

Justice Ginsburg and Religious Liberty

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Justice Ginsburg has left an important mark on many areas of the Supreme Court's jurisprudence, but she has written relatively little in the area of religion. This relatively small footprint increased significantly in the opinion that she wrote in the Court's 2010 decision in Christian Legal Society v. Martinez. This Article examines three strands of Justice Ginsburg's jurisprudence leading up to that opinion: religion, government funding of expression, and equality. It first traces Justice Ginsburg's religious liberty views through four facets of her legal career: her role as an advocate, her opinions on the D.C. Circuit, her Supreme Court nomination testimony, and her opinions and votes on the Supreme Court. It turns next to her views about government funding of expression. It then examines Justice Ginsburg's long-standing commitment to principles of equality. Finally, it considers the interplay of these three strands in Martinez and offers three observations. First, because Martinez pitted religious liberty against liberal equality, it forced Justice Ginsburg to make a choice that prioritized one over the other and may have caused her to overlook some of the religious dimensions of the case. Second, Justice Ginsburg's previous views about government funding of speech should have caused her greater concern over the implications of unconstitutional conditions in this case. Third, Martinez skirted the preceding tensions, relying instead on doctrinal intricacies that detracted from the core issues raised in this case.

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INTRODUCTION

Justice Ruth Bader Ginsburg has left an important mark on many areas of the Supreme Court's jurisprudence, but she has written relatively little in the area of religion. During her nearly twenty years on the Court, she has authored only one majority opinion directly addressing either the Free Exercise Clause or the Establishment Clause of the First Amendment.¹

To some observers of the Court's religion jurisprudence, this relatively small footprint increased significantly with her 2010 opinion in *Christian Legal Society v. Martinez*.² That decision upheld the University of California, Hastings College of the Law's denial of "official recognition" to a student group that limited its membership to Christians who adhered to a moral code that included a prohibition against homosexual conduct.³ Although *Martinez* reads more like a free speech than a free exercise decision, the case involves some of the most difficult and most troubling aspects of religious liberty today.⁴ In particular,

1. *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (upholding a provision of the Religious Land Use and Institutionalized Persons Act); see *infra* notes 80–85 and accompanying text. Justice Ginsburg also wrote the majority opinion in *Hibbs v. Winn*, 542 U.S. 88 (2004), a Tax Injunction Act case that tangentially addressed an Establishment Clause claim. She authored dissents in *Agostini v. Felton*, 521 U.S. 203 (1997), and *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995).

2. 130 S. Ct. 2971 (2010).

3. *Id.* at 2978.

4. I have written critically of the holding and reasoning of *Martinez*. See JOHN D. INAZU,

Martinez's dismissal of the religious *association* claim dealt a severe blow to religious liberty advocates who have struggled to find alternate means of protecting religious expression in the twenty years since the Court's decision in *Employment Division v. Smith*, which lowered the level of constitutional scrutiny applied to generally applicable, neutral laws that burden the free exercise of religion.⁵

Martinez is bad news for religious liberty, but it need not cast the definitive gloss on Justice Ginsburg's views on the subject for at least two reasons.⁶ First, the case involves the tension between religious liberty and Justice Ginsburg's core concern with equality. Second, *Martinez* addresses the relationship between expression and government funding,⁷ an area in which the Court has yet to offer much helpful guidance. Unfortunately, rather than squarely confront these constitutional tensions, Justice Ginsburg's opinion moves too quickly past them and elides her own caution that "[d]octrinal limbs too swiftly shaped, experience teaches, may prove unstable."⁸

To support these claims, I examine three strands of Justice Ginsburg's jurisprudence leading up to *Martinez*: religion, government funding of expression, and equality.⁹ In Part I of this Article, I trace

LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 5, 145–49 (2012) [hereinafter INAZU, LIBERTY'S REFUGE]; John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 195–97 (2010) [hereinafter Inazu, *The Unsettling "Well-Settled" Law*].

5. See 494 U.S. 872 (1990). The claim to religious association was strengthened by the Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694, 706 (2012) ("[T]he text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations."). The Court in *Hosanna-Tabor* recognized a broad ministerial exception to employment discrimination law based on a "religious organization's freedom to select its own ministers." *Id.* Given the religious association interests at issue in both cases, *Hosanna-Tabor* and *Martinez* may be in tension.

6. Only a handful of scholars have ventured an assessment of Justice Ginsburg's religion opinions. See, e.g., Kevin Pybas, *Religious Groups in a Free Society*, 86 U. DET. MERCY L. REV. 685, 692 (2009) (citing Kathleen M. Sullivan, *Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 449, 457 (2000)) (describing Justice Ginsburg as adhering to a "weak free exercise/strong establishment approach"). Kevin Pybas correctly notes that Justice Ginsburg has "endorsed Sullivan's claim that the prohibition on establishment affirmatively establishes a secular moral public order." *Id.* at 692–93 n.30 (citing *Pinette*, 515 U.S. at 817 (Ginsburg, J., dissenting) (citing Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197–214 (1992))).

7. 130 S. Ct. at 2985–86.

8. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992).

9. In addition to these three lines of cases, *Martinez* drew substantially from two others: cases addressing student groups seeking official recognition at public universities and cases establishing the doctrinal framework for limited-public-forum analysis. The former precede Justice Ginsburg's tenure on the Court and thus do not shed light on her perspectives. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972). The latter include some cases decided since Justice Ginsburg has been on the Court, see, for example, *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), and *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), but I omit a separate treatment of them for two reasons. First, the doctrinal framework that emerges from these cases is relatively straightforward: Content-neutral laws generally survive scrutiny, and

Justice Ginsburg's religion views through four facets of her legal career: her role as an advocate, her opinions on the D.C. Circuit, her Supreme Court nomination testimony, and her opinions and votes on the Supreme Court. In Part II, I turn to her views about government funding of expression, relying principally upon her dissent in *DKT Memorial Fund v. Agency for International Development*.¹⁰ Then, in Part III, I examine her long-standing commitment to principles of liberal equality. Finally, in Part IV, I consider the interplay of these three strands in *Martinez* and offer three observations. First, because *Martinez* pitted religious liberty against liberal equality, it forced Justice Ginsburg to make a choice that prioritized one over the other and may have caused her to overlook some of the religious dimensions of the case. Second, Justice Ginsburg's previously expressed views about government funding of speech should have caused her greater concern over the implications of unconstitutional conditions in this case. Third, *Martinez* skirted the preceding tensions, relying instead on doctrinal intricacies that detracted from the core issues raised in this case.

Martinez should not have prioritized liberal equality over religious liberty, it should not have avoided an unconstitutional conditions analysis, and it should not have sidestepped the underlying values clash. This criticism is not for Justice Ginsburg alone, nor is it limited to the five-member majority in *Martinez*. The Supreme Court has for decades been less than clear about the interrelation among religious liberty, associational freedom, and government funding. *Martinez* emerges from within the murky intersection of these constitutional doctrines. And yet there is another sense in which this opinion authored by Justice Ginsburg must be situated within the rest of her own jurisprudence. This Article begins that effort.

I. RELIGION

A. ADVOCACY

One of Justice Ginsburg's earliest encounters with a religious liberty claim came with her involvement in the case of Susan Struck, an Air Force officer who became pregnant and refused on religious grounds to have an abortion.¹¹ Struck's refusal to end her pregnancy subjected her to discharge under military regulations.¹² Ginsburg, then general counsel for

viewpoint discriminatory laws generally do not. Second, to the extent that public-forum analysis is relevant to the issues addressed in this Article, it is encompassed in the religion cases that I address. See *infra* notes 71–79 and accompanying text (discussing *Rosenberger* and *Good News Club*).

10. 887 F.2d 275 (D.C. Cir. 1989).

11. *Struck v. Sec'y of Def.*, 460 F.2d 1372, 1376 (9th Cir. 1972).

12. *Id.* at 1373–74.

the Women's Rights Project of the ACLU, authored the merits brief when Struck's case reached the Supreme Court.¹³ She wrote that "the challenged regulation operates with particularly brutal force against women of [Roman Catholic] faith" and "pit[s] [Struck's] Air Force career against . . . her religious conscience."¹⁴ Importantly, Ginsburg insisted, "While the regulation challenged by Captain Struck is not designed to interfere with religious beliefs, if in effect it does so interfere, it must be supported by necessity of the kind totally absent here."¹⁵

It is important not to make too much of Justice Ginsburg's advocacy arguments in a case from the 1970s. For one thing, we cannot readily attribute to her everything that she asserted on a client's behalf. Yet there remains a sense in which her descriptions ("particularly brutal force" and "necessity of the kind totally absent here") reflect not just the rhetorical flair of a skilled advocate but also a deeper empathy for claims of religious conscience.

B. JUDGE GINSBURG

Prior to her elevation to the Supreme Court, Ginsburg sat for thirteen years on the Court of Appeals for the District of Columbia Circuit. Her views about religious liberty emerge in three of the opinions she authored during that time: her majority opinions in *Olsen v. Drug Enforcement Administration*¹⁶ and *Leahy v. District of Columbia*,¹⁷ and her dissent in *Goldman v. Secretary of Defense*.¹⁸

Judge Ginsburg's first religion opinion came in her dissent from the denial of an en banc request in *Goldman*.¹⁹ Simcha Goldman, a Jewish Air Force officer, alleged that a military regulation that prevented him from wearing a yarmulke while in uniform violated his free exercise of

13. Brief for the Petitioner, *Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972) (No. 72-178). Although the Supreme Court vacated and remanded Struck's case for the Ninth Circuit to consider mootness after the government changed its position on discharging Struck, see *Struck*, 409 U.S. at 1071, Ginsburg's brief remains important and has recently drawn increased scholarly attention. See, e.g., Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010).

