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Turning Anti-Discrimination Laws on their Head: Using Rhetoric to Attempt to Turn the Medicine Into the Illness

Todd Tolin
Seton Hall Law

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Introduction

Justice Scalia points out a "Kulturekampf" in his dissenting opinion in *Romer v. Evans,*[1] referring to the battle between traditional moralists (often religious groups) and proponents of anti-discrimination laws dealing with sexual orientation. One must appreciate the irony that five years earlier, it was Justice Scalia who authored the Supreme Court's decision in *Employment Division v. Smith.*[2] *Smith* arguably placed religious organizations on the defensive, resulting in an abundance of rhetoric featuring claims that "religion is under attack" and that compliance with anti-discrimination requirements is, in-and-of-itself, discrimination against religion.[3] While there may be colorable claims to such a statement when dealing with religious and wholly-private expressive institutions in *certain* circumstances, applying the same arguments to anti-discrimination statutes in *all* circumstances is patently disingenuous. The modern rhetoric is skilled at weaving a tapestry of justification for religious exceptions out of many different legal threads. When one reaches the result, it looks coherent and sound, but upon closer scrutiny (or a good wash) it falls to pieces. The recent case of *Christian Legal Society v. Martinez*[4] highlights how tangled the rationales have become and how the rhetoric of "attacks" and "discrimination by anti-discrimination" has obscured the real legal arguments at issue.

Part I of this paper will attempt to explain the current state of the law as it relates to regulations that have run up against the religious protections of the First Amendment in various

[1] Romer v. Evans, 517 U.S. 620 (1996) (Scalia, J., dissenting).
[2] Employment Div. v. Smith, 494 U.S. 872 (1990).
[3] *See, e.g.* Kristen Moulton, *U. President: Mormons should join ACLU*, THE SALT LAKE TRIBUNE, April 4, 2011; Alliance Defense Fund – The Homosexual Agenda: The Principal Threat to Your Religious Freedom, http://www.alliancedefensefund.org/Marriage ("There is no doubt that God's plan for marriage is under an all-out, full-scale attack by advocates of same-sex 'marriage' and the homosexual legal agenda."); Morality in Media, *On the 'Religious Right,' We Too Have a 'Blind Side'*, CHRISTIAN NEWSWIRE, Dec. 29, 2009.
[4] Christian Legal Society v. Martinez, 130 S. Ct. 2971 (2010).

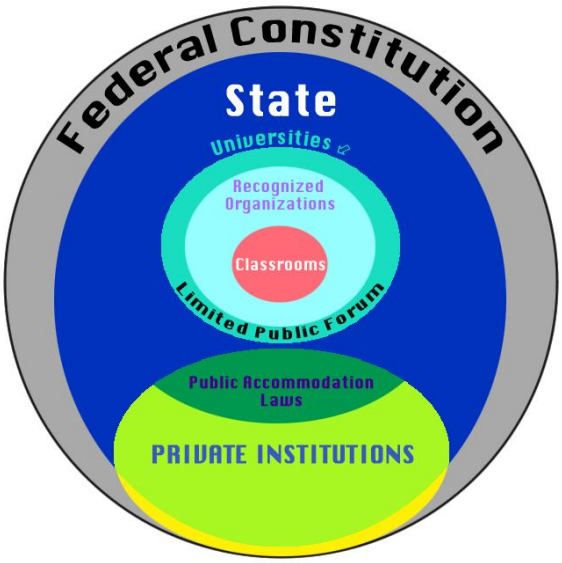
situations. This examination will focus on the developments from *Smith* to *Martinez* and show that there are distinct spheres in which the First Amendment protections must allow some "give." This part will be heavy on theory, but it is necessary to establish this framework to truly reach the doctrinal analysis in the subsequent sections. Part II will examine the legal arguments and rhetoric from religious organizations such as Christian Legal Society, and expose how their misrepresentations and fundamentally flawed arguments work to obscure debate on the actual legal issues. The analysis will focus primarily on the *Martinez* case as an example and include other precedent and opinion which was expressed during the lead-up to the ultimate holding in *Martinez*. This section will also highlight that starting at least as far back from the case of *Boy Scouts v. Dale*,[5] Christian Legal Society was planning on bringing such a suit as was at issue in *Martinez*. One could intimate that by building up a stockpile of Court-sanctioned religious-exceptions, Christian Legal was looking to raise an issue of religious exception in a variety of areas so that they might knit together the holdings into a jurisprudence of preferential exceptions and circumvent the Court's declaration in *Smith*. This section will conclude demonstrating how effective the rhetoric of "religious exception" has permeated legal landscape, even when its use is imprecise by analyzing an article by Dean Howarth of Michigan State College of Law. Part III will take a step back from the narrow focus on *Martinez* and its forbearers, and examine how the rhetoric has been employed to expand religious exemptions in the larger spheres, specifically in state statutes regarding civil marriage. By framing the debate in the guise of "religious protection" or "religious freedom," anti-discrimination laws are being whittled away. Finally, this paper will conclude reiterating that in approaching religious exemptions versus neutral, anti-discrimination laws, one must look to the proper sphere of First Amendment guarantees to gain perspective on whether an exemption is or is not appropriate.

[5] 530 U.S. 640 (2000).

Part I – Conceptualizing the Current State of the Law

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[6] The operative words used by the Court are "believe" and "profess", not "act on." When it comes to the conduct and actions involved with the free exercise of religion, the Court has never been so magnanimous.

This section will attempt to put free exercise into perspective in light of Supreme Court decisions from *Smith* to *Christian Legal Society v. Martinez.*[7] In approaching this analysis, the conceptual model of spheres within spheres seemed to provide a good structure for establishing the current state of the law in relation to absolute free exercise. Figure one is a two-dimensional illustration.



The model requires a bit of mental dusting and a mental trip back to high-school physics. Imagine for a moment, a beam of light. As it passes through each tinted sphere, it not only bends, but dims a bit each time. Thus, someone standing at the center of the spheres would see something much different than someone standing near the outer edge. Now replace that beam of light with the concept of free exercise of religion. Outside the sphere of the State, it exists absolutely, but crossing into these spheres changes the experience of free exercise as it

[6] *Smith*, 494 U.S. at 877.
[7] 130 S. Ct. 2971 (2010).

moves through the layers. Analysis of this model will begin with the outer sphere, representing the federal Constitution and government's effects on free exercise.

