From Rosenberger to Martinez: Why the Rise of Hyper-Modernism is a Bad Thing for Religious Freedom

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From *Rosenberger* to *Martinez*: Why the Rise of Hyper-Modernism is a Bad Thing for Religious Freedom

Perhaps the news of modernity's death, accompanied by the supposed advent of postmodernity, has been greatly exaggerated? Throughout the last two decades, many scholars have opined about the rise of postmodernism and its impact on religion, specifically the First Amendment's Religion Clause. One commentator asks, "If the sun is setting on the Enlightenment while postmodernism rises in the evening sky, what becomes of religious freedom in America?" Most scholars agree that the transition from modern to postmodern has diminished the principle of church-state separation as a driving force in recent Supreme Court jurisprudence. Instead, the Enlightenment's "crown jewel" of church-state separation is now merely a competing orthodoxy. Before, liberalism marginalized religion for operating outside the bounds of rational discourse. Today, postmodern thought places liberalism on the same playing field as religion, both jockeying for position in public discourse. This concept of a postmodern era seemed well established until the summer of 2010 when the Supreme Court handed down its decision in *Christian Legal Society* ("CLS") *v. Martinez*.

In the context of public universities, a true postmodernist would encourage student religious groups to obtain equal access to public facilities, funding, and rational discourse. This postmodern sensibility is most clearly reflected in the Supreme Court's *Rosenberger* decision. However, while many scholars continue to proclaim the rise of postmo-

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2. For purposes of this Comment, I will refer to both the Establishment Clause and the Free Exercise Clause together as the "Religion Clause." However, as discussed infra I(E), there are notable differences between postmodernism's impact on the interpretation of the Establishment Clause, as distinguished from the Free Exercise Clause.
4. *Id.*
dernism, the Court's recent decision in CLS v. Martinez reflects a sharp departure from postmodern thought and a crystallization of hypermodernism.

This Comment will argue that what has been flying under the banner of "postmodernism" is actually an intensification of modern paradigms. Moreover, hyper-modernism is not a friend to religious freedom. Instead, the Court held in Martinez that the ideologies of "diversity," "non-discrimination," and "non-commitment" trump religious freedom. Postmodernists and Christians alike should find this objectionable. Additionally, the Martinez decision raises serious questions about the so-called rise of postmodern thought and its impact, at least in the minds of all nine Supreme Court justices. This decision may only mark the beginning of a rise in hyper-modern Religion Clause jurisprudence. At the outset, it is helpful to provide a background to modernism and postmodernism and their impact on religious freedom.

I. LIBERALISM, POSTMODERNISM, AND RELIGION

Most scholars mark the rise of postmodernism with the fall of modernism and loss of confidence in modern civilization, technology, social regimentation, and rational planning. Before discussing the postmodern mind, it is important to explain what it claims to transcend: the modern.

7. See Martinez, 130 S. Ct. at 2991–94.

8. GENE EDWARD VEITH, JR., POSTMODERN TIMES: A CHRISTIAN GUIDE TO CONTEMPORARY THOUGHT AND CULTURE 40 (Marvin Olasky ed., Crossway Books 1994). In fact, many scholars mark the fall of modernism with the fall of the Berlin Wall and the dualistic division of the Eastern and Western civilizations. Id. at 27 (quoting THOMAS C. ODEN, TWO WORLDS: NOTES ON THE DEATH OF MODERNITY IN AMERICA AND RUSSIA 32 (InterVarsity Press 1992)). Specifically, postmodernism critiques the West's failure of the social sciences and ambitious government programs to achieve their promise. Postmodernism can also be attributed to the counterculture movement. Id. at 40. One scholar noted that our "cultural mood turned sour" as we began to realize that the notion of progress was a fallacy. DAVID WELLS, ABOVE ALL EARTHLY POW'RS: CHRIST IN A POSTMODERN WORLD 40 (Eerdmans Publishing 2005). Thus, it was the sourness that sprouted the postmodern mood, a rebellion of modern goals. Id.
THE RISE OF HYPER-MODERNISM & RELIGIOUS FREEDOM

A. The Modern Mind

In the beginning, “[m]odernity started out to conquer the world in the name of [r]eason.” Modernity also “questions all conventional ways of doing things, substituting tradition with its own more reliable authorities of science, economic growth, democracy, and law.” The period of modernity is commonly referred to as the Enlightenment. The cornerstone of the Enlightenment emphasized “reason” as the best guide for earthly matters. Reason permits an individual to survey “the world from a vantage point outside the flux of history.” The “Enlightenment mind” would agree that knowledge is “certain, objective, and good.” Meanwhile, appeals to external, unverifiable authority (i.e., revealed truth) should be treated with great skepticism.

