Come One, Come All!

CLS v. Martinez: The Battle Between First Amendment Rights of Students and State Regulation Using All-Comer’s and Non-Discrimination Policies

By: Joy Wolf

I. Introduction

Our founding fathers believed in the ability to practice religion without interference from the government. But they also greatly desired to keep church and state separate.

Theoretically it sounds simple. Everyone has the right to practice his religion without government interference. But what happens when the government also has an interest in preventing things like discrimination? Where do we draw the line? When does protection from discrimination become interference with religion? This is a question that the courts have long labored to answer.

American society is familiar with religious exemptions to government requirements. There are exemptions for employment issues, vaccinations, housing discrimination and others. The Supreme Court “has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.”¹

Most campuses have a plethora of student organizations built around different interests or associations. Many of these organizations create requirements for their leaders to ensure that the organization continues to promote the ideas they are associated with. This can cause problems,

especially for religious student groups which oftentimes have beliefs that clash with university non-discrimination policies.2

This struggle for balance is not uncommon. In 2003, the University of Minnesota Law School threatened to derecognize the Christian Legal Society (CLS) because of the requirement for voting members and officers to sign a statement of faith. A faculty member wrote a letter to the administration and the school did end up recognizing the organization. But then the university denied a different religious group recognition because its constitution did not state that “membership was open to all students regardless of religion or sexual orientation.”3 The CLS chapter at Washburn University School of Law refused to allow a student to lead Bible studies for the organization in 2004.4 The student had explicitly rejected CLS’s statement of faith and had led a Bible study that was contrary to CLS’s viewpoints. The student filed a religious discrimination complaint against CLS and WU derecognized CLS as a student organization. The University of Toledo Law School’s nondiscrimination policy had a specific exemption for religious groups. But in 2005, the school insisted that a CLS chapter pledge not to discriminate on the basis of religion. In 2005 Southern Illinois University denied recognition to CLS claiming that the organization violated the school’s policy against discrimination on the basis of religion.

2 Generally, university non-discrimination policies forbid discrimination on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.
4 CLSNET.org, CLS Chapters that Have Been Faced with Derecognition, http://www.clsnet.org/center/litigation/cls-chapters-have-been-faced-derecognition (last visited April 18, 2011).
and sexual orientation. At Montana University School of Law in 2008, CLS was derecognized because of its religious requirements for membership and leadership.

Over time, case law regarding university non-discrimination policies has developed. Under normal circumstances, usually the First Amendment rights of religious student organizations will trump a university’s non-discrimination policy. A university cannot deny recognition to a student group because of its religious views.

A recent Supreme Court decision, CLS v. Martinez, introduced a novel question; whether a university’s “all-comers” policy violated the First Amendment rights of a religious student organization. Whereas a non-discrimination policy requires student groups to refrain from discriminating on certain bases, the all-comer’s policy requires all groups to accept all students as participants, members and leaders. Most universities have a form of the non-discrimination policy and very few have this type of all-comer’s policy. In Martinez, the religious student organization lost its recognition from Hastings School of Law because it refused to change its religious requirements for membership. Hastings’ policy as written appeared to be a normal non-discrimination policy; however the school interpreted it as an all-comer’s policy. The Court held that the policy did not violate the free speech and associational rights of the

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5 Christian Legal Society v. Walker, 453 F.3d 853 (7th Cir. 2006).
6 CLSNET.org, CLS Chapters that Have Been Faced with Derecognition, http://www.clsnet.org/center/litigation/cls-chapters-have-been-faced-derecognition (last visited April 18, 2011).
8 The “all-comers” policy at issue was that “School-approved groups must “allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs.” Martinez, 130 S.Ct. at 2979.
9 Id. at 2979.
10 Id. at 2980-81.
11 See id. at 2979.
students.\textsuperscript{12} This was a big victory for universities and has the potential to change how universities and religious student organizations interact in the future.

In Part I of this note, I will examine the historical background of cases involving student religious groups and universities. In part II, I will discuss the facts and holding of \textit{Martinez} as well as what makes it different from past cases. In part III, I will set forth some suggestions for student religious groups who encounter a similar problem as the one faced in Martinez.