A. The Outer Sphere – The Constitution & Federal Law

At the outer edge of this wide sphere, one can imagine that First Amendment rights are at their apex. The only constraints that come to bear on one's freedom of expression, association, or free exercise of religion are those that would conflict with other portions of the Constitution. As we move away from the edge, however, various federal statutes and regulations necessarily come to bear on one's behavior. Such conflicting interests are resolved by placing a difficult burden on the Federal Government to justify any regulation that may infringe on the free exercise right guaranteed by the First Amendment. The Federal Government may not infringe on a person's free exercise of religion, "even if the burden results from a rule of general applicability," except if the Government satisfies a "compelling interest test" where it must show that the infringement on free exercise rights is "in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."[8]

The outer sphere thus presents a minimum level of resistance to the free exercise of religion, however existence in this sphere is conceptual rather than actual. When a question of free exercise of religion is raised, it usually involves the state also exerting its authority.

[8] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006), *citing* Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb et seq. (2006). This strict standard is a statutory creation. Justice Scalia scorned the use of the compelling interest test when dealing with generally applicable laws when writing for the majority in *Employment Div. v. Smith*, 494 U.S. 872, 888 (1990)(discussed in more detail *infra*). He stated that "[a]ny society adopting such a system would be courting anarchy…" *Id*.
Congress however, overrode the Court's decision by passing RFRA, reinstating the application of the compelling interest test. Analysis of the history of RFRA is beyond the scope of this paper, however it is important to note that in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that RFRA was not applicable against the states. Therefore, while the Federal Government must satisfy the compelling interest test when defending a law of general applicability that burdens the free exercise of religion, a state does not have the same burden, and the *Smith* case is controlling.

B. The Intermediate Spheres – State Laws & Private Expressive Organizations

The United States' federal system creates a tension between the powers of the states to regulate the behaviors of their citizens while remaining in accord with federal constitutional protections. This can be seen by the interaction (or lack thereof) between the state and the private organization. The First Amendment of the United States' Constitution[9] bars states from infringing on the speech and associative conduct of people and private expressive organizations.[10] Thus, private expressive organizations are protected by the Constitution from many federal and state restrictions. The edge of the outer sphere sees a minimum amount of resistance to free exercise, and entering the intermediate sphere of state regulation adds additional burdens. Private expressive organizations, despite finding a Constitutional shield from some state and federal laws, cannot be immune from all of them, and *Employment Division v. Smith* provides an excellent example of how free exercise must necessarily bend.

In *Smith*, the respondents were fired from their jobs at a private drug rehabilitation organization after they had been charged with ingesting peyote, an illegal drug in the State of Oregon, during a ceremony at the Native American Church.[11] The respondents sued, ultimately presenting the Supreme Court with the question of "whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug…".[12]

Justice Scalia, writing for the majority in response, answered that question in the affirmative, stating that the "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law

[9] The states also may also have First Amendment corollaries in their own constitutions.
[10] *See* Gitlow v. New York, 268 U.S. 652, 666 (1925), where the concept of the First Amendment being applicable (incorporated) against the states through the Fourteenth Amendment was first stated by the Court.
[11] *Smith*, 494 U.S. at 874.
[12] *Id*.

proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[13] To permit such an exception would allow the respondents to use their religious motivation to place them "beyond the reach of a criminal law that is not specifically directed at their religious practice."[14] In essence, this would allow an individual "to become a law unto himself," which the Court found contradictory to both "constitutional tradition and common sense."[15] Justice Scalia highlights this conclusion several times throughout the opinion: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition."[16]

A state impermissibly intrudes into the protections afforded by the Free Exercise clause, however, when its regulations deviate from being neutral or generally applicable. The majority points out that the exercising of religion can involve conduct such as "assembling for worship."[17] Should a state seek "to ban such acts… *only* when they are engaged in for religious reasons, or because of the religious belief that they display" it would be acting unconstitutionally.[18] In such a case, the practice of assembling for a religious purpose is set aside from assemblies for other purposes and prohibited due to its religious component, a distinction that the First Amendment forbids.

Smith thus sets a boundary for our intermediate sphere.[19] A state must be able to regulate the behavior of its citizenry, and if it incidentally burdens the exercise of religion through a generally applicable, constitutional, and valid provision, the protections of the First Amendment

[13] *Smith*, 494 U.S. at 879, *citing* United States v. Lee, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring).
[14] *Smith*, 494 U.S. at 878.
[15] *Id*. at 885.
[16] *Id*. at 878-79.
[17] *Id*. at 877.
[18] *Id*.
[19] As the light green portion of Figure One depicts.

are not violated.[20] Of course, this example is deceptively simple… it involves individuals and the act at issue is one of drug use, behavior generally looked upon with disfavor. Complications arise, for instance, when free exercise involves a group, is partnered with another First Amendment right, such as freedom of association, or confronts a regulation which doesn't garner overwhelming popular support. In addition, states may try to regulate beyond their Constitutional authority and reach too far into the private organizational sphere. It is here where we find cases such as *Boy Scouts v. Dale*[21] and *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*.[22]

In both *Dale* and *Hurley*, the state was attempting to enforce anti-discriminatory practices on private expressive organizations through their public accommodations laws.[23] Initially aimed at physical places, the scope of public accommodation laws has expanded, and with that expansion "the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased."[24] This area of uncertainty where state law overlaps into private organizations' sphere of autonomy has no clear boundary. The controversies which arise from this realm will find their results extremely fact dependent. In some cases, the state has not been seen overreaching when enforcing an antidiscrimination provision of its public accommodation laws against a private organization. For example, the Supreme Court found that a state had a compelling interest in eliminating discrimination against women, and enforcement of the statutes was appropriate when it "would not materially interfere

[20] See *Smith*, 494 U.S. at 878.
[21] 530 U.S. 640 (2000).
[22] 515 U.S. 557 (1995). In Figure One, this would be depicted by the darker green portion of the sphere, where state law tries to permeate more of the private organizations' sphere.
[23] In New Jersey, the statutes at issue were N.J. Rev. Stat. §§ 10:5-5, 10:5-6; in Massachusetts, the statute at issue was Mass. Gen. Laws § 272:98 (1992).
[24] *Dale*, 530 U.S. at 657.

