Christian Legal Society v. Martinez: Six Frames

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On an historic last day of the 2009 Term, the Supreme Court bid farewell to Justice John Paul Stevens, incorporated the Second Amendment into the Fourteenth Amendment,[1] and announced its decision in *Christian Legal Society v. Martinez*,[2] a challenge to the University of California, Hastings College of the Law's ("Hastings") nondiscrimination policy for official Registered Student Organizations ("RSOs").

Justice Ruth Bader Ginsburg authored the majority opinion in *Martinez*, in which the determinative analytical moves were to treat this case as a government "carrot" case, not a regulation "stick" case, and to apply the test used for a limited public forum to the RSO program.[3] Under the latter test, conditions on access are permissible if they are "reasonable" and "viewpoint-neutral."[4] And, under the "carrot" line of cases, government likewise has the right to condition benefits on compliance with "reasonable" and "viewpoint-neutral" rules.[5]

The majority's determinative factual move was to assume that the nondiscrimination condition was an "all-comers" policy—that is, all student organizations had to admit all students who wished to

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1. McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

2. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010).

3. *Id.* at 2986.

4. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

5. *See infra* text accompanying notes 147–98.

join—as the parties had stipulated.[6] According to Justice Ginsburg, Hastings had a significant interest in preserving diversity and prohibiting discrimination when its name and resources were involved.[7] The "all-comers" policy was a reasonable and viewpoint-neutral means of advancing those goals.

Justice Samuel Alito argued in vigorous dissent that the case was only remotely a government subsidy case,[8] that the Court's ruling dealt a serious blow to the First Amendment,[9] and that the result was hostile to the purported university interest in diverse viewpoints.[10] He believed that the case should have been controlled by *Healy v. James*, in which the Court struck down the exclusion of a chapter of the Students for a Democratic Society ("SDS") from a public university campus.[11] In his view, the principle that actually drove the outcome was that there is "no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning."[12]

The tension between the majority and dissenting opinions highlights a deep and abiding conundrum within the applicable doctrine. Case law strongly supports the government's power to condition access to its benefits, property, and imprimatur in content-specific,[13] even viewpoint-specific ways.[14] Indeed, some cases impose an affirmative duty on the government to prevent use of its resources to promote certain ends—most notably ends that violate the Equal Protection Clause or the Establishment Clause.[15] At some point, the Court has stated, government subsidies or other support of private actors can become government entanglement with private activities that constitutes state action.[16] To avoid attribution of private

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

7. *Id.* at 2989.

8. *Id.* at 3007 (Alito, J., dissenting).

9. *Id.* at 3020.

10. *Id.* at 3016–17.

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

12. *Martinez*, 130 S. Ct. at 3000 (Alito, J., dissenting).

13. *See, e.g.*, Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006); Rust v. Sullivan, 500 U.S. 173 (1991).

14. *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194 (2003) (plurality opinion); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

15. *See, e.g.*, Norwood v. Harrison, 413 U.S. 455 (1973); *see also infra* text accompanying notes 70–78, 88–98.

16. *See, e.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Dennis v. Sparks, 449 U.S. 24 (1980); *Norwood*, 413 U.S. 455; Reitman v. Mulkey, 387 U.S. 369

purposes to itself, the government must effect a certain distance from the private actors. More generally, however, government has wide discretion to dictate how its resources and property are used, as necessary to promote substantive, non-neutral government ends. To hold otherwise would be to interfere with the coordinate branches' and state authorities' undeniable ability to set policy and enforce common goals, not to mention perform the wide range of activities that fall under the big tent of government functions—all without close judicial supervision or second-guessing.

Yet the case law also demands—occasionally—that conditions on government resources and property not arbitrarily fence out applicants where their exclusion appears to be, or is discriminatory or unduly burdensome.[17] The government's spending power is not a license to twist recipients' messages unreasonably, invade their autonomy unduly, or compel them to cede basic liberties in exchange for government support where it is not necessary to do so to promote government ends. The purse strings power also should be exercised in a sensible and proportional manner—conditions should be germane and not veer off the government programmatic mark. And government property often is not exclusively held by government for "its" purposes; indeed, the pronoun "it" is a misleading one when applied to "our" government programs and resources. The sense of government property as "ours" is most pronounced when it has forum features, and when access is requested for expression, not conduct or other purposes. Recognizing this, the Court has developed sophisticated, even Byzantine, constitutional brakes on government control over its property, programs, and grants that are particularly visible in First Amendment cases.

As we shall see, however, the Court *rarely* applies these brakes itself; rather, it allows the government actors to police these constitutional boundaries.[18] The cases in which the Court does intervene are very much the exception, not the rule. They typically deal with rules that have been applied in an uneven manner, within a category of activities that the government already has allowed for

(1967); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); *cf.* Moose Lodge v. Irvis, 407 U.S. 163 (1972). *But see* Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (mere fact that government subsidizes private conduct does not make it "state action").

17. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Healy v. James, 408 U.S. 169 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); *see also infra* text accompanying notes 145–98.

18. *Id.*

others. In recent years, they also have offered religious actors, in particular, judicial protection.

Choosing between these two basic threads always has been controversial: One person's worthy government end is another person's unconstitutional condition. The haziness of the distinction between these competing characterizations of conditions on access to government resources and government imprimatur led inexorably to the doctrinal faceoff revealed in *Christian Legal Society v. Martinez*. Given the factual peculiarities of the case, and given the pervasiveness of the "unconstitutional conditions" problem, *Martinez* is hardly the final word on this subject. Nevertheless, the case is an important one, especially for what it did *not* do.

Martinez also underscores an ever-important selective indifference problem.[19] Those with acute sensitivity to the coercive or dignity-dismissive aspects of subsidy or access conditions as they relate to religious groups were well-represented. They argued that Hastings had engaged in discriminatory behavior against Christian Legal Society ("CLS"): Not only by applying the policy in an unfair manner, but also by failing to accommodate its beliefs and make exceptions for its conduct. At least in part, its argument was that even neutral rules can impose wildly disproportionate burdens that deserve a second constitutional look.

In other words, special treatment—an exemption from the general rules—was necessary to place CLS on equal footing with other student groups, in terms of freedom of expressive association and identity. Taking individual freedoms seriously, they insist, requires leavening the weight of rules that fall this unevenly. The irony, of course, is that the same argument so often has been made by members of other minority groups—including gay groups—to compel closer judicial scrutiny of ostensibly neutral government policies and practices that impose disproportionate burdens on some citizens or groups (e.g., nobody can marry someone of the same sex; nobody can ingest peyote; nobody can wear a yarmulke or other nonconforming headgear in the military). In most cases, however, the constitutional answer is a harsh one: Equal treatment, not equal outcomes, is the constitutional standard, even when equal treatment means grossly disproportionate consequences.[20] Absent a showing of intent to

19. *See* Paul Brest, *The Supreme Court, 1975 Term–Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8 (1976).

20. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (absent showing of intent to discriminate, rational basis test applies in Equal Protection cases); Emp't Div., Dep't of

create the discriminatory burden, the government typically need only have a reasonable basis for adopting the rule in question.[21] Nothing about *Martinez* altered this constitutional baseline, even though CLS made an especially appealing argument against its application here.

In this essay, I locate *Christian Legal Services v. Martinez* within this wider doctrinal landscape, and show that the Court must choose among several analytical frames whenever it analyzes a condition on a government subsidy. The Court in *Martinez* identified two primary frames to choose from: "Carrots" versus "sticks." In fact, however, there were multiple frames implicated by the facts of the case,[22] each of which would have had a significant impact on the outcome. Some of these frames are best viewed through the lens of civil rights history, when the Court was more vigilant in policing government action that facilitated private discriminatory conduct.

I outline six possible frames for *Martinez*. Under four of these frames, the government decision to condition access to RSO status on compliance with a nondiscrimination clause was permissible. Under the first two of these four, the government arguably had no choice but to impose the condition.

Under the third and fourth frames, the government had the right to condition RSO status on compliance with its conditions, but was not *obliged* to impose the condition. Only under the final two frames was governmental power to impose the nondiscrimination conditions even arguably permissible. Under the fifth frame, the government

Human Res. of Oregon v. Smith, 494 U.S. 872 (1990) (a facially neutral law of general applicability can be applied against religious dissenters if the law is rational, subject to three exceptions).

21. One exception is a content-neutral rule that has a burden on speech, when the intermediate scrutiny test applies. *See, e.g.*, Clark v. Cmty. for Creative Nonviolence, 468 U.S. 288, 293 (1984) (outlining the three-part test for content-neutral time, place, and manner regulations). See also the exceptions outlined in *Employment Division v. Smith*, 494 U.S. 872 (1990).

22. A narrower way to tease out the different sides of approaching *Christian Legal Society v. Martinez* is by analyzing the case under the First Amendment public forum doctrine. Even this narrower frame leads to multiple "subframes" of analysis. The Court and the litigants restricted their inquiry to these frames. I argue, however, that public forum analysis merely is a free speech application of the more general problem of constitutionally permissible conditions on government benefits. The unconstitutional conditions on subsidies problem, in turn, is an application of the more general problem of when government support for private ends becomes state action. Thus it is useful to locate *Martinez* within a wider constitutional matrix. Doing so better reveals just how adventuresome the CLS request for exemption from the non-discrimination condition really was, as a matter of doctrine. *See infra* text accompanying notes 145–98.

conditions could be challenged facially or as applied, though as applied challenges stand a better chance of success.

Under the final frame, the government could impose the conditions as a general matter, but as applied to certain student organizations like CLS the conditions arguably could *not* be sustained; for these student organizations the burden of complying with the condition was constitutionally significant and may have entitled them to an exemption from the otherwise constitutional policy.

All six frames have in common the "attribution" question, which is derived from the state action frame. Indeed, this is the backdrop to all of the other frames, which likewise involve the question of whether private conduct that government seeks to control is reasonably *attributable to the government itself*. Once this often complex, highly contextual question is answered, the rest of the legal analysis falls into place, given the government's undeniable power to spend money, engage in speech, control property, and advance ends that are nonneutral, viewpoint-specific and even—in *these* senses—discriminatory. Only those who comply with the conditions are entitled to access.

The only remaining questions then become: (1) does the applicant *satisfy* the non-neutral conditions; and (2) are the non-neutral ends beyond government regulatory power for some *other* reason? In other words, a search for government "neutrality" in defining its programs, its property, or its grant conditions usually is a red herring, as is a search for the size of the burden imposed by a government condition. Government is never truly neutral when it allocates resources. The first step in a government fund/forum case always involves a government decision to create and define the parameters of a program, a step that clearly is attributable to the government and is inherently nonneutral. In this respect, the concurring opinion of departing Justice Stevens was spot on. A demand that government rules be "neutral" only comes into play at the second step: Allocation of benefits or access among applicants who satisfy the program/forum criteria.

The state action frame also illuminates concerns about government "passive participation." The Court in recent decades has tailored the state action doctrine very narrowly, such that very few government programs that involve private participants become "government action" per se. Yet lingering concerns about government entanglement with private discrimination still affect how

some government actors view their duties, and what conditions they are likely to place on public funds or fora—and rightly so.

State action analysis lifts to the foreground the many ways in which the status quo is not neutral, and why disparate impact still matters—even when it is not unconstitutional. The selective indifference problem identified above is particularly vivid when government action and government inaction are viewed through this lens.

Finally, I argue that conditions on access to government and funding generally should be analyzed through one set of criteria, rather than through separate tests. First Amendment cases like *Martinez* should be reconciled with other cases that involve arguably unconstitutional burdens on access to government benefits so that the common concerns about government responsibility—or lack thereof—for private parties' actions can be viewed in a wider context, not just in fact-intensive isolation, and more coherent standards might emerge. I identify eight "conditions on conditions" that govern all such cases, and suggest that courts apply these factors to determine whether the conditions past constitutional muster. One of these criteria speaks directly to government's legitimate concern about an appearance of government endorsement, even when applicable case law would not hold it legally responsible for a private party's actions. *Martinez* is an excellent case to see why this criterion is important to government officials' ability to provide support to private parties without risking complicity in their diverse, discriminatory ends.

I. *Christian Legal Society v. Martinez*

Hastings, a public law school, extended official recognition to law student groups through its RSO program. The conditions of RSO status included the following:

- Noncommercial organization;
- Membership limited to Hastings students;
- Submission of bylaws to Hastings for approval;
- Execution of a license agreement, if the organization intends to use the Hastings name or logo;
- Compliance with Hastings's "Policies and Regulations Applying to College Activities, Organizations and Students;"
- Compliance with Hastings's Policy on Nondiscrimination.[23]

23. *Martinez*, 130 S. Ct. at 2979.

The condition that prompted the lawsuit was the Policy on Nondiscrimination ("Policy"), which provided 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 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.[24]

Hastings interpreted the Policy to mandate acceptance of all comers: "School-approved groups must 'allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs.'"[25]

CLS sought an exemption from the Policy and was denied. According to CLS, its bylaws require all members to sign a "Statement of Faith" pledging to conduct their lives in accordance with its principles.[26] Among the tenets is that sexual activity should not occur outside of marriage between a man and a woman, which would exclude from affiliation anyone who engages in "unrepentant" fornication or homosexual conduct.[27] In addition, students whose religious beliefs differ from the Statement of Faith cannot become members of CLS.

CLS believed that the Hastings nondiscrimination policy was unconstitutional, and brought suit alleging that Hastings's refusal to grant it RSO status violated its First and Fourteenth Amendment rights to free speech, freedom of expressive association, and free exercise of religion. Hastings countered that the nondiscrimination condition on access to RSO status was reasonable and viewpoint-neutral, and thus within its right to impose on all RSOs. It noted that CLS could still meet on campus, and had been allowed other forms of

24. *Id.*

25. *Id.*

26. *Id.* at 2980.

