

CLS v. MARTINEZ AND COMPETING LEGAL
DISCOURSES OVER THE APPROPRIATE DEGREE
OF JUDICIAL DEFERENCE TO THE CO-
CURRICULAR REALM

NEAL H. HUTCHENS*
KRISTIN WILSON**
JASON BLOCK***

I. INTRODUCTION	541
II. LOOKING TO DISCOURSE ANALYSIS WHILE COMPARING AND CONTRASTING OPINIONS IN <i>CLS v. MARTINEZ</i>	543
III. OVERVIEW OF LEGAL ISSUES AT STAKE IN <i>CLS v. MARTINEZ</i>	545
IV. COMPETING LEGAL DISCOURSES IN <i>CLS v. MARTINEZ</i>	550
A. Competing Interpretations of the Record.....	550
B. Clashing Stances Regarding Application of Precedent.....	553
C. Political and Diversity Rhetoric	557
V. REFLECTIONS ON COMPETING LEGAL DISCOURSES IN <i>CLS v.</i> <i>MARTINEZ</i>	559
VI. CONCLUSION.....	563

I. INTRODUCTION

Public colleges and universities have faced legal challenges in recent years from members of student organizations testing the legal permissibility of institutions conditioning official recognition for student

* Neal Hutchens is an assistant professor in the Department of Educational Policy Studies and Evaluation at the University of Kentucky. He received a Ph.D. in Education Policy with a specialization in higher education from the University of Maryland, College Park, and a J.D. from the University of Alabama School of Law.

** Kristin Wilson is the Chief Academic Officer for Hopkinsville Community College, a campus of the Kentucky Community and Technical College System. She received a Ph.D. with an emphasis in Higher and Continuing Education from the University of Missouri-Columbia.

*** Jason Block is a doctoral student in the Department of Educational Policy Studies and Evaluation at the University of Kentucky. He received a J.D. from The Ohio State University Michael E. Moritz College of Law.

groups on adherence to campus nondiscrimination rules.¹ Group members have argued in litigation that campus nondiscrimination rules impinge on their rights related to speech, association, and religion. Legal wrangling over nondiscrimination policies for student organizations reached a high point when a closely divided Supreme Court, in a five-to-four decision, upheld a law school's nondiscrimination policy in *Christian Legal Society v. Martinez*.² The case highlighted glaring differences among Court justices regarding how to interpret the factual issues presented in the record,³ the constitutional standards that should apply to the challenged nondiscrimination policy and, more generally, the extent of judicial deference that courts should extend to institutional decision-making.

This article examines the legal and ideological divisions that existed between the justices in the majority and those in the dissent, by comparing and contrasting the competing opinions from *Martinez*. While much of the article's assessment of the opinions is representative of methods of legal analysis commonly used by attorneys, this article looks to analytical approaches used in qualitative research, specifically methods and concepts associated with discourse analysis. Guided by discourse analysis methods, the article explores the markedly differing ways that the majority and dissenting justices relied on precedent, their competing interpretations of the facts and legal issues presented in the case, and their conflicting characterizations of colleges and universities in relation to nondiscrimination efforts. In examining the divergent legal and factual interpretations at play in *Martinez*, a key goal of the article is to consider the potential legal implications for colleges and universities depending on whether the views of the majority or those of the dissent ultimately prevail in future case law.⁴

1. See *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006); *Every Nation Campus Ministries at San Diego State Univ. v. Achtenberg*, 597 F. Supp. 2d 1075 (S.D. Cal. 2009); *Christian Legal Soc'y v. Eck*, 625 F. Supp. 2d 1026 (D. Mont. 2009).

2. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2978 (2010).

3. For commentary on this issue, see, for example, Julie A. Nice, *How Equality Constitutes Liberty: The Alignment of CLS v. Martinez*, 38 HASTINGS CONST. L.Q. 631, 636 (2011), who discusses how ". . . the extraordinary potshots and retorts between the opinions revealed the heightened tensions between the majority and dissenting Justices."

4. The issue of these competing views arising in future litigation is, in fact, still very relevant in relation to the kind of institutional nondiscrimination policy under scrutiny in *Martinez*. In the decision, the Supreme Court considered the permissibility of an accept-all-comers policy. The focus on such a specific type of policy left unresolved whether a college or university may impose a nondiscrimination rule on student organizations that prohibits membership discrimination on certain grounds, such as religion or sexual orientation, but permits membership exclusion on bases not prohibited by the rule. The U.S. Court of Appeals for the Ninth Circuit has already approved the legal permissibility of such a narrower nondiscrimination policy, and

The article discusses in Part II how discourse analysis helps guide and structure consideration of the *Martinez* opinions. To provide context, Part III provides an overview of the decision from a more conventional legal viewpoint. The article then turns in Part IV to an examination of *Martinez* from a perspective influenced by discourse analysis. In Part V, the article considers the potential legal consequences for higher education depending on whether the stances of the justices in the majority or those in the dissent succeed in future legal decisions. The article concludes in Part VI by underscoring how the competing legal discourses at play in *Martinez* represent not only legal disagreement over college and university nondiscrimination efforts in the student organizational context, but reflect broader discord among justices of the Supreme Court regarding judicial attitudes toward higher education.

II. LOOKING TO DISCOURSE ANALYSIS WHILE COMPARING AND CONTRASTING OPINIONS IN *CLS v. MARTINEZ*

A striking feature from *Martinez* involves how completely in opposition the majority and dissenting justices were in terms of the legal issues at stake, the constitutional standards that should govern colleges' and universities' nondiscrimination policies, and even how to interpret factual issues contained in the record. The competing opinions produced in the decision offer rich data for analyzing the manner in which the majority and concurring opinions competed against the dissenting opinion for intellectual dominance and legitimacy, especially as the opinions capture some of the polarizing political discourse prevalent in the United States regarding higher education institutions.

The authors borrowed from methods and concepts associated with discourse analysis to guide their examination of the decision's opinions in an effort to analyze the clashing views of the justices in *Martinez* in a systematic way. Discourse analysis is the study of the way language (or other forms of communication such as images) is used to describe and build social activities.⁵ Because language is used to describe common aspects of society, the significance and power relations undergirding language often go unarticulated.

Multiple approaches exist to discourse analysis, and the authors looked to one with an emphasis on the analysis of written text and the

other legal challenges to these types of institutional nondiscrimination rules are likely to emerge. *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790 (9th Cir. 2011).

