THE FIRST AMENDMENT DYAD AND *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*: GETTING PAST "STATE" AND "INDIVIDUAL" TO HELP THE COURT "SEE" ASSOCIATIONS

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I. INTRODUCTION

Since Robert Putnam pointed to the fragility of associations in a democracy,[1] constitutional scholars and political theorists have paid increasing attention to freedom of association and to the role of intermediary institutions in American life.[2] Putnam's concern dates back at least to Alexis de Tocqueville's study that described free associations as an important component in the lives of Americans and essential to the health of American democracy.[3] Both Putnam and Tocqueville understood the significance of associations and their place in a liberal democracy. Tocqueville worried that the equality and individualism endemic in a democratic society would erode associational ties[4] and Putnam vindicated Tocqueville's concerns by documenting their decline in American democratic society.

The Supreme Court's treatment of freedom of association has only made the existence of associations more tenuous. In *NAACP v. Alabama*, the Court described freedom of association as emerging from freedom of speech and

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1. Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995). Five years later Putnam developed the article into a book. *See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

2. *See, e.g.*, FREEDOM OF ASSOCIATION (Amy Gutmann, ed., 1998) (a collection of essays by an array of political philosophers offering diverse perspectives on the meaning of freedom of association).

3. *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 898 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012).

4. *Id.* at 885–86.

freedom of assembly.[5] As the case law developed, the Court increasingly relied on speech as the location of the right, effectively only defending freedom of association when it could be directly tied to the individual right to free speech and justified as essential to democratic dialogue.[6] In *Roberts v. Jaycees* the Court coined the term "expressive association" to describe associations that garner First Amendment protection.[7] The right of associations *as associations* was ignored by the Court. In subsequent cases[8] the Court justified its rulings on the grounds that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[9] While the Court upheld freedom of association, it showed no concern for the *association* apart from its expressive potential.

The tendency in freedom of association case law to treat associations as instrumental to free speech reached its apotheosis in 2010 when the Supreme Court ruled in *Christian Legal Society v. Martinez*[10] that a public university had the authority to deny official recognition to a religious group on the grounds that it required its leaders and voting members to be Christian, further diminishing the scope of freedom of association as a constitutional right.

Most scholars who addressed the *Martinez* opinion were critical, pointing to problems with the Court's specific arguments or to flaws in its use of precedent. Many noted that the *Martinez* Court failed to adequately protect associations and that its case law had been heading in this direction for some time.[11] But in general these scholars failed to diagnose and describe the flawed theoretical framework underlying the decision. The Court did ignore the role of associations. The question is: why? What is it in the Court's theory of the First Amendment that would cause it to ignore the associational rights at stake in a

5. NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."). Interestingly, the Court located the right of association in the Due Process Clause of the Fourteenth Amendment, and not in the First Amendment. *See id.* at 449. The NAACP Court connected freedom of association to the textual rights found in the First Amendment, such as speech, assembly, and press, but never directly linked them to the First Amendment, instead describing them as part of the "liberty" protected by the Due Process Clause. *See* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 82 (2012) [hereinafter LIBERTY'S REFUGE]. Nonetheless, most scholars at the time saw NAACP as a First Amendment case because of its treatment of speech, assembly, press and association. *See, e.g.*, Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964); *see also* LIBERTY'S REFUGE, *supra* note 5, at 85 n.44.

6. LIBERTY'S REFUGE, *supra* note 5, at 21.

7. Roberts v. U.S. Jaycees, 468 U.S. 609, 610 (1984).

8. *See generally* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., 515 U.S. 557 (1995).

9. *Boy Scouts of Am.*, 530 U.S. at 648.

10. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 694 (2010).

11. *See, e.g.*, Timothy J. Tracey, Christian Legal Society v. Martinez*: In Hindsight*, 34 U. HAW. L. REV. 71 (2012). Tracey served on CLS's legal team. *See id.* at 72; *see also* LIBERTY'S REFUGE, *supra* note 5, at 76–162.

case that explicitly implicates freedom of association?

This article intends to answer that question by providing a detailed analysis of the *Martinez* decision and to develop a theoretical paradigm, the First Amendment Dyad, that explains the Court's decision in its totality by describing its underlying hermeneutical framework. The First Amendment Dyad consists of two concepts, the individual and the state.[12] The terms *individual* and *state* in the Court's reasoning are conceptually abstract and analytically exclusive.[13] The Court conceives of the *individual* as separated from its social context according to what William Galston calls "liberal autonomy" defined as "individual self-direction."[14] The individual is discrete, self-sufficing, and more or less interchangeable with other individuals. The term is abstract and exclusive in that the Court will understand the individual as abstracted from his social context in associations and institutions, the communities of belief in which he is actually found, and consider his exercise of rights in isolation from their real-world context.[15] When the Court considers constitutional rights, it will limit them to the rights of individuals considered in their solitary state. Rights that emerge from interactions with others, such as the rights to association and assembly, will be circumscribed by an overriding concern for their origin in the individual.

The *state* in the Court's conception is the political authority defined in a Hobbesian manner: monolithic in power and reach, absolute in sovereignty. This does not mean that the state is undemocratic. In the Court's conception, the state is democratic and, as such, democratic citizenship is the primary mode of membership for individuals. Galston describes this theory of the democratic state as "civic totalism." The political power is supreme in authority and importance over lesser social authorities that are contained within it. This is related to the Roman law concept of concession: the state concedes the existence of associations, a concession which it may revoke at will for its own reasons.[16]

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12. *See generally* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 5 (2013) (providing the apt characterization).

13. The problem of conceiving state and individual as abstract and exclusive in modern political theory more broadly is described by Jacob Levy who writes, "The rise of the language of liberal universalism, of abstract doctrines of rights applicable everywhere, sometimes flattens our sense of what the liberal tradition has consisted of, and of what liberal ideas can consist of now. It leads us to overemphasize the dyadic relationship of individual and state, both of which seem abstract and universally necessary, rather than the triadic relations of individual, state, and a plurality of social groups that seem unavoidably locally specific." JACOB LEVY, RATIONALISM, PLURALISM, & FREEDOM 12 (2015).

14. WILLIAM GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY 21, 24 (2002).

15. Horwitz criticizes this tendency in constitutional law as the "Lure of Acontextuality" that reduces First Amendment rights to conflicts between individual and state while ignoring the institutions (such as churches, associations, libraries, and so forth) where First Amendment rights are practiced. HORWITZ, *supra* note 12, at 5–7; *see also id.* at 25–104 (providing a full discussion of Horwitz's argument). John Inazu also calls for the courts to pay attention to the context of First Amendment rights. LIBERTY'S REFUGE, *supra* note 5, at 14–17.

16. There is no need to describe the history of the transmission of this idea into modern political thought (such an exercise is beyond the scope of this paper) to note its presence in

Rights that the individual has against state power apply just as readily to the authority of associations. The state in this understanding will not permit any authority to make a claim on individuals outside of its purview. In constitutional law, this concept of the state is applied by the Court when it subsumes the idea of the association into its understanding of the state and considers activity of associations to be essentially state activity, protected only insofar as it furthers state objectives. As represented in the state university, the Court will allow the state to suppress associations that would restrict their own membership in a manner impermissible to the state. Associations must be the larger political community "writ small."[17]

Under the conceptual framework of the First Amendment Dyad, the Court will only protect freedom of association when it furthers the rights of individuals or when it is considered valuable to the functioning of the democratic state. This is not to say that the Court never recognizes institutions and associations, but to point out that those instances are exceptions to the rule. Constitutional scholar Paul Horwitz notes that when the Court breaks its own rules and strays from its interpretive framework, it means that the Court's framework has missed something important.[18] This article is seeking to describe the flawed framework in the *Martinez* decision and to explain from a theoretical perspective how the Court could miss something as important as *associations* in its evaluation of *freedom of association*.

The main focus of this paper is the First Amendment Dyad in the *Martinez* decision. Part II begins with a brief examination of the work of two of the premier contemporary scholars on freedom of association, John Inazu and Paul Horwitz, and explains how this article complements their scholarship by providing a much-needed theoretical construct through which to understand how the Court has misconceived this important right. Part III provides an account of the facts of the *Martinez* case and the Court's reasoning. Part IV analyzes the *Martinez* decision in terms of the Court's conceptualization of the individual and the state. Analysis of Supreme Court case law in this article is confined to *CLS v. Martinez* because this case is the culmination of the Court's doctrinal development of freedom of association since the right's inception in *NAACP*.[19]

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contemporary constitutional law. Suffice it to point out that Galston places the idea philosophically in Aristotle, Hobbes, and Rousseau: Aristotle for his emphasis on the political partnership as the highest form of the good; Hobbes for denunciation of divided sovereignty; and Rousseau for his insistence that citizens' loyalty be undivided by "partial societies." *See* GALSTON, *supra* note 14, at 24–25.

17. *See id.* at 20 ("If we insist that each civil association mirror the principles of the overarching political community, then meaningful differences among associations all but disappear; constitutional uniformity crushes social pluralism.").

18. HORWITZ, *supra* note 12, at 7. Horwitz is relating the Court's occasional need to break from its interpretive framework which it bases upon abstract, acontextual rules to take account of the actual context in which First Amendment rights are practiced. Such acontextual categories are therefore less helpful than the Court asserts and, I argue, damaging when it causes the Court to mangle or ignore essential rights, such as association or assembly.

19. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958); *see* LIBERTY'S REFUGE, *supra* note 5, at 6.

To demonstrate the presence of the First Amendment Dyad in the *Martinez* case, this article highlights six features of the decision and organizes them in terms of the components of the First Amendment Dyad. The concept of the individual is located in the Court's "merger" of freedom of association into freedom of speech, the abolition of the status/belief distinction, and the Court's use of the terms "reasonable" and "viewpoint neutral." The concept of the state is found in the Court's argument for the role of speech in the democratic state, the Court's notions of state property and state action (manifested in its novel use of forum analysis, subsidy analysis, and application of the Fourteenth Amendment), and the Court's treatment of group regulation of conduct. The first three demonstrate the Court's concern with the individual as a discrete and self-sufficing unit, rather than a person with social context. The latter three reflect the Court's concern with the state as the primary locus of membership for individual students. All six result in a denigration of associations. During the discussion counter-arguments to these points will be addressed.

This article argues that when the Court surveys the First Amendment landscape it *sees* only the individual and the state. Its theoretical foundation is limited by that paradigm which blinds it to the presence of associations and institutions that lay beyond its dyadic framework. While this article focuses only on *CLS v. Martinez*, this paradigm could be more broadly applied to previous freedom of association cases which followed a similar logic to *Martinez*.[20] By accurately diagnosing the theoretical problem at the heart of freedom of association, this article sheds light on the lens through which the Court examines freedom of association and illuminates the foundation of the Court's jurisprudence on this important right. Only from such a fundamental theoretical starting point can begin a fruitful scholarly search for a solution to the problem of the disappearance of freedom of association from Supreme Court case law.

II. FIRST AMENDMENT SCHOLARSHIP AND FREEDOM OF ASSOCIATION

The problem of the decline of freedom of association in Supreme Court case law has been widely recognized in recent First Amendment scholarship.[21] John Inazu argues in *Liberty's Refuge: The Forgotten Freedom of Assembly* that the right to associate was originally preserved in the Assembly Clause of the First Amendment, which contained a right of dissenting groups.[22] In *Confident Pluralism: Surviving and Thriving Through Deep Difference*,[23] Inazu lays out a program composed of a variety of constitutional and civic principles that would undergird a pluralist political society. Paul Horwitz argues in *First Amendment*

20. Inazu and Tracey see *Martinez* as the outcome of previous freedom of association jurisprudence. *See* LIBERTY'S REFUGE, *supra* note 5, at 145–49; Tracey, *supra* note 11, at 96.

21. *See infra* notes 76–83.

