

The First Amendment in the Multicultural
Climate of Colleges and Universities:
A Story Ending with
Christian Legal Society v. Martinez

by BLAKE LAWRENCE*

If there is a time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

—Justice Brandeis¹

Introduction

The First Amendment, being a cornerstone of American democracy and central to the ideal of American citizenry, prevents a governmental actor from inhibiting the speech of a private actor. However, the United States Supreme Court has consistently held that not all speech enjoys full First Amendment protection. Cases such as *Chaplinsky v. New Hampshire*,² *FCC v. Pacifica Foundation*,³ and *R.A.V. v. City of St. Paul*⁴ hold that fighting words, obscenity, and hate speech, respectively, may be limited without disrupting Constitutional bounds. Public policy supports such limitations—fighting words meant to invoke a response lead to disruption and violence, obscene speech subjects the unwilling listener to

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1. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).
2. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
3. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).
4. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

communication that is undesired and potentially harmful, and hate speech limits respectful discourse in a civil society.

Those limitations on speech, however, occur in the “public” setting and speech will be treated differently based on where it is uttered.⁵ Public colleges and universities present a much different forum than the general public. Universities play host to a multicultural environment where students of different backgrounds, cultures, and religions coalesce and *must* find a way to co-exist. This is especially true since public colleges cannot base admissions decisions on race or background—leading to diverse student bodies which the Supreme Court recognizes as an important component of higher education.⁶ Further, in order to recruit active student participation in on-campus activities, colleges allow students to form groups and associations for like-minded students to meet each other and participate in various social and philanthropic activities. Once such groups are allowed, public colleges create a “limited public forum” and must abide by the rules that they themselves set.⁷ In recognition of their diverse student bodies, public colleges and universities should encourage different views and beliefs within their student organizations and implement “all-comers” policies towards individual speech and expressive association. These policies reach what should be a college’s core mission: to educate, inform, and present students with different ideas and cultures.

The Supreme Court has made clear that it will treat speech on public college and university campuses differently than speech in a public forum, and will give strong deference to university officials working “on the ground,” trusting their judgment of what works best in a particular college’s unique environment. Part I of this article comprehensively discusses the “limited public forum” analysis as a method of proscribing speech. It also outlines the major cases dealing with the creation of the limited public forum on public college

5. For instance, Justice Oliver Wendell Holmes famously declared that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.” *Schenck v. United States*, 249 U.S. 47, 52 (1919).

6. See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003). Both *Grutter* and *Gratz* hold that diverse student bodies serve a compelling state interest, allowing for some types of lawful discrimination. While the Court held that the admissions policies in *Grutter* were constitutional, it found that those in *Gratz* were not.

7. *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2984 n.11 (2010) [hereinafter *CLS v. Martinez*] (“governmental entities establish limited public forums by opening property ‘limited to use by certain groups or dedicated solely to the discussion of certain subjects.’”).

campuses, revealing that what works best in higher education may not fit for primary and secondary education, and vice-versa. Part I.C. explains that the Supreme Court has always given some deference to school officials in making decisions regarding student campus speech, and explores whether that is the best policy or merely the most efficient choice for disposing of campus speech cases. Part II discusses the most recent high-court case on the issue, *Christian Legal Society v. Martinez*,⁸ where the Court determined that a limited public forum existed, and that the policies put in place by Hastings College of the Law were reasonable and content-neutral. The Part will also discuss some of the interesting and potentially problematic sections of the *Martinez* opinion.

I. The Limited Public Forum Analysis as a Method of Proscribing Speech

A well-known line of Supreme Court cases has held that a college campus is not an open forum, and colleges and universities will be subjected to a lesser form of scrutiny when they proscribe speech. Defined by the Court, “[a] public forum may be created for a limited purpose such as use by certain groups or for the discussion of certain subjects.”⁹ In that way, colleges “confine[] a speech forum to the limited and legitimate purposes for which it was created.”¹⁰ That “limited and legitimate purpose” on college campuses may be to encourage educational discourse, to present differing views (albeit peacefully), or to allow contrary viewpoints in an acceptable forum for expression with each other. Further, “the Court observed that universities ‘occupy a special niche in [the] constitutional tradition of the First Amendment,’ and thus are entitled to substantial ‘educational autonomy.’”¹¹ The limited nature of the public-college First Amendment forum presents an effective vehicle for analyzing speech that occurs on college campuses, which “demand[] a different approach to otherwise generally applicable First Amendment principles.”¹² The applicable analysis that courts undertake after determining a limited public forum exists respects the speaker’s rights

8. *CLS v. Martinez*, 130 S. Ct. 2971.

9. *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45 n.7 (1983).

10. *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 829 (1995).

11. Paul Horwitz, *Universities as First Amendment Institutions*, 54 *UCLA L. REV.* 1497, 1499 (2007) (quoting *Grutter*, 539 U.S. at 329). Deference to school administration in judicial analysis will be discussed *infra* Part II.C.

12. Horwitz, *supra* note 11 at 1499.

of speech and association as well as the rights of the university as property owner and educational institution.¹³

However, the rights of a university to proscribe speech (or, conversely, of a student's right to speech itself) are not absolute. A university policy for proscribing certain speech must be reasonable, "taking into account all of the circumstances"¹⁴ and must be viewpoint neutral.¹⁵

A. Seminal Student-Association Cases from the Supreme Court

1. *Healy v. James*¹⁶

Probably the best examinations of speech proscribed by a university within a limited public forum occur in *Healy v. James*,¹⁷ *Widmar v. Vincent*,¹⁸ and *Rosenberger v. University of Virginia*.¹⁹ *Healy* arises in the early 1970s "out of a denial by a state college of official recognition to a group of students who desired to form a local chapter of Students for a Democratic Society (SDS)."²⁰ During that time "[t]here had been widespread civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson," and SDS chapters "had been a catalytic force" in some of the unrest.²¹ A group of students attempted to form a SDS chapter and filed the proper paperwork for recognition as a campus organization.²²

The request specified three purposes for the proposed organization's existence. It would provide 'a forum of discussion and self-education for students developing an analysis of American society'; it would serve as 'an agency for integrating thought with action so as to bring about constructive changes'; and it would endeavor to provide 'a coordinating

13. See *CLS v. Martinez*, 130 S. Ct. at 2986.

14. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985).

15. See Horwitz, *supra* note 11, at 1505 (stating that "the very essence of the content-neutrality doctrine is the attempt to craft a neutral rule that applies across a variety of instances of protected speech.").

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

17. *Id.*

18. *Widmar v. Vincent*, 454 U.S. 263 (1981).

19. *Rosenberger*, 515 U.S. 819.

20. *Healy*, 408 U.S. at 170.

21. *Id.* at 171.

22. *Id.*

body for relating the problems of leftist students' with other interested groups on campus and in the community.²³

Based on the language in the students' petition for recognition and the national reputation of SDS, the administration of Central Connecticut State College (the university President, specifically) feared that SDS would attempt to violently assemble or protest, and "found that the organization's philosophy was antithetical to the school's policies, and that the group's independence [from the national organization] was doubtful."²⁴ Denial of official campus recognition resulted in SDS being forbidden from using campus bulletin boards and using campus facilities for meetings and events.²⁵ Further, without official status as a student organization, SDS was unable to reach its goal of significantly increasing its membership.²⁶ The student group then sought recourse in the courts.

