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COMMENT

WHEN THE GOVERNMENT COERCES GROUPS TO ACCEPT MEMBERS THEY DO NOT WANT: ASSOCIATIONAL PRIVACY AS A REMEDY

Michael Hastings Wendt[†]

I. INTRODUCTION

Step into the shoes of the *Feminist Student Society for Future Attorneys*, which meets in a classroom during after-school hours in a state university law school. This feminist society only admits females as members and only allows females to hold officer positions. Imagine that a fellow male classmate is deeply disheartened because he cannot join this illustrious society. Now the feminist society decides to extend an olive branch to this male student and allow him to attend some of their general meetings as a fellow guest. Nevertheless, he is still dissatisfied that he cannot achieve a more active role in the society. Ever since childhood, this male student has championed the feminist cause. He gracefully petitions the society to grant him an exception and admit him as a member with the corollary right to run for an officer position. The feminist society refuses to grant his petition. The male student complains to the law school and asserts that the feminist society has violated the law school's nondiscrimination policy because it has discriminated on the basis of gender. The law school enforces the policy by ordering the feminist society to open its doors to male members and officers or else forfeit its status as an official school club. The feminist society, alleging a violation of the First Amendment guarantee of freedom of association, brings and subsequently loses a 42 U.S.C § 1983[1] action against the law school.

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1. The statute, in relevant part, says:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Although the preceding scenario may sound absurd, similar scenarios have occurred in cases before the United States Supreme Court, the United States Courts of Appeals, and the United States District Courts throughout the country. A government entity can use its nondiscrimination policy to coerce a private group, which gathers on property that the government has opened up to the public for a limited purpose, to accept new members that the group does not want.[2] The United States Courts of Appeals are split on how to resolve this issue.[3] The Seventh Circuit holds that nondiscrimination policies cannot be used to exclude expressive associations from limited public fora who discriminate based on membership.[4] The Second Circuit, Ninth Circuit, and a district court within the Eleventh Circuit disagree.[5] A district court within the Third Circuit could resolve this issue either way, depending on the facts of the case.[6]

The United States Supreme Court had an opportunity to directly resolve this issue in *Christian Legal Society v. Martinez*,[7] but declined to do so. In *Martinez*, a state university initially used its nondiscrimination policy to bar a student religious society from official recognition as a club; however, the university subsequently invented an all-comers policy during the course of litigation.[8] The Court resolved *Martinez* solely based on the all-comers policy and not the nondiscrimination policy.[9] Nevertheless, more recent lower court decisions have interpreted the *Martinez* opinion to extend to nondiscrimination policies as well.[10]

Part II of this Comment examines the origins and evolution of freedom of association, the impact of *Christian Legal Society v. Martinez*, and the circuit split on whether the government can use a nondiscrimination policy to coerce groups that meet on limited or nonpublic fora to include persons they wish to exclude.

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42 U.S.C. § 1983 (2012). For an excellent treatise on § 1983 and how to litigate constitutional rights, see generally SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (4th ed. 2010).

2. *See* discussion *infra*, Parts II.D–E.
3. *See* discussion *infra*, Part II.E.
4. *See* discussion *infra*, Part II.E.3.
5. *See* discussion *infra*, Parts II.E.1, 4, & 5.
6. *See* discussion *infra*, Part II.E.2.
7. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010).
8. *See* discussion *infra*, Part II.D
9. *Id.*
10. *See* discussion *infra*, Part II.E.4.

Part III of this Comment details how the government infringes on the constitutional right of groups to associate when it attempts to force those groups to be inclusive of nonmembers. It also describes how the current framework that courts use to analyze freedom of association cases is inadequate to resolve these types of fringe cases and to protect groups from government incursions through nondiscrimination policies. Although, in the abstract, there is nothing wrong with a nondiscrimination policy, this Comment will show that its wrongful use can lead to the diminution of constitutional freedom.

Part IV of this Comment proposes the concept of associational privacy as a modification to the current framework that courts use to analyze freedom of association cases to resolve the problem created by government nondiscrimination policies. There was a time when the Court implicitly assumed that there is a right to associational privacy.[11] Unfortunately, the Court's subsequent decisions have both greatly limited the extent of associational privacy and usually ignored it.[12] A closer look at associational privacy will reinvigorate neglected constitutional freedoms and add an extra layer of protection to prevent the government from forcing private groups that meet on government property to accept outsiders as new members that the group does not want.

II. BACKGROUND

A. *Origins of Freedom of Association*

Both courts and scholars attribute the origins of freedom of association to *NAACP v. Alabama ex rel. Patterson*.[13] In *Patterson*, the Alabama attorney general attempted to stop the NAACP from conducting its activities in Alabama, unless the NAACP registered itself as a foreign corporation.[14] The State moved for and the trial court ordered the NAACP to produce a number of documents, including the organization's membership lists.[15] The Court held that the forced disclosure of the

11. *See* discussion *infra*, Parts II.A, III.C.

12. *See* discussion *infra*, Part III.C.

13. *See* NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449 (1958); *see also* Buckley v. Valeo, 424 U.S. 1, 64 (1976); *In re* Motor Fuel Temperature Sales Practices Litig., 641 F.3d 470, 479 (10th Cir. 2011); 16A AM. JUR. 2D *Constitutional Law* § 580 (2013); John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485, 506 (2010).

14. *Patterson*, 357 U.S. at 452.

15. *Id.* at 453.

membership lists was an unjustified violation of freedom of association.[16] To force the NAACP to disclose their membership lists would significantly damage the NAACP's efforts to advocate their beliefs because it would encourage current members to withdraw and discourage others from joining it.[17] The Court recognized that an individual's choice to associate with a group and advocate a point of view grows out of a "close nexus between the freedoms of speech and assembly" and is an "inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment."[18] More importantly, the Court characterized the freedom to associate as a broad and essential right that encompassed both the "freedom to associate and *privacy* in one's associations."[19]

The right to associate goes beyond the mere right of individuals to coalesce together in groups; the right also protects the privacy of those groups.[20] In *Gibson v. Florida Legislative Investigation Committee*,[21] a committee investigated the NAACP for purportedly questionable activities and ordered the organization's president to disclose its lists of members and contributors.[22] The Court made it emphatically clear that the right also encompassed an associational right to privacy, especially as it pertains to an

16. *Id.* at 466.

17. *Id.* at 462–63. In fact, the Court stated that the State's forced disclosure of the membership lists was such a significant deprivation of rights that it was analogous to "[a] requirement that adherents of particular religious faiths or political parties wear identifying arm-bands . . . ." *Id.* at 462.

18. *Id.* at 460.

19. *Id.* at 462 (emphasis added).

20. Buckley v. Valeo, 424 U.S. 1, 64 (1976); Griswold v. Connecticut, 381 U.S. 479, 483 (1965); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 544 (1963); *Patterson*, 357 U.S. at 462; *In re* Motor Fuel Temperature Sales Practices Litig., 641 F.3d 470, 479 (10th Cir. 2011).

21. *Gibson*, 372 U.S. 539.

22. *Id.* at 540, 542. The investigation concerned the following:

> "[A]ctivities of various organizations which have been or are presently operating in this State in the fields of, first, race relations; second, the coercive reform of social and educational practices and mores by litigation and pressured administrative action; third, of labor; fourth, of education; fifth, and other vital phases of life in this State." The chairman also stated that the inquiry would be directed to Communists and Communist activities, including infiltration of Communists into organizations operating in the described fields.

Id. (internal quotation marks omitted).

organization's membership lists.[23] The right to associate freely is "fundamental and highly prized, and 'need[s] breathing space to survive.'"[24] Therefore, the right must be "'protected not only against heavy-handed frontal attack, but also from being stifled by more *subtle* governmental interference.'"[25] Here, the committee failed to demonstrate that the NAACP posed a threat to the State or that it engaged in subversive activities, even if some of its members happened to also be members of other unpopular groups, such as the Communists.[26] The mere fact that several members held an unpopular philosophy did not justify the committee's intrusion into the NAACP's associational privacy.[27]

Although both *Patterson* and *Gibson* exemplify the origins of the right to associate, these cases neither defined its precise boundaries nor attempted to promulgate a framework for analyzing this right. Rather, they left the right open to be defined on a case-by-case basis. Nevertheless, both cases clearly describe this fundamental right as also encompassing a substantial privacy interest in a person's associations.[28] Twenty-six years after *Patterson*, a significant landmark case would forever alter how courts analyze a person's right to associate.

B. *Two Categories of Freedom of Association*

Roberts v. United States Jaycees[29] is the earliest case to explicitly outline a framework to analyze freedom of association claims.[30] Justice Brennan, writing for the Court,[31] stated that all of the previous freedom of association cases fell within one of two lines of cases.[32] The first line "protects against unjustified government interference with an individual's choice to enter

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23. *Id.* at 544, 555. *See Buckley*, 424 U.S. at 66 (reaffirming that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights").

24. *Gibson*, 372 U.S. at 544 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

25. *Id.* (quoting Bates v. City of Little Rock, 361 U.S. 516, 523 (1960) (emphasis added)).

26. *Id.* at 554–55. Nevertheless, the government may be justified in compelling a group to disclose its membership lists if the group was an imminent threat to national security. *See* Uphaus v. Wyman, 360 U.S. 72, 81 (1959) (holding that "governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy . . . .").

27. *Gibson*, 372 U.S. at 555–56.

28. *Id.* at 555; NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

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

30. Inazu, *supra* note 13, at 558.

31. *Roberts*, 468 U.S. at 612.

32. *Id.* at 617–18.

into and maintain certain intimate or private relationships."[33] This line of cases embodies certain fundamental rights that are protected by the Fourteenth Amendment's Due Process Clause.[34] The second line protects "the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities."[35] This line pertains to rights that are protected by the First Amendment.[36]

Nevertheless, *Roberts* departed from the original freedom of association cases because it divided associational protection based on whether and where the claim fell within the framework.[37] This means that some claims, such as an allegation of government interference with a deeply personal relationship, may be entitled to more constitutional protection than others, such as an allegation of government violation of associational expression.[38] In effect, the *Roberts* framework greatly limited freedom of association claims to two categories: intimate association and expressive association.[39]

1. Intimate Association

Intimate association is the fundamental right to "enter into and maintain certain intimate human relationships" without interference from the

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33. Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544 (1987) (citing *Roberts*, 468 U.S. 609).

34. *See Roberts*, 468 U.S. at 618; NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

35. *Duarte*, 481 U.S. at 544 (citing *Roberts*, 468 U.S. at 618).

36. *Roberts*, 468 U.S. at 618. Freedom of association is an implied right from the First Amendment:

> The [First] Amendment restricts government from interfering with religious freedom and free press, of course. But it also restricts government from interfering with rights of assembly and grievance. From these express freedoms, the Supreme Court has abstracted what is often termed a right of free association, meaning a right to form and belong to groups with social, political, or religious purposes, including groups that may be critical of government.

Anita L. Allen, Symposium, *Privacy Jurisprudence As an Instrument of Social Change First Amendment Privacy and the Battle for Progressively Liberal Social Change*, 14 U. PA. J. CONST. L. 885, 899 (2012).

37. Inazu, *supra* note 13, at 558–59; *see Patterson*, 357 U.S. at 460 (holding that the Fourteenth Amendment and First Amendment are inseparable components that comprise the right to associate).

38. *See* Inazu, *supra* note 13, at 558–59; *see also Roberts*, 468 U.S. at 621, 623.

39. *See Duarte*, 481 U.S. at 544; *Roberts*, 468 U.S. at 618; 16A AM. JUR. 2D *Constitutional Law* § 581 (2013).

government.[40] The Court has never determined the precise boundaries of what constitutes an intimate association.[41] Nevertheless, familial relationships exemplify the heart of intimate associations.[42] Although intimate associations can occur outside of a familial relationship, these associations, by analogy, must include the key characteristics of a familial relationship.[43] This requires "a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."[44]

Like familial relationships, these non-familial intimate relationships are characterized by their "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[45] Furthermore, intimate associations are

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40. *Roberts*, 468 U.S. at 617–18.

> [T]here has been some debate as to the source of the right to intimate or familial association. Some authority holds that the freedom of intimate association receives protection as a fundamental element of personal liberty under the due process clauses. Other authority holds that relationships that exemplify intimate associations are protected by the First Amendment.

16A AM. JUR. 2D *Constitutional Law* § 581 (2013) (footnotes omitted); *compare* Montgomery v. Stefaniak, 410 F.3d 933, 937 (7th Cir. 2005) (holding that intimate association is protected by the due process clauses), *with* Adler v. Pataki, 185 F.3d 35, 44 (2d Cir. 1999) (holding that intimate association is protected by the First Amendment).

41. *Duarte*, 481 U.S. at 545–46.

42. *Roberts*, 468 U.S. at 619–20. Several lower courts have subsequently taken a broad view on what constitutes interference with an intimate familial association. *See* Jones v. Bay Shore Union Free Sch. Dist., No. 12-CV-4051 JS GRB, 2013 WL 2316643, at *6 (E.D.N.Y. May 28, 2013) (denying, in part, a public school's motion to dismiss because the school's retaliation against the plaintiff, by suspending his daughter, constituted an infringement on the plaintiff-daughter intimate association); D.M. v. Cnty. of Berks, No. 12-6762, 2013 WL 1031824, at *6 (E.D. Pa. Mar. 14, 2013) (holding that parents stated a claim a for relief for infringement of intimate association, when social workers and police entered the parents' home to take custody of their daughter and to forbid them from communicating with their daughter, even though there was no evidence of suspected child abuse); *but see* Bassett v. Snyder, No. 12-10038, 2013 WL 3285111, at *13 (E.D. Mich. June 28, 2013) (holding that while a homosexual couple was an intimate association, a state's ban on providing state benefits to the cohabitants of public employees did not interfere with the couple's intimate relationship).

43. *Roberts*, 468 U.S. at 620.

44. *Duarte*, 481 U.S. at 545–46 (quoting *Roberts*, 468 U.S. at 620). "In addition, [some] courts have extended protection to personal friendships and non-marital romantic relationships." U.S. Citizens Ass'n v. Sebelius, 705 F.3d 588, 598 (6th Cir. 2013).

45. *Roberts*, 468 U.S. at 620.

characterized by much more than a "special community of thoughts, experiences, and beliefs;" they also must involve the deeply personal facets of each individual's life within the group camaraderie as well as a resolute commitment to the group.[46]

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46. *Id.* at 620. The courts tend to narrowly construe what constitutes an intimate association. Generally, the following relationships do not constitute an intimate association: doctor-patient relationships; customer relationships with health insurance companies; school classmate relationships; sports team relationships; employer-employee relationships; restaurant owners-customer relationships; landlord-tenant relationships; business relationships; coworker relationships; escort service-client relationships; adulterous relationships; attenuated relationships with in-laws; attenuated relationships within college fraternities; attenuated friendships; recreational dancing; protesting; and private clubs where the sole purpose is to drink or take recreational drugs. *See* City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989) ("It is clear beyond cavil that dance-hall patrons, who may number 1,000 on any given night, are not engaged in the sort of 'intimate human relationships' referred to in *Roberts.*"); *U.S. Citizens Ass'n*, 705 F.3d at 598 ("[Medical patients typically do not share 'deep attachments and commitments' with physicians, nor do patients and physicians typically share a special community of thoughts, experiences, and beliefs.") (internal quotation marks omitted)); *Id.* at 599 ("[R]elationships with large business enterprises like health insurance companies do not qualify as intimate associations warranting constitutional protection."); Michaelidis v. Berry, 502 F. App'x 94, 96–97 (2d Cir. 2012) (holding that restaurant owners' "relationships with their landlords, their restaurant customers, and their employees are not sufficiently intimate to implicate this protection" because they are not analogous to "the sort of close family relationships recognized as intimate relationships warranting constitutional protection"); Marcum v. McWhorter, 308 F.3d 635, 642 (6th Cir. 2002) (holding that an adulterous relationship is not a protected intimate association based on the rationale that it is antithetical to marriage and family); Gary v. City of Warner Robins, 311 F.3d 1334, 1338 (11th Cir. 2002) ("[T]here is no generalized right to associate in alcohol-purveying establishments with other adults."); Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 438 (3d Cir. 2000) (holding that a college fraternity was not an intimate association based on its "size, membership criteria, and openness to the public"); Sanitation & Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 996 (2d Cir. 1997) ("[P]ure business relationships with organized crime members fall outside the protected sphere [of intimate association]."); Marshall v. Allen, 984 F.2d 787, 799 (7th Cir. 1993) (holding that associating "conspicuously with others for the purpose of protesting allegedly discriminatory practices" is not an intimate association); Watson v. Fraternal Order of Eagles, 915 F.2d 235, 244 (6th Cir. 1990) (holding that a private drinking club was not an intimate association); Rode v. Dellarciprete, 845 F.2d 1195, 1199, 1204 (3d Cir. 1988) (holding that a woman's association with her brother-in-law was not an intimate association); IDK, Inc. v. Clark Cnty., 836 F.2d 1185, 1193 (9th Cir. 1988) (holding that a client-escort relationship is not an intimate association, in part, because "the relationship between a client and his or her paid companion may well be the antithesis of the highly personal bonds protected by the fourteenth amendment"); Donegan v. Livingston, 877 F. Supp. 2d 212, 224 (M.D. Pa. 2012), *aff'd*, No. 12-3400, 2013 WL 3481737 (3d Cir. June 24, 2013) (holding that coworkers are not an intimate association); Kirby v. Loyalsock Twp. Sch.