with the ideas that the organization sought to express."[25] The decision, however, turned on the function, philosophy, and how *de facto* "public" the organization was. In *Dale* and *Hurley*, the murkiness of this realm is made even more evident by the courts' disagreements about how to define the organizations and how that affects the interaction between state authority and First Amendment protections.[26]

In *Hurley*, a group of gay, lesbian, and bisexual descendents of Irish immigrants formed an organization, GLIB, to march in a St. Patrick's Day parade organized by the South Boston Allied War Veterans Council.[27] The Council refused to admit GLIB as a parade contingent, objecting to the perceived message – acceptance of non-heterosexual lifestyles – that GLIB's participation would convey.[28] Both the lower court and Massachusetts' Supreme Judicial Court found the parade to fall under the statutory definition of a public accommodation, and thus could not discriminate on the basis of sexual-orientation.[29] The lower court rejected an argument by the Council that the parade was private, and also stated it was "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment."[30] The Supreme Judicial Court affirmed.[31] Upon review, Justice Souter, writing for a unanimous Court, stated that Massachusetts' interpretation of its public accommodations law was applied in a

[25] *Id*. at 657-58, *citing* Roberts v. United States Jaycees, 468 U.S. 609, 626 (1984) and Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987).
[26] Note that in *Hurley*, free exercise is not the First Amendment guarantee at issue, rather the case deals more with freedom of speech and assembly. Throughout all five of the main cases discussed in Part I (*Gonzales, Smith, Hurley, Dale,* and *Martinez*), each shares a common theme where a public law collides with a philosophy that is expressed by action. Whether this philosophy is defined as a religious belief or expressive association, the person or persons who hold the belief claimed that their First Amendment rights were violated by the state. While the Court in *Hurley* does not deem the parade "an expressive association," it states in *Dale* that the analysis applied in both cases is similar, and therefore *Hurley* is necessary to understanding the current state of the law. *Dale*, 530 U.S. at 659.
[27] *Hurley*, 515 U.S. at 560.
[28] See *Hurley*, 515 U.S. at 574-75.
[29] *Hurley*, 515 U.S. at 562.
[30] *Id*. at 563.
[31] *Id*. at 564.

"peculiar way."[32] By those courts' interpretation, "any contingent of protected individuals with a message would have the right to participate in [the Council's] speech, so that the communication produced…would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own."[33] Where Massachusetts went wrong, according to the Court, is that it extended the reach of its public accommodations laws so far so as to turn the Council's speech itself into a public accommodation.[34] While a state has broad powers of regulation, there are limits to its reach. The Court holds that Massachusetts' use of public accommodation laws in this manner "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[35]

In *Dale*, a former Eagle Scout had his adult membership in the Boy Scouts revoked after the Boy Scouts learned that he is "an avowed homosexual and gay rights activist."[36] Dale sued the Boy Scouts, alleging that they had violated New Jersey's public accommodations statute which prohibits discrimination on the basis of sexual orientation in places of public accommodation."[37] The Chancery Division of the New Jersey Superior Court determined that the Boy Scouts "was not a place of public accommodation, and that, alternatively the Boy Scouts is a distinctly private group exempted from coverage under New Jersey's law."[38] This interpretation would not be upheld by the New Jersey Supreme Court, however, which reversed the Chancery court holding that the Boy Scouts *was* a place of public accommodation, was not exempt from the law, and had violated the law by revoking Dale's membership based on his

[32] *Dale*, 530 U.S. at 661, citing *Hurley*, 515 U.S. at 572.
[33] *Dale*, 530 U.S. at 661, citing *Hurley*, 515 U.S. at 573.
[34] *Hurley*, 515 U.S. at 573.
[35] *Id*.
[36] *Dale*, 530 U.S. at 644.
[37] *Id*. at 645.
[38] *Id*.

"avowed homosexuality."[39] Indeed, both courts had looked at the record and reached a different conclusion about where the boundary lies for the public and private spheres. The Supreme Court determined that the Boy Scouts' "large size, nonselectivity, inclusive rather than exclusive purpose, and practice of allowing non-members to attend meetings," removed the organization from being "sufficiently personal or private" so as to "warrant constitutional protection' under the freedom of intimate association."[40] Therefore, like Massachusetts, New Jersey has found that a private organization has sufficiently drifted into the public sphere so as to subject it to regulations from which it would otherwise be immune.

The Supreme Court, while unable to overturn the New Jersey Supreme Court's determination that the Boy Scouts is subject to New Jersey public accommodations laws, nonetheless reiterates that the record revealed the "Boy Scouts is a private, nonprofit organization."[41] And further, it is a private organization with an expressive purpose.[42] As such, the state's laws must, except under compelling circumstances, bend to the protections of the First Amendment rather than the reverse.[43] "Forcing a group to accept certain members may impair

[39] *Id*. at 646.
[40] *Id.*
[41] *Dale*, 530 U.S. at 649. The Court highlights that it believes the New Jersey Supreme Court overreached, that it "went a step further and applied its public accommodations law to a private entity without even attempting to tie the term 'place' to a physical location." *Id.* at 657.
The Boy Scouts concede that Scouting has received "several benefits from government, including a federal charter, the support of Presidents and members of Congress, access to some military facilities and equipment, use of public buildings and spaces for meetings, and sponsorship of some Troops by government entitites." Brief for Petitioner, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)(No. 99-699), 2000 U.S. S. Ct. Briefs LEXIS 122 at *15. However as the US Catholic Conference highlights in its Amicus brief, "In the era of pervasive government, every organization that collaborates with government or participates in public programs is, therefore, under the lower court's approach, potentially a 'place of public accommodation.'" Brief for United States Catholic Conference and New Jersey Catholic Conference as Amicus Curiae Supporting Petitioners, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)(No. 99-699), 2000 U.S. S. Ct. Briefs LEXIS 131 at *8. The Supreme Court seems to agree.
[42] *Dale*, 530 U.S. at 648.
[43] *Id*.

the ability of the group to express those views, and only those views, that it intends to express… freedom of association plainly presupposes a freedom not to associate."[44]

The Court is careful to note that an expressive association cannot "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."[45] Again, there is a fact-based analysis to determine if the First Amendment's protections can be overridden 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."[46] Here, Dale is a self-professed leader in his community who is open and honest about his sexual orientation.[47] The implication being that if Dale was not such a prominent "face" of a gay male scout, or was just "suspected" of being a homosexual, that the discrimination would clearly be about his status which may have led the Court to a different result. While the Court did not confront that question, it did reference *Hurley* pointing out that "the parade holders did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner."[48] Perhaps then, New Jersey's public accommodations laws find no barrier in the First Amendment when it comes to non-heterosexuals who make no effort to be "avowed."