14. Brief for the Petitioner, *supra* note 13, at 56.

15. *Id.* *Struck* preceded the Supreme Court's landmark decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that neutral laws of general applicability would be subject only to rational basis review under a free exercise challenge. *Id.* at 882-90. But because the Air Force regulation was a *federal* restriction on free exercise, today it likely would be decided under the standard set forth in the Religious Freedom Restoration Act of 1993, a standard similar to the one upon which Ginsburg relied in her *Struck* brief. See 42 U.S.C. § 2000bb-1 (2010) (providing for strict scrutiny of substantial government burdens on the exercise of religion).

16. 878 F.2d 1458 (D.C. Cir. 1989).

17. 833 F.2d 1046 (D.C. Cir. 1987).

18. 739 F.2d 657 (D.C. Cir. 1984) (en banc).

19. *Id.* at 660 (Ginsburg, J., dissenting).

religion.²⁰ The case eventually reached the Supreme Court, where Chief Justice Rehnquist's majority opinion denied Goldman's claim.²¹ In response, Congress enacted legislation to ensure that "a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed force."²²

On its way to the Supreme Court, Goldman's case came through the D.C. Circuit. After a panel of that court ruled against him, Goldman unsuccessfully sought en banc review.²³ Three judges dissented from the denial of the en banc petition: Kenneth Starr, Antonin Scalia, and Ruth Bader Ginsburg. Judge Starr's dissent concluded:

It is time to recall that the First Amendment means more than a strong and free press. It means more than protecting the right peaceably to assemble. It means more than preventing the National Government from establishing a state religion. It means the inalienable right of all our people as free men and women to worship God. That is what this country is all about. Dr. Goldman has been required to render to Caesar far too much for far too little reason.²⁴

Judge Ginsburg, joined by Judge Scalia, excoriated the "callous indifference" to Dr. Goldman's religious faith" that "runs counter to 'the best of our traditions' to 'accommodate[] the public service to the[] spiritual needs [of our people].'"²⁵ She emphasized that she dissented "[f]or the reasons indicated in Judge Starr's eloquent statement."²⁶ No longer an advocate, echoes of *Struck* resounded in Judge Ginsburg's *Goldman* dissent.

Judge Ginsburg next wrote in a religion case three years after *Goldman*, in *Leahy v. District of Columbia*.²⁷ The case involved a free exercise challenge to the District of Columbia's requirement that applicants for driver's licenses provide their Social Security numbers.²⁸ The legal analysis in the opinion is unremarkable—it corrects the lower court's error on an issue of civil procedure.²⁹ But what is more interesting about this brief opinion is the empathy that Judge Ginsburg displayed for John Leahy's religious beliefs. She took time to explore "[t]he *theological*

20. *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986), *aff'g* *Goldman v. Sec'y of Def.*, 734 F.2d 1531 (D.C. Cir. 1984).

21. *Id.* at 509–10.

22. National Defense Authorization Act for Fiscal Years 1988 AND 1989, Pub. L. No. 100-180, § 508, 101 Stat. 1019, 1086 (1987) (codified as amended at 10 U.S.C. § 774 (2010)).

23. *Goldman v. Sec'y of Def.*, 739 F.2d 657, 658 (D.C. Cir. 1984) (en banc).

24. *Id.* at 659–60 (Starr, J., dissenting).

25. *Id.* at 660 (Ginsburg, J., dissenting) (alterations in original) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

26. *Id.*

27. 833 F.2d 1046 (D.C. Cir. 1987).

28. *Id.* at 1047.

29. *Id.* at 1048–49.

roots of Leahy's asserted belief."³⁰ Instead of dismissing or ignoring those beliefs, she set forth a careful description of them. As she wrote, the roots of Leahy's belief

lie in the New Testament BOOK OF REVELATION which, in its thirteenth chapter, refers to two beasts. REVELATION prophesies that those who receive the mark of the second beast shall be condemned to eternal damnation. This mark is characterized as a number required for buying and selling. Leahy avers that "social security numbers have come to share many of the characteristics of the mark of the beast, and that social security numbers may therefore be the mark of the beast." On that account, Leahy refused to provide his social security number when applying for a driver's license.³¹

This brief description emerges from within a short and legally uninteresting case. But it reflects Judge Ginsburg's recognition that sometimes assessing a religious liberty claim requires probing the underlying belief.³²

In 1989, Judge Ginsburg wrote the majority opinion in *Olsen v. Drug Enforcement Administration*.³³ Carl Olsen sought a religious-use exemption from federal drug laws prior to the Supreme Court's practical end to such exemptions in *Employment Division v. Smith*.³⁴ Olsen was a member and priest of the Ethiopian Zion Coptic Church, which boasted a U.S. membership of somewhere between 100 and 200 adherents.³⁵ As the government conceded for purposes of the case, the church viewed marijuana as its primary sacrament, which was to be "combined with tobacco and smoked 'continually all day, through church services, through everything we do.'"³⁶ Olsen and other church members had received multiple federal convictions for importing twenty tons of marijuana.³⁷ Following these convictions, Olsen petitioned the Drug Enforcement Administration ("DEA") to grant an exemption permitting the church's sacramental use of marijuana.³⁸ He raised two arguments: (1) the Free Exercise Clause required the exemption; and (2) the

30. *Id.* at 1047–48 (emphasis added).

31. *Id.* at 1048 (citations omitted).

32. *Cf. Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 181 (1993) [hereinafter *Hearings*] (statement of Judge Ginsburg) ("Leahy's religious belief involved a rejection of identification with a Social Security number. If he were to use that number to identify himself, he would very substantially reduce his chances for an after-life. That was his religious belief.").

33. 878 F.2d 1458 (D.C. Cir. 1989).

34. 494 U.S. 872 (1990).

35. *Olsen*, 878 F.2d at 1459.

36. *Id.* (quoting *State v. Olsen*, 315 N.W.2d 1, 7 (Iowa 1982)); *id.* at 1460 ("[The DEA] accepted, for purposes of its decision, that the Ethiopian Zion Coptic Church is a bona fide religion with marijuana as its sacrament.").

37. *Id.* at 1459.

38. *Id.*

Establishment Clause and Equal Protection Clause required that the DEA grant an exemption similar to the one given to the Native American Church for its sacramental use of peyote.³⁹

Judge Ginsburg's opinion for the court rejected both of Olsen's claims.⁴⁰ Quoting from a recent Supreme Court opinion, she observed that "certain overt acts prompted by religious beliefs or principles" can be regulated when they pose "some substantial threat to public safety, peace or order."⁴¹ Based upon this language, and finding that importing marijuana poses a "substantial threat to public safety, peace or order," she rejected Olsen's first argument.⁴² Turning to Olsen's second argument, Judge Ginsburg observed that "in cases of this character, establishment clause and equal protection analyses converge."⁴³ She gave short shrift to Olsen's claim, suggesting an apples-to-oranges comparison between peyote and marijuana: During a seven-year period preceding the litigation, she noted, the DEA seized nineteen pounds of peyote but more than fifteen *million* pounds of marijuana.⁴⁴

Even before more recent developments in free exercise jurisprudence, *Olsen* is an easy case. Religious arguments for exemptions from marijuana use laws raise intriguing questions about the nature of religious practice, but as a practical matter, they get nowhere.⁴⁵ A broad cross section of American society would have no trouble concluding that a group that imports twenty tons of marijuana into the United States poses a "substantial threat to public safety, peace or order."⁴⁶ But *Olsen* remains an interesting case that sheds light on Judge Ginsburg's religious liberty views. The key insights are buried in her rejection of Olsen's

39. *Id.*

40. *Id.* at 1463–65. Judge Buckley dissented on Establishment Clause grounds, arguing that the DEA's denial of Olsen's exemption request "create[d] a clear-cut denominational preference in favor of the Native American Church, which has been granted such an exemption." *Id.* at 1468 (Buckley, J., dissenting).

41. *Id.* at 1461–62 (majority opinion) (quoting *Emp't Div. v. Smith*, 485 U.S. 660, 670 n.13 (1988)). The threat in *Olsen* seemed clear enough,

in light of evidence that in years past, the church's "[c]hecks on distribution of cannabis to nonbelievers in the faith [were] minimal," there was "easy access to cannabis for a child who had absolutely no interest in learning the religion," and "[m]embers [partook] of cannabis anywhere, not just within the confines of a church facility."

Id. at 1462 (alterations in original) (quoting *Town v. State ex rel. Reno*, 377 So. 2d 648, 649, 651 (Fla. 1979)).

42. *Id.* at 1463.

43. *Id.* at 1463 n.5 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 694, 696 (1970) (Harlan, J., concurring)).

44. *Id.* at 1463.

45. *See, e.g.*, *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968) (rejecting a free exercise defense in a prosecution for marijuana and LSD use); *Lineker v. State*, Nos. A-8957, A-8967, 2010 WL 200014 (Alaska Ct. App. Jan. 20, 2010) (rejecting a free exercise defense in a marijuana prosecution).