\textbf{I. Freedom of association and free speech for student organizations}

\textit{A. Official recognition is a free speech and free association right}

Students do not leave their First Amendment rights at the door when they attend a state university or college.\textsuperscript{13} On the other hand, school officials do have the authority to control conduct on campus.\textsuperscript{14} This power to regulate conduct does not mean that First Amendment rights apply less strictly to college students; rather “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”\textsuperscript{15} Universities offer the highest levels of education and are usually full of debate and discourse on many different issues with widely different perspectives.\textsuperscript{16} “There can be no doubt that denial of

\begin{footnotes}
  \item[12] \textit{Id.} at 2971.
  \item[14] \textit{Tinker}, 393 U.S. at 507.
  \item[16] Elementary and secondary schools may be able to regulate the conduct and speech of their students significantly more than universities due to the type of learning environment and the age of the students. However, this issue is beyond the scope of this note.
\end{footnotes}
official recognition, without justification, to college organizations burdens or abridges that
associational right.”

In 1972, Central Connecticut State College (CCSC) denied recognition to a student
chapter of Students for a Democratic Society (SDS).\(^{18}\) The President of the college said that the
organization violated the school’s approved conduct policy due to its connection to the national
SDS which had a reputation for disruptive behavior.\(^{19}\) This was during the Vietnam War; a time

\(^{17}\) Healy v. James, 408 U.S. 169, 181 (1972).
\(^{18}\) Id. at 172.
\(^{19}\) A committee comprised of four students, three faculty members and the Dean of students
recommended approval of the SDS’s application by a vote of six to two. The President of CCSC
then rejected their recommendation. His accompanying remarks were as follows: ‘Though I
have full appreciation for the action of the Student Affairs Committee and the reasons stated in
their minutes for the majority vote recommending approval of a local chapter of Students for a
Democratic Society, it is my judgment that the statement of purpose to form a local chapter of
Students for a Democratic Society carries full and unmistakable adherence to at least some of the
major tenets of the national organization, loose and divided though that organization may be. The
published aims and philosophy of the Students for a Democratic Society, which include
disruption and violence, are contrary to the approved policy (by faculty, students, and
administration) of Central Connecticut State College which states: “Students do not have the
right to invade the privacy of others, to damage the property of others, to disrupt the regular and
essential operation of the college, or to interfere with the rights of others. “The further statement
on the request for recognition that ‘CCSC Students for a Democratic Society are not under the
dictates of any National organization’ in no way clarifies why if a group intends to follow the
established policy of the college, they wish to become a local chapter of an organization which
openly repudiates such a policy. ‘Freedom of speech, academic freedom on the campus, the
freedom of establishing an open forum for the exchange of ideas, the freedoms outlined in the
Statement on Rights, Freedoms, and Responsibilities of Students that ‘college students and
student organizations shall have the right to examine and discuss all questions of interest to them,
to express opinion publicly and privately, and to support causes by orderly means. They may
organize public demonstrations and protest gatherings and utilize the right of petition’-these are
all precious freedoms that we cherish and are freedoms on which we stand. To approve any
organization or individual who joins with an organization which openly repudiates those
principles is contrary to those freedoms and to the approved ‘Statement on the Rights, Freedoms,
and Responsibilities of Students' at Central.’ Healy, 408 U.S. at 176.
of civil disobedience at colleges and universities throughout the country.\textsuperscript{20} SDS chapters were often directly involved in this unrest.\textsuperscript{21}

The Court held that when the school denied recognition to the SDS chapter, it violated the students’ associational rights.\textsuperscript{22} It said that denying SDS use of campus facilities and access to communication with CCSC students could not be viewed as insubstantial.\textsuperscript{23} This does not mean that a university can never interfere with students’ right to association. Disagreement with a group’s philosophy alone is not justification enough to deny recognition to a student organization, however, “[a]ssociational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.\textsuperscript{24}

The Court held that a school cannot bar a group from associating as a recognized student group as long as the group (1) follows the formalities of recognition, (2) does not pose a threat of material interruption to the campus, and (3) no other compelling state interest warrants non-recognition.\textsuperscript{25} In addition, once the student organization complies with the formal requirements of the educational institution, a heavy burden rests on the school to show that it has a legitimate interest in rejecting the organization.\textsuperscript{26} In this situation, the Court found that SDS had complied with the formal requirements and that there was not enough evidence that the group would cause a material disruption.\textsuperscript{27}