22. LIBERTY'S REFUGE, *supra* note 5, at 22–25.

23. JOHN D. INAZU, CONFIDENT PLURALISM SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE 15 (2016) [hereinafter CONFIDENT PLURALISM] (summarizing a series of constitutional and civic principles that the author believes will secure a diverse and plural society).

Institutions[24] that the judiciary does not take adequate account of the context in which First Amendment rights are exercised, namely, in what he calls "First Amendment institutions," such as churches, newspapers, and voluntary associations. The theoretical proposal in this article is different from, although largely complementary to, their diagnoses.

Freedom of association as a constitutional term was coined by the Court in the 1950s,[25] but, Inazu argues in *Liberty's Refuge*, its pedigree as a practice, and a constitutionally protected practice, is much older.[26] The Court did not have an operative doctrine of "freedom of association" when Tocqueville described such associations.[27] Nonetheless, they formed an essential part of the lives of many Americans. Their constitutional protection was anchored in the Assembly Clause in the First Amendment.

The right to assemble was not limited to "petitioning the government" or to exercising freedom of speech, both easily reducible to participation in democratic governance. Rather, Inazu writes, "the text of the First Amendment and the corresponding debates over the Bill of Rights suggest that the framers understood assembly to encompass more than petition,"[28] and much more than simply holding public meetings. It was written with the intent of protecting dissenting groups. The Assembly Clause lacks a formulation of "for the common good," and thus is not bound by what a political majority wants or even what a democracy needs.[29] Inazu argues for a resuscitation of the Assembly Clause as the location of freedom of association, which he believes will sidestep the Court's flawed jurisprudence leading up to *Martinez*.[30]

Inazu's textual proposal is intriguing. However, the Court simply lacks the theoretical apparatus to be able to recognize the very associations that Inazu argues the Assembly Clause protects. The dyadic conception of state and individual that this article argues controls the Court's analysis precludes, from a theoretical standpoint, the ability of the Court to *see* groups, to recognize their role in First Amendment inquiry. To put it another way, the Court has ignored the Assembly Clause and focused on the Speech Clause because it can only recognize *individuals* as speakers. Its concept of "expressive association," the only type of association the Court recognizes in its association jurisprudence, is groups of individuals speaking in unison.[31] The Court simply cannot *see*

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24. *See generally* HORWITZ, *supra* note 12.

25. *See* discussion *supra* note 5.

26. LIBERTY'S REFUGE, *supra* note 5, at 29–60 (providing historical examples of actions protected by freedom of assembly).

27. DE TOCQUEVILLE, *supra* note 3, at 895–917.

28. LIBERTY'S REFUGE, *supra* note 5, at 6.

29. *Id.* at 21–22.

30. *Id.* at 186 (arguing that First Amendment litigation should take up the Assembly Clause as a separate constitutional claim in an attempt to get the courts to revisit its jurisprudence on Assembly).

31. *See* Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1487 (2000) (describing the Supreme Court's interpretation of the right of association).

associations.

Inazu's second book, *Confident Pluralism*, argues for constitutional and civic principles that would undergird a pluralistic society. Inazu's constitutional principles include recognition of voluntary groups, a robust public forum, and neutral public funding. He bases these principles on a "modest unity" of commitment to rights, political inclusion, dissent, and public funding for at least a few public works.[32] The civic practices that he sees as important to a pluralistic society include the aspirations of tolerance, humility, and patience as well as a commitment to dialogue between disagreeing citizens. His argument in *Confident Pluralism* is helpful in giving the Court constitutional principles that correct some of the criticisms aimed at the Court in this article. Nothing in this article contradicts Inazu's proposals. The First Amendment Dyad articulated here will help the Court to see the need for the constitutional principles Inazu advocates by demonstrating that the Court has missed their importance by focusing on the individual and the state.

Paul Horwitz explicitly recognizes the problem of the First Amendment Dyad identified above in his book *First Amendment Institutions*. He writes,

> [First Amendment experts] habitually ignore real-world context and focus instead on one central distinction: that between the speaker and the state. On one side is the speaker, often thought of as an individual soapbox orator . . . [o]n the other side is the state—powerful, coercive, censorious, an imposing and undifferentiated mass.[33]

According to Horwitz, courts often engage in "institutional agnosticism," ignoring the fact that it is rarely a single speaker who speaks or engages in other rights protected by the First Amendment. Rather, it is almost always in the context of institutions that such rights are practiced. Horwitz emphasizes that the First Amendment was designed to protect broad engagement in public discourse. He defines a First Amendment institution as "one 'whose contributions to public discourse play a fundamental role in our system of free speech.'"[34] He wants the courts to pay attention to the "infrastructure of free expression"[35] in First Amendment law. This requires developing doctrines on the institutions that make public discourse possible.

By "public discourse," Horwitz means, quoting Robert Post, "those speech acts and media of communication that are socially regarded as necessary and proper means of participating in the formation of public opinion."[36] Public discourse is important for legitimate self-government. Citizens must be allowed to take part in shaping public opinion. Horwitz, contra Post, emphasizes the breadth of this definition. Public discourse shapes culture in a broad sense not limited to the formation of political ideas and practices. Speech that does not

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32. CONFIDENT PLURALISM, *supra* note 23, at 7.

33. HORWITZ, *supra* note 12, at 5.

34. *Id.* at 12 (quoting Paul Horwitz, Grutter's *First Amendment*, 46 B.C. L. REV. 461, 589 (2005)).

35. *Id.* at 9.

36. *Id.* at 12 (quoting Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 483 (2011)).

engage in the democratic process would be more protected under Horwitz's conception of the First Amendment than Post's.[37]

Two problems emerge in Horwitz's approach. The first problem is similar to the problem with Inazu's proposal, namely, that the Court cannot theoretically conceive of a non-state, non-individual entity, as Horwitz acknowledges.[38] The point of his book is to explain the presence and importance of such institutions. But in order for such institutions to come into judicial focus the Court must renovate its dyadic conceptual framework to allow it to *see* the institutions in question. Otherwise the Court will treat such institutions as mere aggregates of individuals or administrative manifestations of the state, both problems addressed below. In other words, Horwitz does not provide a way for the Court to emerge from the theoretical dyad of state and individual that, by his own acknowledgement, currently shackles First Amendment jurisprudence.

The second problem in Horwitz's approach is that the basis for the protection of institutions is their role in public discourse. Institutions are protected for their instrumental contribution to the broader social dialogue, but not for being *communities* that are functionally relevant to the persons that compose their memberships. In many ways, this conception of institutions that makes their constitutional protection dependent on their instrumental value to democratic governance compounds the first problem. Valuing institutions and associations only for their ultimate role in facilitating the function of democratic society reinforces a conception of the group as existing only insofar as it contributes to the health of the democratic state, which is the theoretical reason why the Court ignores institutions in the first place.

While this article argues for something that seems to be missing in Inazu's and Horwitz's proposals, it is important to emphasize that this argument assumes their theses. First, Inazu's textual proposal is accurate and there is a textual location to ground constitutional protection for associations. Second, Horwitz's argument that the logic of the First Amendment infers the presence of institutions and associations is accurate, but the Court has largely failed to develop appropriate doctrines to recognize their presence. This article builds on their contributions by developing a theoretical paradigm to explain the Court's blindness to the meaning of the Assembly Clause and to the presence of institutions in the First Amendment more broadly. This is accomplished by a close examination of just one case, *CLS v. Martinez*, but its application to First Amendment law more broadly could bolster both Inazu's and Horwitz's arguments.

III. *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*

The above discussion of the scholarship produced by Inazu and Horwitz

37. *Id.* at 13.

38. *Id.* at 27 ("In looking at . . . [current values, theories, and judicial doctrines of the First Amendment] we will see a common thread: they routinely emphasize the individual and deemphasize the institutional.").

demonstrates the need for a theoretical account of the flaws in the Supreme Court's freedom of association jurisprudence. This section considers in detail *CLS v. Martinez*, the Supreme Court's most recent treatment of freedom of association. First, it outlines the facts of the case and then explains the Court's reasoning, including its decision to collapse freedom of association into freedom of speech. After this analysis, the article turns to a detailed discussion of the elements of the case organized according to the two exclusive concepts of the First Amendment Dyad, the individual and the state.

A. Facts and Issues

Christian Legal Society (CLS) was a Registered Student Organization (RSO) at the University of California, Hastings College of the Law.[39] In the 2004-2005 academic year, Hastings rejected CLS's application for official student group recognition on the grounds that CLS was in violation of the university's non-discrimination policy which forbids discrimination on the basis of a variety of criteria including religion and sexual orientation.[40] CLS's bylaws contained a "Statement of Faith" requiring belief and practice in accordance with Christian moral teaching. In addition to list of required theological beliefs,[41] CLS also included the following prohibitions,

> In view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership. . .(which includes) all acts of sexual conduct outside of God's design for marriage between one man and one woman, which acts include fornication, adultery, and homosexual conduct.[42]

While any student was allowed to attend meetings regardless of their beliefs or professed moral practices, CLS required all leaders and voting members to sign the Statement of Faith and adhere to its requirements.[43]

Under the antidiscrimination policy, Hastings enforced an "all-comers policy" that required every RSO to allow anyone to join its group, be allowed to

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39. Charles J. Russo & William E. Thro, *Another Nail in the Coffin of Religious Freedom?:* Christian Legal Society v. Martinez, 12 EDUC. L.J. 20, 20 (2011).

40. *See* Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 670 (2010) ("[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.") (citations omitted).

41. Brief for Petitioner at 6, *Martinez*, 561 U.S. 661 (No. 08-1371) ("Trusting in Jesus Christ as my Savior, I believe in: One God, eternally existent in three persons, Father, Son and Holy Spirit. God, the Father Almighty, Maker of heaven and earth. The Deity of our Lord, Jesus Christ, God's only Son, conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return. The presence and power of the Holy Spirit in the work of regeneration. The Bible as the inspired Word of God.").

42. *Id.* at 7.

43. *Martinez*, 561 U.S. at 672. The policy was relatively uncontroversial for students on campuses with CLS chapters. *See* Brief for Petitioner, *supra* note 41, at 7 ("Nationwide, CLS has only once had to expel a member for beliefs inconsistent with the Statement of Faith, and it is unaware of any homosexual person being expelled from any chapter.").

vote, and even to run for office within the organization.[44] CLS's requirement that leaders and voting members sign the Statement of Faith was in apparent contradiction of this policy and they were denied RSO status along with its incumbent benefits.[45] Under Hastings' RSO program student groups are recognized by the school and receive certain benefits including use of school funds, facilities, and channels of communication, as well as Hastings' name and logo.[46] Specifically, the Hastings chapter of CLS was denied travel funds to attend the national CLS conference.[47]

CLS filed suit against Hastings for violating its "First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion."[48] Hastings won at both the District and Circuit levels. CLS appealed the decision to the Supreme Court, which granted *certiorari*. CLS had agreed to a stipulation during litigation that the all-comers interpretation of the non-discrimination policy was at issue and not the non-discrimination policy as written,[49] assuming that the Court would treat the case as a matter of freedom of association.[50] The Court refused to rule on the constitutionality of the non-discrimination policy.[51] The Court only ruled on "whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution."[52] In a five-four decision authored by Justice Ruth Bader Ginsburg the Court agreed with the lower courts' rulings that "Hastings' all-comers policy. . .is a reasonable, viewpoint-neutral condition on access to the student-organization forum."[53] The Court argued that the restrictions imposed on RSO's at Hastings were "reasonable in light of the purpose served by the forum" and viewpoint neutral.[54] The regulations applied to all RSOs and therefore they met the purpose of the limited public forum, which existed to "encourage[] tolerance, cooperation, and learning among students" at Hastings Law School.[55]

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44. *Martinez*, 561 U.S. at 668. The Court wrote, "Hastings interprets the Nondiscrimination Policy, as it relates to the RSO program, to mandate acceptance of all comers." *Id.* at 671. This interpretation arose during deposition of the former law school dean Mary Kane, who stated, "[I]n order to be a registered student organization you have to allow all of our students to be members and full participants if they want to." *See* Brief for Respondent at 7, *Martinez*, 561 U.S. 661 (No. 08-1371) (explaining the stipulation of the all-comers policy).