B. Modernism’s Politics of Early Liberalism

The Enlightenment set the stage for liberal democracy and the notion of church-state separation. Early classical liberalism is commonly referred to as the politics of modernism. Michael McConnell argues, “[w]e tend to forget that liberalism was born of concerns about religion.” Many early political thinkers of liberalism struggled with the is-

9. For purposes of this Comment, I will use the words “Enlightenment,” “modernism,” and “liberalism” interchangeably. However, there is arguably a notable distinction between modernism and liberalism. Generally, liberalism is often referred to as the political manifestation of modernism and more narrowly focuses on the specific notions of “individual freedom” and “autonomy.” SMITH, supra note 1, at 60 n.113. Liberalism is committed to individual freedom as the “good,” and endorses political autonomy and epistemological autonomy. Id. Meanwhile, modernism embraces liberalism and more broad notions of reason as good.

10. DAVID LYON, CONCEPTS IN SOCIAL THOUGHT: POSTMODERNITY 27 (University of Minnesota Press 1999).
11. Id.
13. Id. at 99.
15. Id.
16. Baker, supra note 3, at 100 (citing GRENZ, supra note 14, at 4).
18. Id.
sues of religion and government. For example, John Locke warned in his Letter Concerning Toleration:

I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will be always arising.

For Locke and many other early thinkers, freedom of religion was a cornerstone of early liberalism. Above all, liberalism meant that every person has the freedom to worship God in accordance with the dictates of his own conscience. With that said, liberalism also meant that “religion should be separated from public life so that all citizens may participate in government predicated on the employment of common reason that everyone possesses.”

The influence of early liberalism has been most fully achieved in the United States, where many citizens and courts have argued that this country was founded upon the principle of church-state separation. The Founders’ conception of religious freedom is most eloquently articulated by James Madison’s Memorial and Remonstrance Against Religious Assessments, which recognizes:

It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society.

Madison identifies that we have separate duties to God and civil society, and those duties should be performed in separate spheres. This notion is clearly realized in the Religion Clause of the First Amendment. McConnell argues, “No one would have said that liberalism at the time of the Founding was inconsistent with or hostile to religious freedom, for religious freedom was one of its principal commitments and preoccupations.” But, as early liberalism developed into an ideology, it de-

19. Id. at 166–67.
22. Id.
24. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS § 1 (1785), reprinted in Everson v. Bd. of Educ., 330 U.S. 1, 64 (Rutledge, J., dissenting).
25. McConnell, supra note 17, at 172; see also Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 HARV. L. REV. 1409, 1431–
parted from its so-called religious roots. Or maybe Locke’s liberal doctrine of toleration, which allegedly set the stage for religious freedom, took on a new, distorted, meaning. The question is whether a rise in postmodernism or hyper-modernism is to blame.

C. The Postmodern Mind

Postmodernism has been termed the “anti-Enlightenment” because it represents a new way of thinking, which calls into question the beliefs of linear progress, absolute truth, and the standardization of knowledge. From the postmodern viewpoint, “knowledge no longer appears to be certain” and individuals are “incapable of viewing the world objectively, but instead live in a cage constructed of [their] own experiences, culture, language, and temperament.” A postmodern mind resembles the following general assertions: (1) the world is read differently by those who encounter it; (2) the world is an arena of dueling texts; (3) reason is not the only valid way of knowing; other valid ways of knowing include intuition, emotion, and revelation; (4) there is no absolute truth, instead truth is relative to the community to which we belong; and (5) personal autonomy is not necessarily the greatest good, but the community will self-define what is best.

Tolerance of all beliefs and ideologies is the “golden rule” of postmodernity. Once any claim to universal moral norms is stricken, the only value that remains is the notion of tolerance or passive willingness to accept anything as true for that person. Given all of the choices in the West today, along with the awareness of difference, diversity, plural-

32 (1990). It is also important to note that broad coalition of the founding generation supported the disestablishment of religion. Richard Bowser & Robin Muse, Historical Perspectives on Church and State, in CHURCH-STATE ISSUES IN AMERICA TODAY: RELIGION AND GOVERNMENT 43 (Ann W. Duncan & Steven L. Jones eds., Praeger 2008). During the founding era, there were at least four distinct views of religion and society, those including: (1) Puritan, (2) Evangelical, (3) Enlightenment, and (4) Civic Republican. Id. While their underlying motivations for separating religion from the State was diverse, these groups did reach some degree of compromise in the creation of the Religion Clause. See id.

