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Martinez's Unanswered Question: The Present State of Religious Organizations' Ability to Exist in Public Universities

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Research Guides

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Scope

This guide provides an overview of *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), and the current state of religious student organizations' ability to exist on school campuses. Particularly, this guide focuses on a public university's authority to restrict the recognition of religious student organizations for purposes of access to school funding and facilities through the guise of the school's nondiscrimination policies.

Following the *Martinez* decision, whether a student group can form and select its membership based on religious beliefs in light of such nondiscrimination policies is questionable given the narrow holding of the case. Therefore, the resources provided in this guide include helpful case law, secondary materials, and Internet resources regarding the limited public forum in which the constitutional rights of post-secondary student organizations are analyzed. Additionally, constitutional and statutory provisions are included to provide context to the procedural basis for suing a public university over denied recognition. This guide is intended to assist attorneys with little or no familiarity with this subject matter in gaining a better understanding of the relevant law.

Disclaimer

This research guide is a starting point for a law student or an attorney to research the implications of *Christian Legal Society v. Martinez* and related precedent regarding the limited public forum doctrine and religious freedom. Because case law continues to evolve, it is imperative to Shepardize or KeyCite all cases and statutes before relying on them. This guide should not be considered as legal advice or as a legal opinion on any specific facts or circumstances. If you need further assistance in researching this topic or have specific legal questions, please contact a reference librarian in the Georgia State University College of Law library or consult an attorney.

Overview

Christian Legal Society v. Martinez, 130 S. Ct. 2971 (2010), is an important decision by the Supreme Court involving the rights of a public university's student organizations. Specifically, the Court, through a 5-4 vote, upheld the policy of the University of California, Hastings College of the Law governing official recognition of student groups. The law school's policy required student groups to accept all students regardless of their status or beliefs in order to obtain recognition. However, the Court's dissent argued that the majority opinion ignored the evidence that the law school's "accept-all-comers" policy was merely announced as a pretext to justify viewpoint discrimination against one of the law school's student organizations, the Christian Legal Society (CLS).

The controversy surrounding the case involved the CLS's requirement that all members subscribe to a "Statement of Faith" affirming their belief in fundamental Christian doctrines, including the view that sexual activity should not occur outside of marriage between a man and woman. As a result of this exclusive selection process for membership, Hastings denied the CLS's recognition as a student organization. The CLS then sued, arguing that the group's First Amendment rights had been violated.

Even though the majority opinion ruled against the CLS, there were many questions left unanswered involving how far constitutionally-protected speech rights extend to college students at public universities. Additionally, because the lower court later ruled that the CLS failed to preserve its appeal on the remanded the issue of whether Hastings selectively enforced the "accept-all-comers" policy, the facts of the case as described by the dissent have yet to be resolved. Accordingly, in order to predict how future cases will be decided, an understanding of current precedent surrounding religious student organizations' constitutional rights in a quasi-school setting is needed.

About the Author

Russell Britt will graduate from the Georgia State University College of Law in December, 2011. While in law school, Mr. Britt served as an associate editor on the Georgia State University Law Review and was member of the school's Moot Court Board. Prior to attending law school, Mr. Britt graduated cum laude from the University of Georgia with a Bachelor of Arts in Political Science and a minor in History. After graduation, he will begin working for a law firm in Atlanta, Georgia. For more information, please contact Professor Nancy Johnson via e-mail at njohnson@gsu.edu.

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Primary Sources

United States Constitution

Note: The Constitution and United States Code can be found, free of charge, online from the Cornell Legal Information Institute.

U.S. Const. amend. I.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

- Proposed student organizations that are denied recognition by a public university often argue that the civil liberties found in the text of the First Amendment have been violated. However, the tension between the Free Speech and Establishment Clauses creates complexity regarding religious organizations' ability to exist on government property, which is illustrated by the *Martinez* case.

United States Code

42 U.S.C. § 1983.

"Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

- This federal statute allows a person to bring a suit for money damages against a government actor for violation of his or her constitutional rights. Other than asking for an injunction, proposed student organizations often bring a § 1983 claim against a public university to redress violations of constitutionally protected rights.