5. See generally NORMAN FAIRCLOUGH, *DISCOURSE AND SOCIAL CHANGE* (1992); see also JAMES PAUL GEE, *HOW TO DO DISCOURSE ANALYSIS: A TOOLKIT* (2011); JAMES PAUL GEE, *AN INTRODUCTION TO DISCOURSE ANALYSIS THEORY AND METHOD* (2nd ed. 2005).

accompanying concept of intertextuality and hegemony.⁶ Intertextuality refers to the understanding that no text is produced in isolation, but, rather, reflects a complex set of relationships between other texts and cultural elements.⁷ In the context of discourse analysis, hegemony refers to the power that dominant groups assert over others;⁸ for example, one group may be the “voice of authority” over other groups. From such a perspective, the Supreme Court represents a dominant group asserting its right over a privileged discourse, namely legal language, to assert what are justifiable practices at colleges and universities in the regulation of student organizations. The competing opinions in *Martinez* provide insight into the struggle for dominance (hegemony) between the justices in the majority and those in the dissent.

It is important to note that in looking to discourse analysis, the goal was not to supplant methods of case interpretation often relied upon by legal scholars. Rather, the authors had the more modest aim of seeking to complement conventional legal analysis of the *Martinez* opinions. Accordingly, the authors do not claim that this approach to analyzing the cases necessarily results in insights dramatically different from those gained when attorneys and legal scholars typically analyze and interpret cases. But, looking to discourse analysis may help to provide a systematic approach when considering the *Martinez* opinions and also result in an orientation to language in legal opinions somewhat distinct from that often taken by attorneys when reading cases.

Following the suggestion that discourse analysis is best undertaken from an interdisciplinary perspective,⁹ the authors come to higher education with differing disciplinary and professional perspectives. While two of the authors are attorneys focusing on law and policy issues in higher education, the other is a higher education practitioner and scholar who relies primarily on qualitative research methods. Two of the authors, one an attorney and one not, coded the four opinions in *Martinez*. “Coding” is used to refer to the creation of separate documents that, based on themes and topics of interest, identified relevant language and passages from which to compare and contrast Justice Ginsburg’s majority opinion,¹⁰ the concurring opinions written by Justices Stevens¹¹ and Kennedy,¹² and the dissenting opinion authored by Justice Alito.¹³

6. See generally FAIRCLOUGH, *supra* note 5.

7. *Id.* at 101–05.

8. *Id.* at 93–96.

9. See generally FAIRCLOUGH, *supra* note 5.

10. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2978 (2010).

11. *Id.* at 2995 (Stevens, J., concurring).

12. *Id.* at 2998 (Kennedy, J., concurring).

13. *Id.* at 3000 (Alito, J., dissenting).

Because both the authors read the data (i.e., opinions) prior to the formation of a codebook, they approached coding with a shared view of the legal discourses under consideration as a hegemonic struggle within the institution of law about the role of colleges and universities and the appropriate degree of judicial deference with regards to the co-curricular realm and issues involving diversity and nondiscrimination. The authors were especially interested in coding for themes related to the following hegemonic cultural struggle: To what extent should legal standards support or restrain institutional nondiscrimination efforts in the student organizational realm? That is, should courts assume a level of trust and deference to colleges and universities in reviewing nondiscrimination policies applicable to student groups or should they operate from a more circumspect position? To help better contextualize the results from the coding of the opinions, the article will review the specific legal issues at play in *Martinez*.

III. OVERVIEW OF LEGAL ISSUES AT STAKE IN *CLS V. MARTINEZ*

In *Martinez*, a chapter of the Christian Legal Society (CLS), which was affiliated with the national group of the same name, initiated a lawsuit against Hastings College of Law after the group's rejection by the law school to become registered as an official student organization.¹⁴ Recognized student organizations at the law school were eligible for a variety of benefits, including access to funding, the ability to send out mass emails, and access to law school equipment and facilities.¹⁵ As a nonregistered student organization, CLS still had access to school facilities to hold meetings and could make announcements on designated bulletin boards and chalk boards.¹⁶ The national CLS organization, with which the Hastings student group had formed an affiliation, required chapters to have members sign a "Statement of Faith."¹⁷ Under the standards of the Statement, the Hastings CLS intended to deny membership to students who refused to sign the Statement, condoned sex outside of marriage, demonstrated "unrepentant homosexual conduct," or disagreed with other religious tenets of the group.¹⁸

Following its denial as a recognized student organization, members of the Hastings CLS initiated a lawsuit, claiming that the action violated members' rights to freedom of speech, religion, and expressive association.¹⁹ The group's challenges proved unsuccessful in federal

14. *Id.* at 2981.

15. *Id.* at 2979.

16. *Id.* at 2981.

17. *Id.* at 2980.

18. *Id.*

19. *Id.* at 2981.

district court and with the U.S. Court of Appeals for the Ninth Circuit.²⁰ Other student groups, however, were successful in legal challenges against institutional nondiscrimination policies.²¹ Seeking to resolve conflicting decisions among federal courts regarding the appropriate standards to evaluate institutional regulation of student organizations, the Supreme Court accepted the *Martinez* case for review.

In considering the case, the Supreme Court could look to several of its previous decisions that had dealt with student organizations. These cases established that the First Amendment, as well as other constitutional protections, applies to the recognition and regulation of student groups at public colleges and universities. In *Healy v. James*,²² for example, the Supreme Court rejected the position that non-recognition of a student organization posed no First Amendment violation because the group could still meet off campus.²³ While making clear that First Amendment principles apply to institutional regulation of student groups, the Court in *Healy* also stated that public colleges and universities possess discretion to prohibit associational activities that “infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.”²⁴

In formulating and refining First Amendment standards applicable to institutional regulation of student organizations, the Supreme Court has relied on its decisions dealing with the regulation of government owned property (i.e. its forum cases).²⁵ Some types of public property, such as streets or sidewalks, are deemed traditional public forums and legally recognized as places historically open to speech.²⁶ Restrictions on the content of speech in a public forum are subject to heightened judicial review.²⁷ Other types of forums are considered nonpublic and are not generally open to the public, with the government possessing considerable control over speech-related issues in such a forum. The Supreme Court has also recognized forums that are voluntarily created by the government but are restricted to certain groups, such as students, and, depending on the

20. *Id.*

21. *See, e.g.*, *Christian Legal Soc’y v. Walker*, 453 F.3d 853 (7th Cir. 2006) (holding that university nondiscrimination policy violated members’ rights of expressive association).