Hurley and *Dale* demonstrate that within the area in which public policy and First Amendment freedoms collide is a zone where determining which side will prevail requires careful scrutiny of the facts. It is relevant how the organization behaves – how "public" or "private" it is, whether the organization has an expressive message, whether a state has determined a compelling interest exists, the identity of the person or people who are trying to

[44] *Id*. (internal quotations omitted).
[45] *Id*. at 653.
[46] *Id*. at 648 (internal quotations omitted).
[47] *Dale*, 530 U.S. at 653.
[48] *Id*.

gain access or recognition by the organization, etc. What is clear, however, is that the Court is making its best effort to ensure that a balance is maintained between the competing interests.

C. The Inner Spheres – The University Setting and Its Organizations

The inner spheres for the purpose of this paper consist of the public university and its student organizations. Set firmly within the state's authority, it nonetheless is no stranger to controversies about institution policy and First Amendment protections.

In *Christian Legal Society v. Martinez*, the Court was faced with a suit by the Christian Legal Society (CLS) against the University of California's Hastings Law School.[49] CLS alleged that Hastings' requirement that it accept any student as a member in order to become a "Recognized Student Organization (RSO)" violated its First Amendment rights to free exercise and freedom of association.[50] The crux of CLS's complaint turned on the fact that it would have to accept members that may not share the organization's beliefs on religion and sexual orientation in order to obtain the benefits of RSO status.[51]

Part of the Court's decision resembles the outcome seen *Smith*. Justice Ginsburg, writing for the majority, states that an "all-comers condition on access to RSO status, in short, is textbook viewpoint neutral," and holds it to be "a reasonable, viewpoint-neutral condition on access to the student-organization forum."[52] Recall the similar language in *Smith*: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[53]

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[49] *Martinez*, 130 S. Ct. at 2978.
[50] *Id*. at 2978-79.
[51] *Id*. at 2978.
[52] *Martinez*, 130 S. Ct. at 2993, 2978.
[53] *Smith*, 494 U.S. at 878. Intriguingly, Justice Scalia, the author of the *Smith* decision, joined the dissent in *Martinez*. Unfortunately he did not compose the opinion and therefore it is not clear if he now disfavors *Smith*. *Martinez*, 130 S. Ct. at 3000 (Alito, J., dissenting).

The other component of the Court's decision turns on the position of public universities within our theoretical spheres-model. A public university is not synonymous with the state in its relationship to individuals within its bounds. Open spaces within a university's control are not deemed equivalent to the parks and streets and therefore "First Amendment rights… must be analyzed in light of the special characteristics of the school environment."[54] The edge of the university's sphere thus begins to take form. Whereas the state must permit speech and forms of expression to all groups, the Court has recognized that a university has a right "to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education."[55] Therefore, in the "limited public forums" that the university may choose to make available within its bounds, it may "reserve[] it for certain groups or for the discussion of certain topics."[56]

At the very center of the spherical model would find the classroom, where it is virtually undisputed that the protections of the First Amendment would be at their most dim, but rightfully so. A university must be able to exert control over the conduct that takes place in its facilities and its curricula. Taking a slight step back, however, shows us that the limited public forum would be the outermost ring of this innermost sphere. Here, an expressive organization would be able to exist with the minimum amount of interference from the university, barring neutral time-place-manner restrictions. Sandwiched between this ring and the classroom sphere, however, is the "recognized" student organization sphere… a place where the university can impose neutral restrictions or requirements in exchange for granting of special privileges.

[54] *Martinez*, 130 S. Ct. at 2988 (*citing* Widmar v. Vincent, 454 U.S. 263, 268 n. 5 (1981)).
[55] *Widmar*, 454 U.S. at 277.
[56] Rosenberger v. University of Virginia, 515 U.S. 819, 829 (1995). Both *Widmar* and *Rosenberger* were cited by the Court in *Martinez* in regards to the "limited public forum" theory, but will be discussed in more detail in Part II.

In any event, existence in these innermost spheres is clearly distinct from the private organization sphere. A student or group of students has the option to form groups outside of the university sphere where First Amendment protections are more rigorous. Under this method of analysis, the legal basis of the Court's decisions appear much more straightforward than the current climate of debate would seem to convey. Groups like CLS have attempted—and for the most part successfully managed—to obscure the true legal debate by falsely equating circumstances occurring within different spheres and framing any attempt to regulate in and among the accepted spheres as "attacks" on religion.

Part II: Rhetoric as a Tool of Obfuscation and Confusion

"In courtrooms and schoolrooms, offices and shops, public buildings and even churches… those who believe in God are increasingly threatened, punished, and silenced."[57]

"If homosexuals succeed, "all people – especially Christians – who do not affirm homosexual behavior could be silenced, punished, and possibly even jailed for so-called discrimination and intolerance."[58]

The quotations above provide a small sampling of how groups such as CLS are attempting to frame conflicts between civil regulations and religious practices as "attacks." CLS indicated in its amicus brief for the *Dale* case that the cause of their defensive rhetoric stemmed in part from the *Smith* decision: "After this Court's restriction of exemptions for religious persons from neutral, generally applicable laws, in *Employment Division v. Smith,*… , religious persons and organizations are vulnerable to such attacks."[59]

What CLS either does not want to accept, refuses to confront, or perhaps hopes will escape notice, is that far from "attacks," curtailments of religious free exercise have always

[57] Alliance Defense Fund – Defending Religious Freedom in America, http://www.alliancedefensefund.org/ReligiousFreedom (last visited May 15, 2011).
[58] *Id.*
[59] Brief for Christian Legal Society, et. al. as Amicus Curiae Supporting Petitioners, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)(No. 99-699), 2000 U.S. S. Ct. Briefs LEXIS 156 at *5 [hereinafter CLS Amicus Brief].

occurred, and vary depending on the surrounding circumstances. The language employed however, adopts the position that religious free exercise is *absolute*,[60] something that every case cited in this comment has refuted.[61] Nonetheless, CLS and its brethren plod forward with rhetoric and disingenuous legal arguments, perhaps hoping it will create a movement to overturn *Smith*, and impose preferential exceptions. To illustrate, this section will examine more closely the argument put forward by CLS in the *Martinez* case as well as in its amicus brief from the *Boy Scouts v. Dale* case, as that brief almost resembles a complaint which could have been filed in this case, dealing with university anti-discrimination policies and their danger to religious free-exercise.[62]