The Supreme Court began its analysis by noting that "state colleges and universities are not enclaves immune from the sweep of the First Amendment"²⁷ and that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."²⁸ Then it reasoned that, due to the particularities of the college campus, "First Amendment protections should apply with less force on college campuses than in the community at large," but "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."²⁹ The Court must therefore attempt to balance students' legitimate First Amendment rights against allowing college campuses to remain a peaceful "marketplace of ideas."³⁰

The *Healy* Court continued by stating that "a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has the power appropriately to protect itself and its property; [and] that it may

23. *Id.* at 172.

24. *Id.* at 175. The local chapter, in its own defense, stated that if granted university recognition the chapter would not follow the national organization's beliefs. The University found that explanation unpersuasive. *Id.*

25. *Id.* at 176.

26. *Id.*

27. *Id.* at 180.

28. *Id.* (quoting *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

29. *Healy*, 408 U.S. at 180 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

30. *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003).

expect that its students adhere to generally accepted standards of conduct.”³¹ Since students, by enrolling in public higher education, can expect their conduct to be regulated in some way, the Court thus reasons that a college has the “inherent power to discipline,” which logically includes the ability to punish certain types of speech.³² “Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected.”³³

Therefore, colleges and universities may enforce requirements that official recognition of campus groups occur only after the groups manifest a willingness to “adhere to reasonable campus law.”³⁴ “Such a requirement does not impose an impermissible condition on the student’s associational rights.”³⁵ In that way, a group’s associational rights are not infringed and the campus can expect all groups to “conform with reasonable standards respecting conduct.”³⁶ The Court goes as far as stating that conforming with reasonable conduct standards “is a *minimal requirement*, in the interest of the entire academic community, of any group seeking the privilege of official recognition.”³⁷ While the Court in *Healy* remanded the case for rehearing based on the lack of evidence that the petitioners could abide by reasonable campus policies, it laid the foundation that a university could deny recognition of a campus organization based on a belief that the group would not adhere to reasonable standards respecting conduct, which may include university policies of non-discrimination.

31. *Healy*, 408 U.S. at 192 (quoting *Esteban v. Cent. Miss. State Coll.*, 415 F.2d 1077, 1089 (8th Cir. 1969)).

32. While public colleges and universities must keep all actions within constitutional limits, private colleges maintain more of a contractual relationship with their students. For example, by attending a private college the student agrees to give up certain rights, which are generally outlined in a student manual. Those rules/limitations need not always follow the same constitutional limitations as public colleges and universities. See *Centre College v. Trzop*, 127 S.W.3d 562, 568 (Ky. 2003) (“The relationship between a private college and its students can be characterized as contractual in nature. Therefore, students who are disciplined are entitled only to those procedural safeguards which the school specifically agrees to provide.”).

33. *Healy*, 408 U.S. at 192–93.

34. *Id.* at 193.

35. *Id.*

36. *Id.*

37. *Id.* (emphasis added).

3. *Widmar v. Vincent*³⁸

*Widmar v. Vincent*³⁹ concerned members of a religious group at the University of Missouri at Kansas City (UMKC) which brought an action challenging a university policy that excluded religious groups from open access to meeting rooms despite university facilities being generally available for any activity planned by a registered student group.⁴⁰ A religious group named Cornerstone challenged the policy, which “prohibits the use of University buildings or grounds ‘for purposes of religious worship or religious teaching.’”⁴¹ The Court determined that the university had created a limited public forum “[t]hrough its policy of accommodating [other student groups] meetings Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.”⁴²

Unlike *Healy*, the college in this instance sought to limit any association between itself and religion, claiming a compelling interest in “maintaining strict separation” between the two.⁴³ Since Cornerstone desired to use campus facilities for religious worship, the university, in line with its policy, denied its continued existence. The Court “agree[d] that the interest of the University in complying with its constitutional obligations may be characterized as compelling. It does not follow, however, that an ‘equal access’ policy would be incompatible with this Court’s Establishment Clause cases.”⁴⁴ In effect, the university policy limited only religious speech, confining the limited public forum to discussion of all topics *but* religion.

While the UMKC should be congratulated for its attempt to safeguard constitutional rights for its students (and for itself), it misconstrued the nature of its own interest. “It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization’s enjoyment of merely ‘incidental’ benefits does not violate the prohibition against the ‘primary advancement’ of religion.”⁴⁵ To avoid violating the Establishment Clause, a public

38. *Widmar v. Vincent*, 454 U.S. 263 (1981).

39. *Id.*

40. *Id.* at 265–68.

41. *Id.* at 265 (quoting the relevant university policy).

42. *Id.* at 267.

43. *Id.* at 275.

44. *Id.* at 271.

45. *Id.* at 273 (quoting *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 771 (1973)).

university's policy must clear the three-prong test established in *Lemon v. Kurtzman*: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the [policy] must not foster 'an excessive government entanglement with religion.'"⁴⁶ In this case, the UMKC policy clearly has a secular purpose as it in no way promotes a particular religious viewpoint.⁴⁷ Further, satisfying the third prong of analysis, the policy does not foster an unnecessary entanglement with religion. To the contrary, the policy exhibits a "hands-off" approach to religion in its entirety, taking care not to endorse or lambast any religion at all. The second prong of the test is where the UMKC policy encounters some difficulty. Since the policy, in essence, prohibits all religion from being discussed or practiced on campus, it *inhibits* religion, violating the second prong of the *Lemon* test.⁴⁸

In the end, *Widmar*'s outcome is determined by the fact that the university singled out *only* religious groups, rendering the policy not viewpoint neutral, a required constitutional component.⁴⁹ The

46. *Widmar*, 454 U.S. at 268 (quoting *Lemon v. Kurtzman*, 403 U.S. 646, 653 (1980)).

47. *Widmar*, 454 U.S. at 272.

48. *Id.* at 271.

49. See CALVIN R. MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 789–90 (3rd ed. 2009).

Content-based regulations are those that are aimed at the subject matter of the speech (e.g., "no political speech"). Viewpoint-based regulations—laws that discriminate on the basis of a specific viewpoint (e.g., "no libertarian speech")—are merely a more sharply focused subset of content-based regulations. On the other hand, content-neutral regulations are indifferent to the subject matter or viewpoint expressed

In general, content based regulations are presumed to be void; the government bears the burden of justifying them by proving that they are necessary to achieve a compelling public objective

Id. See also R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 333 (2006).