27. *Id.*

access, but it was not entitled to the benefits of official RSO status, i.e., use of school funds, channels of communication, and school name and logo.[28]

A central factual question in the case was whether the Policy *as written* was applied to the student chapter of CLS, or if the Policy *as interpreted* was applied to the group. In Part II of the majority opinion, Justice Ginsburg noted that the parties had stipulated below that the Policy was an "all-comers" policy, and that the Court would not second-guess that stipulation.[29] Whether this was in fact the Hastings policy (and if so, when it took effect), whether Hastings faithfully applied this policy across-the-board, and whether the terms of the stipulation between the parties was as the majority described them all were strongly denied by the dissent.[30] Justice Alito concluded that the parties had stipulated that CLS was denied RSO status because it did not comply with the *written* Policy, not an "all-comers" policy.[31] Justice Alito also pointed to evidence that the "all-comers" policy "was announced as a pretext to justify viewpoint discrimination."[32] As he read the record, Hastings did allow other student groups to select officers and members based on beliefs and ideals: "Only religious groups were required to admit students who did not share their views."[33] Under this construction of the facts, viewpoint discrimination plainly occurred.

The dissent also disagreed about the evidence regarding the burden on CLS. Justice Ginsburg emphasized the ways in which CLS still enjoyed access to campus, and how the organization continued to flourish.[34] Justice Alito regarded these conclusions as "quite amazing"[35] and pointed to other evidence that in his view

28. *Id.* at 2981.

29. *Id.* at 2984.

30. *Id.* at 3001 (Alito, J., dissenting).

31. *Id.* at 3005. He also noted that Hastings admitted in its answer that it did not follow an "all-comers" policy; instead, it "allowed 'political, social, and cultural organizations to select officers and members who are dedicated to a particular set of ideals or beliefs.'" *Id.* at 3003.

32. *Id.* at 3001 (arguing that "[o]verwhelming evidence . . . shows that Hastings denied CLS's application pursuant to the Nondiscrimination Policy and that the accept-all-comers policy was nowhere to be found until it was mentioned by a former dean in a deposition taken well after this case began").

33. *Id.* at 3010. On remand, the Ninth Circuit concluded that the issue of whether the policy was a "pretext" was not presented by CLS. *See* Christian Legal Soc'y v. Wu, 626 F.3d 483 (9th Cir. 2010).

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

35. *Id.* at 3006 (Alito, J., dissenting).

substantiated CLS's claim that denial of RSO status was a significant burden. Moreover, CLS is an expressive association that exists primarily, if not exclusively, to advance particular ideas. To require it to yield to conditions that subvert its message and associational cohesion was beyond coercive; CLS characterized it as "absurd." [36]

Although the dissent thought that *Healy v. James* was "largely controlling,"[37] it did engage the majority on the doctrinal point of whether the Hastings policy was a permissible regulation in a limited public forum. *Either way*, the dissent concluded, denial of RSO status to CLS was unconstitutional given the evidence of discriminatory application of the Policy.

Finally, Justice Alito believed that "funding plays a very small role in this case. Most of what CLS sought and was denied—such as permission to set up a table on the law school patio—would have been virtually cost free. If every such activity is regarded as a matter of funding, the First Amendment rights of students at public universities will be at the mercy of the administration."[38] In other words, this was not a carrot case but a forum case—and one in which the access barrier was neither reasonable nor viewpoint neutral.[39]

Given these factual disputes, the provenance of the case may be fairly limited. Only Justice Stevens made clear in his concurring

36. *Id.* at 2992 (majority opinion) (quoting Brief for Petitioner at 49 Christian Legal Soc., v. Martinez, 130 S. Ct. 2971 (No. 08-1371)).

37. *Id.* at 3009 (Alito, J., dissenting).

38. *Id.* at 3007. Alito's view of the scant import of funding shored up his conclusion that this case was virtually indistinguishable from *Healy v. James*, 408 U.S. 169 (1972), in which the Court struck down on First Amendment grounds a public college's refusal to recognize a local chapter of the Students for a Democratic Society. He noted that he saw "only two possible distinctions between *Healy* and the present case. The first is that *Healy* did not involve any funding, but . . . funding plays only a small part in this case. And if *Healy* would otherwise prevent Hastings from refusing to register CLS, I see no good reason why the potential availability of funding should enable Hastings to deny all of the other rights that go with registration. This leaves just one way of distinguishing *Healy*: the identity of the student group." *Martinez*, 130 S. Ct. at 3008 (Alito, J., dissenting).

39. In fact, one can argue this is not literally a "government funding" case for another reason: the source of the funds distributed to the student organizations was derived from student fees. CLS thus had a stronger claim to "its" share of that pie than might be the case when general tax funds are the source of program funding. The Court in *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), dealt with a related issue of whether a student could challenge a mandatory student fee that went to support a variety of student organizations, some of which engaged in political or ideological advocacy. The Court rejected the students' argument that this fee constituted a form of "compelled affirmation" of ideas with which the students' disagreed. As long as the funds were distributed equally among the student groups on a viewpoint-neutral basis, the students could not claim a violation of their First Amendment rights.

opinion that he believed Hastings had power to impose the Policy as written, as well as construed.[40] Justice Ginsburg did not reach this question. Justice Anthony Kennedy also wrote a concurring opinion, in which he noted that "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," this would be a different case.[41] But he regarded the Policy *as construed* as a reasonable way to advance professional education and a culture of deliberation. A majority of the Court thus upheld an "all-comers" policy if and only if is not a pretext for discrimination on the basis of viewpoint.

Whether the Policy *as written* was a legitimate condition on RSO status or on receipt of other government benefits therefore remains unclear. Moreover, five justices upheld the Policy on the assumption that this was a subsidy case, in which a key aspect of government power to impose the nondiscrimination conditions on the student groups hinged on government power over "carrots," not "sticks."[42] Consequently, the case sheds little light on the limits of direct government regulatory power to prohibit discrimination by private parties.

Nevertheless, all of the justices conceded that the government *can* condition access to its property and resources on a demand that parties observe nondiscrimination rules, provided the rules are "reasonable" and "viewpoint neutral." "Reasonableness" does not mean most reasonable or even advisable, according to Justice Ginsburg.[43] "Viewpoint neutrality" means conditions that are "*justified* without reference to the content [or viewpoint] of the regulated *speech*."[44] That is, the nondiscrimination rules must target *the act* of rejecting others, not the *reasons* for rejecting them.[45] Finally, the application of these rules must be even-handed.

When these conditions are satisfied, exemptions to nondiscrimination conditions usually need not be granted as a matter of constitutional law, regardless of the burden on an affected

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

41. *Id.* at 3000 (Kennedy, J., concurring). He also thought the case would be different "if there were a showing that in a particular case the purpose or effect of the policy was to stifle speech or make it ineffective." *Id.*

42. *Id.* at 2986 (majority opinion).

43. *Id.* at 2992.

44. *Id.* at 2994 (emphasis added) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

45. *Id.*

individual or group. Although it helps if the individual or group has alternative avenues of expression and association, the government is not obliged to create or fund these alternative avenues.

The three cases that the Court considered most pertinent to the constitutional issues and the facts of *Martinez* were *Healy v. James*,[46] *Rosenberger v. Rector & Visitors of University of Virginia*,[47] and *Widmar v. Vincent*.[48] All three dealt with public universities and access claims by student groups.[49] All three were, according to the majority, distinguishable on the ground that the public schools in these cases singled out the student groups for adverse treatment; benefits were withheld because of their viewpoints.[50]

In *Martinez*, in contrast, CLS was not singled out for adverse treatment because of its religious views. Rather, it was denied RSO status and benefits because of its failure to comply with an across-the-board, "neutral" rule that required all student groups to admit "all comers." The majority viewed the nondiscrimination rule as reasonable, given the educational context in which the rule was adopted. Although the school was entitled to no deference on the question of whether it exceeded constitutional bounds, it was entitled to deference on the point of whether its chosen pedagogical approach was sound.[51] Thus the Court respected the following justifications offered by Hastings for the "all-comers" policy: It "'ensures that the leadership, educational, and social opportunities afforded by the [RSOs] are available to all students;'" it allows Hastings to avoid an inquiry into an RSO's motivation for excluding a member; it encourages tolerance of diverse backgrounds; and it reflects state law antidiscrimination values and thus prevents diversion of state monies and benefits to ends that conflicted with state policy.[52]

Justice Ginsburg noted with approval that Hastings had offered CLS alternative channels of communication. Again, she did not assert that the school itself had to provide these alternatives, but noted that in speech cases the availability of alternative avenues of expression is part of the burden analysis. The student group was allowed access to school facilities for meetings, and was otherwise

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

47. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

48. Widmar v. Vincent, 454 U.S. 263 (1981).

49. *See infra* text accompanying notes 147–50, 158–66.

50. *Martinez*, 130 S. Ct. at 2993.

51. *Id.* at 2988–89.

52. *Id.* at 2989–90.

able to congregate and communicate with fellow students on campus, outside of official channels.[53] Like other private student affinity groups—e.g., fraternities and sororities—CLS thus had vehicles for reaching like-minded Hastings students.

That Hastings might have adopted another rule—one that accommodated religious groups and allowed them to set membership rules based on adherence to their tenets—did not doom the Policy. In Justice Ginsburg's words, "the *advisability* of Hastings' policy does not control its *permissibility*."[54] The risk that student saboteurs might infiltrate student groups to subvert the groups' messages was more conjectural than real, and could be dealt with by Hastings were it to materialize:[55] "A reasonable policy need not anticipate and preemptively close off every opportunity for avoidance or manipulation."[56]

The heart of the matter, of course, was that religionists were obliged to forego their religious identity in order to obtain RSO status. They were not allowed to favor coreligionists or expect members to adhere to their tenets if they wanted to receive status and benefits. In short, they could not *be* CLS and also comply with the RSO condition. They believed that the link between expressive association and group identity was stronger than a garden variety freedom of expression claim. Indeed, it was so strong that Hastings should have been required to allow CLS—and other affinity groups with similar concerns—to associate around its ideas without losing these particular government benefits and this form of equal forum access.

The majority's response to this burden on CLS was that "[e]xclusion . . . has two sides. Hastings, caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership."[57] Such a policy also is viewpoint-neutral, because it requires that *all* groups accept *all* comers.[58] That the burden it

53. *Id.* at 2991.

54. *Id.* at 2992.

55. *Id.*

56. *Id.* at 2993.

57. *Id.*

58. *Id.* at 2993–94; *cf.* Wisconsin v. Mitchell, 508 U.S. 476 (1993) (unanimously upholding law that imposed greater punishments for bias-motivated crimes, on the ground that penalty enhancements were directed at conduct, not speech).

imposes falls more heavily on some groups than others does not render it viewpoint-specific.[59] The *justification* for the Policy—preventing the act of exclusion—was content and viewpoint neutral.[60] Again, it was directed at *conduct*, not speech.[61]

The majority saw nothing in the Court's freedom of expressive association cases that required a different analysis or result. For one thing, the relevant expressive association cases involved government regulatory, not purse strings, power—i.e., whether a private association could be compelled to accept someone as a member of the association where his or her presence would undermine the expressive association's self-proclaimed message, when the association sought no government benefits or imprimatur.[62] These cases require—at least in theory—that the government have a compelling interest, unrelated to suppression of ideas, in forcing the association to accept such a member. Moreover, even a compelling interest will not suffice when it might be advanced by significantly less restrictive means.[63] In the most recent such case, *Boy Scouts of America v. Dale*, the Court did not consider the government interest in nondiscrimination to be a sufficiently compelling reason to require the Boy Scouts to accept an openly gay person as a scoutmaster.[64]

Where, however, the association is allowed to exist in its preferred form but seeks greater access to a limited government forum or to government benefits, *without* complying with its conditions, there is no reason to treat its access request any differently than any other applicant's. In the majority's view, "speech and expressive-association rights are closely linked" and "[w]hen these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association."[65] In fact, if the government were required to exempt expressive associations from its conditions on access, this would defeat the very point of limited

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

60. *Id.*

61. *Id.*

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

63. *Dale*, 530 U.S. at 648–49.

64. *Id*.

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

access forums. The definition of such forums is that they are restricted by the government to topics or categories of speakers.[66]

Framed in *this* way, *Martinez* actually was, as Justice Stevens observed, quite straightforward. Whether the Policy was an "all-comers" policy, or one that defined categories of unlawful discrimination, it was a legitimate exercise of government power.[67] This was not a regulatory case, but a subsidy case. It was not about suppression of speech, but suppression of the *act of exclusion*. And this was not an "open commons" that the school happened to maintain; it was a "mechanism through which Hastings confers certain benefits and pursues certain aspects of its educational mission. . . . [A] university must treat all participants evenhandedly. But [it] need not remain neutral—indeed it could not remain neutral—in determining which goals the program will serve and which rules are best suited to facilitate those goals."[68]

As I will show, however, each of these assumptions was debatable. Even if one ignores the problematic and contested factual record, this was a sticky matter. One way of seeing this is to examine the narrow legal issues on which the parties focused. As the split within the Court suggests, the applicable case law does point two ways in terms of whether nondiscrimination conditions on funding can be applied to private associations whose tenets require them to discriminate.[69] Though the clearer path is the one the Court followed, the outcome in *Martinez* was not easy to predict even within this narrow framing of the case. Conditions on benefits and fora do *not* differ as sharply from direct regulation of private conduct as the "carrots versus sticks" dichotomy implies. Nor do conditions on benefits and conditions on fora differ as sharply as the dissent's "funding-plays-a-small-role" point implies. But when all agree—as they did in *Martinez*—that the case involves a limited public forum, then exclusion for failure to adhere to a point-of-view about sexuality becomes very problematic. One can label this a "conduct" versus "speech" regulation, but the line between these two categories is

66. *Id.*

67. *Id.* at 2995 (Stevens, J., concurring).

68. *Id.* at 2998.

69. The best piece of scholarship to analyze these issues is Eugene Volokh's impressive article, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919 (2006). He concludes that government may limit its subsidies to groups that do not discriminate on the basis of religion, sexual orientation, race, gender, ethnicity, and similar factors and argues that nondiscrimination rules are content neutral, provided they are applied even-handedly against all groups that violate the policy.

likewise blurry, and the bottom line here was that CLS was excluded because it required the *act of professing a belief*.