26. McConnell, supra note 17, at 172.
27. GRENZ, supra note 14, at 42.
29. Id. at 102 (citing GRENZ, supra note 14, at 11).
31. Id.
ism, and plasticity of life, "it seems highly implausible that there is any such metanarrative, any such central and single meaning, or viable and compelling worldview."32 Instead, "one's personal conscience and personal convictions (or those of the community he or she belongs to) ought to become the chief sources of moral authority and autonomy."33 This idea has been identified as the core of the postmodern worldview.

D. The Impact of Postmodernism: Good or Bad for Christians?

Michael McConnell credits postmodernism for the "exposure of liberalism as just another ideology."34 Additionally, postmodernism allows religion to "reenter the serious world of intellectual inquiry on a presumptively equal footing — one belief against another, and let us see which offers the most persuasive account of the human experience. . . ."35 The Enlightenment view assumed that God could not be properly foundational to one's thought because his existence was impossible to prove by empirical evidence.36 Furthermore, in science, it was taboo to mention God when discussing the origins of the universe.37 Now, postmodernism calls to abandon every type of foundationalism, which allows for Christian theology to "reassert its right to live and think on its own terms."38 Postmodernism will deconstruct the critical apparatus that was developed to undermine the Christian story as intrinsically

32. WELLS, supra note 8, at 78.
33. Liederbach, supra note 30, at 791 (recognizing that "[o]nce this move is made, the erosion of any claim to universal moral norms (and thus even the first principles of natural law) are completely undercut"). As Liederbach noted, a postmodern world may endanger universal truth claims of "the eternal law of God" and "the will of God." Id. This may be a legitimate concern for Christians.
34. McConnell, supra note 17, at 182. McConnell summarizes the postmodern viewpoint as believing that "[t]here is no neutral, objective vantage point from which to view the world; we are all prisoners of our own perspectives; the beginning of wisdom is to recognize the potential worth and value of others different from ourselves." Id. As a result, liberalism is not neutral, but rather is the carrier of its own substantive principles, which include individualism, independence, and rationality. Id. at 186.
35. Id. at 182.
36. WELLS, supra note 8, at 82.
37. Id. at 72.
38. Id. at 84. Wells also warns that a non-foundationalist theology surrenders its claim of having universal significance, which may be an undesirable byproduct of postmodernism. Id. Can Christianity be content with only being a fragment of the whole, by being one competing ideology in a sea of voices?
inferior to the present. As a result, McConnell suggests that postmodernism will invite a more free understanding of religious freedom and “religious ways of thought could be restored to legitimacy and cease to be marginalized.”

To the contrary, many people view postmodernism as a threat to religion. Specifically, there is a concern that the shift from modernity to the postmodern places an emphasis on tolerance of religion, rather than free exercise of religion. As a result, “tolerant neutrality manifests itself by imposing a requirement of secularity in the public sphere, requiring religious individuals to keep their faith to themselves.” Under the postmodern lens, Christianity is not part of the search for truth, but instead “becomes just another expression of individual belief entitled to no more protection than any other secularized expression.”

For many Christians, postmodern thought seems threatening because it stands to reject absolute truth. Most Christians, regardless of denomination, would agree that the Word of God is an absolute truth. For Christians, the Bible is a super-text and postmodernism does not recognize super-texts. However, postmodernism does not rule out religion, as modernity tended to do. Instead, today, religion is seen as a preference. Morality is viewed as a desire, not a truth. Therefore, I can desire to believe in the saving grace of Jesus Christ and that belief will be truth (to me). The postmodernist cannot critique my preference to follow Christianity as truth and my own moral compass. Instead, in a postmodern world, any way of thinking must be considered as “good” as any other worldview. Gene Edward Veith noted that “[w]hereas modernism sought to rid the world of religion, postmodernism spawns new ones.” Many Christian thinkers express excitement about the new-

39. Liederbach, supra note 30, at 72; see also Paul Lakeland, Postmodernity: Christian Identity in a Fragmented Age (Fortress Press 1997).
40. McConnell, supra note 25, at 183; Liederbach, supra note 29, at 72 (recognizing that there is a “new prospect” for Christian thought in a postmodern world).
42. Id. at 1042-43.
43. Id. at 1043.
44. Grenz, supra note 14, at 11.
45. Veith supra note 8, at 193.
46. Id. at 195.
47. Id.
48. Id. at 198.
found potential for Christian thought in a postmodern age. However, it is worth noting that postmodern sensibilities will also likely lead to increased segmentation of society, religious groups, and the Church.