Legislative History

42 U.S.C. § 1983 (R.S. § 1979; Pub. L. No. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. No. 104-317, Title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.):

- 42 U.S.C. § 1983 is probably the most important codified statute originating from the Civil Rights Act of 1871. The Act was originally enacted shortly after the American Civil War. One of the main reasons for its passage was to protect African Americans in the South from actions of the Klu Klux Klan.
- Passage of the Civil Rights Act of 1871(17 Stat. 13):
  - Introduced in the House as H.R. 320 by Samuel Shellabarger (R-OH) on March 28, 1871
  - Committee consideration by: House Select Committee on the President's Message, Senate Judiciary
  - Passed the House on April 7, 1871 (118–91)
  - Passed the Senate on April 14, 1871 (45–19)
  - Reported by the Joint Conference Committee on April 19, 1871; agreed to by the House on April 19, 1871 (93–74) and by the Senate on April 19, 1871 (36–13)
  - Signed into law by President Ulysses S. Grant on April 20, 1871
- The statute has only been subject to minor changes that have not affected its substantive intent for purposes of this research guide.
- 42 U.S.C. § 1983 is current through Pub. L. No. 112-39 (excluding Pub. L. No. 112-34), Oct. 12, 2011.

The following secondary sources provide more insight into the history of the Civil Rights Act of 1871 and 42 U.S.C. § 1983.

Bernard Schwartz, ***Statutory History of the United States*** (1970).

This book provides an in-depth discussion of legislative history in the United States, including 42 U.S.C. § 1983.

Alfred Avins, ***Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment***, 11 St. Louis U. L.J. 331 (1966).

This article analyzes the congressional debates regarding the Act "for the reflected light [these debates] cast on the power of Congress to punish private individuals under the [F]ourteenth [A]mendment."

Case Law

The following are notable Supreme Court cases in the history and development of limited public forum analysis and its effect on religious organizations, as well as pertinent circuit court cases that discuss the *Martinez* decision's implications on related issues.

Supreme Court

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

The Court framed the issue as: "May a public law school condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students?" This is the so-called "all-comers" policy. After rejecting the CLS contention that the policy was not actually an "all-comers" policy, but one that targeted certain groups based on religion, the Court examined the issue under the limited public forum doctrine, and stressed the "educational context" in which the situation arose. As a result, the Court held that a public law school can condition its official recognition of a student group on the organization's agreement to open eligibility to all students—even if doing so conflicts with the organization's religious beliefs or practices. However, the Court did acknowledge that the CLS argument that the "all-comers policy" was pretext for discriminating against religious groups may be reviewed on remand "if, and to the extent it is, preserved."

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

A small religious group argued that Pleasant Grove City violated the Free Speech Clause of the First Amendment when it refused to display it's monument in the city's park, which already contained fifteen other monuments, including a Ten Commandments display. The Court held that a municipality's acceptance of a privately funded permanent monument erected in a public park while refusing to accept other privately funded permanent memorials is a valid expression of governmental speech. In analyzing the facts, the Court divided forum analysis into three categories and explained that a limited public forum is created when the government property is "limited to use by certain groups or dedicated solely to the discussion of certain subjects." In such instances, "a governmental entity may impose restrictions on speech that are reasonable and viewpoint neutral." This category of forum analysis was used in the *Martinez* opinion to justify the university's ability to restrict its recognition of certain student groups.

Good News Club v. Milford Central Sch., 533 U.S. 98 (2001).

This case further illustrates application of the limited public forum doctrine. A school system adopted regulations under which they opened their facilities to public use during non-school hours. However, when a religious group applied to use the facilities, the school system rejected their application because the group's discussions were not secular in nature. In ruling against the school system, the Court noted that when the government establishes a limited public forum, it is not required to permit any and all speech within that forum, and it may "reserve its forum for certain groups or for the discussion of certain topics." However, the government may not discriminate against speech on the basis of its viewpoint, and any restriction it imposes must be reasonable in light of the purpose served by the forum.

Boy Scouts of America vs. Dale, 530 U.S. 640 (2000).

This is a case the CLS used to defend its right to have discriminatory practices. In this case, the Boy Scouts expelled a scoutmaster from its organization because he was openly gay. The Court held that the lower court's decision unconstitutionally violated the rights of the Boy Scouts, specifically the freedom of association, which allows a private organization to exclude a person from membership when "the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." The court ruled that opposition to homosexuality is part of the Boy Scouts' "expressive message," and allowing homosexuals as adult leaders would interfere with that message. However, it is important to note that the CLS's position differs from the Boy Scouts' position in *Dale*—the CLS is looking for affirmative support and recognition by a state university rather than just the right to be left alone in its associational choices.