\textsuperscript{20} \textit{Id.} at 171.
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.} at 181.
\textsuperscript{23} \textit{Id.} at 181-2.
\textsuperscript{24} \textit{Id.} at 189.
\textsuperscript{25} \textit{Id.} at
\textsuperscript{26} \textit{Id.} at 184.
\textsuperscript{27} \textit{Id.} at 185.
In the 1981 case of *Widmar v. Vincent*, the court expanded on the idea that a school cannot suppress student organizations’ expression because of the organization’s viewpoint. A university is not required to allow student groups to use school facilities. But if it does grant access, then it cannot deny a group access because of the views it espouses.\(^{28}\) Cornerstone, a recognized religious group at the University of Maryland (UMKC), lost its recognition in 1977. UMKC had a regulation that barred the use of University buildings for religious purposes.\(^{29}\) The university created an open forum for the general use of students and this created an “obligation to justify its discriminations and exclusions under applicable constitutional norms.”\(^{30}\) The Court held that UMKC had to show that the “regulation [wa]s necessary to serve a compelling state interest and that it [wa]s narrowly drawn to achieve that end.”\(^{31}\) The university failed to do so. Many groups might support views the University does not want to be associated with but that does not give the University the right to discriminate on the basis of viewpoint.

**B. University funding must be available to student groups, including religious groups, on a viewpoint neutral basis.**

Student organizations are considered private speakers. Although they do receive the benefits that come with official recognition, their speech is still private.\(^{32}\) In the 1995 case of *Rosenberger v. Rector & Visitors of University of Virginia*, the Court made a distinction between

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\(^{29}\) *Id.* at 265.

\(^{30}\) *Id.* at 267.

\(^{31}\) *Id.* at 270.

\(^{32}\) See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833-34 (1995) (explaining the difference between government funding of private groups to spread a government-controlled message and government funding of private groups simply to encourage a diversity of views from private speakers); *see also Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229, 233 (2000).
content discrimination and viewpoint discrimination. The university denied funding to a student organization newspaper because it “primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality.” The Court held this was viewpoint discrimination and therefore impermissible. There is a difference between the funding of private groups in order to spread a message the government wants to spread as opposed to encouraging private speakers to express their diverging viewpoints.

Then in the 2000 case of Board of Regents of Univ. of Wis. Sys. v. Southworth, the Court held that as long as funds are distributed in a viewpoint neutral manner, it is constitutional to charge students a student-activity fee, even if those fees would eventually go to fund a group whose speech the student disagrees with. The key is to distribute the funds in a manner that is viewpoint neutral.

C. Expressive groups have an associational right to define their leadership and membership to protect their message.

The government has a compelling interest to end discrimination. However, “[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.” In Boy Scouts of Am. v. Dale, Court held the Boy Scouts were allowed to remove a homosexual man as a scoutmaster. The Boy Scouts were a private, not for profit organization, the goal of which was to instill values

33 Rosenberger, 515 U.S. 819.
34 Id.
35 Id.
36 Bd. of Regents, 529 U.S. at 229.
38 Roberts, 468 U.S. at 623.
into young boys.\(^{40}\) The Court found that if a forced member’s presence affects the way that a group advocates its message, then it can be unconstitutional.\(^{41}\) “The freedom to associate assures that the majority (or a powerful or vocal minority) cannot force its views on groups that choose to express unpopular ideas.”\(^{42}\)

The Court also said that it should defer to an association’s assertions as to the nature of its expression and what would impair that expression.\(^{43}\) In order to be able to override this right, the government has the burden of demonstrating that the ‘regulations [are] adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.’\(^{44}\) Dale also established very clearly that infringements on expressive association are subject to strict scrutiny.\(^{45}\)

This is no different for student organizations simply because they are part of a college campus. Student organizations have the same associational rights. Therefore, the government should defer to the religious student organizations’ assertions of what will impair their expression.