Roberts was the first case to apply this criteria regarding intimate association. *Roberts* involved a suit in Minnesota against the Jaycees, an all-male civic organization.[47] Although the Jaycees reserved full membership to young men, they permitted women to join as nonvoting members.[48] Nevertheless, the Jaycees prohibited women from both holding office in the Jaycees organization and from attending leadership-training activities.[49] The State contended that the Jaycees violated the State's public accommodations law.[50] The Court unequivocally held that the State could require the Jaycees

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Dist., 837 F. Supp. 2d 467, 474–75 (M.D. Pa. 2011) (holding that a "Plaintiff's friendships with her classmates and basketball teammates are legally insufficient to be protected by the First Amendment" because "'[t]he Constitution does not recognize a generalized right of social association.'") (quoting *Sanitation and Recycling Inds. v. City of New York*, 107 F.3d 985, 996 (2d Cir.1997)); Taverns for Tots, Inc. v. City of Toledo, 341 F. Supp. 2d 844, 850 (N.D. Ohio 2004) (holding that a tavern organization was not an intimate association because it was "not small in size" and there was nothing "selective about becoming a member") (internal quotation marks omitted)); Reno v. Metro. Transit Auth., 977 F. Supp. 812, 825 (S.D. Tex. 1997) (holding that friendships are generally not an intimate association); Semaphore Entm't Grp. Sports Corp. v. Gonzalez, 919 F. Supp. 543, 550 n.4 (D.P.R. 1996) (stating that participation in a martial artist competition, "like the association of dancers or businessmen[,]" is not an intimate association). *But see* Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216, 1221 (9th Cir. 2012) (holding that a housing roommate is an intimate association because "[a]side from immediate family or a romantic partner, it's hard to imagine a relationship more intimate than that between roommates, who share living rooms, dining rooms, kitchens, bathrooms, even bedrooms"); Kicklighter v. Evans Cnty. Sch. Dist., 968 F. Supp. 712, 720 (S.D. Ga. 1997) ("'[D]ating' is associational activity protected by the First Amendment.") (citing Wilson v. Taylor, 733 F.2d 1539, 1544 (11th Cir. 1984)), *aff'd sub nom.* Kicklighter v. Evans Cnty. Sch., 140 F.3d 1043 (11th Cir. 1998).

47. *Roberts*, 468 U.S. at 612. The purpose of the Jaycees was

> [T]o pursue "such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and understanding among young men of all nations."

Id. at 612–13.

48. *Id.* at 613–14.

49. *Id.*

50. *Id.* at 615–16. The Minnesota public accommodations law stated that "[i]t is an unfair discriminatory practice: To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public

to accept female members because the State had a compelling interest in ending gender discrimination.[51]

The Jaycees did not constitute an intimate association because they were "large and basically unselective groups."[52] Some local Jaycees chapters had more than four hundred members and normally never denied any applicant admission, except for those who did not meet the Jaycees's age or gender requirements.[53] In fact, even nonmembers, including women, typically participated in several of the Jaycees's significant activities.[54] Therefore, the Jaycees appeared to be a mere group of strangers and did not relate to each other in a way that is analogous to a familial relationship.[55]

Another landmark case that addressed intimate association was *Board of Directors of Rotary International v. Rotary Club of Duarte*.[56] In this case, a California "Rotary Club"[57] sought to enjoin its parent organization from enforcing its constitution, which barred women from official membership in the organization.[58] The parent organization argued that it excluded women from membership for the purpose of promoting fellowship among professional men but that it still allowed women to participate in some of its club activities.[59] The California Court of Appeal held that the club resembled a business organization and violated the state's public

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accommodation because of race, color, creed, religion, disability, national origin or sex." *Id.* at 615.

51. *Id.* at 624, 626.

52. *Id.* at 621.

53. *Id.*

54. *Id.* On this regard, the Court especially noted that:

> In 1974 and 1975, respectively, the Minneapolis and St. Paul chapters of the Jaycees began admitting women as regular members. Currently, the memberships and boards of directors of both chapters include a substantial proportion of women. As a result, the two chapters have been in violation of the national organization's bylaws for about 10 years.

Id. at 614.

55. *Id.* at 621.

56. Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

57. Generally, the Rotary clubs embodied "an organization of business and professional men united worldwide who provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world." *Id.* at 539.

58. *Id.* at 541–42.

59. *Id.* at 541.

accommodations law.[60] The United States Supreme Court affirmed the appellate court's decision but analyzed it under the *Roberts* framework.[61]

Applying the *Roberts* framework, the Court held that the Rotary Club did not constitute an intimate association because of its size, its nonselectivity of its members, and its activities that were conducted in the presence of nonmembers.[62] The Court reasoned that the clubs, in general, ranged from twenty to nine hundred members.[63] Furthermore, the clubs were instructed to be as inclusive as possible of men to form a crossover between diverse businesses and professional networks.[64] "Such an inclusive fellowship for service based on diversity of interest . . . however beneficial to the members and to those they serve, does not suggest the kind of private or personal relationship to which we have accorded protection under the First Amendment."[65] Finally, the willingness of the clubs to conduct their activities in front of strangers was so prevalent that it was analogous to having their "windows and doors open to the whole world."[66]

Intimate association includes our most personal and private relationships in either one-on-one relationships or very small groups.[67] A significant impact of the *Roberts* and *Duarte* cases is that a person's right to privacy within his associations is now generally analyzed as a form of intimate association.[68] The Court generally presumes that larger groups lack the characteristics of an intimate association.[69] Therefore, if a larger group

60. *Id.* at 542. The California public accommodations law stated: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." *Id.* at 541 n.2 (internal quotation marks omitted).

61. *Id.* at 544–45.

62. *Id.* at 546–47. Although *Duarte* primarily dealt with intimate association, the Court also briefly addressed and dispensed with the Rotary Club's expressive association claim. *Id.* at 548–49. The Court held that there was no infringement on the club's expressive association, and even if there was a burden, the State had a compelling interest to eliminate gender discrimination. *Id.*

63. *Id.* at 546.

64. *Id.* at 546–47.

65. *Id.* (internal quotation marks omitted).

66. *Id.* (citation omitted).

67. *Id.* at 545; Roberts v. U.S. Jaycees, 468 U.S. 609, 619–20 (1984).

68. *Duarte*, 481 U.S. at 545–46.

69. *Id.* at 546–47; *Roberts*, 468 U.S. at 620–21.

wishes to claim the protection afforded by the right to associate, it must demonstrate that it is an expressive association.[70]

2. Expressive Association

Expressive association is the right of groups of citizens to associate together to engage in activities protected by the First Amendment, including those activities it explicitly mentions, such as "speech, assembly, petition for the redress of grievances, and the exercise of religion."[71] Those explicit rights imply "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[72] Nevertheless, a citizen's right to expressive

70. *Duarte*, 481 U.S. at 544–46; *see Roberts*, 468 U.S. at 621–22.

71. *Id.* at 618. For an excellent survey of the various types of expressive association, see generally Randall P. Bezanson et al., *Mapping the Forms of Expressive Association*, 40 PEPP. L. REV. 23 (2012).

72. Boy Scouts of Am. v. Dale, 530 U.S. 640, 647 (2000) (quoting *Roberts*, 468 U.S. at 622). "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989). Generally, the following groups and activities do not constitute an expressive association: recreational dancing; escort-services; associations with people of the same age group; associations of two or more persons who merely hold common beliefs; mere casual conversations between friends and acquaintances; participation in competitions; purely social fraternities; purely recreational festivals; mere cordial gatherings of smokers; gatherings of motorcyclists and bicyclists that convey no particularized message; wedding receptions; a single individual proselytizing another; sports teams; tavern owners and clients. *Id.* at 24 (holding that recreational dancing is not an expressive association because those "who congregate each night at . . . [a] dance hall are not members of any organized association; they are patrons of the same business establishment."); URI Student Senate v. Town of Narragansett, 631 F.3d 1, 13 (1st Cir. 2011) (holding that the categories of intimate and expressive association "cannot be stretched to form a generic right to mix and mingle [or] to sanctify a generalized 'right to congregate and socialize.'"); Smith v. City of Lebanon, 387 F. App'x 186, 188 (3d Cir. 2010) (holding that a tavern owner and her clients were not an expressive association); Club Retro, L.L.C. v. Hilton, 568 F.3d 181, 211 (5th Cir. 2009) (stating that expressive association "does not protect chance encounters at a dance club that contain no element of expression."); Schultz v. Wilson, 304 F. App'x 116, 121 (3d Cir. 2008) (holding that a wedding reception was not an expressive association); S. Or. Barter Fair v. Jackson Cnty., 372 F.3d 1128, 1135 (9th Cir. 2004) (stating that "purely recreational" activities, "such as some carnivals, festivals, and exhibitions[,]" are not expressive associations); Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 442–43 (3d Cir. 2000) (holding that a college fraternity "was not a constitutionally protected expressive association because it was essentially a social organization."); Churchill v. Waters, 977 F.2d 1114, 1120 n.6 (7th Cir. 1992) ("[T]he right to expressive association 'is not implicated when two persons simply hold common beliefs or

even when those different person[s] express those common beliefs—they must join together 'for the purpose of' expressing those shared views.'") (citation omitted) (internal quotation marks omitted), *vacated*, 511 U.S. 661, 681–82 (1994) (vacating the judgment of the appeals court, which had granted a motion for summary judgment, because the plaintiff raised a genuine issue of material fact on whether her right to free speech was violated); Conti v. City of Fremont, 919 F.2d 1385, 1388 (9th Cir. 1990) (holding that a person's association with people of a particular age group, without more, is not an expressive association); IDK, Inc. v. Clark Cnty., 836 F.2d 1185, 1196 (9th Cir. 1988) (holding that an escort service is not an expressive association because it "cannot claim that [its] expression constitutes anything but an incidental aspect of their commercial activity."); Watchtower Bible Tract Soc. of New York, Inc. v. Sanchez-Ramos, 647 F. Supp. 2d 103, 120 (D.P.R. 2009) (holding that several Jehovah's Witnesses, who independently and not as a group, attempted to proselytize nonmembers within an urbanization were not an expressive association), *aff'd in part, vacated in part sub nom.* Watchtower Bible & Tract Soc'y of New York, Inc. v. Sagardia De Jesus, 634 F.3d 3, 13, 17 (1st Cir. 2011) (the appeals court vacated the district court's order to deny declaratory and injunctive relief on the plaintiff's as-applied challenge regarding their free speech claims); Villegas v. City of Gilroy, 363 F. Supp. 2d 1207, 1217, 1219 (N.D. Cal. 2005) (holding that a group of motorcyclists, who wore vests at a festival, was not an expressive association because it was "unclear what, if any, *particularized* message Plaintiffs intended to convey."), *aff'd*, 484 F.3d 1136 (9th Cir. 2007), and *aff'd sub nom.* Villegas v. Gilroy Garlic Festival Ass'n, 541 F.3d 950 (9th Cir. 2008); Taverns for Tots, Inc. v. City of Toledo, 341 F. Supp. 2d 844, 851 (N.D. Ohio 2004) (stating that a mere group of smokers in a tavern is not an expressive association because "'[w]hile the Smoking Bans restrict where a person may smoke, it is a far cry to allege that such restrictions unduly interfere with smokers' right to associate freely with whomever they choose in the pursuit of any protected First Amendment activity.'" (quoting NYC C.L.A.S.H., Inc. v. City of New York, 315 F. Supp. 2d 461, 473 (S.D.N.Y. 2004))); Semaphore Entm't Grp. Sports Corp. v. Gonzalez, 919 F. Supp. 543, 550 n.4 (D.P.R. 1996) (stating that participation in a martial artist competition is not an expressive association); Contreras v. City of Chicago, 920 F. Supp. 1370, 1388 (N.D. Ill. 1996) (stating that "casual conversation[s] between friends and acquaintances" are merely "'opportunities of association that do not pertain to expressive association, even if they might be described as 'associational' in common parlance.'" (quoting Glatt v. Chicago Park Dist., 847 F. Supp. 101, 104 (N.D. Ill. 1994))), *aff'd in part, vacated in part*, 119 F.3d 1286, 1296 (7th Cir. 1997) (vacating the district court's order regarding the costs of litigation); Burrows v. Ohio High Sch. Athletic Ass'n, 712 F. Supp. 620, 626 (S.D. Ohio 1988) ("Members of youth soccer teams have not associated for expressive purposes, but to improve athletic skills. They are playing a game, not promoting an ideal. As this type of association is not related to 'an individual's freedom to speak, to worship, . . or to petition the government for the redress of grievances . . . ', this is not the type of expressive association protected by the first amendment."), *aff'd sub nom.* Burrows by Burrows v. Ohio High Sch. Athletic Ass'n, 891 F.2d 122 (6th Cir. 1989). *But see* Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., 274 F.3d 377, 396 (6th Cir. 2001) (holding that "the First Amendment protect[ed] the [exotic] entertainers and audience members' right to free expressive association" because they "work[ed] together as speaker and audience to create an erotic, sexually-charged atmosphere"); Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 444 (3d Cir. 2000) (("It is entirely possible that a fraternity (or sorority, or similar

association is not absolute but has limitations.[73] The government may suppress expressive association so long as such suppression withstands a modified form of strict scrutiny.[74] "Infringements on that [expressive associational] right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[75]

Most United States Supreme Court cases on expressive association involve state public accommodations laws that ban discrimination based on race, color, religion, disability, national origin, gender, and, in some cases, sexual orientation.[76] Other significant cases challenge nondiscrimination policies or other similar rules that suppress the rights of groups to meet on government property, such as universities, and express their message.[77] These cases can be classified based on whether the nondiscrimination law or policy either suppresses or changes the association's message.

a. Where the relationship between the group's actual ideas or message and the burden of the nondiscrimination rule is attenuated at best

Roberts is the prime example of an expressive association that failed to show any substantial burden on its message that would result if the government forced it to include nonmembers. Just as *Roberts* promulgated the criteria for intimate association, it also explicitly outlined the parameters of expressive association,[78] especially in the context of quasi-

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group) could make out a successful expressive association claim.")); IDK, Inc. v. Clark Cnty., 836 F.2d 1185, 1196 (9th Cir. 1988) (stating that "dating and other social groups" might, in some instances, constitute an expressive association); Bray v. City of New York, 346 F. Supp. 2d 480, 488 (S.D.N.Y. 2004) (holding that a group of bicyclists was an expressive association because their rides were "intended to promote the environmental and aesthetic benefits of alternative modes of transportation").

73. *Roberts*, 468 U.S. at 623.

74. *See id.* (giving standard of review for expressive association); 16A AM. JUR. 2D *Constitutional Law* § 587 (2013).

75. *Roberts*, 468 U.S. at 623.

76. *See, e.g.*, *Dale*, 530 U.S. at 645; Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp., 515 U.S. 557, 572 (1995); N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 4–5 (1988); Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 541–42 (1987); *Roberts*, 468 U.S. at 614.

77. *See, e.g.*, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2979 (2010); Healy v. James, 408 U.S. 169, 174–75 (1972).

78. Inazu, *supra* note 13, at 558.

commercial organizations.[79] Although the Jaycees were technically a private club, they had the characteristics of a business training enterprise, which knocked them into the public accommodations category.[80] The Jaycees "promotes and practices the art of solicitation and management," which gives its members a distinct advantage when they venture into the realm of the business environment.[81] The Court acknowledged that "[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."[82] Nevertheless, Minnesota had a compelling interest in eradicating gender discrimination in public accommodations[83]—an interest that had merely an incidental and not a material burden on the Jaycees's expressive association.[84]

Essentially, the Court failed to see why the admission of women as members would affect the Jaycees's goal of promoting the success of young men.[85] The Court did not believe that the forced inclusion of women as members would alter "the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."[86] Therefore, Minnesota could legitimately compel the Jaycees to accept female members because female members would not substantially impair the Jaycees's expressive message and goals.[87]

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79. *See Roberts*, 468 U.S. at 616, 625.

80. *Id.* at 639 (O'Connor, J., concurring).

81. *Id.*

82. *Id.* at 623 (majority opinion).

83. *Id.* The Court stated that the public accommodations law "reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services. That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order." *Id.* at 624 (citation omitted).

84. *Id.* at 626; *see* Boy Scouts of Am. v. Dale, 530 U.S. 640, 657–58 (2000).

85. *Roberts*, 468 U.S. at 627.

86. *Id.*

87. *Id. Roberts* and *Duarte* are not the only United States Supreme Court cases that dealt with the clash between the right to associate and ending gender discrimination. In *New York State Club Association, Inc. v. City of New York*, a coalition of private clubs sought to strike down New York City's nondiscrimination law. N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 7, 9 (1988). The policy banned any club that had more than 400 members from discriminating on the basis of gender if the club "provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or

b. Expressive association cases that actually do involve the suppression of a group's ideas and the changing of the group's message

(1) Healy v. James

A government entity cannot deny an association access to property that it has opened up to certain members of the public merely because it disagrees with the association's philosophy.[88] In *Healy v. James*,[89] Central Connecticut State College's president denied Students for a Democratic Society ("SDS")[90] official recognition as a campus organization.[91] Although

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business." *Id.* at 6. The Court held the city's nondiscrimination law did not infringe on the clubs' expressive association because did "not affect 'in any significant way' the ability of individuals to form associations that will advocate public or private viewpoints." *Id.* at 13. (quoting Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987)). Nevertheless, the Court did acknowledge that it was theoretically possible for a club that discriminated on the basis of gender to fall under the protection of the First Amendment if "it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion." *Id.* The Court also held that the nondiscrimination law did not infringe on the clubs' intimate association because clubs had the characteristics of commercial organizations. *Id.* at 12.

88. Healy v. James, 408 U.S. 169, 187–88 (1972).

89. *Id.*

90. The students who wished to form a local chapter of SDS stated that they had three goals: to provide '"a forum of discussion and self-education for students developing an analysis of American society;' [that] would serve as an agency for integrating thought with action so as to bring about constructive changes; and it would endeavor to provide 'a coordinating body for relating the problems of leftist students' with other interested groups on campus and in the community.'" *Id.* at 172. (quoting Healy v. James, 445 F.2d 1122, 1135–39 app. (1971)). Nevertheless, the Court did note that SDS had a controversial reputation that arose out of the social turmoil of the 1960s. "There had been widespread civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson. Some colleges had been shut down altogether, while at others files were looted and manuscripts destroyed. SDS chapters on some of those campuses had been a catalytic force during this period." *Id.* at 171.