[T]he distinction between regulations that are content-based or content-neutral is central to contemporary free speech law. A leading scholar has gone so far as to argue that "[t]oday, virtually every free speech case turns on the application of the distinction between content-based and content-neutral laws." The sheer number of cases referring to this distinction is, after a historically late start, by now in the thousands. Justice O'Connor, citing a range of free speech cases, has written that "[t]he normal inquiry that our doctrine dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny."

school's interest "in maintaining strict separation of church and State is not sufficiently compelling to justify viewpoint discrimination against religious speech."⁵⁰

3. *Rosenberger v. University of Virginia*⁵¹

The Supreme Court used its analyses of *Healy* and *Widmar* to decide *Rosenberger v. University of Virginia*.⁵² The case involved the University of Virginia's denial of funding for reimbursement of printing costs to Wide Awake Productions, a philosophical and religious magazine created "to facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints."⁵³ Members of the group brought suit, "alleg[ing] that refusal to authorize payment of the printing costs of the publication, solely on the basis of its religious editorial viewpoint, violated their rights to freedom of speech and press, to the free exercise of religion, and to equal protection of the law."⁵⁴ While the case involves access to funds and not facilities, it still deals with the prohibition of a certain type of speech based upon the content of the message itself, which renders it not content neutral.

The Court began its analysis by referring to the applicable forum as "a forum more in the metaphysical than in a spatial or geographic sense,"⁵⁵ but relied on well-established limited public forum cases, declaring that

Once [a State] has opened a limited forum . . . the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint.⁵⁶

The University of Virginia acknowledged that "ideologically driven attempts to suppress a particular point of view are

Id.

50. *CLS v. Martinez*, 130 S. Ct. 2971, 2987–88 (2010) (quoting *Widmar*, 454 U.S. at 270).

51. *Rosenberger v. Univ. of Va.*, 515 U.S. 819 (1995).

52. *Id.*

53. *Id.* at 825–26.

54. *Id.* at 827.

55. *Id.* at 830.

56. *Id.* at 829 (internal quotation marks omitted).

presumptively unconstitutional in funding, as in other contexts.”⁵⁷ Further, “[t]he Guideline invoked by the University . . . effects a sweeping restriction on student thought and student inquiry in the context (*maybe in the forum?*) of University sponsored publications.”⁵⁸ Since protected speech was suppressed by denial of access to funds, the University denied the student members their right to free speech.⁵⁹ Quite simply, *Rosenberger* stands for the blanket proposition that a university may not generally withhold benefits (whether monetary benefits or the benefits of recognition) from student groups based solely on the group’s religious viewpoint.

B. Similar Application to High School Speech? Compare *Hazelwood School District v. Kuhlmeier*⁶⁰

Healy, Widmar, and Rosenberger all stand for the proposition that once a public university has created a limited public forum, the university must respect the lawful boundaries it has set for itself. Of course, that assumes that the policies a university crafts can reasonably further the ideal of a college campus as a “marketplace of ideas”⁶¹ and that the policies are viewpoint and content neutral. As the cases explained above show, even when a policy is otherwise reasonable, a court will declare it invalid if it is not content neutral. As noted, these cases involved institutions of higher education.

57. *Id.* at 830.

58. *Id.* at 836.

59. *Id.* at 837.

60. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

61. While some may argue that the ideal of “liberal education” in America is slowly eroding to a more vocational-training educational system (one in which students choose educational paths with the end-goal of acquiring jobs instead of knowledge), many in higher education believe to the contrary. Take, for example, this excerpt:

There are fewer students majoring in humanities fields than was once the case, but undergraduates continue to take courses in literature, art, music, and philosophy; despite an uncertain job market, people continue to apply to doctoral programs in those fields; and a great deal of scholarship continues to get published. The humanities disciplines may go through a period of reorganization, but they aren’t likely to become extinct.

LOUIS MENAND, *THE MARKETPLACE OF IDEAS; REFORM AND RESISTANCE IN THE AMERICAN UNIVERSITY* 62–63 (2010).

A strong emphasis in liberal education will encourage students with diverging/differing viewpoints to continue to discuss their differences and similarities. The necessity and efficiency of campuses which maintain an “all-comers” policy for student groups will likely continue to increase as numbers in liberal-arts majors increases, due to the liberal idea that there is no one “right” solution to a complex problem.

Another landmark case, with facts similar to *Rosenberger*, arose in the context of a high school. The case thus presents a noticeably different lens through which to examine a familiar problem.

*Hazelwood School District v. Kuhlmeier*⁶² “concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school’s journalism curriculum.”⁶³ Student staff members of the *Spectrum*, the school newspaper at Hazelwood East High School, claimed that school officials impeded their First Amendment rights “by deleting two pages of articles from the May 13, 1983, issue of *Spectrum*.”⁶⁴ Factually, the acting supervisor of the newspaper deleted two articles from the *Spectrum*’s last issue of the school year due to privacy concerns and a lack of time available before the summer break to edit the articles.⁶⁵ “He concluded that his only options under the circumstances were to publish a four-page newspaper instead of the planned six-page newspaper, eliminating the two pages on which the offending stories appeared, or to publish no newspaper at all.”⁶⁶

The Court ultimately concluded that

[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are *reasonably related to legitimate pedagogical concerns*.

This standard is consistent with our oft-expressed view that the education of the Nation’s youth is primarily the responsibility of

62. *Hazelwood*, 484 U.S. at 260.

63. *Id.* at 262.

64. *Id.* The deleted pages contained two articles; one dealing with teen pregnancy at the school and the other dealing with divorce and its effect on students. School officials feared that the pregnancy story may cause embarrassment of students in the school that had become pregnant (though false names were used), and worried that a particular parent’s privacy would be compromised based on a student interviewee talking about divorce. *Id.* at 265–66.

65. Mr. Emerson served as interim instructor for Hazelwood’s Journalism II class during the end of the 1982–83 academic year. Students in the Journalism class submitted a six-page proof of what they desired to be the final newspaper of the semester. Mr. Emerson delivered the proof to Mr. Reynolds, who objected to the two articles in question. After submitting the proofs back to Emerson to make changes or come up with new articles, Mr. Emerson decided to publish the paper without the two questionable articles. *Id.* at 263–64.

66. *Id.* at 264.

parents, teachers, and state and local school officials, and not of federal judges.⁶⁷

The Court reasoned further that the only constitutionally permissible censorship of school-sponsored speech (be it a publication or theatrical production, for example) occurs when the expression “has no valid educational purpose that the First Amendment is so directly and sharply implicated as to require judicial intervention to protect students’ constitutional rights.”⁶⁸

High school speech that falls outside of the pedagogical (or educational) barrier may be banned consistent with *Hazelwood*, and as determined by school officials themselves. Thus, a simple determination that a certain type of speech has no educational use (from the school’s perspective and not the students’) may lead to particular types (or genres) of speech being proscribed. Commentators have pushed against the extension of *Hazelwood* to higher education, stating the following:

Unlike primary and secondary schools, the Court has long held, college campuses are unquestionably a “marketplace of ideas.” Exposure to many viewpoints indeed historically has been a defining characteristic of higher education. With this mindset, the Supreme Court has held, for example, that a university cannot fire employees pursuant to state law for belonging to the Communist Party. To do so, the Court has stated, would contravene the notion that the “[n]ation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas.”⁶⁹

Further, “in recent decades, the vast majority of courts have recognized only a limited role for free speech in primary and secondary schools, in sharp contrast to the broader free speech rights granted to college students.”⁷⁰ Perhaps the reasoning for limiting speech in primary and secondary education approaches a government’s desire to instill impressionable youth with certain civic values. As another commentator states:

67. *Id.* at 273 (emphasis added).

