

## THE IDENTITY OF THE PUBLIC UNIVERSITY

*B. Jessie Hill\**

Is institutional identity something a public entity can possess? Institutional identity is often associated with private universities and other private associations—especially those that are religiously affiliated. Yet at the same time, “institutionalism” as a concept has gained wide currency in legal culture lately,<sup>1</sup> and along with this newfound popularity, it seems to be steadily increasing its reach.<sup>2</sup> After all, if a corporation the size of Hobby Lobby can have a religious identity,<sup>3</sup> then what cannot?

The goal of this essay is to consider the concept of institutional identity as it might apply to the modern, secular, public university, but before delving into the concept of a public university’s institutional identity, it may be worthwhile to first elucidate the term “institutional identity.” The term “institution” implies an assembly or group of some sort that is established or recognized to some degree.<sup>4</sup> Universities, but also churches, libraries, businesses, and maybe even voluntary associations—the Boy Scouts or the Christian Legal Society—may be denominated “institutions.”<sup>5</sup> The second word, “identity,” implies a shared affiliation; this may include a racial or religious identity—think “identity politics”—but the concept of identity may be broadened to also include a shared culture or set of values.<sup>6</sup> Finally, the concept of institutional identity often entails the necessity, and thus the

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\* Judge Ben C. Green Professor of Law and Associate Dean for Academic Affairs, Case Western Reserve University School of Law. Many thanks to Professor Perry Dane for inviting me to participate in the Donald C. Clark lecture and to the editors of the *Rutgers Journal of Law & Religion*. Thanks also to Natalie Cohen, who provided excellent research assistance.

<sup>1</sup> See, e.g., MICAH SCHWARTZMAN ET AL., *THE RISE OF CORPORATE RELIGIOUS LIBERTY* (2016); PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2013).

<sup>2</sup> See, e.g., Zoë Robinson, *Hosanna-Tabor After Hobby Lobby*, in SCHWARTZMAN, *supra* note 2, at 173–74 (“Since *Hosanna-Tabor* [*Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012)], the federal courts have been faced with a slew of institutional claimants arguing that they are ‘religious institutions’ entitled to constitutionally mandated exemptions from a variety of generally applicable civil restrictions.”).

<sup>3</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>4</sup> HORWITZ, *supra* note 2, at 15.

<sup>5</sup> *Id.* at 11. Horwitz provides a more limited definition of “First Amendment institutionalism,” including only those associations that are self-regulating, engaging in education, meaning-making, forming an identity, and contributing meaningfully to public discourse. *Id.* at 15, 20, 95.

<sup>6</sup> See generally RICHARD JENKINS, *SOCIAL IDENTITY* 7-8 (4<sup>th</sup> Ed. 2014) (discussing group-based identities and interest-based identities).

legal ability, to maintain that identity by protecting organizational purity through excluding, or at least sanctioning, those who do not belong.<sup>7</sup>

Part I will provide an overview and reinterpretation of *Christian Legal Society v. Martinez*,<sup>8</sup> a case that starkly raises the question of public universities' institutional identities.<sup>9</sup> Next, Part II will argue that the neutrality standard that usually applies to government actors, particularly where the First Amendment is at issue, should not necessarily apply to public universities, based in part on my view that true neutrality is unattainable and likely illusory. Instead, public universities, like other universities, should be permitted to embrace and act consistently with their institutional identities, but within certain limits because regulating private speech and associations is an undertaking fraught with peril for individuals' First Amendment rights. Finally, Part III will carefully consider what those limits should be against the robust protection for university faculty's academic freedom, in light of the potential perils presented by allowing public universities to embrace particular identities.

#### I. UNDERSTANDING *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*

Where universities are concerned, multiple institutional identities can be involved, including their own—religious or secular—and those of the groups within it. With regards to the former, a Mormon university may choose to limit its student body or its faculty to those who share its culture and beliefs, and may even require that members of the community subscribe to a particular code of conduct.<sup>10</sup> With regards to the latter, student organizations such as the College Democrats or the Federalist Society may possess a particular political identity and have the right to expect that they can protect their identity by excluding students who do not share that identity.

I argue here that *Christian Legal Society v. Martinez* (“*CLS*”) is about the intersection of these institutional identities, and reject the understanding of *CLS* that labels it as a standard

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<sup>7</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

<sup>8</sup> 561 U.S. 661 (2010).

<sup>9</sup> *See infra* pp. 3.

<sup>10</sup> For example, Brigham Young University requires “faculty, staff, administration, and students” to comply with its honor code, including detailed injunctions such as refraining from alcohol, tobacco, and caffeine, as well as observing a dress code. *Church Educational System Honor Code*, BYU, <https://policy.byu.edu/view/index.php?p=26>.

limited-public-forum free speech case. Instead, I argue that *CLS* is about the right of a public university—which is, after all, a voluntary association—to regulate its membership consistently with its own identity, values, and beliefs.