91. *Id.* at 170, 172, 174. The college's denial of SDS's official recognition had severe and adverse effect on the future viability of SDS's existence:

> Its members were deprived of the opportunity to place announcements regarding meetings, rallies, or other activities in the student newspaper; they were precluded from using various campus bulletin boards; and—most importantly—nonrecognition barred them from using campus facilities for holding meetings. . . . Petitioners circulated a notice calling a meeting to discuss what further action should be taken in light of the group's official rejection. The

the record was not entirely clear regarding the reasons why the president denied recognition, the Court extrapolated four possible reasons.[92] First, SDS appeared to be affiliated with a national organization that advocated a philosophy of violence and disruption.[93] Second, SDS might advocate for this philosophy of violence on campus.[94] Third, SDS's philosophy would become a disruptive influence on campus.[95] Fourth, the members of SDS might refuse to follow the school's code of conduct.[96]

The Court stated that the first three of these reasons were illegitimate reasons for the school to deny SDS official recognition.[97] With the first and second reasons, the Court emphasized that the president's mere disagreement with an association's philosophy, however repugnant, did not justify its exclusion from official recognition.[98] With the third and fourth reasons, the Court emphasized that "the critical line for First Amendment

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> members met at the coffee shop in the Student Center ('Devils' Den') but were disbanded on the President's order since nonrecognized groups were not entitled to use such facilities.

Id. at 176.

92. *Id.* at 185.

93. *Id.* Nevertheless, the Court emphasized that "'guilt by association alone, without (establishing) that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights." *Id.* at 186 (quoting United States v. Robel, 389 U.S. 258, 265 (1967)).

94. *Id.* at 187. When it came to whether SDS would advocate a philosophy of violence on campus, the following series of questions and answers between the college's Student Affairs Committee and the students who wished to form a local SDS chapter had a significant impact on the course of litigating this case:

> 'Q. How would you respond to issues of violence as other S.D.S. chapters have?
>
> 'A. Our action would have to be dependent upon each issue.
>
> 'Q. Would you use any means possible?
>
> 'A. No I can't say that; would not know until we know what the issues are.
>
> 'Q. Could you envision the S.D.S. interrupting a class?
>
> 'A. Impossible for me to say.'

Id. at 173.

95. *Id.* at 188.

96. *Id.* at 191.

97. *Id.* at 185.

98. *Id.* at 187–88. Justice Black once commented: "'I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.'" *Id.* at 188 (quoting Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black, J., dissenting)).

purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not."[99] The third reason was invalid because it discriminated more against SDS's advocacy rather than its conduct because it was not evident that SDS's advocacy would lead to violent action.[100] The school did not provide enough evidence to prove the fourth reason, which would be the only legitimate reason for the school to deny SDS official recognition.[101]

Therefore, the Court held that the effect of the school's denial of recognition burdened SDS's right to associate because SDS was forbidden from using all campus facilities to hold meetings, using bulletin boards, making announcements at rallies, and advertising in the school's newspaper.[102] The school's burden on SDS's right to associate was unjustifiable, even if the group had the ability to exist outside of the campus.[103]

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99. *Id.* at 192. Historically, several Justices on the Court believed that the State can criminalize behavior, as long as it is aimed at conduct and not exclusively at expressive advocacy. City of Erie v. Pap's A.M., 529 U.S. 277, 307–08 (2000) (Scalia, J., joined by Thomas, J., concurring) (asserting that a city ordinance against public nudity was "general law regulating conduct and not specifically directed at expression, [therefore] it is not subject to First Amendment scrutiny at all."); *see* Employment Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 892 (1990) ("[I]f prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." (internal quotation marks omitted)); Reynolds v. United States, 98 U.S. 145, 166 (1878) (upholding the criminalization of polygamy on the rationale that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices").

100. *Id.* at 189–90.

101. *Id.* at 194.

102. *Id.* at 176, 181. The Court also stated that the college's refusal to recognized SDS constituted a prior restraint. *Id.* at 184. "A prior restraint is an administrative or judicial order that prohibits speech before it occurs, and it does so on the basis of the speech's content." *See* CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 979 (Vicki Been et al. eds., 3d ed. 2009). Prior restraints are not favored by the law and are presumptively unconstitutional. *Id.*; Org. for a Better Austin v. Keefe, 402 U.S. 415, 417, 419–20 (1971) (holding that a judicial preliminary injunction against "passing out pamphlets, leaflets or literature of any kind" was a prior restraint and unconstitutional); Cantwell v. Connecticut, 310 U.S. 296, 304–07 (1940) (voiding a permit scheme for religious and charitable solicitations where a government official had the discretion to deny a permit to any cause that he considered to be nonreligious); Near v. Minn. ex rel. Olson, 283 U.S. 697, 713, 722–23 (1931) (holding that a statute that criminalized the newspaper circulation of defamatory content was a prior restraint and unconstitutional).

103. *Id.* at 183.

(2) Hurly v. Irish-American Gay, Lesbian & Bisexual Group of Boston

Not only is the government forbidden from suppressing an expressive association's ideas, it also cannot force an association to accept a member who will substantially change the association's message. In *Hurly v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,[104] a number of homosexual descendants of Irish immigrants ("GLIB") sued South Boston Allied War Veterans Council ("Council") because they were excluded from marching under their own banner in Boston's St. Patrick's Day-Evacuation Day Parade.[105] For nearly fifty years, the city of Boston had granted the Council, a private association, the exclusive right to organize the city's St. Patrick's Day parade.[106] GLIB tenaciously claimed that their exclusion from participating as a distinct and expressive unit in the parade constituted discrimination and violated Massachusetts's public accommodations law.[107] Nevertheless, the Council did not exclude members of GLIB from participating as individuals in other groups that had a different theme in the parade.[108] The Massachusetts's Supreme Judicial Court held in favor of GLIB because the Council did not promote a specific message in its parades.[109]

The United States Supreme Court disagreed and unanimously held that it violates the First Amendment to force a private parade to admit a group that expresses a message that is contrary to the private organizer's wishes.[110]

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104. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557 (1995).

105. *Id.* at 560–61. The designated name of this parade has a highly fascinating history:

> March 17 is set aside for two celebrations in South Boston. As early as 1737, some people in Boston observed the feast of the apostle to Ireland, and since 1776 the day has marked the evacuation of royal troops and Loyalists from the city, prompted by the guns captured at Ticonderoga and set up on Dorchester Heights under General Washington's command. Washington himself reportedly drew on the earlier tradition in choosing "St. Patrick" as the response to "Boston," the password used in the colonial lines on evacuation day.

Id. at 560.

106. *Id.*

107. *Id.* at 561. The public accommodations law prohibited discrimination on the basis of sexual orientation in "any place . . . which is open to and accepts or solicits the patronage of the general public," including boardwalks, and places of public entertainment. *Id.* at 561–62.

108. *Id.* at 572.

109. *Id.* at 563–64.

110. *Id.* at 566.

Parades are inherently an expressive form of communication because citizens march in a parade to espouse a certain point, even if that point is conveyed purely through symbolism and not spoken words.[111] Although the Council did not express a specific message against GLIB, "a private speaker does not forfeit constitutional protection [to have autonomy over his message] simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."[112] In fact, the Massachusetts Supreme Judicial Court's application of the public accommodations law essentially transformed the Council's speech into a public accommodation, which essentially allowed anyone who desired to join the parade to mold the Council's speech.[113]

(3) Boy Scouts of America v. Dale

A corollary case to *Hurly* is *Boy Scouts of America v. Dale*,[114] where the Boy Scouts of America ("Boy Scouts") expelled an assistant scoutmaster after he campaigned for values that were contrary to the Boy Scouts's values[115] by publicly announcing in a newspaper interview that he was a homosexual activist and advocating for homosexual role models for children.[116] The former assistant scoutmaster claimed that the Boy Scouts's revocation of his membership violated New Jersey's public accommodations law, which prohibited discrimination on the basis of sexual orientation.[117] The New Jersey Supreme Court agreed and held that the Boys Scouts were a public accommodation.[118]

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111. *Id.* at 568–69. "Real 'parades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration.'" *Id.* at 568 (quoting S. DAVIS, PARADES AND POWER: STREET THEATRE IN NINETEENTH-CENTURY PHILADELPHIA 6 (1986)).

112. *Id.* at 569–70.

113. *Id.* at 573.

114. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

115. *Id.* at 644–45. The values of the Boy Scouts are embodied in two statements: the Scout Oath and Scout Law. *Id.* at 649. The Scout Oath says: "On my honor I will do my best[:] To do my duty to God and my country and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight." BOY SCOUTS OF AMERICA, BOY SCOUT HANDBOOK 9 (11th ed. 1998). The Scout Law says: "A Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent." *Id.*

116. *Dale*, 530 U.S. at 644–45.

117. *Id.* at 645.

118. *Id.* at 646. New Jersey's public accommodations law stated:

The United State Supreme Court disagreed,[119] and, in a five-to-four split opinion, held that the State's interest in ending discrimination did not outweigh the significant and unconstitutional burden that it imposed on the Boy Scouts's expressive association.[120] If the State forced the Boy Scouts to readmit the former assistant scoutmaster as a member, the State would also essentially force the Boy Scouts to send a message that it approves of homosexual conduct.[121]

The four dissenting justices, including Justice Souter, who wrote the *Hurly* opinion,[122] believed that Boy Scouts's expressive values are not contrary to homosexuals whatsoever.[123] Even if inclusion of a homosexual did burden the Boy Scouts's values, it was not significant enough to warrant exclusion because those values lacked clarity.[124] The dissent emphasized the

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> "All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right."

Id. at 661–62 (quoting N.J. STAT. ANN. § 10:5-5 (West Supp. 2000)).

119. There are three reasons why the majority disagreed with the New Jersey Supreme Court:

> First, associations do not have to associate for the "purpose" of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection. . . .
>
> Second, even if the Boy Scouts discourages Scout leaders from disseminating views on sexual issues—a fact that the Boy Scouts disputes with contrary evidence—the First Amendment protects the Boy Scouts' method of expression. If the Boy Scouts wishes Scout leaders to avoid questions of sexuality and teach only by example, this fact does not negate the sincerity of its belief discussed above.
>
> Third, the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be "expressive association."

Id. at 655.

120. *Id.* at 659.

121. *Id.* at 650, 656, 661.

122. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 559 (1995).

123. *Dale*, 530 U.S. at 668–69 (Stevens, J., dissenting).

124. *Id.* at 685.

Roberts opinion to say that the proper analysis for a court is to inquire into whether the antidiscrimination rule "'impose[d] any *serious burdens*' on the group's 'collective effort on behalf of [its] *shared goals*,'" that outweighs the state's compelling interest in ending discrimination.[125] In this case, the dissent believed that the state's interest in ending discrimination was unrelated to the suppression of ideas, the latter of which is forbidden.[126] Furthermore, an association defending against an antidiscrimination rule "must at least show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude."[127]

In contrast to the majority,[128] the dissent does not defer to the association's asserted beliefs, but rather requires the association to convince the Court that it genuinely holds those beliefs.[129] Unlike the Court's unanimous decision in *Hurly*, which was written four years prior to *Dale*, the dissent departs from their previous decision, which did not require the South Boston Allied War Veterans Council to prove that it took an unequivocal expressive position against homosexual behavior.[130]

(4) California Democratic Party v. Jones

Expressive association, and, particularly, the idea that the government cannot change the message of an association, extends not only to purely private groups, but also to political parties.[131] In *California Democratic Party v. Jones*,[132] California voters adopted a proposition that changed the election

125. *Id.* at 683 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 622, 626–27 (1984)). The majority also held to this interpretation of *Roberts*, but believed that there was a serious burden on the Boy Scouts's shared values. *See id.* at 650, 657 (majority opinion).

126. *See id.* at 680 (Stevens, J., dissenting).

127. *Id.* at 687.

128. The majority clearly "give[s] deference to an association's assertions regarding the nature of its expression ... [and] give[s] deference to an association's view of what would impair its expression." *Id.* at 653 (majority opinion).

129. *Id.* at 687 (Stevens, J., dissenting).

130. *Id.*; *see* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 569–70 (1995). Although the dissent in *Dale* denied departing from *Hurley*, it made a weak argument for distinguishing between the two cases. While conveniently ignoring the homosexual assistant scoutmaster's newspaper interview and activism, the dissent contended that unlike *Hurley*, the homosexual assistant scoutmaster's membership in the Boys Scouts would have no influence on the public's perception of the Boy Scouts's speech. *See Dale*, 530 U.S. at 645, 694–95.

131. Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000).

132. *Id.* at 567.

primary process for all parties from a closed-partisan-primary to an open-blanket-primary.[133] Four political parties contended that the proposition violated their right to freedom of association and sought injunctive and declaratory relief.[134] The State contended that primaries are a component of the public interest and are not private proceedings; thus, the State was merely regulating an election process.[135] The Court disagreed and held that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee."[136] The right to associate is meaningless unless associations have the right to exclude those who are

133. *Id.* at 570. There are several different types of election primaries. A closed primary is where "only voters who are registered as members of a political party prior to the primary date may participate in the nomination process for its candidates." *State Primary Election Types*, NATIONAL CONFERENCE OF STATE LEGISLATURES (last visited July, 23, 2013), http://www.ncsl.org/legislatures-elections/elections/primary-types.aspx. An open primary allows "any registered voter to cast a vote in a primary, regardless of his or her political affiliation. This means that a Democrat could 'cross over' and cast a vote in the Republican primary, or vice versa, and an unaffiliated voter can choose either major party's primary." *Id.* There are also different combinations between open and closed primaries. *Id.* The primary at issue in *Jones*, was an open-blanket-primary, where "each voter's primary ballot ... lists every candidate regardless of party affiliation and allows the voter to choose freely among them. ... [But] the candidate of each party who wins the greatest number of votes is the nominee of that party at the ensuing general election." *Jones*, 530 U.S. at 570 (citation omitted) (internal quotation marks omitted).

134. *Jones*, 530 U.S. at 571. The political parties that brought suit included the following: the California Democratic Party, the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party. *Id.*

135. *Id.* at 572.

136. *Id.* at 575. The regulation of primary elections is generally, but not always, subject to strict scrutiny if it interferes with a voter's or a party's First Amendment rights. *See* MASSEY, *supra* note 102, at 1036; *see also* Tashjian v. Republican Party, 479 U.S. 208, 210–11, 229 (1986) (voiding a primary election law, as applied, that "requir[ed] voters in any party primary to be registered members of that party" when it interfered with the associational rights of a state party wanted to include independent voters in the selection process of its nominees); Eu v. San Francisco Cnty. Democratic Comm., 489 U.S. 214, 216–17, 232 (1989) (voiding a primary election law that prohibited political party officials from "endors[ing], support[ing], or oppos[ing], any candidate for nomination by that party for partisan office in the direct primary election"). *Compare* Kusper v. Pontikes, 414 U.S. 51, 52, 58–59, 61 (1973) (using heightened scrutiny to void a primary election law that prevented voters from voting in a primary election if they had also voted in another party's primary election within the previous twenty-three months), *with* Rosario v. Rockefeller, 410 U.S. 752, 760–61 (1973) (using minimal scrutiny to uphold a primary election law that required voters to register eight to eleven months before voting in a primary election).

antithetical to the expressive purpose and philosophy of the association.[137] The underlying problem with the California proposition is that it forces "political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival."[138] The State had no compelling interest[139] to change the message and, consequently, the outcome of party elections.[140]

(5) Rumsfeld v. Forum for Academic and Institutional Rights, Inc.

Government infringements on expressive association cross ideological boundaries. Regardless of the political party in power, the government can impermissibly use its power to subsidize with funds to alter or undermine a group's expression. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*[141] involved an association of law schools and facilities that formed a coalition to challenge the Solomon Amendment.[142] The law schools had

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137. *Jones*, 530 U.S. at 574.

138. *Id.* at 577.

139. *Id.* at 584. The State offered a number of purported compelling interests, including: electing officials who are more representative of the electorate, expanding the debate on the issues beyond partisan politics, allowing independent voters and voters who are political minorities to participate in the selection of the primary candidates, promoting fairness, granting voters a greater choice of candidates, and protecting privacy. *Id.* at 582–84.

140. *Id.* at 581–82, 586. The cases after *Jones* have departed from the application of strict scrutiny to party elections in several instances. In *Clingman v. Beaver*, the Court modified the rule to make it more akin to a balancing test. "Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest. However, when regulations impose lesser burdens, 'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'" Clingman v. Beaver, 544 U.S. 581, 586–87 (2005) (plurality opinion) (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997)). There, the Court held that Oklahoma's semi-closed primary, which allowed political parties to invite independents to vote in their elections, did not compel "association with unwanted members or voters." *Id.* at 584, 587. In *Washington State Grange v. Washington State Republication Party*, the Court applied a balancing test to uphold a primary election law that mandated candidates to be "identified on the ballot by their self-designated 'party preference;' that voters may vote for any candidate; and that the top two votegetters for each office, regardless of party preference, advance to the general election." Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 444, 458–59 (2008). The Court reasoned that "unlike the California primary [in *Jones*], the [Washington] primary does not, by its terms, choose parties' nominees." *Id.* at 453.

141. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006).