45. *Martinez*, 561 U.S.at 672–73 (explaining CLS's application process and rejection).

46. *Id.* at 669–70 (explaining the purpose and benefits of Hastings' RSO program).

47. Brief for Petitioner, *supra* note 41, at 12 (explaining how Hastings denied a previously promised grant of travel funds to CLS).

48. *Martinez*, 561 U.S. at 673 (explaining CLS's application process for RSO status, denial, and subsequent lawsuit).

49. *Id.* at 675 (explaining the stipulation in litigation that the all-comers policy and not the non-discrimination policy was at issue in the case).

50. Tracey, *supra* note 11, at 73.

51. *See id.* at 71–73. According to some legal scholars, the policy remains presumptively unconstitutional until the Supreme Court rules otherwise. *See id.*

52. *Martinez*, 561 U.S. at 678.

53. *Id.* at 669.

54. *Id.* at 685 (citations omitted).

55. *Id.* at 685, 689.

B. The Court's Reasoning

The Court refused to analyze CLS's arguments on the basis of freedom of association because it did not distinguish between the arguments for association and the arguments for speech.[56] The Court wrote, "[CLS's] expressive-association and free-speech arguments merge: *Who* speaks on its behalf, CLS reasons, colors *what* concept is conveyed. . .It therefore makes little sense to treat CLS's speech and association claims as discrete."[57] By conflating these claims, the Court, in the words of one legal scholar, "executed a major legal maneuver" that bypassed nearly all of its previous jurisprudence regarding expressive-association claims.[58] This allowed the Court to avoid strict scrutiny, which applies to expressive association, and instead apply a rational basis test for speech claims in a limited public forum.

A limited public forum exists when the government "open[s] up property for certain purposes or certain groups."[59] The Court gave three reasons for deciding the case according to limited public-forum precedents. First, "speech and expressive-association rights are closely linked,"[60] so limited public forum analysis still applies despite the semantic distinction between speech and expressive association. Second, the state can restrict limited public forums to certain groups. Universities, for example, may limit student groups to students.[61] Third, "CLS may exclude any person for any reason if it forgoes the benefits of official recognition."[62] Hastings was not forcing CLS to admit other students, only refusing RSO recognition and benefits to them on that basis. The Court distinguished between the government's use of "the carrot of subsidy. . .[and] the stick of prohibition."[63]

The Court's forum analysis is complicated and it will be discussed in detail below.[64] But in general, the Court allows restrictions on freedom of speech in a limited public forum as long as the restrictions are reasonable and viewpoint neutral.[65] The Court found the policy reasonable on the grounds that the RSO forum was taking place in the educational context. It considered the RSO program an extracurricular part of the college's mission and an "essential part[]

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56. *See id.* at 680, 697 n.27 (dismissing CLS's free exercise claim as inapposite to laws of general applicability (citing Emp't Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990)).

57. *Id.* at 680.

58. Erica Goldberg, *Amending* Christian Legal Society v. Martinez*: Protecting Expressive Association as an Independent Right in a Limited Public Forum*, 16 TEX. J. ON C.L. & C.R. 129, 148 (2011).

59. Jonathan Winters, *Thou Shall Not Exclude: How* Christian Legal Society v. Martinez *Affects Expressive Associations, Limited Public Forums, and Student's Associational Rights*, 43 U. TOL. L. REV. 747, 752 (2012).

60. *Martinez*, 561 U.S. at 680.

61. *Id.* at 681 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983)).

62. *Id.* at 663, 682.

63. *Id.* at 663.

64. *See infra* Section IV.B.2.a (tying the Court's use of forum analysis in *Martinez* to the concept of the state).

65. *Martinez*, 561 U.S. at 679.

of the educational process."[66] If the university decided that its educational mission was best served by allowing all comers to its RSO's then, the Court reasoned, courts should defer to the university's judgment.[67]

The Court ruled that Hasting's policy was viewpoint neutral because it applied equally to all RSO's despite the fact that it unequally burdened some groups over others.[68] Furthermore, the policy only "aim[ed] at the *act* of rejecting would-be group members without reference to the reasons motivating that behavior."[69] So group members could continue to profess certain beliefs but could not act collectively to exclude would-be members on the basis of whether would-be members held those beliefs. All individual students had an equal right to join any group on campus, whether the group wanted them there or not, and regardless of whether their presence affected the message that the group wished to convey.

The Court rejected three of CLS's arguments based on freedom of speech and freedom of association. First, the Court rejected CLS's argument that "[t]here can be no diversity of viewpoints in a forum. . . if groups are not permitted to form around viewpoints"[70] on the grounds that Hastings' decision was constitutional, even if it was not advisable.[71] The university's position had its own reasoning even if it was not "the most reasonable" option. Second, the Court rejected the argument that the policy enabled hostile takeovers of unpopular groups on the grounds that such a possibility was "more hypothetical than real."[72] Third, the Court rejected CLS's argument that Hastings did not have a legitimate interest in encouraging religious groups to admit non-believers into the group.[73]

The Court did not rule on whether the inclusion of unwanted members would affect the association as such.[74] The putative neutral language of the policy would not trigger a separate freedom of expressive association analysis.[75] The Court would only examine the case on the grounds of whether the policy was facially applicable to all student groups. It deemed that it was.

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66. *Id.* at 686.

67. *Id.* at 687.

68. *Id.* at 695.

69. *Id.* at 696.

70. *Id.* at 692.

71. *Id.* ("This catchphrase confuses CLS's preferred policy with constitutional limitation—the *advisability* of Hastings' policy does not control its *permissibility*…[A] State's restriction on access to a limited public forum need not be the most reasonable or the only reasonable limitation.") (internal citations omitted).

72. *Id.* The Court was incorrect in stating that a hostile takeover is a hypothetical fear. Actual cases have been documented where hostile students took over student groups for reasons of ideological disagreement. *See* Brief for the Foundation for Individual Rights in Education and Students for Liberty et al. as Amicius Curiae Supporting Petitioner at 8–12, *Martinez*, 561 U.S. 661 (No. 08-1371).

73. *Martinez*, 561 U.S. at 693–94.

74. Tracey, *supra* note 11, at 95.

75. *See id.* at 86.

IV. THE INDIVIDUAL AND THE STATE IN *CLS V. MARTINEZ*

Scholars have focused on various aspects of the *Martinez* decision. Some hold that it is a narrow decision that applies *only* to an "all comers" policy that existed *only* at Hastings Law School and apparently applied *only* to the specific instance in the case.[76] Tracey argues that it is much broader and that it will dismantle the doctrine of equal access.[77] Others argue that the ruling will change the understanding of limited public forums,[78] alter the understanding of student organizations at public universities,[79] affect the state subsidy analysis,[80] and eliminate the freedom of association as a separate First Amendment right.[81] Some see it as setting up a scenario where the Court can choose from several streams of jurisprudence that are all equally valid given the case history and achieve the outcome it wants based upon which stream of jurisprudential precedents it chooses to follow.[82]

This article uses the insights of much of the scholarship on the *Martinez* case cited in the previous paragraph to develop the First Amendment Dyad as a conceptual framework to understand the case and the Court's treatment of freedom of association. The issues identified by these scholars are organized

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76. *See id.* at 72 n.3, 74 n.20 (providing a diverse list of commentators who agree that the decision applies narrowly to the "all comers" policy at Hastings); *see also* William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 720 (2011) (arguing that *Martinez* is an example of a narrow constitutional ruling).

77. *See id.* at 116–23 (arguing that the Court will only consider a group's right of expression).

78. *See* B. Jessie Hill, *Property and the Public Forum: An Essay on* Christian Legal Soc'y v. Martinez, 6 DUKE J. CONST. L. & PUB. POL'Y 49, 51 (2010) (finding it noteworthy that the Court applied forum analysis to a freedom of association claim).

79. *See generally* David Brown, *Hey! Universities! Leave Them Kids Alone!:* Christian Legal Soc'y v. Martinez *and Conditioning Equal Access to a University's Student-Organization Forum*, 116 PENN ST. L. REV. 163, 165–67 (2011) (describing restrictions on student organizations at public universities in light of the First Amendment's public forum protection).

80. *See* Goldberg, *supra* note 58, at 160–62 (emphasizing the important jurisprudential innovation in the *Martinez* decision). *But see* Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 718 (2010) (Alito, J., dissenting) (dismissing the subsidy aspect as "play[ing] a very small role in this case" in the majority decision). *See infra* Section IV.B.2.b.

81. *Compare* Goldberg, *supra* note 58, *with* Julie A. Nice, *How Equality Constitutes Liberty: The Alignment of* CLS v. Martinez*, (The Constitution on Campus: The Case of* CLS v. Martinez*)*, 38 HASTINGS CONST. L.Q. 631 (2011). Goldberg and Nice come to opposite conclusions in terms of the soundness of the holding, but both agree on the potential effect of the decision on freedom of association. Goldberg, *supra* note 58; Nice, *supra* note 81; *see also* Ashutosh Bhagwat, *Associations and Forums: Situating* CLS v. Martinez, 38 HASTINGS CONST. L.Q. 543, 549 (2011) (explaining that the Court treated CLS's association claims as speech claims).

82. Edward J. Schoen & Joseph S. Falchek, Christian Legal Soc'y v. Martinez*: Rock, Paper, Scissors*, 21 S. L.J. 201, 222–23 (2010) ("The manner in which these three competing interests are resolved in *Christian Legal Society* strikes the authors as being rather like the ancient game of 'Rock—Paper—Scissors' in which participants use hand gestures symbolizing the rock, paper, and scissors to defeat an opponent . . . In *Christian Legal Society*, First Amendment principles are like the competing hand gestures.") http://www.southernlawjournal.com/2011_2/SLJ_Fall%202011_Schoen%20and%20Falchek.pdf [https://perma.cc/4BCX-N394].

according to their fundamental theoretical origin in the Court's conceptions of the individual and the state. The scholars who have addressed the *Martinez* case are not wrong about the aspects of the case on which they comment. But by focusing on various particular features of the case, they fail to diagnose the fundamental theoretical framework at play in the *Martinez* case as a whole and, by implication, freedom of association jurisprudence more broadly. It should be further pointed out that the scholars cited above are not universally critical of the decision. Most are critical or at least skeptical, but some simply note the changes that the decision will bring and others are outright supportive of the decision.[83]

However, the opinions of the scholars on the soundness of the Court's holding in *Martinez* are not important for the analysis here. What concerns us is the fundamental theoretical issues undergirding the Court's decision which their scholarship helps to illuminate by describing the jurisprudential ramifications of various aspects of the case. This article is critical of the *Martinez* Court's reasoning, how it got to its holding. One need not reject the Court's holding in *Martinez* to be troubled by its treatment of freedom of association in its reasoning. For example, Horwitz accepts the Court's ruling on the grounds that CLS was a "nested institution."[84] By its nature, it operated under the aegis of the university and, in the name of First Amendment institutionalism, the Court was right to defer to the presiding institution, in this case the university, rather than the institution nested within it.[85] But Horwitz admits that the Court's reasoning in *Martinez* is a half-hearted institutionalism.[86] It fails to adequately develop a doctrine of First Amendment institutionalism along the lines he suggests.[87] Horwitz writes, "If the Court had examined *CLS* through a genuinely institutional lens, the outcome might not have been different. But the language would have been, and so would the ensuing public conversation."[88]

This section discusses six subjects in the Court's opinion in terms of their relationship to the themes of the individual and the state. The first three—the

83. *See* Nice, *supra* note 81; Max Kanin, Christian Legal Soc'y v. Martinez*: How an Obscure First Amendment Case Inadvertently and Unexpectedly Created a Significant Fourteenth Amendment Advance for LGBT Rights Advocates*, 19 AM. U.J. GENDER SOC. POL'Y & L. 1317, 1324–26 (2011). Both Nice and Kanin see the case as a significant achievement of constitutional rights for gays and lesbians on par with Lawrence v. Texas, 539 U.S. 558 (2003) and Romer v. Evans, 517. U.S. 620 (1996). Nice, *supra* note 81; Kanin, *supra* note 83.