#### A. *The Facts*

Hastings College of Law, a public law school that is part of the University of California system, promulgated a non-discrimination policy prohibiting discrimination “on the basis of race, color, religion, national origin, ancestry, disability, age, sex, or sexual orientation.”<sup>11</sup> Hastings’ policy was applicable to, among other things, registered student organizations (“RSOs”).<sup>12</sup> Being an RSO carried certain advantages, such as access to particular sources of funding and to various university resources for recruitment, advertising, and meetings.<sup>13</sup> One such student group, the Christian Legal Society (“CLS”), sought to maintain its RSO status but also asked for an exemption to the non-discrimination policy.<sup>14</sup> CLS requested the exemption because it had a policy of excluding homosexuals from its membership, on the grounds that “unrepentant homosexual conduct” violates the traditional sexual mores that make up part of CLS’s mandatory tenets.<sup>15</sup> Hastings declined to grant the exemption and CLS lost its RSO status, but CLS remained active without that status; litigation ultimately ensued.<sup>16</sup>

Crucially, the parties stipulated that Hastings’ policy was actually an “all-comers” policy, requiring all student groups to accept anyone who wished to join, notwithstanding the policy’s considerably narrower text.<sup>17</sup> This stipulation turned out to be a deciding factor in the case, which was analyzed under free-speech forum analysis.<sup>18</sup> Drawing on other public university student-organization cases, the Court determined that Hastings had created a “limited public forum” with its RSO program, and the relevant standard dictated that Hastings’ policy would pass constitutional muster if it was “reasonable in light of the purpose

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<sup>11</sup> *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 670 (2010).

<sup>12</sup> *Id.* at 669–70.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 672.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 673.

<sup>17</sup> *Christian Legal Soc’y*, 561 U.S. at 675–76.

<sup>18</sup> *Id.* at 669, 678

served by the forum” and viewpoint-neutral.<sup>19</sup> Given that an all-comers policy is the epitome of viewpoint neutrality,<sup>20</sup> Hastings only had to show that its policy was reasonable.<sup>21</sup> This condition was satisfied, because, according to Hastings, it helped to ensure that students were not being forced to fund activities that excluded them by way of their activity fees; Hastings believed that the educational experience was advanced by such inclusiveness, and that the policy was easily administered without requiring inquiry into groups’ exclusionary motivations, among other reasons.<sup>22</sup> Significantly, the Court declined to separately analyze CLS’s freedom-of-association claim from its free-speech claim, treating it instead as essentially coextensive.<sup>23</sup>

The parties’ stipulation that the non-discrimination policy was actually an all-comers policy made *CLS* both easier and narrower than it otherwise would have been.<sup>24</sup> By construing the policy in this manner, the Court avoided the much more difficult question of whether a “selective” non-discrimination policy could be applied to prevent a religious group from discriminating on particular grounds, including sexual orientation and religion; this raises more serious freedom-of-association and free-speech issues.<sup>25</sup>

Under the Court’s public-forum framework, it is not clear that such a policy would qualify as viewpoint-neutral, and thus may not pass First Amendment muster. As Justice Alito argued in his *CLS* dissent, a selective non-discrimination policy allows

membership requirements that express[] a secular viewpoint. (For example, the Hastings Democratic

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<sup>19</sup> *Id.* at 685 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

<sup>20</sup> *Id.* at 694–95 (“An all-comers condition on access to RSO status, in short, is textbook viewpoint neutral.”).

<sup>21</sup> *Id.* at 685.

<sup>22</sup> *Id.* at 687–90. Hastings also justified the policy on the ground that “development of conflict-resolution skills, toleration, and readiness to find common ground” were goals of the RSO program and on the ground that the policy furthers and reflects state law non-discrimination norms. *Id.*

<sup>23</sup> *Christian Legal Soc’y*, 561 U.S. at 675–76.; see also B. Jessie Hill, *Property and the Public Forum: An Essay on Christian Legal Society v. Martinez*, 6 DUKE J. CONST. L. & PUB. POL’Y 49, 51–52 (2010).

<sup>24</sup> Alan Brownstein & Vikram Amar, *Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action*, 38 HASTINGS CONST. L.Q. 505, 509–10 (2011).

<sup>25</sup> See, e.g., Rebecca D. Ryan, Note, *Why Non-Discrimination Policies in Higher Education Require a Second Look: The Battle for First Amendment Freedom in the University Setting*, 62 CATH. U. L. REV. 575, 600 (2013).

Caucus and the Hastings Republicans [would be] allowed to exclude members who disagree[] with their parties' platforms.). But religious groups [are] not permitted to express a religious viewpoint by limiting membership to students who share[] their religious viewpoints.<sup>26</sup>

The impact of such a policy, then, is to hobble the efforts of certain groups but not others to maintain the purity of their message by excluding those whose presence undermines their existence.<sup>27</sup> Thus, arguably, non-discrimination policies that include religion inherently discriminate against groups based on their religious viewpoints.<sup>28</sup>

The majority's understanding of the non-discrimination provision in *CLS* thus allowed the Court to avoid some potentially thornier questions, but I contend that it also distorted the picture of what was really at stake in the case. A true all-comers policy is arguably so broad and non-specific that it is difficult to see how it is anything but neutral.<sup>29</sup> A selective policy, by contrast, is an expression of values. This is true if the policy forbids discrimination on the same grounds as federal law (race, sex, religion, disability, and age),<sup>30</sup> but it is especially true if the policy includes traits that are not universally protected, such as sexual identity or orientation. It demonstrates that the university wishes to promote tolerance and acceptance of particular groups and not others. It thus distinguishes among groups based on their worthiness of protection in the eyes of the institution

### *B. A New Gloss*

The clash between *CLS* and Hastings is a clash over Hastings' system of values. A facially selective non-discrimination policy like Hastings' essentially tells students that Hastings

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<sup>26</sup> *Christian Legal Soc'y*, 561 U.S. at 726 (Alito, J., dissenting) (internal citation omitted); see also Ryan, *supra* note 26, at 600. Nonetheless, courts have found even selective non-discrimination policies written like Hastings' to be viewpoint-neutral. See, e.g., *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 801 (9th Cir. 2011); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 866 (7th Cir. 2006).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 726–27.