142. *Id.* at 51–52. As explained in *Rumsfeld*,

restricted military recruiters from accessing their campuses because the universities opposed the military's policy against openly homosexual soldiers.[143] Congress reacted by passing the Solomon Amendment, which prohibited universities from receiving federal funding if they restricted military recruiters from their campuses.[144] The law schools argued that the Solomon Amendment violated their right to associate because it undermined their "ability to express their message that discrimination on the basis of sexual orientation is wrong ... [by requiring] the presence of military recruiters on campus and the schools' obligation to assist them."[145]

The Court held that the Solomon Amendment regulates conduct, but not expressive behavior.[146] Furthermore, unlike the *Dale* case, this regulation of conduct does not encroach on the law schools' right to associate.[147] In this context, the Court indicated that there are two types of regulations of an association. The first type is where the government coerces a group to *formally accept members* that it does not want.[148] The second type is where the government encourages—or depending on another perspective, actually coerces—a group to *interact with and aid outsiders* without technically

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The Solomon Amendment denie[d] federal funding to an institution of higher education that "has a

> policy or practice ... that either prohibits, or in effect prevents" the military "from gaining access to campuses, or access to students ... on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer."

Id. at 55 (quoting 10 U.S.C. § 983(b) (2000 & Supp. IV 2000)). Nevertheless, the Solomon Amendment also had "an exception for an institution with 'a longstanding policy of pacifism based on historical religious affiliation.'" *Id.* (quoting 10 U.S.C. § 983(c)(2) (2000)).

143. *Id.* at 51.

144. *Id.* at 51, 55.

145. *Id.* at 68. In a much broader sense, the law schools essentially argued that the Solomon Amendment forced them "to choose between exercising their First Amendment right to decide whether to disseminate or accommodate a military recruiter's message, and ensuring the availability of federal funding for their universities." *Id.* at 53.

146. *Id.* at 60. The Court concluded that "[a]s a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.*

147. *Id.* at 69. "The Solomon Amendment therefore does not violate a law school's First Amendment rights. A military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message." *Id.* at 70.

148. *See id.* at 69.

inducting them into the group's membership.[149] The first type is impermissible and a violation of associational rights, but the second type is permissible and not a violation of associational rights.[150] Essentially, this case seemingly grants the government the power to coerce groups to associate with other persons as long as the government is not coercing groups to formally accept these persons as members. Unfortunately, this allows the government to walk a thin line that is shaded rather than bright.

Most of the foregoing cases establish by a narrow split between the Justices on the Court that the government may not force expressive groups to associate with persons who may alter their message.[151] Nevertheless, the landmark case of *Christian Legal Society v. Martinez*[152] authorizes the government, in certain instances, to use coercive methods to compel expressive groups to not only associate with outsiders, but also to formally accept them into the group.[153] Before the *Martinez* case is examined, it is necessary to explore the rules pertaining to restrictions of speech on government property, including public fora.

C. *Restrictions of Speech on Government Property*

The First Amendment generally provides broad protection for an American citizen's right to speak freely.[154] Nevertheless, when American

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149. *See id.*

150. *See id.* The Court elaborated on this distinction:

> To comply with the statute, law schools must allow military recruiters on campus and assist them in whatever way the school chooses to assist other employers. Law schools therefore "associate" with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association. This distinction is critical. Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school "'to accept members it does not desire.'"

Id. (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).

151. Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000); Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 566 (1995); Healy v. James, 408 U.S. 169, 187–88 (1972); *but see Rumsfeld*, 547 U.S. at 50, 69 (2006) (all members of the Court joined in the opinion, except for Justice Alito).

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

153. *See id.* at 3011 (Alito, J., dissenting).

154. U.S. CONST. amend. I. The United States Supreme Court has consistently held that "'the First Amendment means that government has no power to restrict expression because

citizens are on government property, the government may limit their speech based on the characteristics of the speech and the classification, or "forum," of the property.[155]

1. Restrictions on the Characteristics of Speech

The Court has divided government restrictions on free speech into three categories: content-based discrimination; content-neutral discrimination; and viewpoint discrimination.[156] Content-based discrimination occurs when the government limits the subject matter of the speech to certain topics.[157] In contrast, a restriction on speech is content-neutral if it is "justified without reference to the content [subject matter] of the regulated speech."[158] Viewpoint discrimination occurs when the government permits the subject matter of the speech but prohibits the discussion of the subject matter from a particular perspective.[159] Unlike content-based

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of its message, its ideas, its subject matter, or its content.'" Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (quoting Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 65 (1983)).

155. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992) (This is a seminal case in defining public fora).

156. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 822–23, 829–30, 894 (1995) (holding that a state university that refused to pay for the publication costs of a student organization's newspaper on the sole basis that it "'primarily promotes or manifests a particular belief . . . in or about a deity or an ultimate reality'" constituted viewpoint discrimination) (quoting Petition for Writ of Certiorari at *4, *Rosenberger*, 515 U.S. 819 (No. 94-329)).

157. See *id.* at 828–29.

158. DA Mortg., Inc. v. City of Miami Beach, 486 F.3d 1254, 1266–67 (11th Cir. 2007) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding that a noise ordinance that a city enforced against a night club was content-neutral and a reasonable time, place, and manner restriction).

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

Ward v. Rock Against Racism, 491 U.S. 781, 791, 796 (1989) (citation omitted) (holding that a city's regulation of sound amplification in a public park was content-neutral and a reasonable time, place, and manner restriction).

159. *Rosenberger*, 515 U.S. at 829. ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

discrimination, viewpoint discrimination is hardly ever permissible.[160] Within each forum, the government may place restrictions that discriminate based on the content of the speech under certain conditions.[161] These conditions vary according to the classification of the forum.[162]

2. Restrictions of Speech in Public Fora

There are four types of public fora: a traditional public forum, a designated public forum, a limited public forum, and a nonpublic forum.[163]

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160. *Id.*; Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394, 397 (1993) (holding that a public school's denial of a church from showing a film on its premises after schools hours constituted viewpoint discrimination, even though it was a limited public forum).

161. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).

162. *Id.* Even if a restriction on speech is otherwise proper based on the classification of the forum, a person can still challenge the restriction under the Overbreadth and Vagueness doctrines. The Overbreadth doctrine is "based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 129 (1992); *see* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800–01 (1984). An individual may "challenge a statute on its face 'because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.'" Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985)). The standard of review is whether the challenged rule reaches a substantial amount of expressive activity, so that it not only prohibits unprotected speech, but also deeply encroaches into protected speech. United States v. Williams, 553 U.S. 285, 294 (2008). Even a "clear and precise enactment" is overbroad when it sweeps speech within its restriction that is protected by the First and Fourteenth Amendments. Grayned v. City of Rockford, 408 U.S. 104, 114–15 (1972). The Vagueness doctrine states that a restriction fails the requirements of Due Process when it is so vague and standardless that (1) "men of common intelligence must necessarily guess at its meaning," Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973), and (2) it fails to provide fair warning so that "it leaves the public uncertain as to the conduct it prohibits. . . ." City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (quoting Giaccio v. Pennsylvania, 382 U.S. 399, 402–03 (1966)). The restriction's "chilling effect" on speech "must be both real and substantial, and a narrowing construction must be unavailable before a court will set it aside." Doe v. Univ. of Mich., 721 F. Supp. 852, 866–67 (E.D. Mich. 1989) (citing Young v. Am. Mini-Theatres, 427 U.S. 50, 60 (1976)); *see* Screws v. United States, 325 U.S. 91, 98 (1945). The Vagueness doctrine ensures that any restriction on speech must articulate explicit standards to guide the authorities who are to apply it so that they do not engage in viewpoint discrimination. Fla. Businessmen for Free Enter. v. City of Hollywood, 673 F.2d 1213, 1218 (11th Cir. 1982) (citing Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972)).

163. Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–79 (1992).

Although the Court has historically used the public fora approach to analyze restrictions on speech, the Court has recently used a public fora analysis to limit expressive association on government property.[164]

a. Traditional public fora

A traditional public forum is government property that has "immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,"[165] including streets and public parks.[166] A person's expressive behavior in traditional public forum is entitled to the highest protection because the "use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."[167] Therefore, government regulation of the content of speech in a traditional public forum is subject to strict scrutiny.[168] This means that a court will presume that the restriction is invalid,[169] which places the burden on the government to "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end" using the least restrictive means.[170]

b. Designated public fora

A designated public forum is where the government has opened its property for "indiscriminate public use for communicative purposes."[171] This pertains to property that the government has not held "immemorially" in the public trust, but, rather, it is property that the government is not

164. *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2985–86 (2010).

165. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

166. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). *But see Summum*, 555 U.S. at 464 (holding that the placement of a permanent monument in a public park is not subject to the fora analysis because it is a form of government speech).

167. *Hague*, 307 U.S. at 515.

168. United States v. Kokinda, 497 U.S. 720, 726 (1990). Nevertheless, the government may impose reasonable time, place, and manner restrictions for the expressive behavior as long as the restrictions are content-neutral. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

169. Ashcroft v. ACLU, 542 U.S. 656, 660 (2004).

170. *Perry Educ. Ass'n*, 460 U.S. at 45. (citing Carey v. Brown, 447 U.S. 455, 461 (1980)); *see* Elrod v. Burns, 427 U.S. 347, 362–63 (1976).

171. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392 (1993).

required to but chooses to open to the public.[172] When "[t]he government creates a designated public forum . . . [it] treat[s] [the property] as if it were a traditional public forum."[173] Although the government is not required to keep a designated forum open to the public indefinitely, any government restriction on speech in a designated public forum is also subject to strict scrutiny.[174]

c. Limited public fora

A limited public forum is also property that the government has opened for public discourse, but "the State is not required to and does not allow persons to engage in every type of speech. The State may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics.'"[175] Unlike traditional and designated public fora, a limited public forum is not subject to strict scrutiny.[176] Instead, "a government entity may impose restrictions on speech that are reasonable and viewpoint neutral" in light of the purpose for which the forum was created.[177]

d. Nonpublic fora

"[A] nonpublic forum is a publicly-owned property that is not by tradition or governmental designation 'a forum for public

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172. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–79 (1992); *Perry Educ. Ass'n*, 460 U.S. at 45.

173. Miller v. City of Cincinnati, 622 F.3d 524, 534 (6th Cir. 2010).

174. *Lee*, 505 U.S. at 678; *Perry Educ. Ass'n*, 460 U.S. at 46.

175. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001) (quoting Rosenberger v. Rector, 515 U.S. 819, 829 (1995)) (holding that a public school's exclusion of a religious club from meeting after school hours constituted viewpoint discrimination).

176. Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009); *see* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2986 (2010).

177. *Summum*, 555 U.S. at 470; *see* Widmar v. Vincent, 454 U.S. 263, 267–68, 277 (1981) (holding that a state university that opened its facilities to student secular groups but not to student religious groups constituted content-based discrimination, which also implied viewpoint discrimination, even though it was a limited public forum). It is also important to note that the Court has never quite clearly articulated what level of scrutiny, such as intermediate or minimal, is used to analyze a limited public forum. *See Good News Club*, 533 U.S. at 106. Nevertheless, there is one point that the Court has made clear, which is that a limited public forum is subject to a lesser level of scrutiny than strict scrutiny. *Id.*; *cf.* Miller v. City of Cincinnati, 622 F.3d 524, 536 (6th Cir. 2010) ("[S]peech in both a limited public forum and a nonpublic forum receive the same level of scrutiny.").

communication.'"[178] Essentially, a nonpublic forum is any other government property that does not fit in the aforementioned fora, including airports, post offices, military bases, and advertising space on public transportation.[179] Like a limited public forum, the government may limit speech in a nonpublic forum to a certain topic and exclude speakers who deviate from that topic—as long as the restriction is reasonable and viewpoint neutral.[180] Nevertheless, the government, at its discretion, may transform a nonpublic forum into either a designated or limited public forum.[181] It is the government's intent that determines whether government property is a designated, limited, or nonpublic forum.[182]

Although these rules pertaining to speech in public fora have never historically applied to the right to associate, *Martinez* applied the public fora doctrine to an expressive association.[183] It specifically authorizes the government to interfere with expressive associations that gather in limited public fora.[184] *Martinez* places the right to associate in great jeopardy

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178. *Miller*, 622 F.3d at 535 (6th Cir. 2010) (quoting Helms v. Zubaty, 495 F.3d 252, 256 (6th Cir. 2007)).

179. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992) (holding that airport terminals are nonpublic fora); United States v. Kokinda, 497 U.S. 720, 730 (1990) (holding that the sidewalk of a post office is a nonpublic forum); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 48 (1983) (holding that a public school mail system is a nonpublic forum); Greer v. Spock, 424 U.S. 828, 838 (1976) (holding that "the business of a military installation . . . [is] to train soldiers, not to provide a public forum"); Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (holding that advertising space on public transportation is not a public forum).

180. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806, 808 (1985) (holding that the government may exclude charity drives aimed at federal employees in the federal workplace, in part, because the federal workplace is a nonpublic forum).

> The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated.

Id. at 808.

181. *Id.* at 802; Miller v. City of Cincinnati, 622 F.3d 524, 534 (6th Cir. 2010).

182. *Cornelius*, 473 U.S. at 802 ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."); *Miller*, 622 F.3d at 534 ("Governmental intent is the 'touchstone' of a court's analysis in determining whether it has created a public forum." (quoting Kincaid v. Gibson, 236 F.3d 342, 348–49 (6th Cir. 2001))).

183. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2986 (2010).

184. *Id.* at 2985–86.

because it opens the door for government to compel one to associate with others.

D. Christian Legal Society v. Martinez

Christian Legal Society v. Martinez[185] drastically reduced the rights of groups that engage in expressive behavior. In *Martinez*, the Hastings College of Law, a California public school, used its nondiscrimination policy to bar the Christian Legal Society ("CLS"), a religious organization, from official recognition[186] as a school club.[187] The law school contended that CLS's bylaws violated the school's nondiscrimination policy[188] because the bylaws required students who wanted to become members and officers in CLS to sign a statement of faith[189] and to live their lives based on certain

185. *Id.* at 2971.

186. The benefits of official recognition included the following:

> Groups that are granted registration are entitled to meet on university grounds and to access multiple channels for communicating with students and faculty—including posting messages on designated bulletin boards, sending mass e-mails to the student body, distributing material through the Student Information Center, and participating in the annual student organizations fair. They may also apply for limited travel funds, which appear to total about $4,000 to $5,000 per year. . . . Most of the funds available to RSOs [Registered Student Organizations] come from an annual student activity fee that every student must pay.

Id. at 3002 (Alito, J., dissenting) (citations omitted).

187. *Id.* at 3001.

188. The nondiscrimination policy states:

> "[Hastings] is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, [Hastings]-owned student residence facilities and programs sponsored by [Hastings], are governed by this policy of nondiscrimination. [Hasting's] policy on nondiscrimination is to comply fully with applicable law.["]
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> "[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities."

Id. at 2979 (majority opinion) (quoting Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 app. 220 (2010)).

189. "The Statement of Faith provides:"

> "Trusting in Jesus Christ as my Savior, I believe in:
>
> ◦ One God, eternally existent in three persons, Father, Son and Holy Spirit.

principles.[190] Specifically, the law school contended that CLS discriminated on the basis of religion and sexual orientation.[191] CLS countered that the law school's nondiscrimination policy violated their free speech and expressive associational rights.[192] The law school subsequently invented an "all-comers" policy during the course of the litigation.[193] This all-comers policy purportedly interpreted the nondiscrimination policy to require all student clubs to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of... status or beliefs."[194] The Court resolved the case based on the all-comers policy, but not the nondiscrimination policy as written, which left open the question of whether a public university or other government entity can use its nondiscrimination policy to passively force coercive association.[195]

In laying a foundation to decide this case, the majority opinion promulgated a new method for analyzing expressive association where the alleged constitutional violation occurs on government property.[196] The Court reasoned that free speech and expressive association are functionally equivalent if they "arise in exactly the same context."[197] Given that CLS brought both of these claims against a state institution, they must be

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- 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."

Id. at 2980 n.3 (quoting Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 app. 226 (2010)).

190. *Id.* at 2980. These principles included that belief that "sexual activity should not occur outside of marriage between a man and a woman; CLS thus interprets its bylaws to exclude from affiliation anyone who engages in 'unrepentant homosexual conduct.'" *Id.*

191. *Id.*

192. *Id.* at 2981.

193. "Overwhelming evidence, however, shows that Hastings denied CLS's application pursuant to the Nondiscrimination Policy and that the accept-all-comers policy was nowhere to be found until it was mentioned by a former dean in a deposition taken well after this case began." *Id.* at 3001 (Alito, J., dissenting) (internal quotation marks omitted).

194. *Id.* at 2979 (majority opinion).

195. *Id.* at 2984.

196. *Id.* at 2985–86.

197. *Id.* at 2985.

resolved under a limited-public-forum analysis.[198] The Court stated that a limited-public-forum analysis was necessary to balance CLS's free speech and expressive association rights with the law school's rights as a "property owner and educational institution."[199]

In analyzing CLS's claims, the Court held that, the law school's all-comers policy was both reasonable[200] and viewpoint neutral[201] under a

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198. *Id.* at 2986. The majority opinion gave three reasons for applying a limited-public-forum analysis:

> First, the same considerations that have led us to apply a less restrictive level of scrutiny to speech in limited public forums as compared to other environments apply with equal force to expressive association occurring in limited public forums . . . .
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> . . . .
>
> Second, and closely related, the strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums—the State may "reserv[e] [them] for certain groups . . . ."
>
> . . . .
>
> Third, this case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition. The expressive-association precedents on which CLS relies, in contrast, involved regulations that *compelled* a group to include unwanted members, with no choice to opt out.

Id. at 2985–86 (citations omitted) (internal quotation marks omitted).

199. *Id.* at 2986.