22. 408 U.S. 169 (1972).

23. *Id.* at 169.

24. *Id.* at 189.

25. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263 (1981); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217 (2000).

26. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2984 n.11 (2010).

27. *Id.*

circumstances, limited to certain speech topics.²⁸

Whether in the context of virtual or physical space, the Supreme Court has looked to its forum standards in evaluating the authority possessed by colleges and universities over forums they have created for student groups.²⁹ The Court has held that public colleges and universities may not favor or disfavor particular viewpoints once a campus forum has been created for students.³⁰ For example, an institution may choose to designate a particular student forum for the discussion of political topics, but it could not then choose to grant recognition to the campus Republicans and then deny it to the campus Democrats based on the political views of the second group. In *Rosenberger v. Rector and Visitors of University of Virginia*,³¹ the Supreme Court held that a university could not deny funding to a student publication that sought to advocate a religious viewpoint.³² Under viewpoint neutrality standards, the Supreme Court has also held that public colleges and universities are permitted to use mandatory student fees to support speech by recognized student organizations, as long as funds are distributed in a viewpoint neutral way.³³

Questions regarding college and university authority over student groups persisted following cases such as *Rosenberger*, particularly in light of the Court's decision in *Boy Scouts of America v. Dale*,³⁴ and its limitation on the application of state nondiscrimination standards to private groups. In *Dale*, the Supreme Court held that individuals associated with a Boy Scout troop possessed a First Amendment right to dismiss a scoutmaster because he was gay.³⁵ CLS argued in *Martinez* that its members occupied a legally analogous position as that faced by the Boy Scouts in *Dale*.³⁶ In cases preceding the Supreme Court's decision in *Martinez*, lower federal courts had reached conflicting conclusions regarding the legal permissibility of imposing nondiscrimination policies on student organizations.³⁷

In a five-to-four decision, the Court in *Martinez* affirmed the law school's authority to impose nondiscrimination standards on student groups

28. *Id.*

29. *Id.*

30. *See, e.g.*, *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 830–31 (1995).

31. *Id.*

32. *Id.* at 819.

33. *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217, 217 (2000).

34. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

35. *Id.* at 643.

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

37. *See, e.g.*, *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006); *Every Nation Campus Ministries at San Diego State Univ. v. Achtenberg*, 597 F. Supp. 2d 1075 (S.D. Cal. 2009); *Christian Legal Soc'y v. Eck*, 625 F. Supp. 2d 1026 (D. Mont. 2009).

seeking official institutional recognition.³⁸ Writing for the majority, Justice Ginsburg stated that the case involved the issue of whether a public law school could require officially recognized student organizations to “open eligibility for membership and leadership to all students.”³⁹ The opinion noted that previous decisions prohibited governmental actors, including those at public universities, from denying access to a limited public forum on the basis of an individual’s viewpoint.⁴⁰ The majority determined that the law school sought to impose an “accept-all-comers policy” on CLS in the enforcement of the institution’s nondiscrimination policy.⁴¹ The policy specifically prohibited discrimination on the basis of “race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.”⁴² Rejecting arguments by CLS to the contrary, the majority accepted the law school’s position that an accept-all-comers requirement was how the law school applied the rule to student groups.⁴³

Looking to cases dealing with regulation of governmental property under its control, the majority opinion discussed that previous decisions had grouped governmental property into three types of forums: (1) traditional public forums; (2) designated public forums; and (3) limited public forums.⁴⁴ From these three categories, Justice Ginsburg’s opinion stated that the law school had created a limited public forum for student organizations.⁴⁵ For limited public forums, according to the opinion, a governmental actor may impose restrictions related to speech that are reasonable in light of the purposes served by the forum and that do not discriminate on the basis of viewpoint.⁴⁶

Despite CLS’s efforts, the majority in *Martinez* concluded that the associational rights cases like *Dale* did not provide the appropriate legal framework to assess the student organization’s First Amendment claims.⁴⁷ Instead, the majority determined that standards associated with the limited public forum proved better suited to evaluate institutional regulation of student organizations, with colleges and universities having to satisfy standards of reasonableness and viewpoint neutrality.⁴⁸

Among the primary justifications for using these standards, Justice Ginsburg explained, was that adoption of the legal standards advocated by

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

39. *Id.* at 2978.

40. *Id.* at 2984.

41. *Id.* at 2982.

42. *Id.* at 2979.

43. *Id.* at 2982.

44. *See id.* at 2984 n.11.

45. *Id.* at 2984 n.12.

46. *Id.* at 2984 n.11.

47. *Id.* at 2985–86.

48. *Id.*

CLS would void the less restrictive rules typically associated with regulation of limited public forums if colleges and universities also had to routinely satisfy the standards from the associational rights cases like *Dale* in regulating student organizations.⁴⁹ Additionally, the opinion stated that the situation facing the student group fit “comfortably within the limited-public-forum category” as CLS was only facing “indirect pressure to modify its membership policies” to receive a governmental subsidy.⁵⁰ The organization could still exist and continue to rely on discriminatory membership criteria if it chose to forego the benefits provided by official institutional regulation.⁵¹

By applying the standards of the limited public forum, the majority held that the law school’s policy satisfied constitutional requirements of reasonableness and viewpoint neutrality.⁵² According to the majority opinion, the policy met the reasonableness prong in seeking to make sure that all students had access to co-curricular “leadership, educational, and social opportunities” and also promoted bringing individuals together from diverse backgrounds.⁵³ The accept-all-comers requirement also permitted the law school to enforce its nondiscrimination standards without having to conduct an inquiry into a group’s reasons or motivations for any membership restrictions.⁵⁴ Turning to viewpoint neutrality, Justice Ginsburg explained that the policy easily satisfied this standard because the accept-all-comers requirement applied equally to all groups, regardless of the views expressed.⁵⁵

In contrast, the dissenting justices rejected the notion that in reality the policy actually operated on an accept-all-comers basis.⁵⁶ But, even if accepting that the law school’s standards operated in this manner, the dissenters still disagreed that the policy satisfied constitutional requirements.⁵⁷ Writing for the dissenting justices, Justice Alito described the situation facing CLS as akin to that at issue in cases like *Healy* and *Dale* and represented a substantial burden on students’ associational rights.⁵⁸ Justice Alito stated that the institution created a forum for students analogous to “the same broad range of private groups that nonstudents may form off campus.”⁵⁹ The accept-all-comers policy subverted such an effort

49. *Id.* at 2985.