While it seems postmodernism, as compared to modernism, is more likely to accommodate the Christian worldview, we should be aware of the limits of postmodernism. Christians will be shunned for “thinking they have the only truth” and they will be condemned for “trying to force their beliefs on everybody else.” When Christians cross that line, they should “expect to be excluded from postmodernists’ invocations of tolerance and pluralism.” Additionally, there is a legitimate fear that postmodernism will treat religion as a mere “commodity,” a product to be consumed in an increasingly consumer-driven world. With regards to Christianity’s place in the marketplace of ideologies, the “opportunities are endless, and the quest for new market niches” are constant. Consumerism knows no boundaries; values and beliefs “seem to lose any sense of coherence, let alone continuity, in a world of consumer choice.” Many fear that if Christianity succumbs to consumerism in this postmodern era, it will become a mere “leisure pursuit,” which individuals simply buy into on a whim. Indeed, this has the effect of pluralizing and fragmenting Christianity, which may be a legitimate concern for Christians.

If postmodernism is rightly associated with an intensified consumer culture, then Christianity’s place in a postmodern world can be analogized to a box of Cheerios on the cereal aisle at the grocery store. A consumer strolls the aisle, searching through hundreds of different brands of cereal, all deserving of their own placement on the shelf. Similarly, a postmodernist views Christianity as just another ideology on the shelf. This may raise concern for Christians who will be discontent with the characterization of Christianity as a mere commodity. Christianity is more than just a mere ideology, it is a way of living. In a general sense, it

49. WELLS, supra note 8, at 73 (noting that Thomas Oden has spoken “exhuberantly” about the possibility of postmodern theology). Also, Stanley Grenz is making attempts to rewrite the evangelical faith in terms compatible with the emerging postmodern ethos. Id.

50. VEITH, supra note 8, at 222–23.
51. Id. at 223.
52. Id.
53. WELLS, supra note 8, at 77.
54. LYON, supra note 10, at 71.
55. Id. at 76-77.
56. Id.
seems as though Christianity loses its significance if it is analogized to box of Cheerios on the cereal aisle at the grocery store.

E. Postmodernism and the Religion Clause

The contemporary shift to a postmodern era leads to the rejection of modernist dichotomies, which necessarily calls for a change in the vocabulary of Religion Clause jurisprudence. Indeed, the Enlightenment-minded metaphor of the "wall of separation" has been replaced by the "public square." The wall of separation was built on the modernist notion that reason (i.e., law) and religion are opposites. As the wall has been criticized and ultimately destroyed, postmodernism now views law and religion as competing orthodoxies in the public square. One scholar noted that the public square "contemplates shared space" where religious claims are "equally represented" in public education. In other words, religion is now allowed to contribute to the rational discourse in a postmodern era. As a result, one would expect the Religion Clause to be interpreted in a manner to satisfy that expectation. Accordingly, the Establishment Clause would be interpreted narrowly to offer expanded protection to religious groups.

It is important to note that a postmodernist would not utilize the Free Exercise Clause to accommodate religious voices in the public square. In the public square, postmodernism does not recognize claims to privilege based on the special nature of religion, as compared to other secular voices. In a true postmodern era, religious groups will be unable to gain exemptions from neutral laws by relying on the Free Exercise Clause. It would be improper to allow a competing orthodoxy to "stand out from the pack" by asserting religion as a justification to be treated differently. Indeed, the Employment Division v. Smith decision exemplifies this concept by holding that a religious claimant receives no protection under the Free Exercise Clause, unless he can show an addi-

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58. Id.
59. Id. at 99.
60. Id. at 106-07.
61. Baker, supra note 3, at 120.
62. See id.
63. Id.
tional and separate constitutional violation. Accordingly, religious groups should not rely on the Free Exercise Clause in a postmodern world, but instead proceed under the Free Speech Clause if they desire religious freedom in the public square.

II. POSTMODERNISM OR HYPER-MODERNISM?

While postmodernism may be described as transcending modernism, some scholars argue that there is a deep continuity between the modern and "supposedly" postmodern. David Wells warns, "[W]e should not be too hasty in declaring the complete overthrow of the Enlightenment regime" because "important threads of continuity between modernity and postmodernity exist." Thus, what flies under the banner of postmodern is really just hyper-modernism. David Lyon points out that "within the ranks of sociologists one can find both disagreement about whether our social condition is 'postmodernity' or 'high,' 'late,' 'radicalized,' or 'reflexive' modernity." James K.A. Smith recognizes that "while it may be that the foundationalist paradigms of modernity have largely collapsed, the dogma concerning the autonomy of theoretical thought has not really been dislodged in postmodernity." In particular, Smith argues that postmodernism actually emphasizes the "idol of freedom," which was generated by the modern ideal of political autonomy. If "all moderns are liberals," then Smith suggests, "all postmoderns are [also] liberals."