200. The majority opinion stated that the all-comers policy was reasonable for four reasons:

> First, the open-access policy "ensures that the leadership, educational, and social opportunities afforded by [RSOs] are available to all students . . . ."
>
> Second, the all-comers requirement helps Hastings police the written terms of its Nondiscrimination Policy without inquiring into an RSO's motivation for membership restrictions . . . .
>
> . . . .
>
> Third, the Law School reasonably adheres to the view that an all-comers policy, to the extent it brings together individuals with diverse backgrounds and beliefs, "encourages tolerance, cooperation, and learning among students . . . ."
>
> Fourth, Hastings' policy, which incorporates—in fact, subsumes—state-law proscriptions on discrimination, conveys the Law School's decision "to decline to subsidize with public monies and benefits conduct of which the people of California disapprove."

limited-public-forum analysis.[202] Although CLS's continued existence would be problematic because the law school denied it the benefits of official recognition, the majority stated that CLS was mildly burdened by the all-comers policy, because there were significant "other available avenues for the group to exercise its First Amendment rights [that] lessen[ed] the burden created by those barriers."[203] Furthermore, the Court claimed that the law school's all-comers policy merely discriminated against CLS's act of excluding members and not their beliefs.[204]

Although the fateful *Martinez* decision allows coerced association under an all-comers policy, it left the issue unresolved as it pertains to nondiscrimination policies.[205] Prior to *Martinez*, the United States Courts of Appeals and several United States District Courts had several opportunities to address the right to associate as it relates to nondiscrimination polices. These courts are split on whether the government can use nondiscrimination policies or other similar rules to compel groups to associate with outsiders. Several of their prominent decisions and rationales will now be discussed.[206]

Id. 2989–90 (quoting Brief of Hastings College of the Law Respondents at 32, *Martinez*, 130 S. Ct. 2971 (No. 08-1371)).

201. The majority held that the all-comers policy was purportedly "'justified without reference to the content [or viewpoint] of the regulated speech.'" *Id.* at 2994 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

202. *Id.* at 2995.

203. *Id.* at 2991.The dissent was perplexed by the majority's reasoning here, because "one of CLS's principal claims is that it was subjected to discrimination based on its viewpoint, the majority's emphasis on CLS's ability to endure that discrimination—by using private facilities and means of communication—is quite amazing." *Id.* at 3006 (Alito, J., dissenting). Furthermore, the majority conveniently ignored the rule that a "student group's 'possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by' nonrecognition." Christian Legal Soc'y v. Walker, 453 F.3d 853, 864 (7th Cir. 2006) (quoting Healy v. James, 408 U.S. 169, 183 (1972)).

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

205. *Id.* at 2984.

206. The cases discussed in this next section are about where a government uses its nondiscrimination policy to deny expressive associations access from public fora. There is one other fascinating case where the government denied an expressive association access to public fora, but did not involve a nondiscrimination policy. In the Sixth Circuit case of *Miller v. City of Cincinnati*, an Ohio nonpartisan political action committee opposed a plan by the City of *Cincinnati* to implement "an automated photo-monitoring program to enforce traffic regulations." Miller v. City of Cincinnati, 622 F.3d 524, 529 (6th Cir. 2010). When the political action committee wished to hold a rally and press conference in the interior lobby of city hall, the city denied the committee access pursuant a policy that required advocacy

E. *The Circuit Split*

1. Second Circuit

The Second Circuit holds that where the inclusion of outsiders would undermine a group's message, expressive association protects the group's decision to exclude outsiders only to the extent that its purpose is to "foster the group's shared interest in particular speech."[207] In *Hsu ex rel. Hsu v. Roslyn Union Free School District No. 3*,[208] two high school students wanted to form an after school Bible club.[209] The students wrote the club's constitution and submitted it to the school's principal, board, and district superintendent for approval.[210] Later, the principal and district superintendent met with the students and told them that the constitutional provision that limited the club's "officers to 'professed Christians' and those who have 'accepted Jesus Christ as savior' ... violated the District's 'nondiscrimination policy.'"[211] Furthermore, the school board refused to recognize the club unless its founders removed the provision that limited

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groups to get a city council member to sponsor their planned events inside city call. *Id.* at 529–30. The court held that city hall was at best, a limited public forum, and that the policy was reasonable and viewpoint neutral. *Id.* at 535–36. Furthermore, the court held that the policy did not infringe on the political action committee's expressive association because it did not affect their decision of whom to select as members. *Id.* at 538. "Officials who 'sponsor' or 'collaborate' with groups to use the interior spaces do not become members of the group—they are outsiders with whom groups must interact only for the limited purpose of accessing the city hall space." *Id.*

207. Hsu *ex rel.* Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 859 (2d Cir. 1996).

208. *Id.* at 839.

209. *Id.* at 848–49.

210. *Id.* at 849.

211. *Id.* at 850. The school's policy prohibited discrimination:

> "[O]n the basis of race, color, national origin, creed or religion, marital status, sex, age or handicapping condition," in providing "access to ... student activities."
>
> ....
>
> [The policy] requires that the District provide every student with equal educational opportunities regardless of race, color, creed, sex, national origin, religion, age, marital status, or disability. No student will be excluded on such basis from participating in or having access to any course offerings, athletics, counseling, employment assistance, *extracurricular activities* or other school resources.

Id.

the club's officers to professing Christians.[212] The students brought legal action and moved for a preliminary injunction, which the district court denied.[213]

The United States Court of Appeals for the Second Circuit reversed in part,[214] and held that "the School's *complete ban* on 'religious discrimination,' however it is enforced, also bans the Bible club envisioned by the Hsus."[215] Yet, the Hsus were likely to succeed on some, but not all of their claims.[216] Although the school was a limited public forum, secondary public schools may not ban religious clubs from meeting under the Equal Access Act[217] by conditioning official recognition on the abandonment of their core principles.[218] The Equal Access Act did not explicitly mention expressive association, but it encompassed "an implicit right of expressive association when the goal of that association is to meet for a purpose protected by the Act."[219] Nevertheless, the court held that the club could only require its president, vice president, and music coordinator to be professing Christians "because their duties consist of leading Christian prayers and devotions and safeguarding the 'spiritual content' of the meetings."[220] In contrast, the other officer positions were not essential to promoting the core religious principles of the club and thus not protected

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212. *Id.* at 850–51.

213. *Id.* at 851–52.

214. *Id.* at 873.

> We hold only that, on this record, the Hsus are *likely to succeed* on that part of their Equal Access Act claim that relates to the Club's President, Vice-President, and Music Coordinator. We therefore affirm in part, reverse in part, and remand for the issuance of an injunction and additional proceedings (if necessary) that are consistent with this opinion.

Id.

215. *Id.* at 862 (emphasis added).

216. *Id.* at 872–73.

217. The Equal Access Act states in relevant part:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

Id. at 854 (quoting 20 U.S.C. § 4071(a)).

218. *Id.* at 862.

219. *Id.* at 859.

220. *Id.* at 858.

by expressive association.[221] Furthermore, the club is less likely to be protected by expressive association if it "engages in social and community activities that are not integral to a sectarian religious experience."[222]

The Second Circuit has also extended the reasoning in the *Roberts* decision to nondiscrimination policies. In *Chi Iota Colony of Alpha Epsilon PI Fraternity v. City University of New York*,[223] the College of Staten Island[224] denied official recognition to an all-male Jewish fraternity club because the fraternity violated the college's nondiscrimination policy by discriminating on the basis of gender.[225] Although the fraternity argued that its message was that it was a "predominantly Jewish male fraternity,"[226] like *Roberts*, the trial court questioned "why women would significantly affect the Fraternity's ability to engage in such expression."[227] Furthermore, the court

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221. *See id.* at 857–58. According to the court, the club's other officers, including the activities coordinator, were purportedly not essential to its expression. *Id.* Regarding the activities coordinator, the court stated that "an agnostic with an understanding of 'Christian sensibilities' might plan these activities as well as any other student." *Id.* at 857. The court also did not believe that the club's "'religious speech' . . . would be affected by having a non-Christian 'Secretary,' whose principal duties are 'to accurately record the minutes of meetings and be involved in the Club's financial accounting and reporting.'" *Id.*

222. *See id.* The court postulated that skits, guest speakers, games picnics, and community service projects are not activities are "unambiguously 'religious.'" *Id.*

223. Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 443 F. Supp. 2d 374 (E.D.N.Y. 2006), *vacated by* Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136 (2d Cir. 2007) (vacating the district court's issuance of a preliminary injunction, which it issued on the belief that the fraternity was likely to succeed on its claims regarding intimate association).

224. The College of Staten Island is a subsidiary of City University of New York. *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 443 F. Supp. at 376.

225. *Id.* at 396. The college's nondiscrimination policy stated:

> In order for an organization to be officially recognized at the College of Staten Island, membership and participation in it must be available to all eligible students of the College. In addition, in order to be recognized, each organization must agree not to discriminate on the basis of age, alienage or citizenship, color, *gender*, differing ability, national or ethnic origin, race, religion, sexual orientation, veteran or marital status, or social class.

Id. at 380.

226. *Id.* at 378. The district court characterized this as "a description that suggests that this [fraternity's] expressive message is composed of the two inseparable components of (1) appreciating Jewish culture (2) as a male." *Id.* at 395.

227. *Id.* at 393. The fraternity especially argued that their value of "brotherhood" was one of their strongest messages and that admitting women would undermine that message.

declared that although the "Fraternity does not discriminate on the basis of faith and welcomes all men who are comfortable with belonging to a group affiliated with Jewish culture, it is difficult to believe how a woman, whether Jewish or not, would not be able to hold the same appreciation for Jewish culture."[228] Therefore, the fraternity was unlikely to succeed on the merits of that claim.[229]

The Second Circuit also allows governments to use their nondiscrimination policies to exclude groups from participating in government sponsored charity campaigns, on the basis that a group's membership composition is incompatible with the government's nondiscrimination policy.[230] In *Boy Scouts of America v. Wyman*,[231] a Connecticut state entity[232] banned the Boys Scouts from participating in a state charity campaign that was directed at public employees.[233] For more than thirty years, the state had allowed the Boy Scouts to participate in the charity campaign.[234] Nevertheless, the state banned the Boys Scouts from the charity campaign because the Boys Scouts discriminated on the basis of sexual orientation.[235] The Second Circuit held that the charity drive was a

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Nevertheless, the district court held that this was "not enough" to show that the admitting women would harm the fraternity. *Id.* at 395.

228. *Id.* at 393.

229. *Id.* at 395. The district court denied the fraternity's motion for a preliminary injunction against the college for their expressive association claim. *Id.* 395, 397. The fraternity had also argued that it was an intimate association and it succeeded in persuading the district court to grant a preliminary injunction for that claim. *Id.* at 389, 397. On appeal, the Second Circuit held that the fraternity was not likely to succeed on the merits of its intimate association claim because there was no limit to its membership, it had "broad, public-minded goals that do not depend for their promotion on close-knit bonds[,]" it invited nonmembers to participate in its activities, and it sought to become affiliated with a national organization. Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 146–47 (2d Cir. 2007).

230. *See* Boy Scouts of Am. v. Wyman, 335 F.3d 80, 84–85 (2d Cir. 2003).

231. 335 F.3d at 80.

232. The state entity was known as the "Connecticut Commission on Human Rights and Opportunities." *Id.* at 85.

233. *Id.* at 86. The purpose of the charity campaign was to "'raise funds from state employees for charitable and public health, welfare, environmental, conservation and service purposes.'" *Id.* at 84. (quoting CONN. GEN. STAT. § 5-262 (2013)).

234. *Id.* at 85.

235. *Id.* The state agency argued that "by allowing the [Boy Scouts,] BSA[,] to participate in the Campaign and to benefit from a fundraiser that used state resources, the [State Employee Campaign] Committee potentially made the state a party to discrimination in violation of Connecticut's Gay Rights Law[.]" *Id.*

nonpublic forum; therefore, the state could exclude the Boy Scouts, if its nondiscrimination policy was reasonable and viewpoint neutral.[236]

Although the court acknowledged that the nondiscrimination policy had an adverse impact on the Boy Scouts, the court stated that the purpose of the nondiscrimination policy was "to discourage harmful conduct and not to suppress expressive association."[237] Essentially, the nondiscrimination policy, as written, had the *secondary effect*[238] of suppressing the Boy Scouts's viewpoint, but it was not aimed at their viewpoint.[239] Instead, the state enacted their nondiscrimination policy to prevent the "immediate harms-like the denial of concrete economic and social benefits-such discrimination causes homosexuals."[240] Furthermore, the nondiscrimination policy was reasonable because the state had a legitimate interest in ending discrimination.[241] Therefore, the court held that that "the removal of the Boy Scouts from this nonpublic forum did not violate the Boy Scouts' First Amendment right to expressive association."[242]

2. Third Circuit

Although the Third Circuit, at the appellate level, has not resolved any expressive association cases involving nondiscrimination policies, there is a

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236. *Id.* at 91. In reaching its decision, the Second Circuit relied on *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, which had held that a "federal charitable campaign was a nonpublic forum and concluded that access to the campaign 'can be restricted as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Id.* (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).

237. *Id.* at 93, 95.

238. The Secondary Effects doctrine says that the "governments may regulate speech (even by apparent reference to its content) if its purpose for doing so is wholly unrelated to the content of the speech but is instead designed to ameliorate some phenomenon closely associate with speech but not produced by the content of the speech." *See* MASSEY, *supra* note 102, at 927. Although the court in *Wyman* did not specifically mention the Secondary Effects doctrine, its rationale relied on the Supreme Court's discussion of the Secondary Effects doctrine in *R.A.V. v. City of St. Paul. Compare Wyman*, 335 F.3d at 93–94, *with* R.A.V. v. City of St. Paul, 505 U.S. 377, 389–90 (1992). Nevertheless, the Secondary Effects doctrine applies to restrictions that have the effect of governing the *content* of expression; but instead, the Second Circuit's analysis in *Wyman* focused on *viewpoint* discrimination, which is almost never allowed. *See Wyman*, 335 F. 3d at 93–94; Rosenberger v. Rector, 515 U.S. 819, 829 (1995).

239. *Wyman*, 335 F.3d at 93–94.

240. *Id.* at 93.

241. *Id.* at 98.

242. *Id.* at 84.

significant district court decision within that circuit. In *Cradle of Liberty Council, Inc. v. City of Philadelphia*,[243] the City of Philadelphia attempted to coerce the Boy Scouts into changing its membership policy because it violated the city's nondiscrimination policy.[244] For more than eighty years, the Boy Scouts had used a building as its regional headquarters, which was owned by the city.[245] The city did not charge the Boy Scouts rent for using the building.[246] Eventually, the city became offended at the Boy Scouts for denying membership to homosexuals.[247] The city gave the Boy Scouts an ultimatum: the Boys Scouts must change their membership policy, pay the city $200,000 per year to use the building, or be evicted.[248] At the trial court, the city argued that it should prevail based on the Court's decision in *Martinez*.[249]

Although the building was a nonpublic forum,[250] the trial court distinguished this case from *Martinez*.[251] In *Martinez* the plaintiff made one claim two different ways, which was essentially "that the government's policy violated its right to express its views."[252] In this case, the Boy Scouts alleged two separate claims—the city's ultimatum violated the doctrine of

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243. Cradle of Liberty Council, Inc. v. City of Philadelphia, 851 F. Supp. 2d 936 (E.D. Pa. 2012).

244. *Id.* at 948. This case does not recite the city's nondiscrimination policy verbatim. Nevertheless, the court clearly did state that "a dispute arose between the two parties concerning Plaintiff's [Boy Scouts's] membership policy [because] Plaintiff denies membership to openly homosexual men, and Defendant [City] informed Plaintiff that this practice violates its nondiscrimination laws." *Id.* at 939.

245. *Id.* at 938.

246. *Id.*

247. *Id.*

248. *Id.* More specifically:

> [T]he Philadelphia City Council passed a resolution approving the eviction of Plaintiff from Defendant's property. Plaintiff [Boy Scouts] was left with three options: (1) it could continue its rent-free use of the building if it changed its policy with respect to homosexuals; (2) it could remain in the building and continue to discriminate if it paid rent in the amount of $200,000 per year; or (3) it could vacate the building.

Id. at 939 (citations omitted).

249. *Id.* at 941.

250. *Id.* at 942 n.4.

251. *Id.* at 942–43 & n.4.

252. *Id.*

unconstitutional conditions[253] and amounted to viewpoint discrimination.[254] Furthermore, in *Martinez*, the conditions placed on the benefits of official recognition dealt with activities that related to the law school. [255] In this case, the ultimatum that the city placed on the Boy Scouts was much broader and unrelated to their use of the building.[256] Therefore, a reasonable jury could decide that the Boy Scouts should prevail on their claim regarding unconstitutional conditions, but also could decide that the Boy Scouts should fail on their viewpoint discrimination claim.[257]

3. Seventh Circuit

Prior to the Supreme Court's fateful decision in *Martinez*, the Seventh Circuit decided a case that had facts nearly identical to *Martinez*. In *Christian Legal Society v. Walker*,[258] the Southern Illinois University School

253. The doctrine of unconstitutional conditions "prohibits the government from conditioning the discretionary grant of a benefit on an individual's waiver of a constitutional right." Pareja v. Attorney Gen. of the United States, 615 F.3d 180, 189 (3d Cir. 2010); *See* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 59 (2006) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit." (quoting United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 210 (2003) (internal quotation marks omitted)). "[W]hen a condition for receipt of a government benefit compromises a First Amendment right, it must be reasonable and viewpoint neutral." *Cradle of Liberty Council, Inc.*, 851 F. Supp. 2d at 948.

254. *Cradle of Liberty Council, Inc.*, 851 F. Supp. 2d at 942.

255. *Id.* at 943.