50. *Id.* at 2986.

51. *See id.*

52. *Id.* at 2991, 2993.

53. *Id.* at 2989.

54. *Id.* at 2990.

55. *Id.* at 2994.

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

57. *Id.* at 3010.

58. *Id.* at 3008–10.

59. *Id.* at 3013.

and ran afoul of cases such as *Dale*, argued Justice Alito, because it prevented student organizations, as expressive associations, from excluding individuals in the same manner than if the government sought to apply such a standard to private groups outside of a campus environment.⁶⁰ The dissenting justices also argued that it appeared that the policy served as a pretext to silence CLS on the basis of the group's views.⁶¹

Martinez reveals decidedly different legal conclusions on the part of the majority and the dissenting justices, as well as contradictory interpretive reactions to the facts presented in the case. Considering the conflicting views or narratives presented in the decision, *Martinez* provides a context to examine competing judicial perceptions of higher education institutions in relation to nondiscrimination initiatives, and of colleges and universities more generally. With these aims in mind, the paper now turns to assessment of the legal narratives jockeying for dominance in *Martinez* through a perspective influenced by discourse analysis.

IV. COMPETING LEGAL DISCOURSES IN *CLS v. MARTINEZ*

After coding the four opinions in *Martinez* in the manner discussed in Part II, three themes seemed especially cogent to the authors. First, the justices, both in the majority and in the dissent, engaged in a remarkably strident dispute over the correct interpretation of issues and facts contained in the record, with this conflict seemingly undergirding the deeply contrasting ideological perspectives in contention. The second theme, which reflected contrasting judicial attitudes toward colleges and universities, including co-curricular situations, involved fundamental disagreement over which prior cases and legal standards should govern review of the law school's nondiscrimination policy. Third, the majority and dissenting justices employed ideologically distinct rhetoric in relation to colleges and universities generally, as well as to the specific nondiscrimination policy at issue in the case.

A. Competing Interpretations of the Record

While the record represented a shared text from a discourse analysis perspective, the majority and dissenting justices disagreed significantly over issues involving its correct interpretation. A basic point of divergence dealt with the actual nondiscrimination policy before the Court and whether the record supported the allegation that the law school had unfairly applied its nondiscrimination policy to CLS in relation to other student groups.

Justice Ginsburg's majority opinion characterized the case as involving the issue of whether a public law school could require officially recognized

60. *Id.* at 3010.

61. *Id.* at 3017.

student organizations to “open eligibility for membership and leadership to all students.”⁶² The majority accepted the law school’s position that, through the institution’s nondiscrimination policy as actually applied, it sought to impose an “accept-all-comers policy” on CLS (and all other student groups).⁶³ The majority also appeared amenable to the law school’s arguments that certain kinds of membership standards not based on status or belief, such as requiring members to pay dues, did not violate the accept-all-comers nature of the nondiscrimination rule.⁶⁴

The majority opinion criticized the dissent and CLS for arguing that the law school had not actually followed an accept-all-comers policy.⁶⁵ According to Justice Ginsburg’s opinion, CLS had agreed to a stipulation that the law school enforced such a policy.⁶⁶ Justice Ginsburg stated, “[t]ime and again, the dissent races away from the facts to which CLS stipulated.”⁶⁷ Justice Ginsburg referred at one point to CLS’s “unseemly attempt to escape from the stipulation and shift its target to Hastings’ policy as written [rather than as actually applied].”⁶⁸ In terms of how the law school enforced the policy against CLS, the majority also argued that Justice Alito’s dissent “present[ed] a one-sided summary of the record evidence . . . an account depending in large part on impugning the veracity of a distinguished legal scholar and a well respected school administrator.”⁶⁹

Of the two concurring opinions, Justice Stevens’ also weighed in on issues related to the record. He noted that, “[t]he Court correctly confines its discussion to the narrow issue presented by the record. . . .”⁷⁰ His opinion rejected the view that the record supported the assertion that the law school adopted the policy as a means to target the views of CLS:

There is . . . no evidence that the policy was adopted because of any reason related to the particular views that religious individuals or groups might have, much less because of a desire to suppress or distort those views. The policy’s religion clause was plainly meant to promote, not to undermine, religious freedom.⁷¹

While acknowledging that the nondiscrimination policy could affect

62. *Id.* at 2978.

63. *Id.* at 2979.

64. *See id.* at 2980 n.2.

65. *Id.* at 2983.

66. *Id.* at 2982.

67. *Id.* at 2983.

68. *Id.* at 2984.

69. *Id.* at 2995 n.29.

70. *Id.* at 2995 (Stevens, J., concurring).

71. *Id.* at 2996.

religious student organizations more than other types of groups, Justice Stevens stated that “there is likewise no evidence that the policy was intended to cause harm to religious groups, or that it has in practice caused significant harm to their operations.”⁷²

Justice Alito’s dissenting opinion offered a pointedly different interpretation of the record in relation to the policy under consideration and to the law school’s apparent treatment of CLS.⁷³ It charged the majority with offering “a misleading portrayal of this case” in relation to the law school’s activities and noted that the school had never previously denied recognition to a student organization.⁷⁴ According to Justice Alito, “the record is replete with evidence that [at least until 2005,] Hastings routinely registered student groups with bylaws that limited membership and leadership positions to those who agreed with the groups’ viewpoints.”⁷⁵

His opinion argued that the law school fabricated the concept of an accept-all-comers requirement only in response to the litigation brought by CLS members.⁷⁶ Whatever the actual policy supposedly followed by the law school, the dissenting opinion also contended that the record supported the view that the law school had treated CLS differently from other groups, ostensibly as a means to squelch the organization’s religious views.⁷⁷ According to the dissent, “[e]ven if it is assumed that the policy is viewpoint neutral on its face, there is strong evidence in the record that the policy was announced as a pretext.”⁷⁸ Additionally, Justice Alito chastised the majority for distorting the record regarding the impact of non-recognition on CLS, arguing that the facts demonstrated that the law school had actually not permitted CLS any meaningful use of school facilities as a nonregistered student organization.⁷⁹

The competing opinions in *Martinez* reveal a tale of two seemingly different records. The majority interpreted the record as establishing that the law school acted impartially and consistently in enforcing its nondiscrimination standards for students groups and its treatment of CLS. In contrast, the dissent concluded that the record supported the view that the law school altered its formal policy in response to litigation concerns and likely targeted CLS in an unfair manner to silence the group’s religious views. As developed in Part V, this disagreement is indicative of more fundamental differences in how the justices view the appropriate role of the

72. *Id.*

73. *Id.* at 3000 (Alito, J., dissenting).