<sup>29</sup> See *id.* at 694 (“It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers.”).

<sup>30</sup> See, e.g., 42 U.S.C. § 2000e (2012); 42 U.S.C. § 12101 (2012); 29 U.S.C. § 629 (2012).

embraces liberal values of inclusiveness, including with respect to homosexual students but not with respect to groups that are themselves illiberal or intolerant—that is, according to Hastings’s values. Put differently, Hastings’ understanding of diversity—tolerance and openness to difference—differed from CLS’s—the inclusion of a plurality of groups and belief systems, including those in conflict with Hastings’. Or, as Professors Alan Brownstein and Vikram Amar put it, Hastings valued “intra-organizational diversity,” whereas CLS wished to promote inter-organizational diversity.<sup>31</sup>

Indeed, in a post-CLS case, *Alpha Delta Chi-Delta Chapter v. Reed*,<sup>32</sup> San Diego State University enforced a selective non-discrimination policy against a Christian sorority, wishing to exclude non-Christians. The Ninth Circuit essentially acknowledged that such conditions protect students from exclusion and inculcate values.<sup>33</sup> For example, the court noted that the university handbook listed “Principles of Community,” which included “basic values” such as encouraging student groups to affirmatively reach out to recruit members of underrepresented minorities and embracing an understanding of non-discrimination that apparently disallows any affinity groups based on traits such as race, ethnicity, or gender.<sup>34</sup> The court also quoted *Hazelwood School District v. Kuhlmeier*, a case involving high school students, for the point that “part of a school’s mission is to instill in students the ‘shared values of a civilized social order . . . .’”<sup>35</sup> There is thus, according to the court’s logic, little question that public universities do adopt specific, substantive—or “thick”—values systems and at least attempt to require community members to act in conformity with those values.<sup>36</sup>

In CLS, the institution’s values system came into conflict with that of one of the groups within it. Although CLS argued that it was only seeking to reject homosexuals based on their conduct

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<sup>31</sup> Brownstein & Amar, *supra* note 28, at 511.

<sup>32</sup> 648 F.3d 790, 801 (9th Cir. 2011).

<sup>33</sup> *Id.* at 98-99.

<sup>34</sup> *Id.* at 799.

<sup>35</sup> *Id.* at 798 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988) (emphasis added)).

<sup>36</sup> See also *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 367 (M.D. Pa. 2003) (describing a campus speech policy as “part of an attempt to achieve a utopian community within” the university). The term “thick” was used by the philosopher Bernard Williams to refer to concepts that are morally ethically loaded, as opposed to more neutrally descriptive or less freighted with ethical judgments. See, e.g., Sophie Grace Chappell, *Bernard Williams*, *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta, ed. 2015), available at <http://plato.stanford.edu/archives/spr2015/entries/williams-bernard/>.

and beliefs (barring those who engaged in “unrepentant” homosexual conduct), not their status,<sup>37</sup> the fact remains that CLS’s values and beliefs with respect to homosexuals did not match Hastings’.<sup>38</sup> Professor Corey Brettschneider has adopted an interpretation of *CLS* that is related to but distinct from mine.<sup>39</sup> According to Brettschneider, *CLS* is about the state’s use of its expressive ability to promote the specific value of equality by subsidizing or declining to subsidize private speech on campus.<sup>40</sup> Brettschneider argues that, because the funding of student groups is essentially a form of government speech, “the Court should reject the viewpoint-neutrality requirement itself concerning discriminatory viewpoints when it comes to state funding . . . [,] allow[ing] the state and public universities to promote a message of respect for free and equal citizenship when deciding to grant subsidies.”<sup>41</sup> Brettschneider thus argues that a public university (along with other state actors) may require private speakers to act in conformity with particular substantive values, as long as the public entity is using expressive or fiscal tools rather than coercive or regulatory ones.<sup>42</sup>

It is not clear what a truly “neutral” position vis-à-vis the private speech of student groups would look like. Perhaps a neutral policy would be the all-comers policy on the basis of which *CLS* was litigated, although even that may be questioned, since some groups—those that are less liberal and more exclusionary—would be predictably burdened by such a policy.<sup>43</sup> A policy that permitted every group to express whatever views it wished to express, and to adopt membership policies in conformity with those views, even if they involved controversial grounds such as race or ethnicity, might be considered truly neutral. However, a policy that restricts private speech on particular substantive grounds but not others is not neutral; indeed, it seems

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<sup>37</sup> *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 689 (2010). The Court rejected the distinction between status and conduct, noting that conduct and status were too closely correlated with regard to homosexuals. *Id.*

<sup>38</sup> *Id.* at 661.

<sup>39</sup> Corey Brettschneider, *Value Democracy as the Basis for Viewpoint Neutrality: A Theory of Free Speech and Its Implications for the State Speech and Limited Public Forum Doctrines*, 107 NW. U. L. REV. 603, 633–35 (2013).

<sup>40</sup> *Id.* at 608, 631.

<sup>41</sup> *Id.* at 634.

<sup>42</sup> *Id.* at 634–35.