84. *See* HORWITZ, *supra* note 51, at 234–35.

85. *See id.* at 237 ("In my view . . . Hastings probably should have won . . . The university's right to sponsor groups like the CLS, or to exclude them altogether, trumps the nested rights of the associations in question.").

86. *See id.* at 236 ("Although [the case] pays lip service to the idea of deferring to universities, it is really driven by broad, acontextual doctrinal categories.").

87. *See id.* at 238 ("A true victory for diversity and pluralism in CLS would have involved neither demanding that student groups include all comers not insisting that universities cannot tell them to do so. It would have involved adopting a robust institutional framework that would help us see that there is room for universities to reach different decisions on this question . . . .").

88. *Id.* at 236.

way in which speech subsumed association, the dismantling of the status/belief distinction, and the Court's use of "reasonableness" and "viewpoint neutrality"—reflect the Court's concern with the individual. The latter three themes—the Court's instrumental view of groups and democratic politics, its treatment of state property and state action, and restrictions on associational regulation of conduct—reflect the Court's concern with the state. The subject of state property and state action includes the Court's use of forum analysis, government property and government subsidy, and its application of restrictions on the government to private groups.

The analytical focus is on the majority opinion, but the concurrences[89] and the dissent[90] are discussed when relevant. The point of doing so is to demonstrate that the First Amendment Dyad suffuses the thinking of all of the Justices of the *Martinez* Court, not only the five who voted in the majority. While the holding in this case was closely decided, it would be a mistake to understand the First Amendment Dyad as only coloring the reasoning of a bare majority of Justices. The entire Court was implicated in this dyadic way of thinking to various degrees. Even if the Court's holding had been in favor of CLS, the First Amendment Dyad would have still permeated the Court's reasoning.

A. The Individual

This section explores the concept of the individual at the center of the Court's opinion as it is manifested in the Court's reasoning. In the introduction, the Court's conception of the individual was defined as solitary, interchangeable with other individuals, and bereft of social attachments other than the rights it receives from the state. The individual encountered in each of the three aspects of the Court's reasoning discussed below fits this definition. During the course of the discussion, two objections to this depiction of the individual in the *Martinez* decision will be discussed and addressed.

1. Speech Subsumes Association

Recent First Amendment scholarship has harshly criticized the Court's treatment of freedom of association as a species of freedom of speech.[91] This article takes this point further to locate the *Martinez* Court's conflation of free speech and expressive association in an individualistic rubric.[92] Speech rights,

89. While concurrences are non-controlling, they can provide insight into the votes of particular justices, in this case, Justices John Paul Stevens and Anthony Kennedy. *See, e.g.*, Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 698 (2010) (Stevens, J., concurring); *id.* at 703 (Kennedy, J., concurring).

90. *See, e.g.*, *id.* at 706 (Roberts, C.J., Alito, Scalia, & Thomas, JJ., dissenting).

91. *See, e.g.*, LIBERTY'S REFUGE, *supra* note 5, at 118–49 (arguing that freedom of association jurisprudence has attached the right of association to the right of free speech); Bhagwat, *supra* note 81 (arguing that the CLS Court wrongly focused on free speech rather than freedom of association); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978 (2011) [hereinafter *Associational Speech*] (arguing that freedom of association is a right coequal to freedom of speech).

92. *See infra* Section IV.B.1 for a discussion of the relation between speech and the state.

unlike rights of association or assembly, are individual rights.[93] An individual can speak alone, like our soapbox speaker, or he can speak in unison with others. The right to free speech encompasses both, but the locus of the right is the individual in that the right to speak does not emerge from the act of associating with other individuals. To the contrary, the Court has held that the act of associating with other individuals emerges from the individual right to speech.[94]

By locating the right of association in the right to speech, the Court effectively subsumed freedom of association into freedom of speech. The Court wrote that "expressive-association and free speech arguments merge: *[w]ho* speaks on its behalf. . .colors *what* concept is conveyed[.]"[95] Rather than analyze the claims separately under each right's respective precedents, as the Court had done previously,[96] the Court stated that "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."[97] Apparently, "the expressive association claim played a secondary role in support of the free speech claim, [so] the Court concluded that free speech analysis should control."[98] By merging the two rights, the Court eliminated independent protection for associations in a limited public forum, and possibly beyond.

The reduction of expressive association to speech demonstrates that the Court will only uphold the right of association if it amplifies the speech of individuals, but not if it reflects a group dynamic or an associational goal that cannot be reduced to individual speech. This move on the part of the Court eliminated freedom of association as a separate right and grounded it solely in freedom of speech. It is difficult to see how the speech of any individual in a group would be harmed by the presence of an individual who disagrees. Members of CLS or any other group may still express their *individual* views regardless of the presence of a dissenting person. It has become unclear under

93. *See, e.g.*, John D. Inazu, *The First Amendment's Public Forum*, 56 WM & MARY L. REV. 1159, 1169 (2015) ("[T]he assembly right necessarily invokes a relational context: one can speak alone; one cannot assemble alone.").

94. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) (defining the link between association and speech as the right of *expressive* association) (emphasis added); NAACP v. Alabama, 357 U.S. 449, 460 (1958) (locating the right of association in both freedom of speech and freedom of assembly); Bhagwat, *supra* note 81, at 566 ("The modern Court . . . has treated association as a right derivative of, and subsidiary to free speech."); LIBERTY'S REFUGE, *supra* note 5, at 132–35 (explaining this doctrinal movement vis a vis *Roberts*, 648 U.S. 609); Tracey, *supra* note 11, at 99 ("The Court will only find an expressive association violation when forcing the association to accept an unwanted person will produce a measurable impact on the association's speech.").

95. *Martinez*, 561 U.S. at 680.

96. *See id.* The Court justified this unprecedented maneuver by citing Citizens Against Rent Control/Coal. for Fair Housing. v. Berkeley, 454 U.S. 290, 300 (1981), where the Court found that a California housing ordinance violated both the right to free speech and the right to expressive association.

97. *Martinez*, 561 U.S. at 681.

98. Brown, *supra* note 79, at 180.

what circumstances the Court will *ever* recognize an associational right.

Justice Kennedy's concurrence and even the dissent likewise saw the case through the prism of the individual right to free speech rather than the right of association. Justice Kennedy's concurrence displayed a disregard for associations similar to the majority's opinion by describing their purpose as "facilitat[ing] interactions between students, enabling them to explore new points of view, to develop interests and talents, and to nurture a growing sense of self."[99] For Justice Kennedy, associations do not exist to cultivate camaraderie around shared values, but to encourage interactions with different points of view for the purposes of self-development.

The dissent arranged its objections to the decision on the grounds of speech and not association. The dissent summarized the majority opinion as resting on the principle that there is "no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning."[100] While such a statement is critical of the majority's holding, it accepts the premise that the issue at stake is *speech*, not *association*. One of the dissent's main arguments drew from analogizing the case to *Healy v. James*[101] in which a university rejected the application of a chapter of Students for a Democratic Society (SDS). The opinion in *Healy* was predicated on the value of associations to speech. The dissent made it clear when citing *Healy* that the First Amendment meant the defense of *expression*. The dissent wrote,

> The *Healy* Court was true to the principle that when it comes to the interpretation and application of the *right to free speech*, we exercise our own independent judgment. We do not defer to Congress on such matters. . .and there is no reason why we should bow to university administrators.[102]

a. The Court's Need for Message-Based Groups?

A counter argument to what is presented above is that the Court needs a message-based analysis of groups to properly identify groups as First Amendment institutions. As noted above, Robert Post and Paul Horwitz make variations of this argument.[103] The Court in its entirety has collapsed freedom of association and freedom of assembly into freedom of speech. The Speech Clause has swallowed other freedoms that have historically been part of the pantheon of First Amendment rights.[104] While it is certainly true that there is a

99. *Martinez*, 561 U.S. at 704 (Kennedy, J., concurring).

100. *Id.* at 706 (Alito, J., dissenting).

101. *See id.* at 718–22 (discussing Healy v. James, 408 U.S. 169 (1972)).

102. *Id.* at 721 (emphasis added) (internal citation omitted). This demonstrates that the Court is so enmeshed in its dyadic theory of association that even a victory for CLS would not have secured the right of association as the alternative majority opinion would have still justified association on the basis of the individual right to speech.

103. *See* HORWITZ, *supra* note 12, at 12 (quoting Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 483 (2011)).

104. *See generally* John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 814 (2014) (explaining how a free speech framework has diminished constitutional protections for religious groups); John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 601–03 (2010) (explaining how the Court has prioritized the right

First Amendment right to associate for the purpose of speaking, it does not follow that the right to association embodied as it is in the right of assembly[105] can be exercised *only* for the purpose of expression. A message-based approach to association misses that important point.

2. Dismantling the Status/Belief Distinction

For most of the freedom of association precedents prior to *Martinez*, the Court allowed discrimination in membership based on belief and conduct that accompanies that belief, but not based on immutable characteristics or status.[106] On the one hand, freedom of belief and freedom of speech are fully protected and individuals can associate freely with those of like mind; on the other hand, invidious discrimination on the basis of race or sex is forbidden so individuals are judged for what they choose to think, say, and do, but not for who they ineradicably are.[107]

The status/belief distinction was operative in *Roberts* where the Court allowed an association to determine its message by restricting its membership. Jaycees could not reject a potential member based on her *status* as a woman, but it could reject a woman—or a man—who disagreed with Jaycees' *message* to advocate for the interests of young men in business. The Court made a distinction between discrimination based on status (in this case, sex), which is not an acceptable criterion for membership and cannot survive strict scrutiny, and discrimination based upon belief, which is constitutionally acceptable.[108] This distinction allows the government to suppress invidious discrimination based on race or sex while also allowing all ideas and beliefs, no matter their discriminatory content, to have unhindered instantiation in groups.

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of speech and ignored the right of assembly). *See generally* LIBERTY'S REFUGE, *supra* note 5 (providing the most insight into the development of this First Amendment right).

105. *See* LIBERTY'S REFUGE, *supra* note 5, at 6–7 (explaining how the right of assembly protects associations).

106. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (distinguishing between the status of homosexuality and belief in the morality of homosexual acts); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (distinguishing between the status of sex and the belief in advancing young men in business); Runyon v. McCrary, 427 U.S. 163 (1976) (distinguishing between the status of race and racist beliefs); *see also* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1938 (2006) ("[A] religious group . . . that condemns homosexuality might demand that its members share those views. Such a demand would be neither religious discrimination nor sexual orientation discrimination, but only discrimination based on holding a certain viewpoint that secular people could hold as well as religious ones. But such a group rule wouldn't just exclude practicing homosexuals, or at least those practicing homosexuals who believe that homosexuality is proper—it would also exclude heterosexual Catholics who disagree with church teachings on this issue. And if the group tolerates these dissenting heterosexual Catholics but excludes dissenting homosexual Catholics, then it would be engaging in prohibited sexual orientation discrimination, not permitted religious discrimination.").

107. *See* Goldberg, *supra* note 58, at 153 (explaining that free speech protections fail to distinguish "between discriminating on the basis of involuntary status and limiting membership to students of chosen beliefs or conduct.").

108. *Roberts,* 468 U.S. at 624–26; *see also* Nice, *supra* note 81, at 655–56 (explaining the difference in *Roberts* between the unprotected act of gender discrimination and protected belief in or speech about gender discrimination).

The status/belief distinction is important for freedom of association because it locates the right of association *in the association*. It allows groups to have unique identities by limiting their membership to those who agree with the ideals of the group and it maintains the potential for substantive ideological differences between groups. Under this conception of freedom of association, individuals are not interchangeable but have diverse characteristics that find form and reinforcement in various associations. The associations in turn can police the border of their group to maintain their distinctive identities—as long as the border of the group is based on belief, not status.