74. *Id.* at 3001.

75. *Id.* at 3004.

76. *Id.* at 3003.

77. *See id.* at 3017.

78. *Id.* at 3016–17.

79. *Id.* at 3008.

judiciary in reviewing a college's or university's nondiscrimination rule as well as the likely motives of the law school in enforcing its nondiscrimination policy.

B. Clashing Stances Regarding Application of Precedent

Just as with issues involving the record, the majority and concurring opinions diverged extensively over how previous Supreme Court decisions should apply to the case. The majority concluded that associational rights cases like *Dale*⁸⁰ did not provide the appropriate legal framework to assess the student organization's First Amendment claims.⁸¹ Instead, as noted, the majority decided that the more permissive legal standards of reasonableness and viewpoint neutrality associated with the limited public forum proved better suited to evaluate institutional regulation of student organizations.⁸² In reaching this determination, the majority rejected the position that a student organization subjected to a campus nondiscrimination rule occupied an analogous legal position to other private groups in society facing governmental regulation of their membership, such as a church or the Boy Scouts. According to the majority, CLS only faced an "indirect pressure to modify its membership policies" in order to receive a government subsidy.⁸³ From this perspective, rather than experiencing coercion, CLS simply encountered a decision regarding whether to modify its membership criteria in exchange for the benefit (subsidy) associated with official recognition as a student group.⁸⁴ If it chose not to adhere to the nondiscrimination requirement, the group could still exist and meet off campus or take advantage of certain kinds of access to the law school granted to non-recognized groups. Additionally, it could make use of online social networking sites.⁸⁵

Justice Ginsburg described the law school policy as easily satisfying the limited forum standards of viewpoint neutrality and reasonableness.⁸⁶ In relation to reasonableness, the majority stressed the pedagogical goals of the policy, including the law school's striving to make sure that all students had access to co-curricular "leadership, educational, and social opportunities" and to bring individuals together from diverse backgrounds.⁸⁷ The majority determined that the policy also satisfied viewpoint neutrality because the accept-all-comers requirement applied

80. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

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

82. *Id.* at 2971.

83. *Id.* at 2986.

84. *Id.*

85. *Id.* at 2991.

86. *Id.* at 2975.

87. *See id.* at 2989.

equally to all groups, regardless of the views expressed.⁸⁸

In discussing how the policy satisfied pertinent legal standards, a key theme developed in Justice Ginsburg's opinion centered on situating the nondiscrimination policy within the broader context of institutional academic decision-making. In her opinion, Justice Ginsburg discussed the importance of courts deferring to colleges and universities and to educators in relation to pedagogical decisions.⁸⁹ Accordingly, the majority sought to align nondiscrimination policies for student organizations alongside Supreme Court decisions that emphasized noninterference by courts with academic (i.e., curricular) decisions in cases such as *Board of Curators of University of Missouri v. Horowitz*⁹⁰ and *Regents of University of Michigan v. Ewing*.⁹¹ Rather than treating co-curricular, pedagogically-related policies as legally distinct from curricular situations, Justice Ginsburg explained how "extracurricular programs are, today, essential parts of the educational process."⁹²

With this view of co-curricular decisions with pedagogical aims as deserving legally analogous judicial deference as that applied to curricular-based academic decisions, Justice Ginsburg's opinion stated that "special caution" was warranted in reviewing the policy to ensure that the Court showed appropriate legal consideration to the academic judgment of public colleges and universities.⁹³ Responding to views expressed in the dissenting opinion, the majority argued that "determinations of what constitutes sound educational policy or what goals a student-organization forum ought to serve fall within the discretion of school administrators and educators."⁹⁴

In furthering a depiction of the nondiscrimination standards at issue as an exercise of academic decision-making, the opinion describes the law school's policy as equivalent to an institution disallowing a professor from excluding students from a classroom based on their beliefs or status.⁹⁵ Rather than treating Hastings Law School acting merely as any other governmental entity in relation to the regulation of a limited forum, the Court promoted a view of the law school as fulfilling a special and distinct educative role in its regulation of student groups. In framing the regulation at issue within the general context of academic decision-making, the majority assessed these justifications in a deferential manner, one operating

88. *Id.* at 2975.

89. *Id.* at 2993–94.

90. 435 U.S. 78 (1978).

91. 474 U.S. 214 (1985).

92. *Martinez*, 130 S. Ct. at 2989.

93. *Id.*

94. *Id.* at 2989 n.16.

95. *Id.* at 2989.

from an overall position of trust in relation to the announced and perceived motives of the law school.

Justice Stevens' concurring opinion describes the policy as seeking to "advance numerous pedagogical objectives," in a manner similar to the majority opinion.⁹⁶ Justice Stevens echoed the majority opinion's sentiments that the student group's access to a special forum on campus was not the same as a governmental regulation imposed in a "wholly public setting."⁹⁷ According to his opinion, a public college or university represented a special type of place, one with unique attributes that deserve recognition in assessing the First Amendment issues at stake:

The campus is, in fact, a world apart from the public square in numerous respects, and religious organizations, as well as all other organizations, must abide by certain norms of conduct when they enter an academic community. Public universities serve a distinctive role in a modern democratic society. Like all specialized government entities, they must make countless decisions about how to allocate resources in pursuit of their role. Some of those decisions will be controversial; many will have differential effects across populations; virtually all will entail value judgments of some kind. As a general matter, courts should respect universities' judgments and let them manage their own affairs.⁹⁸

As in the majority opinion, Justice Stevens emphasized that the limited public forum for student organizations created by the law school provided a means for it to advance multiple educational objectives, including those related to tolerance and openness.⁹⁹ The decision to impose a nondiscrimination policy represented an educational choice deserving of judicial noninterference to the extent possible. Perhaps even more forcefully than the majority opinion, Justice Stevens advanced a view of public colleges and universities as unique societal institutions deserving respect and deference from the courts, even when making educationally based decisions in co-curricular settings.¹⁰⁰

While relatively brief, Justice Kennedy's concurring opinion also emphasizes that the nondiscrimination policy was closely connected to educational interests.¹⁰¹ He suggests that the law school sought to encourage the sharing and debate of a wide variety of ideas, with such "vibrant dialogue . . . not possible if students wall themselves off from

96. *Id.* at 2997 (Stevens, J., concurring).

97. *Id.*

98. *Id.* at 2997–98.