<sup>43</sup> *Cf. Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 724, 726–27 (2010) (Alito, J., dissenting) (discussing the disparate impact of Hastings’s policy on particular groups).

indisputable that such a policy is not content-neutral.<sup>44</sup> If we set aside the purported all-comers policy and consider the policy Hastings actually adopted, the central issue in *CLS* can therefore be conceptualized as whether (and to what extent) a public university has a right to embrace a particular values system *and* require members of the university community to act in conformity with that values system, even when those members' free speech and free association rights are implicated.

Other sorts of conflicts that have become commonplace on college campuses may be viewed similarly. Universities—both public and private—sometimes attempt to enforce codes of conduct that prohibit certain forms of speech that could not be prohibited in society at large. For example, San Francisco State University initiated disciplinary proceedings against a student group after it held an “Anti-Terrorism Rally” that involved stepping on images of the flags of Hamas and Hezbollah, which (unbeknownst to the members, who did not read Arabic) had “Allah” written on them.<sup>45</sup> Disciplinary action was brought about by the complaint of a student who was offended by the group members' conduct and based on a provision of the school's conduct code that required students to “be civil to one another.”<sup>46</sup> A federal court, like many others across the country, found the university's attempt to restrict controversial speech (or, depending on one's perspective, hate speech) to violate the First Amendment.<sup>47</sup> Yet, the fact that universities have such codes and apply them to regulate the speech of their students indicate that they possess a set of values that is more substantive—or “thicker”—than those of the government, and that they occasionally act to enforce those values against groups within the university community.<sup>48</sup> Indeed, it is

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<sup>44</sup> Brownstein & Amar, *supra* note 25, at 515–16. Alternately, one might argue that, unlike the actual activities of a group like CLS, which may include hosting lectures, worship services, or film viewings (for example), the act of excluding individuals from membership on the basis of their status or conduct is not speech at all, just as declining to hire someone based on status or conduct is not speech. Given the Court's decision in *CLS* to analyze the impact of Hastings's policy on CLS as a free-speech issue, however, it seems that it is too late in the day to dispute whether student groups' membership decisions implicate free-speech concerns.

<sup>45</sup> *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1007 (N.D. Cal. 2007).

<sup>46</sup> *Id.* at 1009.

<sup>47</sup> *Id.* at 1021; *accord* *McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

<sup>48</sup> One might also perceive a similar dynamic in the controversy over the recent use of Title IX on university campuses. *See, e.g.*, Marc Tracy, *Expelled Basketball Player Sues Yale*, N.Y. TIMES, June 10, 2016, at B10. On one understanding, universities are finally addressing, under federal pressure, the epidemic of sexual assault on their campuses, yet some claim



unimaginable that a municipality or even a public employer could have a requirement that people or employees behave civilly toward one another if it is applied in such a way as to prohibit or penalize speech that might be rude but not obscene, not fighting words, and not otherwise constitutionally unprotected.<sup>49</sup>

## II. PUBLIC UNIVERSITIES, SECULAR IDENTITIES

Within limits, it may be possible and desirable to allow universities to express a particular set of values and to require members of the university community—faculty, staff, and students—to observe those values as well, even when their free speech rights are implicated. The possible negative consequences of according this right to universities, as well as the necessary limits on the right, will be discussed in Part III, while this Part outlines the arguments in favor of recognizing a meaningful institutional identity for universities. In particular, it begins by making the case that this recognition would simply reflect reality—universities embrace and express substantive values, and they act in conformity with those values. Indeed, I argue, even courts recognize this to some extent, though not necessarily in those terms. It then draws on the existing literature on universities and on institutions in the law to discuss why according such rights to public universities would have positive societal consequences.

First, it is important to understand precisely what the requirement of “neutrality” by public actors means. When the government acts in a regulatory capacity, it generally must maintain both viewpoint-neutrality and content-neutrality: it cannot forbid, censor, or punish speech based either on the speech’s subject matter or on the political, aesthetic, religious, or

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universities have gone too far in enforcing sexual codes of conduct, infringing on the rights of accused students. *See, e.g.*, Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 76 (2013). If universities are crossing a line and infringing on accused students’ rights, much of the problem can probably be laid at the feet of the Department of Education, which has provided important guidance to universities on the issue. *Id.* at 53. Nonetheless, one could also conceptualize this issue as a question of whether universities have the right to hold students to higher moral standards with respect to sexual conduct (for example, by requiring “affirmative consent” for sexual activity) than the criminal law might, or should, enforce. *See generally id.* at 64.

<sup>49</sup> *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 18–22 (1971).

other viewpoint that the speech embodies.<sup>50</sup> This requirement of neutrality is justified on various grounds, including: individual autonomy, the government's inherent lack of competence to distinguish between valuable and worthless speech, and the necessity of allowing various viewpoints—even incorrect or undesirable viewpoints—to flourish in order for democracy to function fully and fairly.<sup>51</sup> Of course, there may be special qualifications on this fairly categorical rule in particular contexts, such as where: children are involved,<sup>52</sup> there is a captive audience,<sup>53</sup> the speech falls into a limited number of “unprotected” categories,<sup>54</sup> or the government is also acting as an employer.<sup>55</sup> Furthermore, when the government itself is speaking, it is constitutionally entitled to embrace any viewpoint it chooses and need not be neutral; for example, it may adopt an anti-smoking message without giving equal time to pro-smoking messages, or it may adopt pro-democracy messages without also validating anti-democracy messages.<sup>56</sup> Nonetheless, the notion that government must in most circumstances maintain an attitude of strict neutrality toward private speech remains one of the most basic assumptions of American free-speech jurisprudence.<sup>57</sup>

### A. *Reflecting Reality*

As noted above in Part I, courts have already recognized, albeit obliquely, the fact that universities adopt and express particular sets of values and even attempt to require students and others to act in conformity with those values.<sup>58</sup> *CLS*, as well as a series of other cases dealing with the rights of religious student

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<sup>50</sup> See, e.g., *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (“Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.” (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648–649 (1984)); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92 (1992).