In *Martinez*, the Court dismantled the distinction between status and belief. Groups are allowed to express whatever discriminatory view they have, but they may not limit their membership on the basis of belief or conduct arising from belief.[109] The Court relied on its ruling in *Lawrence v. Texas* (2003)[110] to eliminate the distinction between status and belief on the grounds that to discriminate on the basis of sexual acts that emerge from sexual orientation amounted to status discrimination on the basis of sexual orientation.[111] The Court wrote, "When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination."[112] Conduct, previously an aspect of *belief*, was transferred to an aspect of *status*. One scholar explained, "[D]iscriminating against same-sex conduct constitutes discrimination against gays as a class of persons."[113] Rejecting someone who engages in same-sex conduct from membership in a religious group was tantamount to rejecting someone who has a same-sex sexual orientation.[114]

The Court reasoned that requiring Hastings to make a distinction between a status-based and a belief-based rejection would place too high a burden on Hastings to determine "whether a student organization cloaked prohibited status exclusion in belief-based garb[.]"[115] However, the Court had not only never had a problem with this in the past, but based its past opinions on this very distinction.[116] "In the expressive-association context, private groups, who are not prohibited from discriminating by the Constitution and who do not possess

109. *See* Robinson v. California, 370 U.S. 660, 666 (1962) (distinguishing between the status of drug addiction and the conduct of illegal drug use).

110. Lawrence v. Texas, 539 U.S. 558, 575 (2003) (ruling that homosexual acts are protected from government regulation under the liberty guaranteed by the Due Process Clause).

111. Inazu links this to Justice Ginsburg's "inattention to religious liberty." John D. Inazu, *Justice Ginsburg and Religious Liberty*, 63 HASTINGS L.J. 1213, 1234 (2012).

112. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 689 (2010) (quoting *Lawrence*, 589 U.S. at 575) (emphasis added by the *Martinez* Court).

113. Nice, *supra* note 81, at 670.

114. Kanin, *supra* note 83, at 1324–26.

115. *Martinez*, 561 U.S. at 688; *see also* Christian Legal Soc'y v. Walker, 453 F.3d 853 (7th Cir. 2006) (ruling in favor of the CLS chapter in question because the group discriminated in membership on the basis of same-sex conduct, but not the immutable characteristic of sexual orientation).

116. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 623–24, 628–29 (1984) (distinguishing between the status of sex and the belief in advancing young men in business).

the power of the state, often wish to select members who share their core values for the purposes of expression, not discrimination."[117] The Court had previously deferred to that associational prerogative when expression was at stake.[118]

The status/belief distinction was an attempt by the Court to eliminate invidious discrimination based upon immutable characteristics while maintaining the reality of stark differences of opinion and lifestyle among individuals. These differences include religious creeds, moral values, lifestyle choices, political views, and much else that comprises an ideologically diverse populace. The status/belief distinction assumed that association around belief was a meaningful association. The collapse of that distinction by the Court reduces all persons to discrete individuals in its jurisprudence and ignores profound ideological disagreements and lifestyle differences drawn from the complexity of their individual histories. The Court considers these differences unimportant compared to their fundamental equality as *individuals before the state*.

a. Associational Autonomy and the Individual Right to Act Corporately

A counterargument to the status/belief distinction discussed here is that the Court was simply recognizing homosexuality as a status, rather than conduct associated with belief.[119] Julie Nice is the scholar who most clearly and directly defends this aspect of the Court's opinion.[120] She situates the *Martinez* decision in sexual orientation line of jurisprudence.[121] *Romer* was the first case where the Court recognized equal rights of homosexuals, applying the Equal Protection Clause to strike down a state constitutional amendment that forbid state and local laws from protecting homosexuals as a group.[122] *Lawrence* relied on the Due Process Clause to strike down a state law outlawing homosexual sexual conduct.[123] Each case claimed that gays had an equal right to privacy and liberty in their sexual conduct as did heterosexuals.[124]

What Nice's analysis ignores is the extent to which the individual liberty appropriately established in *Romer* and *Lawrence* is inappropriately applied in the *Martinez* case. The inapposite use of the *Lawrence* precedent and the Fourteenth Amendment in *Martinez* is addressed in detail below. Here it will suffice to point out that, unlike *Romer* and *Lawrence*, *Martinez* dealt with a

117. Goldberg, *supra* note 58, at 153.

118. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 655 (2000) ("An association must merely engage in expressive activity that could be impaired in order to be entitled to protection.").

119. *See* cases cited *supra* note 106.

120. *See* Nice, *supra* note 81, at 672 ("By effectively refusing to conflate openly gay identity with any ideological expression, Martinez enhances liberty, making space for an individual to embrace any religious ideology regardless of his or her sexual orientation.").

121. *Id.* at 645–48 (using Romer v. Evans, 517 U.S. 620 (1996), and Lawrence v. Texas, 539 U.S. 558 (2003), to explain the jurisprudence used in *Martinez*).

122. Romer v. Evans, 517 U.S. 620, 624 (1996) (striking down a state constitutional provision that banned local ordinances or state laws providing specific protections for homosexuals).

123. Lawrence v. Texas, 539 U.S. 558, 575 (2003).

124. Justice Kennedy argued for the Court in both opinions that the rights of persons were at stake in questions of private sexual acts, and the Equal Protection Clause allows no legal difference between homosexual or heterosexual acts. *Id.*; *Romer*, 517 U.S. at 635.

private association and its ability to determine requirements for its leaders that align with its mission. Both *Romer* and *Lawrence* were striking down *state* enactments, either a state constitutional amendment (as in *Romer*) or a state law (as in *Lawrence*). In *Martinez*, the issue is not a state law or action but the liberty of an association to determine its own membership and the liberty of an individual to act corporately, to join a group that supports his or her viewpoint, and to commune with other individuals who support his or her lifestyle.[125]

Three additional points are worth making in response to Nice's argument. First, Nice downplays the synergy between the rights of religious groups and the rights of gay groups. The Court's defense of religious viewpoints and membership discrimination for campus religious groups in a case like *Rosenberger v. Rector and Visitors of the University of Virginia*[126] was used by lower federal courts to defend the rights of gay groups on college campuses.[127] The right of association, including the right of membership requirements attenuated in *Martinez* is the same right of association that protects the right of gay groups to associate. The right of CLS to exclude those who engage in acts it finds immoral is the same right that would allow a group like OUTLAW, the gay rights group at Hastings, to exclude conservative evangelicals who oppose one or all of the organization's goals. This concern was reflected incidentally in the bylaws of OUTLAW that required all of its members to have a commitment to gay rights.[128] Presumably, any member of CLS who signed its statement of faith would be unwelcome in OUTLAW. Equality would require that CLS be granted the same associational liberty. What Nice sees as an expansion of individual rights for gays to join all student groups at Hastings is a shrinking of individual rights of all students at Hastings to act corporately with others of the same ideological disposition. It affects the rights of gay students and gay rights advocates to associate with others of like mind just as much as it affects the right of conservative evangelical students to associate in CLS.

Second, associations with closed membership requirements are often the

125. Bruce P. Frohnen, *The One and the Many: Individual Rights, Corporate Rights and the Diversity of Groups*, 107 W. VA L. REV. 789, 845 (2009) ("A multitude of authorities, aiming at differing end . . . allowed space for each person to carve out his or her own sphere of autonomous action while also pursuing substantive goods in common with his or her fellows.").

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

127. *Id.*; *see* Brief for Gays & Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner at 9 n.2, Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661 (2010) (No. 08-1371) (internal citations omitted) ("The expressive freedom claims of religious and gay student groups have long been mutually reinforcing. The plaintiffs in Rosenberger 'relied heavily on Gay & Lesbian Students Assn. v. Gohn . . . ' and many high school gay-rights groups have found refuge in the Equal Access Act, which was enacted in part at the behest of religious-liberty advocates.").

128. Brief for Petitioner at 12–13, Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661 (2010) (No. 08-1371). The dissent pointed out that many student groups at Hastings were allowed to have membership requirements in their bylaws. *Martinez*, 561 U.S. at 712–13 (Alito, J., dissenting). The university only objected to those membership requirements after CLS's litigation was under way. *Id.*

source of the sort of salutary social change that Nice praises.[129] What begins as a fringe dissenter opinion gains momentum as individuals associate around certain values, build internal consensus, support each other, and convince fellow citizens of the validity of their ideas. What was true for racial and sexual equality holds true for the success of gays in having their individual rights respected in *Romer* and *Lawrence*[130] and various legislative efforts. Early gay rights groups had trouble associating and advancing their agenda because their right to freedom of association was not recognized.[131] It was only with the Court's expansive treatment of expressive associations that gay rights groups were able to organize and achieve social change.[132] The individual rights for gays that Nice praises were made possible by the work of associations that had closed membership requirements around support for gay rights.[133]

Third, dismissing freedom of association after it has contributed to the achievement of a certain amount of social progress ignores the possibility of social *regress*. While current scholarly and public opinion, as Nice notes, is favoring gay rights, it is impossible to know if that will last. One gay scholar poignantly wrote after the *Dale* case,

> In Germany, there were nightclubs for gays in the 1920s and concentration camps for them in the 1940s. The relative tolerance of pre-Depression New York gave way to the repression of the 1930s. Yesterday New Jersey declared us criminal; today it protects us from discrimination; tomorrow it may again find us wanting.[134]

If such a reversal of recent social changes were to take place, a robust freedom of association around beliefs would ensure that gays and their allies still had a place of refuge in their own associations and a starting point to engage once again in the fight for equality.

This article is emphasizing the associational nature of groups, not their role in the individual and the democratic state. But this should not be taken as an argument that individual speech or wellbeing and democratic government are not positively affected by associations. Salutary social change in a democratic society, including an expansion of equality and individual rights, often starts with the work of dissident associations forming around viewpoints and discriminating in membership based upon those viewpoints. But in order for

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129. *See* LIBERTY'S REFUGE, *supra* note 5, at 44–48. (discussing how the women's rights movement and the civil rights movement are two prominent examples).

130. Now, Obergefell v. Hodges, 576 U.S. __, 135 S. Ct. 2584 (2015) can be added to the list of Supreme Court victories for gay rights coming out of Supreme Court decisions.

131. *See* Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale*: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1528–31 (2001).

132. *Id.* at 1519 ("[The First Amendment's] chief value may be the role it plays in protecting people who want to combine with others to promote common causes. This lesson holds for gay people, who have benefited politically and personally when they organize, and who have suffered terribly when the state impeded their ability to do so.").

133. Many went even further: the first gay rights organization, the Chicago Society for Human Rights, required that members be both homosexual and male. *Id.* at 1529. Even bisexual males were excluded. *Id.*

134. *Id.* at 1588 (internal citations omitted).

groups to achieve these salutary aims, they require a freedom of association that exists prior to and apart from individual speech and democratic governance. Thus, the Court must refocus attention on the group itself. This refocusing of the Court's attention would have benefited gay associations of the past as readily as religious associations like CLS today.

3. "Reasonable" and "Viewpoint Neutral"

The Court's definitions of "reasonable" and "viewpoint neutral" in the *Martinez* case are premised on the concept of the individual abstracted from social context. When arguing for the reasonableness of the decision the majority wrote,

CLS's analytical error lies in focusing on the benefits it must forgo while ignoring the interests of those it seeks to fence out: Exclusion, after all, has two sides. Hastings, caught in the crossfire between a group's desire to exclude and student's 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.[135]

The Court is concerned with exclusion of individuals from student groups, even though the potentially excluded individuals do not agree with the orienting mission of the group they may be joining and, while excluded from CLS, may join any other group whose ideas they agree with, or even start their own student group. The Court's analysis focused exclusively on accommodating the individual's desire to join a group, ignoring the social context of a diverse student body manifested in a variety of cultural and religious student groups.