Emphasis on freedom is the most noteworthy continuity between modernism and postmodernism. Additionally, both modernity and postmodernity are characterized by an idolatrous notion of self-

64. Employment Div. v. Smith, 494 U.S. 872, 881–82 (1990); see also Baker, supra note 3, at 120.
65. SMITH, supra note 1, at 92.
66. WELLS, supra note 8, at 67.
68. LYON, supra note 10, at 105.
69. SMITH, supra note 1, at 139–40.
70. Id. at 140 (emphasis added).
71. Id.
sufficiency and deep naturalism, largely because both deny grace. Wells also suggests that "[t]he autonomous self is a thread that comes into the postmodern era from the modern." It is this cultural reality that "believes the thought that the postmodern is completely postmodern." In a true postmodern world, there is no central authority, which is the overriding thought, holding the world together. Therefore, some scholars conclude that postmodernism is merely an "intensification" of modernity, particularly with respect to liberal notions of freedom.

This critique of postmodernism raises the following question: Do recent Supreme Court cases reflect postmodern or hyper-modern paradigms? This Comment largely presumes that the notion of "freedom in the public square" is a postmodern principle; however, it is important to note that such a principle has modern origins. That is not to say postmodernism is a sham, merely disguised to hide modern notions. Even Smith concludes that postmodernism only emphasizes certain paradigms of modernism.

Most importantly, the notion of freedom has been intensified (hyper-modernized) under the so-called reign of postmodernism. Moreover, a postmodernist would find it objectionable if one ideology (i.e., non-discrimination, non-commitment, and diversity) attacked and constrained another ideology (i.e., Christian statement of faith). As Stanley Fish warns, "to say that all beliefs should be respected equally is to do nothing more than embrace one of the competing orthodoxies (liberalism) making a play for power to guide the body politic." As discussed infra, this ideology of non-discrimination in the public square is gaining force and beginning to swallow any other ideologies that may disagree or fail to play by the rules. Postmodernism presumes that liberal notions no longer play "referee," but instead become competing or-

72. JAMES K.A. SMITH, WHO'S AFRAID OF POSTMODERNISM?: TAKING DERRIDA, LYOTARD, AND FOUCAULT TO CHURCH 26 (Baker Academic 2006) (citing GRAHAM HUGHES, WORSHIP AS MEANING: A LITURGICAL THEOLOGY FOR LATE MODERNITY 2 (Cambridge University Press 2003)) (recognizing that both modernity and postmodernity are characterized by a trenchant “disenchantment of the world”).
73. WELLS, supra note 8, at 248.
74. Id. (emphasis added).
75. Id. at 249.
76. SMITH, supra note 72, at 26.
77. Id. at 20 n.8.
78. Baker, supra note 3, at 108 (citing Stanley Fish, A Reply to Judd Owen, 93 AM. POLITICAL SCI. REV. 925, 929 (1999)).
thodoxies. Turning to an analysis of recent jurisprudence, this Com-
ment will analyze reflections of postmodernism and then expose the hy-
per-modern trend where the Supreme Court has allowed liberal notions
to play referee and achieve supremacy in the so-called public square.

III. POSTMODERNISM REFLECTED IN ROSENBERGER AND ITS PROGENY

There is apparent evidence that recent United States Supreme Court
decisions reflect a postmodern sensibility. As one scholar noted, "per-
haps the single finest example of the transition from modern to postmo-
dern in the Court's opinions can be seen in the hallmark Rosenberger v.
University of Virginia decision."81

A. Rosenberger and Similar Cases: Religion Clause or Free Speech
Clause?

In Rosenberger, the University of Virginia set up a student activities
fund to support extracurricular student activities.82 Some religious
groups were expressly prohibited from receiving funds if they promoted a "particular belief in or about a deity."83 Meanwhile, Ron Rosenberger
and a group of students created a publishing magazine dealing with
Christian issues.84 When Rosenberger and the magazine requested that
the school pay their printing from the student activities fund, the school
denied the request on the grounds that the publication was an imper-
missible "religious activity."85

Ron Rosenberger and the Christian magazine sued the University of
Virginia for constitutional violations, including free speech and free ex-
ercise claims among others.86 The Supreme Court held that the universi-
ty had created a limited public forum through the student activities
fund, and then had unlawfully performed viewpoint discrimination
against the magazine by denying funding on the basis of religion.87 Ron
Rosenberger prevailed on his First Amendment claim, and the Estab-

79. See id. at 107.
80. See Baker, supra note 3, at 115.
81. Id. at 114.
83. Id. at 825.
84. Id. at 825–26.
85. Id. at 827.
86. Id.
87. Id. at 828–37.
The Establishment Clause "posed no insuperable barrier to the publication of an explicitly Christian newspaper with state university funds."