<sup>51</sup> See generally Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

<sup>52</sup> *Ginsberg v. New York*, 390 U.S. 629, 641–42 (1968).

<sup>53</sup> *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

<sup>54</sup> *United States v. Stevens*, 559 U.S. 460, 468–69 (2010).

<sup>55</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

<sup>56</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009).

<sup>57</sup> See, e.g., Brett Schneider, *supra* note 41, at 607 (stating that “liberal democracy ‘cannot take [its] own side in an argument,’ even against hateful or discriminatory viewpoints”) (footnote omitted).

<sup>58</sup> See *supra* text accompanying notes ADD-ADD.

groups in universities, treated the university as a “limited public forum” for speech in analyzing whether restricting the speech of particular student groups would violate their First Amendment rights.<sup>59</sup> Conversely, as Justice Stevens’ concurrence pointed out in one such case:

University facilities—private or public—are maintained primarily for the benefit of the student body and the faculty. In performing their learning and teaching missions, the managers of a university routinely make countless decisions based on the content of communicative materials. . . . [I]n encouraging students to participate in extracurricular activities, they necessarily make decisions concerning the content of those activities.

. . . In my judgment, it is both necessary and appropriate for those decisions to evaluate the content of a proposed student activity. I should think it obvious, for example, that if two groups of 25 students requested the use of a room at a particular time—one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of Hamlet—the First Amendment would not require that the room be reserved for the group that submitted its application first.

. . . A university legitimately may regard some subjects as more relevant to its educational mission than others.<sup>60</sup>

Justice Stevens thus recognizes that public universities are situated differently from other public actors because their mission-driven nature affects the First Amendment’s application to their regulation of student speech.<sup>61</sup> Indeed, one might argue that First

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<sup>59</sup> See *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 685 (2010); see also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392 (1993); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981).

<sup>60</sup> *Widmar*, 454 U.S. at 278-80 (Stevens, J., concurring).

<sup>61</sup> Indeed, as Professor Stephen Feldman points out, it is difficult to say exactly why the Court applied the forum doctrine in this line of cases, according to which groups have free-speech rights against the university, and not the government speech doctrine, according to

Amendment forum doctrine, as applied to religious student speech within universities, already takes this reality into account in considering the forum's educational purpose.<sup>62</sup> Thus, the Supreme Court has explained that it applies deference to universities when they "choose among pedagogical approaches" and decide what values undergird the educational purposes of a student forum—such as, in Hastings' case, "tolerance, cooperation, and learning among students."<sup>63</sup> Simply put, it is difficult to see those purposes as entirely neutral or value-free.<sup>64</sup>

Indeed, from their origins—which were universally religious—and until perhaps the past half-century, universities were believed to fulfill a critical mission of teaching morals, and not just conveying knowledge and critical thinking skills.<sup>65</sup> Thus, William F. Buckley, Jr.'s 1951 book, *God and Man at Yale*, took the university to task for its failure to instill, and take seriously, Christian values.<sup>66</sup> Yet the modern university, in the view of historian George M. Marsden, has replaced its religious (mostly Protestant) roots with a "[l]iberal Protestantism without Protestantism."<sup>67</sup> The secular, public university divorced from any particular social or moral ethos is something that has never actually existed.

### *B. Benefits of Institutionalism*

The point that universities embrace thick, substantive values connects this argument to a broader discourse surrounding the possibility of government neutrality with respect to values. Several prominent legal scholars have argued that government neutrality outside the university is not possible or not desirable. For example, Professor Abner Greene argues that the state can embrace

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which the government entity can say whatever it wishes when it is speaking or subsidizing private speakers to convey its chosen message. Stephen M. Feldman, *Conservative Eras in Supreme Court Decision-Making: Employment Division v. Smith, Judicial Restraint, and Neoconservatism*, 32 CARDOZO L. REV. 1791, 1808 (2011).

<sup>62</sup> See *Christian Legal Soc'y*, 561 U.S. at 685 ("Our inquiry is shaped by the educational context in which it arises . . .").

<sup>63</sup> *Id.* at 686, 689.

<sup>64</sup> In fact, Professor Corey Brettschneider argues that even the most basic democratic values of autonomy and equality are not neutral, but rather constitute substantive values. Brettschneider, *supra* note 41, at 606.

<sup>65</sup> For a broad overview, see GEORGE M. MARSDEN, *THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF* (1994).

<sup>66</sup> WILLIAM F. BUCKLEY, JR., *GOD AND MAN AT YALE: THE SUPERSTITIONS OF "ACADEMIC FREEDOM"* (1951).

<sup>67</sup> MARSDEN, *supra* note 66, at 408, 410, 415–16.

particular values, because in our “pluralistic nation . . . political liberalism should be seen as generating a multitude of ideas about the good life, from both the private and public sector[s].”<sup>68</sup> Relatedly, Professor Corey Brettschneider argues that, at least when acting in its “expressive” capacity (as opposed to its “coercive” capacity), the state should affirmatively promote certain values such as freedom and equality.<sup>69</sup> Although my argument is situated within this broader conversation about government speakers more generally, I do not go as far as these scholars. Rather, my argument is limited to the public university context.