In the more recent case of \textit{CLS v. Walker}, Southern Illinois University’s School of Law (SIU) derecognized its CLS chapter as a student organization.\(^{46}\) This case is very similar to \textit{Martinez}.\(^{47}\) The SIU dean revoked CLS’s student organization status because it would not allow

\begin{flushleft}
\textit{Id.}\(^{40}\)
\textit{Id.} at 640.\(^{41}\)
\textit{Id.} at 647-8.\(^{42}\)
\textit{Id.} at 653.\(^{43}\)
\textit{Id.} at 648.\(^{44}\)
\textit{Id.} at 658.\(^{45}\)
\textit{CLS v. Walker}, 453 F.3d 853, 857 (Ill App. 2006).\(^{46}\)
\textit{Martinez}.\(^{47}\) The benefits of recognition in this case include access to school email, use of bulletin boards, official school publications and website, ability to use space at the school, a faculty advisor, and the ability to apply for funds.\(^{47}\)
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those who practiced or affirmed homosexuality to be members.\textsuperscript{48} So CLS sued for a preliminary injunction. The district court held that derecognition did not prevent CLS from holding meetings and associating together and therefore their rights were not violated.\textsuperscript{49} The Seventh Circuit disagreed.

First the court found that it was likely CLS did not even violate one of the school’s policies.\textsuperscript{50} Then the court proceeded to review the two claims – expressive association and free speech. First the court found that CLS was an expressive association.\textsuperscript{51} It also determined that the application of SIU’s anti-discrimination policy would affect CLS’s ability to express its beliefs.\textsuperscript{52} Applying the test from \textit{Dale}, the court found that the only reason SIU had for enforcing this policy was to convince CLS to change the content of its expression.\textsuperscript{53} \textit{Walker} held that “the only apparent point of applying the policy to an organization like CLS is to induce CLS to modify the content of its expression or suffer the penalty of derecognition.”\textsuperscript{54} Furthermore, CLS’s “interest in exercising its First Amendment freedoms is unquestionably substantial.”\textsuperscript{55} Although SIU argued that it was not forcing CLS to include anyone and that the effects of derecognition were so minor they did not arise to a constitutional violation, the court disagreed.\textsuperscript{56}

\textsuperscript{48} \textit{Walker}, 453 F.3d 853.
\textsuperscript{49} \textit{Id.} at 859.
\textsuperscript{50} \textit{Id.} at 860-1.
\textsuperscript{51} \textit{Id.} at 862.
\textsuperscript{52} \textit{Id.} at 863.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.} at 853.
\textsuperscript{55} \textit{Id.} at 863.
\textsuperscript{56} \textit{Id.} at 864.
II. CLS v. Martinez

CLS v. Martinez was decided in June of 2010. There was a split between the ninth and seventh circuits on the issue of non-discrimination policies violating the First Amendment rights of religious student organizations. Martinez could have resolved this split, but because of its unique and narrow holding, it failed to do so.

A. Background

Hastings Law School gives official recognition to student groups through its registered student organization (RSO) program. These RSOs receive certain benefits from recognition, including financial assistance from the school, communication channels, access to weekly student services newsletter, advertising on bulletin boards, use of school email and participation in student organization fair. They are also permitted to use space at the school as well as the school logo. In order to get these benefits, RSOs must be a non-commercial organization whose membership is limited to Hastings Students. Each RSO must submit its bylaws for approval and must comply with Hastings’ policies and regulations. Hastings, like many schools of higher education, has a non-discrimination policy. The policy states: Hastings shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.

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

\[57\] Martinez, 130 S.Ct. at 2978.
\[58\] Id.
\[59\] Id.
\[60\] Id.
nondiscrimination. Hastings’ policy on nondiscrimination is to comply fully with applicable law.\textsuperscript{61}

The Christian Legal Society (CLS) has a chapter at the Hastings Law School. Up until 2004, CLS was a recognized RSO at Hastings.\textsuperscript{62} The mission of CLS is

“to inspire, encourage, and equip lawyers and law students, both individually and in community, to proclaim, love and serve Jesus Christ through the study and practice of law, the provision of legal assistance to the poor, and the defense of religious freedom & sanctity of human life.”\textsuperscript{63}

At the beginning of the 2004-2005 school year, Hastings CLS affiliated with the national CLS (NCLS).\textsuperscript{64} NCLS bylaws require members and officers to sign a “statement of faith” “and to conduct their lives in accord with prescribed principles. Among those tenets is the belief that sexual activity should not occur outside of marriage between a man and a woman.”\textsuperscript{65} Each RSO must reapply for recognition each school year. When CLS applied for RSO status, Hastings rejected it because it did not comply with the school’s non-discrimination policy.\textsuperscript{66} CLS requested an exemption but Hastings refused to grant one. CLS chose not to alter its bylaws and therefore lost its RSO status. The organization continued to operate independently.