Rosenberger v. Rector and Visitors of the University of Va., 515 US 819 (1995).

The university provided funding to every student organization that met funding-eligibility criteria, which the student religious publication fulfilled. Nonetheless, the university claimed that denying student activity funding for the religious publication was necessary to avoid violating the Establishment Clause of the First Amendment. The Court disagreed, ruling that the Free Speech Clause of the First Amendment required the state university to provide the same financial subsidy for a student Christian publication as for all other publications. The Court's holding was based on the fact that the student organizations existed in a limited public forum—a government-created space wherein speech occurs according to the government's guidelines. However, although the government could create guidelines on speech in general, the government could not discriminate against a given point of view in such forum.

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

This is a case the CLS in *Martinez* relied on to support their rights of expressive-association. In *Hurley*, the controversy surrounded a private organization that conducted the city of Boston's yearly St. Patrick's Day parade. After the private organization denied the Irish-American Gay, Lesbian and Bisexual Group of Boston's (GLIB) request to march alongside other approved groups, the GLIB sued. The Court reasoned that the parade constituted a message that the private organization had right to protect. More specifically, the Court found that private citizens organizing a public demonstration may not be compelled by the state to include groups who impart a message the organizers do not want to be included in their demonstration, even if such a law had been written with the intent of preventing discrimination. Thus, the CLS through analogy argued that a public university cannot require the group to open its membership to those that do not agree with its message.

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 390 (1993).

A school board issued rules and regulations allowing social, civic, and recreational uses of its schools after-hours, but prohibiting use by any group for religious purposes. After the school board refused requests by a church to use school facilities for a religious-oriented film series, the church sued. The lower court reasoned that the school property, as a limited public forum open only for designated purposes, remained nonpublic except for the specified purposes, and ruled that the exclusion of the church's film was reasonable and viewpoint neutral. However, the Supreme Court reversed and held that denying the church access to school premises to exhibit the film violates the Freedom of Speech Clause. The Court reasoned that the subject of the film—child rearing—was permitted by the school board; however, the viewpoint was discriminated against because the school denied access "solely because the church's film dealt with the subject from a religious standpoint."

Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226 (1990).

High school students brought an action against a school district to require the district to give equal access to a student Christian club. The Supreme Court ruled that because the district created limited open forums for noncurriculum related student groups, the district must provide equal access to student religious groups. Furthermore, such practice of allowing equal access did not violate the Establishment Clause. This decision is significant because it permitted religious activities to take place in public schools. Nonetheless, the Court believed that it was important that the activity be student-led and initiated in order to avoid any perception of an endorsement of a particular religion.

Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788 (1985).

This case illustrates the notion that equal access is not without restrictions. The NAACP Legal Defense & Education Fund brought suit alleging that an executive order unconstitutionally excluded them from participation in a charity drive aimed at federal employees and military personnel. This decision clarified that the Court looks to the "policy and practice" of the government to ascertain whether it intended to designate a place not traditionally open to public discourse as a public forum. The Court concluded that, although the government had created a charity drive through which organizations could solicit donations from federal employees, it could restrict the participation of certain legal-defense and advocacy organizations. Because the government's policy was to limit participation in the charity drive to "appropriate" volunteer organizations, the Court reasoned that the charity drive was not a public forum. As such, the exclusion needed only to be reasonable in light of the purpose served by the forum and viewpoint-neutral, a standard that was met in this case. The reasonableness and viewpoint-neutrality standard was later incorporated into the limited-public forum analysis in subsequent cases, including the *Martinez* opinion.