The fuzziness of all of these lines is generally understood and is not my primary focus here. Rather, my goal is to outline other frames of analysis that the Court ignored and that might have made the admittedly complex question of whether government nondiscrimination conditions on RSO status are constitutional somewhat easier to parse. In particular, viewing *Martinez* through the state action lens is helpful in seeing why "neutrality" is an incomplete—often misleading—measure of whether access conditions on government benefits or on access to a forum is constitutional. A much more important question, in terms of the judicial outcome, is whether the activity in question can reasonably be attributed to the government itself. The stronger the link between the government and the ostensibly private activity in question, the weaker the claim becomes that a condition on private participation is unconstitutional. Even a link that is clearly not strong enough to satisfy the state action doctrine will be enough to justify government power to determine the conditions of private participation—in decidedly "non-neutral" and "viewpoint-specific" ways. This is *particularly* true when the private party seeks access to government funds or fora but wishes to exclude others in ways that jar nondiscrimination sensibilities.

When the nature of the private discrimination is still socially pervasive—which tends to be true when a civil rights principle has not yet matured into more general public and private acceptance—then government must be even more cautious about allowing private parties to deploy public resources to further their private expressive and associational ends. The risk and the impact of "passive participation" by government are potentially higher. Of course, government's decision to condition public resources on compliance with a "new" nondiscrimination principle often will evoke especially deep emotions because it unsettles more status quo expectations. Thus, it is with nondiscrimination conditions that prohibit (or have the effect of prohibiting) discrimination based on sexual orientation: The notion that private discrimination on this basis is wrong is still relatively fresh. This too was an aspect of *Martinez* that made the case such a difficult one.

II. Six Frames, Eight Conditions

Martinez could have been framed in multiple ways, each of which would have important effects on the outcome of the case. Some of

these frames are less doctrinally obvious than others, but all are plausible ways of looking at the matter under past or current constitutional analysis. Moreover, I argue that all of them affect, if only subliminally, the approach it takes in a conditional spending case.

A. Frame One: State Action

The first and most fundamental frame for *Martinez* involves the background principle that undergirds all constitutional liberty cases, though in many of them it is latent. The so-called state action doctrine holds that government action, not private action, violates the provisions of the Fourteenth Amendment[70] and that the Bill of Rights speaks expressly of limits on government, not private parties. The only Amendment that constrains private parties as well as the government is the Thirteenth Amendment.[71]

The difficult and abiding question, of course, is whether the impetus for allegedly unconstitutional conduct is official versus private. The issue is of vast significance given government's regulatory and subsidy reach into ostensibly private domains, and given the ways in which private entities exercise great power over matters of public concern, often with implicit if not explicit government support. Failure to prevent harmful private action is not, without more, government action that triggers constitutional rights.[72] But government inaction in the face of such harms is hardly uncontroversial.[73]

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70. The Civil Rights Cases, 109 U.S. 3 (1883). The state action doctrine also limits what Congress can do to eradicate private discrimination. The Court has held that congressional enforcement actions under Section 5 of the Fourteenth Amendment may not reach beyond state action. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000). Some members of the Court do agree, however, that government may act to prevent becoming a "passive participant" in private discrimination, though the contours of this zone of permissible government action are unclear. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

71. U.S. CONST. amend. XIII.

72. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 197 (1989) (noting that "a State's failure to protect an individual against private violence simply does not constitute a violation of the [Fourteenth Amendment's] Due Process Clause").

73. The rich literature on the state action doctrine has made clear how unstable the line is between private and government action, and how government inaction is problematic. *See, e.g.*, LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 57 (1996); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 341 (1993); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471 (1923). On the complexities and underlying incoherence of the doctrine of unconstitutional conditions itself, see generally

When government does more than stand idle, and affirmatively supports private action—through subsidies, provision of other benefits, or access to government property and forums—the balance may tip toward a finding of state action. Thus, government must avoid undue entanglement when a private actor receives government support and contravenes public policy or engages in activities that are inappropriate for government to undertake itself. One way in which government may seek to dissociate from private conduct with which it disagrees is to set conditions on funding that prevent diversion of its funds to these disfavored ends.

There is a great irony built into the relevant cases. On the one hand, they insist that government affirmatively detach from private conduct that would violate the Constitution were government itself to pursue it. On the other hand, they prevent government from making "content-based" or otherwise discriminatory distinctions among private actors, even when the private actors embrace and seek to foster views and behaviors that government deems ill-advised, illegal, or dangerous.

The collision between the two views is most visible in the First Amendment and Equal Protection arenas, where government is obliged to maintain access "neutrality" to its property, at least when the property is characterized as a public or even limited public forum. If government bars a private actor from access, then this may be a free speech violation. But if it grants access to property that is, or looks, "official," it may be deemed to be entangled with the private actor in ways that allow the message or discriminatory conduct to be attributed to government.

For example, in *Burton v. Wilmington Parking Authority*,[74] the Court held that a coffee shop located within a municipal parking structure was acting with sufficient government imprimatur to become a state actor when the restaurant lessee was "a physically and financially integral, and, indeed, indispensable part of the

Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1195–97 (1990) (discussing the analytical quagmire); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1298 (1984) (same); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1416 (1989) (same); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 594 (1990) (same).

74. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

[government's] plan to operate its project as a self-sustaining unit."[75] In contrast, where a private club received a state liquor license and was required to submit its bylaws to the state as a condition of receiving a liquor license, this was not enough to deem the private actor's racially discriminatory policies "state action."[76]

More to the point of attribution, in *Norwood v. Harrison*,[77] the Court unanimously held that provision of free textbooks to a private school that engaged in race discrimination constituted state action, noting that the "State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination."[78]

This is not to say that government is legally implicated in private discriminatory conduct simply by offering private actors funding or assistance of other kinds. On the other side of the ledger are many modern cases like *Rendell-Baker v. Kohn*, in which a private school received over ninety percent of its funding from the state yet was not, perforce, deemed to be a "state actor" when it fired one of its teachers.[79] To attribute the termination decision to the government required a stronger showing of government involvement in the specific conduct than its funding of the actor who made the decision.

The more the government seeks to control how the funding recipient behaves, however, the easier it is to attribute the actions of that private actor to the government. That is, the government makes the state action argument stronger, and increases its liability exposure by setting more specific and directive conditions on its funds. Yet as *Norwood* shows, it also risks liability when it does not condition access to its funds on compliance with nondiscrimination conditions.

The arc of the state action case law since the 1970s clearly points against a finding of state action as a consequence of funding alone. *Rendell-Baker*, not *Norwood*, is more reflective of the modern Court's approach. As applied to *Martinez*, this means that a litigant would be hard pressed to attribute to the university legal responsibility for a recognized student group's decision to exclude

75. *Id.* at 723–24.

76. Moose Lodge v. Irvis, 407 U.S. 163 (1972).

77. Norwood v. Harrison, 413 U.S. 455 (1973).

78. *Id.* at 467; *see also* Gilmore v. City of Montgomery, 417 U.S. 556 (1971) (government could not give exclusive use of public recreation facilities to private schools that discriminated on the basis of race).

79. Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

another student from its organization simply because the group received government benefits. However, when a student group flies the University flag, as it were, a *Burton*-type argument of symbiosis between the University and RSO becomes much stronger. Provision of space under the University's roof, funding, and use of the school logo and name make the analogy to *Burton* even more apt than it first appears.

In short, conditioning access to RSO status on compliance with a nondiscrimination policy arguably made constitutional, not just pedagogical, sense. Were the student group in question a white supremacist student organization, this argument may have been more obvious to the litigants and to the Court. Viewed in this way, the relevant question was not whether the student organization program constituted a "limited public forum," but whether recognized law student groups could reasonably be viewed as sufficiently entangled with Hastings, such that their exclusionary decisions could be deemed to be officially sanctioned. The nature of the forum affects this question, of course, but in a derivative way. The more open the forum, the less likely a finding of state entanglement or endorsement makes sense. The more strictly the government regulates the forum, the easier it is to declare the activities within it "official." In fact, when the activity in question is speech, at some point it becomes "government speech" and the forum feature falls away entirely.[80] When the activities are deemed to be officially sponsored and endorsed, then the only follow-up question is whether the government *itself* could exclude students from the activities on the basis of their adherence to CLS-type tenets.

In *Martinez*, these issues were elided. No party argued this as a state action case per se, and all parties apparently agreed that "Hastings, through its RSO program, established a limited public forum."[81] That is, they accepted the private nature of the student expression at issue. Although the majority cited *Norwood*, it did so for the proposition that simply because "'the Constitution may compel toleration of private discrimination in some circumstances

80. *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1131 (2009) (noting that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech"); *see also* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005). *See generally The Supreme Court, 2004 Term–Leading Cases: Government Speech Doctrine–Compelled Support for Agricultural Advertising*, 119 HARV. L. REV. 277, 278 (2005); *The Supreme Court, 2008 Term–Leading Cases: Freedom of Speech and Expression–Government Speech*, 123 HARV. L. REV. 232, 238 (2009).

81. *See Martinez*, 130 S. Ct. at 2984 n.12.

does not mean that it requires state support for such discrimination.'"[82] The Court did not consider the possibility that Hastings *had to* attach a nondiscrimination condition on RSO status, under the Constitution; rather, it was concerned primarily with whether it *could* do so.

Let me be clear: There is little doubt that the Court would have rejected the state action argument, had it been made cleanly. Again, the arc of the modern case law points away from a finding of entanglement in this case. But the Court seemed to sense that the state action question was relevant when it hinted at the Hobson's choice that Hastings faced, at the close of the majority opinion: "Exclusion," Ginsburg noted, "has two sides."[83] She realized that the school risked "endorsing" behavior—as a practical, if not a legal matter—no matter which way it moved. The school was involved in a way that it would not have been if no funding, no imprimatur, and no conditions were involved. One might respond that the large number and diversity of RSOs made imprimatur concerns weak, at best. Yet the Hastings name linked to discriminatory conduct is not a trivial matter, as the school's unwillingness to settle the dispute proves. This also was not a *pure* private action case or a "street corner" discourse case. Consequently, one frame for the case could have focused on *whose* decision it was to admit only coreligionist students to CLS.

The legal answer to this question is that the membership decision was not attributable to Hastings; correlatively, CLS was not a "state actor" for purposes of the Fourteenth Amendment, even as a recognized RSO. Hastings therefore was not constitutionally *required* to adopt the nondiscrimination policy. But asking the state action question clarifies a major subterranean anxiety within the case, even if the doctrinal answer is evident. The Hastings officials understood that silence here might be interpreted as complicity. They knew that no path was "neutral," or without potential attribution consequences. Seeing this dilemma would make a justice far more sympathetic to Hastings's decision to adopt the nondiscrimination policy—as written or as interpreted. The government's effort then more obviously becomes one of choosing *its* message, not punishing a student group's message. A declaration that something is not state action for purposes of the Constitution does not end the matter "on the ground." For the parties closest to the

82. *Id.* at 2986 (citing *Norwood*, 413 U.S. at 463).

83. *Id.* at 2993.

issues, granting space to a private party still may look like official endorsement, just as refusing to do so may look like official condemnation.

Likewise, many Establishment Clause cases hinge on whether religious speech or symbolism located on public property can likewise be attributed to the government, versus to a private speaker.[84] Government seeks to distance itself from religious messages in order to avoid being seen as endorsing any religious viewpoint. Rather than exclude religious actors altogether, government sometimes conditions access to government property or resources on compliance with rules designed to maintain the government's secular identity or to assure that the government is not entangled in specific religion-based decisions that government either cannot make, or wishes not to make. For example, in *Zelman v. Simmons-Harris*, the Court allowed state funds to flow to private religious schools, on the condition that the recipients not discriminate on the basis of religion in admissions decisions.[85] And in *Locke v. Davey*, the Court upheld the decision of the State of Washington to condition access to its Promise Scholarship Program on not using the funds to pursue a degree in devotional theology.[86] A different result in *Martinez* would have cast doubt on whether such conditions on state funds are constitutional. As I will explain, it also may have led to suspension of some government programs: If government cannot set nondiscrimination conditions it may feel compelled to withhold support altogether.

Although the Court does not analyze these religion cases under the state action umbrella, and instead deploys the Establishment Clause version of the "government endorsement" issue, the factual and legal inquiries are quite similar.[87] As applied to *Martinez*, the state action issue again would be whether the religious activities of CLS could be attributed to Hastings. If so, the Establishment Clause problem looms large. Though again, the likely—though not doctrinally inevitable—answer is that this was not government action and thus not an Establishment Clause violation.

84. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992).

85. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

86. Locke v. Davey, 540 U.S. 712 (2004).

87. Indeed, some argue that the state action doctrine is a better analytical route to follow in the religion cases, and would help to bring them into better alignment with equal protection and free speech cases. *See Developments in the Law–State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1280 (2010).

B. Frame Two: Government Establishment

A second frame for analyzing *Martinez* is as an Establishment Clause case. In other words, was Hastings *obliged* to impose the nondiscrimination condition in order to prevent a reasonable, educated observer from interpreting the activities of CLS as government endorsement of religion?

The overlap between the foregoing state action analysis and the Court's Establishment Clause analysis is significant, though usually unacknowledged. Both lines of cases examine the context of the private/public activity, the degree of government entanglement, the nature of government funding or other support, the nature of government regulation, and all other evidence of government responsibility for the ostensibly private conduct. Both lines of cases also reveal the Court's increasing unwillingness to find government action, even when a private party derives substantial support from government. Both lines of cases tend to divide the Court on ideological grounds, with the more conservative justices favoring a limited interpretation of government responsibility for private actors' conduct.

The Establishment Clause cases are more ornate, however, and have a distinctive historical, textual, and cultural cadence. Consequently, independent analysis of the government responsibility issue is necessary in cases that involve private actors engaged in religious activity with government financial or other support.

Martinez fits under two strands of these Establishment Clause cases. The first strand involves cases in which private religious speakers seek access to government forums but are denied. Whether the speakers have a right to such access depends on the nature of the government forum—is it a public forum, a limited public forum, or a nonpublic forum? It also depends on whether their presence on government property would lead a reasonable observer to think that the private speech was endorsed by government in impermissible ways.

In earlier times, the Establishment Clause barrier to government accommodation of religious speech was more formidable than it is today. Accordingly, many government actors drafted access rules that excluded religious activities in an effort to detach themselves from the appearance of endorsement of religion. This is the same problem identified above under the state action cases, where government risked constitutional liability if it did not exclude private discriminators from government subsidy programs, or attach

conditions to subsidies to prevent diversion of government support to discriminatory ends.