A. Mere Puffery or Deliberately Misleading?

Exaggeration and hyperbole can be a useful in a debate, but CLS has taken these tools to the extreme. In his oral argument before the Supreme Court, CLS Attorney Michael McConnell opened with the statement that under Hastings' policy "a student who does not even believe in the Bible is *entitled* to *demand* to lead a Christian Bible study…"[63] This contention is not remotely true. Hastings' policy requires that any student be able to *seek* a leadership position in

[60] For example, statements such as "… a group may object to governmental coercion -- or at best, governmental bribery -- to disaffirm, in effect, their commitment to particular religious convictions." CLS Amicus Brief, *supra* note 59, at *16.
[61] See, e.g., *Smith*, 494 U.S. at 885 *citing* Lyng v. Northwest Indian Cemetary Protective Assn., 485 U.S. 439, 451 (1988) ("When the government makes policies and laws, it "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.").
[62] CLS Amicus Brief, *supra* note 59.
[63] Transcript of Oral Argument at 1, Christian Legal Society v. Martinez, 130 S. Ct. 2971 (2010) (No. 08-1371) [hereinafter Martinez Transcript] (emphasis added). Further, in the organization bylaws as to the CLS Thomas Cooley Law School chapter, there is no requirement that mere members are entitled to lead prayer. Thomas Cooley Christian Legal Society website, available at: http://christianlegalsociety.tmc.cooley.edu/Default.aspx?pageId=154288 (last visited May 2, 2011). Thus, the contention that Hastings is forcing the organization to be led by homosexuals or non-Christians is without any basis.

a "Registered Student Organization (RSO)"[64] but it does not deny the organization the right to set neutral qualification requirements.[65] For instance, several RSOs already condition membership and leadership eligibility through *neutral* polices which are "designed to ensure that students join because of their commitment to a group's vitality, not its demise."[66] Examples of acceptable requirements include: attending meetings regularly, payment of dues, attendance requirements, and minimum membership time requirements to be eligible for an officer position.[67] What it definitely doesn't say is that any student can walk into an organization and *demand* leadership. Even after the decision came down in favor of Hastings, the CLS remained firm in its rhetoric, releasing a press release stating that the "Hastings policy actually requires CLS to allow atheists to lead its Bible studies and the College Democrats to accept the election of Republican officers in order for the groups to be recognized on campus."[68]

B. Legal Fallacies

Beyond just the social rhetoric, looking at the actual legal arguments raised by CLS also calls into question their candor. Most egregious is their refusal to take into account circumstances when applying case law. For example, in their amicus brief for *Dale*, CLS alleged that "…in the post-*Smith* legal framework, the right of Boy Scouts to select its leadership according to its own criteria will directly affect the ability of religious student groups to select their leadership free from government coercion."[69] The *Martinez* decision shows that this contention is facially flawed, but the basis of the analogy itself is incorrect. As Part I illustrated,

[64] Justice Ginsburg pointed out that CLS had stipulated to the fact that "Hastings requires that registered student organizations allow any student to participate, become a member, *seek* leadership positions…" Martinez Transcript, *supra* note 63, at 6.
[65] *Martinez*, 130 S. Ct. at 2992.
[66] *Id.*
[67] *Id.*
[68] Supreme Court: Calif. University's policy upheld, but school still barred from targeting Christian group, Alliance Defense Fund / CLS News Release – June 28, 2010.
[69] CLS Amicus Brief, *supra* note 59, at *25-26.

the Boy Scouts exist in a sphere of regulation and free expression quite different from that of a student organization at a university. At issue in Boy Scouts was *state* regulation of a private expressive organization, not *university* regulation of a *university student* organization. While CLS may try to obscure this fact, it is not a distinction without a difference. At oral argument, CLS stated that "[t]he State is Hastings. We are perfectly private."[70] This is simply not accurate. Student organizations, while they resemble (or even have the same name as) a private expressive organization *outside* of the university sphere, do not transform them into the same being.[71] The University is itself a restrictive organization that does not take every person who may wish to attend. It selects a certain group from the general population to participate in academic studies, and attempts to provide an educational atmosphere for attendees. "A college's commission -- and its concomitant license to choose among pedagogical approaches -- is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process."[72] Universities, therefore, often encourage students to form organizations to discuss differing philosophies and express diverse opinions. While universities traditionally do this, it is not a *right* of students. A university is not a fortress or a prison that confines its attendees. The Students are free to come and go from the campus, and are able not constrained from joining local chapters of organizations such as CLS. It is a convenience that students form their own versions of such organizations on campuses. CLS, nonetheless, wishes to liken the relationship between the state and the national CLS with that of the University and Student-Org CLS. This would obviate the University as a player in its own home.

[70] Martinez Transcript, *supra* note 63 at 14.
[71] Another conceptual analogy that may put this argument's flaw in perspective is to consider Russian Nesting Dolls. The CLS student organization would be one of the smallest towards the very center, while the CLS national organization would find itself closest to the outermost shell.
[72] *Martinez*, 130 S. Ct. at 2988-89.

What a university cannot do is discriminate on the basis of viewpoint if it has opened a limited public forum within its bounds.[73] CLS, foreshadowing the case eventually brought against Hastings, alleged in its amicus brief for *Dale* that:

> public universities have *threatened* religious student groups with loss of access to campus facilities if the groups refuse to agree to accept as officers persons who do not share the groups' core religious values, including their religious viewpoints regarding homosexual conduct.[74]

This statement again expresses the untruth that any university is attempting to force any specific students into officer positions. More important, however, is that CLS offered no examples at this time of any university that actually engaged in this practice, and would not file a complaint against Hastings for several years to come. The cases CLS *does* point to, however, offer no support for this statement as constructed. CLS cites *Widmar v. Vincent*[75] and *Rosenberger v. University of Virginia*[76] as support for why such "behavior" by universities is forbidden, however these cases deal with issues that are fundamentally different than the concept CLS is attempting to advance.