\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{64} Martinez, 130 S.Ct. at 2980.
\textsuperscript{65} Statement of Faith: 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. CLSNET.org, Purpose, http://www.clsnet.org/society/about-cls/purpose.
\textsuperscript{66} Martinez, 130 S.Ct. at 2980.
After the litigation started, Hastings argued that the correct interpretation of its nondiscrimination policy is as an all-comers policy. According to Hastings, this meant that all student organizations at Hastings must allow any student to participate, become a member or seek leadership positions in the organization regardless of her status or beliefs. In the stipulation of facts, CLS stipulated that this was how Hastings interpreted the policy.

B. The Supreme Court’s Decision

The Court began by noting that it was addressing a novel question; whether a university could condition official recognition to a student organization on compliance with an “all-comers” policy. Citing the stipulation of facts agreed to by both parties, the Court stressed that it would only consider the policy at issue as an “all-comers” policy, not as a non-discrimination policy.

The Court then noted the two different tests prominently used in free speech and expressive association claims. However, the Court decided to merge the two claims because “it made little sense to treat CLS’s speech and association claims as discrete.” It used only one test, the free speech test using limited public forum analysis because it adequately represented both claims. The majority held that Hastings’ all-comers policy was viewpoint neutral and reasonable. The policy “ensures [that the] leadership, educational and social opportunities

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67 Id. at 2982.
68 Id. at 2989.
69 Id. at 2978.
70 The stipulation reads as follows: “Hastings requires that registered student organizations allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs. Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization.” Id. at 2978 (Citing App. 221 (Joint Stipulation ¶ 18)).
71 Martinez, 130 S.Ct. at 2984-5.
72 Id. at 2985.
73 Id. at 2986.
afforded by RSOs are available to all students,” and that no Hastings student is forced to fund a

group that would reject her as a member.\footnote{Id. at 2989.} The Court also held that whether a policy is

advisable or not has nothing to do with the permissibility of the policy.\footnote{Id. at 2992.} The policy at issue did

not need to be “the most reasonable or the only reasonable limitation.”\footnote{Id. at 2984 (citing Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 808 (1985)).} In addition, the Court

found that CLS had “substantial alternative channels for communication,” which made the policy

even more reasonable because it was not forcing CLS to admit any members.\footnote{Id. at 2976.} For these

reasons, and because the Court found that Hastings did not discriminate on the basis of

viewpoint, CLS’ free speech and expressive association claims were rejected.

\textit{C. The Dissent}

The dissent felt that the majority should have addressed the constitutionality of

Hastings’s non-discrimination policy as it was written, not as Hastings interpreted it.\footnote{Id. at 3001.} The

evidence shows that Hastings denied CLS recognition under the nondiscrimination policy and

only after litigation had begun did the school assert that it was an all-comers policy.\footnote{Id. at 3005.} The
dissent also argues that the majority misreads the stipulation and strictly holds CLS to the

stipulation while at the same time not holding Hastings to its admissions in an answer.

Hastings admitted in an answer that its policy “permits political, social, and cultural student

organizations to select officers and members who are dedicated to a particular set of ideals or
beliefs.”\textsuperscript{81} The school later changed its interpretation of the policy. When CLS pointed out that other student organizations that limited membership and leadership positions to students who agreed with the viewpoint promoted by the group received recognition from the school, Hastings “took action to ensure that student groups were in fact complying with the law school's newly disclosed accept-all-comers policy.”\textsuperscript{82}

The dissent was also unhappy that the majority seemed to say that CLS did not really suffer that much from losing its status as an RSO. Even if it were true, it should not have been considered when determining if there was viewpoint discrimination because the Court “ha[s] never before taken the view that a little viewpoint discrimination is acceptable.”\textsuperscript{83} Finally, the dissent thought that the majority put too much emphasis on funding and that most of what CLS was seeking was not monetary.\textsuperscript{84}

Then the dissent compared \textit{Martinez} to \textit{Healy v. James}, the case involved the SDS. The effects of losing recognition in \textit{Healy} were very similar to the effects of CLS’s derecognition.\textsuperscript{85} In \textit{Healy} the Court held that denial of recognition substantially burdened the students’ right to freedom of association.\textsuperscript{86} The dissent felt that the Court should follow Healy and make its own decision rather than simply deferring to the judgment of Hastings’ president.\textsuperscript{87} Instead, the majority chose to largely ignore \textit{Healy} and focus instead on the limited public forum cases.