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

This case is paramount for understanding the Court's forum analysis. Here, the Court adopted a framework that separated different types of government-owned property into three categories—traditional public forums, limited public forums, and nonpublic forums. In "traditional public forums," places traditionally devoted by the government to assembly and debate, the rights of a state to limit expressive activity are more closely scrutinized. In such forums, the government may not prohibit all communicative activity and may enforce content-based restrictions only to the extent that such regulation is necessary to serve a compelling state interest that is narrowly tailored to achieve that end. Second, "limited public forums" are public property which the state has opened for use by the public for expressive activity. Although a state is not bound to retain the open character of the property indefinitely, as long as it does so it is bound by the same standards that apply to a "traditional public forum." Finally, public property that is not by tradition or designation a public forum is designated as a "nonpublic forum." The state may reserve the forum for its intended purposes as long as the regulation on speech is reasonable and not an effort to suppress expression because public officials oppose the speaker's view. Thus, when a religious organization, or any other type of group, challenges a government restriction to their access to property, it is important to identify the type of forum that the government has created. In the context of the *Martinez* opinion, the Court placed the university's recognition of student organizations in the limited public forum. Nonetheless, depending on the facts of a particular school's policy, there may be an ability to argue that the created forum falls into one of the other two categories—which has major implications on what the government can and cannot do.

Widmar v. Vincent, 454 US 263 (1981).

This case was the first major decision on the topic of equal access for religious student organizations. A state university which routinely provided facilities for registered student-organization activities refused to allow a student group to use university facilities to engage in religious worship and discussion. The exclusion was based on a university policy prohibiting the use of school buildings or facilities "for purposes of religious worship or religious teaching." Though the university argued that the Establishment Clause forbade the use of a public university's facilities for worship, the Court rejected this defense, ruling that the university had allowed other student groups to use university property; thus, the complaining group could not be excluded on the basis of its religious viewpoint. The Court held that the Establishment Clause does not bar a policy of equal access where facilities are open to groups and speakers of all kinds.

Healy v. James, 408 US 169 (1972).

A state college denied school affiliation to a student group that wished to form a local chapter of Students for Democratic Society (SDS). The school affiliation would have allowed the group the use of campus facilities for meetings, as well as use of the campus bulletin and school newspaper. Characterizing the SDS's mission as violent and disruptive, and finding the national organization's philosophy repugnant, the college completely banned the SDS chapter from campus. The Court concluded that a denial of recognition based on an organization's mere philosophy rather than activities was improper. However, if the group refused to comply with a rule that required it to abide by reasonable campus rules, there would be a proper basis for non-recognition. By analogy, a university cannot simply reject a religious organization because of its religious beliefs.

Circuit Courts of Appeals

Bloedorn v. Grube, 631 F.3d 1218 (11th Cir. 2011).

A Christian preacher sued a state university, alleging that the university's speech policy violated his expressive rights by requiring him, as an outside, non-sponsored speaker, to apply for a permit to speak on campus and requiring that he speak only in a designated "Free Speech Area" after receiving a permit. The court noted that the university had limited areas only for use by a discrete group of people—the university students, faculty, employees, and their sponsored guests. As a result, the campus was determined to be a limited public forum. The court further ruled that the university's policy was reasonable and viewpoint neutral. Thus, the plaintiff's claim was denied.

Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist., 640 F.3d 329 (8th Cir. 2011).

A non-profit organization, which operated religious soccer camps, sued a school district, alleging that the district violated organization's rights under First Amendment and Equal Protection Clause by refusing to allow the organization equal access to a district program in which informational flyers were sent home in students' backpacks. The court relied on language from *Martinez* to emphasis that speech in a limited public forum may be restricted as long as the restrictions are reasonable and viewpoint neutral. Thus, the court denied the religious organization's claim.

Bronx Household of Faith v. Bd. of Educ. of City of New York, 650 F.3d 30 (2d Cir. 2011).

A church sued a school district alleging that the district's refusal to permit the church to use school facilities for Sunday worship services violated the Free Speech Clause. The court reversed the lower court's decision and held that the exclusion of worship services from a public school was justified by the reasonable concerns that permitting use of school facilities for worship services would violate Establishment Clause. The court reasoned that under the limited public forum doctrine, the school district's policy was reasonable and viewpoint neutral.

Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790 (9th Cir. 2011).

With similar facts as *Martinez*, this case involved the denial of religious student organizations from official recognition by a public university. However, this case involved a narrower nondiscrimination policy than that in *Martinez*—instead of prohibiting all membership restrictions, the policy prohibited membership restrictions

only on certain specified bases (e.g., race, gender, religion, and sexual orientation). Nonetheless, the court ruled that the narrow nondiscrimination policy was still constitutional because it was reasonable and viewpoint neutral under in a limited public forum. The court further emphasized, like *Martinez*, that the university was not forcing student groups to accept unwanted members, but only conditioning certain benefits on the adoption of a nondiscrimination policy. Thus, these conditional benefits were reasonable as long as they were viewpoint neutral. The court did, however, note that the evidence raised a triable issue of fact as to whether the university exempted certain groups from the policy while not granting such an exemption to the religious organizations. Therefore, the court remanded in part to the district court.