Consequently, my argument primarily draws support from proponents of “institutionalism,” such as Professors Paul Horwitz and Frederick Schauer. These scholars argue that institutions should receive unique treatment as per the First Amendment because they are distinct, important entities in society and also because they contribute to public discourse in a uniquely valuable way that individuals on their own cannot.<sup>70</sup> Horwitz, for example, argues that universities should be accorded a measure of autonomy from regulation because of their missions and the fundamental role they fulfill in society.<sup>71</sup> Universities, he explains, are “laboratories *for* democracy”—that is, spaces that contribute to democratic discourse, not “laboratories *of* democracy.”<sup>72</sup> Horwitz continues by arguing that “[t]hey are an institution of their own, with their own norms, practices, and traditions” and should be treated as “self-regulating autonomous enterprises, not public forums.”<sup>73</sup>

A strain of respect for the autonomy of universities runs through some of the Supreme Court’s case law, particularly pertaining to affirmative action. In *Grutter v. Bollinger*,<sup>74</sup> the Court noted its deference to the University of Michigan Law

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<sup>68</sup> Abner S. Greene, *Government Endorsement: A Reply to Nelson Tebbe’s Government Nonendorsement*, 98 MINN. L. REV. HEADNOTES 87, 89 (2013).

<sup>69</sup> COREY BRETTSCHEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?: HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY 3–4 (2012).

<sup>70</sup> HORWITZ, *supra* note 2, at 22. See Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1274–75 (2005) (“For all of these institutions, the argument would be that the virtues of special autonomy—special immunity from regulation—would in the large serve important purposes of inquiry and knowledge acquisition, and that those purposes are not only socially valuable, but also have their natural (or at least most comfortable) home within the boundaries of the First Amendment.”); see also David Fagundes, *State Actors As First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1640 (2006).

<sup>71</sup> HORWITZ, *supra* note 2, at 113–114.

<sup>72</sup> *Id.* at 113.

<sup>73</sup> *Id.*

<sup>74</sup> 539 U.S. 306 (2003).

School's "educational judgment that . . . diversity is essential to its educational mission," based on the "important purpose of public education and the expansive freedoms of speech and thought associated with the university environment."<sup>75</sup> The Court had similar views in *Fisher v. University of Texas*,<sup>76</sup> arguing that "considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission."<sup>77</sup> Although these cases speak in terms of deference to a university's "educational mission," they are clearly referring to values—such as a particular conception of diversity—that run deeper than a shallow understanding of educational goals and objectives.

Finally, in defense of universities' authority not only to embrace particular values but also to urge conformity with those values, it is worth noting that university students are adults, (unlike secondary and elementary students) and are able to choose which university in particular they want to attend.<sup>78</sup> They therefore do not need the kind of protection from governmental indoctrination or coercion that younger people might need.<sup>79</sup> As one court put it: "[T]he state does not require higher education and has much less interest in regulating it, the students in colleges and universities are not children, but emancipated (by law) adults, and, critically, the mission of institutions of higher learning is quite different from the mission of primary and secondary schools."<sup>80</sup> Although the unique status of higher education institutions may suggest there is less of a valid interest on the part of the government in indoctrinating students to a particular set of values, it also demonstrates that there is less reason to worry about the impact on dissenting students when universities embrace particular values.<sup>81</sup>

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<sup>75</sup> *Id.* at 328–29.

<sup>76</sup> 195 L. Ed. 2d 511 (U.S. 2016).

<sup>77</sup> *Id.* at 528.

<sup>78</sup> *Cf.* Deanna N. Pihos, *Assuming Maturity Matters: The Limited Reach of the Establishment Clause at Public Universities*, 90 *Cornell L. Rev.* 1349, 1364 (2005) (discussing voluntariness in the higher education context).

<sup>79</sup> *See, e.g.,* *Tilton v. Richardson*, 403 U.S. 672, 685–86 (1971) (“[C]ollege students are less impressionable and less susceptible to religious indoctrination [than elementary students].”).

<sup>80</sup> *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1015–16 (N.D. Cal. 2007).

<sup>81</sup> *But cf.* Michael C. Dorf, *God and Man in the Yale Dormitories*, 84 *VA. L. REV.* 843, 854–55 (1998). However, the situation might be different if students' options for public higher education were limited. *Id.* at 863–64.

## III. LIMITS

It would not be feasible to allow public universities some autonomy to require conformity with a particular substantive set of values unless strong limitations on that autonomy were also in place. If public universities were entirely free to adopt any set of values whatsoever and to sanction any and all speech that was inconsistent with those values, the cost to individuals' freedom would be excessively high. In addition, a question arises as to what it means to require conformity with the university's values: may a public university censor student or faculty speech that is inconsistent with its identity? May it punish that speech by removing the offending speaker from the community, such as through expulsion or firing? This is surely strong medicine. It is therefore essential to consider the boundaries of the proposed autonomy right. However, to articulate the need for limits is always easier than to articulate exactly what those limits should be. Thus, I do not claim to set forth here a foolproof plan; instead, I hope to make some initial suggestions with the understanding that details would need to be worked out over time.