The dissent argues that even under the limited public forum analysis, the Hastings policy is unconstitutional. In order to exclude speech in a limited public forum, the reason for

\textsuperscript{81} \textit{Id.} at 3005-6.
\textsuperscript{82} \textit{Id.} at 3004.
\textsuperscript{83} \textit{Id.} at 3006.
\textsuperscript{84} \textit{Id.} at 3008.
\textsuperscript{85} \textit{Id.} at 3007 (SDS lost use of campus facilities and access to communication with students).
\textsuperscript{86} \textit{Id.} at 3007 (Citing \textit{Healy}, 408 U.S. at 181).
\textsuperscript{87} \textit{Id.} at 3008.
excluding it must be reasonable in light of the purpose served by the forum.\textsuperscript{88} In addition, “the university must maintain strict viewpoint neutrality,” which includes expression of religious viewpoints.\textsuperscript{89} The dissent concluded that under this analysis, Hastings’ policy fails.\textsuperscript{90}

\textbf{D. What Makes Martinez Different?}

\textit{Martinez} is different from previous cases involving the First Amendment rights of student organizations because it does not deal with a non-discrimination policy, but rather an all-comers policy. There was a lot of argument about what kind of policy Hastings actually had, but in the end, the Court decided the case accepting Hastings interpretation of the policy as an all-comer’s policy. This was the first time that a school asserted this type of policy.

Another difference is that the Court does not examine the claims of free speech and expressive association separately. Instead, the Court merges the two claims into one and uses limited public forum analysis to determine the constitutionality of the policy. Although the facts of the case are very similar to previous cases involving this issue, the Court came out very differently in holding that the university’s policy was constitutional.

\textbf{III. Ramifications for the Future}

\textbf{A. Narrow Holding}

The decision in \textit{Martinez} is a very narrow holding. The Court stressed that the opinion “considers only whether conditioning access to a student organization forum on compliance with

\textsuperscript{88} Id. at 3009 (Citing \textit{Rosenberger}, 515 U.S. at 829).
\textsuperscript{89} Id. at 2009 (Citing \textit{Bd. of Regents}, 529 U.S. at 234).
\textsuperscript{90} Id. at 3009.
an all-comers policy violates the Constitution.”91 The decision does not directly overturn *Walker*, the Seventh Circuit case holding that a university’s non-discrimination policy does violate the rights of the members of religious student organizations.

Schools with non-discrimination policies will not suddenly be able to suddenly restrict recognition in the way that Hastings was able to restrict it. The biggest difference between the all-comer’s policy and a non-discrimination policy is that the all-comer’s policy is facially viewpoint neutral. Under the all-comer’s policy, all students must be allowed to participate in the RSO, become members, and to run for leadership positions, regardless of their status or beliefs.92 This type of policy “serves purposes unrelated to the content of expression” and is therefore considered neutral even if it indirectly affects some speakers and not others.93

A non-discrimination policy is less facially neutral. It is much easier for an RSO to argue that a non-discrimination policy is applied to suppress its particular viewpoint. Under this type of policy, the university sets out specific bases under which the student organizations cannot discriminate. For example, race, gender, and sexual orientation are common bases found in non-discrimination policies. Religious student organizations can argue that these bases target their religious beliefs. When this is the case, the non-discrimination policy is not viewpoint neutral and the First Amendment rights of the students trump the policy. With the all-comer’s policy, the university can skip over any potential conflict with viewpoints, at least facially. By requiring all students to be admitted as members or leaders, the school cuts out the specific bases and can then claim viewpoint neutrality. It targets the act of rejecting members rather than the reasons

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91 *Id.* at 2984.
92 *Id.* at 2979.
for rejecting them. The school is then able to enforce the policy without questioning an RSO’s motivation for requiring membership restrictions.