The Rosenberger decision is a prime illustration of postmodernism because the Court discussed competing orthodoxies as if all had equal footing. For example, the Court treated religious expression not as religion, but as speech. The crux of the Supreme Court's decision rested on the Free Speech Clause analysis, not the Religion Clause implications. By treating the Christian newspaper's message as "speech," the Court was essentially treating any form of religious expression as an ideology that can be adequately analyzed under the Free Speech Clause of the First Amendment. Additionally, religion was treated as one of many ideologies, deserving of a place in public discourse (i.e., a public university campus). An Enlightenment-minded Court would have also likely upheld the university's policy; because, if a public school financially supported a Christian magazine, then that would arguably be an impermissible establishment of religion. An Enlightenment-minded Court would have relied on the principle of church-state separation to crush Ron Rosenberger's dream of publishing a Christian magazine at a public university. However, by relying on a narrow interpretation of the Establishment Clause, the Court was able to satisfy the postmodern ideal of allowing competing orthodoxies in the public square.

The Rosenberger Court primarily relied on two cases, which emphasized that public institutions should provide equal access in the public square. In Widmar v. Vincent, the Court ridiculed a decision of the University of Missouri at Kansas City to deny religious groups access to school facilities after hours, when those same facilities were open to non-religious groups. The Court rejected the notion that the university was required to deny religious groups this benefit based on the separation of church and state. Instead, the Court held that the university was required to act "impartial" and was under a duty not to "inhibit" the advancement of religion.

89. Id.
90. Id.
91. This Enlightenment-minded outrage is articulated in Justice Souter's dissent in Rosenberger: "[The Court today, for the first time, approves direct funding of core religious activities by an arm of the State]." 515 U.S. at 863 (Souter, J., dissenting).
93. Id. at 270–73.
94. Id. at 271.
The Rosenberger Court also cited Lamb’s Chapel v. Center Moriches Union Free School District, which emphasized the same basic principles of Widmar. In Lamb’s Chapel, a religious group was denied access to a public school’s facilities after hours. The Court held that once the school opens its doors to outside organizations, it creates a limited public forum, and cannot discriminate against religious groups on the basis of viewpoint. Importantly, both these cases emphasized the postmodern paradigm of equal access in the public square. Accordingly, both Widmar and Lamb’s Chapel are noteworthy because they introduced slight postmodernist sensibilities and paved the way for Rosenberger and subsequent cases.

Following Rosenberger, there is a noticeable trend of postmodern thought as the Court handed down another case treading on the outer boundary of what the Establishment Clause proscribes. Similar to Rosenberger, in Good News Club v. Milford Central School, the Court ruled in favor of religious activity. In that case, a religious group sought to use an elementary school immediately following the school day to teach children Bible verses, sing songs of worship, listen to Bible stories, and pray. The school objected on the basis that the religious group’s actions were not protected under the Religion Clause. Again, the Supreme Court analyzed this issue under the Free Speech Clause and determined that the school had performed impermissible viewpoint discrimination. If the Good News Club had pursued use of the public school facilities through a free exercise claim, then they almost certainly would have lost. Because they were able to tie their claims to free speech and have religious expression treated like any other worldview-based activity, they prevailed, just like Ron Rosenberger. The Court’s willingness to treat religious expression as another ideology protected by the Free Speech Clause indicates how the Court has followed the postmodern sensibility of protecting all competing orthodoxies in the public square.

96. Id. at 387–88.
97. Id. at 394–97.
99. Id. at 103.
100. Id. at 103–04.
101. Id. at 107–08.
102. Baker, supra note 3, at 118.
103. Id.
B. Not Entirely "Postmodern"

To conclude that Rosenberger, Widmar, Lamb's Chapel, and Good News Club were entirely driven by "postmodern" notions would be misguided. In fact, these cases still embody elements of modernism. For example, these religious groups were only allowed a place in the public square if they played by the rules mandated by the institution. The Court would not protect pervasively sectarian, non-compliant religious organizations. Religious organizations could participate in public discourse to some degree, as long as they pursued what the reasoned consensus would pursue. This concept illustrates how the government's rules still have a significant degree of control over discourse in the public square. A true postmodernist would support a more unrestricted public square, free of the government's attempt to play referee and indirectly force its own ideology of non-discrimination. The government's ideology is not "competing" when it has the ability to constrain other ideologies.

C. Following Rosenberger: Christian Legal Society vs. Public University

Undisputedly, the public university campus has become increasingly diverse in the early twenty-first century. Institutions have ramped up their efforts to make every student feel welcome by prohibiting discrimination on the basis of beliefs.\textsuperscript{104} However, "[i]f freedom of religion means anything, it means that individuals can have whatever belief they choose, can associate with those who share their beliefs, and can exclude those that disagree."\textsuperscript{105} A postmodernist viewpoint recognizes that public universities cannot withhold recognition, access, or funding to student groups as a means of disagreeing with the group's viewpoint.