The reasonableness of the policy depends on the Court's definition of individuals as largely interchangeable. On such an assumption of the nature of the individual, there is no reasonable justification for an individual's exclusion from a group on the basis of membership requirements around associational prerogatives that implicate an individual's ideological commitment to the group, as CLS argued. Individuals are virtually indistinguishable from each other and the Court finds no reason why groups would be able to make such distinctions in membership.

This "reasonable" finding by the Court yields results that would be considered unreasonable if associations were treated by the Court as a category of analysis independent of its conception of the individual. If students are allowed to form groups around certain ideas or ideologies[136] then it would follow that they be allowed to restrict membership to those who agree with their ideas and will abide by conduct the group finds appropriate to its own ideology. The university established a forum for student groups to express views that then eliminated the very item, membership requirements, that allowed identifiable

135. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 694 (2010).

136. *See id.* at 729 (Alito, J., dissenting) (explaining that student groups were required to submit a "statement of *its purpose*" under Hastings Regulations § 34.10.A.1).

groups to form.[137]

The Court's argument regarding "viewpoint neutrality" likewise demonstrates an abstract individualism. The argument allows for the dismantling of differences between groups that ensure that all members of the Hastings community, as individuals, have equal access to student groups. The Court wrote, "It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring all student groups to accept *all* comers."[138] A premise of this statement is that all students are the same, or similar enough, that it makes little difference that any student, no matter how different from another, may join any group, no matter how much he may disagree with the purpose of the group he wishes to join.

The policy is neutral in that it purportedly applies to all groups. But, as constitutional scholar Erica Goldberg writes, "The ability to select members based on ideology in order to promote a group's expression, one of the primary purposes of the right to expressive association, is entirely eroded by Hasting's policy, viewpoint neutral or otherwise."[139] Under the Court's understanding of viewpoint neutrality, a university could forbid the use of religious viewpoints in making membership decisions. This would hamstring only religious groups whose existence depends on certain religious viewpoints, but would have no effect on the chess club or most political or cultural groups. "Thus, a university could apply its nondiscrimination policy in a way that affects certain student groups—such as religious groups—differently from other groups—such as political groups—yet still comply with the Court's reasonable and viewpoint-neutral standard."[140] For the Court, "viewpoint neutrality" means neutralizing the viewpoints of groups and making the individual—conceived abstractly— the locus of ideas and action in its constitutional analysis.

B. The State

The previous section intended to demonstrate the presence of the concept of the individual in the *Martinez* decision. The other side of the First Amendment Dyad, the concept of the state, also loomed large in the Court's reasoning. The state is conceived here in Hobbesian terms as monolithic political power, sovereign and all-encompassing. Associations are conceived as part of the state's overall structure and denied the ability to pursue goals independent of state prerogatives. Defense of associations must take place within the context of their role in advancing state objectives. Even constitutional restrictions against state power over individuals are applied to restrict private associations' authority over individuals.

As a public university, the Court treated Hastings Law School as an extension of the state itself and activities taking place there as under the authority

137. Goldberg, *supra* note 58, at 154.
138. *Martinez*, 561 U.S. at 694.
139. Goldberg, *supra* note 58, at 156.
140. Brown, *supra* note 79, at 187.

and responsibility of the state. This was reflected in the Court's assertion that CLS's discrimination in membership would amount to state discrimination. The Court wrote, "The First Amendment shields CLS against state prohibition of the organization's expressive activity, however exclusionary that activity may be. CLS enjoys no constitutional right to state subvention of its selectivity."[141] This statement was based on the notion that the activity of private groups in the university context constitutes state action. This was reflected in the Court's conception of the relationship between speech and the democratic state, its treatment of the university as government property and any action taking place there as state action, and its prohibition of associational conduct. Each of these aspects of the Court's reasoning will be explained in turn to demonstrate the presence of the concept of the state in the *Martinez* decision. Along the way two objections to these arguments will be addressed.

1. Speech and the Democratic State

Above, the Supreme Court's treatment of speech was discussed as an individual right. This section explores the Court's understanding of the importance of associational speech to the functioning of the democratic state.[142] This understanding can be found not only in the majority opinion, but also in Kennedy's concurrence and the dissenting opinion. The justification for associations under Supreme Court jurisprudence is that they have instrumental value to the state insofar as they provide a means of dialogue to reach democratic consensus.[143] The *Martinez* Court wrote, "[T]he Law School reasonably adheres to the view that an all-comers policy, to the extent it brings together individuals with diverse backgrounds and beliefs, 'encourages tolerance, cooperation, and learning among students.'"[144] These goals of the state university are important to democratic society and worthy goals for a state educational institution to encourage and inculcate among students. Therefore, the Court reasoned, groups could be coopted by the state university for these purposes.[145] The Court saw associations as useful tools in democratic governance, but not entities that should have (and do have) their own diverse and pluralistic ends.

Justice Kennedy's concurrence demonstrated that his vote was swayed at least in part by his understanding of the link between associations and democratic governance. In his concurrence, Kennedy elaborated on the Law School's purposes for the forum,

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141. *Martinez*, 561 U.S. at 669.

142. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (justifying free speech based on its relation to democratic governance).

143. Inazu is the most perceptive scholar in tracing the relationship between free speech and the democratic state in Supreme Court doctrine. He places the theoretical background of this argument in the consensus pluralism of Robert Dahl and David Truman. "American pluralism advanced its own insistent claim that politics relocated among groups achieved a harmonious balance within a broad *consensus* that supported American democracy." LIBERTY'S REFUGE, *supra* note 5, at 97.

144. *Martinez*, 561 U.S. at 689.

145. *Id.* ("Hastings can rationally rank among RSO-program goals development of conflict-resolution skills, toleration, and readiness to find common ground.").

> A law school furthers [its] objectives by allowing broad diversity in registered student organizations. But these objectives may be better achieved if students can act cooperatively to learn from and teach each other through interactions in social and intellectual contexts. A vibrant dialogue is not possible if students wall themselves off from opposing points of view.[146]

Kennedy believes that students are engaged in a cooperative endeavor and that groups exist only to facilitate cooperation, an important objective of the democratic state. But groups do not exist in their own right for their own purposes, which may be beyond the scope and purview of the state.[147] For Kennedy, forming an exclusive association is nothing but intellectual seclusion. Kennedy acknowledged that he would vote differently if "in a particular case the purpose or effect of the policy was to stifle speech or make it ineffective."[148] *Speech*, but not association, is important to democratic governance and therefore deserving of heightened protection.

This notion that associations exist only to bolster the democratic state was also the primary justification for the dissent's defense of free speech. Justice Alito wrote,

> Our country as a whole, no less than the Hastings College of Law, values tolerance, cooperation, learning, and the amicable resolution of conflicts. But we seek to achieve those goals through '[a] confident pluralism that conduces to civil peace and advances democratic consensus-building,' not by abridging First Amendment rights.[149]

Associations must be protected for the purpose of "democratic consensus-building," but not for the purposes for which they were created by their members. The importance of the group, the *end* for which it exists, was ignored by both the *Martinez* Court and the dissent. All of the justices, no matter their vote, focused on the student groups' role in facilitating democratic discussion, which reduced groups to their instrumental role in the democratic state.

2. State Property and State Actors

In a previous case that took place at a university, *Widmar v. Vincent* (1981), the Court ruled that providing meeting space "does not confer any imprimatur of state approval on religious sects or practices. . .[nor] dominate [the university's] open forum."[150] This changed in *Martinez* where the state university in question was treated by the Court as state property. This understanding of the public university as state property where the state pursues its own objectives meant that anything that happened at the university, including the activity of student groups, was considered state activity. This aspect of the Court's concept of the state was reflected in three areas: the Court's new limited

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146. *Id.* at 705. (Kennedy, J., concurring).

147. "An association is a coming together of individuals for a common cause or based on common values or goals." *Associational Speech*, *supra* note 91, at 998. Contra Kennedy, those values or goals need not have anything to do with state objectives.

148. *Martinez*, 561 U.S. at 706. (Kennedy, J., concurring).

149. *Id.* at 734. (Alito, J., dissenting) (internal citations omitted).

150. Widmar v. Vincent, 454 U.S. 263, 274 (1981).

public forum doctrine, its use of the idea of government property and subsidy, and its application of constitutional state restrictions (in the form of the Fourteenth Amendment) to private groups.

a. Forum Analysis

The Court chose to hear *CLS v. Martinez* as a matter of limited public forum doctrine.[151] The Court has articulated four types of forums, although it consistently claims it only has three and some argue it has only two.[152] The four that appear in Supreme Court doctrine are traditional public forums,[153] designated public forums,[154] limited public forums,[155] and non-public forums.[156] The Court has not been consistent in how it defines each type of forum nor in the name it uses for each type.[157]

Conventionally, a limited public forum is one where the Court opens up a public forum but limits it in a particular way, such as by who is permitted into the forum or what subject matter may be discussed.[158] "While the government is not required to open up these types of forums for speech purposes, once it does, the forums are to be held to the same standards as the traditional public

151. *Martinez*, 561 U.S. at 680.

152. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1757 (1987) (arguing that the limited public forum is virtually useless as a category and that there are really only two categories: public and non-public); *see also* Winters, *supra* note 59, at 752.

153. Traditional public forums are places "which had traditionally been open to the public for purposes of assembling and exercising free-speech rights." Winters, *supra* note 59, at 751. Public parks and public sidewalks are the paradigmatic examples. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939).

154. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992) ("The second category of public property is the designated public forum, whether of a limited or unlimited character -- property that the state has opened for expressive activity by part or all of the public." (citing Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983))); *see also Perry*, 460 U.S. at 48; Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 655 (1981).

155. A limited public forum happens when the government designates a forum public and further restricts the forum to a certain class of speakers or for a certain purpose. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802–03 (1985); *Heffron,* 452 U.S. at 655; *see, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267–68 (1981) (restricting student groups at a public university to students). There is ambiguity as to the distinction between designated and limited public forums. *See Perry,* 460 U.S. at 45 (describing a limited public forum as a type of designated public forum).

156. A non-public forum is a government-sponsored forum that is *not* public. The only restriction on the government in a non-public forum is that the government cannot restrict speech on the basis of mere opposition to the speaker's views. Winters, *supra* note 59, at 752*; see also* Bhagwat, *supra* note 81, at 559.

157. Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 440 (2006) ("The forum concept has been criticized for, among other things, its rigidity, its lack of a coherent theoretical foundation, and its myopic focus on property characteristics to the exclusion of expressive rights.").

158. CONFIDENT PLURALISM, *supra* note 23, at 50–51 ("[Limited public forums] can be limited to a particular class of people (like students on public university campuses) or to a particular topic (like a public hearing on a proposed policy).").

forum."[159] In *Widmar* the Court ruled that a university student organization forum is a limited public forum in that it is a public forum limited to students. The Court has made it clear that in these forums "students enjoy First Amendment rights of speech and association on the campus."[160] A public forum, whether traditional or limited, is a place where the state is not only *not* speaking or acting, but is explicitly forbidden from restricting private groups and persons from exercising First Amendment rights. Restrictions on First Amendment rights in the context of the limited public forum must be reasonable and viewpoint neutral subject to strict scrutiny.[161] In the context of student groups, the Court's determination that the situation was a matter of limited public forum has guided the Court's jurisprudence on the subject since.[162] What is disputed here is the Court's novel application of this category which permits the state to co-opt private groups operating in the forum.

The *Martinez* Court relied on a recently redefined limited public forum, which differed substantially from how the forum was described in *Widmar* and the other public forum cases.[163] In *Pleasant Grove City v. Summum*[164] the Court defined three categories of public forums: traditional public forums, designated public forums, and a third less protected category, which, while not labeling it a limited public forum, the Court defined it as "a forum that is *limited* to use by certain groups or dedicated solely to the discussion of certain subjects."[165] However, the Court did not indicate that there were non-public forums, which seemed to conflate a limited public forum with a non-public forum as the third and least-protected category. This changed the limited public forum from a category that was very similar to a public forum except for an explicit limitation on content or participants to a forum where the government has wide latitude to regulate speech for its own purposes. This move dramatically alters the Court's treatment of speech and action within the limited public forum. "While the designated and limited public forums have at times been treated synonymously, under this bifurcated system courts will apply strict scrutiny in cases involving a designated forum and the much less restrictive reasonableness standard in

159. Winters, *supra* note 59, at 752.

160. *Widmar*, 454 U.S. at 267 n.5 ("This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum."); *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–30 (1995) (forbidding the state from limiting speech where doing so is unreasonable in light of the interest the exclusion serves) (internal citations omitted).