Yet if government overreads the risk of attribution and goes beyond what is constitutionally required to distance itself from private conduct, then an applicant may object that his or her exclusion from the government program itself is "discriminatory" or "viewpoint-specific." That is, as the government's constitutional defense to his or her participation grows weaker, the private party's access claim grows stronger.

The turning point in the religious speech arena was the 1981 case of *Widmar v. Vincent*.[88] In *Widmar*, a student religious group sought access to meeting room space on a public university campus. The university officials excluded the group from this forum, on the ground that it would violate the Establishment Clause to accommodate it. The Court rejected this constitutional defense, thereby opening the door to a successful equal access claim for the student group.[89]

Post-*Widmar*, the Court has extended its reasoning beyond the university context and upheld access claims more generally, including access to school grounds after formal school hours, where elementary level students are present.[90] Indeed, no Establishment Clause violation was found even when the religious activity on school grounds included singing of hymns and uttering of prayers while elementary level children were present.[91] The key was not the content of the speech in question; it was irrefutably religious. Rather, the key was whether the religious speech could be attributed to the government. The Court concluded that the speech would not be misunderstood as government endorsement, and held that where other groups were allowed access to the property for meetings and discussions, religious groups could not be denied the opportunity to meet and discuss similar themes from a religious perspective.

The proper test for this attribution inquiry, though, is contested. Some justices—though a dwindling number—have insisted on a wall between church and state that requires significant detachment. Others argue that strict separationism not only is not constitutionally

88. Widmar v. Vincent, 454 U.S. 263 (1981).

89. *Id.* at 277.

90. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

91. *Good News Club*, 533 U.S. 98, 111–12.

required; it is hostile to religion and itself unconstitutional.[92] Both sides claim to be preserving government "neutrality" vis-à-vis religious and nonreligious ideas and speakers.[93]

A minority of the current justices, however, would go farther and allow government to weigh in on the side of religion over irreligion—though not on a particular viewpoint among religions. In their view, strict government neutrality is not consistent with the history of religion in the United States.[94]

The second relevant strand of Establishment Clause cases involves government financial assistance and other benefits for religion. As the Court in *Martinez* observed, government subvention of private activities is different from government regulation of the same activities. In the case of religion, government financial support divides the justices and many citizens quite sharply. But again, the arc of the modern case law bends toward a significant easing of past restrictions on government benefits that reach religious destinations.[95] The current law clearly allows support that is secular in content, that is part of a more general program that serves a secular end, and that passes first through private hands that in turn direct it to religious ends.[96]

Even direct support of sectarian entities may be constitutional however, provided the government program is open to all who advance the government's secular goal, and if certain conditions are met that prevent divertibility of that secular support to religious indoctrination. This last caveat may soon fall as well, given Justice Sandra Day O'Connor's departure from the Court. She was willing to assume good faith on the part of religious actors that receive government funds and presume they would observe rules against diversion of the funds to sectarian ends—but, notably, she did worry about divertibility.[97] Her more conservative colleagues, in contrast, would uphold government programs even if funding flows directly to

92. *See* Toni M. Massaro, *Religious Freedom and "Accommodationist Neutrality": A Non-Neutral Critique*, 84 OR. L. Rev. 935 (2006) (outlining the internal division on the Court).

93. *Id.* at 944–45.

94. *See, e.g.*, McCreary Cnty. v. ACLU, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting) (noting that "governmental invocation of God is not an establishment").

95. *See* Massaro, *supra* note 92, at 963–64.

96. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

97. *See Mitchell*, 530 U.S. at 859–61 (O'Connor, J., concurring).

sectarian institutions, and even if it is divertible, as long as the government program itself is secular and the aid is secular in content.[98] If the religious entity satisfies the secular criteria for the government program, then it should be eligible for government funding. All signs are that Justice O'Connor's replacement on the Court—Justice Alito—will side with this emerging account of funding for religion conditions.

As applied to *Martinez*, the trends in the religion doctrine suggest that the religious nature of the student group in question did affect the dissenting justices, even though the case was not tried as an Establishment Clause case. A more pervasive apprehension about government hostility to religious actors likely influenced Justice Alito and his dissenting colleagues. Some of them would permit the government to be *nonneutral* when it comes to religion, at least at a general and nonsectarian level. Thus, even if the activities of CLS could have been attributed to Hastings, these justices likely would have been relatively unconcerned, as long as no other students were compelled to participate in the activities and all religious groups received similar treatment.

The dissenters viewed the RSO program as secular and of general applicability. That government money and other benefits of the program flowed to CLS and its sectarian ends would not, in their view, constitute an Establishment Clause problem. In fact, it would be an outcome that offered support for an organization that embraces ideals that deserve government respect. These justices are inclined to treat subsidies to religion no differently than provision of a public forum for religion. To them, money is not a special Establishment Clause problem and does not present a special peril—as long as the government support is directed to the secular aspect of the religious institution or activity. Most crucially, religion is *a point of view* within the universe of ideas, not a category of ideas that can be cordoned off when other viewpoints or expression on similar topics are included. Consequently, the exclusion of CLS students from the RSO program not only was unnecessary; it was almost certainly viewpoint-discriminatory, and part of a larger pattern of adverse treatment of religion in the public sphere. Government "neutrality" is "hostility" to religion when it is construed to mean denial of full participation in government programs—including government subsidy programs—for religious actors.

98. *See, e.g.*, *id.* at 820–21 (plurality opinion).

This helps to explain why the dissenting justices likely did not see the exclusion of CLS as in any way analogous to exclusion of a white supremacist student organization that refused to comply with the Policy, and also why they regarded exemption of this officially sanctioned religious group from more general nondiscrimination rules as constitutionally required, not just permissible.[99] The religious content of the student activity was, in their eyes, a *positive good* that the government had the right to affirmatively support.

This also may explain the irritation that the dissent displayed about distinguishing *Healy*. The Court in *Healy* stepped in to prevent exclusion of a left-wing student group; yet the Court in *Martinez* allowed the exclusion of the Christian student group. The difference in treatment, Justice Alito implied, signals a difference in judicial attitude toward the views expressed by the two student organizations, and further evidences judicial hostility to religion in particular. In his view, this is upside down: Religion is entitled to special solicitude, not special suspicion.

The justices who still view the separation of church and state as the best way to protect religious freedom, of course, see the matter quite differently. Their doubts about the Court's steady erosion of more robust Establishment Clause restrictions on government in general make them leerier of government endorsement problems than their colleagues are. They are more likely to view an "access-subject-to-nondiscrimination-condition" as a sensible way to juggle the now-*mandated* access of religious groups to limited public forums, with the government's desire to preserve its secular identity. In fact, they might consider such conditions to be *especiall*y critical when religious actors seek access. In short, SDS and CLS are not equally situated; only the latter group raises the specter of an Establishment Clause concern, if not a violation.

These justices become even more anxious about the recent erosion of Establishment Clause barriers when subsidies, not just forum access claims, are involved. The majority in *Martinez* likely understood that had it *not* upheld Hastings's decision to deny CLS's request for exemption, the case would have been cited as support for the view that similar exemptions from nondiscrimination conditions on government funding must be granted in other contexts as well.

99. There is one significant caveat to this observation. Where a law is of general, neutral application, Justice Scalia does not think that the Free Exercise Clause entitles a religious actor to an exemption. *See* Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

Justice Stevens in particular seemed to grasp this concept, and even Justice Alito seemed to sense it when he downplayed the funding feature of the decision.

All of the justices, including Justice Ginsburg, are quite sympathetic to exemption claims in contexts where exemptions promote religious autonomy without directly undermining the rights of others.[100] The so-called liberal wing is more skeptical of such claims, however, where the parties seek benefits minus a nondiscrimination condition that affects other citizens directly. In the latter scenario, the requests feel less like a demand for equal access or religious autonomy than a demand for *special treatment* that has the potential to wound others, with government support.[101] Special treatment here may enable others to sidestep equality mandates, which may undermine hard-won civil rights advances because nothing in the case law thus far offers a logical way to restrict special exemption treatment to religious actors alone. The cases involve the mantra of "neutral" treatment of ideas and expressive association. Religion often may be a compelling basis for an expressive autonomy exemption from general rules, but other associations that embrace discriminatory tenets also should qualify.

Finally, cases like *Martinez* touch on the acutely sensitive area of sexual orientation, where religious conservatives are most agitated about nondiscrimination mandates that intrude directly into their religious principles and practices, insofar as some religionists regard homosexuality as sinful or otherwise inconsistent with religious tenets. They now are countered by others who regard discrimination on the basis of sexual orientation as irrational in some contexts, if not all.[102] The former group strongly favors exemptions for religious

100. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); *cf.* Cutter v. Wilkinson, 544 U.S. 709 (2005) (unanimously upholding a federal law that allowed for exemptions from general rules where they impose a significant burden on institutionalized religious persons).

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

102. *See, e.g.*, Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010) (striking down section 3 of the Defense of Marriage Act as applied to same-sex couples, on the grounds that it was irrational); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (holding refusal to grant marriage licenses to same-sex couples violated Iowa Constitution because it lacked a legitimate state purpose). The issue of whether such discrimination is "irrational" also is central to the Proposition 8 litigation in California. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010). *See generally* Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45 (1996) (arguing for a rational basis approach to constitutional challenges of laws that discriminate on the basis of sexual orientation).

actors in order to restore "neutrality" and preserve equality for religious peoples; the latter favors newer civil rights laws that prohibit such discrimination to achieve "neutrality," and regard exemptions from these laws as hostile to equality, not religion. There is no obvious bridge between these dramatically opposing viewpoints.

Although the case law leans heavily against groups that insist on a constitutional right to exemption from nondiscrimination conditions on government benefits, the seeds for these adventuresome claims already have been sown. Indeed, this may be the most important reason why *Martinez* was such a hard case for the Court to resolve. The first important doctrinal piece of the CLS argument was the Court's holding that denying equal access to funding is unconstitutional where the denial can be characterized as "viewpoint-sensitive."[103] Once this step was taken, the exclusion of religious groups from funding became much harder to characterize as respect for religious pluralism or a legitimate exercise of government funding discretion. Instead, it looks more like an unconstitutional condition. Moreover, statutory measures like the Religious Land Use and Institutionalized Persons Act of 2000 lend legal and political force to claims for religion-based exclusions from general rules in particular.[104] That the Constitution no longer *prohibits* such solicitude for religious actors opens the door to once incomprehensible, but now quite plausible, claims that the Constitution *requires* such solicitude.[105]

In sum, none of the justices viewed the authorized presence of CLS as an Establishment Clause issue for Hastings. This is because the Clause has been construed in recent years to be a mere shadow of its former self. But the underlying tension between the older, strict separationist and the newer accommodationist accounts of the Clause likely has residual effects on the permissible contours of conditions on participation of religious speakers and actors, as does the residual tension between older state action cases and modern case law that construes state action much more narrowly.

It seems fair to say that the more one worries about the entwinement of church and state, the more sympathetic one will be to

103. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (requiring the University of Virginia to fund a campus religious magazine on equal terms with subsidization of other student publications).

104. 42 U.S.C. §§ 2000cc–2000cc-5 (2000) (amending 42 U.S.C. §§ 2000bb-2–2000bb-3 (1994)). The Court upheld this measure against a facial challenge in *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

105. *Cutter*, 544 U.S. at 719.

nondiscrimination conditions on access and funding. Likewise, the more one worries about the entanglement of government with private discrimination, the more one will favor nondiscrimination conditions on access and funding. Don't like the nondiscrimination conditions? Then don't take the money, and find another place to congregate. This may sound harsh (it *is* harsh), but so is allowing government to buoy actors who advance decidedly unequal, illiberal ends without requiring that they observe common norms. Liberating these actors from common rules is not necessarily a liberal or libertarian good. It depends, of course, on what they are doing with the government support. Allowing government to condition access to its support on common norms likewise is not necessarily a liberal or libertarian good. It depends on the conditions that government imposes.

The matter, though, should not be viewed exclusively from the perspective of the private party constrained by the condition. One also must consider how that private party constrains others. The doctrinal assumption that only the government can violate constitutional rights—and only when it acts affirmatively—never has persuaded everyone, particularly when the private party engages in race- or caste-based discrimination, or when the private party is engaged in explicitly sectarian activities. The state action and Establishment Clause cases remind us of this abiding concern about government participation in private affairs and offer important insight into the Hastings decision to impose its nondiscrimination claims.

C. Frame Three: Government Speech

As indicated above, the more the government asserts control over the content of a funded program or private speaker, the more it becomes responsible for the conduct and content produced.[106] At some point, the government "owns" the message. Once again, the key issue for the government is attribution. In fact, the so-called government speech doctrine is best understood as a freedom of speech riff on the more general state action theme identified above.

The most recent case to address this issue in the context of freedom of expression was *Pleasant Grove City v. Summum*.[107] In

106. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991). A related issue, though one not implicated by the facts of *Martinez*, is whether government property is not dedicated to private expressive purposes *at all*, or is a "forum" of some kind—public, designated, limited—as to which *some* private actors have *some* claim of access. All of the parties agreed that the RSO program anticipated some access by private student actors.

107. Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009).

Summum, a religious group requested permission to place a monument bearing its "Seven Aphorisms" in a public park, where other monuments already were erected.[108] The Court upheld the city's refusal to grant this permission, on the ground that the permanent monuments in the park were a "form of government speech."[109] This characterization of the monuments was dispositive of the freedom of speech access claim: "[T]he government may adopt whatever message it chooses—subject, of course, to other constitutional constraints, such as those embodied in the Establishment Clause—and need not alter its speech to accommodate the views of private parties."[110]

This is one end of the wide spectrum of speech on government property. On the other end is a private speaker in a quintessential public forum, who is free to express even heretical or seditionist political views, short of an imminent disruption or other illegal act[111] and subject to reasonable time, manner, and place restrictions.[112]

Martinez fell into the grey zone between these First Amendment poles, and was not easily charted. It is clear that none of the justices regarded the speech of CLS as "government speech" for purposes of First Amendment analysis—for many of the same reasons why they did not see a significant "state action" or Establishment Clause problem. Less clear is why the justices do not analyze these three ways of framing a condition on funding or access case—state action, Establishment Clause, government speech—together, given their substantial analytical and factual overlap. In any event, all three frames point in the same direction—here, and in most other cases. In the case of *Martinez*, these conclusions were: No state action, no establishment, and no government speech.