Throughout the last decade, it has become increasingly common for public universities to dispute the membership policies of their student groups, especially religious organizations.\textsuperscript{106} Giving rise to the Supreme

\textsuperscript{104}. William E. Thro, Preserving Orthodoxy on Secular Campuses: The Right of Student Religious Organizations to Exclude Non-Believers, 250 WEST'S EDUC. L. REP. 497, 515 (2010).

\textsuperscript{105}. Id. at 515–16.

Court's recent *CLS v. Martinez* decision, there were two notable circuit court decisions discussing the alleged institutional discrimination of student religious groups on college campuses. The Seventh Circuit in *CLS v. Walker*\(^{107}\) and the Ninth Circuit in *CLS v. Kane*\(^{108}\) ruled opposite of each other when balancing the interests of student religious groups in excluding members against the public university's interest in preventing discrimination.

The facts in *CLS v. Walker* involved the dean of Southern Illinois University Law School revoking the recognition of *CLS* as an official student group because *CLS* required its members to subscribe to the moral principles in a statement of faith.\(^{109}\) Problematically, the statement of faith forbid individuals from engaging in pre-marital sexual relations, whether by homosexuals or heterosexuals.\(^{110}\) The university claimed the *CLS* statement of faith violated university policy and equal opportunity laws.\(^{111}\) The Seventh Circuit ruled against the university holding that it impermissibly infringed on *CLS's* freedom of association.\(^{112}\) The Court noted that university policy cannot "force the group to accept members it does not desire" because that would "affect in a significant way the group's ability to advocate."\(^{113}\) The Seventh Circuit did not decide *Walker* on free speech grounds, but recognized in *dicta* that the university's non-discrimination policy was applied in a discriminatory manner, even though it was deemed facially neutral.\(^{114}\)

Similar to *Walker*, the facts in *CLS v. Kane* (later known as *CLS v. Martinez*) involved a similar controversial "statement of faith" as the source of the dispute.\(^{115}\) Inconsistent with *Walker*, in *Kane*, the district court and Ninth Circuit ruled against *CLS*, holding that the university's decision to deny student organization benefits was not viewpoint dis-
This apparent circuit split led the Supreme Court to grant certiorari to review the matter. In light of Rosenberger, it seemed as though the Supreme Court was going to treat the CLS statement of faith as protected speech. At the least, a postmodernist would have predicted such an outcome.

IV. CLS v. MARTINEZ: THE RISE OF HYPER-MODERNISM

In the summer of 2010, the Supreme Court issued its decision in CLS v. Martinez, confronting the ongoing battle between student religious groups and public university policies. The facts in Martinez are rather simple and similar to the facts of CLS v. Walker. In 2004, CLS applied for the privileges of a “registered student organization” at the University of California-Hastings Law School. However, CLS’s application for official recognition and funding was denied because of its unwillingness to admit into its ranks those students who did not share its fundamental commitments, which included a rejection of homosexuality and a strong commitment to sex only within marriage. To be precise, CLS’s charter only required officers and voting members to affirm the key tenets, which include the prohibition of “unrepentant” sexual conduct. Specifically under dispute was the law school’s “all-comers” policy that required all religious student organizations to admit all interested students to their ranks, regardless of any clash in belief or worldview.

Justice Ginsburg drafted the majority opinion in Martinez, upholding the law school’s “all-comers” policy and ruling against CLS. The majority held that the Hastings policy was viewpoint neutral and did not

119. Martinez, 130 S. Ct. at 2974.
120. Epstein, supra note 118, at *1 (citing Martinez, 130 S. Ct. at 2974).
121. Martinez, 130 S. Ct. at 2974.
122. Id.
123. Id. at 2994–95. Richard Epstein noted that this decision rested upon an “uneasy five-member coalition” consisting of two concurrences from Justices John Paul Stevens and Anthony Kennedy. Epstein, supra note 118, at *105–06. In this case, the Enlightenment-minded coalition on the Supreme Court prevailed, but surprisingly, the majority did not rely upon staunch church-state principles to rule against CLS.
Justice Ginsburg noted:

CLS's conduct — not its Christian perspective — is, from Hastings' vantage point, what stands between the group and [registered student organization] status. In the end, as Hastings observes, "CLS is simply confusing its own viewpoint-based objections to ... nondiscrimination laws (which it is entitled to have and [to] voice) with viewpoint discrimination."125

In other words, the majority indicated that CLS is entitled to its own views, but those views must conform to the views of the university.