In *Widmar*, for example, the issue was that the university, "which makes its facilities generally available for the activities of registered student groups" subsequently closed its facilities to a "registered student group desiring to use the facilities for religious worship and religious discussion."[77] The aggrieved organization was already an approved organization which had been operating for several years and had complied with all university policies.[78] The Court determined, therefore that the discrimination was based on the viewpoint of organization, their

[73] *Martinez*, 130 S. Ct. at 2978 ("First Amendment generally precludes public universities from denying student organizations access to school-sponsored forums because of the group's viewpoints.").
[74] CLS Amicus Brief, *supra* note 59, at *8 (emphasis added).
[75] 454 U.S. 263 (1981).
[76] 515 U.S. 819 (1995).
[77] *Widmar*, 454 U.S. at 264.
[78] *Id.*

religious speech.[79] The regulation was not neutral on its face, it prohibited "the use of University buildings or grounds for purposes of religious worship or religious teaching."[80] This demonstrates that a university cannot open its doors to all student organizations and then subsequently shut one out for what they choose to discuss,[81] but it doesn't confront any issues of organization leadership nor antidiscrimination regulations.

In *Rosenberger* the university authorized student organizations to contract with outside printers for publications but "withheld any authorization for payments on behalf of petitioners for the sole reason that their student paper 'primarily promotes or manifests a particular belief in or about a deity or an ultimate reality.'"[82] The student group was designated a "Contracted Independent Organization," a status which distinguished it from a "religious organization," yet it was denied funding because it espoused a religious viewpoint.[83] As in *Widmar*, the Court said the university could not discriminate on the basis of viewpoint.[84]

Both cases remain good law today, and are important for protecting student organizations from arbitrary regulations that target their speech for regulation. What CLS would like these cases to express, is that religious expression deserves *special* protection within the university sphere. CLS cites both *Widmar* and *Rosenberger* in their arguments against Hastings' policy.[85] As previously described, the situations are factually distinguishable. In both *Widmar* and *Rosenberger*, the organization experiencing viewpoint discrimination was *already* a university-

[79] *Widmar*, 454 U.S. at 265.
[80] *Widmar*, 454 U.S. at 265 n. 3.
[81] *Widmar*, 454 U.S. at 267 ("University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.").
[82] *Rosenberger*, 515 U.S. at 822-23.
[83] *Rosenberger*, 515 U.S. at 826.
[84] *Rosenberger*, 515 U.S. at 829.
[85] Petition for Writ of Certiorari, Christian Legal Society v. Martinez, 130 S. Ct. 2971 (2010)(No. 08-1371), 2010 U.S. S. Ct. Briefs LEXIS 2091 at *29.

certified organization.[86] Therefore, it had achieved equal status to the other organizations yet was still being treated dissimilar. *Widmar* did not establish a right for a religious student organization *to exist*, but instead that if a religious student organization *does exist*, it must be treated the same as all other student organizations. This is the key distinction which CLS hopes to avoid in *Martinez*, where it is asking to be made equivalent to a RSO without abiding by the same rules… as Justice Ginsburg states "CLS, it bears emphasis, seeks not parity with other organizations, but a preferential exemption from Hastings' policy."[87]

What CLS also wishes to ignore that in both decisions is that the Court consistently stated that the university may *limit* its forum, "reserving it for certain groups of for the discussion of certain topics."[88] Where a university runs into trouble with viewpoint discrimination is where it has opened up a forum and subsequently attempts to manage the messages on an ad hoc basis.[89] Hastings, perhaps with a slight bit of irony, has not opened up its forums to all-comers. Some means of communication with students and methods of conducting group activities on the campus are subject to a threshold commitment that the group not discriminate on the basis of several enumerated statuses.[90] If a group does not wish to abide by the threshold requirements, it may not participate in certain forums, but may in others that *are* open to all-comers.[91] Hastings stated to the Court, that "the school would be pleased to provide CLS the use of Hastings facilities for its meetings and activities" should it choose to remain unrecognized, as well as allow it "access to chalkboards and generally available campus bulletin boards to announce its

[86] *Widmar*, 454 U.S. at 264; *Rosenberger*, 515 U.S. at 826.
[87] *Martinez*, 130 S. Ct. at 2978.
[88] *Rosenberger*, 515 U.S. at 829.
[89] *Rosenberger*, 515 U.S. at 829 ("Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set.").
[90] *Martinez*, 130 S. Ct. at 2981 ("Hastings has merely placed conditions on the use of its facilities and funds…").
[91] See the outermost portion of the university spheres in Figure One.

events."[92] In this respect, the Court noted that "Hastings would do nothing to suppress CLS's endeavors, but neither would it lend RSO-level support for them."[93]

C. "Religious Exception" Fallacy Gaining Traction

The language that has been employed of "religious exception" is used repeatedly, although as has been described, "exception" is something of a misnomer. In the cases involving student organizations, the First Amendment is not being invoked as a shield to protect the organization's message, but is rather used as a sword to attack rules which bind everyone else. The "exception" desired is not to protect an organization's right to speak or assemble, but the right to obtain a preferred status without playing by the rules. Nonetheless, organizations have been very effective in framing their message as one of defense and "exceptions." They have found support from well-learned quarters who also fall into the trap of defending "exceptions" by conflating the spheres of First Amendment protections.

Joan Howarth, the Dean of Michigan State University College of Law, for example, takes such a position in her article, "Teaching Freedom: Exclusionary Rights of Student Groups."[94] In this article, Dean Howarth states that nondiscrimination policies of the school should not trump expressive association rights.[95] While I have demonstrated that student group First Amendment rights would fall in the inner spheres, Dean Howarth supports her conclusion by citing to cases which occur outside of the University sphere.[96] Further, Dean Howarth virtually ignores the fact

[92] *Martinez*, 130 S. Ct. at 2981 (internal quotations omitted). It should be noted that during the time that CLS was operating at Hastings without being recognized, it was still able to organize and implement a number of activities from barbeques to bible studies. *Id*.
[93] *Martinez*, 130 S. Ct. at 2981.
[94] Joan Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. DAVIS L. REV. 889 (2008-2009).
[95] *Id*. at 891.
[96] *Id*. at 892. Specifically, Dean Howarth cites *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987). These cases involved discriminatory practices by private organizations and how they were affected by state anti-discrimination law. The analysis of *Dale* and *Hurley* in Part I of this paper adequately explains why this comparison is inapposite to a university student organization.