But older case law—which has not been overruled—suggests that these conclusions were not inevitable. These backdrop cases cast shadows over the modern doctrine, just as older Commerce Clause, economic substantive due process, and Tenth Amendment cases still hover over other regions of constitutional law doctrine. In the right

108. *Id.* at 1130.

109. *Id.* at 1129.

110. *Id.*

111. *See* Brandenburg v. Ohio, 395 U.S. 444, 447–81 (1969).

112. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 719, 725–26 (2000); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Clark v. Cmty. for Creative Nonviolence, 468 U.S. 288, 293 (1984); United States v. Grace, 461 U.S. 171, 177 (1983); Cox v. New Hampshire, 312 U.S. 569, 576 (1941).

case, in the right context, with the right Court composition, the thinking that governs in these older, recessive cases can become dominant—if only implicitly—and outcomes in close cases can shift in ways that do not require overruling any case outright. In other words, nagging doubts about relieving the government of constitutional responsibility for so much private discrimination, and about allowing quite significant government involvement in religion, may cause some justices to uphold modern nondiscrimination conditions on government funds and favors. It also may cause conscientious government actors to take affirmative steps to distance themselves from private speech or conduct, even when the law does not require them to do so.

So it may have been here.

D. Frame Four: Government 'Play in the Joints'

Private speech or conduct can become government speech or conduct—the problem identified in the foregoing three frames. Yet, private speech or conduct often can be accommodated by government, without substantial risk of attribution to the government, given the Court's narrow construction of "state action" within the above three frames. This wide zone may be described as the "play in the joints" zone, where government need not, but often does, allow private access to its property or resources.

The shrinking of the first foregoing frames expands this government policy elbow room. Likewise, the shrinking of Frames Five and Six—which define limits on government power to exclude private parties from its programs—expands the zone of government discretion. Both moves allow government to make access decisions without worrying unduly about a colorable constitutional claim. The middle ground is determined by the Court's definition of the scope of the surrounding territory.

In *Martinez*, the majority located the Hastings RSO policy in the middle ground. Government could create the RSO student program in question, but it did not have to do so. Government could condition access on compliance with a nondiscrimination condition, but it did not have to do so. It could draft an "all-comers" nondiscrimination condition, but it did not have to do so. It could have exempted religious groups (and, presumably, other affinity groups that satisfied similar conditions with respect to the burden on their expressive association autonomy) from an "all-comers" nondiscrimination condition, but it did not have to do so.

In short, accommodating the dissenting student groups would not have been impermissible endorsement of their ends/views, and failure to accommodate the dissenting student groups was not impermissible discrimination against their ends/views. How to navigate between these options was a matter of government discretion, not a constitutional imperative.

What hinges on the Court's definition of this "play in the joints?" *An enormous amount*, given the staggering array of contexts in which the government manages property, programs, and resources with the presence and participation of private parties. To argue that government's managerial discretion over these contexts should be superintended by the courts is to put the proverbial camel's nose under a stupendously large tent. But the sheer scope of government provenance also suggests that to deny judicial scrutiny in favor of broad government discretion is to banish meaningful constitutional rights from vast common territory.

To take but a few examples, the government employs at least 11 million of the nation's workers,[113] a figure that is obscured by the number of private businesses that work on government contracts and are not included in this statistic.[114] Over 49 million American schoolchildren attend K-12 public schools.[115] Government support of private schools, in the form of vouchers and other grants, has ballooned.[116] Likewise, government financial and tax-exemption support for private entities, including "faith-based" organizations, is fairly commonplace.[117] Government bailouts of private corporations and financial institutions during the current economic crisis have made distinctions between "government" and "private" business—

113. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CURRENT EMPLOYMENT STATISTICS HIGHLIGHTS, JUNE 2010 (July 2, 2010), http://www.bls.gov/ces/highlights062010.pdf.

114. PAUL C. LIGHT, CTR. FOR PUB. SERV., THE BROOKINGS INST., FACT SHEET ON THE NEW TRUE SIZE OF GOVERNMENT (Sept. 3, 2003), http://www.brookings.edu/~/media/Files/rc/articles/2003/0905politics_light/light20030905.pdf.

115. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS (2009), http://nces.ed.gov/programs/digest/d09/tables/dt09_034.asp.

116. The Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002), gave the constitutional go-ahead to properly crafted voucher programs. The door opened before *Zelman*, however, in *Mitchell v. Helms*, 530 U.S. 793, 815–25 (2000) (plurality opinion), and *Agostini v. Felton*, 521 U.S. 203, 232–351 (1997).

117. *See* OFFICE OF FAITH-BASED & NEIGHBORHOOD P'SHIPS, EXEC. OFFICE OF THE PRESIDENT, ABOUT US, http://www.whitehouse.gov/administration/eop/ofbnp/about/council (last visited July 19, 2010).

long a nettlesome issue of state action[118]—even more obscure. And privatization of so-called government activities also has increased in many domains, including criminal punishment and military warfare, further muddying the line between public and private activity.[119] In all of these contexts, private and public actors are enmeshed with one another. In some, there is no doubt that the government is the primary engine; "state action" clearly is satisfied. But in many more of them—and within some of them—a finding of state action is very unlikely under current doctrine.

Nevertheless, Charles Black is (still) right: "[T]he 'state action' problem is the most important problem in American law,"[120] which is why the state action doctrine continues to excite considerable scholarly interest.[121] It matters enormously to constitutional liberty whether a matter that falls within the vast domain of government authority and potential responsibility is deemed to be governmental or private. It likewise matters enormously whether the government has significant or scant "play in the joints" regulatory power, within these vast domains.

But the most important question is not whether a particular government program or policy that affects private actors constitutes "state action" per se; at some level, it surely *is* state action and the government often is a co-creator of the outcome in question in some sense. Critics of the state action doctrine have made this case so convincingly that no thoughtful person can deny the force of the claim that the line between private and public often is a chimera. The important *legal* question is whether government action or inaction is

118. *See* Adolf A. Berle, Jr., *Constitutional Limitations of Corporate Activity–Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952); *see also* Roberta S. Karmel, *Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?*, 14 STAN. J.L. BUS. & FIN. 151 (2008); Timothy K. Kuhner, *The Separation of Business and State*, 95 CALIF. L. REV. 2353 (2007); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003). *See generally* John C. Harrison & Lillian Riemer BeVier, *The State Action Principle and Its Critics*, 96 VA. L. REV. (forthcoming 2010).

119. *See* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009); JOHN D. DONAHUE, THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS (1989); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT (2007); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005); Metzger, *supra* note 118.

120. Charles L. Black, Jr., *The Supreme Court, 1966 Term–Foreword: 'State Action,' Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

121. *See supra* notes 72, 86, 117–18.

sufficiently *directive* of a private party, such that the *specific conduct in question* is *attributable to* the government: In other words, who is the proximate and primary decision maker—in fact, and by all reasonable appearances—with respect to the specific conduct in question? (The important *practical* question is: What are the real world consequences of allowing the conduct to continue, even if it is not legally attributable to the government?)

The fact is that government has significant control over how this legal issue is resolved, because it so rarely is required in the first place to create a program or policy. Government need not run schools, operate workplaces, grant tax exemptions, fund private organizations, open its land to speakers (apart from the sliver of fora that are "traditional" public fora), or bail out struggling private concerns. When it does, it has considerable power *ab initio* to define the things it chooses to do and the conditions of private participation. The more the government sets up specific, unambiguous, program-relevant, proportional, detailed, and evenly applied conditions from the start, the more likely the specific outcomes of that program are its own—its "action." Correlatively, the less likely it is that a private participant in the program can claim that these conditions are "unreasonable" or "coercive," at least when the conditions only constrain the private party while he or she is "on the (government) job or dime." The private actor had a choice (at least in theory) about participation, and was on notice of the conditions from the beginning.

More fundamentally, the government can take its very big ball and go home, if courts intervene and second-guess government decisions about the program conditions. Government can close the forum, terminate the funding, shutter the schools. Only rarely has the Court held that such a "cut off your nose to spite your face" response triggers constitutional liability.[122]

In some cases, of course, the government is not likely to cut the activity in question—privatization is practically infeasible or politically impossible. As applied to *Martinez*, though, this was not a far-fetched possibility. If Hastings could only run the RSO program if it permitted exemptions from the nondiscrimination policy that allowed exclusion of students based on status or belief, then Hastings may have discontinued the RSO program and let all student groups

122. *See* Griffin v. Cnty. Sch. Bd, 377 U.S. 218 (1964) (holding it was unconstitutional for school system to close rather than comply with a desegregation order); *but see* Palmer v. Thompson, 403 U.S. 217 (1971) (holding that Jackson, Mississippi, could surrender its public swimming pools rather than attempt to run them on a desegregated basis).

seek access as private organizations. In other contexts, one can imagine similar responses.

If the government cannot impose "decency" restrictions on funding for the arts,[123] it might be inclined to discontinue such finding. If it cannot limit the use of government funded computers in ways that prevent children from viewing adult material, it may rethink the funding program itself.[124] If a school library has no editorial control over the content of a section of its collection, then it may choose to eliminate that category of the collection altogether.[125] If a high school is required to grant access to all student extracurricular organizations, including lesbian, gay, bisexual, and transgender ("LGBT") groups, it may cease to grant access to any of them.[126] If the government cannot condition access to Title X money on compliance with a condition that prohibits counseling or referral for abortion as a method of family planning,[127] it may cease Title X funding altogether. And if the government cannot condition access to major grants on compelling recipients to grant access to military recruiters,[128] it may well sweep such grants from the table.

Of course, government makes policy decisions for multiple reasons: The risk of constitutional liability is only one of them. And the casual assumption that government actors who design government programs do not care about the liberties of applicants for government grants, of speakers seeking access to government fora, of public library patrons, or of public school students and public sector employees during the school day or work week is simply wrong. In the last two scenarios in particular, anybody close to the ground knows how hard many teachers, administrators, and employers work to respect public school students' and public sector employees' expressive and other autonomy. The partisan divisions among Americans about hot button issues like religion, sexually explicit expression, abortion, security versus liberty, gays in the military, or

123. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 588 (1998).

124. *See* United States v. Am. Library Ass'n, 539 U.S. 194 (2003) (plurality opinion).

125. Island Trees Sch. Dist. v. Pico, 457 U.S. 853, 870–72 (1982) (plurality opinion).

126. *See, e.g.*, Mark Walsh, *Gay Students' Request Spurs Board to Cut Clubs*, EDUC. WEEK (Feb. 28, 1996), http://www.edweek.org/ew/articles/1996/02/28/23gay.h15.html (reporting that a Salt Lake City school board voted to eliminate all extracurricular clubs rather than allow formation of a high school gay student support group).

127. *See* Rust v. Sullivan, 500 U.S. 173, 200 (1991).

128. *See* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 59 (2006).

affirmative action all can skew the public's impression of whether government ever can be trusted to set access conditions in a sensible, liberty protective, and even-handed way.

Moreover, the level and location of government actor—as well as regional, local, and individual variations—may have a big impact on how access conditions on public resources or government programs are crafted, and with what concerns in mind. For example, whether a public school or local library contains a comprehensive collection on human sexuality often depends more on the First Amendment and other sensibilities of the librarian in charge of acquisitions than on any other variable. Likewise, how a public school's RSO policy actually is implemented may depend more on the associate or assistant dean in charge of enforcing the policy, than on any higher level official. And all of this may depend on another elusive factor: Whether any official is *paying attention* to the strict letter of often complex government policies, or monitoring whether recipients of government resources adhere to upfront conditions.[129]

129. The dissent in *Martinez* made much of the former dean's deposition, in which she stated that the Hastings policy was an "all-comers" policy. 130 S. Ct. at 3001 (Alito, J., dissenting). Justice Alito was deeply skeptical of this statement, and argues that the change in interpretation was a "pretext" for discrimination against the religious student group. *Id.*

A much simpler explanation, though, might be that the former dean was not focused on the details of this policy—as it applied to *any* student organization—until CLS initiated its nationally orchestrated test of similar policies nationwide. That is, the national CLS organization called the question here, not the Hastings students or Hastings itself. It likely did so in order to make a larger point about the right of religious actors to seek exemptions from generally applicable nondiscrimination rules, rather than because of a pattern of actual invidious, enforced exclusion of its student chapters from university programs or forums.

RSOs—at Hastings and elsewhere—likely conduct their activities without much supervision by campus officials to assure that they are complying with every jot and title of the applicable campus or organization regulations. Once the litigation gong was struck, of course, the former dean and Hastings had to look closely at the policy, as written, as applied, and as a matter of school authority in future, related matters.

The Hastings CLS students themselves may have preferred to keep things as they were before the national organization ginned up this campaign to demand access-plus-exemption on campuses. Some of them may have had no idea that they were, in essence, required by national CLS regulations to exclude fellow students who disagreed with the tenets, assuming any students with dissenting views sought to join. Others may have assumed that they could reserve membership to fellow believers. None may have wanted to stir up this tempest, but may have felt compelled to honor CLS's national rules in order to preserve their connection to the organization, and to respect its associational autonomy.

And once the question was called, the Hastings chapter of Outlaw (a student group concerned with gay rights) may have felt compelled to step up and protest. Although the CLS policy did not exclude gays alone, it made clear that unrepentant homosexuality was

Yet the range of government activity that the Court would have to monitor if conditions on government benefits and fora trigger strict judicial scrutiny is very broad indeed. Like Hastings, the Court thus was caught in its own cross fire—but at a higher level. If it sided with Hastings, it would appear to side against CLS. But if it did *not* side with Hastings, it not only would appear to side with a group whose identity required it to exclude others based on belief or status; it also would set new expressive association limits on this government "play in the joints" authority.

Nearly every time the Court approaches this particular constitutional cliff, it *balks*. Seeing this helps to put *Martinez* into proper perspective.