68. *Id.*

69. Mark J. Fiore, Comment, *Trampling the “Marketplace of Ideas”: The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915, 1948–49 (2002).

70. *Id.* at 1951.

The dilemma of public education is thus manifest. Because few institutions affect young, impressionable personalities as profoundly as do our schools, we as a community are justifiably concerned that our education program should promote the “right” skills and values for the development of an individual capable of contributing in a meaningful way to our community. Yet by authorizing schools to develop this “right” environment, we leave our children highly vulnerable to “village tyrants” who might pervert the education process. Under the guise of properly educating the young, government could predispose children to accept and defer to authority while passively adopting prevailing values and current attitudes. The school system, consequently, epitomizes the tension between liberty and authority.⁷¹

Ingber thus worries about applying rules of primary and secondary schools to colleges and universities—the former being decidedly more authoritarian and giving greater judicial deference to school administration. In that case, college students would never be in a position to fully articulate their own ideas (and ideals), and would be under the thumb of government-sponsored education at every step of the process.⁷² For that reason, he and Fiore would refuse to extend the “pedagogical concerns” analysis to free speech issues on college campuses.⁷³

But there is at least one Circuit Court of Appeals that would apply this pedagogical standard to college and university campuses. Judge Easterbrook articulates why pedagogical-analysis reasoning may extend to college and university campus speech:

[P]laintiffs argue, and the district court held, that *Hazelwood* is inapplicable to university newspapers and that post-secondary educators therefore cannot insist that student newspapers be submitted for review and approval. Yet this footnote does not even hint at the possibility of an on/off switch: high school papers reviewable, college papers not reviewable. It addresses degrees of deference. Whether some review is possible depends on the answer to the public-forum question, which does not

71. Stanley Ingber, *Liberty and Authority: Two Facets of the Inculcation of Virtue*, 69 ST. JOHN'S L. REV. 421, 430 (1995).

72. Doesn't this sound akin to what a certain infamous anarchist rock band warned against? See PINK FLOYD, *Another Brick in the Wall, Part 2*, on THE WALL, DISC ONE (Sony/Columbia 1987). “We don't need no education, we don't need no thought control. / No dark sarcasm in the classroom, Teachers leave them kids alone. / Hey! Teachers! Leave them kids alone!” *Id.*

73. See *supra* notes 70–71 and accompanying text.

(automatically) vary with the speakers' age. Only when courts assess the reasonableness of the asserted pedagogical justification in nonpublic-forum situations does age come into play, and in a way suggested by the passage we have quoted from *Hazelwood's* text. To the extent that the justification for editorial control depends on an audience's maturity, the difference between high school and university students may be important. (Not that any line could be bright; many high school seniors are older than some college freshmen, and junior colleges are similar to many high schools.)⁷⁴

The Seventh Circuit reasoned that since the *Hazelwood* Court declined to extend its reasoning for limiting high school speech to public colleges and universities in a footnote, the Court had no strong feelings on the matter.⁷⁵ Therefore, Judge Easterbrook extends the *Hazelwood* pedagogical concerns analysis to higher education. The Seventh Circuit appears to be the only court willing to extend *Hazelwood* this far.⁷⁶

Consider, though, the Supreme Court practice of including immensely important rules of law within the footnotes of an opinion.⁷⁷ *Carolene Products'* "Famous Footnote Four" created the modern levels of judicial scrutiny—rational basis review for legislation that deals with economic matters and strict scrutiny for legislation that, on its face, violates the United States Constitution or attempts to

74. *Hosty v. Carter*, 412 F.3d 731, 735 (7th Cir.) (*en banc*), *cert. denied*, 546 U.S. 1169 (2005).

75. For an interesting explanation of the legal community's use of footnotes, see J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 276 (1989).

Symbolically, of course, the footnote is of minor importance. It is relegated to the bottom of the page (or, in the case of endnotes, to the back of the volume). It is excluded from the main body of the text, either because it disturbs the flow of the text, because it is unessential to the argument, or because it is a digression or afterthought.

Id. However, even Balkin agrees that the footnote retains a high level of utility. "Perhaps the footnote might state the real point of the argument in a highly economical way Perhaps, then, the footnote is an afterthought, but the thoughts that come after . . . might be more important, more clear, more to the point. Here [as in other contexts] the footnote has become more important than the text." Balkin, *supra* note 75, at 280.

76. See *Student Gov't Ass'n v. Univ. of Mass.*, 868 F.2d 474, 480 n.6 (1st Cir. 1989); *Kincaid v. Gibson*, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (*en banc*); see generally *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002).

77. See *U.S. v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (referred to as "Famous Footnote Four") and *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966) (known as "Brennan's Ratchet").

discriminate against minority groups.⁷⁸ “Footnote Four . . . has become the most famous footnote in constitutional law. It has come to stand for one of the most intriguing theoretical approaches to judicial review, an approach that has attracted brilliant exegesis and equally powerful criticism.”⁷⁹ Another legendary footnote in American constitutional law is known as “Brennan’s Ratchet.”⁸⁰ Under the Ratchet theory, Congress may only expand liberties that the Court has determined to be within the ambit of the Equal Protection Clause of the Fourteenth Amendment, and it may not restrict those liberties.⁸¹ While many commentators rejected Justice Brennan’s reasoning,⁸² Brennan’s Ratchet remained positive law until it was overruled in *City of Boerne v. Flores*.⁸³ Famous Footnote Four and Brennan’s Ratchet, at the very least, undercut Judge Easterbrook’s reasoning that the Court had not fully considered the

78. One commentator explains the effect of Footnote Four in this way:

Legislation regulating commercial transactions was not to be invalidated unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some *rational basis* within the knowledge and experience of the legislators.

Having clothed economic legislation with so strong a presumption of constitutionality, Justice Stone recognized that he might be diluting the constitutional protection afforded individual rights. In the now-famous footnote four, he conceded that “[t]here may be narrower scope for operation of the presumption of constitutionality” when legislation (1) “appears on its face to be within a specific prohibition of the Constitution,” or (2) “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” or (3) discriminates against minorities Thus the Court’s dual standard of review was born.

Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293, 301 (quoting *Carolene Products*, 304 U.S. at 152 n.4).

79. Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 165 (2004).

80. *Katzenbach*, 384 U.S. at 651 n.10.

81. *See id.* (“We emphasize that Congress’ power under § 5 [of the Fourteenth Amendment] is limited to adopting measures to enforce the guarantees of the Amendment; [it] grants Congress no power to restrict, abrogate, or dilute these guarantees.”).

82. *See generally* William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606–08 (1975) (discussing the analytical flaws in Brennan’s theory).

83. *City of Boerne v. Flores*, 521 U.S. 507, 528 (“There is language in our opinion in *Katzenbach v. Morgan* which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one.”).

matter solely because the Supreme Court placed important language in a footnote. In contrast, the Supreme Court's refusal to extend the pedagogical-concerns analysis to higher education in a footnote should not be misunderstood to imply that the Court felt the matter was unimportant to the opinion's analysis.