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

A religious student organization sued a state university, challenging the constitutionality of the university's refusal to fund certain religious activities out of university's fee account that funded a variety of student activities. The court concluded that as a result of *Martinez*, the university's activity-fee fund must cover the religious organization's contested programs, if similar programs that espouse a secular perspective were reimbursed. Thus, the court held that the state university's reimbursement of expenses of religious speakers, through a program equally available to secular speakers, did not violate the Establishment Clause. However, the dissent argued that the majority was incorrect in declaring that *Martinez* decided the issue. Instead, the dissent concluded that the university's policy was reasonable and viewpoint neutral because the university did not deny money to the religious organization for expressing its version of worship; rather, the university denied money to any group to practice its version of worship.

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

This case addressed the remanded portion of the *Martinez* opinion. The court held that the CLS failed to preserve for appeal its argument that law school selectively applied its nondiscrimination policy because such claim was not argued specifically and distinctly in the organization's opening brief. Nonetheless, although the CLS's pretext argument was not preserved, such argument is still unsettled by the courts. Thus, the issue involving the facts of the *Martinez* case, as depicted by Justice Alito's dissent, is still unresolved.

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Secondary Sources

Law Journal Articles

Below are notable law review and other periodic sources that contain relevant information to shed light on this topic. Those sources are organized by author and can be found on LexisNexis, Westlaw, or HeinOnline for a fee.

Joseph Blocher, ***Viewpoint Neutrality and Government Speech***, 52 B.C. L. Rev. 695 (2011).

In discussing problems with the viewpoint neutrality doctrine, this article addresses the argument made in *Martinez* about adequate alternatives. In *Martinez*, the Court reasoned that because the CLS had other avenues to express its opinion, the CLS was not detrimentally harmed by the school's refusal to recognize the organization. Blocher argues that such approach does not ensure that private viewpoints are sufficiently protected. Furthermore, he points to the fact that there is no officially recognized de minimis exception to the First Amendment's bar on viewpoint discrimination.

Alan Brownstein & Vikram Amar, ***Reviewing Associational Freedom Claims in A Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action***, 38 Hastings Const. L.Q. 505 (2011).

This article reviews the *Martinez* decision and agrees with the CLS that the school's policy imposes serious burdens on associational freedom. However, Brownstein and Amar's sympathy is not limited to religious groups. They argue that because prior Supreme Court cases frequently concluded that the exclusion of religious groups from limited public forums constituted viewpoint discrimination, religious organizations have not experienced the full brunt of the Court's decisions in this area. They argue that while restrictions on the access of secular speakers received lenient review and were often upheld, the exclusion of religious expressive activities was rigorously reviewed and struck down. Thus, Brownstein and Amar propose that the appropriate doctrinal response to Martinez may be to call for increasing the rigor of review applied to both content-discriminatory speech regulations and constraints on associational freedom that determine the parameters of a limited public forum. They believe this change in doctrine would benefit speakers and associations across the board, not just those promoting religious beliefs.

Richard A. Epstein, ***Church and State at the Crossroads: Christian Legal Society v. Martinez***, 2010 Cato Sup. Ct. Rev. 105 (2010).

This article analyzes the *Martinez* decision and notes how the case illustrates the built-in tension between the Free Exercise and Establishment clauses. Epstein proposes that the doctrine of unconstitutional conditions should play an important role in setting the ground rules for state interaction with religious organizations. The doctrine of unconstitutional conditions is a rule which describes that the government cannot condition a person's receipt of a governmental benefit on the waiver of a constitutionally protected right. Through considering this doctrine, Epstein argues that the university should have recognized all student organizations, regardless of their substantive positions. Otherwise, there will continue to be negative consequences on key issues dealing with the treatment of speech and religion under a wide range of anti-discrimination norms. Epstein further argues that applying the doctrine of unconstitutional conditions will prevent people who engage in criminal activity from seeking government benefits. Alternatively, if the state cannot punish private meetings of the CLS, it cannot withhold benefits from the organization.

Richard Esenberg, ***Of Speeches and Sermons: Worship in Limited Purpose Public Forums***, 78 Miss. L.J. 453 (2009).