True, the public school child does not "shed [her] constitutional rights . . . at the school house gate."[130] But the public school can discipline students for using sexual metaphors at an official school assembly,[131] or for holding up a sign that reads: "Bong Hits 4 Jesus" at an off-campus, school-approved activity that occurred during school hours.[132] The Court repeatedly has deferred to educators, lest it become a "super school board"[133] that oversees daily school decision-making authority.[134]

True, a public school teacher has a constitutional right to free speech.[135] For example, she cannot be fired for failure to take an oath not to advocate the unlawful overthrow of the government, unless the teacher is an active member in such an organization, has actual knowledge of its illegal ends, and has a specific intent to further those ends.[136] But she also cannot speak without reprisal when the speech is

a basis for exclusion. At that point, Hastings was caught in multiple cross fire, as Justice Ginsburg noted. And no one involved—CLS, Hastings, or Outlaw—could be conciliatory without risking important aspects of their organizational or institutional identity.

130. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

131. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 678 (1986).

132. Morse v. Frederick, 551 U.S. 393, 401–03 (2007).

133. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (noting that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, not federal judges"); *see also* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (noting that the "[Michigan] Law School's educational judgment that . . . diversity is essential to its educational mission is one to which we defer").

134. For a general review of the constitutional rights of students in public schools, see Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113 (2010).

135. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

136. Keyishian v. Bd. of Regents, 385 U.S. 589, 606–10 (1967).

about a personnel issue internal to the workplace,[137] does not involve a matter of "public concern,"[138] is a statement "pursuant to . . . official duties,"[139] or where the speech may cause a disruption of the workplace.[140] In any of these cases, the teacher can be disciplined or even fired.

True, the government does not have unlimited discretion in setting conditions on funding or in crafting its programs.[141] But a government "'decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.'"[142]

I am not defending or critiquing any of this doctrine here.[143] Rather, I am underscoring that whenever the Court applies the Constitution to a zone of government control other than a true public forum, it *typically* defers to government policy-making power to impose conditions on its benefits and other government-sponsored activities, in ways that make *Martinez* relatively unsurprising. In fact, it does so even in "stick" cases—not just in "carrot" cases. And this is true even when the context is education, the activity is expressive, and the burdens are significant.[144]

The reason for this is a prosaic one: Courts simply are not equipped to superintend these day-to-day government decisions. The

137. *See* Connick v. Myers, 461 U.S. 138, 145–46 (1983); *see also* Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1 (1987).

138. *See* City of San Diego v. Roe, 543 U.S. 77, 84 (2004); Massaro, *supra* note 137.

139. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006). The Court suggested, however, that this test may not apply where the speech is related to academic expression or classroom instruction. *Id.* at 425.

140. *See* Rankin v. McPherson, 483 U.S. 378, 388 (1987).

141. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 207–08 (1987) (describing limits on congressional purse strings power); *see also infra* text accompanying notes 164–98.

142. *See, e.g.*, Ysursa v. Pocatello Educ. Ass'n, 129 S. Ct. 1093, 1098 (2009) (quoting Regan v. Taxation With Representation of Wash., 461 U.S. 540, 549 (1983)).

143. Though I have done both in other works. *See, e.g.*, Massaro, *supra* note 137 (critiquing the Court's approach to public employee speech).

144. It is worth noting here that unlike disappointed plaintiffs in many other cases, the CLS students were not faced with termination, expulsion, loss of unemployment benefits, or discipline of any kind. Nor were they officially silenced while on government property, or banished from school grounds. They also reserved more expressive power to reach their intended audience than did a rival union in the case of *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46–48 (1983). They did lose RSO status and benefits, which—as explained in the following sections—is enough to trigger constitutional scrutiny in some "carrot" cases, but is rarely enough to prevail.

sheer number of them makes this inevitable—just as it makes judicial nonintervention so worrisome.

The cases in which the Court *has* intervened and disrupted government policy-making power are the doctrinal outliers. In recent years, the winners in many of the outlier cases have been religious actors. It is the outlier cases that involve religious actors—not the more general landscape of permissible conditions on government funding and fora—that made the outcome in *Martinez* difficult to predict. It is to these cases, which were the primary focus of the parties in *Martinez*, that we now turn.

E. Frame Five: Mandatory Access

The government rarely is required to grant access to its property, resources, or programs, apart from "true" public fora—i.e., places the government has historically or by designation opened to full First Amendment activity. Moreover, a public forum is not created by inaction.[145]

As stated above,[146] government has *significant* control over the contours of its programs, whether private parties can be participants, and the conditions on private participation, if any. Constitutionally defensible conditions on private participation include the following:

- Specific and unambiguous;
- Program-relevant;
- Proportional in scope and burden;
- Evenly applied as to similarly situated applicants for participation;
- Limited to the substantive, spatial, and time parameters of the program or other benefit;
- Tied to legitimate government goals—in actual purpose, stated justification, and practical effect;
- Reasonably necessary to further those legitimate goals;
- Reasonably necessary to preserve government independence from private expression or conduct.

In other words, the conditions must observe basic notions of procedural due process, a rational basis threshold of equal protection, and a thin, rational basis threshold of substantive due process. They

145. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992).

146. *See supra* notes 129–41 and accompanying text.

clearly may promote the government's legitimate interest in preserving its own expressive independence—i.e., to avoid the appearance of government imprimatur on private ideas or conduct.

Although in speech cases, the Court conducts a "forum" analysis to determine the constitutionality of conditions on access, there actually is no practical difference between this analysis and this more general set of "conditions on conditions" applied in other contexts. If, for example, a public university sets up a program for student organizations to engage in speech, it may set the parameters of the program, define the participants, and otherwise set the conditions for participation. If the university satisfies the criteria above in crafting these conditions, then the program likely will be upheld. The real key is, I submit, whether the program meets these general criteria, not whether the program is labeled a "limited" or "nonpublic" forum, or even whether it is deemed to be "government speech." Indeed, the above series of factors would be a much better, and clearer, way of analyzing the factors that drive the forum cases and that influence whether conditions on access pass constitutional muster, than the Court's analytically unsatisfying forum tests.

Likewise, if the government sets up a grant program for private applicants, it may set the parameters of the grants program, define the participants, and otherwise set the conditions for private participation. The same list of factors will determine whether the grant program conditions pass constitutional muster. In short, the forum and funding cases present essentially the same issues, and should be analyzed under the same eight criteria.

A sampling of significant forum and funding cases illustrates this point quite nicely.

1. Forum Cases

i. Widmar v. Vincent[147]

In *Widmar*, the University of Missouri at Kansas City, a public university, opened its facilities for the activities of RSOs.[148] A registered student religious organization that had previously received permission to meet on campus was informed that it no longer could meet there because of a rule that prohibited the use of University buildings and grounds "for the purposes of religious worship or

147. Widmar v. Vincent, 454 U.S. 263 (1981).

148. *Id.* at 265.

religious teaching."[149] The Court held that this was a content-specific condition on access to a forum generally open for use by student groups, which triggered strict scrutiny. The University's desire to achieve greater separation of church and state than the Establishment Clause required was not a sufficiently compelling reason to exclude the student religious group.[150]

ii. Lamb's Chapel v. Center Moriches Union Free School District[151]

In *Lamb's Chapel*, a New York law authorized public schools to regulate the after school use of facilities and property.[152] A school prohibited the use of its property by any religious group, and refused repeated requests by Lamb's Chapel for permission to use school property after hours to show a religious-oriented film series on family values and child rearing.[153] A unanimous Court held that this was an impermissible restriction on use of a government forum.[154] The school could restrict access to certain speakers and certain subjects, but it could not impose speaker-based restrictions within those parameters that were unreasonable or viewpoint specific.[155] Other speakers were allowed access to address the same themes but from a secular perspective.[156] To restrict the religious groups from equal access violated their freedom of expression.[157]

iii. Healy v. James[158]

In *Healy*, a public college denied recognition as a registered student organization to a local chapter of Students for a Democratic Society ("SDS").[159] Recognition would have included the right to use campus facilities for meetings and use of the campus bulletin board and school newspaper.[160] The president of the college refused to grant recognition to the chapter, because he was not satisfied it was

149. *Id.*
150. *Id.* at 270–74.
151. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).
152. *Id.* at 389–90.
153. *Id.* at 388–89.
154. *Id.* at 392–93.
155. *Id.* at 393–94.
156. *Id.*
157. *Id.*
158. Healy v. James, 408 U.S. 169 (1972).
159. *Id.* at 172–76.
160. *Id.* at 176.

sufficiently independent of the national SDS organization, which had a philosophy of disruption and violence in conflict with the college's declaration of student rights. The Court concluded that insofar as the denial of recognition was based on an assumed relationship with the national SDS, on an unsupported fear of disruption, or on disagreement with the group's philosophy, it was improper.[161] However, if the group refused to comply with a rule that required it to abide by reasonable campus rules, this would have been a proper basis for nonrecognition.[162] The record, however, was not clear on whether there was such a rule and if the group was willing to abide by it. The case thus was reversed and remanded.[163]

2. Funding Cases

i. Rosenberger v. Rector & Visitors of University of Virginia[164]

In *Rosenberger*, the University of Virginia refused to provide funding from a student activities fund to help subsidize the costs of *Wide Awake: A Christian Perspective*, on the ground that it "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality."[165] The Court held that the University denied the student staff of the publication their First Amendment rights, because it had promoted other student publications. To deny only this publication University support, because of its religious perspective, was viewpoint discrimination.[166]

ii. Rust v. Sullivan[167]

In *Rust*, the Court reviewed the federal Public Health Service Act, which specified that none of the federal funds appropriated under Title X of the Act could be used "in programs where abortion is a method of family planning."[168] The Act was further amended to prohibit Title X projects from engaging in counseling concerning, referrals for, and activities advocating abortion as a method of family

161. *Id.* at 188.
162. *Id.* at 188–89.
163. *Id.* at 194.
164. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).
165. *Id.* at 822–23.
166. *Id.* at 830–32.
167. Rust v. Sullivan, 500 U.S. 173 (1991).
168. *Id.* at 178.

planning. Title X grantees and doctors who supervise Title X funds challenged the regulations on First Amendment grounds. The Court held that these conditions on funding were constitutional on a facial challenge, because they assured that the program funds would be used for the designated purposes, and helped avoid the appearance of government support for abortion-related activities.[169] In response to the argument that the regulations were "viewpoint-specific," the Court noted that the government can make a value judgment favoring childbirth over abortion, and can implement that judgment by allocation of its funds.[170] The regulations did not require recipients to give up abortion-related speech; they merely required that such activities be kept separate from Title X funded programs.[171]

iii. National Endowment for the Arts v. Finley[172]

In *Finley*, the Court addressed the constitutionality of the National Endowment for the Arts and Humanities Act's vesting of the National Endowment for the Arts ("NEA") with substantial discretion over the distribution of grant money for the arts. The funding priorities included works of "artistic and cultural significance" with emphasis on "creativity and cultural diversity," "professional excellence," and "public . . . education . . . and appreciation of the arts."[173] The criteria later were amended, after an outcry over controversial—allegedly blasphemous—works, to require that the grant makers take into account "general standards of decency and respect for the diverse beliefs and values of the American public."[174] In a facial challenge to the Act, the Court held that the Act did not pose a substantial risk that it would lead to the suppression of freedom of expression. "Decency and respect" were two of several conditions on grants, and the amendment adding these criteria was a "bipartisan proposal introduced as a counterweight to amendments that would have eliminated NEA's funding or substantially constrained its grant-making authority."[175] The limited resources for arts grant funding requires the exercise of judgment, and although the First Amendment applies in the subsidy context, "Congress has wide

169. *Id.* at 188.
170. *Id.* at 193.
171. *Id.* at 193–94.
172. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).
173. *Id.* at 573.
174. *Id.* at 576.
175. *Id.* at 581.

latitude to set spending priorities."[176] At least at the stage of a facial challenge, the Court was unwilling to assume that the criteria would be applied in a way that suppressed disfavored viewpoints.[177]

iv. Legal Services Corporation v. Velazquez[178]

In *Velazquez*, the Court addressed the federal Legal Services Corporation Act, which authorized grantee organizations to provide free legal assistance to indigent clients with respect to welfare benefits claims, but prohibited recipients from representing clients in an effort to amend or challenge existing welfare law.[179] The Court held that the condition was an unconstitutional restriction on recipients' freedom of expression, and distinguished *Rust* on the ground that *Rust* involved "government speech."[180] *Velazquez*, in contrast, involved funding for private speech, as well as the independence of the judicial system.[181] According to the Court, the restriction on attorney speech "distorted the usual functioning" of the funded medium of communication[182] and thus was a substantial restriction on that expression. The Court further noted that cases involving a limited forum, though not controlling, "provide some instruction" for evaluating restrictions in governmental subsidies.[183]

v. United States v. American Library Association[184]

In *American Library*, a plurality of the Court upheld federal grant programs that required public library recipients to install filtering programs to block obscene or pornographic images and prevent minors from accessing inappropriate materials.[185] The First Amendment rights of adult library patrons were not abridged, given that the filters could be disabled upon request, and because the government has "broad discretion to make content-based judgments in deciding what private speech to make available to the public."[186]

176. *Id.* at 587–88.
177. *Id.* at 587.
178. Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).
179. *Id.* at 538.
180. *Id.* at 541–42.
181. *Id.* at 542–43.
182. *Id.* at 543.
183. *Id.* at 544.
184. United States v. Am. Library Ass'n, 539 U.S. 194 (2003).
185. *Id.* at 199–201.
186. *Id.* at 194–95.