99. *Id.* at 2997.

100. *Id.* at 2998.

101. *Id.* at 2999–00 (Kennedy, J., concurring).

opposing points of view.”¹⁰² His opinion describes the nondiscrimination policy as a function of educational decision-making.¹⁰³ As such, judicial scrutiny of the policy should not unduly interfere with the educational process and the autonomy that public colleges and universities should possess in the context of exercising academic judgment, including in co-curricular contexts.¹⁰⁴

Justice Alito’s dissenting opinion in *Martinez* concludes that precedent should apply in a strikingly different way to the legal issues at play in the case. A fundamental difference involved a determination that the law school’s authority over student groups, for purposes of the First Amendment, was legally akin to any other governmental actor’s regulation of a private entity.¹⁰⁵

Justice Alito’s opinion described the situation presented in the case as most similar to *Healy*,¹⁰⁶ a decision where the Supreme Court prohibited a university from denying a student group access to campus because institutional officials disapproved of the group’s political views.¹⁰⁷ The dissent urged that the *Martinez* case presented a similar situation to the one encountered by the Court in *Healy*, with Hastings Law School targeting “one category of expressive association for disfavored treatment: groups formed to express a religious message.”¹⁰⁸ In relation to deference to academic decision-making, Justice Alito wrote:

[The] *Healy* Court, unlike today’s majority, refused to defer to the college president’s judgment regarding the compatibility of “sound educational policy” and free speech rights. The same deference arguments that the majority now accepts were made in defense of the college president’s decision to deny recognition in *Healy* Unlike the Court today, the *Healy* court emphatically rejected the proposition that “First Amendment protections should apply with less force on college campuses than in the community at large.”¹⁰⁹

Besides *Healy*, the dissenting opinion also contended that *Dale* was applicable.¹¹⁰ According to the dissent, the legal situation facing CLS paralleled that encountered by the Boy Scouts in *Dale*. In making this point, Justice Alito stated that the majority erred in permitting the law

102. *Id.* at 3000.

103. *Id.* at 2999.

104. *Id.*

105. *Id.* at 3010–11 (Alito, J., dissenting).

106. *Id.* at 3008–09.

107. *Healy v. James*, 408 U.S. 169 (1972).

108. *Martinez*, 130 S. Ct. at 3010 (Alito, J., dissenting).

109. *Id.* at 3008.

110. *Id.* at 3014 (citing *Boy Scouts v. Dale*, 530 U.S. 640 (2000)).

school to place a nondiscrimination restriction on “a [student] forum that is designed to foster the expression of diverse viewpoints” when California would not be able under the First Amendment to “impose such restrictions on all religious groups in the State.”¹¹¹

While disagreeing that rules associated with a limited public forum should apply, the dissenting justices argued that the law school’s written policy failed under these standards as well, based on either the version of the nondiscrimination policy advanced by the majority or by the dissent.¹¹² Justice Alito’s opinion characterizes the policy as affecting only those groups advocating a religious viewpoint, while not impinging on the views of secular student groups.¹¹³ In contending that the policy violated standards of viewpoint neutrality, the opinion emphasizes the judiciary’s role in overseeing the action of public colleges and universities: “We have also stressed that the rules applicable in a limited public forum are particularly important in the university setting, where ‘the State acts against a background of tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.’”¹¹⁴

The dissenting justices, then, took a stance rejecting the view that the law school’s nondiscrimination policy merited substantial judicial deference because the standards at issue represented an exercise of academic judgment. For them, the policy did not represent an extension of academic judgment akin to the kinds of institutional decisions reviewed in cases such as *Ewing* and *Horowitz*. Instead, the dissenting justices sought to treat the law school as any other governmental actor seeking to regulate a private entity. Or, on somewhat alternative grounds, the dissent contended that courts should actually play a heightened role in ensuring that colleges and universities respect students’ speech and free exercise rights. As discussed in Part V, these competing views of judicial oversight of colleges and universities reflect deeply different views of contemporary higher education that go beyond the specific institutional policy at issue in *Martinez*.

C. Political and Diversity Rhetoric

Consideration of the contrasting discourses present in *Martinez* related to rhetoric on politics and diversity also stood out. The majority opinion, along with viewing the institution’s policy and actions favorably from a pedagogical perspective, also validated the school’s efforts to curtail discrimination as in alignment with overall public policy goals in

111. *Id.*

112. *Id.* at 3013.

113. *Id.* at 3011.

114. *Id.* at 3009 (quoting *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995)).

California.¹¹⁵ Accordingly, the justices in the majority characterized the law school's actions as situated within broader governmental efforts to curtail discrimination in society against various groups and individuals, including discrimination related to sexual orientation.¹¹⁶

According to Justice Ginsburg's opinion, the law school possessed a legitimate purpose in seeking to bring individuals together "with diverse backgrounds and beliefs" to exchange ideas in a way that "encouraged tolerance, cooperation, and learning among students."¹¹⁷ She notes that CLS's "predecessor organization . . . experienced these [kinds of] benefits first-hand when it [previously] welcomed an openly gay student as a member."¹¹⁸ In considering the interests of those students potentially subject to discrimination if CLS prevailed, the opinion points out that since mandatory fees were available to help support student organizations, it would be unfair to make students provide financial support to a group that could then deny them membership.¹¹⁹

Justice Stevens' concurring opinion directly challenges the dissenting justices for focusing on alleged religious discrimination of CLS members while failing to acknowledge legitimate governmental or educational concerns in responding to discrimination aimed at individuals for such reasons as their sexual orientation.¹²⁰ According to Justice Stevens, "Although the dissent is willing to see pernicious antireligious motives and implications where there are none, it does not seem troubled by the fact that religious sects, unfortunately, are not the only social groups who have been persecuted throughout history simply for being who they are."¹²¹

As long as satisfying basic constitutional requirements, Justice Stevens argued that the law school should be able to enact standards meant to resist discrimination and it did not have to subsidize discriminatory student organizations. While a "free society must tolerate" groups that "exclude or mistreat Jews, blacks, and women—or those who do not share their contempt for Jews, blacks, and women," it is not required to "subsidize them, give them its official imprimatur, or grant them equal access to law school facilities."¹²²

In contrast to the themes present in the majority and concurring opinions related to the importance of supporting the law school's nondiscrimination

115. *Martinez*, 130 S.Ct. at 2990-91.

116. *Id.* at 2991 ("[S]o long as a public university does not contravene constitutional limits, its choice to advance state-law goals through the school's educational endeavors stands on firm footing.").