256. *Id.*

257. *Id.* at 957–58. At least one scholar has proposed doctrine of unconstitutional conditions as a remedy for similar situations that arise to *Martinez* and cases that address nondiscrimination policies in public fora. *See* Richard A. Epstein, *Church and State at the Crossroads: Christian Legal Society v. Martinez*, CATO SUP. CT. REV., 105, 108–10 (2010). Nevertheless, the doctrine is subject to a test that is similar to the one for a limited public forum. The government action in a limited public forum and the government condition for the waiver of a constitutional right must be both reasonable and viewpoint neutral. *Compare* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2986 (2010), *with Cradle of Liberty Council, Inc.*, 851 F. Supp. 2d at 948. Given that *Martinez* decided that Hastings's all-comers policy was both reasonable and viewpoint neutral, an analysis under the doctrine of unconstitutional conditions will probably yield the same result. *See* Boy Scouts of Am. v. Wyman, 335 F.3d 80, 92 (2d Cir. 2003) (stating that a case involving the "denial of access to a nonpublic forum or ... the denial of a government benefit" made no difference in how the court analyzed it, because both were subject to a similar standard of review).

258. Christian Legal Soc'y v. Walker, 453 F.3d 853 (7th Cir. 2006).

of Law revoked its official recognition[259] of CLS because CLS refused to admit homosexual members, which violated the law school's nondiscrimination policy.[260] Although CLS's meetings were open to all students, only Christian members and officers could vote and participate in CLS's decision-making process.[261] Unlike *Martinez*, where the Court declined to decide the merits of the case regarding Hastings's nondiscrimination policy, *Walker* was decided in light of the law school's nondiscrimination policy.[262]

The court recognized that if the "government forces a group to accept for membership someone the group does not welcome and the presence of the unwelcome person 'affects in a significant way the group's ability to advocate' its viewpoint, the government has infringed on the group's freedom of expressive association."[263] Furthermore, the court stated that the law school had significantly burdened CLS's right of expressive association to the point where its defining identity might "cease to exist."[264] "It would be difficult for CLS to sincerely and effectively convey a message of

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259. Much like in *Martinez*, the revocation of CLS's membership caused it to lose the following benefits:

> [A]ccess to the law school List-Serve (the law school's database of e-mail addresses), permission to post information on law school bulletin boards, an appearance on lists of official student organizations in law school publications and on its website, the ability to reserve conference rooms and meeting and storage space, a faculty advisor, and law school money.

Id. at 857.

260. The law school's nondiscrimination policy was actually embodied in two policies:

> The first is SIU's Affirmative Action/Equal Employment Opportunity Policy.... [which] states that SIU will "provide equal employment and education opportunities for all qualified persons without regard to race, color, religion, sex, national origin, age, disability, status as a disabled veteran of the Vietnam era, sexual orientation, or marital status." The second is a policy of the SIU Board of Trustees which provides that "[n]o student constituency body or recognized student organization shall be authorized unless it adheres to all appropriate federal or state laws concerning nondiscrimination and equal opportunity."

Id. at 858.

261. *Id.* at 862–63.

262. *Id.* at 857.

263. *Id.* at 861 (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000)).

264. *Id.* at 863. The Court emphasized that "CLS's beliefs about sexual morality are among its defining values; forcing it to accept as members those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to cease to exist." *Id.*

disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct."[265]

The court did not decide whether the law school constituted a particular forum.[266] Nevertheless, the court assumed that even if the law school was a nonpublic forum, CLS was likely to succeed on its claims for a preliminary injunction because it is probable that the law school's action constituted viewpoint discrimination.[267] "CLS is the only student group that has been stripped of its recognized status on the basis that it discriminates on a ground prohibited by SIU's Affirmative Action/EEO [nondiscrimination] policy,"[268] even though other student groups discriminated on the basis of religion and even gender.[269]

In *Association of Faith-Based Organizations v. Bablitch*,[270] a case decided after *Walker*, a district court within the Seventh Circuit held that a Wisconsin state entity cannot use its nondiscrimination policy to exclude groups from participating in state sponsored charity campaigns.[271] In that

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265. *Id.*

266. *Id.* at 866.

267. *Id.* at 867. Additionally, the court held that CLS was likely to succeed on it claims because the facts of case were "legally indistinguishable from *Healy*.... CLS was deprived of the same benefits as the student group in *Healy*. Both were frozen out of channels of communication offered by their universities; both were denied university money and access to private university facilities for meetings." *Id.* at 864.

268. *Id.* at 866. The court especially noted:

> What interest does SIU have in forcing CLS to accept members whose activities violate its creed other than eradicating or neutralizing particular beliefs contained in that creed? SIU has identified none. 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.

Id. at 863.

269. *Id.* The court elaborated on several specific examples:

> The Muslim Students' Association, for example, limits membership to Muslims. Similarly, membership in the Adventist Campus Ministries is limited to those "professing the Seventh Day Adventist Faith, and all other students who are interested in studying the Holy Bible and applying its principles." Membership in the Young Women's Coalition is for women only, though regardless of their race, color, creed, religion, ethnicity, sexual orientation, or physical ability.

Id.

270. Ass'n of Faith-Based Orgs. v. Bablitch, 454 F. Supp. 2d 812 (W.D. Wis. 2006).

271. *Id.* at 816–17.

case, a Wisconsin administrative committee[272] banned a number of religious organizations participating in a state charity campaign that was directed at public employees.[273] The defendants banned religious organizations from the charity campaign because the religious organizations violated an administrative nondiscrimination policy[274] by discriminating on the basis of religion within their membership structures.[275] The religious organizations claimed that the nondiscrimination policy infringed on their expressive association because it was analogous to "forcing inclusion of board members who do not hold similar beliefs to those of the organization[s]."[276]

The court disagreed and held that this was not a case of forced inclusion because the nondiscrimination policy did not intrude on religious organizations' right to control their membership and express their views.[277] Unlike the student organizations in the *Healy* and *Walker* cases, the continued existence of these religious organizations did not depend on their participation in the charity drive.[278] Therefore, there was no indirect coercion for the religious organizations to include members that they did not desire.[279]

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272. Any organization that wished to participate in the charity campaign had to receive approval from the "Eligibility Committee," a subsidiary of the Wisconsin Department of Administration. *Id.* at 813.

273. *Id.*

274. The nondiscrimination policy regarding the charity campaign, was embodied in an administrative regulation, which stated:

> The charitable organization shall have a policy and procedure of nondiscrimination in regard to race, color, religion, national origin, handicap, age, or sex applicable to persons served by the charitable organization, applicable charitable organization staff employment, and applicable to membership on the charitable organizations governing board.

Id.

275. *Id.* at 813–14.

276. *Id.* at 815.

277. *Id.* at 815–16. The court also commented that "neither *Healy* nor *Christian Legal Society* stand for the proposition that any withholding of benefits, no matter how slight relative to the functioning of the organization, amounts to the state compelling an organization to admit unwanted members." *Id.* at 816.

278. *Id.*

279. *Id.* "Nothing suggests that the absence of that benefit in anyway threatens the members from pursuing their organizational objectives. Nothing suggests that any member would be compelled to abandon its rights to expressive association in exchange for this limited benefit." *Id.*

Furthermore, the court, relying on the Second Circuit case of *Wyman*, declared that the charity campaign was a nonpublic forum.[280] Nevertheless, unlike *Wyman*, the court reached a different result.[281] In contrast to *Wyman*, where Connecticut law prohibited state sponsored charity campaigns from aiding groups that discriminate on the basis of sexual orientation, Wisconsin law allows religious organizations to discriminate on the basis of religion in selecting their members.[282] Therefore, the Court held that the nondiscrimination policy, as applied, was unreasonable under the standard for a nonpublic forum because it stood as a "single stark exception to a consistent state policy."[283]

4. Ninth Circuit

Both before and after the *Martinez* decision, the Ninth Circuit held that a state-run school may use its nondiscrimination policy to force a student group to accept nonmembers.[284] Nevertheless, the *Martinez* decision strengthened the Ninth Circuit's position. In *Alpha Delta Chi-Delta Chapter v. Reed*,[285] San Diego State University denied official recognition to both a Christian fraternity and a Christian sorority for violating the school's nondiscrimination policy because they required "that their members and officers profess a specific religious belief, namely, Christianity."[286] The

280. *Id.*

281. *Compare Bablitch*, 454 F. Supp. 2d at 816–17, *with* Boy Scouts of Am. v. Wyman, 335 F.3d 80, 84–85 (2d Cir. 2003).

282. *Bablitch*, 454 F. Supp. 2d at 817. "Wisconsin does not espouse a policy against discrimination by religious groups in choosing members of their faith as directors and employees, and has affirmatively supported such rights. Such discrimination is, of course, fundamental to the nature of religious organizations and their right of expressive association." *Id.*

283. *Id.* at 817–18. The court declined to decide whether the nondiscrimination policy, as written or as applied, was viewpoint neutral. *Id.* at 818.

284. Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1743 (2012); Truth v. Kent Sch. Dist., 542 F.3d 634, 645 (9th Cir. 2008) (holding that a public high school may use its nondiscrimination policy to deny a student Bible club official recognition), *overruled on other grounds by* Los Angeles County v. Humphries, 131 S. Ct. 447 (2010) (the overruling pertained to a § 1983 procedural matter and did not address the merits of the foregoing case); *see* Christian Legal Soc'y. v. Eck, 625 F. Supp. 2d 1026, 1032–33 (D. Mont. 2009) (holding that a state institution, such as a university, may use its nondiscrimination and open membership policies to deny a student religious club official recognition).

285. *Reed*, 648 F.3d 790.

286. *Id.* at 796.

Ninth Circuit extended the reasoning from *Martinez* to resolve an issue that the Court left open: nondiscrimination policies.[287] Given that the fraternity and sorority brought both an expressive association and free speech claim, the court held that in light of *Martinez*, both of these claims merge because the school was a limited public forum.[288] Therefore, the school's nondiscrimination policy merely needed to be reasonable and viewpoint neutral to pass constitutional muster.[289] The nondiscrimination policy was reasonable because the purpose of the school's student organization program was "to promot[e] diversity and nondiscrimination,"[290] and the fraternity and sorority had alternative avenues of communication besides the forum from which they had been excluded.[291] The nondiscrimination policy was facially viewpoint neutral because the policy's purpose was not to suppress a particular viewpoint but rather to "remove access barriers imposed against groups that have historically been excluded."[292] The school still allowed the fraternity and sorority to express their message and exclude anyone from membership.[293] The school simply denied them the privileges

287. *Id.* at 795, 798. "We see no material distinction between San Diego State's student organization program and the student organization program discussed in *Christian Legal Society*...." *Id.* at 797.

288. *Id.* at 798.

289. *Id.*

290. *Id.* at 799.

291. *Id.*

292. *Id.* at 801. Earlier that year, a district court within the Ninth circuit decided a case that was similar to *Reed*, but it did not involve the public fora doctrine. In *Apilado v. North American Gay Amateur Athletic Alliance*, three heterosexuals were disqualified from competing in the Gay Softball World Series because the game's rules only allowed "'a maximum of two Heterosexual players'" per team. Apilado v. N. Am. Gay Amateur Athletic Alliance, 792 F. Supp. 2d 1151, 1155 (W.D. Wash. 2011) (quoting Dkt. No. 34 Ex. 2, *Apilado*, 792 F. Supp. 2d 1151 (No. C10-0682)). Although the district court held that the homosexual sports club was a public accommodation under the state's nondiscrimination law, the court also held that there was no "compelling state interest in allowing heterosexuals to play gay softball" that also overrode the burden on the homosexual sports club's expressive association. *Id.* at 1160, 1163. "It would be difficult for the NAGAAA[,the homosexual sports club,] to effectively emphasize a vision of the gay lifestyle rooted in athleticism, competition and sportsmanship if it were prohibited from maintaining a gay identity." *Id.* at 1162. Therefore the homosexual sports club could place a cap on heterosexual membership so that it could preserve its expressive message. *Id.*

293. *Reed*, 648 F.3d at 803.

of official recognition.[294] Therefore, the school's nondiscrimination policy was facially valid.[295]

5. Eleventh Circuit

A district court within the Eleventh Circuit also agrees with the Ninth Circuit.[296] In *Beta Upsilon Chi v. Machen*,[297] the University of Florida denied a Christian fraternity[298] official recognition.[299] The school claimed that the fraternity's "requirement that its members believe in Jesus Christ is a violation of UF's Nondiscrimination Policy because it discriminates against

294. *Id.* The benefits of official recognition included "university funding, use of San Diego State's name and logo, access to campus office space and meeting rooms, free publicity in school publications, and participation in various special university events." *Id.* at 795.

295. *Id.* at 805. Despite these grim results for the fraternity and sorority, the Ninth Circuit remanded the case to the trial court to determine if it had exempted certain groups from the policy while not granting such an exemption to Plaintiffs. *Id.*

296. *See* Beta Upsilon Chi v. Machen, 559 F. Supp. 2d 1274, 1278 (N.D. Fla. 2008), *vacated as moot and remanded sub nom.* Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla. v. Machen, 586 F.3d 908 (11th Cir. 2009). The appeals court vacated the district court's order denying the Christian fraternity's motion for a preliminary injunction because the school amended its policy to accommodate the fraternity. *Id.* at 918. It then remanded the case for dismissal. *Id.* at 915, 918. Nevertheless, the fact that the appeals court never addressed the merits of the fraternity's claims means that district courts within the Eleventh Circuit may still rely on this case and even *Martinez* to compel groups to associate with outsiders.

297. *Machen*, 559 F. Supp. 2d at 1274.

298. The Christian fraternity was known as Beta Upsilon Chi, Upsilon Chapter, (hereinafter "BYX"), which is "the nation's largest Christian fraternity" *Id.* at 1276. BYX required students to go through a pledge process to be inducted as members. *Id.*

> The purpose of the pledge process is to examine the applicants' understanding of salvation, their personal relationship with Jesus Christ, and their willingness to adhere to guidelines of and work toward fulfilling the purpose of BYX. During the interview segment of the pledge process, the applicants are asked questions about their Christian experience, Christian beliefs and willingness to adhere to the organization's Statement of Faith and to conform with the organization's Code of Conduct.

Id.

299. *Id.* at 1277. Like *Martinez*, and even *Healy*, the benefits of being an officially recognized student organization at the University of Florida were "priority use of facilities on campus, eligibility to seek University funding, having access to bulletin boards in high traffic areas of campus, appearing in student organization lists in UF publications, and having a university-sponsored website and email address." *Id.*

non-Christians on the basis of religious belief or creed."[300] The trial court used *Dale* as a model for analyzing this case and found that the fraternity engaged in expressive association.[301] Nevertheless, unlike the Supreme Court's decision in *Dale*, the court did not believe that the school's nondiscrimination policy materially burdened the fraternity, even if it coerced the fraternity into opening their membership to non-Christians.[302] In fact, the court believed that this case was distinguishable from *Dale*.[303] Purportedly, the difference was that in *Dale* the Boy Scouts barred an activist from membership who spoke out against the Boy Scouts's values, but, here, the fraternity at the school attempted to bar students from membership solely because they were non-Christians.[304] The trial court also contended that the school's rejection of the fraternity was motivated by nonideological reasons because other religious fraternities gained official recognition by adhering to the school's nondiscrimination policy.[305] Therefore, the school's nondiscrimination policy amounted to regulation of conduct and not belief or expression.[306]

III. PROBLEM

The ideals of inclusiveness within a group, regardless of a person's race, gender, religion, or other characteristics of status that nondiscrimination policies strive for are generally admirable. Although, in the abstract, there is nothing wrong with the ideals behind a nondiscrimination policy, a governing entity can use a nondiscrimination policy to discourage an individual's legitimate exercise of constitutional rights. The Constitution guarantees the right of every individual to believe what he wishes to believe

300. *Id.* The school's nondiscrimination policy "require[d] that all student organizations state in their organizational constitutions that they will not discriminate on the basis of race, creed, color, sex, age, national origin, or disability." *Id.*

301. *Id.* at 1278.

302. *Id.*

303. *Id.* at 1279 n.2.

304. *Id.* The court found that "BYX has failed to show that the forced inclusion of a non-Christian in their group meetings or other functions will prevent BYX from encouraging their Christian members in their faith, fostering unity with like-minded Christians, and teaching Christian leadership. *Id.* at 1278.

305. *Id.* at 1279–80.

306. *Id.*

and to associate with others who hold those beliefs without government interference.[307]

A. *Christian Legal Society v. Martinez: A Trojan Horse for the Diminution of Associational Freedom*

1. *Martinez* Downgrades Some Expressive Association Claims from Strict Scrutiny to a Lesser Level of Scrutiny

Prior to *Martinez*, the government could only infringe on a group's expressive association if it withstood a form of strict scrutiny review by showing a compelling state interest that is narrowly tailored.[308] This rule applied regardless of the forum of the expressive activity.[309] Nevertheless, *Martinez* modified the rule. Now, in the context of a limited public forum, if a claimant brings a free speech claim and an expressive association claim, both claims merge and are analyzed under a public fora analysis.[310] Although *Martinez* only addressed this in a limited public forum,[311] it is likely that the *Martinez* rule will extend to other public fora in future cases. Naturally, a claimant would desire to argue alternative theories to win his case. Given that speech and expressive association are related claims, an infringement on expressive association can also be an infringement on speech because the forced inclusion of a nonmember into an association may alter its speech. For example, it is logical to extend this rule to a nonpublic forum where the claimant brings an identical claim to *Martinez*. If this prophecy is fulfilled, government regulation of expressive activity in both a traditional public forum and a designated public forum will remain subject to strict scrutiny, but government regulation of expressive activity will only be subject to a lesser level of scrutiny in a limited or nonpublic forum based on prior precedent.