As in *Rust*, the government here is merely assuring that "public funds be spent for the purpose for which they are authorized."[187] A library is not a true "public forum," and collection content decisions by public librarians are not subject to heightened scrutiny.[188] Rather, the government here may determine the content of the materials it provides to the public without close judicial oversight.

vi. Rumsfeld v. Forum for Academic and Institutional Rights[189]

In *Rumsfeld*, a unanimous Court upheld the Solomon Act, which withholds certain federal funds from colleges and universities that restrict the access of military recruiters to students on campus.[190] According to the Court, the funding condition restricted conduct, not speech, and in no way interfered with a recipient's ability to express its disagreement with the military's "Don't Ask, Don't Tell" policy regarding service by gay men and women in the military.[191] Indeed, the Court suggested that Congress could have imposed the campus military recruitment access rule directly on colleges and universities, as a "stick"; thus it surely had power to impose this requirement as a "carrot" condition on federal funding.[192]

vii. Locke v. Davey[193]

In *Davey*, the Court upheld the Washington State Promise Scholarship Program, which prohibited scholarship recipients from using the award to pursue a devotional theology degree.[194] The majority concluded that the condition on the scholarship award was a legitimate exercise of "play in the joints" discretion by the State of Washington. The state here did not discriminate against religion or unduly burden free exercise of religion; it merely chose not to fund a distinct category of instruction.[195] Students could still pursue devotional study, and could otherwise freely practice their religion. There was no evidence of animus against religion, and although the state could have included devotional study majors in the scholarship

187. *Id.* at 211.
188. *Id.* at 204–05.
189. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006).
190. *Id.* at 55–56.
191. *Id.* at 57.
192. *Id.* at 60.
193. Locke v. Davey, 540 U.S. 712 (2004).
194. *Id.* at 715.
195. *Id.* at 720–21.

ambit, it was not required to do so.[196] The state's antiestablishment interests were a sufficient reason for this policy, even if federal antiestablishment principles were not as strict.[197] Finally, the state constitution could explicitly prohibit state money from going to religious instruction without violating the federal free exercise rights of its citizens.[198]

3. Reconciling the Access Cases

Whether the outcomes in the above illustrative cases can be reconciled is much debated. Most observers—myself included[199]—think they *cannot* be reconciled. There is no compelling reason, for example, why the program in *Rust* was "government speech" and the program in *Velazquez* was not. Nor is it clear why the "forum" in *Widmar*, was a "public" one—as the case implies—and not a "limited public forum"—though this likely was because the Court had not yet embraced this unfortunate and unhelpful terminology.

Even if a forum is a "limited public forum," it is not obvious why excluding the topic of "religion" is "viewpoint" versus "subject matter" discrimination. Nor is it clear why editorial discretion was a legitimate reason to defer to the government conditions on computer grants imposed in *American Library*, given the infinity of the internet versus the zero-sum space limits of a hard copy book collection.

It is also not clear when a case will be categorized as a "subsidy" case versus a "forum" case: When a public school provides funding for authorized student groups to engage in activities that include publications but excludes religious expression, it surely is both. When government provides funding for authorized grantees to deliver family planning advice but excludes advice about abortion, it likewise would seem to be both as well. Why are the latter restrictions not "viewpoint discrimination" when the former are?

This internal incoherence is why folks can cry "foul" when a condition on access—forum or funding—goes against them. There is no generally accepted principle for determining when a particular case will fall on one side of the line versus the other—especially given the more recent cases like *Rosenberger* and *Lamb's Chapel.*

196. *Id.* at 718–19.

197. *Id.* at 722–23.

198. *Id.* at 723–24.

199. *See* Massaro, *supra* note 92, at 980–82 (outlining the logical inconsistencies between *Locke v. Davey* and cases like *Rosenberger v. Rector & Visitors of University of Virginia*).

Nevertheless, an honest appraisal of the full stable of decisions suggests that a disappointed applicant should not be surprised, let alone outraged, when an adverse decision involves both government funding and a *credible case for government attribution*. In these cases, the government almost always wins. The more remote the government's thumb print is from the funded activity, however, and the more the program in question was specifically designed to foster private expression with few content-based restrictions, the more likely it becomes that a court will consider seriously a challenge to an access restriction. By definition, and by American tradition, the attribution claim is weakest when the government benefit is a true forum—that is, a space that government clearly designates as available for speech that is not government's own. Whether this space is cordoned off on a school campus, within a government workplace, or even on a military base or prison, it triggers fewer concerns about observers misunderstanding the messages conveyed in that arena as government's own.

But *even then*, the argument for mandatory access still encounters tough sledding, given the very broad discretion government reserves over its property, its funds, and its imprimatur—actual or perceived. *American Library* in particular illustrates this point. Few people likely would see the government's imprint on a decision by a private patron of the library to download pornography on a library computer. On the contrary, many observers likely think the library is a "public forum"—at least until they think more carefully about the inevitable content-based decisions involved in creating a collection. But the Court *allowed* restrictions on the grants that required the computer filters, even in this First Amendment sensitive space, inherently and often expressly dedicated to free inquiry and exploration of ideas by private patrons.

The reason is that all of these cases entail a demand that the courts rewrite the government's access rules—something courts are unwilling to do even when First Amendment concerns loom large and government imprimatur concerns are relatively attenuated. Designing a government forum, program, or policy is *inherently* content-specific work; often, it is viewpoint-specific. The government nudges with its money and name and space, but it also pushes, pulls, and shoves. This is a matter of government political and practical judgment, and is decidedly not neutral.

Finally, one need not consider any of the more complex subrules that surface in forum cases to resolve the constitutional issues. One can simply run the fact pattern through the eight criteria listed above.

This may not lead to results that are more internally coherent; this is still a very context and fact-driven analysis. But it would eliminate some of the misleading terminology, would reinstate up front the concern about government imprimatur, and would give neutrality its proper place, i.e., a way of expressing that government must observe its own rules, and treat like supplicants alike, *after* it determines what non-neutral ends it wishes to pursue.

4. Application to Martinez

The above summary of leading cases likely explains why the Petitioners in *Martinez* worked so hard to locate the case in the "forum" rather than "funding" column, and emphasized the cases in which the Court regarded the government's creation of the forum as a nigh-on *public* forum. The more the case looked like *Widmar*, *Healy*, and *Rosenberger* the harder it was for Hastings to deny the group equal RSO status and benefits. It also is why the Petitioners emphasized the *uneven* application of the RSO forum rules, and discounted the subsequent re-description of the access Policy as an "all-comers" policy. Finally, this is why the Petitioners emphasized the private nature of its activities, and that the members merely sought to associate and express themselves—not "impose their moral principles on others."[200]

All of these moves were necessary to fit the CLS's case into the one, narrow frame that led most easily—though still not without doctrinal difficulty—to a conclusion that Hastings exceeded its authority to craft RSO rules and enforce them. Moreover, these moves would have limited the scope of a ruling in their favor—which might have persuaded the crucial fifth justice to sign on to the ruling.

Once a case moves to the "funding" column, however, then the doctrinal authority thins significantly—because selective funding just is not easily characterized as "discrimination"; it more often is treated as government policy to support some, but not other, worthy ends. Short of turning off the funding spigot, government has to make choices—ones that may be odd, partisan, clunky, heartless, ill-considered—even stupid—but rarely unconstitutional. And the choice made here—to prevent RSOs from discriminating on the basis of characteristics that are commonly listed in nondiscrimination laws nationwide—is *exceedingly* hard to characterize as constitutionally

200. Brief for Petitioners at 44, Christian Legal Soc., Chapter of Univ. of Cal., Hastings College of Law v. Martinez, 130 S. Ct. 2971 (2010) (No. 08-1371).

suspect—or "absurd" and "risible." It is easier, in fact, to characterize as constitutionally *required*, despite the erosion of state action and Establishment Clause barriers.

Petitioners' viewpoint and the dissent's position are testimony to the very dramatic shifts in the state action, Establishment Clause, and civil rights landscapes since the early 1970s. It also reflects just how successful religious advocates have been in characterizing nondiscrimination measures as a forbidden form of viewpoint discrimination and as a virulently hostile form of "political correctness" aimed at their convictions.

But again, the older case law has *not* been overruled, and the constitutional values reflected in the older cases remain an important backstop to the modern cases that have carried us so far from these earlier moorings. Moreover, a majority of the Court still remains wary of overstepping its boundaries, and setting up new restrictions on conditional funding that may prove unworkable at best and subversive of many important government ends at worst.

As applied to CLS and other religious groups in particular, this judicial deference is a prickly matter. In CLS's view, nondiscrimination mandates are themselves discriminatory. This is why CLS fairly bristled at the notion that an all-comers policy might require that student organizations cannot discriminate on the basis of beliefs or status:

> Far from being compelling, the all-comers policy is frankly absurd. The notion that the Democratic Caucus should not be able to "discriminate" against Republicans in the selection of officers or discussion of group leaders is risible . . . . [S]urely no one thinks that all people should mingle together randomly at all times. Groups are built around common interests and beliefs—interests and beliefs that are less than universal. Free association, including the right to exclude, better facilitates the goal of promoting an exchange of ideas; it protects the seedbeds where ideas emerge and mature in the first place. There can be no diversity of viewpoints *in a forum* if groups are not permitted to form around viewpoints.[201]

CLS's argument here has considerable appeal. The Petitioners could—and did—point out that where government has moved to include discrimination based on sexual orientation to the more traditional list of prohibited forms of discrimination, it often has

201. *Id.* at 50 (emphasis added).

provided at least some exemption for religious groups.[202] There definitely is growing support for the notion that religion deserves special legal treatment when antidiscrimination norms collide with traditional religious convictions.

This does not (yet) prove the case, however. As the final section shows, there is an important difference between exemptions built into the design of government policies, and exemptions that are imposed by the judiciary in response to lawsuits like *Martinez*. In the former case, the government has expressed its policy preference, and when the court assesses the relevant government interest, this stated expression of government policy matters. In the latter case, the government's silence makes it much harder to infer that an exemption would not undermine the government's interests. Indeed, a contrary inference is more plausible, given how common it is today for government to build exceptions for religious actors into statutory nondiscrimination schemes—especially when the nondiscrimination scheme includes sexual orientation. The failure to do so, one can argue, speaks volumes.

In sum, the Petitioners' real bottom line was not an objection to different treatment by Hastings. Rather, the heart of their objection was the government-imposed nondiscrimination policy, *as written and as construed*. CLS wished to avoid the usual, though often harsh, burden of being permitted to express dissenting views through association and speech, but only *without* government benefits and imprimatur.

Let me make one further point about the exemption argument. There is good reason to think that the Petitioners would have stuck to this objection only as it applied to a religious group's desire to exclude members "who conduct their lives (unrepentantly) in violation of . . . [a well-established set of convictions regarding *human sexuality*]," [203] not to a religious group's desire to exclude members on the basis of *race*. If a white supremacist religious (or nonreligious) group sought a similar exemption from the RSO Nondiscrimination Policy, then at least some of the lawyers for the Petitioners likely would have been unwilling to pen a brief in support of this claim. The Petitioners' reply brief contemptuously described such a "parade of horribles" as "desperate hyperbole"[204]; but a ruling in favor of CLS

202. *Id.* at 46.

203. *Id.* at 45 (emphasis added).

204. Reply Brief for Appellants at 52–53, Christian Legal Soc., Chapter of Univ. of Cal. Hastings College of Law v. Kane, 319 F. App'x 645 (9th Cir. 2009) (No. 06-15956).

logically would have extended to such a group, no less than to CLS itself. Recall that the doctrine invoked by the parties and by the Court relies heavily on "neutrality" as the justification for the fullest possible First Amendment protection.

The Petitioners nevertheless attempted to distinguish CLS associational principles from supremacist groups by labeling the latter as engaged in "invidious" discrimination.[205] But a court faced with the argument that *both* kinds of discrimination are "invidious" cannot easily side with one over the other, especially while invoking a neutrality justification. Such a distinction among forms of associational expressive arguably would itself be "viewpoint discriminatory."

In fact, CLS seemed to be arguing for an "all groups, *all views*" RSO policy. This surely must embrace a supremacist student group—as well as a Wiccan group, a socialist group, a Summum group, and any others who applied for RSO status. A court could not craft a rule prohibiting Hastings from adopting an "all-comers" policy without demanding, in essence, that it adopt such an "all groups, all views" policy instead.

If a judge somehow could cordon off race discrimination from the freedom of expressive association ruling, without violating the principles of "neutrality" CLS invokes, then why could Hastings not cordon off *other forms of discrimination* from the RSO program itself? One possibility is that CLS thinks government has a compelling reason to prevent affinity groups from discriminating on the basis of race—even when a religious group might insist this violates their expressive association rights—but it lacks a compelling reason to prevent affinity groups from discriminating on the basis of sexual orientation. Race receives special Fourteenth and Thirteenth Amendment protection. Yet neutrality does not explain this different treatment of the government's interests here, and traditional First Amendment analysis precludes it. The Equal Protection Clause may rank order various bases for government discrimination—only some government classifications trigger strict scrutiny—but it does not impose a parallel hierarchy on government power to define its program funding or other parameters. Government power over programs designed to promote equal access for disabled Americans, for example, are no less "compelling" than ones designed to promote racial equality—even though disability triggers only "rational basis"

205. *Id.*

scrutiny under equal protection. And a religious group that sought to exclude members based on some perceived disability would have no greater—or lesser—First Amendment rights than one that sought to exclude members based on race.

And here's another rub: To *require* Hastings to grant RSO status to a white supremacist organization in order to respect "neutrality" would be to lose sight entirely of the long shadow of Frame One—and of the government's legitimate interest in distancing itself from sinister forms of private expressive autonomy. Racist speech *is* allowed, of course, even on campus; but only in traditional or designated public forums, and often with campus police present to control for the potential disruption inspired by such provocative discourse. To treat the law school's RSO program as a full public forum would be far more "absurd" and "risible" than it may have been to allow Hastings to control the program in ways that made such collisions between its freedom of expression and nondiscrimination aspirations less sharp.

Finally, to call this move mere "political correctness" is both tiresome and a denial of the multiple ways in which modern universities are expected to *teach* diverse students, not just permit them to experience the greatest possible First Amendment freedoms. Universities *are* unique environments devoted to First Amendment principles and diversity of viewpoints. But they *also* are bounded spaces in which messages are conveyed—messages for which the campus leaders often are held accountable. The implicit analogy to a street corner or public park weakens considerably once one moves away from the campus mall, and once the school name is deployed as it was in *Martinez*. The call to "neutrality" likewise becomes less convincing, and the background concern about government imprimatur becomes much more powerful.

F. Frame Six: Mandatory Access-Plus-Exemption

If mandatory access claims are difficult to win—and they are—then mandatory access-*plus-exemption* claims are presumptive losers. Government has fairly broad discretion to build exemptions into its funding and regulatory schemes, as we have seen.[206] Consequently, if one frames *Martinez* as an exemption to funding conditions case, then

206. *See supra* notes 163–97 and accompanying text; *see also* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); Cutter v. Wilkinson, 544 U.S. 709 (2005).

the outcome was entirely consistent with the case law. It becomes, just as Justice Stevens suggested, an easy case.