117. *Id.* at 2990.

118. *Id.* at 2990, n.19.

119. *Id.* at 2992.

120. *Id.* at 2997, n.3 (Stevens, J., concurring).

121. *Id.*

122. *Id.* at 2998.

efforts, Justice Alito's opinion for the dissenting justices states that the decision resulted in "no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning."¹²³ The opinion charged that the majority had given institutions a "handy weapon for suppressing the speech of unpopular groups."¹²⁴

Responding to the assertion that the law school's policy promoted "tolerance, cooperation, learning, and the development of conflict-resolution skills," the dissenting opinion countered: "These are obviously commendable goals, but they are not undermined by permitting a religious group to restrict membership to persons who share the group's faith."¹²⁵ Quoting an amicus brief submitted by a group called "Gays and Lesbians for Individual Liberty," the opinion argued that goals related to tolerance and cooperation were best achieved through a "confident pluralism that conduces to civil peace and advances democratic consensus-building" rather than efforts to abridge First Amendment rights.¹²⁶

Just as with interpretive issues involving the record and precedent, the dissent also differs significantly from the majority regarding how to portray the nature and impact of the law school's nondiscrimination policy. This disagreement reflected far different conceptualizations, both legally and ideologically, of the purposes and impact of the nondiscrimination standards at issue. As with the other themes previously discussed, out of these conflicting judicial stances, the one that prevails over the long term in relation to judicial decision-making potentially has important consequences for how courts respond to institutional actions, both in curricular and co-curricular settings. The article now turns to the consideration of these possible implications.

V. REFLECTIONS ON COMPETING LEGAL DISCOURSES IN *CLS v. MARTINEZ*

The competing legal discourses in *Martinez* touch on intriguing and important issues regarding judicial conceptions of and attitudes towards colleges and universities. As discussed by both supporters and critics of the majority opinion,¹²⁷ and also as shown in this analysis, the opinions reveal significant disagreement between the justices regarding college and university efforts to promote equality through nondiscrimination policies

123. *Id.* at 3000 (Alito, J., dissenting).

124. *Id.* at 3001.

125. *Id.* at 3015.

126. *Id.* at 3016.

127. See generally, e.g., Theresa M. Beiner, *Shift Happens: The U.S. Supreme Court's Shifting Antidiscrimination Rhetoric*, 42 U. TOL. L. REV. 37 (2010); William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657 (2011); Nice, *supra* note 3; William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of Christian Legal Society v. Martinez*, 261 ED. LAW REP. 473 (2010).

versus the speech and association rights of religiously conservative groups.

More specifically, the competing discourses reveal a hegemonic struggle regarding whether discrimination on the basis of sexual orientation should be placed alongside other nondiscriminatory classifications, such as those based on race, or whether it may receive judicial approval, even when speech or associational rights are affected. While noting that institutional nondiscrimination goals on the basis of sexual orientation should not necessarily be viewed in a negative light, the dissenting justices in *Martinez* rejected the proposition that sexual orientation discrimination warrants any heightened judicial protection or deference in relation to governmental nondiscrimination efforts.

In fact, instead of directly speaking to the harms caused to those who face discrimination on the basis of their sexual orientation, the dissent emphasizes how the issues at stake in *Martinez* essentially involve marginalization of another group of individuals, those students with conservative religious beliefs. As one author points out, Justice Alito's opinion, though stopping short, "came very close to suggesting that religious adherents might be a suspect class deserving of heightened protection."¹²⁸ Accordingly, the issue of which group of students most legitimately deserve judicial protection represents a basic fault line between the majority and the dissent, helping to shape each side's legal discourse.

The ideological fault lines present in *Martinez* contributed to and were highlighted in another significant area of legal contention in the case. The justices were also divided over whether institutional co-curricular rules with a pedagogical purpose should receive the same kind of judicial deference as given to academic decisions in curricular contexts. From one perspective, the outcome in *Martinez* comports with previous cases affirming judicial deference to academic decision-making in cases such as *Ewing*¹²⁹ and *Horowitz*.¹³⁰ But, the case adds an important new wrinkle to this line of precedent in explicitly placing co-curricular activities under an institution's academic or pedagogical umbrella.

While in *Board of Regents of University of Wisconsin System v. Southworth* the Supreme Court recognized the special nature of the higher education environment in the context of a mandatory student fee program,¹³¹ the majority opinion in *Martinez* went even further. It emphasizes that the substantial judicial deference typically given to academic judgments should also extend to co-curricular contexts. As

128. Nice, *supra* note 3, at 668. She also discusses how "this sense of fundamentalist Christians or fundamentalist religious adherents as a suspect class permeates the logic of Justice Alito's dissenting opinion." *Id.*

129. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985).

130. *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978).

131. 529 U.S. 217, 231–32 (2000).

Justice Ginsburg states in the majority opinion: “Students may be shaped as profoundly by their peers as by their teachers. Extracurricular activities . . . facilitate interactions between students, enabling them to explore new points of view, to develop interests and talents, and to nurture a growing sense of self.”¹³²

Depending on the extent to which courts in future legal decisions incorporate the views articulated by the majority regarding the co-curricular realm, the majority’s characterization of co-curricular decisions as academic judgments deserving substantial judicial deference may prove one of the more noteworthy legal legacies of *Martinez*. Such language seemingly represents an expansion of the judicial deference shown in decisions involving academic judgment in clearly curricular settings in cases such as *Ewing* and *Horowitz*. Accordingly, an issue to follow in future litigation involves the extent to which courts actually look to the *Martinez* decision as a basis to provide heightened judicial deference to co-curricular decision-making.

In considering the deference shown in the majority and concurring opinions to the law school and its nondiscrimination policy, one can describe these justices as having displayed a substantial degree of trust in public colleges and universities. The majority opinion emphasized that colleges and universities offer support to student organizations as a way to enhance student speech opportunities and to enrich the academic experience.¹³³ Underlying the majority’s acceptance of the policy was a willingness to view public colleges and universities as serving a special societal role and that they may be trusted to treat their students in an even-handed manner. As such, the majority situates its approval of the law school’s nondiscrimination policy within a broader context of overall judicial confidence in and deference to public colleges and universities in relation to academic decisions, which also encompasses co-curricular environments. Thus, Justice Ginsburg’s majority opinion casts the law school’s efforts to promote tolerance in the regulation of student organizations as a reasonable and legitimate exercise of pedagogical judgment, the kind that has routinely received judicial deference.