This pre-*Martinez* article reviews the law governing forums for speech provided by the government and the treatment of religious speech within limited purpose public forums. Specifically, Esenberg analyzes the significance of worship in public places and concludes that worship should be allowed within broadly defined limited purpose public forums. This inclusion will create true neutrality between religions and irreligion that "cannot be achieved by the creation of secular public spaces or publicly-sponsored 'religion-free' dialogues bearing on matters to which religion speaks." Esenberg's conclusion is based on the premise that "[i]f the government intends to facilitate the growth of community and the development of private values by providing spaces and other opportunities for the discussion and promotion of a variety of political, social, moral and philosophical perspectives, its exclusion of religious perspectives is not neutral."

William A. Glaser, ***Worshiping Separation: Worship in Limited Public Forums and the Establishment Clause***, 38 Pepp. L. Rev. 1053 (2011).

This student comment examines the split between the Seventh and Ninth Circuits regarding the issue of whether worship may be allowed in limited public forums.

Through this examination, Glaser highlights the intersection of the Free Speech and Establishment Clauses in Supreme Court jurisprudence and discusses religious speech in limited public forums in general. Glaser concludes that there should be equality between religious and nonreligious groups who seek exist in a limited public forum. Otherwise, "[g]overnment actors will be allowed to discriminate against religious groups in ways inconsistent with the First Amendment and the historical practice of our nation."

Erica Goldberg, ***Must Universities "Subsidize" Controversial Ideas?: Allocating Security Fees When Student Groups Host Divisive Speakers***, 21 Geo. Mason U. Civ. Rts. L.J. 349 (2011).

This article is helpful because it includes an outline of current Supreme Court jurisprudence and the doctrinal ambiguity surrounding First Amendment standards governing student organizations, from *Healy v. James* to *Martinez*. Goldberg notes that the Court has been somewhat inconsistent in applying First Amendment standards to student organizations at public universities. In regards to scope of this topic, Goldberg argues that the "extent to which *Martinez* has altered the First Amendment protections afforded student organizations remains to be seen." Although it is now clear that student organizations constitute a limited public forum, much of the Supreme Court jurisprudence allots student organizations speech protections that lie somewhere between those applicable in a traditional public forum and a limited public/nonpublic forum. Furthermore, there continues to be concerns about protecting controversial speech after *Martinez*. Goldberg points to the fact that even the Court in *Martinez* noted that if hostile takeovers of student groups did disrupt the expression of minority views, "Hastings presumably would revisit and revise its policy."

Toni M. Massaro, ***Christian Legal Society v. Martinez: Six Frames***, 38 Hastings Const. L.Q. 569 (2011).

This symposium article analyzes *Martinez* and the opinion's approach to conditions on government subsidies. Although the Court in *Martinez* identified two primary frames to choose from: "Carrots" versus "sticks," Massaro argues that there were multiple frames implicated by the facts of the case—each of which would have had a significant impact on the outcome. She outlines six possible frames for *Martinez* and concludes that under four of these frames, the government decision to condition recognition as a student organization on compliance with a nondiscrimination clause was permissible. Nonetheless, Massaro argues that conditions on access to government and funding generally should be analyzed through one set of criteria, rather than through separate tests. She concludes that "First Amendment cases like *Martinez* should be reconciled with other cases that involve . . . unconstitutional burdens on access to government benefits so that the common concerns about government responsibility . . . for private parties' actions can be viewed in a wider context. . . ." Such approach would allow for more coherent standards for government conditions to emerge.

Julie A. Nice, ***How Equality Constitutes Liberty: The Alignment of CLS v. Martinez***, 38 Hastings Const. L.Q. 631 (2011).

This article explores how the Supreme Court's *Martinez* decision handles the linkage between liberty and equality in the context of expressive association. Using a close examination of the *Martinez* opinion and related decisions, as well as some cross-doctrinal comparison, this article seeks to understand what was at stake in this particular controversy and to explore the implications of the decision. Nice concludes that "the Court framed Martinez as involving only indirect governmental pressure via conditions on subsidies to ensure non-discrimination by student organizations in a university's limited public forum." As a result, this combination of factors provided the basis for the Court to distinguish *Martinez* from precedents otherwise similar with regard to one factor or another. Thus, the Court did not order the university to subsidize religious exercise as it had in *Rosenberger*. Nonetheless, Nice argues that rather than trumping liberty with equality, the *Martinez* decision may enhance liberty as well. She reasons that "[b]y 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."

