organizations to operate within the forum with an ability to dictate certain aspects of its membership and leadership composition.

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