Even though Martinez did not directly overturn Walker, through this decision the Supreme Court has given colleges and universities a powerful tool. There is nothing to prevent them from adopting an “all-comers” policy similar to the one Hastings said that it created. In addition, Martinez could and likely will be used as persuasive authority when universities are defending their non-discrimination policies in the future. CLS has already faced recognition issues at the law schools of Florida State University, the University of Oklahoma, the University of Pittsburgh, the University of New Mexico, the University of Idaho, and the University of South Carolina. So what should religious student groups do to avoid a Martinez problem?

B. What Can RSOs do Pre-litigation?

Student religious groups should make every attempt to create good relationships with the administration of the school as well as other student groups on campus. The CLS website includes a page of suggestions for this type of relationship building. The better relationship

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94 Martinez, 130 S.Ct. at 2977.
95 Id. at 2976.
96 The suggestions from the CLS website are:
1. Be respectful in your treatment of the administrators and other student groups.
2. Place “Everyone Welcome” on all materials your chapter posts or distributes. While CLS continues to require that leaders agree to the CLS Statement of Faith, CLS has always welcomed all students to attend its events and activities. By placing “Everyone Welcome” on written materials, it makes your policy clear.
3. Also place a disclaimer on all materials your chapter posts or distributes to the following effect: “The law school neither sponsors nor endorses CLS’s meetings or speech.” Again, this may help to reassure the university that law students will understand that CLS’s speech and meetings are not the university’s own speech or meetings.
4. Build relationships with other student organizations if possible. Begin with obvious allies in other campus ministries, faith groups, and “traditional” groups and branch out as seems wise. We want to reach out, encouraging your colleagues on campus.
the religious student organization can develop with the students and the university, the less likely a challenge will be brought or recognition will be denied.

If a university is considering adopting an all-comers policy that is similar to Hastings’ policy, the RSO’s should argue strongly against such a policy. The RSO could argue that such a policy can create extreme conflict among its student organizations. Hastings Dean Martinez admitted in a PBS interview that this type of policy would require a Jewish group to admit Muslim students or an African-American group to admit white supremacists. The RSO could also argue that this type of policy would require significant administrative involvement in the decision making of the student organizations because any student can complain that any decision of any group has violated the all-comer’s policy. Under a non-discrimination policy, only objections to decisions involving protected categories can be challenged. And finally, an all-comers policy must be applied uniformly to all student groups. So it is not just religious student groups, but none of the student organizations can condition membership or leadership on the beliefs or values they hold. For example, a student Democrat organization could not require its

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97 The excerpt from the interview is as follows:

O’BRIEN: Would a student chapter of, say, B’nai B’rith, a Jewish Anti-Defamation League, have to admit Muslims?
MARTINEZ: The short answer is yes.
O’BRIEN: A black group would have to admit white supremacists?
MARTINEZ: It would.
O’BRIEN: Even if it means a black student organization is going to have to admit members of the Ku Klux Klan
MARTINEZ: Yes.


leadership to adhere to the beliefs of the Democratic Party. Seen in this light, a university might reconsider adopting such a policy.

C. What Can an RSO do after Derecognized or Once Litigation has Started?

If litigation has already begun, the RSO should attempt to settle the case if possible. This may seem obvious, but it is an important step. Many of the recent cases involving derecognition of student organizations have been settled outside of court. Oftentimes schools would rather grant a religious exception to faith-based groups rather than face litigation. University of Minnesota Law School changed its policy to allow religious student groups to “require their voting membership and officers to adhere to the organization’s statement of faith and its rules of conduct.” The University of Toledo Law School ignored its own exemption in its non-discrimination policy. But after a lawsuit was filed, the University reaffirmed its religious exemption and agreed that religious groups could cite to the Bible in their constitutions. Arizona State University College of Law eventually conceded that CLS’s practice did not constitute discrimination on the basis of sexual orientation and granted recognition to religious groups that limited voting membership and leadership to students sharing the same religious beliefs. Ohio State University, Boise State University, Penn State, and Rutgers are a few schools who have similar exemptions from their nondiscrimination policies for religious

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99 CLSNET.org, CLS Chapters that have been Faced with Derecognition, http://www.clsnet.org/center/litigation/cls-chapters-have-been-faced-derecognition (Last visited April 18, 2011).
100 Id.
groups. More schools may follow this example. In addition, another compromise could be
made regarding funding if having access to the school building, email and other ways of
communicating with students is more important. An RSO might try to settle by agreeing to not
receive funding from the school in exchange for access to these ways of communicating and
meeting together.