A. Louise Oliver, ***Tearing Down the Wall: Rosenberger v. Rector of the University of Virginia***, 19 Harv. J.L. & Pub. Pol'y 587 (1996).

As an examination of the Supreme Court's *Rosenberger* decision, this article is helpful for understanding precedent relied on in the *Martinez* decision. Although Oliver agrees with the decision's outcome—holding that public universities must fund religiously-oriented student journals if funding is made widely available to other student publications—he felt the Court's rationale was overly formalistic. He argues instead that a "more explicit functional analysis using the Establishment Clause's true purpose –ensuring that government action does not influence religious choices –would have provided a more coherent basis for future religion jurisprudence and for religious equality in an increasingly pluralistic society." Nonetheless, Oliver concludes that the *Rosenberger* decision was a step in the right direction of restoring "access to the 'public square' for all comprehensive world views, including theistic views."

Mark Strasser, ***Religion in the Schools: On Prayer, Neutrality, and Sectarian Perspectives***, 42 Akron L. Rev 185 (2009).

This *pre-Martinez* article traces the development of Establishment Clause jurisprudence with respect to religion in the public schools, noting how the Court's analyzing and justifications have changed over time. For purposes of researching religious organization rights in public universities, Strasser provides contrary reasoning to the Supreme Court's decisions in *Widmar, Good News Club,* and *Rosenberger*, which is necessary for a well balanced understanding of the issues involved with these pivotal cases that lead up to *Martinez*.

Eugene Volokh, ***Freedom of Expressive Association and Government Subsidies***, 58 Stan. L. Rev. 1919 (2006).

This article tackles the question of whether religious groups, along with others, may be constitutionally excluded from generally available benefit programs simply because they exercise this constitutional right to discriminate. Volokh concludes that such groups "have the constitutional right to put on events and programs open only to blacks, heterosexuals, men, or religious believers; and they may also put on programs open to all listeners but designed by group officers who are chosen in discriminatory ways." However, he argues that the government need not subsidize this right, just as the government need not subsidize the rights to abortion, private schooling, or political expression about candidates or about legislation. Although written prior to the *Martinez* decision, Volokh's analysis likely supports the Court's outcome.

Books & Treatises

Below are notable books and treatises that discuss this topic.

- Higher Education Law: Policy and Perspectives by Klinton W. Alexander and Kern Alexander
  Call Number: KF4225 .A95 2011
  ISBN: 0415800315
  Publication Date: 2011
  http://gilfind.gsu.edu/vufind/Record/2160067/Holdings#tabnavThis book is a comprehensive and accessible guide to the law of higher education. Drawing from cases on campuses across the country, the author provides readers with the tools and knowledge to effectively respond in an environment of increasing litigation. Particularly, this book addresses religion in public universities and the requirements surrounding the funding of religious speech. Through the examination of this funding issue, the book provides a thorough discussion of the evolution of case law in this area—from Widmar to Martinez.