One way around the *Martinez* rule is to allege an expressive association claim without alleging an additional free speech claim, elevating the standard of review to strict scrutiny. Nevertheless, it is doubtful that future courts will allow a claimant to utilize this strategy to avoid the *Martinez* rule because freedom of association is especially implied from and is similar to

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307. *See* U.S. CONST. amend. I; Griswold v. Connecticut, 381 U.S. 479, 483 (1965); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

308. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

309. *See id.* at 622; Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2985 (2010).

310. *Martinez*, 130 S. Ct. at 2985–86.

311. *Id.* at 2986.

the freedom of speech as well as other rights in the First Amendment.[312] Both speech and expressive association are similar activities.[313] The only significant difference is that expressive association involves the right to form groups to express certain ideas, which includes the right to exclude individuals from the group who threaten to alter its message.[314] In fact, the Court stated in dicta that "the same considerations that have led us to apply a less restrictive level of scrutiny to speech in limited public forums as compared to other environments apply with equal force to expressive association occurring in limited public forums."[315] Therefore, it should come as no surprise if, in a subsequent case, the Court begins to analyze exclusively freedom of association cases under a public fora doctrine.

2. *Martinez* Allows the Regulation of Viewpoint Under the Premise of Regulating Conduct

The Court's primary justification for forcing a group to accept members that it does not desire is that they are merely regulating conduct and not the group's viewpoint.[316] The Court assumes that an association's members are still free to promote their ideas, even if they must accept a nonmember. The problem is that this decision opens the door for the government to regulate conduct as a pretext for discriminating against a group's viewpoint.[317]

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312. *See id.* at 2985. Even before *Martinez*, some courts have refused to recognize a substantive difference between a freedom of speech claim and freedom of association claim brought by the same party. Illiano v. Mineola Union Free Sch. Dist., 585 F. Supp. 2d 341, 355 (E.D.N.Y. 2008) ("Expressive association claims, such as the Plaintiff's claim that she was retaliated against for associating with Jews, are considered to be the equivalent of free speech claims .... [T]he plaintiff's freedom of association claim is duplicative of her inviable freedom of speech claim." (internal quotation marks omitted)); Econ. Opportunity Comm'n v. Cnty. of Nassau, 106 F. Supp. 2d 433, 439 (E.D.N.Y. 2000) (holding that a nonprofit community organization failed establish that a municipality compelled it to associate with an general contractor) ("Expressive association claims, such as the Plaintiffs' claims that they have been retaliated against for their associations with minority groups and the poor, are considered to be the equivalent of free speech claims, since the expressive conduct alleged is inextricably linked to protected speech."); Birmingham v. Ogden, 70 F. Supp. 2d 353, 368–69 (S.D.N.Y. 1999) ("Expressive association is considered a form of 'speech,' in the way that certain expressive conduct has been held to constitute speech.").

313. NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

314. *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000).

315. *Martinez*, 130 S. Ct. at 2985 (citations omitted).

316. *Id.* at 2988, 2991, 2994.

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

Martinez ignores the prior case of *Healy*, where the Court held that a university cannot deny a student club official recognition solely because it disagrees with the club's philosophy.[318] The facts of *Healy* are nearly on point with the facts of *Martinez*. Like the Christian Legal Society in *Martinez*, the Students for a Democratic Society in *Healy* were "denied the use of campus facilities, as well as access to the customary means used for communication among the members of the college community."[319] The only significant distinction between *Healy* and *Martinez* is the group's identity: discrimination against a group that advocated a philosophy of violence, compared to discrimination against a harmless religious group.[320] Essentially, *Martinez* signals a reversal of the Court's holding in *Healy*, where the Court chose to refrain from regulating viewpoint. Now the government can regulate viewpoint, as long as it can construe the viewpoint as conduct.

B. *The Circuit Courts: The Problem Persists*

Martinez's failure to address the relationship between nondiscrimination policies and freedom of association technically leaves, at least on the surface, the circuit courts split on this issue. The Seventh Circuit holds that nondiscrimination policies cannot be used to exclude expressive associations that discriminate based on membership.[321] The Second Circuit, Ninth Circuit, and a district court within the Eleventh Circuit allow state entities to use their nondiscrimination policies to alter the core group dynamics of associations that meet on government property that either constitutes a limited or nonpublic forum.[322] A district court within the

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318. Healy v. James, 408 U.S. 169, 187–88 (1972).

319. *Martinez*, 130 S. Ct. at 3007 (Alito, J., dissenting).

320. *Id.* at 3008.

321. *See* Christian Legal Soc'y v. Walker, 453 F.3d 853 (7th Cir. 2006).

322. *See* Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 799 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1743 (2012); Hsu *ex rel.* Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 862 (2d Cir. 1996); Beta Upsilon Chi v. Machen, 559 F. Supp. 2d 1274, 1279 (N.D. Fla. 2008), *vacated as moot and remanded sub nom.* Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla. v. Machen, 586 F.3d 908 (11th Cir. 2009); Chi Iota Colony of Alpha Epsilon PI Fraternity v. City Univ. of N.Y., 443 F. Supp. 2d 374 (E.D.N.Y. 2006), *vacated by* Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136 (2d Cir. 2007) (vacating the district court's issuance of a preliminary injunction, which was issued on the belief that the fraternity was likely to succeed on its claims regarding intimate association).

Third Circuit would resolve this issue either way, depending on the facts of the case at hand.[323]

Although the Second and Eleventh Circuit cases were decided before *Martinez*, they follow a path of analysis that is similar to *Martinez*. It is true that these circuits never directly applied a public fora analysis. Nevertheless, they allow the regulation of viewpoint under the premise of regulating conduct and they base their decisions on whether forced inclusion would substantially alter the group's message. A closer reexamination of the relevant cases from both of these circuits is warranted.

In the Second Circuit case of *Hsu ex rel. Hsu*,[324] the court decided that the state may force an after school religious club to accept outsiders as members and allow them to run for all but three officer positions.[325] The court believed that only the president, vice president, and music coordinator positions were essential to fostering the group's expressive religious message and that forced inclusion in other aspects would not harm the group.[326] The Second Circuit case of *Chi Iota Colony of Alpha Epsilon PI Fraternity*[327] reached a similar result because the court did not believe that male solidarity justified excluding women from an all-male Jewish club.[328] Essentially, the court believed the status of being a male was unrelated to the expression of Jewish culture.[329] The Second Circuit case of *Boy Scouts of America v. Wyman*[330] allows a government entity to use its nondiscrimination policy to exclude expressive groups from participating in government sponsored charity campaigns.[331] Here, the court believed that the government may justly use its nondiscrimination policy to exclude the Boys Scouts from access to a nonpublic forum because the Boy Scouts did not allow homosexuals to become members of their group.[332]

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323. *See* Cradle of Liberty Council, Inc. v. City of Philadelphia, 851 F. Supp. 2d 936, 958 (E.D. Pa. 2012).

324. *Hsu ex rel. Hsu*, 85 F.3d 839.

325. *Id.* at 857–58.

326. *Id.*

327. *Chi Iota Colony of Alpha Epsilon PI Fraternity*, 443 F. Supp. 2d at 374.

328. *Id.* at 393.

329. *Id.*

330. Boy Scouts of Am. v. Wyman, 335 F.3d 80 (2d Cir. 2003).

331. *Id.* at 84–85.

332. *Id.*

The Eleventh Circuit case of *Beta Upsilon Chi v. Machen*[333] also permitted a state university to regulate belief, under the premise of regulating conduct. There, the trial court believed that a university's nondiscrimination policy only regulated conduct because several student religious organizations gained official recognition by adhering to the policy.[334] Therefore, it was permissible to deny a Christian student organization official recognition because they excluded non-Christians.[335]

Like the *Martinez* case, in each of these cases, the courts believed that they were regulating conduct rather than the group's beliefs. Although the plaintiffs in each of these cases contended otherwise, the courts chose to question the clubs' sincerely held beliefs and expressions. The courts have failed to recognize that "the particular conduct at issue here constitutes a form of expression that is protected by the First Amendment."[336] When the government does not allow expressive associations, such as religious, cultural, or philosophical groups to express their beliefs because they limit their membership to those who share those beliefs, the government engages in viewpoint discrimination.[337]

Regarding the Seventh Circuit case of *Christian Legal Society v. Walker*,[338] it resolved before *Martinez*'s fateful decision.[339] Although the Seventh Circuit may decline to extend the *Martinez* rule to future cases on nondiscrimination policies, the circuit may find that the difference between an all-comers policy and nondiscrimination policy is *de minimis* enough to warrant an extension of the *Martinez* rule. In fact, this was the view held by

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333. Beta Upsilon Chi v. Machen, 559 F. Supp. 2d 1274 (N.D. Fla. 2008), *vacated as moot and remanded sub nom.* Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla. v. Machen, 586 F.3d 908 (11th Cir. 2009).

334. *Id.* at 1279–80.

335. *Id.* at 1279.

336. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 3011 (2010) (Alito, J., dissenting).

337. *Id.* The freedom to form and express beliefs is an essential right of every American citizen.

> It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.

United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 817 (2000).

338. Christian Legal Soc'y v. Walker, 453 F.3d 853 (7th Cir. 2006).

339. *Compare Martinez*, 130 S. Ct. at 2971, *with Walker*, 453 F.3d at 853.

the Ninth Circuit in *Alpha Delta Chi-Delta Chapter v. Reed*[340] when it extended the *Martinez* rule to nondiscrimination polices.[341] "[W]hen a university excludes a student organization from official recognition for refusing to comply with the school's *nondiscrimination policy*, both freedom of speech and freedom of expressive association challenges are properly analyzed under the limited-public-forum doctrine."[342]

After examining where circuit courts stand both before and after *Martinez*, the future of a person's right to associate looks grim. Overruling *Martinez* would benefit liberty because freedom of association cases would be decided under the *Roberts* framework. Nevertheless, this raises another issue because the *Roberts* framework leaves much to be desired.

C. *A Return to the Roberts Framework Is Inadequate*

Although *Roberts* announced a framework for addressing freedom of association cases, this framework opened the door for a diminution of associational rights, compared to its prior cases. The *Roberts* limitation effectively deprived individuals who did not fall within intimate association of an extra layer of constitutional protection, even if those individuals had a claim to expressive association.[343] Although *Roberts* indicated that expressive association claims were subject to strict scrutiny,[344] the courts do not always apply that standard in freedom of association cases, in part, because *Roberts* also indicates that these claims should be subject to a balancing test.[345] Even in *Dale*, which was a triumph for the Boy Scouts, the Court still clung to *Roberts*'s implied balancing test regarding expressive association.[346] This test examines whether "the state law would impose any '*serious burden*' on the organization's rights of expressive association. So in these cases, the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other."[347] The problem with this is that it allows courts to apply an arbitrary standard. In

340. Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 797 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1743 (2012).

341. *Id.*

342. *Id.* (emphasis added).

343. Inazu, *supra* note 13, at 559 n.572.

344. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (giving standard of review for expressive association); 16A AM. JUR. 2D *Constitutional Law* § 587 (2013).

345. *Roberts*, 468 U.S. at 626.

346. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648, 658–59 (2000).

347. *Id.* at 658.

Dale, the Court was split five to four on whether coercing the Boy Scouts to admit a homosexual scoutmaster would impose a serious burden on the Boy Scouts's expressive association.[348] Although the Boy Scouts blunted the plaintiff's assault on their freedom in *Dale*, it appears that the courts are willing to question the sincerity of an association's core beliefs.

Another problem is that the *Roberts* standard of review for expressive association departs from the traditional strict scrutiny test itself, which indicates a lesser level of scrutiny.[349] Regarding expressive association, the Court held that "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means *significantly less restrictive* of associational freedoms."[350] The traditional strict scrutiny test is that the government action must achieve a compelling state interest and be narrowly tailored in the *least restrictive means* and not *significantly less restrictive* means.[351] In fact, some courts have interpreted this standard to be lower than strict scrutiny.[352] For example, in the Second Circuit case of

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348. *Id.* at 642.

349. John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 175 (2010).

350. *Roberts*, 468 U.S. at 623 (emphasis added).

351. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813, 816 (2000) (holding that a content-based restriction on the transmission hours of sexually oriented programming failed strict scrutiny's narrowly tailoring requirement). The traditional strict scrutiny requirement is a very high standard.

> Strict scrutiny varies from ordinary scrutiny by imposing three hurdles on the government. It shifts the burden of proof to the government; requires the government to pursue a "compelling state interest;" and demands that the regulation promoting the compelling interest be "narrowly tailored."
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> . . . .
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> Strict scrutiny's "narrow tailoring" requirement provides a means to examine the government's "precision of regulation," allowing the Court to uphold government action "only if . . . it is necessary to achieve . . . [the] compelling interest" that the government has asserted as the purpose of its action. Narrow tailoring demands that the fit between the government's action and its asserted purpose be "as perfect as practicable." Strict scrutiny's narrow tailoring requirement means that legislation must be neither overinclusive nor underinclusive.

Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 359–61 (2006) (footnotes omitted).

352. *See* Inazu, *supra* note 349, at 176 n.143.

Chi Iota Colony of Alpha Epsilon PI Fraternity,[353] the court relied on this lesser level of scrutiny to hold that a state university may compel an all-male Jewish fraternity to accept female members.[354] "The mere fact that the associational interest asserted is recognized by the First Amendment does not necessarily mean that a regulation which burdens that interest must satisfy strict scrutiny."[355] Therefore, even if the Court were to abandon the *Martinez* rule as it pertains to freedom of association and speech in limited public fora, the *Roberts* standard still fails to provide the full amount of protections to which associations, especially private ones, are entitled under the First Amendment.

More crucial than the inconsistency and arbitrariness of the *Roberts* standard of review is that what is missing from the *Roberts* framework—i.e., intimate and expressive association—is a separate associational privacy analysis.[356] Specifically, the *Roberts* framework ignores prior case law, which makes clear that "'freedom to associate and privacy in one's associations' . . . [is] a peripheral First Amendment right."[357] Instead, *Roberts* limits associational privacy to a subset of intimate association.[358] This implies that small intimate groups are entitled to privacy within their associations, but large expressive groups are generally not entitled to the

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353. Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136 (2d Cir. 2007).

354. *Id.* at 139.

355. *Id.*

356. Although the post *Roberts* Court has never articulated a separate associational privacy analysis, the concept is implied within the post-*Roberts* opinions. N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 20 (1988) (Scalia, J., concurring) (noting that the Court "assumes for purposes of its analysis, but does not hold, the existence of a constitutional right of private association for other than expressive or religious purposes"); *see* Allen, *supra* note 36, at 910.

> Private associations are entitled by the First Amendment to segregate themselves in exclusive physical domains, hold secrets, confidences, and embrace viewpoints and messages that may be offensive to others. Government cannot tell us whom or what to like. First Amendment associational privacy cases, like Fourteenth Amendment decisional privacy cases, trade, for better and for worse, on the notion that privacy "amounts to the state of the agent having control over decisions concerning matters that draw their meaning and value from the agent's love, caring, or liking."

Id. at 913.

357. Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (quoting NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 462 (1958)).

358. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 631 (1984) (O'Connor, J., concurring).

same level of protection.[359] Nevertheless, there are a few narrow instances where courts may ignore the *Roberts* framework and still follow the *Patterson* approach by applying an associational privacy analysis to expressive groups.[360] The seminal example is when the government attempts to compel groups to disclose internal information.[361] In contrast, courts that have addressed associational privacy outside of the *Patterson* context tend to analyze it under the intimate association prong of the *Roberts* framework.[362] Therefore, when it comes to coercing groups to

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359. *Id.*

360. *Compare* DeGregory v. Attorney Gen. of N.H., 383 U.S. 825, 827–29 (1966) (holding that a court that jailed a private person for refusing to answer questions pertaining to his prior association with communist groups violated the First Amendment's protection of associational privacy), *and Patterson*, 357 U.S. at 466 ("[T]he immunity from state scrutiny of membership lists . . . is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment."), *with In re* Motor Fuel Temperature Sales Practices Litig., 641 F.3d 470, 481 (10th Cir. 2011) (applying a *Patterson* associational privacy analysis and holding that a court's discovery order that compelled the disclosure of a trade group's prelobbying communications violated the trade group's right to associate), *cert. denied*, 132 S. Ct. 1004 (2012), *and* Guthrey v. Cal. Dep't of Corr. & Rehab., 1:10-CV-02177-AWI, 2012 WL 2499938, at *9–11 (E.D. Cal. June 27, 2012) (holding that a discovery request violated a party's right to privacy in his religious associations under the First Amendment).

361. *Patterson*, 357 U.S. at 462; *In re Motor Fuel*, 641 F.3d at 479–80.

362. *See* Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987) ("[T]he freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights. Such relationships may take various forms, including the most intimate."); Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 441–42 (3d Cir. 2000) (holding that intimate association includes private relationships and that a university fraternity that averaged between twenty and eighty members did not constitute an intimate association); Louisiana Debating & Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1493 (5th Cir. 1995) ("The right of private association protects the choice of individuals and organizations 'to enter into and maintain certain intimate human relationships ... against undue intrusion by the State....'" (quoting *Roberts*, 468 U.S. at 617–18)); Griffin v. Strong, 983 F.2d 1544, 1547 (10th Cir. 1993) (holding that familial association, which at its core includes a privacy right, is a subset of intimate association); Payne v. Fontenot, 925 F. Supp. 414, 419 (M.D. La. 1995) (characterizing intimate association as a form of "private association [that] is protected not by the First Amendment, but by the fundamental right of privacy emanating from the [F]ourteenth [A]mendment"); Able v. United States, 863 F. Supp. 112, 115 (E.D.N.Y. 1994) (relying on *Roberts* to hold that intimate association is related to a right to privacy and is a separate claim from expressive association); Christy v. Servitto, 699 F. Supp. 618, 656 (E.D. Mich. 1988) ("[T]he right to associate consists of two components: the freedom of private association which is a fundamental element of personal liberty under the [F]ourteenth [A]mendment, and the freedom of expressive association under the [F]irst [A]mendment.").

accept members whom they do not want, an associational privacy analysis is lacking in the post-*Roberts* freedom of association cases.