If settling the case is not an option, the RSO must be extremely careful what stipulations
it makes. In Martinez, a huge problem in the case for CLS was that the majority refused to even
consider the constitutionality of the non-discrimination policy because of the stipulation. CLS
surely did not anticipate that the stipulation it agreed to would preclude it from asserting most of
its arguments. The Court emphasized that CLS could not get around the facts that were
stipulated to and thus Hastings was able to say its policy was an all-comers policy when the
actual language of the policy is clearly a non-discrimination policy. It is impossible to know
whether CLS would have won the case if it had not stipulated to this fact, but it would have had a
stronger case. The dissent’s evaluation of the policy as a non-discrimination policy seems to
imply that CLS would have won if it had been allowed to argue this.

The RSO should also carefully consider what claims to bring in a lawsuit. In Martinez, the Court combined the free speech and expressive association claims together and looked at them simultaneously\(^{103}\). The court then used limited public forum analysis to determine what
type of scrutiny to apply. Previous expressive association cases did not involve forum analysis.
In Walker, the court examined the free speech and expressive association claims separately. Post
Martinez, an RSO may have a better chance of succeeding by bringing an expressive association

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\(^{102}\) CLSNET.org, CLS Chapters that have been Faced with Derecognition, http://www.clsnet.org/center/litigation/cls-chapters-have-been-faced-derecognition (Last visited April 18, 2011).

\(^{103}\) Martinez, 130 S.Ct. at 2985.
claim only rather than both expressive association and free speech claims. This could possibly avoid using the less favorable test used for free speech violations in a limited public forum context and allow use of the more favorable test from Dale, that there must be a compelling state interest that is unrelated to the suppression of ideas and that cannot be achieved through means significantly less restrictive of associational freedoms. However, the Court may decide to apply limited public forum analysis anyway, having set out three reasons in *Martinez* why the expressive association claims should be merged with the free speech claims. The RSO might need to show that it was compelled to accept members in order for the Court to use the Dale test. And yet, the Court did not eliminate expressive association as a claim in *Martinez*, so some difference must remain. The RSO could argue that using limited public forum analysis would effectively eliminate the need for an expressive association claim.

In addition, the case has been remanded back to the district court to determine if the policy is being applied neutrally. The all-comers policy at Hastings may still not be viewpoint neutral. CLS argued in *Martinez* that the all-comers policy is just a pretext for selective enforcement. The Supreme Court did not make a decision on this issue because it was not argued in the lower courts.104 Hastings recognized other student groups who limited membership and leadership positions to those who agreed with their viewpoints, including the Democratic Caucus, the Association of Trial Lawyers, the Vietnamese American Law Society and the Silenced Right.105 If the court finds that it is neutrally applied, this case may provide a new way for colleges and universities to circumvent first amendment rights. They may change their non-discrimination policies to so called “all-comers policies” and thus avoid constitutional issues.

104 *Martinez*, 130 S.Ct. at 2995.
105 *Id.* at 3002.
However, if the court finds that the policy is not being applied neutrally, that should take a lot of fire out of this particular method of dealing with religious student organizations.

VI. Conclusion

Martinez is far from the last word on this debate. The Supreme Court’s decision did not resolve the circuit split on this issue. Universities will continue to fight for their nondiscrimination polices. Religious groups like CLS will continue to fight for their rights of freedom of religion, speech and association. Although the Supreme Court did not resolve the circuit split nor directly overrule CLS v. Walker, it seems to have provided universities a way to circumvent these constitutional rights of student organizations. Due to the differences in the two types of policies, if schools continue to operate under a non-discrimination policy, religious student organizations will have a better chance at receiving exemptions that allow them to practice their rights of free speech and of expressive association.

But if universities change their policies, or in fact keep the same policy but label it as an all-comers policy, it could hamper the ability of religious organizations to operate. This decision may change the way religious organizations are run on campuses around the country. It is possible that religious student groups will be severely limited in the future. But there may be ways to get around Martinez. RSOs should actively develop good relationships on campus and speak out against adoption of a similar all-comers policy. With care and awareness, RSOs can continue to function in harmony on state university campuses.