161. *Rosenberger*, 515 U.S. at 828–29; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

162. *Widmar*, 454 U.S. at 267 n.5; *see* Winters, *supra* note 59, at 756–57. The Court has understood student group programs at public universities as limited public forums since *Widmar*. *See* Rosenberger v. Rector & Visitors of the University. of Va., 515 U.S. 819, at 829 (1995), Bd. of Regents of University of Wis. Sys. v. Southworth, 529 U.S. 217, at 234 (2000), and most recently, of course, Martinez, see *supra* note 60-63. Previous cases such as Healy v. James, 408 U.S. 169 (1972), implicated similar concerns.

163. *See supra* note 155 (listing limited public forum cases pre-*Martinez*).

164. Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

165. *Id.* at 469–70 (emphasis added).

cases involving the limited public forum."[166]

In *Martinez*, the Court cited *Summum* in its decision to use forum analysis in *Martinez* and listed the three types of forums described in *Summum*: traditional public forums, designated public forums, and limited public forums.[167] Note the absence of non-public forums, implying, as it did in *Summum*, that limited public forums are the Court's lowest category for the purpose of forum analysis. The Court's conception of a limited public forum in *Martinez* was more akin to a non-public forum than to the middle category of designated public forum or the pre-*Summum* definition of limited public forum, both of which were more protective of First Amendment rights by providing more strenuous requirements on government regulation than what is found in *Martinez*. The new definition of a limited public forum the Court established in *Summum* made it little more than a state-sponsored non-public forum, which means that when the state declares a limited public forum it is only required to abide by standards of reasonableness and viewpoint neutrality subject to rational basis scrutiny.[168] Whereas the student organization forums were previously places where "students enjoy First Amendment rights of speech and association,"[169] the *Martinez* definition of a limited public forum reduced the student groups of Hastings to little more than state appendages, private entities acting at the government's behest and for the government's purposes.

The dissent accepted limited public forum analysis on the grounds that the requirements of reasonableness and viewpoint neutrality would favor a contrary ruling on the case. Its opinion assumed the pre-*Summum* understanding of limited public forums.[170] The dissent was careful to point out that the use of religion and sexual orientation fall under the viewpoint category and any effort by the Law School to exclude organizations because of the group's membership requirements would be textbook viewpoint discrimination subject to strict scrutiny.[171] Hastings Law School allowed political, social, and cultural groups to discriminate in membership on the basis of viewpoint so they must allow religious groups the same latitude or demonstrate a compelling government interest to justify the disparate treatment.[172]

In sum, the Court's forum analysis dubs limited public forums as essentially

166. Winters, *supra* note 59, at 753.

167. Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez, 561 U.S. 661, 679 n. 11 (2010) (explaining the term "limited public forum," which the court did not describe in *Summum*); *see Summum*, 555 U.S. at 469–70 n.16.

168. *Summum*, 555 U.S. at 469; *id.* at 484 (Breyer, J., concurring). Discussing the context of the public forum doctrines, Inazu writes, "The reasonableness requirement is an inherently squishy standard that can almost always be met." CONFIDENT PLURALISM, *supra* note 23, at 54.

169. Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981).

170. *Martinez*, 561 U.S. at 718–22 (Alito, J., dissenting). The dissent cited Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217 (2000), Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995), and Healy v. James, 408 U.S. 169 (1972), as cases that dealt with the presence of religious groups on public school property. *Id.* However, the dissent did not reference *Summum*. *Id.*

171. *Id.* at 726–27. (Alito, J., dissenting).

172. *See id* at 728.

forms of *state* speech. Groups are allowed to enter the forum insofar as they accomplish *state* objectives. This change in forum analysis imported the state into group activities. By doing so it subsumed group activity into state activity and made it subject to state prerogatives.

b. Government Property and Subsidy

The Court's emphasis on the government as property owner implicated a notion of government subsidy and state action. The Court wrote, "We are persuaded that our limited-public-forum precedents adequately respect both CLS's speech and expressive-association rights, and fairly balance those rights against Hastings' interests as *property owner* and educational institution."[173] Constitutional scholar Jesse Hill remarks, "By applying forum analysis in CLS, the Court reminded us that the government is not just a regulator—it is also a property owner that exercises dominion, control, and exclusionary rights over its domain."[174] As a property owner, it may do what it likes, and exclude who it will, from its property. In addition to a much lower standard for reasonableness and viewpoint neutrality, the Court's move to consider public universities as public property bolstered the government's right as a property owner in the context of expressive association, which "empower[ed] the government to exclude unwanted speakers, mostly under conditions that the government itself is free to define."[175]

The Court's argument is dubious on its face. The government as "property owner" does not accurately capture the state's relationship to traditional public fora such as public parks and public sidewalks, despite the fact that the government owns the property. On the contrary, government ownership of public fora renders these locations uniquely open to the practice of First Amendment rights. As Hill notes, the "use of property is problematic when First Amendment values are at stake."[176] It is doubly problematic when the right of *association* is at stake because this conception of government property makes all activities of private associations on public property effectively acts of the state. Rather than private institutions that act according to their own ends, under this doctrine associations are considered nothing more than state actors whose otherwise private actions and speech are rendered effectively state sponsored.

This government property analysis was further exacerbated by the Court's claim that CLS's application for RSO status was "seeking what is effectively a state subsidy."[177] The Court distinguished between compelling "a group to include unwanted members, with no choice to opt out," as was the case in *Dale*,[178] and simply denying a group government benefits. The Court wrote, "through its RSO program, [Hastings] is dangling the carrot of subsidy, not

173. *Id.* at 683 (majority opinion) (emphasis added).
174. Hill, *supra* note 78, at 52.
175. *Id.* at 53.
176. *Id.*
177. *Martinez*, 561 U.S. at 682.
178. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).

wielding the stick of prohibition."[179] The description of university benefits as "subsidy" means that when the state university subsidizes, the state university speaks. Under this understanding, groups operating at state universities are effectively channels of government speech and government action. The Court placed subsidy analysis in the context of Hastings' claim that it was simply incorporating California state law into its non-discrimination policy[180] and therefore it was acceptable for a public university to forbid the use of "public money" to subsidize conduct that the people of California had determined was discriminatory.[181]

The first problem with the Court's subsidy analysis is that the "subsidy" in question was from student fees. The Court has previously held that student fees were not government speech or a government subsidy as such, although the government must treat their distribution in a reasonable and viewpoint neutral manner, subject to strict scrutiny.[182] Second, the very presence of a forum implies precisely the opposite of government speech. "When a university sets up a forum for speech, that speech is considered entirely private and not attributable to the school."[183] The Court had recognized this principle in *Widmar*,[184] *Rosenberger*,[185] and *University of Wisconsin v. Southworth*.[186] One scholar commented, "The Court had always categorized a school's recognition of student groups as the creation of a forum for private speakers. Schools are

179. *Martinez*, 561 U.S. at 683.

180. *Id.* at 689–90 (referencing CAL. EDUC. CODE § 66270 (West 2010), which prohibits discrimination based on several characteristics including, but not limited to, disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, and sexual orientation).

181. Winters, *supra* note 59, at 767.

182. *See* Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (requiring public university funds to be distributed to a religious newspaper as long as distribution is viewpoint neutral); Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000) (allowing a public university to charge a student fee to fund student groups as long as distribution of funds is viewpoint neutral); Goldberg, *supra* note 58, at 160 ("[I]n the student organizational context, the Court has never considered a university's lending of its facilities or funding to be a governmental subsidy in the same way it has in other contexts . . . .").

183. Goldberg, *supra* note 58, at 160; *see also* Tracey, *supra* note 11, at 120 ("The University of Wisconsin's activity fees were fostering private speech from student groups. As such, the university had to allocate those fees in compliance with the principle of equal access.") (citations omitted).

184. Widmar v. Vincent, 454 U.S. 263, 267 (1981) ("[T]he Establishment Clause does not bar a policy of equal access, in which facilities are open to groups and speakers of all kind . . . [T]he 'primary effect' of such a policy would not be to advance religion, but rather to further the neutral purpose of developing students' '*social and cultural awareness as well as [their] intellectual curiosity.*'") (emphasis added) (citations omitted).

185. *Rosenberger*, 515 U.S. at 834 ("It does not follow, however, and we did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.").

186. *Southworth*, 529 U.S. at 235 ("In the instant case, the speech is not that of the University or its agents. It is not, furthermore, speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered.").

accommodating the student groups' private expression, not using the student groups to send their own message."[187] But according to the Court's analysis of public universities as public property in *Martinez*, the messages expressed in that context are the government's messages. Private groups can now be subsumed into the state when they associate on "government property." In sum, as constitutional scholar Ashutosh Bhagwat writes, "[G]ranting the state the power to dictate access to its property by fiat is essentially the power to denude [the rights of assembly and association], a result surely forbidden by the First Amendment."[188]

i. Seeking State Recognition?

A counterargument to what is argued here regarding the role of associations in a limited public forum that implicates state property and state subsidy is that, regardless of the above analysis, CLS is still seeking RSO status and therefore state recognition and approval of its views. As the majority in *Martinez* notes, CLS had the freedom to meet off campus without state recognition with all the rights of exclusion that entails.[189] The problem for the Court is that CLS sought "state subvention of [its] selectivity."[190] If CLS, or any group, does not seek state recognition then they have full freedom "to exclude any person for any reason."[191] Julie Nice is one scholar who sees the subsidy issues as important to the case since it implicates state recognition and involvement.[192]

The issue of state recognition confuses state recognition as state appropriation and state recognition as a securing of rights. While the issue of subsidy and student fees in the limited public forum was addressed in the previous sections, it is worthwhile to note that entering a public forum is *not* seeking state recognition of one's views or one's association. But when persons enter a public forum, such as a park, to practice First Amendment rights they *are seeking government recognition of those rights*. The state is obligated to recognize their rights by refraining from censorship and even offering protection, no matter the content or viewpoint of the speech or other First Amendment acts.[193] An important implication of the First Amendment is precisely that these persons have a right to enter the forum, a right that the government must, by definition, recognize. In terms of a limited public forum, a person has a right to the forum as long as he meets the specific limitations of the forum. In the case of student groups, the person or persons in question must be students, but otherwise the logic of government recognition of their rights

187. Tracey, *supra* note 11, at 116.

188. Bhagwat, *supra* note 81, at 561.

189. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 682 (2010).

190. *Id.* at 669.

191. *Id.* at 682.

192. Nice, *supra* note 81, at 648.

193. Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134–35 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation . . . Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.").

applies. CLS was not seeking "state subvention" of their group, but its members, as students of a public university that had established a student organization forum, were seeking only state recognition of their First Amendment right to freedom of association.

The subsidy issue and its relation to state recognition is similarly refuted. Subsidy, as it pertains to this case, is not state recognition. Some government "subsidy" is inevitable in any public forum. Inazu writes, "[T]he public forum does not appear out of nowhere, with free meeting space for the forum and free electricity to keep the lights on. Government dollars pay for the spaces, the utilities, and the employees who make public forums possible. Facilitating pluralism means funding pluralism."[194] In addition to the necessity of some government funding for public forums is the simple fact of "the ubiquity of government dollars in today's regulatory state."[195] If the state is allowed to claim that the use of all public dollars is government speech or government action, especially student fees at public schools, then the work of nearly all private groups becomes state-sponsored.