The easiest way to outline the case law under this frame is to identify the isolated cases in which the Court has required *exemptions* from conditions on forums or funding. Note that these isolated cases do not deal with the related question of when exemptions from general rules ("sticks") are constitutionally required.[207] Rather, we are concerned here only with cases that involve "carrots," and a request from an applicant that the *conditions on carrots* that apply to all other applicants be lifted for this applicant and others similarly situated.

Nor do we deal here with statutes or other government regulations that provide for such exemptions; in these cases government already has determined that its policy ends would not be unduly hampered by a patch work of compliance. Rather, the focus is on the handful of cases in which the courts require the lifting a condition on a benefit or forum access, in response to a claim that the condition could not constitutionally be applied to a specific applicant. The condition is lifted only for the complaining applicants (and others like them) for government benefits or other support; it remains in place as to all other participants.

So narrowed, the *only* significant Supreme Court case on point is *Sherbert v. Verner*,[208] in which a member of the Seventh-Day Adventist Church was fired by her employer because she would not work on her Sabbath (a Saturday). She filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act and was denied on the ground that her refusal to work on Saturdays was a refusal, without good cause, to accept suitable work when offered. The Court held that this disqualification for benefits was a burden on her free exercise of religion, even though it did not prevent her from practicing her faith.[209] The pressure to forego her religious principles was significant, and thus triggered Free Exercise Clause analysis. The Court held that

207. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (accommodation of expressive association); Wisconsin v. Yoder, 406 U.S. 205 (1972) (accommodation of religion); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (accommodation of freedom of expression and resistance to compelled affirmation).

208. Sherbert v. Verner, 374 U.S. 398 (1963).

209. *Id.* at 404–06.

absent a compelling state interest, South Carolina could not impose this significant burden on her First Amendment rights.[210]

The Free Exercise Clause provenance of *Sherbert* was read narrowly in *Employment Division v. Smith*,[211] in which the Court limited *Sherbert* to the unemployment compensation field and perhaps other contexts that lend themselves "to individualized governmental assessment of the reasons for the relevant conduct."[212] *Smith* channeled the dissent in *Sherbert*, which noted that the "situations in which the Constitution may require special treatment on account of religion are . . . far and few between, and this view is amply supported by the course of constitutional litigation in this area. Such compulsion in the present case is particularly inappropriate in light of the indirect, remote, and insubstantial effect of the decision below on the exercise of appellant's religion and in light of the direct financial assistance to religion that today's decision requires."[213] Indeed, the dissent continued, it has been noted that "such singling out of religious conduct for special treatment may violate the constitutional limitations on *state action*."[214] The dissent rejected this argument, concluding instead that the government could accommodate the religious person without violating the Establishment Clause,[215] but the argument was hardly seen as far-fetched.

And so we come full circle. For government to set access conditions on its programs is not only permissible, but may be *required*—as a matter of *state action* (here, of state action that implicates the Establishment Clause). That is, Frames One and Two affect some thinkers' view of Frame Six—and rightly so. For the judiciary to step into a state of affairs and affirmatively *require* an exemption—an exemption that the government itself has not granted—is to *disrupt* the legal status quo, not preserve it. It also disrupts democratic processes, in favor of the potentially undemocratic (and illiberal) desire of some individuals to opt out of common rules. And as the dissent in *Sherbert* notes, a judicial

210. *Id.* at 409–10.

211. Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

212. *Id.* at 884.

213. *Sherbert*, 374 U.S. at 423 (Harlan, J., dissenting) (citations omitted).

214. *Id.* at 422 (emphasis added).

215. *Id.*

decision that does so may *itself* constitute state action, according to some accounts.[216]

There are constitutional trap doors *everywhere*.

III. Summing Up

The Court has moved a great distance from the sensibilities of the 1960s and 1970s that made earlier justices more acutely aware of the state action problem, and of how accommodation of private actors who engage in actions that government itself wishes to (or must) avoid is risky business. But government actors on the ground today still understand the problem—perhaps better than the justices themselves.

When, for example, school officials in school districts as geographically and otherwise distinct as Seattle, Washington and Jefferson County, Louisiana, saw how the racial stratification of their neighborhoods was altering the composition of their public schools, they acted.[217]

Likewise, when a Southern city saw how the pattern of its government contracts was flowing disproportionately away from minority contractors, it sought to address the disparity.[218]

And when a Midwestern public university studied the effect of past societal discrimination on student enrollments, it developed programs and policies designed to counteract those forces.[219]

In each case, government actors worried about becoming passive participants in wider societal patterns. They evidenced an intuitive understanding that "public" and "private" are enmeshed in ways that modern state action and equal protection doctrine tend to obscure. They understood as well that the action *and inaction* of public authorities, vested with public duties and supported by public funds, are not neutral, not without cultural meaning, and not without legal and political consequences. And they also were constrained—even pushed—by Supreme Court opinions that limited many other ways in which they might have worked against private discrimination directly. At the very least, the officials may have thought they could cordon off their own resources and communicate their own message of

216. *Id.*; *see also* Shelley v. Kraemer, 334 U.S. 1 (1948).

217. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (plurality opinion).

218. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

219. *See* Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

nondiscrimination. It was the least and perhaps the most they could do, in light of these other cases.

RSO policies that include nondiscrimination conditions need to be read in this wider context. Universities nationwide continue to wrestle with the passive participation dilemma, and understand that their imprimatur matters. As they admit a diverse student population—vastly more diverse than in decades past—they encounter collisions of cultures and ideologies and sensibilities. When they grant students implicit authority to act under the name of the university, they also seek to teach them how to behave. A nondiscrimination condition on RSO status exhorts these students to a higher public ideal of open access, regardless of status and belief—an ideal that collides inevitably and perpetually with the ideal of private associational and ideological autonomy. This was a forum case—as the parties agreed—but it was not an open forum case, and it was not an open-and-shut one either.

There is no doubt that the Court must play a role here—the Court ultimately draws the constitutional lines, even as it defers to educators on matters of pedagogy. But it also must recognize that its One First Street address lifts it very far above the government scenes where these constitutional, cultural, and policy battles are now being waged. It therefore makes sense for the Court to defer to educators', city council members', and public employers' judgment—not because they are "elites" imposing their political sensibilities on an unwilling public, as some of the justices claim—but because they are *there* in the trenches, working to advance the public values the justices themselves have identified, and once tasked them with promoting, then limited their tools for addressing. And in any event, it is nonsense—"desperate hyperbole"—to paint the government officials in all of these cases, in all of these American settings, with the same political brush, or to assume they all are unmindful of the burdens of their policies on dissenting citizens—let alone that they are openly hostile to their concerns.

Of course, there are many times when judicial skepticism of these government actors is supremely warranted—bias and capture problems are perennial. Again, as I said in the opening section, one person's worthy government end is another's unconstitutional condition. But a *nondiscrimination* condition that compels "all-comers" access to a government-authorized benefit—*enforced in an even-handed way*—arguably stands near the bottom of the list of

government policies likely to commit these constitutional errors, because it does burden us all.[220] The very list of organizations to which application of the policy struck the CLS lawyers as "absurd" belies a claim that it is also aimed primarily at *them*. Rather, such a measure often—surely not always—is better seen as an effort to distance government from the lingering taint of private discrimination in which it fears it may be implicated, even if it does nothing at all. This is *especially* true in this era of "undoing" civil rights—through judicial decisions, voter initiatives, and other measures designed to restore an ostensibly neutral status quo, despite proof that the world is still racially and otherwise stratified.

Were the state action question still a foreground, versus background concern, perhaps the Court would still be inclined to make finer distinctions among these forms of government action. Given its blunt-edged approach to the passive participation issue, however—e.g., declaring racially stratified neighborhoods a private concern, and not "resegregation"[221] and preventing government from using race-conscious methods to attack the effects of this stratification—nondiscrimination conditions on benefits may be the best, albeit imperfect, way for government to limit its involvement in private patterns of discrimination. Government still must assure that a true public forum remains open to expression that may be, or seem, discriminatory; but it need not do more. And it surely need not excuse those who wish to use government resources to perpetuate private discrimination; however that may be defined in the years ahead.

The doctrinal intricacies of Frames Four, Five, and Six obviously dominated the discourse in *Martinez* and ultimately governed the outcome. Neither the lawyers nor the justices likely could have been expected to take the longer, theoretical view of the case outlined here, or to spend time on analysis of alternative frames that plainly would have produced one result, under modern doctrine. It thus made perfect short-term sense for the Court to spend no time on Frames One, Two, or Three.

220. An obvious and very important caveat to this claim are so-called "Civil Rights Initiatives" (also called "Connerly Amendments"), voter-approved initiatives that prevent government from "discriminating" on the basis of race, sex, color, ethnicity, or national origin in order to undo the remnants of affirmative action programs. *See, e.g.*, Proposition 107, H.C.R. 2019, 49th Leg., 1st Reg. Sess. (Ariz. 2010).

221. *See Parents Involved*, 551 U.S. at 736.

But something is lost, as I have shown here, when one moves too quickly past the state action moorings of this and similar cases and considers the longer term consequences and historical antecedents to the problem at hand. In particular, one misses how state action penumbras still affect how one balances the concerns that surface more visibly in the other three frames of analysis, and how they also may affect government actors who are striving to avoid lending government imprimatur to some private conduct and expression—perhaps especially religious conduct and expression, but certainly discriminatory conduct and expression.

The state action frame also offers another way to examine the Court's conditions on fora and funds cases. It shows that the Court has taken the government off the constitutional hook in the vast majority of cases in which it offers private parties funding, access to its property, and other benefits. Without more, provision of such benefits is not enough to make a private actor a "state actor."

But the Court also has given the government broad discretion—and responsibility—to police its benefits and property to assure that private participants observe public values. This may reflect the Court's respect for state actors' ability to manage state action principles without judicial supervision. Or it may simply reflect a kind of pragmatism: The judiciary is simply not equipped to (or inclined to) second-guess the government on all of these decisions. In any event, it relocates but does not eliminate a central state action concern—that government decisions inevitably convey government imprimatur.

What swells, under this approach of shrinking state action and limiting constitutional "conditions on conditions," is the middle terrain—the "play in the joints"—where government may choose to protect common resources and common spaces in ways that promote its policy ends, without significant judicial oversight. The remaining concern, then, is whether government will exercise this vast power responsibly and humanely.

This obviously depends. As civil rights theorists pointed out decades ago, in ways that CLS and other modern religious freedom advocates now echo, selective indifference to the disparate consequences of ostensibly even-handed rules still happens, and still matters to the way in which citizens experience government actors and government power. Even when the Court declares that something is "private," it still can feel, and it still often *is*, very much a matter of public power and of public concern.

It thus was rather ironic that the justices who often seem least inclined to define the constant interplay of public and private as "state action," and who usually deny that disparate impact violates the Constitution absent a discriminatory intent, viewed the disparate impact of this government effort to maintain some modest distance from religious and other private associational forms of discrimination, and to control its message and its imprimatur by demanding nondiscrimination, so offensive. But it was also ironic that the justices who usually do see how passive participation happens, who worry a lot about government entanglement with private discriminatory conduct and ideas, and who do see how disparate impact can wreak as much havoc on minority groups as can disparate treatment, were not more apprehensive about the "play in the joints" power reinforced in the case.

A final significant irony of *Martinez* was that the parties have so much in common on this very point, though so often are at constitutional odds. Few other groups today are more engaged in the ongoing struggle over cultural belonging and government imprimatur, than are religious and LGBT groups. Both seek government benefits without conditions that would bar them full access. Both believe its denial is a form of viewpoint and status-based discrimination. Both feel the effects of the selective indifference problem in ways that strike at their identity cores. Each is heard by the other as seeking "special rights," not equal treatment. Each is seen by the other as threatening and accusatory ("bigoted" and "damned"). Both appeal to the courts for relief, even as they continue to appeal to other government actors to alter policies that burden their private beliefs and ways of living. Both have had significant victories in recent years. Both want *more*. Neither is likely to find in a judicial ruling the deeper satisfaction that can only come from a genuine and grassroots sense of belonging to the community at large. Choosing between their claims to belonging is not a neutral act.

Of course, public universities are neither courts nor legislatures; they are places where government attempts to inculcate public values, as well as transmit knowledge. There can be no "neutrality" in this either—not in general, nor as applied to disputes about students' conflicting civil rights.

Whether Hastings got it right, in its effort to juggle competing evolving public ideals of equality, freedom of expressive autonomy, freedom of religion, and a robust marketplace of ideas, remains to be seen. But the Court in *Martinez* likely did get it right, in letting the educators and students work out this particular conflict internally and

locally—and in deeming the "all-comers" compromise as a constitutionally permissible condition on the government's imprimatur in this case. A ruling in favor of CLS would have imperiled government power to control its involvements in private discrimination without suspending a government program.

As other universities now wrestle with their existing policies, it will be interesting to see whether they now abandon nondiscrimination conditions on RSOs, adopt "all-comers" rules, allow for expressive association exemptions upon request, or stick to their policies as written where they enumerate specific categories of prohibited discrimination and defend them in court. An unlikely outcome, thanks to *Martinez*, is that they will abandon RSO programs altogether, lest they be perceived as endorsing private discriminatory conduct.

The aim of this piece has been to put this particular campus and "unconstitutional conditions" dispute into a wider context of government control over its imprimatur. I have argued that the Court should revisit the state action fundamentals outlined here, and acknowledge their relevance even when modern state action doctrine does not. I also have proposed an eight-factored test that captures this aspect of government power over its purse strings and property, as well as the other constitutional values at play. In my view, this test is a more accurate way to describe the enduring problem of "unconstitutional conditions" than is current doctrine, because it gives more explicit attention to how and why government imprimatur still matters—to government actors, and to the people most affected by their decisions. Whether the test would lead to more convincing or internally coherent results is difficult to predict; the policy is general, would apply to a vast terrain, and would be subject to judicial interpretation—just like the current tests for conditions on subsidies and fora. But it would, at least, ask the right questions, and identify all of the relevant concerns. This would be a good first step in the inevitable cases to follow.

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