46. *See Olsen*, 878 F.2d at 1461–62.

attempt to bring the practices of the Ethiopian Zion Coptic Church closer in line with those of the Native American Church:

The peyote exemption was accorded to the Native American Church for a traditional, precisely circumscribed ritual. In that ritual, the peyote itself is an object of worship; for members of the Native American Church, use of peyote outside the ritual is sacrilegious. Thus the church, for all purposes other than the special, stylized ceremony, reinforced the state's prohibition. In contrast, the Ethiopian Zion Coptic Church, as earlier observed, teaches that marijuana is properly smoked "continually all day," as Olsen himself stated, "through everything that we do." True, for purposes of the exemption requested, Olsen narrowed the permission he sought to track the one accorded the Native American Church. But "narrow" use, concededly, is not his religion's tradition.⁴⁷

This description suggests two possible angles to Judge Ginsburg's approach to religious liberty. The first is her suggestion that a religious practice that "reinforced the state's prohibition" on illegal drug use might *for this reason* be more amenable to constitutional protection. Judge Ginsburg's description could almost be read to suggest that a religious practice that toes a line closer to the state's norms might be intrinsically more worthy of protection. But the disruption that a religious practice poses to the state's norms must factor into the weight of the government's interest in restricting the practice, not whether the practice warrants constitutional protection in the first place.

The second insight into Judge Ginsburg's religious liberty views appears in the final sentence of the paragraph quoted above. In asserting that Olsen's requested exemption fell outside of his religion's tradition, Judge Ginsburg purports to know what constitutes that tradition. But Olsen's narrowing of his religious practice might represent continuity with rather than a break from tradition—particularly if the tradition depended upon this narrowing for its survival.⁴⁸ This observation is easily obscured by *Olsen's* colorful facts, but it serves as reminder that judicial descriptions about the content of religious belief can obscure the clash of

47. *Id.* at 1464 (citations omitted).

48. Frederick Gedicks poignantly conveys this perspective in his description of the Mormon Church's decision to abandon its polygamist practices in the face of intense persecution by the federal government:

When all its efforts failed, the church came face to face with one of the most serious crises of religious conscience: the choice between faithfulness and survival. . . .

....

. . . Mormons understand their church to exist in the world to do God's work, and the church clearly cannot do God's work unless it exists in the world. For Mormons, then, there is religious integrity even in compromise and survival.

Frederick Mark Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Hauerwas*, 42 DEPAUL L. REV. 167, 171–72 (1992).

competing narrative traditions that often underlies religious liberty cases.⁴⁹

C. NOMINATION TESTIMONY

The Senate confirmed Judge Ginsburg's nomination to the Supreme Court by a vote of 96–3 on August 3, 1993.⁵⁰ As the vote suggests, the confirmation hearings were relatively uneventful and uncontroversial. But they coincided with an unprecedented crisis engulfing the Court's approach to religious liberty. Three years earlier, the Court had reshaped its free exercise jurisprudence with its landmark decision in *Employment Division v. Smith*.⁵¹ *Smith* announced that claims brought under the Free Exercise Clause of the First Amendment would receive only the barest of constitutional protection from “neutral law[s] of general applicability.”⁵² The holding effectively shifted the constitutional analysis of laws burdening free exercise claims from strict scrutiny to rational basis scrutiny.⁵³ *Smith* set off a firestorm and drew fierce reactions from around the political sphere. On March 11, 1993, Howard McKeon of California and Dean Gallo of New Jersey introduced a bill in the House of Representatives that would have reversed the effect of *Smith* by stipulating a return to strict scrutiny.⁵⁴ Eight months later—and three months after the Senate confirmed Justice Ginsburg's nomination—Congress enacted a version of the McKeon and Gallo bill, the Religious Freedom Restoration Act of 1993 (“RFRA”).⁵⁵

The crafting of RFRA over the summer of 1993 meant that tensions between Congress and the Supreme Court over religious liberty emerged around the time of Ginsburg's confirmation process. These tensions were amplified by three religion decisions released in close proximity to President Clinton's nomination of Judge Ginsburg to fill the seat vacated by Justice Byron White. On June 7, 1993, the Court issued its decision in *Lamb's Chapel v. Center Moriches Union Free School District*, holding that the use of public school facilities for after-school religious

49. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 60–68 (1983).

50. Joan Biskupic, *Senate, 96–3, Approves Ginsburg as 107th Supreme Court Justice*, WASH. POST, Aug. 4, 1993, at A4.

51. 494 U.S. 872 (1990).

52. *Id.* at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

53. See *id.* at 885 (“To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is ‘compelling’—permitting him, by virtue of his beliefs, ‘to become a law unto himself,’ contradicts both constitutional tradition and common sense.” (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879))).

54. H.R. Res. 1308, 103d Cong. (1993) (enacted).

55. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (2010)).

instruction posed no Establishment Clause concerns.⁵⁶ Four days later, the Court announced its opinion in *Church of the Lukumi Babalu Aye v. City of Hialeah*, which clarified that strict scrutiny would continue to apply post-*Smith* when a regulation appeared to single out free exercise for hostile treatment.⁵⁷ The following week—three days after Justice Ginsburg’s nomination—the Court announced its decision in *Zobrest v. Catalina Foothills School District*, a 5–4 ruling that required an Arizona school district to pay for a sign-language interpreter for a deaf student attending a religious high school.⁵⁸ *Lamb’s Chapel*, *Lukumi Babalu*, and *Zobrest* raised some of the core issues of contemporary religious liberty claims: use of public facilities by religious groups, express or implied animus toward religion, and governmental subsidy of religious practice. The decisions were generally heralded as victories for religious liberty that reinforced “neutral” or “equal” treatment of religious and nonreligious expression. Jim Henderson, an attorney for the conservative advocacy group American Center for Law and Justice, even suggested that “the [C]ourt has turned a corner on religious freedom and religion in public life.”⁵⁹ Law professor Michael McConnell was more circumspect: Church-state jurisprudence “was a muddle before and it’s a muddle now.”⁶⁰

News coverage drew connections between the recent decisions and Justice Ginsburg’s nomination. An article in the *Christian Science Monitor* the week after the nomination quoted law professor Jesse Choper as attributing the Court’s ambiguity in religion cases to Justice White and suggested that Judge Ginsburg could set a new course as “a stronger separationist than White.”⁶¹ *New York Times* reporter Linda Greenhouse speculated that “Judge Ginsburg is likely to be substantially more liberal than Justice White” on matters pertaining to religion.⁶²

In light of the ongoing push for RFRA and the Court’s recent decisions in *Lamb’s Chapel*, *Lukumi Babalu*, and *Zobrest*, Judge Ginsburg’s views about religion cases seemed particularly relevant. In response to a question from Senator Patrick Leahy during her testimony to the Senate Judiciary Committee, she emphasized that “[o]ur tradition

56. 508 U.S. 384, 395 (1993).

57. 508 U.S. 520, 546 (1993) (“A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.”).

58. 509 U.S. 1 (1993).

59. Max Boot, *Supreme Court Extends Scope of Religious Rights*, CHRISTIAN SCI. MONITOR, June 21, 1993, at 6 (quoting Jim Henderson, Am. Ctr. for Law and Justice).

60. *Id.* (quoting Professor Michael McConnell).

61. *Id.* (quoting Professor Jesse Choper).

62. Linda Greenhouse, *Overview of the Term; The Court’s Counterrevolution Comes in Fits and Starts*, N.Y. TIMES, July 4, 1993, at E1.

has been one of many religions, one of tolerance and mutual respect.”⁶³ When Senator Leahy pressed her about possible tensions between the Free Exercise and Establishment Clauses, Judge Ginsburg responded with a favorable characterization of the Court’s recent *Lamb’s Chapel* opinion:

Some crossovers do not create intractable problems, as the Supreme Court indicated fairly recently. For example, suppose a school facility is available after hours. Can the school board say we are not going to allow a religious group to use the facilities, because we don’t want the State to be acknowledging religion in any way? The Supreme Court said if the facility is open on a first-come, first served basis to anyone, the school’s authorities can’t exclude a group on the ground of religion. That position does not involve the State in establishing religion. Instead, it allows room for people freely to exercise their religion, as long as they are not being treated differently from any other group.⁶⁴

In its report accompanying its unanimous endorsement of Judge Ginsburg’s nomination, the Senate Judiciary Committee praised her “understanding of the values of religious pluralism and tolerance” and “her approval of the idea that government must accommodate religious practice in the absence of ‘special circumstances’—an idea directly in conflict with the *Smith* analysis.”⁶⁵ Assessing Judge Ginsburg’s testimony and her *Leahy* and *Goldman* opinions, the Committee concluded that Judge Ginsburg “shows sensitivity to the problem at the core of *Smith* and of modern free exercise clause doctrine—the problem of adjusting government action on religious practice in a pluralistic society.”⁶⁶

D. JUSTICE GINSBURG

The first religious liberty case that Justice Ginsburg confronted on the Supreme Court was *Board of Education of Kiryas Joel Village School District v. Grumet*.⁶⁷ The case involved an Establishment Clause challenge to the creation of a school district to facilitate the educational needs of disabled children of Satmar Jews.⁶⁸ The majority rejected the school district on the grounds that it manifested unconstitutional aid to religion.⁶⁹ Justice Ginsburg joined Justice Stevens’ concurrence, which contended that the school district “affirmatively supports a religious

63. *Hearings, supra* note 32, at 182; *see id.* at 212 (“I appreciate that the United States is a country of many religions. We have a pluralistic society, and that is characteristic of the United States.”).