Inazu further argues, "[W]e might be especially concerned when government constrains *generally available* funding in settings that welcome and encourage a diversity of viewpoints and ideas."[196] While this part of the argument would extend beyond the use of student fees, it is an important point that undergirds the proper use of student fees. The state can use resources to advance its own agenda through the use of "government speech."[197] But it should not discriminate based upon a group's viewpoint in distribution of generally available resources, no matter how contrary to democratic sensibilities such a group's viewpoint may be. This applies to Hastings in that a public university should not be allowed to refrain from extending generally available resources in the form of campus meeting space and student fee funds to any student group that meets the basic requirements of the limited public forum (i.e. being students at Hastings). This was the logic of the student fee cases such as *Healy*, *Widmar*, *Rosenberger*,[198] and *Southworth*. Inazu writes, "Public colleges and universities that establish forums for student organizations must welcome student organizations without regard to viewpoint or ideology. That includes extending generally available funding to them."[199]

d. The Fourteenth Amendment and the Extension of Restrictions on the State to Private Groups

The third area in *Martinez* where the Court treats a private group as acting as a government entity is in its application of Fourteenth Amendment restrictions

194. CONFIDENT PLURALISM, *supra* note 23, at 67.

195. *Id.*

196. *Id.*

197. *Id.* at 70–71.

198. *See id.* at 70 (describing *Rosenberger* as an example of the proper use of generally available funds).

199. *Id.* at 80.

on the government to student groups.[200] The Court argued that CLS's conduct policy, which forbade "sexual conduct outside of. . .marriage between one man and one woman,"[201] was a veiled attempt to discriminate based on status.[202] The Court referenced *Lawrence*, which struck down a state law that prohibited homosexual conduct.[203] The Court explicitly cited a constitutional limitation on government—the Fourteenth Amendment proscription on discrimination grounded in the Due Process and Equal Protection Clauses—and applied it to private groups. Private groups are not state actors and are not supposed to be subjected to the strictures of the Fourteenth Amendment in the same manner as the state.

The Court's extension of limits on state discrimination against private groups regarding beliefs demonstrates the theme of the state: the Supreme Court defines private groups as essentially subdivisions of the state, subject to its restrictions. Rights granted to individuals against government encroachment are expanded to protect individuals against private belief-based discrimination. The Court applied the principle that the state must treat citizens equally to private groups to ensure that they, like the state, cannot treat individuals unequally. The action of a private group was treated as state action.

The concurrences of Justices Stevens and Kennedy similarly reflected the idea that private associations are subject to constitutional proscriptions aimed at government action. Neither Kennedy nor Stevens referenced the Fourteenth Amendment, but their concerns tracked the majority's logic and concerns and applied constitutional restrictions on the government to private groups. For both Justices, if a group acts in a state university, it acts in the name of the state.

Discussing the anti-discrimination policy of which the all-comers policy was part, Justice Stevens wrote, "The policy's religion clause was plainly meant to promote, not undermine, religious freedom."[204] His reasoning is that "all acts of religious discrimination are equally covered. The discriminator's beliefs are simply irrelevant."[205] Stevens was correct under the premises of the First Amendment Dyad. Individuals who hold religious beliefs may continue to hold those beliefs as individuals, but they may not form a cohesive group around their beliefs and enforce practices and lifestyle choices consistent with them. A restriction on government power over individual conscience was used to justify the requirement that private groups abide by the same restrictions as the state in their treatment of individuals.

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200. Goldberg, *supra* note 58, at 153.

201. Russo & Thro, *supra* note 39, at 21 fn.6.

202. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 689 (2010). In referring to the relationship between being homosexual and engaging in homosexual conduct, the *Martinez* Court noted that its "decisions have declined to distinguish between status and conduct in this context." *Id.*

203. Lawrence v. Texas, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal *by the law of the State*, that declaration in and of itself is an invitation to subject homosexual persons to discrimination.") (emphasis added).

204. *Martinez*, 561 U.S. at 700 (Stevens, J., concurring).

205. *Id.*

Justice Kennedy's concurrence demonstrated a similar disregard for groups and a conflation of restrictions on non-state associations with those that apply to the state. He wrote,

> The era of loyalty oaths is behind us. A school quite properly may conclude that allowing an oath or belief-affirming requirement, or an outside conduct requirement, could be divisive for student relations and inconsistent with the basic concept that a view's validity should be tested through free and open discourse.[206]

Like the Fourteenth Amendment issue, the proscription on loyalty oaths applies to the government, but not to private groups. Churches may have creeds, social groups may be arranged around loyalty to certain ideas, but liberal constitutional states may not. Under Kennedy's conception, religious groups are not allowed to make claims on their members by requiring adherence to certain belief-based tenets in order to be a part of the group. Such a neutral policy should apply to the state,[207] but not to non-state associations.

i. Institutional Autonomy and the Public/Private Distinction

A response to the argument articulated above regarding state property and state action is that the Court was simply granting the *university* institutional autonomy. Rather than ignoring associational rights, the Court was recognizing the associational autonomy of the university to define for itself what sorts of lesser groups it allows within its domain. When the university dictated the terms of its student organization forum it was doing so not as a *state* institution, but as an institution *independent of state control*.[208] The Court was wrong to take the case as a matter of limited public forum because this case simply does not implicate the state at all.

Both Paul Horwitz and Jacob Levy take this position on the case. Horwitz, as already noted, argues that CLS should be understood as a "nested institution," an institution that owes its existence to a higher institution.[209] When this happens, courts ought to defer to the highest institutional level. If there is a dispute between the Catholic Church and a Catholic university, the courts should allow the Catholic Church to resolve the dispute internally. The Catholic university is an institution nested within the larger institution of the Catholic Church itself.[210] It would be inappropriate for courts to intervene in such a dispute. Similarly, student groups are nested within the university and courts

206. *Id.* at 706 (Kennedy, J., concurring).

207. *See* U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."); *but see* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 181 (2012) ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.").

208. *Martinez*, 561 U.S. at 687. This is one possible interpretation of the Court's ruling, although it is contradicted by the Court's use of limited public forum analysis.

209. HORWITZ, *supra* note 12, at 234–35.

210. *Id.* at 185 ("Disputes within hierarchical religious organizations, such as the Roman Catholic Church, would be resolved by accepting as final the decision of the highest church adjudicator to address the question.").

should defer to the university.[211] Levy similarly describes "complex associations,"[212] which are associations that encompass smaller associations within them. The relationship between student groups and the university is a prototypical example of this type of association.[213] Like Horwitz, Levy would have courts defer to the highest level of the association.

The basis of both Horwitz's "nested institutions" and Levy's "complex associations" is an explicit rejection of a firm distinction between public and private in the university context.[214] Both would treat particular categories of institutions and associations as having their own character and autonomy regardless of whether a specific institution is public or private. Horwitz and Levy would have courts look at the category of the institution (i.e. library, university, voluntary association, etc.) and assign institutional rights based upon the nature of the institution. Public libraries and private libraries, public universities and private universities, would be treated the same by the courts with the same institutional rights appropriate to the library and the university respectively.

In general, this article agrees with that position. But there is no apparent need to abandon the traditional liberal demarcation between public and private in the case of universities.[215] When the state creates an institution and acts through it, as the Court believes it is doing in this case, then the Court should not grant institutional rights to a public institution in the same way it would to a private institution. This does not mean that the Court should not distinguish between types of public institutions. Certainly, a public university ought to be treated differently than the post office and public university professors ought to be recognized as having different rights and responsibilities than postal workers. It simply means that the Court ought to apply a nuanced analysis to public institutions and apply the First Amendment where appropriate. In *Martinez*, a pre-*Summum* limited public forum analysis is the most appropriate judicial treatment of a public university. This would require the Court to consider how freedom of association attaches to groups operating in that forum.

3. Private Authority and the Regulation of Conduct

The Court's rejection of conduct as an aspect of speech was discussed above as part of the Court's theme of the individual and its role in associational expression.[216] This section examines how the Court refused to acknowledge the *authority* of a private group to regulate the conduct of its members. The Court's treatment of conduct reflected a deeper violation of group autonomy than simply an imposition on the speech rights of the group's individual members. It was a

211. *See id.* at 237 ("Whichever path it chooses, the university, as the primary institution involved, should be able to make that choice for itself.").

212. Levy, *supra* note 13, at 266 (depicting associations that "are themselves internally pluralistic.").

213. *Id.* at 268–69.

214. *Id.* at 271 n. 5; HORWITZ, *supra* note 12, at 137.

215. It is beyond the scope of this paper to comment on the application of the public/private distinction to libraries or other institutions.

216. *See supra* Section IV.A.2.

rejection of the collective (albeit limited) *authority* of the group over individuals within the group. In a sense, this is a combination or culmination of the Court's dyadic conception of the individual and the state. By refusing to allow a group to determine membership based on conduct associated with the group's mission, the Court was denying a group's ability to have an existence independent of the state and the state's goals. Individuals should think of themselves only as individuals, not *members* invested in and loyal to a group and its ideals.

The Court wrote, "The Law School's policy aims at the *act* of rejecting would-be group members without reference to the reasons motivating that behavior. . . CLS's conduct—not its Christian perspective—is, from Hastings' vantage point, what stands between the group and RSO status."[217] The Court acknowledged that the internal motivations, beliefs, and thoughts of each *individual* member of CLS remain intact and justified its ruling on that basis.[218] But the *Martinez* ruling hindered *group conduct*, the ability of groups to exercise authority over their members in a manner that provides functional value by concretizing their belief system. The enforcement of rules regarding conduct through exclusion makes an association's presence felt to its members to a greater degree than if it merely forbade through exhortation. This element is important for an association's existence and activity independent of the state and for its importance to the lives of its individual members. Groups can assert beliefs and require conduct in a manner that would be unconstitutional if required by the state.

The dissent also did not understand the importance of this element of the case. While the dissent rejected some aspects of the Court's conception of the state, its treatment of group regulation of conduct indicated that it understood conduct simply as an aspect of expression and did not understand its role in the internal associational dynamics and identity of groups. The dissent wrote,

> This Court has held, however, that the particular conduct at issue here constitutes a form of expression that is protected by the First Amendment. It is now well established that the First Amendment shields the right of a group to engage in expressive association by limiting membership to persons whose admission does not significantly interfere with the group's ability to convey its views.[219]

The dissent's defense of group regulation of conduct was based on the role of conduct in *expression*, not on its role in group cohesion that is essential to group identity. As discussed in the section above on "Speech and the Democratic State," the Court considers groups valuable for their effect on the state in terms of promoting dialogue. But groups do not matter in terms of their

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217. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 696 (2010).

218. *Id.* at 696 n.26 ("Although registered student groups must conform their conduct to the Law School's regulation by dropping access barriers, they may express any viewpoint they wish—including a discriminatory one."). In other words, a group may not express its views via exclusion, but the members may continue to express their views, possibly in the presence of disagreeing members.

219. *Id.* at 725 (Alito, J., dissenting).

own purposes apart from bolstering the state, however democratic it may be. Once again, the dissent is indistinguishable from the majority in its fundamental theoretical orientation that identifies only the dyad of state and individual in its analysis of First Amendment rights.

V. CONCLUSION

This article explained the Court's treatment of freedom of association in *CLS v. Martinez*, the latest installment of its freedom of association jurisprudence, in terms of the "First Amendment Dyad," a theoretical framework consisting of the state and the individual as the exclusive categories of analysis of First Amendment rights, ignoring the role of *associations* in freedom of association. The Court based its reasoning in *Martinez* on how Hasting's "all-comers" policy relates to individuals, understood as abstract, solitary entities bereft of social context and basically interchangeable, and the state university as a concretization of the political state and the primary source of identity and purpose for all individual students. The dyadic hermeneutical framework warps the Court's understanding of freedom of association. When associational rights come into play, the Court will defend them only on the basis of their value to the individual or to the state and it will allow their restriction when they do not explicitly serve the interests of either component of this dyad. The Court's theory, its way of *seeing* freedom of association, is determined by the First Amendment Dyad, which excludes groups from its analysis.