The first important limit would pertain to the means used by universities to protect their identities. Universities would have the right to protect their identities by means proportional to the threat posed by the speech undermining it. Thus, truly existential threats to a university's identity might authorize expelling a student or faculty member from the community, but such instances would likely be rare. For example, one could imagine a hypothetical scenario in which a university is subject to the sort of takeover that Justice Alito described in his *CLS* dissent with respect to the Christian Legal Society:

During a recent year, CLS had seven members. Suppose that 10 students who are members of 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.”<sup>82</sup>

One could similarly imagine a scenario in which a large enough group of students organize, *en masse*, and engage in speech that undermines the overall religious identity of a Christian University by, for example, refusing to attend mandatory religious services or publically presenting viewpoints antithetical to key precepts of the faith in a way that suggests university endorsement of those views. Such extreme scenarios do not seem particularly likely to occur, however.

More commonly, universities would likely enforce their identity through expressive means, actively disavowing student or faculty speech that conflicts with the university’s identity, or declining to subsidize or otherwise support that speech through official recognition, as in *CLS*.<sup>83</sup> It is possible that universities may deploy internal disciplinary mechanisms and internal sanctions to regulate such speech as well—for example as when universities punish hate speech through censure, suspension, and other penalties short of expulsion.<sup>84</sup> Moreover, courts would be charged with ensuring that the sanction was proportional. Although they would defer to universities on the content of their values, they would not defer to them on the nature of the threat posed by conflicting speech. Thus, overall, public universities would have less autonomy than private voluntary organizations,<sup>85</sup> but this limitation seems both appropriate and necessary in light of the public nature of the university, which still requires sensitivity to First Amendment concerns.<sup>86</sup>

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<sup>82</sup> Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 740 (2010) (Alito, J., dissenting). As Justice Alito acknowledges, however, “Whether a change represents reform or transformation may depend very much on the eye of the beholder”. *Id.*

<sup>83</sup> See Brettschneider, *supra* note 41, at 633–35.

<sup>84</sup> See, e.g., Doe v. University of Michigan, 721 F. Supp. 852, 865 (E.D. Mich. 1989) (discussing an incident in which a university responded to speech that violated its harassment and discrimination policy by “persuad[ing] the perpetrator to attend an educational ... session, write a letter of apology to the [school newspaper], and apologize to his class”).

<sup>85</sup> See, e.g., Brownstein & Amar, *supra* note 28, at 534 (noting the Supreme Court’s extremely deferential stance toward the expressive claims of private voluntary associations).

<sup>86</sup> See, e.g., Bair v. Shippensburg Univ., 280 F. Supp. 2d 357, 370–71 (M.D. Pa. 2003) (noting the “nation’s tradition of safeguarding ‘free and unfettered interplay of competing views’ in the academic arena” and arguing that “[c]ommunications which provoke a response, especially in the university setting, have historically been deemed an objective to be sought after rather than a detriment to be avoided” (quoting *Doe v. Michigan*, 721 F.Supp. 852, 864 (E.D.Mich.1989))).



Another important limitation on university speech pertains to the content of the values and messages that a university could espouse. Although I have thus far suggested that universities should be accorded a fair amount of leeway to craft their mission as they see fit, they surely cannot embrace a mission that is entirely inconsistent with the role that universities play as, in Paul Horwitz's words, "laboratories for democracy."<sup>87</sup> Thus, they could not adopt values that do not reflect any plausible version of liberal democratic values, such as racist values, nor could they adopt an identity that runs contrary to the values of individual autonomy and equality.<sup>88</sup> However, there is still ample room for variation, even if all public universities' identity must remain consistent with the bedrock values of individual autonomy and equality. For example, universities could, as suggested by *CLS*, take different stances with respect to the question whether intra- or inter-organizational diversity is preferable;<sup>89</sup> with respect to expectations of civility among students in daily interactions; and even with respect to more apparently mundane matters such as dress codes and attitudes toward recreational drinking and marijuana use.

Similarly, public university speech is subject to the Establishment Clause, which forbids the government from endorsing religion or coercing religious expression or observance.<sup>90</sup> A public university thus could not adopt a religious identity, or perhaps even an atheistic identity.<sup>91</sup> It could not favor or suppress religious speech by members of the community in the name of advancing explicitly religious (or anti-religious) values.<sup>92</sup> Additionally, the Equal Protection Clause would arguably prevent the university from expressing certain kinds of values, such as racist or sexist values, that would be harmful and denigrating to constitutionally protected groups.<sup>93</sup>

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<sup>87</sup> HORWITZ, *supra* note 2, at 113.

<sup>88</sup> Cf. BRETTSCHEIDER, *supra* note 69, at 122 (arguing that the government should not be able to use its funds to subsidize the speech of hate groups, such as the films *Birth of a Nation* and *Triumph of the Will*).

<sup>89</sup> See *supra* note 31 and accompanying text.

<sup>90</sup> U.S. CONST. amend. I.

<sup>91</sup> See *Mellen v. Bunting*, 327 F.3d 355, 371-75 (4th Cir. 2003).

<sup>92</sup> *Id.*

<sup>93</sup> U.S. CONST. amend. XIV. See Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 658 (2013), where Professor Nelson Tebbe argued that racist government speech would violate the Equal Protection Clause; see also *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1563 (11th Cir. 1990) (dismissing a claim that flying the Confederate flag on the Alabama state capitol violated the Fourteenth Amendment).