IV. SOLUTION: A MODIFIED ROBERTS FRAMEWORK

A. *The Justification for Finding an Implied Right to Associational Privacy*

In the early years, when the boundaries of the right to associate were in their infancy, the Court recognized that the First Amendment "imposes limitations upon govermental [sic] abridgment of 'freedom to associate and privacy in one's associations.'"[363]Although other provisions in the Bill of Rights,[364] especially the Fourth Amendment,[365] address a right to privacy from government intrusion, no particular amendment can be translated into a general right to privacy.[366] Rather certain amendments protect particular venues of privacy.[367] The concept of privacy is essentially the "right of the individual to be let alone."[368] It is true that the terms *association* and *privacy* are not explicitly mentioned in the Bill of Rights or even the Fourteenth Amendment, but, as will be shown, they are implied.

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363. Katz v. United States, 389 U.S. 347, 350 n.5 (1967) (quoting *Patterson*, 357 U.S. at 462).

364. To some extent, the Third Amendment concerns a right to privacy because it prevents the government from quartering soldiers in homes during peace time. *Id.* The Fifth Amendment's privilege against self-incrimination, in part, concerns "the right of each individual 'to a private enclave where he may lead a private life.'" *Id.* (quoting Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966)).

365. The Fourth Amendment guarantees a reasonable expectation of privacy against the government for unreasonable searches and seizures. *Id.* at 360–61 (Harlan, J., concurring); *see* Kyllo v. United States, 533 U.S. 27, 44 (2001).

366. *Katz*, 389 U.S. at 350.

367. *Id.*

368. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890); *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men.

Id.

Chief Justice Marshall wrote that unlike a legal code, which specifies precisely the actions that the government or individuals are forbidden from taking, the Constitution is a framework.[369] A framework does not require precision, but only that "its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves."[370] This means that when interpreting the Constitution's provisions, especially the Bill of Rights, it is important "to effectuate their purposes—to lend them meanings that ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials."[371] This technique involves using the Constitution's framework to "identify a fundamental human liberty that should be shielded forever from government intrusion."[372]

The First Amendment's specific purpose is to shield private citizens from government intrusions into their freedom of religion, freedom of speech, and freedom of the press and to protect their right to peaceably assemble and to petition the government for a redress of grievances.[373] Nevertheless, the First Amendment is silent about government rules pertaining to expressive behaviors that do not fall squarely within the purview of free speech, religion, peaceful assembly, etc.[374] Therefore, "to give effect to the purpose of the Amendment, we have applied it to regulations of conduct designed to convey a message . . . ."[375]

The application of the First Amendment's specific provisions, imply a broader purpose to protect certain fundamental rights that are incidental to the application of its enumerated provisions. For example, the First Amendment implies a right to believe.[376] The right to associate is analogous

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369. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget that it is a *constitution* we are expounding.").

370. *Id.*

371. Oliver v. United States, 466 U.S. 170, 187 (1984).

372. *Id.* at 186.

373. U.S. CONST. amend. I. The First Amendment says: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

374. *Oliver*, 466 U.S. at 187 n.5.

375. *Id.*

376. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). "Thus the [First] Amendment embraces two concepts,-freedom to believe and freedom to act. The first is absolute but, in

to the right to believe because it "is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means."[377] Implied rights, such as the right to associate and the right to privacy within those associations are an extension of "expression of opinion; and while it is not expressly included in the First Amendment[,] its existence is necessary in making the express guarantees fully meaningful."[378] In fact there is a corollary right of privacy in holding beliefs and sharing those beliefs within a person's associations.[379] "In other words, the First Amendment privilege generally guarantees the right to maintain private associations when, without that privacy, there is a chance that there may be no association and, consequently, no expression of the ideas that association helps to foster."[380] Therefore, an examination of the First Amendment justifies finding an implied right to associational privacy within the First Amendment, which "creates an area into which the Government may not enter."[381]

The next step is to address whether there is an implied right to associational privacy in nonexpressive behavior that falls outside the boundaries of the First Amendment. If there is an implied right to associational privacy in nonexpressive behavior, it is found in the Fourteenth Amendment.[382] The Court in *Patterson* held that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces the freedom of

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the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Id.* at 303–04.

377. Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

378. *Id.* at 483.

379. William O. Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361 (1963).

380. *In re* Motor Fuel Temperature Sales Practices Litig., 641 F.3d 470, 479 (10th Cir. 2011).

381. Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 570 (1963) (Douglas, J., concurring).

382. *See* NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460 (1958). The Fourteenth Amendment, in relevant part, says:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

speech."[383] Even in the *Roberts* case, the Court implied a right to associational privacy, but, unlike the previous cases, it limited the right to intimate association.[384] Nevertheless, the freedom of association is worthless without linking it to a right to privacy to curtail government intrusions into all associations and not merely intimate ones. This right of associational privacy is fundamental and goes deeper than a First Amendment analysis of this issue. It is found in the Fourteenth Amendment and within the structure of the Constitution itself.

Many cases decided under a Fourteenth Amendment theory address fundamental rights.[385] When the Court finds a fundamental right, it is recognized as "'deeply rooted in this Nation's history and tradition,'[386] and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[387] The *Patterson* Court recognized that all liberty would be in jeopardy without the freedom to

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383. *Patterson*, 357 U.S. at 460.

384. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 618–19 (1984); *see also* Inazu, *supra* note 13, at 558–59.

385. *See* MASSEY, *supra* note 102, at 743–44. A Tenth Circuit case gives an excellent summary of the primary protections found in the Fourteenth Amendment.

> The Fourteenth Amendment embodies three different protections: (1) a procedural due process protection requiring the state to provide individuals with some type of process before depriving them of their life, liberty, or property; (2) a substantive due process protection, which protects individuals from arbitrary acts that deprive them of life, liberty, or property; and (3) an incorporation of specific protections afforded by the Bill of Rights against the states.

Miller v. Campbell Cnty., 945 F.2d 348, 352 (10th Cir. 1991).

386. Washington v. Glucksberg, 521 U.S. 702, 721–22 (1997) (quoting Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503 (1977) (plurality opinion)).

387. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)). The philosopher, John Locke, writes:

> [T]he end of the law is not to abolish or restrain but to preserve and enlarge freedom; for in all the states of created beings capable of laws, where there is no law, there is no freedom. For liberty is to be free from restraint and violence from others, which cannot be where there is not law; but freedom is not, as we are told: a liberty for every man to do what he lists—for who could be free, when every other man's humor might domineer over him?—but a liberty to dispose and order as he lists his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.

JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, ch. VI, § 57 (Thomas P. Peardon ed., Prentice-Hall Inc. 1997) (1690).

associate with others and the right to keep the government out of those associations.[388] The government would have unlimited discretion to inquire into the private lives of citizens and to dictate with whom they can or cannot associate.

Fundamental rights also were recognized at the time of the ratification of the Constitution.[389] The Federalist papers are essential to interpreting the role of the Constitution as it relates to fundamental rights. Although the right to privacy, especially associational privacy, is not explicitly expounded on in the Federalist papers, it is implied,[390] particularly in Alexander Hamilton's writings. In Federalist No. 78, Hamilton discusses the role of the judiciary under the proposed constitution.[391] "[T]he independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the *private rights* of particular classes of citizens, by unjust and partial laws."[392] Hamilton foresaw that the new national government, specifically the legislature, would be tempted to pass laws that infringed on the fundamental rights of citizens.[393] Therefore, one of the functions of the judiciary was to act as a check against the legislative branch.[394]

It is true one of the reasons why the Bill of Rights was passed was to protect fundamental rights.[395] Nevertheless, in Federalist No. 84, Hamilton declared that "[t]he truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[396] This is why the Federalists, including

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388. *Patterson*, 357 U.S. at 460.

389. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. "We hold these Truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness . . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

390. *See* Anita L. Allen, *Constitutional Law and Privacy*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 146–47 (Dennis Patterson ed., 2010).

391. THE FEDERALIST NO. 78, at 463 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

392. *Id.* at 469 (emphasis added).

393. *Id.*

394. *Id.*

395. *See* Darien A. McWhirter & Jon D. Bible, PRIVACY AS A CONSTITUTIONAL RIGHT 2, 61 (1992).

396. THE FEDERALIST NO. 84, at 514 (Alexander Hamilton) (Clinton Rossiter ed., 2003). Hamilton further justifies why the Constitution is itself a bill of rights:

Hamilton, asserted that a separate Bill of Rights was not necessary because the Constitution limits the government so that it does not have jurisdiction over what is not enumerated to its respective branches.[397] Hamilton writes that, "a minute detail of particular rights is certainly far less applicable to a Constitution ... which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and *private concerns*."[398] Therefore, in the views of the Federalists, there was no reason to pass the First Amendment because the new government had no powers over the freedoms of religion, speech, peaceful assembly, etc.[399] The problem with listing certain fundamental rights in a bill of rights is that it may instill the dangerous idea that fundamental rights that are not listed are not protected under the Constitution's framework.[400] This may give the government a pretext to trample the rights of citizens,[401] especially associational privacy, as it is seen in the nondiscrimination cases.[402]

> "'WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America.' Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bills of rights and which would sound much better in a treatise of ethics than in a constitution of government."

Id. at 512 (quoting U.S. CONST. pmbl.).

397. *See id.* at 513.

398. *Id.* at 512 (emphasis added).

399. *Id.* at 513.

> Is another object of a bill of rights to define certain immunities and modes of proceeding, which are relative to personal and *private concerns*? This we have seen has also been attended to in a variety of cases in the same plan. Adverting therefore to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention.

Id. at 514–15 (emphasis added).

400. *Id.* at 513.

401. *Id.* Hamilton writes:

> I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?

Id.

402. *See* Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1743 (2012); Hsu *ex rel.* Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d

Therefore, there is an inherent and implied right of associational privacy, with which the government should not interfere, absent a compelling interest that is narrowly tailored in the least restrictive means. The post-*Roberts* decisions have failed to give associational privacy adequate protection. It is time for courts to modify their analysis to provide both groups and individuals with the full protection that they are guaranteed within their constitutional right to associate freely.

B. *Proposed Modification*

Now that associational privacy has been justified both as an indispensable element in the First Amendment's right to associate and as an inherent fundamental right, it should be incorporated into the analysis of future cases. This Comment does not propose to do away with the *Roberts* framework but rather to add to its analysis. The courts should instead apply a three-layer framework by asking whether the group claiming a right to associate engages in intimate, expressive, or private association.[403] The advantage of associational privacy is that it adds another layer of protection. Furthermore, an associational privacy analysis would protect groups that have lacked protection under the traditional *Roberts* framework because they did not fall under either the expressive or intimate classifications.

Given that associational privacy is a fundamental right that extends beyond intimate associations to all forms of associations, the Court should analyze associational privacy cases under traditional strict scrutiny.[404] In this approach, an infringement on associational privacy occurs when the state interferes with the group's right to exclude persons from participating in the group or demands that it disclose confidential information, such as membership lists. Under a strict scrutiny analysis, any government infringement on associational privacy is presumed invalid unless the

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839 (2d Cir. 1996); Beta Upsilon Chi v. Machen, 559 F. Supp. 2d 1274 (N.D. Fla. 2008), *vacated as moot and remanded sub nom.* Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla. v. Machen, 586 F.3d 908 (11th Cir. 2009); Chi Iota Colony of Alpha Epsilon PI Fraternity v. City Univ. of N.Y., 443 F. Supp. 2d 374 (E.D.N.Y. 2006) *vacated by* Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136 (2d Cir. 2007) (The appeals court vacated the district court's issuance of a preliminary injunction, which it issued on the belief that the fraternity was likely to succeed on its claims regarding intimate association.).

403. As used in this Comment, *private association* is synonymous with *associational privacy.*

404. NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958) ("[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.").

government can prove a compelling state interest that is narrowly tailored in the least restrictive means.[405] This approach eliminates the need for courts to arbitrarily inquire into whether the government action imposes a serious burden on the association because it presumes that any infringement on associational privacy is invalid. This is a stronger standard than *Roberts*, which departed from the traditional strict scrutiny analysis.

It is important to examine what constitutes a compelling state interest. It may include emergencies that threaten health and safety[406] and diversity of education within the classroom setting itself.[407] To clarify the latter suggested compelling interest, it should not apply outside the classroom setting when a government entity, such as a state university, invites a private student group or other groups to meet on its property. *Roberts* held that the elimination of gender discrimination was a compelling state interest.[408] Nevertheless, this should be limited to the context of public accommodations, employment, and the classroom setting because this was the original purpose of federal and state civil rights laws.[409] For example, it

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405. *See* Siegel, *supra* note 351, at 359–60.

406. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring in judgment) (stating that the prevention of an imminent race prison riot is a compelling state interest to temporarily segregate the inmates).

407. Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (holding that a "[l]aw [s]chool has a compelling state interest in attaining a diverse student body" through the admissions process).

408. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

409. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 656-57 (2000). According to modern jurisprudential thought, Congress has the power to enforce civil rights laws through its power to regulate interstate commerce. Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (holding that Congress had the power to enforce the Civil Rights Act of 1964 through the Commerce Clause). Alternatively, with respect to race, Congress has the power to enforce civil rights laws through section two of the Thirteenth Amendment because Congress can define racial discrimination as a "badge[] [or] incident[] of slavery." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968); MASSEY, *supra* note 102, at 1168–69; *see* U.S. CONST. amend. XIII. Congress has the power to enforce the Thirteenth Amendment against the federal government, the states, and all private parties. *Jones*, 392 U.S. at 438; MASSEY, *supra* note 102, at 1168–69; *see* U.S. CONST. amend. XIII. Furthermore, with respect to race, but also other issues beyond race such as gender, section five of the Fourteenth Amendment grants Congress the power to remedy historical violations of the Due Process and Equal Protection Causes. U.S. CONST. amend. XIV; *see* City of Boerne v. Flores, 521 U.S. 507, 518–19 (1997); MASSEY, *supra* note 102, at 1171. Nevertheless, Congress can only enforce the Fourteenth Amendment against state action. U.S. CONST. amend. XIV; United States v. Morrison, 529 U.S. 598, 621 (2000); MASSEY, *supra* note 102, at 1170. Section two of the Fifteenth Amendment also grants Congress the power to remedy violations against the right

would be odd for the state to assert that it has a compelling interest to eliminate gender discrimination in a harmless Boy Scout troop and force it to accept female members because it meets at a public high school. The key point to this Comment is that when the government permits private groups to meet on government property, the group's dynamics should be respected so that they can be as selective or nonselective as they choose.[410] "Private organizations often pursue unpopular causes, which produces a great desire to control them."[411] Nevertheless, the structure of the Constitution erects a barricade to create a zone of privacy within a person's associations that the government generally may not enter.[412]

An associational privacy analysis resolves the assault on constitutional liberties from government nondiscrimination policies because it returns to the origins of freedom of association. For example, a university may no longer force religious organizations to include nonreligious members under the premise of regulating conduct, when instead, it is actually regulating belief. The early cases on freedom of association recognized a right to associate, which not only includes a right to share and espouse the same beliefs, but also the right for persons to physically gather together in groups and a right to privacy within those groups.[413] "The associational rights which our system honors permit all white, all black, all brown, and all yellow[,] all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be."[414] If the government wishes to regulate the conduct of groups that it

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to vote on account of race. U.S. CONST. amend. XV; South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2627 (2013) (*Shelby* struck down a congressional formula pertaining to the Voting Rights Act); MASSEY, *supra* note 102, at 1171. Congress can enforce the Fifteenth Amendment against both federal and state action. U.S. CONST. amend. XV.

410. *See* Boy Scouts of Am. v. Dale, 530 U.S. at 656–57.

411. Douglas, *supra* note 379, at 1375; *see* Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 556–57 (1963) ("[W]here the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors and the deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial."); NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 462 (1958) ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.").

412. *See* Douglas, *supra* note 379, at 1376.

413. *See Patterson*, 357 U.S. at 460.

414. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179–80 (1972) (Douglas, J., dissenting). Justice O'Connor also expressed a similar view. *See* N.Y. State Club Ass'n, Inc. v. City of New

invites to meet on its property, it must overcome the proposed privacy standard.

An associational privacy analysis also curtails a repeat of or further expansion of the *Martinez* rule because associational privacy is much broader than expressive association. The rationale in *Martinez* was that free speech claims and expressive association claims were so similar that they were functionally equivalent.[415] Then the Court applied a lesser level of scrutiny under a limited public fora analysis.[416] Although associational privacy is related to expressive behavior, it also pertains to nonexpressive behavior. This means a separate analysis of associational privacy is warranted.

V. CONCLUSION

The right to associate has suffered serious setbacks. Although the early cases that established the right to associate recognized that the privacy within those associations was an essential element of liberty, later cases, such as *Roberts*, drifted away from that philosophy. The floodgates were opened. State government entities began to use their nondiscrimination laws and policies in an attempt to force groups to include those they wished to exclude. This especially manifested itself in the limited public fora context. The United States Supreme Court has failed to resolve this issue and the circuit courts remain split. Furthermore, if this issue were to reach the Court, both the *Martinez* rule and the *Roberts* framework are inadequate to vindicate the rights of associations. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[417] Therefore, it is time for the Court to return to the origins of the right to associate and recognize that there is an inherent right to privacy within associations. Associational privacy is the shield that will protect

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York, 487 U.S. 1, 19 (1988) (O'Connor, J., concurring) ("[T]here may well be organizations whose expressive purposes would be substantially undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background, or who share some other such common bond. The associational rights of such organizations must be respected.").

415. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2985 (2010).

416. *Id.* at 2986.

417. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

groups from being coerced to include individuals whom they wish to exclude.