In sum, when a university creates a limited public forum for its students' expression, it may constitutionally proscribe speech in reasonable and content-neutral ways. The vast majority of Circuit Courts refuse to extend the limited public forum to primary and secondary education, though, due to the differences in context.⁸⁴ However, speech restrictions based on race, gender, and religion (even in an attempt to maintain proper separation between church and state) have not passed constitutional muster. Through the entire process of examining proper speech within the walls of a public university, much deference has been given to college and university administrators and how they may choose to confront an individual situation.

C. Deference Makes a Difference

As mentioned, courts tend to give deference to school officials in making decisions regarding student speech on campus, at the very least allowing administrators and officials to offer vast amounts of information as to whether their policies are reasonable in light of the particularities at each given school. As early as 1972, and as recently as 2010, the Court recognized that the federal bench may not always be the appropriate place to pass judgment on the effectiveness of school policy. To begin with, *Healy* stands for the proposition that the “[e]ducation of the nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.”⁸⁵ The Supreme Court in *Hendrick Community School District v. Rowley* stated that courts should “resist substituting their notions of sound educational policy for those of the school authorities which they review.”⁸⁶ The *Martinez* Court, in line with *Rowley* and *Healy* asserted that “[s]chools, we have emphasized, enjoy ‘a significant measure of authority over the type of officially recognized activities in which their students participate.’”⁸⁷

84. See *supra* note 77 and accompanying text.

85. *Healy v. James*, 408 U.S. 169, 180 (1972).

86. *Bd. of Educ. of Hendrick Cmty. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982).

87. *CLS v. Martinez*, 130 S. Ct. 2971, 2989 (2010) (quoting *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 240 (1990)).

Therefore, with a history of federal judges giving deference to university administrators, campus-speech problems must be approached with special caution since “decisions about the character of [university] student-run program[s] are due decent respect.”⁸⁸ But why have courts traditionally deferred to university administrators in determining the reasonableness of a given policy? Further, how much respect should be given?

1. Why Give Deference?

At the lower court level, it is likely that federal judges have very little experience with the inner workings of higher education. Further up the appellate chain, the likelihood is greater that a judge or justice has been professionally involved with university administration. For example, a former Dean of Harvard Law School⁸⁹ and four former law professors currently sit on the Supreme Court.⁹⁰ Given the five members who understand the complicated decisions that must be made on a university campus, if the Supreme Court decided to take more control of campus-speech matters, it may now have the expertise to do so.

Yet waiting for more cases to move up the appellate chain seems like an inefficient way to deal with First Amendment jurisprudence in the sphere of higher education. Allowing administrators to enact policies tailored to the idiosyncrasies of their own particular school prevents a judge from crafting student policy. Further, if a judge actively addressed each and every university policy that came before him or her, administrators might resort to consulting legal counsel (or risk litigation) in every decision to ratify a student group or grant a speech permit. That would overly burden the court system and likely raise education costs for students.⁹¹

88. *CLS v. Martinez*, 130 S. Ct. at 2989.

89. See *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, www.supremecourt.gov/about/biographies.aspx (last visited Jan. 15, 2011). Justice Kagan was a Professor at both the University of Chicago School of Law and Harvard Law School, and was named the eleventh Dean of Harvard Law School in 2003. *Id.*

90. Justice Scalia taught at University of Virginia School of Law and the University of Chicago School of Law, Justice Kennedy taught at the McGeorge School of Law at University of the Pacific, Justice Ginsburg taught at Rutgers University School of Law, and Justice Breyer taught at Harvard Law School and Harvard University Kennedy School of Government. *Id.*

91. See generally WILLIAM A. KAPLAN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* § 2.2.2 (4th ed. 2006).

2. *The Rational Alternatives*

Perhaps the most theoretical and far-fetched explanation for judicial deference, though maybe the most effective, involves giving greater autonomy and respect to students in the university context to change administrative policies through active student governments. The students in *Healy* who wished to form an SDS chapter had to apply to a student-run body to gain school recognition, and their fellow students denied the application.⁹²

On many large campuses, student governments wield considerable power over both the granting of recognition and the allocation of funding to student groups. For example, to gain recognition as a student group at Oklahoma State University, a student group must petition the Student Government Association and, if approved, undergo a sixteen-week trial period before official recognition is granted. Included in this hands-on approach to group recognition is the requirement that a representative of the student group sign an “Affirmation of Compliance” that includes the University’s policy on non-discrimination. The statement is reproduced below:

In furtherance of its educational objectives and programs, Oklahoma State University extends recognition to a wide variety of student organizations in accordance with policies and procedures in the Student Rights and Responsibilities document. It is the position of Oklahoma State University that registered and recognized student organizations may not exclude students from membership on the basis of race, national origin, sex or creed.

All registered and recognized student organizations shall affirm to the University that their membership selection policies and procedures are in compliance with this policy. In the case of

[The] concept of academic deference is a branch of a more general concept of judicial deference that encompasses a variety of circumstances in which, and reasons for which, a court should defer to the expertise of some decision maker other than itself. *Issues regarding deference can play a vital, sometimes even dispositive, role in litigation involving higher educational institutions . . .* Sometimes requests for deference are framed as claims to institutional autonomy; sometimes as “institutional academic freedom” claims or faculty academic freedom claims; and sometimes as “relative institutional competence” claims, asserting that the institution’s or the faculty’s competence over the matter at issue overshadows that of the court.

Id. at 67 (emphasis added).

92. *Healy v. James*, 408 U.S. 169, 172 (1972).

regional, national, or internationally affiliated groups, Oklahoma State University chapters must affirm to the University that membership selection policies and procedures of the parent organization do not require the chapter to exclude any student from membership on the basis of race, national origin, sex or creed.⁹³

By allowing student governments to police the groups allowed and recognized on their own campuses, the courts do not need to determine whether official recognition ought to be awarded in every instance.⁹⁴ Thus, the student government approach is more efficient, more deferential towards colleges and universities, and a more effective way for students (and not the courts) to determine what is appropriate for their individual campuses.

II. *CLS v. Martinez* and the Twenty-First Century Approach

The most recent case involving student speech and association came before the court in 2010.⁹⁵ *Martinez* confronts whether “a public law school [may] condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization’s agreement to open eligibility for membership and leadership to all students.”⁹⁶ The Court determined that Hastings College of the Law had created a limited public forum, that its policies were reasonable and content neutral, and that it may constitutionally deny the Christian Legal Society (CLS) funding based on its membership requirements.

A. The Facts

In 2004, a group of students at University of California, Hastings College of the Law, attempted to form a local chapter of CLS on the campus of the public law school. In order to gain official recognition, the students had to go through the “Registered Student Organization” (RSO) program.⁹⁷ After official recognition is attained a student group may

93. *Packet for Registering New Student Organizations*, OKLAHOMA STATE UNIVERSITY STUDENT GOVERNMENT ASSOCIATION, <http://www.osusga.com/wp-content/uploads/2010/07/new-student-organization-packet-fillable.pdf>.