that what CLS sought from UC Hastings was not merely freedom of expression, but wanted "recognized status," which would allow them access to subsidies, etc. She states that "in a limited public forum created to allow students to form groups on the basis of shared beliefs, preventing faith-based groups from using their beliefs to organize a group should not be dismissed as viewpoint neutrality."[97] However, such consideration by the Court is consistent with its limited public forum precedent, and is consistent with Hastings' behavior. Dean Howarth later points out that Hastings "never interfered with the chapter's existence until it refused to sign the nondiscrimination policy."[98] It was permitted to hold bible studies, barbeques, etc., but it was not allowed "recognized" status.[99] This is an important distinction. Dean Howarth's argument clearly breaks down where she states that "when a school or university establishes a limited public forum for student organizations, the student organizations constitute private entities, with identities distinct and separate from that of the school or university."[100] This is contradicted by the very nature of a "student organization," which seeks to define itself both by its mission, as well as the fact it is tied to the University within which it operates. A student organization does not seek to be "distinct" from the University, but to define itself as part of it… otherwise, there would be no need to form an organization within a University at all. A group could merely form outside of the campus and visit the limited public forum as it wished. To emphasize separation, Dean Howarth suggests that the university "provide specific disclaimers that … alert everyone that student organization are not within the

[97] Howarth, *supra* note 94 at 907.
[98] *Id*. at 911
[99] *Martinez*, 130 S. Ct. at 2981.
[100] Howarth, *supra* note 94 at 928. Dean Howarth later contradicts this sweeping statement by pointing out that some restrictions on expressive association are necessary within the University setting, such as requiring membership lists be disclosed. *Id*. at 934. This shows that there must be a distinction between a truly private chapter of CLS and a University CLS Organization.

general nondiscrimination policies for access to educational opportunities."[101] Dean Howarth again misses the point of what CLS is seeking. They were already in a position where they were allowed to discriminate and still have access to campus facilities, what they wanted, and what their suit involved, was a request for *less* separation.[102] They wanted a status which allowed them to use Hastings' name, and would use student monies to subsidize their events.[103]

As we have seen, the *Martinez* Court did not follow the reasoning of CLS nor Dean Howarth, and instead maintained consistency with its prior holdings. It is evident, however, that when the complicated area of nested spheres of First Amendment jurisprudence come into play, they are made more obscure and convoluted by emotion-provoking rhetoric. What CLS puts forth as a legal argument, and what Dean Howarth perhaps inadvertently supports, is that religious beliefs deserve *special* treatment under the Constitution. This is clearly against not only the language of precedent but also the spirit of the cases as well. With a success in the university setting, combined with the successes of *Dale* and *Hurley*, it seems that CLS was attempting to gather holdings permitting preferential exceptions in a variety of spheres. While speculative, it would appear that CLS hoped to be able to weave these holdings into a broader argument for religious exemptions to anti-discrimination laws at all levels, in essence nullifying *Smith*. CLS did not obtain such a victory, however the kulturekampf was not being waged on just the judicial front. In Part III, we will take a step back from the university sphere and take a broader look at how religious protection rhetoric is being codified, which will add credence to the speculation that an effort to nullify anti-discrimination laws through a religious "opt-out" is, in fact, occurring.

[101] *Id*. at 935-36.
[102] See *Martinez*, 130 S. Ct. at 2979.
[103] *Id*.

Part III: Kulturekampf and Rhetoric beyond the University Sphere

In the last few years, several of the New England states have passed laws codifying the right of "civil marriage" for same-sex couples.[104] In the four states that codified the right to same-sex marriage in 2009, and in the proposed 2011 legislation in Maryland, however, each bill contains a "religious freedom" provision. In fact, in Vermont and Maine, the bills themselves contained "religious freedom" in the titles.[105]

Maine's now void law, and the New Hampshire law both are affirm protections for clergy to be immune from any suit for refusing to solemnize a same-sex marriage.[106] This "protection" seems largely a tautology as the state has never had the authority to reach into a religious organization and demand it provide a sacrament to all-comers. If that were a valid fear, the rise of civil divorce would pose a much greater threat to religious institutions' marriage sacraments. However, as all religious institutions' clergy are free to discriminate against those who have civilly divorced on the basis of religious doctrine, it does not stand to reason that they would be unable to turn away same-sex couples seeking marriage if it also was contrary to doctrine. In fact, such language as that within the Maine and New Hampshire bills appears to be aimed at quelling the rhetoric which we have seen throughout this paper.[107]

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[104] In Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (Mass. 2003), Massachusetts' Supreme Court held that denying same-sex couples marriage was contrary to its State Constitution. The following year in Opinions of the Justices to the Senate, 440 Mass. 1201 (Mass. 2004), the state's Supreme Court stated that "civil unions" was not acceptable as an alternative to same-sex "marriage." No statute, however, has been passed codifying the court's decisions.

[105] Vermont's bill was entitled "An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage." S. 115, 2009-2010 Leg. Sess. (Vt. 2009). In Maine, the bill was entitled "An Act To End Discrimination in Civil Marriage and Affirm Religious Freedom." S.P. 0384, 124th Maine Leg., 1st Sess. (Me. 2009). Maine's statute was overturned by referendum 6 months later. Maryland's bill also contained "Religious Freedom" in the title of the original bill, however this term was removed by amendment on the Senate floor. S.B. 116, 428th Leg., Reg. Sess. (Md. 2011).

[106] S.P. 0384, 124th Maine Leg., 1st Sess. (Me. 2009), H.B. 436, 2009 Leg. Sess., (NH. 2009).

[107] The Alliance Defense Fund, for example states that groups seeking same-sex marriage recognition "relentlessly advances its legal agenda to eradicate religious freedom, which is why we must be even more devoted to defending

While Part II described student organizations seeking "religious exceptions" to gain access to preferred status at universities, in the outer spheres, the "religious protections" sought can have a substantially more insidious results. In fact, aside from "affirming" religious freedom, they seemed aimed at creating broader "religious exceptions" not only for marriage ceremonies but reaching into anti-discrimination laws as well.[108] In Connecticut and Vermont's laws, and in Maryland's proposed bill, the language differs slightly as to the religious "protections," but all three exceed the mere iteration that the laws will leave the "clergy" free to discriminate. The three all apply to "a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society."[109] Additionally, Connecticut and Vermont state that these organizations "shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods, or privileges is related to the solemnization of a marriage or celebration of a marriage."[110] Maryland's "related to" language includes solemnization as well as any "promotion of marriage" events which may occur "through religious programs, counseling, educational courses, summer camps, and retreats."[111] This language is significantly more encompassing than is necessary to assure religious institutions that the state is not going to interfere with their doctrines. In fact, what it appears to do is give a preferential exception to those religious (and religious affiliated) groups which have taken a step *into* the public sphere. Again, we have a situation where the First Amendment has become a sword instead of shield.