- Constitutional Law: Principles and Policies (4th ed.) by Erwin Chemerinsky
  Call Number: KF4550 .C427 2011
  ISBN: 0735598975
  Publication Date: 2011
  http://gilfind.gsu.edu/vufind/Record/2159242/Holdings#tabnavThis comprehensive treatise takes an in-depth look at all areas of constitutional law and includes an entire chapter dedicated to the First Amendment and religion. Specifically, the treatise provides thorough analysis of the evolution of the public forum doctrine, as well as a detailed discussion of the Martinez opinion.
- The First Amendment: Cases-Comments-Questions (5th ed.) by Steven H. Shiffrin and Jesse H. Choper
  Call Number: KF4770.A7 S48 2011
  Publication Date: 2011
  http://gilfind.gsu.edu/vufind/Record/2204916This casebook provides an entire chapter on the government support of speech, which includes a subsection on subsidies of speech. Specifically, there is a detailed discussion of the Pleasant Grove and Rosenberger cases—both of which were relied on heavily by the Martinez opinion. This subsidies subsection is important for understanding the limits on religious organizations receiving funding from public universities.
- From Schoolhouse to Courthouse: The Judiciary's Role in American Education by Joshua M. Dunn and Martin R. West
  Call Number: KF4119 .F76 2009
  ISBN: 0815703074
  Publication Date: 2009
  http://gilfind.gsu.edu/vufind/Record/2046399Although this book primarily focuses on religion as it relates to secondary public education, there are sections in the book that deal with the issue of access to public universities. Specifically, the book includes a discussion of viewpoint neutrality and how this doctrine is closely associated with the Supreme Court's public forum doctrine.
- Religious Liberty in America: The First Amendment in Historical and Contemporary Perspective by Bruce T. Murray
  Call Number: KF4783 .M87 2008
  ISBN: 1558496378
  Publication Date: 2008
  http://gilfind.gsu.edu/vufind/Record/1775164This book provides an interesting history of religious liberty in America and helps provide context to the topic of this guide. Additionally, the book examines religious liberty in public schools and discusses the concept of neutrality as a guiding principle for the government's relationship to religion.
- First Amendment Law Freedom of Expression and Freedom of Religion by Arthur D. Hellman
  Call Number: KF4770 .H45 2006
  Publication Date: 2006
  http://gilfind.gsu.edu/vufind/Record/1867571This treatise generally covers varies aspects of the First Amendment through certain case law precedent and includes history, policy and theory related to the topic. Specifically, there is an entire chapter devoted to speech on government property and the public forum doctrine. Additionally, the treatise includes helpful insight on the tensions between the Free Exercise and Establishment clauses as they relate to religious speech.

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Internet & Associations

Interest Groups

American Civil Liberties Union (ACLU)

The ACLU is a non-profit organization whose stated mission is "to defend and preserve the individual rights and liberties guaranteed to every person in this country by the Constitution and laws of the United States." Concerned with equality and supportive of Hasting's "all-comer policy," the ACLU agreed with the *Martinez* decision and continues to advocate for freedom of religion without governmental influence or interference.

American Constitution Society (ACS)

The ACS is a progressive legal organization that "promotes the vitality of the U.S. Constitution and the fundamental values it expresses: individual rights and liberties, genuine equality, access to justice, democracy and the rule of law." Concerned with the influence that the conservative legal movement has gained in recent years, the ACS is a voice for the legal and political left. Specifically, concerned with any university group's ability to discriminate, the ACS supported the Supreme Court's *Martinez* decision.

The CATO Institute

The CATO Institute is a a public policy research organization headquartered in Washington, D.C. The organization researches and writes on a variety of topics, including the intersection of religion and government. Specifically, the CATO Institute submitted an amicus curiae brief in support of CLS position in the *Martinez* case.

Christian Legal Society (CLS)

The CLS is a non-profit, non-denominational organization of Christian attorneys, judges, paralegals, law students, and other legal professionals dedicated to serving Christian beliefs through the practice of law and defense of religious freedom. Representing the plaintiff in the *Martinez* case, the CLS is opposed to the Supreme Court's decision and continues to advocate for religious freedom in all three branches of government.

Blogs

Below are a number of blogs that have regularly included content addressing the *Martinez* decision and other topics related to religious freedoms in the context of government.

ACSblog

This is the American Constitution Society's blog that includes posting related to all areas of the organization's issues platform, including the First Amendment. The blog's editors include Jeremy Learning and Nicole Flatow.

Constitutional Law Prof Blog

A member of the "Law Professor Blogs Network," this blog posts daily articles on anything and everything related to constitutional law. The blog includes a topical archive, which includes a category on religion. The blog's editors include Steven D. Schwinn, Associate Professor of Law at John Marshall Law School (Chicago) and Ruthann Robson, Professor of Law & University Distinguished Professor at CUNY School of Law.

Religion Clause

This blog focuses solely on jurisprudence related to the First Amendment's religion clause. The blog is written by Howard Friedman, Professor of Law Emeritus at University of Toledo, and includes an archive.

SCOTUSblog

Sponsored by Bloomberg Law, this blog discusses news related to the Supreme Court. Along with discussions on recent happening by the Court, this blog also provides statistical data regarding the pace of Court grants, decisions, etc.

Speak Up

This blog stated purpose is to protect and promote religious rights at public universities. Other than providing articles on related court cases, this blog includes resources for promoting student rights on campuses and a subscription e-newsletter to keep readers updated on the latest happenings on campuses across the nation.

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