64. *Id.* at 180.

65. S. REP. NO. 103-6, at 27 (1993).

66. *Id.* at 28.

67. 512 U.S. 687 (1994). The discussion of Justice Ginsburg’s votes on the Supreme Court is an illustrative rather than exhaustive consideration of the Free Exercise and Establishment Clause cases that have come before the Court during her tenure.

68. *Id.* at 692.

69. *Id.* at 690.

sect's interest in segregating itself and preventing its children from associating with their neighbors" and "increased the likelihood that they would remain within the fold."⁷⁰

The following term, Justice Ginsburg joined Justice Souter's dissent in *Rosenberger v. Rector and Visitors of the University of Virginia*.⁷¹ The case bears many factual similarities to *Martinez*. A religious student group challenged the university's denial of funding available to other student groups through a student activities fund.⁷² Justice Kennedy (who would prove to be the crucial fifth vote in *Martinez*) authored the majority opinion concluding that the denial of funding amounted to viewpoint discrimination in a limited public forum and that the funding of the religious student group would not violate the Establishment Clause.⁷³ Justice Souter's dissent rejected Justice Kennedy's Establishment Clause analysis and argued that the Court had abandoned its role of ensuring that direct aid flowed only to secular activities and not sectarian ones.⁷⁴

Six years after *Rosenberger*, the Court revisited the relationship between religious expression, government funding, and the public forum, in *Good News Club v. Milford Central School*.⁷⁵ The case involved a public school's denial of after-hours meeting space to a Christian children's club even though the space was generally available to other private groups.⁷⁶ Justice Thomas's majority opinion relied on *Rosenberger* and *Lamb's Chapel* to strike down the denial of meeting space as viewpoint discrimination.⁷⁷ As in *Rosenberger*, the Court found no Establishment Clause concerns.⁷⁸ Justice Ginsburg again joined Justice Souter's dissent.⁷⁹

Justice Ginsburg's most substantial opinion in a free exercise case came in *Cutter v. Wilkinson*,⁸⁰ which involved a challenge brought under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").⁸¹ The case arose when prisoners incarcerated at an Ohio

70. *Id.* at 711 (Stevens, J., concurring).

71. 515 U.S. 819 (1995).

72. *Id.* at 822–23.

73. *Id.* at 831, 846.

74. *Id.* at 873–74 (Souter, J., dissenting).

75. 533 U.S. 98 (2001).

76. *Id.* at 102.

77. *Id.* at 107.

78. *Id.* at 112.

79. *Id.* at 134 (Souter, J., dissenting). Justice Souter argued that the school's policy was viewpoint neutral because it prohibited the use of school facilities for religious purposes, rather than prohibiting use by groups with a religious viewpoint, as in *Lamb's Chapel*. *Id.* at 136–39.

80. 544 U.S. 709 (2005).

81. Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified as amended at 42 U.S.C. §§ 2000cc–2000cc-5 (2010)).

corrections center alleged that they were being prevented from practicing nonmainstream religions, including Wicca and Satanism.⁸² The corrections center countered that accommodating these religions would violate the Establishment Clause.⁸³ Justice Ginsburg's majority opinion held that RLUIPA "does not, on its face, exceed the limits of permissible government accommodation of religious practices."⁸⁴ She quoted language from *Smith* emphasizing that the "exercise of religion often involves not only belief and profession but [also] the performance of . . . physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine."⁸⁵

II. GOVERNMENT FUNDING OF SPEECH

A second strand of Justice Ginsburg's jurisprudence relevant to this Article concerns government funding of speech. The complicated relationship between funding and speech that has emerged in the case law is affected by two related doctrines: the doctrine of unconstitutional conditions and the doctrine of government speech. The basic premise of the unconstitutional conditions doctrine is that denying a generally available governmental benefit (such as funding) is considered a penalty for purposes of constitutional analysis.⁸⁶ The basic premise of the government speech doctrine is that the government may take steps (such as selective funding) to convey its own message.⁸⁷ It is not hard to see why these divergent premises are likely to cause confusion. The Supreme Court, in an opinion joined by Justice Ginsburg, has acknowledged as much:

Neither the latitude for government speech nor its rationale applies to subsidies for private speech in every instance, however. As we have

82. *Cutter*, 544 U.S. at 712.

83. *Id.* at 713.

84. *Id.* at 714.

85. *Id.* at 720 (alterations in original) (quoting *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990)).

86. See Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 155 (1996); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989); see also *Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991) (holding that the failure to fund is not an unconstitutional burden); *Harris v. McRae*, 448 U.S. 297, 326 (1980) (same).

87. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."); see *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005). Justice Scalia's majority opinion in *Johanns* concluded that generic advertising funded by a targeted assessment on beef producers was not susceptible to a First Amendment compelled-subsidy challenge. *Id.* at 562. Justice Ginsburg concurred in the judgment on the grounds that the assessment was a permissible government regulation, but wrote separately to explain why she did not view this as a government speech case. *Id.* at 569–70 (Ginsburg, J., concurring) (arguing that the government did not use its name in the beef advertising, and in fact affirmatively recommended against overconsumption of beef in its various dietary guidelines).

pointed out, “[i]t does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.”⁸⁸

The preceding language highlights the tension between government speech and unconstitutional conditions. But it leaves open important questions of how we ascertain the government’s motive and how we assess what constitutes viewpoint discrimination.

Justice Ginsburg’s most explicit views about this area of the law are found in a partial dissent that she authored while on the D.C. Circuit in *DKT Memorial Fund v. Agency for International Development*.⁸⁹ *DKT* is not a religion case, but it raises questions about funding and associational freedom that bear upon many religious liberty cases, including *Martinez*.

DKT involved statutory and constitutional challenges to restrictions on abortion funding implemented by the executive branch pursuant to the Foreign Assistance Act.⁹⁰ The Act authorized funding for “voluntary population planning,”⁹¹ but prohibited the use of any funds for “abortions or involuntary sterilization as a means of family planning.”⁹² The Agency for International Development (“AID”), in accordance with delegated statutory authority, implemented a requirement that domestic and foreign nongovernmental organizations certify that they would not “perform[] or actively promote[] abortion as a method of family planning in AID-recipient countries or . . . provide[] financial support to any other foreign nongovernmental organization that conducts such activities.”⁹³ A consortium of nongovernmental organizations including DKT Memorial Fund asserted that AID’s policy violated

First Amendment rights by rendering plaintiffs ineligible to receive population assistance funds because they engage in certain activities relating to voluntary abortion, including the dissemination of information, that run afoul of AID’s policy, and by rendering plaintiffs unable to associate in AID programs with persons or entities whose abortion-related activities, including the dissemination of information, conflict with AID’s policy.⁹⁴

Judge Sentelle’s opinion for the court addressed *DKT*’s free speech and expressive association arguments. Turning first to the speech claim, he began by insisting that the plaintiffs had mischaracterized as

88. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (alterations in original) (quoting *Rosenberger*, 515 U.S. at 834).

89. 887 F.2d 275 (D.C. Cir. 1989).

90. *Id.* at 277.

91. *Id.* (quoting 22 U.S.C. § 2151b(b) (1961)).

92. *Id.* (quoting 22 U.S.C. § 2151b(f)(3) (1961)).

93. *Id.* at 278.

94. *Id.* at 282.

viewpoint discrimination what was actually just “a refusal to fund.”⁹⁵ According to Sentelle, it was “settled law” that “[t]he fact that the government subsidizes one constitutionally protected or constitutionally permissible activity is no reason that it has to subsidize another.”⁹⁶ AID’s policy “simply represents an election to fund some communicative and associational acts, while not funding all.”⁹⁷

Sentelle turned next to the expressive association claim. He rejected DKT’s argument that AID’s hindrance of a joint project between DKT and another nonprofit “involving much conduct and some expression” violated DKT’s right of expressive association.⁹⁸ Instead, “the refusal to subsidize the exercise of a constitutionally protected right is not tantamount to an infringement of that right.”⁹⁹

Sentelle concluded his freedom of association analysis by discussing the Supreme Court’s decision in *Grove City College v. Bell*.¹⁰⁰ In that decision, the Court had rejected a freedom of association claim brought by a Christian college denied federal money because it refused as a matter of conscience to sign a Title IX compliance document from the Department of Education.¹⁰¹ Sentelle reasoned that if the Department of Education could deny funding to Grove City College, then AID could deny funding to DKT.

Judge Ginsburg filed a vigorous partial dissent.¹⁰² In her view, *Grove City College* was inapposite because “abortion (or anti-abortion) counseling is speech sheltered by the first amendment, while

95. *Id.* at 287.

96. *Id.* at 288.

97. *Id.* at 289.

98. *Id.* at 292.

99. *Id.* at 293 (citing, inter alia, *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983)).