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marriage between one man and one woman." Alliance Defense Fund – The Homosexual Agenda: The Principal Threat to Your Religious Freedom, http://www.alliancedefensefund.org/Marriage.

[108] Taylor Flynn, *Clarion Call of False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return us to a Religious Understanding of the Public Marketplace*, 5 NW J. L. & SOC. POL'Y 236, 237 (2010).

[109] S.B. 899, 2009 Leg. Sess., (Ct. 2009), S. 115, 2009-2010 Leg. Sess. (Vt. 2009), S.B. 116, 428th Leg., Reg. Sess. (Md. 2011).

[110] S.B. 899, 2009 Leg. Sess., (Ct. 2009), S. 115, 2009-2010 Leg. Sess. (Vt. 2009).

[111] S.B. 116, 428th Leg., Reg. Sess. (Md. 2011).

Rather than protect the religious organization from overreach by the state, we now have religious organizations expanding into the public sphere but refusing to accept the rules which bind other non-religious yet similarly situated organizations and people. Beyond the churches, synagogues, mosques, etc., these statutes create questions as to where the boundaries of "exemptions" lie. How much "association" is required to invoke the exemption, for example? How is a nonprofit operated "in conjunction with" a religious organization defined? And when a religious institution owns housing, or rents facilities to the market at large, have they been given a pass to discriminate on the basis of sexual orientation? Professor Taylor Flynn of Western New England College School of Law, has pointed out some of the dangers he sees lurking in the religious "freedom" language proposed for the civil marriage bills.[112] He believes that the language being employed is a departure from centuries of practice where religious freedom would cede ground "to equality in the public realm."[113] Thus, if someone wished to take enter the commercial environment, they could not bring their biases with them into the marketplace. What appears to be the goal of these religious freedom clauses today, however, is to reverse this practice. By building in exceptions, individuals such as same-sex couples could be "required to conform their lives to others' religious beliefs as a condition of their equal participation in the marketplace."[114] It is the same movement from a private sphere into a public sphere with a demand to play by different rules that we saw in the university context in *Martinez* but with a broader effect.

In an effort to appease the loud voices calling out that same-sex marriage "violates" religious freedom, people like Maryland State Senator Jamie Raskin are determined to make sure

[112] Flynn, *supra* note 108 at 236.
[113] Flynn, *supra* note 108 at 238.
[114] Flynn, *supra* note 108 at 238.

that civil marriage bills also reflect the "main value" of "absolute religious freedom."[115] But this "absolute freedom" is no longer for clergy or within religious practices, it is expanding into the public sphere. The judicial branch has shown that private expressive organizations such as the Boy Scouts, are protected from state law overreach, which implies that more clearly "religious" oriented organizations would find more First Amendment protection without express statutory provision for exemptions. Nonetheless, these exemptions are being added, and they extend beyond the merely "expressive" private organizations. The truly disturbing legal trend is not what church leaders have called "the ominous creep of laws allowing same-sex marriage,"[116] but rather that religious organizations are taking themselves into the public sphere and then demanding religious "exemptions" from neutral laws such as anti-discrimination statutes. The kulturekampf is not a battle where only one side seeks to advance. It appears that what may have been CLS' goal through the judicial path has found more success in the reverse direction along the political path.

IV. Conclusion

This paper has laid out a framework to demonstrate that the protections of the First Amendment will interact differently with anti-discrimination regulations depending upon context and circumstances. A university organization, for example, is *not* on par with a private organization outside the university context, both occupy distinct spheres of being. Therefore the rights of students in a *limited* public forum are not equivalent to an individual in a private expressive organization operating in a public forum. Nonetheless, there has been a great deal of effort made to conflate these spheres and develop a jurisprudence and social parlance of "religious exceptions" and "religious protections." Justice Scalia mentioned a "Kulturekampf"

[115] Julie Bykowicz, *Undecided Delegate offers 'Friendly' Same-Sex Marriage Amendment*, THE BALTIMORE SUN, March 10, 2011.
[116] Erik Eckholm, *An Iowa Stop in a Broad Effort to Revitalize the Religious Right*, N.Y. TIMES, April 2, 2011.

in his *Romer v. Evans* dissent,[117] and we have seen that there is, indeed, one being waged. From the Court's pronouncement in *Smith* that religious organizations must comply with neutral laws, there has been steady movement by religious organizations to escape its binds. This paper demonstrated that while often the terminology frames the issue as religion "under attack" and in need of a protecting "exception," in fact, the goal can be for *special* status or *preferred* treatment without abiding by neutral regulations. To be sure, it is not the intent of this paper to dismiss all calls for religious exemptions as fraudulent. There are cases where laws can overreach into the private expressive organization's sphere, but the Supreme Court has demonstrated its willingness to stop such encroachments.

Courts, governments, and legal minds must be vigorous in scrutinizing calls for "religious exceptions" as the rhetoric of the last decade has worked to obscure the logical legal framework that is in place. Instead, the rhetoric appeals to emotion and creates the idea that somehow anti-discrimination laws are infiltrating the private sphere and "attacking" religion, rather than only applying when religion takes a step into the public sphere. *Martinez* suggests that the Court will also restrain attempts of religious exemption encroachment the other direction as well, but there is still the concern that the anti-discrimination laws of the state will still be circumvented by rhetoric aimed at the political arena. In the same breath that states are recognizing same-sex marriage, there is a risk that other anti-discrimination statutes are being undermined in the name of "religious freedom." As Justice Scalia stated in *Smith*, the Court has *never* held that "when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from government regulation."[118] While there may be resistance within private religious organizations to the anti-discrimination protections afforded to

[117] Romer v. Evans, 517 U.S. 620 (1996) (Scalia, J., dissenting).
[118] *Smith*, 494 U.S at 882.

homosexuals, they cannot be allowed to alter the legal landscape under the guise of First Amendment protection. To do so is to open the floodgates for constitutionally sanctioned discrimination.