In addition, a robust conception of academic freedom would have to apply—significantly more robust than the current state of that doctrine. Although the Supreme Court has seemingly embraced academic freedom in sweeping language, the contours of that doctrine are notoriously unclear, and its real-world tendency to protect and empower university faculty members is highly questionable.<sup>94</sup> Indeed, lower courts sometimes draw on academic freedom rhetoric from Supreme Court cases to emphasize the rights of the university—the sort of “institutional right of self-governance in academic affairs” that this essay has advocated—rather than those of individual faculty members.<sup>95</sup> Indeed, a more robust concept of academic freedom for individual professors threatens to collide with the widely acknowledged right of educational institutions to shape curricula, as well as with the doctrine granting relatively limited freedom of speech to public employees, which many courts apply to cases that appear to invoke academic freedom concerns.<sup>96</sup>

What would be the appropriate scope of academic freedom in the context of a university with a robust and substantive identity? A university could enforce certain requirements of tolerance and diversity with respect to students’ social and extracurricular interactions, as well as with respect to interactions among faculty, staff, and students outside the classroom. Such conduct does not appear to implicate the sort of classroom “orthodoxy” that academic freedom is intended to protect against.<sup>97</sup> However, a university could not function as a place of critical thinking and learning if the university sought to govern the content or viewpoint of speech that takes place within the classroom.<sup>98</sup>

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<sup>94</sup> See, e.g., Todd A. DeMitchell, *Academic Freedom—Whose Rights: The Professor’s or the University’s?*, 168 ED. LAW REP. 1 (2002); J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 YALE L. J. 251, 253 (1989).

<sup>95</sup> See, e.g., *Urofsky v. Gilmore*, 216 F.3d 401, 410, (4th Cir. 2000) (en banc) (stating that academic freedom “inheres in the University, not in individual professors”), quoted in DeMitchell, *supra* note 87, at 2.

<sup>96</sup> See, e.g., *Hardy v. Jefferson Community College*, 260 F.3d 671, 678 (6th Cir. 2001) (applying the test from *Pickering v. Board of Educ.*, 391 U.S. 563, to a university instructor’s First Amendment retaliation claim).

<sup>97</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); see also *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust.”).

<sup>98</sup> *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370–71 (M.D. Pa. 2003).

Indeed, recognizing a larger degree of institutional autonomy for universities could even fuel the efforts of politicians who might want to control various aspects of the educational process to serve political ends. For example, a legislator might argue that the state government controls the identity of the state university and can require faculty and student educational activities to be consistent with the legislature's values. Such a scenario is not entirely far-fetched: in 2010, the Louisiana legislature unsuccessfully attempted to shut down Tulane University Law School's environmental law clinic because of political disagreement with the clinic's actions and mission.<sup>99</sup> Politically motivated decisions are thus a very real threat to potentially controversial university programs, so giving deference to university administrators to define and require conformity with particular substantive values could certainly wreak havoc on those programs, in the absence of powerful academic freedom protections.

At the same time, it is difficult to imagine that most public universities would choose to adopt highly controversial or partisan values. Could a public university, for example, adopt the identity of a "Democratic" or "Republican" (in the party sense) institution? Such an identity would not necessarily be foreclosed by the theory I set forth here; however, it is hard to imagine that public universities, which are subject to some measure of control by legislatures with shifting political compositions and which must also generally attract a broad base of applicants in order to stay afloat financially, would perceive such a course to be a wise one.

Finally, although university students are adults who have voluntarily chosen to associate themselves with a particular educational institution, it is important to recognize that grants of institutional autonomy inevitably empower certain individuals and disempower others. In addition, even within a voluntary association, there will be individual community members who have committed to the institution but disagree with its approach to a particular issue. Consent is not a panacea. Individuals may not always be entirely aware of the terms on which they are consenting to be governed by a particular set of values; those values will always be subject to future interpretation, with which the individual might disagree; and the terms of the agreement are

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<sup>99</sup> Adam Babich, *Can Preemption Protect Public Participation?*, 61 CASE W. RES. L. REV. 1109, 1116 (2011).

always subject to change.<sup>100</sup> In particular, there might be cause for concern if a certain public university was the only highly regarded public institution in the state and a comparable education could not be found elsewhere.<sup>101</sup> Indeed, this may often be the case with so-called “flagship” state universities. With respect to those institutions, where there is simply no adequate substitute within the state, one would worry about whether attendance, and thus explicit acceptance of the university’s values, is sufficiently voluntary. This limitation on the scope of public universities’ institutional autonomy would likely turn out to be a significant one. Although, in this instance, the problem of dissenters within the institution may not be sufficient to cause us to abandon the project altogether, it is important nonetheless to recognize all the costs of pursuing this course.

#### IV. CONCLUSION

Public universities do not just have educational missions. They possess identities, grounded in substantive values, and they seek to impose those values on members of the university community. Indeed, they may go so far as to seek to regulate the speech of students and others when it conflicts with the values and mission of the university. This is not necessarily a bad thing. An extensive literature extols the importance of institutions such as universities to civil society, and courts have in many respects recognized the unique status of the university, as well as its entitlement to a measure of autonomy from the sort of regulation that applies outside its walls. In arguing for further recognition and formalization of institutional autonomy for universities, this article nonetheless urges that careful limits be imposed—including constitutional limits and a robust countervailing right to academic freedom—in order to ensure that public universities and the states that support them do not trample the rights of individual community members or undermine the unique role and educational purpose of the institution.

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<sup>100</sup> See B. Jessie Hill, *Change, Dissent, and the Problem of Consent in Religious Organizations*, in SCHWARTZMAN ET AL., *supra* note 2, at 419, where the issues of institutional autonomy claims are explained in greater depth.

<sup>101</sup> *But cf.* Dorf, *supra* note 80, at 863–64.