94. This, of course, assumes an “all-comers” policy that is reasonable and viewpoint neutral.

95. See *CLS v. Martinez*, 130 S. Ct. 2971, 2971 (2010).

96. *Id.* at 2978.

97. *Id.* at 2979.

seek financial assistance from the Law School . . . use Law-School channels to communicate with students . . . may place announcements in a weekly Office-of-Student-Services newsletter, advertise events on designated bulletin boards, send e-mails using a Hastings-organization address, and participate in an annual Student Organizations Fair designed to advance recruitment efforts. In addition, RSOs may apply for permission to use the Law School's facilities for meetings and office space. Finally, Hastings⁹⁸ allows officially recognized groups to use its name and logo.

In order to gain the benefits of RSO status mentioned above, "RSOs must abide by certain conditions."⁹⁹ Most importantly, all RSOs must comply with the law school's nondiscrimination policy, set forth in its entirety here:

[Hastings] is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, [Hastings]-owned student residence facilities and programs sponsored by [Hastings], are governed by this policy of nondiscrimination. [Hastings'] policy on nondiscrimination is to comply fully with applicable law.

[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.¹⁰⁰

B. The Policy

According to Hastings, compliance with the nondiscrimination statement mandates an "all-comers" policy in which all groups "must allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs."¹⁰¹ This type of policy (and practice) is similar to those of

98. *Id.*

99. *Id.*

100. *Id.* Hastings' nondiscrimination policy is also available on the school website and may be found at www.uchastings.edu/asuch/docs/ResolutionNondiscriminationPolicy.doc. Compare Oklahoma State University policy quoted in *supra* note 94.

101. *CLS v. Martinez*, 130 S. Ct. 2971, 2979 (2010).

many major law schools across the country.¹⁰² Ironically, the policy was written in such a way as to eliminate cases of this very type from arising. It was put in place to limit discrimination cases against the school by encouraging multiculturalism and the intermingling of different ideas in the campus marketplace.

The Hastings all-comers policy finds itself in direct conflict with the goals (or at least the practice) of the Christian Legal Society, which demands that its voting members (and any member wishing to rise to a leadership position) sign a “Statement of Faith” and adhere to a lifestyle which does not violate the belief “that sexual activity should not occur outside of marriage between a man and a woman”; it also excludes “anyone who engages in ‘unrepentant homosexual conduct.’”¹⁰³ In addition, CLS “excludes students who hold religious convictions different from those in the Statement of Faith.”¹⁰⁴ CLS submitted the required application for recognition as an RSO, which included a set of bylaws mandated by the CLS national organization.¹⁰⁵ “Several days later, the Law School rejected the application; CLS’s bylaws, Hastings explained, did not comply with the Nondiscrimination Policy because CLS barred students based on religion and sexual orientation.”¹⁰⁶

It would be hard to argue that the CLS bylaws were not discriminatory (though at oral argument CLS refused to concede that fact and relied only on its freedom of association and religion arguments).¹⁰⁷ From the plain text of the Statement of Faith, Muslim students, Jewish students, and homosexual students would be excluded from the organization based solely on their religion or sexual orientation. Hastings recognized such potential discrimination and required that CLS “open membership to all students irrespective of their religious beliefs or sexual orientation” in order to gain RSO status.¹⁰⁸ But the law school proposed a bargain: although it would refuse to grant CLS status as an RSO, it would allow CLS to use school facilities and have access to common modes of communication

102. *See id.* at 2980 (stating that the law schools at Georgetown and Hofstra have adopted similar policies).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *See* Transcript of Oral Arguments, *CLS v. Martinez*, 130 U.S. 2971 (2008) (No. 08-1371), 2010 WL 1540008, *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1371.pdf.

108. *CLS v. Martinez*, 130 S. Ct. at 2980–81.

with the student body.¹⁰⁹ “Hastings would do nothing to suppress CLS’s endeavors, but neither would it lend RSO-level support for them.”¹¹⁰

C. Enter the Courts

CLS eventually filed suit alleging that Hastings’ refusal to extend RSO status to the organization constituted violations of its First and Fourteenth Amendment rights to free speech, freedom of association, and the free exercise of religion.¹¹¹ The District Court ruled in favor of Hastings, reasoning that the “all-comers condition on access to a limited public forum . . . was both reasonable and viewpoint neutral, and therefore did not violate CLS’s right to free speech.”¹¹² Further, the District Court found no restriction to CLS’s expression because “Hastings’ denial of official recognition . . . was not a substantial impediment to CLS’s ability to meet and communicate as a group.”¹¹³ The Ninth Circuit affirmed the District Court in an opinion that drones on for all of forty-four words. The entire opinion is quoted here: “The parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable.”¹¹⁴

1. *Creating the Public Forum*

To properly analyze student speech in the context of higher education, the Court first had to follow the *Healy-Widmar-Rosenberger* line of cases and determine whether Hastings had created a limited public forum:

109. *Id.* at 2981. It appears that the CLS group took advantage of school facilities on numerous occasions in order to hold regularly scheduled meetings and an end-of-the-year banquet. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 2974 (referring to the lower court decision of *Christian Legal Soc’y Chapter of Univ. of Cal., Hastings Coll. of Law v. Kane*, No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. 2006)).

113. *CLS v. Martinez*, 130 S. Ct. at 2981 (internal quotation marks omitted). For further discussion of CLS’s abilities to meet and communicate as a group, see *infra* Section E.

114. *Christian Legal Soc’y Chapter of Univ. of Cal, Hastings Coll. of the Law v. Kane*, 319 Fed. App’x 645 (9th Cir. 2009).

[T]he Court has permitted restriction on access to a limited public forum, like the RSO program here, with this key caveat: Any access barrier must be reasonable and viewpoint neutral Second, in the context of public accommodations, we have subjected restrictions on that freedom to close scrutiny; such restrictions are permitted only if they serve “compelling state interests” that are “unrelated to the suppression of ideas”—interests that cannot be advanced through . . . significantly less restrictive means.¹¹⁵

Colleges and universities in this context create not a complete public forum, but a limited one—and may restrict speech in certain situations.¹¹⁶ For example, “a speaker may be excluded from a limited public forum if he is not a member of the class of speakers for whose especial benefit the forum was created.”¹¹⁷ Though some cases will distinguish between freedom of speech and freedom of association for limited public forum determination, “[t]he same ground rules must govern both speech and association challenges in the limited-public-forum context, lest strict scrutiny trump a public university’s ability to confine a speech forum to the limited and legitimate purposes for which it was created.”¹¹⁸

Based on the preceding, the Court determined that Hastings had successfully created a limited public forum in its creation of the RSO system, in which students who followed the policies put in place for the forum enjoyed its full use, while student groups who did not agree to accept all of RSO’s mandates (including the all-comers system created by the Nondiscrimination policy) were denied entrance into the limited forum.