100. *Id.* at 294; see *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

101. *Grove City Coll.*, 465 U.S. at 559–60. The compliance document prohibited “discrimination under any education program or activity for which [the school] receives or benefits from Federal financial assistance.” *Id.* at 560–61. The college made clear that “discrimination on the basis of race or sex is morally repugnant to its principles,” see Brief for Petitioners, *Grove City Coll.*, 465 U.S. 555 (No. 82-792), 1983 U.S. S. Ct. Briefs LEXIS 292, at *9, and there was no indication that it had ever discriminated on these grounds, see *Grove City Coll.*, 465 U.S. at 577 (Powell, J., concurring). It argued that the application of the Title IX restrictions violated its “First Amendment rights to academic freedom and association.” Brief for Petitioners, *supra*, at *80. Just two weeks before the college filed its brief, the Supreme Court rebuffed a freedom of association argument from another Christian college in a case that pitted religious group autonomy against antidiscrimination norms. See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). Finding that Grove City College’s freedom of association argument “warrant[ed] only brief consideration,” the Court tersely concluded that Title IX restrictions trumped the college’s First Amendment rights: “Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that education institutions are not obligated to accept.” *Grove City Coll.*, 465 U.S. at 575 (majority opinion).

102. Judge Ginsburg concurred in the court’s rejection of DKT’s statutory claims. *DKT*, 887 F.2d at 299 (Ginsburg, J., concurring in part and dissenting in part).

discriminating adversely on the basis of race, national origin, religion or sex is not one's constitutional right."¹⁰³ She rejected the majority's claim that *DKT* was simply a funding case, insisting that "DKT's case rests on the freedom to communicate, to receive communications, and to maintain associations."¹⁰⁴ She warned that the government was attempting to "manipulate[] out of existence guaranties [of freedom of speech and association] embedded in the Constitution of the United States,"¹⁰⁵ and concluded her opinion by asserting that "[t]he handicap our government has placed on DKT's speech and associations is repugnant to the first amendment."¹⁰⁶ Judge Ginsburg's *DKT* dissent thus advocated robust protections for freedom of speech and association¹⁰⁷ and resisted funding constraints that inhibit "speech sheltered by the first amendment."¹⁰⁸ Her core objection was rooted in the doctrine of unconstitutional conditions.¹⁰⁹

Judge Ginsburg reinforced the beliefs she expressed in her *DKT* dissent during her testimony to the Senate Judiciary Committee during her nomination process. In discussing her views on free speech, she expressed three core ideas: (1) freedom of expression extends to expression that we hate,¹¹⁰ (2) even nonverbal acts can express ideas,¹¹¹ and (3) "taxing and spending decisions . . . can seriously interfere with the exercise of constitutional freedoms."¹¹² As *Martinez* illustrates, each

103. *Id.* at 301 n.2 (citation omitted). Turning to AID's policy, Ginsburg emphasized that "[t]hrough AID, 'the United States continues to be the largest single donor of international population assistance, contributing more than 40 percent of the total \$500 million provided by all donors in 1986.'" *Id.* at 302 (quoting Declaration of John J. Dumm, Deputy Dir. of the Office of Population of AID, Dec. 30, 1987, at 5).

104. *Id.* at 303.

105. *Id.* (alterations in original) (quoting *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 594 (1926)) (internal quotation marks omitted).

106. *Id.* at 308.

107. *Id.* at 303.

108. *Id.* at 301 n.2.

109. *Id.* at 301 (citing *Sullivan*, *supra* note 86). Justice Ginsburg also made an unconstitutional conditions argument in an amicus brief she filed in a case challenging mandatory periods of maternity leave for public school teachers who became pregnant. See Brief of Amici Curiae ACLU et al., *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632 (1973) (No. 72-777), 1973 U.S. S. Ct. Briefs LEXIS 11, at *49 ("While it is true that [a teacher] does not have a constitutional right to continue public employment, it cannot be gainsaid that she does have a right to be free from the imposition of unconstitutional conditions in connection with that employment." (alteration in original) (quoting *Buckley v. Coyle Pub. Sch. Sys.*, 476 F.2d 92, 96-97 (10th Cir. 1973))).

110. Responding to a question from Senator Leahy, Judge Ginsburg emphasized that "free speech means not freedom of thought and speech for those with whom we agree, but freedom of expression for the expression we hate." *Hearings*, *supra* note 32, at 313.

111. *Id.* at 226 ("It is said that during World War II the King of Denmark stepped out on the street in Copenhagen wearing a yellow armband. If so, that gesture expressed the idea more forcefully than words could.").

112. *FEC v. Int'l Funding Inst.*, 969 F.2d 1110, 1118 (D.C. Cir. 1992) (Ginsburg, J., concurring)

of these ideas is also central to any meaningful protections for *religious* expression and practice.

III. EQUALITY

The final dimension of Justice Ginsburg's jurisprudence that influences her views about religious liberty generally and *Martinez* in particular is her emphasis on "equal dignity," which Professor Neil Siegel has called the "central purpose" of her constitutional vision.¹¹³ He suggests that "[d]uring her Supreme Court confirmation hearing, then-Judge Ginsburg put the Senate and the public on notice of the core content of her constitutional vision."¹¹⁴ As Siegel elaborates, Ginsburg

underscored for the Senators who would be voting on her confirmation . . . her belief that the meaning of the Constitution changes over time, as each generation of Americans seeks to perfect constitutional ideals that were originally articulated by the Founders. They perfect these ideals in part by broadening the universe of beneficiaries—for example, by according women the respect and opportunities they are due as full-fledged members of the political community.¹¹⁵

Siegel's assessment of Justice Ginsburg's "constitutional core" has been borne out in her tenure on the Supreme Court. She shares this core vision with at least two other recent Justices—Sandra Day O'Connor and John Paul Stevens.¹¹⁶ But the core concerns of these three Justices also raise important questions as to what constitutes "the political community" and the extent to which the state should regulate nongovernmental actors with the coercive force of law to ensure "respect and opportunities" for the members of that community. These questions are particularly important in religious liberty cases, which introduce competing "counter-assimilationist" ideals that allow people "of different religious faiths to maintain their differences in the face of powerful pressures to conform."¹¹⁷ Justice Ginsburg implicitly recognized these counter-assimilationist values in the support she showed for

(emphasis removed). Senator Patrick Leahy quoted this language while seeking clarification of an earlier statement by Judge Ginsburg. *Hearings*, *supra* note 32, at 184. Judge Ginsburg indicated that she continued to adhere to the view she expressed in that case. *Id.* ("I said yesterday that the Government can buy Shakespeare and not modern theater. . . . [W]hat the Government cannot do is buy Republican speech and not Democratic speech, buy white speech and not black speech . . .").

113. Neil S. Siegel, "Equal Citizenship Stature": Justice Ginsburg's Constitutional Vision, 43 *NEW ENG. L. REV.* 799, 816 (2009).

114. *Id.* at 814.

115. *Id.* at 815 (footnote omitted).

116. See Gregory P. Magarian, *Justice Stevens, Religion, and Civil Society*, 2011 *WISC. L. REV.* 733, 746 (noting the "central concern with equal citizenship" of both Justice O'Connor and Justice Stevens).

117. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 *U. CHI. L. REV.* 1109, 1139 (1990).

Simcha Goldman's wearing of a yarmulke.¹¹⁸ But not every religious liberty case reconciles with her constitutional core as easily as *Goldman*—many of the more difficult cases require a more direct weighing of constitutional values.

The tension between religious liberty and Justice Ginsburg's equality commitments is particularly evident in the area of gay rights. We can glean some insights into her views about gay rights from two key cases decided during her time on the Court: *Romer v. Evans*¹¹⁹ and *Lawrence v. Texas*.¹²⁰ In *Romer*, the Court overturned a voter-approved amendment to Colorado's constitution that would have prohibited state or local government from passing antidiscrimination laws protecting gays and lesbians.¹²¹ In *Lawrence*, the Court invalidated a Texas law criminalizing same-sex sodomy, overruling its earlier decision in *Bowers v. Hardwick*.¹²² Justice Ginsburg joined the majority in both opinions.

Justice Ginsburg also dissented in an important decision that went against gay rights, *Boy Scouts of America v. Dale*.¹²³ *Dale* involved the clash between antidiscrimination law and the freedom of association of a private noncommercial group. The Court sided with the Boy Scouts in their decision to exclude a gay scoutmaster from their membership.¹²⁴ Although *Dale* was a setback for gay rights, it adopted the precarious "expressive association" framework first announced in *Roberts v. United States Jaycees*.¹²⁵ I have argued elsewhere that this framework offers little meaningful protection for private groups that resist antidiscrimination norms.¹²⁶ Indeed, absent a change in the Court's approach to expressive

118. *Goldman v. Sec'y of Def.*, 739 F.2d 657, 660 (D.C. Cir. 1984) (en banc) (Ginsburg, J., dissenting).

119. 517 U.S. 620 (1996).

120. 539 U.S. 558 (2003). Julie Nice observes that *Martinez* reflects the current "moment in time regarding society's consideration of gay rights," which grew out of *Romer* and *Lawrence*. Julie Nice, *How Equality Constitutes Liberty: The Alignment of CLS v. Martinez*, 38 HASTINGS CONST. L.Q. 631, 645 (2011).

121. 517 U.S. at 623.

122. *Lawrence*, 539 U.S. at 578 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

123. 530 U.S. 640 (2000). Justice Ginsburg also joined the unanimous opinion in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, in which the Court held that requiring private parade organizers to allow the participation of an LGBT group would alter the expressive content of the parade and therefore violate the First Amendment rights of the organizers. 515 U.S. 557, 559 (1995).

124. *Dale*, 530 U.S. at 659.

125. *Id.* at 648 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984)). The Court in *Roberts* recognized a distinction between freedom of intimate association and freedom of expressive association. Intimate association "receives protection as a fundamental element of personal liberty." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984). Expressive association, "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition . . . and the exercise of religion," receives protection only "as an indispensable means of preserving other individual liberties." *Id.* at 618 (emphasis added).