In contrast, the dissenting justices believed that colleges and universities were not necessarily deserving of any special kind of judicial deference in relation to the treatment of students in the context of co-curricular activities. The case, they determined, did not fall into the same category as other Supreme Court decisions that emphasize the restraint that courts should exercise when reviewing academic decisions.¹³⁴ Instead, the dissenting justices treat the student forum created by the law school as

132. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2999 (2010).

133. *Id.* at 2990.

134. *Id.* at 3008 (Alito, J., dissenting).

involving action by a governmental entity in general, rather than within the context of a special educational environment. From this vantage, the law school's actions related to its nondiscrimination policy and regulation of student organizations did not deserve any special judicial deference.¹³⁵ In fact, the opinion contends that courts arguably need to play an especially vigilant role in protecting students' speech and free exercise rights at public colleges and universities.

As shown in this analysis, the dissenting opinion did not limit itself to depicting the law school as simply a governmental entity undeserving of any special judicial deference in this instance; it went further, describing the law school as seeking to promote liberal views and ideas. Additionally, the dissent did not confine its characterizations of the nondiscrimination policy and the motives behind it to Hastings Law School, with the opinion contending that liberal prerogatives dominate higher education in general.¹³⁶ These views arguably show a degree of distrust and disapproval by the dissenting justices regarding colleges and universities in a more universal sense.

Under the narrative (discourse) advanced by the dissenting opinion, CLS occupied the position of an unpopular minority group suffering from discrimination at the hands of a law school seeking to promote political correctness. Again, rather than only focusing on events at the law school, Justice Alito characterizes the institution's actions as illustrative of a broader societal problem, from the perspective of the dissent, with political correctness and left-leaning indoctrination efforts at the nation's colleges and universities.

The judicial attitude of the dissenting justices in *Martinez* towards colleges and universities contrasts significantly with that of the majority. While the case focuses on co-curricular issues in relation to the regulation of student organizations, the overall lack of trust in higher education institutions shown by the dissenting justices could easily be applied to other contexts, including curricular settings.

Depending upon the Court's future membership, language in the dissenting opinion suggests the possibility of a weakening of judicial deference to institutional decision-making, including in relation to academic decisions in curricular settings. Just as the majority opinion provides the possibility for an expansion of judicial deference to colleges and universities in co-curricular contexts, the dissenting justices articulate a rationale to restrict institutional discretion that could be applied to curricular matters in addition to co-curricular ones. In sum, the dissenting opinion suggests that courts have an important role to play in ensuring that left-leaning colleges and universities do not encroach on the speech and

135. *Id.*

136. *Id.* at 3000.

religious rights of students with conservative beliefs.

The competing legal discourses in *Martinez* can be viewed as encapsulating broader societal debates regarding nondiscrimination on the basis of sexual orientation and common allegations that colleges and universities routinely seek to indoctrinate students with left-leaning values. The point of this article, however, has not been to wade directly into these debates; rather the analysis of the *Martinez* opinions highlights how such larger societal debates surface in legal opinions, affecting the ways in which the judiciary conceptualizes and interprets the legal issues at stake.

Our analysis suggests that the distinct ideological differences dividing the justices played an important role regarding how the majority and the dissent approached the legal issues under consideration and the correct interpretation of factual issues presented in the decision. The competing opinions in *Martinez* demonstrate two different discourses regarding the appropriate level of trust and deference the judicial system should extend to colleges and universities in making decisions in the area of academics, including in co-curricular situations. The outcome of this hegemonic struggle has potential importance not only for institutional nondiscrimination efforts and regulation of student organizations, but also more broadly in relation to the appropriate level of judicial deference that should exist for academic expertise and judgment.

VI. CONCLUSION

The authors believe that the type of analysis undertaken in this study will be beneficial in better understanding evolving and competing judicial notions of the appropriate legal treatment of colleges and universities, in both curricular and co-curricular settings. The analysis suggests significant legal and ideological differences between the justices regarding higher education. Depending on which view ultimately prevails, the Supreme Court may demonstrate a greater willingness to extend judicial deference to the co-curricular realm. Alternatively, the lack of trust in colleges and universities displayed by the dissenting justices could indicate, depending on the Court's membership, the possibility of a contraction of judicial deference to academic decisions in the future.

The point of this article, as noted, has not been to "take sides" in the legal discourses competing for dominance in *Martinez*. Rather, the goal has been, borrowing from methods and concepts associated with discourse analysis, to analyze the *Martinez* opinions in a systematic manner and to consider the possible legal implications of competing judicial attitudes towards colleges and universities. The use of methods and concepts associated with discourse analysis contextualizes the competing views within a larger legal discourse related to academic decisions involving colleges and universities. Along with providing a means to consider legal conflict specifically involving institutional nondiscrimination standards addressing sexual orientation, this analysis assesses the potential

implications of the opinions in a more general sense in relation to higher education and the courts.

In particular, this article's approach to analysis led us to reflect on the explicit migration in the majority opinion of judicial deference from the curricular to the co-curricular realm. The authors suggest that this may prove to be one of the more enduring outcomes from *Martinez* and one that has not yet received substantial scholarly attention.¹³⁷ This method of analysis also helped to highlight the dissenting justices' seeming acceptance—and accompanying distrust—of colleges and universities as motivated by left-leaning goals and ideology. While stressing that the analysis largely reflected a standard approach to case reading and interpretation, the authors suggest that borrowing from methods and concepts associated with discourse analysis generates useful analytical insights. Other legal writers, including those concerned with legal issues involving higher education, may find value as well in examining legal opinions from a discourse analysis perspective.

137. The authors are, of course, in no way seeking to undervalue the contributions or quality of other scholarship that has dealt with *Martinez*, but, instead, only trying to point out how this analytical approach has hopefully helped to contribute some new facets to ongoing discussion and assessment of the decision. Additionally, the issue of deference to institutional authority existing in *Martinez* has been addressed to varying degrees by other authors. See, e.g., Chapin Cimino, *Campus Citizenship and Associational Freedom: An Aristotelian Take on the Nondiscrimination Puzzle*, 20 WM. & MARY BILL RTS. J. 533 (2011) (providing extensive discussion of the concept of campus citizenship and institutional efforts to engage students beyond the classroom); Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 912 (2011) (arguing that *CLS v. Martinez* should be considered among those association rights decisions in which the Supreme Court has shown “deference toward the government’s view on the importance of its measure”).