2. *Reasonableness of the Forum*

Next, the Court needed to decide whether the policy created by Hastings in the limited public forum was reasonable. Given the peculiarity of facts presented in each college and university, the court does not apply a blanket rule in considering the reasonableness of school policies. The Court observes that First Amendment rights “must be analyzed in light of the special characteristics of the school

115. *CLS v. Martinez*, 130 S. Ct. at 2984–85 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

116. See discussion on limited public forum, *supra* Part II.

117. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

118. *CLS v. Martinez*, 130 S. Ct. at 2986. See also *Healy v. James*, 408 U.S. 169, 189 (1972) (“Associational activities need not be tolerated where they infringe reasonable campus rules . . .”).

environment.”¹¹⁹ Further, “[t]he state may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, . . . nor may it discriminate against speech on the basis of . . . viewpoint.”¹²⁰ If a policy restricting speech is not reasonable, any regulation of speech may be held unconstitutional.¹²¹

Hastings first argued that its “open access policy ensures that the leadership, educational, and social opportunities afforded by RSOs are available to all students.”¹²² In that way, “the all-comers policy ensures that no Hastings student is forced to fund a group [through student activity fees] that would reject her as a member.”¹²³ The all-comers policy also helps Hastings police the written terms of its nondiscrimination policy without inquiring into an RSO’s motivation for membership. Requiring all RSOs to adhere to certain policies reasonably put in place by the school allows the school to turn a blind eye to each organization’s particular (perhaps hidden) subjective views and motivations—as long as the group does not restrict membership to any student, it may take advantage of RSO recognition and all that comes with it. Lastly, the nondiscrimination policy brings together individuals with diverse backgrounds and beliefs, and encourages tolerance, cooperation, and learning among students.¹²⁴ The Court concluded that given all of Hastings’ justifications, its policies are “surely reasonable in light of the RSO forum’s purposes.”¹²⁵

119. *CLS v. Martinez*, 130 S. Ct. at 2988 (quoting *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981)) (internal quotation marks omitted).

120. *CLS v. Martinez*, 130 S. Ct. at 2988 (quoting *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 829 (1995)).

121. Interestingly, while the Court concedes that it will give some deference to school administration based on “the peculiar facts of each college and university,” the Court “owe[s] no deference to universities when [it] considers [whether] a university policy is constitutional.” *CLS v. Martinez*, 130 S. Ct. at 2988. Justice Stevens would afford more deference to Hastings officials, stating that the nondiscrimination policy reflects a judgment “that discrimination by school officials or organizations on the basis of certain factors, such as race and religion, is less tolerable than discrimination on the basis of other factors.” *Id.* at 2997 (Stevens, J., concurring). He painted the issue a bit broader, though, stating that “[a]s a general matter, courts should respect universities’ judgments and let them manage their own affairs.” *Id.* at 2998 (Stevens, J., concurring).

122. *Id.* at 2989.

123. *Id.*

124. *Id.* at 2990.

125. *Id.* at 2991.

CLS argued against these points, as was to be expected, maintaining that the restrictions were not reasonable. However, that argument ran into a problem by

focusing on the benefits its must forego (SBA funds, access to certain bulletin boards, email system and address, and use of school facilities) while ignoring the interest of those it seeks to fence out: Exclusion, after all, has two sides. Hastings, caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership.¹²⁶

3. *Viewpoint Neutrality*

Once determining that the policy was reasonable, the Court also needed to determine if it was viewpoint neutral. The majority opinion makes short work of this point because the Hastings nondiscrimination policy openly refuses to discriminate or choose certain speech for proscription based on *any* criteria. "An all-comers condition on access to RSO status, in short, is textbook viewpoint neutral."¹²⁷ "Even if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, '[w]here the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.'"¹²⁸

D. Justice Alito's Possibility of a Hostile Takeover

Justice Alito authored the dissent in *Martinez*, in which Justices Roberts, Scalia, and Thomas joined. A particularly interesting section of the dissent discusses whether the Hastings all-comers policy would allow for a hostile takeover of any organization, stating that "Hastings does not really have an accept-all-comers policy—it has an accept-some-dissident-comers policy—and the line between members who merely seek to change a group's message (who apparently must be admitted) and those who seek a group's 'demise' (who may be kept out) is hopelessly vague."¹²⁹

The dissent then argues that since organizations would be forced to accept all students as members, small organizations, especially,

126. *Id.* at 2993.

127. *Id.*

128. *Id.* at 2994 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 390 (1992)).

129. *CLS v. Martinez*, 130 S. Ct. at 3019 (Alito, J., dissenting).

might be overrun by dissident students who only wish to assume leadership roles in order to disband the organization itself. It lays out the following scenario:

Suppose that 10 students who are members of [religious] denominations that disagree with CLS decided that CLS was misrepresenting true Christian doctrine. Suppose that these students joined CLS, elected officers who shared their views, ended the group's affiliation with the national organization, and changed the group's message. The new leadership would likely proclaim that the group was "vital" but rectified, while CLS, I assume, would take the view that the old group had suffered its "demise."¹³⁰ Whether a change represents reform or transformation may depend very much on the eye of the beholder.¹³⁰

The result of such a situation would then "permit[] small unpopular groups to be taken over by students who wish to change the views that the group expresses."¹³¹ What Justice Alito fails to recognize, though, is the utter impracticality of his exercise into the conceivable.

To begin, his point must be conceded: the Hastings all-comers policy mandates that a student group must allow students to join even if the student does not share the core beliefs of the organization. By definition, that is what an all-comers policy seeks. The goals of the policy are to encourage diversity of views in a shared marketplace. By defending one's views or beliefs against a hostile (or skeptical) audience, one's own views become more comprehensive and sound.¹³²

130. *Id.*

131. *Id.*

132. Or, at the very least, one's own perspective on the argument may change. "As iron sharpens iron, so one man sharpens another." *Proverbs 27:17*. For an interesting (albeit unconventional) commentary on this verse, see CALEB GRIMES, *STAR WARS JESUS: A SPIRITUAL COMMENTARY ON THE REALITY OF THE FORCE* 218 (2007).

We have better things to sharpen iron with today, but we do not have anything better to sharpen mankind with than ourselves. Often we lose this wisdom and either try to replace mentoring and friendship, speed it up, or get rid of it. So it's invigorating to see the mentoring and apprenticeship in *Star Wars*. Even though Obi-Wan is now a master on the Jedi Council and Anakin a full Jedi, there is still learning and teaching back and forth between them These relationships foster better, more complete, teaching, but also encourage the value and identity of an individual as a person.

Id.

Justice Alito's point loses ground, however, by assuming that an organized group of students would care enough about, and take the time, to overrun an organization with views contrary to their own. Especially during the tumultuous three years of law school (using the facts of *Martinez*), the likelihood of a student making the conscious effort to be voted into leadership of an organization only to kill it are next to nil. Assuming that the possibility of a hostile takeover exists, the group's original members still have access to a school's recognition process. They could simply start another organization and carry on with the values they desire the group to have. Also, the national organization could refuse recognition to the now-rogue chapter that is misrepresenting the organization's mission. Similar groups that share most, but not all, values can co-exist in a forum that encourages non-discrimination. Even in such situations, groups likely would benefit from exploring and understanding the subtle differences between their beliefs.¹³³

Perhaps Justice Alito's hypothetical takeover could hold water if evidence had shown student discontent with CLS or similar organizations. Yet no such evidence was presented into the opinion. A stronger point made by the dissent (though not taken up here) concerns the fact that some religious groups cannot accept all comers; some groups "cannot in good conscience agree in their bylaws that they will admit persons who do not share their faith, and for these groups, the consequence of an accept-all-comers policy is marginalization."¹³⁴ However, within the confines of a limited public forum, a university need not allow all types of speech, or every speaker, access to the same podium.