126. See Inazu, *The Unsettling "Well-Settled" Law*, *supra* note 4, at 181–97 (illustrating the weaknesses of the expressive association doctrine).

association, it may only be a matter of time before *Dale* is overruled. The key gay rights cases leading up to *Martinez* are *Romer* and *Lawrence*, not *Dale*.

IV. *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*

The preceding sections have traced Justice Ginsburg's views on religion, government funding of expression, and equality (particularly in the area of gay rights). These areas converged in *Martinez*. The litigation leading up to *Martinez* began in 2004, when the Christian Legal Society ("CLS") chapter at the University of California, Hastings College of the Law in San Francisco sought to become a recognized student organization.¹²⁷ Hastings typically granted "official recognition" to private student groups, making clear that it "neither sponsor[ed] nor endorse[d]" the views of those groups and insisting that they inform third parties that they were not sponsored by the law school.¹²⁸

Hastings officials withheld recognition from CLS because the group's Statement of Faith violated the religion and sexual orientation provisions of the school's Nondiscrimination Policy.¹²⁹ As a result, the school denied CLS travel funds and funding from student activity fees.¹³⁰ It also denied them the use of the school's logo, use of a Hastings email address, the opportunity to send mass emails to the student body, participation in the annual student organizations fair, and the ability to reserve meeting spaces on campus.¹³¹ Hastings subsequently asserted that its denial of recognition stemmed from an "accept-all-comers" policy that required student organizations to accept any student who desired to be a member of the organization.¹³²

CLS filed suit in federal district court asserting violations of expressive association, free speech, free exercise of religion, and equal protection.¹³³ The court granted Hastings' motion for summary

127. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2980 (2010).

128. Brief for Petitioner at 4, *Martinez*, 130 S. Ct. 2971 (No. 08-1371) [hereinafter CLS Brief].

129. *Id.* at 9.

130. *Id.* at 10.

131. *Christian Legal Soc'y v. Kane*, No. C 04-04484, 2006 WL 997217, at *17 (N.D. Cal. May 19, 2006); Petition for Writ of Certiorari at 10, *Martinez*, 130 S. Ct. 2971 (No. 08-1371).

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

133. *Kane*, 2006 WL 997217, at *4.

judgment.¹³⁴ CLS appealed the district court's decision to the Ninth Circuit, which affirmed the district court.¹³⁵

After granting certiorari, a divided Supreme Court rejected CLS's challenge.¹³⁶ Justice Ginsburg's majority opinion concluded that Hastings' all-comers policy was "a reasonable, viewpoint-neutral condition on access to the student-organization forum."¹³⁷ The following pages assess her opinion in the areas of religion, government funding of speech, and equality.

A. RELIGION

Martinez involved a Christian student group that ascribed to a theological creed and met regularly for Bible study and prayer.¹³⁸ Justice Ginsburg dismissed CLS's free exercise claim in a footnote.¹³⁹ Of course, she is not wholly to blame—the conclusion flows almost inevitably from *Employment Division v. Smith*.¹⁴⁰ But *Martinez* obscures the values of religious *association*—values upon which religious groups had increasingly relied in the wake of *Smith*.¹⁴¹

134. *Id.* at *1. The district court granted leave for a group called Hastings Outlaw to intervene in the case. Petition for Writ of Certiorari, *supra* note 131, at 10. Outlaw asserted that its members had a right to be officers and voting members in any other campus group (including CLS) and that its members opposed their student activity fees funding an organization that they found offensive. *Id.* at 10–11.

135. *Christian Legal Soc'y v. Kane*, 319 F. App'x 645, 645–46 (9th Cir. 2009) (citing *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649–50 (9th Cir. 2008) (holding that the school district could deny recognition to a high school Bible club that limited its voting members and officers to those who shared the group's beliefs)).

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

137. *Id.* at 2978. Justice Alito authored a dissent joined by Chief Justice Roberts and Justices Thomas and Scalia. *Id.* at 3000 (Alito, J., dissenting).

138. See CLS Brief, *supra* note 128, at 5 ("The national Christian Legal Society maintains attorney and law student chapters across the country. Student chapters, such as that at Hastings, invite speakers to give public lectures addressing how to integrate Christian faith with legal practice, organize transportation to worship services, and host occasional dinners. The signature activities of the chapters are weekly Bible studies, which, in addition to discussion of the text, usually include prayer and other forms of worship. . . . [T]o be officers or voting members of CLS—and to lead its Bible studies—students must affirm their commitment to the group's core beliefs by signing the national CLS Statement of Faith and pledging to live their lives accordingly." (citations omitted)); see also *id.* at 6 (quoting CLS's Statement of Faith).

139. *Martinez*, 130 S. Ct. at 2995 n.27 ("CLS briefly argues that Hastings' all-comers condition violates the Free Exercise Clause. Our decision in *Smith* forecloses that argument. In *Smith*, the Court held that the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct. In seeking an exemption from Hastings' across-the-board all-comers policy, CLS, we repeat, seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause." (citations omitted)).

140. See 494 U.S. 872 (1990).

141. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (concluding that a school's exclusion of a Christian group from school premises was "impermissible viewpoint

Justice Ginsburg concluded that CLS's speech and association claims "merged," which allowed her to resolve the dispute entirely within a free speech limited-public-forum analysis.¹⁴² This merging of CLS's speech and association claims reflects a worrisome trend that fails to make meaningful distinctions between the various rights protected under the First Amendment.¹⁴³ It misses the expressiveness inherent in almost any act of associating, and in this way obscures religious liberty claims that are tied to associational freedom.

Justice Ginsburg insisted that "CLS's conduct—not its Christian perspective—is, from Hastings' vantage point, what stands between the group and RSO [registered student organization] status."¹⁴⁴ But CLS's "conduct" is inseparable from its message.¹⁴⁵ Justice Ginsburg's opinion misses this connection. Quoting from CLS's brief, she wrote that "expressive association in this case is 'the functional equivalent of speech itself'"¹⁴⁶ to set up the idea that expressive association is entitled to no more constitutional protection than speech. But CLS had asserted:

[W]here one of the central purposes of a noncommercial expressive association is the communication of a moral teaching, its choice of who will formulate and articulate that message is treated as the functional equivalent of speech itself.¹⁴⁷

CLS was not arguing that association is nothing more than speech but that association is itself a form of expression—whom it selects as its members and leaders communicates a message. CLS underscored this point elsewhere in its brief, arguing that "[b]ecause a group's leaders define and shape the group's message, the right to select leaders is an

discrimination"); see also 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, 540 (2011). The Court's recent *Hosanna Tabor* decision renews the focus on religious association. See *supra* note 5.

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

143. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981). While *Widmar* was the first case to resolve a free exercise claim explicitly through the rights of speech and association, the Court had previously engaged in similar reasoning. See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634–35 (1943). For an academic argument on these grounds, see Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 94 (2001) ("The free speech doctrine and the newly defined right of expressive association go a long way to providing an adequate substitute for the Free Exercise Clause."). As Steven Smith has observed, "[p]roposals to collapse the commitment to religious freedom into other values such as freedom of speech, freedom of association, and equal protection have proliferated." Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 239 n.363 (1991).

144. *Martinez*, 130 S. Ct. at 2994.

145. The Supreme Court occasionally evades this distinction. See, e.g., *Rumsfeld v. Forum for Academic & Inst'l Rights*, 547 U.S. 47, 66 (2006) ("[W]e have extended First Amendment protection only to conduct that is inherently expressive.")

146. *Martinez*, 130 S. Ct. at 2985 (quoting CLS Brief, *supra* note 128, at 35).

147. CLS Brief, *supra* note 128, at 35.

essential element of its right to speak.”¹⁴⁸ Justice Ginsburg interpreted this assertion to mean that “CLS suggests that its expressive-association claim plays a part auxiliary to speech’s starring role.”¹⁴⁹ That interpretation may be consistent with the understanding of expressive association that has emerged in cases like *Dale*,¹⁵⁰ but it misses the fundamental connection between a group’s message and its composition.

Justice Ginsburg’s inattention to religious liberty is also evident in her rejection of CLS’s distinction between gay “conduct” and the “status” of being gay.¹⁵¹ CLS insisted that it welcomed members who were gay but precluded gay or straight students who condoned or engaged in gay sex.¹⁵² CLS also denied membership to students who condoned or engaged in heterosexual sex outside of marriage.¹⁵³ The distinction between status and conduct is a familiar one in the law.¹⁵⁴ It is also rooted in Christian tradition, and in that context it is not limited to homosexuality—according to most Christian traditions, one can be a sinner and abstain from a particular sin; one can desire to eat an apple and

148. *Id.* at 18.

149. *Martinez*, 130 S. Ct. at 2985 (citing CLS Brief, *supra* note 128, at 18).

150. *See supra* notes 124–25 and accompanying text.

151. *Martinez*, 130 S. Ct. at 2990.

152. CLS Brief, *supra* note 128, at 5.

153. *See Martinez*, 130 S. Ct. at 3001 (Alito, J., dissenting) (“In early 2004, the national organization adopted a resolution stating that “[i]n view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership.” (alteration in original)).