E. Social Media as a Reasonable Alternative to Open Public Speech

Another particularly troubling portion of the opinion, this time in the majority, concerns whether CLS suffered actual prejudice and whether the denial of typical communication channels is no longer relevant due to the rise of internet communication and social media. To wit, by denying CLS recognition as an RSO, Hastings limited the

133. While no ready example has been found, groups with subtle distinctions in message can be found in religious organizations on school campuses. For instance, a "Catholic Student Association" and a "Baptist Student Group" could amicably discuss (for example) their diverging views of transubstantiation, but agree on the usefulness of communion.

134. *CLS v. Martinez*, 130 S. Ct. at 3019.

group from using “RSO-specific communication.”¹³⁵ The Court then stated that “the advent of electronic media and social-networking sites reduces the importance of those [RSO-specific] channels.”¹³⁶ Is the Court saying, then, that the existence and vast visibility of social networking sites reduces any prejudice CLS may have suffered from denial of recognition?

Taken to its logical conclusion, the availability of social networking websites like Facebook and Twitter, which are increasingly seen as legitimate and professional methods of communication,¹³⁷ would diminish the necessity of RSO recognition in its entirety. Since Hastings is willing to allow CLS to use campus facilities for meetings and post on campus bulletin boards, CLS suffers no prejudice from denial if it can gain access to students through social media. As an example of its assertion, the Court states that “[p]rivate groups, from fraternities and sororities to social clubs and secret societies, commonly maintain a presence at universities without school affiliation.”¹³⁸

The majority cites a Seventh Circuit case to buttress its reasoning. *Christian Legal Society v. Walker* states that “[m]ost

135. *Id.* at 2991.

136. *Id.*

137. Social networking websites have even been legitimized by the courts as a valuable source for evidentiary information to be used in litigation. See *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 657 (S. Ct. Suffolk Cnty. 2010) (holding that “[s]ince Plaintiff knew that her information may become publicly available [on Facebook], she cannot now claim that she had a reasonable expectation of privacy.”).

138. *CLS v. Martinez*, 130 S. Ct. at 2991. This author doubts the assertion that large student groups “commonly” exist on school campuses without recognition by the school itself. For example, the Greek Life system at Texas Christian University operates entirely through the school. In fact, “43% of the undergraduate TCU population is affiliated with a fraternity or sorority.” *FSL Quick Fact*, TEXAS CHRISTIAN UNIVERSITY, www.greeks.tcu.edu. From the university-owned sorority houses to a full-time staff member that holds the title of “Director of Fraternity and Sorority Life,” the school controls many aspects of the Greek community. See *Fraternity and Sorority Life*, TEXAS CHRISTIAN UNIVERSITY, www.greeks.tcu.edu. Oklahoma City University’s Greek System operates similarly. See *generally Greek Life*, OKLAHOMA CITY UNIVERSITY, www.okcu.edu/students/greeklife.aspx.

This also holds true in popular media; compare NATIONAL LAMPOON’S ANIMAL HOUSE (Universal Studios 1978); REVENGE OF THE NERDS (Interscope Commc’ns 1984); P.C.U. (20th Century Fox 1994). All of these films deal with a fraternity’s attempts to gain official recognition by their university. *Contra* the Skull and Bones Society at Yale University. The famous Order of the Skull and Bones has existed at Yale for over a century, maintaining a strong (even infamous) presence on campus while never being officially recognized or affiliated with the university itself. See *generally* ANTHONY C. SUTTON, AMERICA’S SECRET ESTABLISHMENT: AN INTRODUCTION TO THE ORDER OF SKULL & BONES (2004).

universities and colleges, and most college-aged students, communicate through email, websites, and hosts like MySpace If CLS had its own website, any student at the school with access to Google—that is, all of them—could easily have found it.”¹³⁹ Again, taking this reasoning to its conclusion, a university may state that all student groups may be forbidden from using campus-sponsored lines of communication merely because other (maybe even more versatile) means of communication are easily available. If that were to happen, student groups and campus organizations would be forbidden from being sponsored or supported by the school, since the school may not officially sponsor or support their speech. Surely such a restriction would not be determined reasonable. Justice Alito’s dissent may even state that denial of campus-based communication limits student speech.

Conclusion

To conclude, though the Court’s limited public forum jurisprudence has remained unchanged for many years, it still serves as the proper analytical framework for examining student speech at public colleges and universities. Further, judicial deference to school administrators “on the ground” keeps the courts from imposing unnecessary school policy and allows for a “ground-up” management approach to thrive at institutions of higher education. Lastly, *CLS v. Martinez*, while not ruffling too many feathers, reaffirms Supreme Court deference to reasonable school policies protecting freedom of speech and association while maintaining the university sphere as a “marketplace of ideas.” Though the opinion may have some weaknesses in dicta, its holding will remain strong in the future.

Further, Hastings College of the Law should be congratulated in its recognition of the valuable experiences to be gained when students are put in situations where they must interact with others who may hold different beliefs. By instituting a policy where no group can exclude, Hastings implicitly states that everyone’s ideas and beliefs hold equal value, and all are entitled to share those beliefs with others. While the point is well taken that some groups cannot include everyone, it should not be the policy of universities to discourage open communication, even if that speech is not what other students, or school administrators, would like to hear.

139. *Christian Legal Soc’y Chapter at S. Ill. Univ. Sch. of Law v. Walker*, 453 F.3d 853, 874 (7th Cir. 2006) (Wood. J., dissenting).

This rings especially true given the recent events that perpetuated at the campus of University of California, Davis, in which campus police methodically, and without regard to safety or health, used non-lethal force to disrupt a peaceful protest of students.¹⁴⁰ Note that university administration does not represent the final arbiter of what constitutes as “acceptable” student speech, and if a university allows student groups to peaceably assemble without disruption of vital campus activities, the *content* of the student’s speech is of no import. While particular words have enormous power, silent presence can carry incredible weight.

Student demonstration, like student association, falls within the ambit of the limited public forum. Therefore, a public college or university cannot constitutionally deny access to publically available locations based solely on the message that a gathering of students wishes to express. Above all else, content neutrality must be observed when dealing with student speech. As mentioned previously, a university need not allow all types of speech, or every speaker, access to the same podium.¹⁴¹ However, once access to that podium is allowed, the university is divested of the ability to decide for the student what can and cannot be said. “If there is a time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”¹⁴²

140. <http://articles.latimes.com/2011/nov/20/local/la-me-occupy-uc-davis-20111120> (last visited Jan. 15, 2011).

141. *See supra* Part III.D.

142. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).