154. *See, e.g., Robinson v. California*, 370 U.S. 660, 665–67 (1962) (distinguishing between the status of narcotic addiction and the crime of illegal drug use); *see also* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1938 (2006) (“[A] religious group (say, a Catholic group) that condemns homosexuality might demand that its members *share those views*. Such a demand would be neither religious discrimination nor sexual orientation discrimination, but only discrimination based on holding a certain viewpoint that secular people could hold as well as religious ones. But such a group rule wouldn’t just exclude practicing homosexuals, or at least those practicing homosexuals who believe that homosexuality is proper—it would also exclude heterosexual Catholics who disagree with church teachings on this issue.”); *cf. Powell v. Texas*, 392 U.S. 514, 532 (1968) (“On its face the present case does not fall within [the holding of *Robinson*], since appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*”); *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 860 (7th Cir. 2006) (“CLS’s membership policies are . . . based on belief and behavior rather than status”); *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004) (“Whereas [the state constitutional amendment at issue in *Romer v. Evans*] encompassed both conduct *and* status, Florida’s adoption prohibition is limited to conduct.” (citations omitted)); *United States v. Black*, 116 F.3d 198, 201 (7th Cir. 1997) (“Black maintains that he has been convicted based on his status as a pedophile or ephrophile. However, the indictment does not criminalize him in that capacity but simply charges him for his conduct of receiving, possessing and distributing child pornography that traveled in interstate commerce.”).

not eat an apple; one can be gay (or straight) and be celibate.¹⁵⁵ One of the amicus briefs in *Martinez* emphasized this distinction to the Court.¹⁵⁶

As Kenji Yoshino has observed, the relationship between status and conduct is also closely tied to gay identity.¹⁵⁷ According to Yoshino, performance (or conduct) is sometimes constitutive of identity.¹⁵⁸ He elaborates:

Gay status can at times be experienced as existing independently of homosexual sodomy, as perhaps most clearly seen in the instance of celibate individuals who nonetheless conceive of themselves as gay. But gay status can at other times be experienced as constituted by homosexual sodomy, as perhaps most clearly seen in the instance of the individual whose homosexual experience leads him to embrace a gay identity.¹⁵⁹

Yoshino's description is highly plausible as a sociological or experiential claim. But its translation into a constitutional norm is less clear. For Yoshino—whose larger project critiques legal regimes that encourage a “covering” or hiding of gay conduct—the question is “whether a commitment against status discrimination might require us to prohibit discrimination against an act [sometimes] constitutive of that status.”¹⁶⁰ I think Yoshino is mostly right here, but the bracketed qualifier that I have added to his question is critical to the constitutional analysis. If conduct were a necessary condition of status, then discrimination against conduct would be discrimination against status. But that is not Yoshino's argument—he is making the weaker claim that conduct is sometimes constitutive of status. The weaker claim also has an important corollary: Inaction is also a kind of conduct (or performance) that is partially constitutive of status. A virgin maintains that status (and identity claim) through inaction. A gay person who chooses not to engage in sexual conduct makes an identity claim (cognitively, but also performatively) that acknowledges both gayness and some other

155. See generally RICHARD B. HAYS, *THE MORAL VISION OF THE NEW TESTAMENT—COMMUNITY, CROSS, NEW CREATION, A CONTEMPORARY INTRODUCTION TO NEW TESTAMENT ETHICS* (1996). The distinction between status and conduct advanced by CLS in *Martinez* should not be confused with either the “nurture” versus “nature” arguments raised by some conservative religious believers or with certain strands of neo-Thomistic natural law objections to homosexuality.

156. See Brief of Amici Curiae Evangelical Scholars, in Support of Petitioner at 9, *Martinez*, 130 S. Ct. 2971 (No. 08-1371) (“[A] distinction between inward desires and outward conduct is a common one in evangelical thinking and would apply in many areas of moral conduct.”).

157. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 778 (2002).

158. *Id.* at 868. Yoshino advances what he calls the “weak performative model” of identity, *id.* at 871, which builds upon the work of Judith Butler. See generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (2d ed. 1999); JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX”* (1993).

159. Yoshino, *supra* note 157, at 873.

160. *Id.*

characteristic that modifies gayness (perhaps placing gayness in a subservient role, as with the gay Christian who chooses celibacy).¹⁶¹

Once we acknowledge that both action and inaction can be constitutive of identity, we see why a constitutional pronouncement that equates status and conduct (like Justice Ginsburg's assertion in *Martinez*) overreaches. It may well be that with respect to sexual orientation, most gays view conduct as at least partially constitutive of identity. If that is the case, it should cause us to question a coercive law of the state (like a sodomy restriction) that purports to prohibit only conduct and not discriminate against status.¹⁶² But this reasoning cannot be readily exported to all antidiscrimination laws. A private group that insists upon certain conduct (or inaction) as a basis of membership is not denying the right of anyone to pursue her performative identity in society—the constraint is simply that a person who wishes to be a member of the group must prioritize her identity claims in a way consistent with the norms of the group. That claim will inevitably encounter some limits. For example, if a group provided an essential means of access to core social or economic goods, then we might be concerned about a kind of de facto state action.¹⁶³ But CLS at Hastings College of the Law is not such a group.

Given the essentially private nature of CLS, the effects of its membership policy, while exclusionary and not without harm, do not constrict performative identity. In fact, the membership restriction asks its own kind of performance—a performance of celibacy and denial of the primacy of sexual identity. In the context of a private group (as opposed to the public law at issue in *Lawrence*), it is difficult to conflate a conduct requirement with one directed at status.

In her *Leahy* opinion on the D.C. Circuit, Judge Ginsburg took the time to explore “[t]he theological roots of Leahy’s asserted belief.”¹⁶⁴ Yet

161. While Yoshino recognizes the possibility of prioritizing other identities over gay identity, he implies that gays who do so are “covering.” See *id.* at 846 (“Gays can cover by prioritizing their other identities over their gay identity. Because human beings have many identities, they can cover a particular identity with the others. The impetus to cover a stigmatized identity with unstigmatized identities will be particularly strong.”). But unless we remove all agency from prioritizing identities, it can’t be the case that *all* instances of subverting gay identity to a different identity (even an identity like Christian) are problematic.

162. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O’Connor, J., concurring) (“While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.”).

163. Cf. *INAZU, LIBERTY’S REFUGE*, *supra* note 4, at 14–16 (“The right of assembly is a presumptive right of individuals to form and participate in peaceable, noncommercial groups. This right is rebuttable when there is a compelling reason for thinking that the justifications for protecting assembly do not apply (as when the group prospers under monopolistic or near-monopolistic conditions).”).

164. *Leahy v. Dist. of Columbia*, 833 F.2d 1046, 1047–48 (D.C. Cir. 1987).

in *Martinez*, she swiftly rejected the theological argument, asserting that “[o]ur decisions have declined to distinguish between status and conduct” in the context of sexual orientation.¹⁶⁵ *Stare decisis* did not compel this conclusion; indeed, Justice Ginsburg’s pronouncement was widely viewed as a significant development, as evidenced by the supplemental brief filed by the plaintiffs in the Proposition 8 litigation the day after *Martinez* was announced.¹⁶⁶

B. SPEECH AND MONEY

Justice Ginsburg emphasized that CLS was “seeking what is effectively a state subsidy.”¹⁶⁷ She claimed that “Hastings, through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition.”¹⁶⁸ But this argument elides the fact that, like the plaintiffs in *DKT*, CLS’s case “rests on the freedom to communicate, to receive communications, and to maintain associations.”¹⁶⁹ In *DKT*, then-Judge Ginsburg warned that the government’s funding constraint was attempting to “manipulate[] out of existence guaranties [of freedom of speech and association] embedded in the Constitution of the United States.”¹⁷⁰ She concluded her opinion by asserting that “[t]he handicap our government has placed on *DKT*’s speech and associations is repugnant to the first amendment.”¹⁷¹

The same principles that led Justice Ginsburg to argue for strong associational protections in *DKT* are at issue in *Martinez*.¹⁷² Indeed, one

165. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2990 (2010). Justice Ginsburg relied on two authorities for the claim: *Lawrence v. Texas* and *Bray v. Alexandria Women’s Health Clinic*. The key language in *Lawrence* emphasized that “[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination.” 539 U.S. at 575 (majority opinion). The sentence that Justice Ginsburg highlighted from *Bray* asserted that “[a] tax on wearing yarmulkes is a tax on Jews.” 506 U.S. 263, 270 (1993).

166. Letter from Theodore J. Boutros, Jr., Counsel for Plaintiffs in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), to Vaughn R. Walker, Chief Judge, U.S. Dist. Ct. for the N. Dist. of Cal. (June 29, 2010), available at <http://docs.justia.com/cases/federal/district-courts/california/candce/3:2009cv02292/215270/695/> (“The Court’s holding [in *Martinez*] arose in response to Christian Legal Society’s argument that it was not discriminating on the basis of sexual orientation, but rather because gay and lesbian individuals refused to acknowledge that their conduct was morally wrong. The Court rejected that argument, holding that there is no distinction between gay and lesbian individuals and their conduct.”).

167. *Martinez*, 130 S. Ct. at 2986.

168. *Id.*

169. *DKT Mem’l Fund Ltd. v. Agency for Int’l Dev.*, 887 F.2d 275, 303 (D.C. Cir. 1989) (Ginsburg, J., concurring in part and dissenting in part).

170. *Id.* (alteration in original) (quoting *Frost & Frost Trucking Co. v. R.R. Comm’n*, 271 U.S. 583, 594 (1926)) (internal quotation marks omitted).

171. *Id.* at 308.

172. Richard A. Epstein, *Church and State at the Crossroads: Christian Legal Society v. Martinez*, 2010 CATO SUP. CT. REV. 105, 110 (“[B]y ignoring the unconstitutional conditions doctrine, [Ginsburg] allowed Hastings far too much discretion in how it treated its student organizations.”).

of Justice Ginsburg's more problematic arguments in her *DKT* dissent was her effort to distinguish *Grove City College* on the grounds that "abortion (or anti-abortion) counseling is speech sheltered by the first amendment, while discriminating adversely on the basis of race, national origin, religion or sex is not one's constitutional right."¹⁷³ That argument misses the reality that "discrimination" and "freedom of association" are two sides of the same coin. As Justice Ginsburg herself noted in *Martinez*, "[f]reedom of association, we have recognized, plainly presupposes a freedom not to associate,"¹⁷⁴ and "[i]nsisting that an organization embrace unwelcome members . . . directly and immediately affects associational rights."¹⁷⁵

Justice Ginsburg encounters a similar problem with her claim in *Martinez* that "[i]n diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits."¹⁷⁶ Just as the distinction between *DKT* and *Grove City College* cannot hold, neither can a distinction between "action requiring" and "benefit withholding" policies. Almost every religion case requires a decision about whether to grant or withhold benefits. The special education services in *Kiryas Joel*,¹⁷⁷ the newspaper in *Rosenberger*,¹⁷⁸ and the classroom facilities in *Good News Club*¹⁷⁹ all drew upon public funding. While Justice Ginsburg endorsed the funding line in all of these cases, her attempts to draw different lines are similarly problematic. The incarcerated adherents of "nonmainstream" religions in *Cutter* drew upon taxpayer dollars to support their religious practice¹⁸⁰—as do most accommodations of religious practice in prisons and military settings. A religious exemption allowing John Leahy to apply for a driver's license without providing his Social Security number would have increased administrative costs funded by tax dollars.¹⁸¹ In today's bureaucratic

173. *DKT*, 887 F.2d at 301 n.2 (citation omitted).

174. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2985 (2010) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)) (internal quotation marks omitted).

175. *Id.* (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000)) (internal quotation marks omitted); see *Roberts v. U.S. Jaycees*, 468 U.S. 609, 633 (1984) (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624, 688 (1980) ("One of the points of any freedom of association must be to let people make their own definitions of community.").

176. 130 S. Ct. at 2986 (citing *Grove City Coll. v. Bell*, 465 U.S. 555, 575–76 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574, 602–04 (1983)).

177. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 692 (1994).

178. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 825 (1995).

179. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102 (2001).

180. *Cutter v. Wilkinson*, 544 U.S. 709, 712–16 (2005).

181. See *Leahy v. Dist. of Columbia*, 833 F.2d 1046 (D.C. Cir. 1987). *But see id.* at 1049 n.6 (noting that the District of Columbia already had in place a system for providing driver's licenses to foreign

state, money is everywhere.¹⁸² And because the Supreme Court has equated the grant of tax-exempt status with a government subsidy,¹⁸³ presumably the government is subsidizing tens of thousands of religious and discriminatory organizations.

These questions of funding are difficult, but in working toward a solution, the answer cannot be that generally available funding equitably distributed from a common pool means that the government is expressing a viewpoint or creating an unconstitutional subsidy. If that were true, then every campus ministry supported by a state-sponsored school would be violating the Establishment Clause, and every tax exemption granted to the Catholic Church would violate Fourteenth Amendment norms against gender discrimination.

Of course, the tensions surrounding Justice Ginsburg's efforts to navigate these funding questions are not hers alone. As Julie Nice has observed, the subsidy issue in *Martinez* "raises the perpetually troubling issue of the Court's inconsistency about when such governmental conditions are unconstitutional."¹⁸⁴ The interplay between government speech and unconstitutional conditions creates a seemingly irresolvable tension.¹⁸⁵

In *Martinez*, Justice Ginsburg seems conflicted as to the threshold question of the government's purpose in the "all-comers" policy. She notes approvingly that the policy "encourages tolerance, cooperation, and learning among students"¹⁸⁶ and "conveys the Law School's decision 'to decline to subsidize with public monies and benefits conduct of which

diplomats, who lack Social Security numbers).

182. Stark money lines are largely unworkable and "neutral forms of aid" are the norm in Establishment Clause cases. Thomas C. Berg, *Slouching Towards Secularism: A Comment on Kiryas Joel School District v. Grumet*, 44 EMORY L.J. 433, 456 (1995).

183. See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) ("Every tax exemption constitutes a subsidy that affects non-qualifying taxpayers, forcing them to become indirect and vicarious 'donors.'" (internal quotation marks omitted)); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983) ("A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."); see also Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379, 380-81 (1998) ("The Court itself has equivocated, equating tax benefits and direct spending in some constitutional cases but not in others without indicating a rationale . . .").

184. Nice, *supra* note 120, at 648.

185. In *Locke v. Davey*, 540 U.S. 712, 715 (2004), the Supreme Court concluded that the Free Exercise Clause did not require the State of Washington to fund theology degrees as part of a generally applicable scholarship fund. As Douglas Laycock has noted, *Locke's* holding is that "when the state elects to fund a category of private-sector programs, it may facially discriminate against religious programs within the category." Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 171 (2004). Laycock observes: "From the perspective of the Court's cases on claims of a right to government funding, this holding is not surprising. From the perspective of the Court's cases on discrimination against religion, it is remarkable." *Id.*

186. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010).

the people of California disapprove.”¹⁸⁷ These normative assertions sound like government speech. They also express a viewpoint, which suggests that the suppression of a contrary perspective would represent a classic case of viewpoint discrimination.¹⁸⁸ But Justice Ginsburg neither embraces a government speech rationale nor acknowledges the viewpoint discrimination. Instead, she characterizes the all-comers policy as “textbook viewpoint neutral” because it applies equally to all groups.¹⁸⁹ The reality, of course, is that progressive groups with open membership policies will have few problems with an all-comers policy, but some conservative groups will face significant consequences.

C. EQUALITY

My discussion of *Martinez* to this point has critiqued Justice Ginsburg’s neglect of the case’s religious liberty dimensions and her lack of clarity about the connection between money and speech. There is, however, a stronger constitutional argument throughout the opinion: Justice Ginsburg’s core commitment to equal dignity and equality of opportunity. The normative commitment to equality is the firmest constitutional grounding for *Martinez*. But it encounters important competing constitutional values pertaining to religious liberty and associational freedom.

Justice Ginsburg may have best reflected her commitments to equal opportunity in her seminal opinion in *United States v. Virginia*, which ended the exclusion of women from state-supported military education at the Virginia Military Institute.¹⁹⁰ But there are strong constitutional and political arguments that *Martinez* does not flow inevitably from *United States v. Virginia*. Most significantly, the Virginia Military Institute was a state actor—the message of exclusion was the message of the state. This was not the case with *Martinez*. Hastings College of the Law went out of its way to disclaim any official endorsement of recognized student organizations.¹⁹¹ The message of exclusion in

187. *Id.* (quoting Brief for Respondents at 35, *Martinez*, 130 S. Ct. 2971 (No. 08-1371)).

188. As Justice Souter noted in his *Rosenberger* dissent, in which Justice Ginsburg joined:

Other things being equal, viewpoint discrimination occurs when government allows one message while prohibiting the messages of those who can reasonably be expected to respond. . . . “[When] the legislature’s suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.”

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 894 (1995) (Souter, J., dissenting) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 455 U.S. 765, 785–86 (1978)).

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

190. 518 U.S. 515, 519 (1996). Professor Siegel has called *United States v. Virginia* “perhaps her most important majority opinion.” Siegel, *supra* note 113, at 817.

191. CLS Brief, *supra* note 128, at 4.

Martinez came from a private religious group. In fact, far from reflecting anything close to a state norm, the views expressed in CLS's membership policy run contrary to the reigning orthodoxy of the legal academy, the overwhelming majority of the faculty and administration at Hastings, and most of the students who attend the school.

CONCLUSION

There may be room for disagreement over how we should resolve the clash of constitutional values at issue in *Martinez*. But Justice Ginsburg's opinion never poses that question. Instead, it mutes the religious liberty and associational dimensions of the case and further confounds the Court's approach to the link between funding and expression. As a result, *Martinez* falls short in both scope and execution: We are left with neither a clear explanation of Justice Ginsburg's equality commitments nor a plausible reason for ignoring the claims to religious expression and religious association.

In August 2011, the Ninth Circuit relied on *Martinez* to suggest that a public university might be able to deny official recognition to Christian student groups because "their members and officers profess a specific religious belief, namely, Christianity."¹⁹² That is in some ways the logical conclusion of *Martinez*, and it is cause for alarm. In the area of religious freedom, we are better served by an appreciation for the importance of religious practice and a concern for the ways in which limits on government funding can constrain constitutional freedoms—the very commitments that Justice Ginsburg showed us prior to *Martinez*.

192. *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 795–96 (9th Cir. 2011); see *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 644–45 (9th Cir. 2008) ("States have the constitutional authority to enact legislation prohibiting invidious discrimination. . . . [W]e hold that the requirement that members [of a high school Bible club] possess a 'true desire to . . . grow in a relationship with Jesus Christ' inherently excludes non-Christians . . . [thus violating] the District's non-discrimination policies . . .").