The Court attempted to distinguish Rosenberger by concluding that the University of Virginia, in that case, singled out the Christian newspaper and denied funding on the basis of its religious viewpoint.126 However, in Martinez, the Hastings "all-comers" policy draws no distinction between views, but only restricts discriminatory views.127 The Court's distinction is unpersuasive because, in both cases, the universities applied policies that infringe a particular viewpoint: religious expression. The dissent cited Rosenberger, Widmar, Lamb's Chapel, and Good News Club as authority, and proclaimed that any policy that restricts a religious group's freedom of speech, expression, and association on the basis of a religious viewpoint should be struck down.128 In Martinez, the "all-comers" policy infringed the right of CLS on the basis of its religious viewpoint.

Justice Alito's dissent noted that the majority opinion was peculiar because "in some instances [it] follows old precedent, in other instances repudiates precedent, and in other instances goes beyond precedent."129 Before, the Court had established a noticeable trend of almost always ruling in favor of the religious group's autonomy. However, the Enlightenment-minded coalition of Supreme Court justices prevailed in Martinez. CLS lost in Martinez because postmodern sentiment failed them. CLS lost because Justice Ginsburg contended that they abused their place in the public square. Gene Edward Veith warned us of this; the postmodernist will provide Christians with equal footing in public dis-

125. Id. at 2994.
126. Id. at 2993.
127. Id.
128. Id. at 3009 (Alito, J., dissenting).
129. Epstein, supra note 118, at *14.
course, but will frown upon Christians when they appear to assert superiority over other views.\textsuperscript{130}

\textsuperscript{130} Veith, supra note 8, at 40.
Interestingly, Richard Epstein's critique of *Martinez* exemplifies postmodern sensibilities. Epstein is a prominent leader of the CATO Institute, which filed an amicus brief supporting CLS in the *Martinez* case. In its brief, the CATO Institute argues that CLS's right to expressive association trumps any purported state interest in enforcing a school non-discrimination policy. Epstein noted that Justice Ginsburg wrongly concluded that Hastings Law School should, by its "all-comers" policy, treat all student groups as *de facto* common carriers. Instead, "Hastings itself functions as a limited common carrier that must admit into its ranks all groups regardless of their substantive positions." Epstein's critique raises the question: Who is acting intolerant? Hastings or CLS? Justice Ginsburg points the finger at CLS for acting intolerant by excluding students who disagree with their fundamental beliefs. Meanwhile, Epstein points the finger at Hastings for making the mistake of legitimizing intolerance against small and isolated religious groups.

The debate regarding "toleration" is significant because the tension illustrates how both sides of the dispute want to be viewed as "more tolerant." While toleration is a classic postmodern sensibility, the *Martinez* Court treats toleration (i.e., non-discrimination) as the dominant ideology. Justice Ginsburg defended the law school's "all-comers" policy for "fostering cooperation." However, that view "presuppose[s] that organizations are allowed to maintain their separate identities, and then explains how different groups and individuals should think about and interact with others." Disagreeing with Justice Ginsburg, Epstein stated:

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131. According to its website, the CATO Institute is "a public policy research organization — a think tank — dedicated to the principles of individual liberty, limited government, free markets and peace. Its scholars and analysts conduct independent, nonpartisan research on a wide range of policy issues." See CATO Institute, http://www.cato.org/about.php (last visited Nov. 22, 2010).
133. Epstein, supra note 118, at *3.
134. Id.
136. Epstein, supra note 118, at *3.
The lesson of toleration at Hastings Law School is best achieved by letting CLS go about its own business. . . . Toleration requires adopting a live-and-let-live attitude about those with whom you disagree. It does not require any religious group to suffer a forced surrender of essential group characteristics, by admitting non-believers into its ranks. Regardless of whether Ginsburg or Epstein is correct, this focus on “toleration” as a driving force, trumping the intolerant, should make a postmodernist cringe. John Locke would also likely agree with Epstein’s position that the government should tolerate the expression of religious groups. Many argue that Locke’s emphasis on toleration was intended to allow religion to flourish, free of government intrusion. Ironically, Locke’s view on toleration has arguably been distorted by the Court and used against religious groups. The notion of toleration has morphed into an ideology bolstered by the Court and implemented by government at the expense of religious expression.

While unlikely, a postmodernist may attempt to defend *Martinez* by arguing that the Court’s holding was justified because CLS abused its place in the public square. Christians asserted their statement of faith, which excluded those in disagreement with their beliefs, and pronounced that staying true to their beliefs was more important than the school’s non-discrimination policy. CLS never offended the public square and never attempted to control discourse in the public square. Thus, it is difficult to argue that CLS abused its place.

We learn that the *Martinez* decision is actually hyper-modernistic because the Court is compelling an orthodoxy of diversity, non-discrimination, and non-commitment. The Court indicated that there is no constitutional limit on government, if government pursues the orthodoxy of diversity. A hyper-modernist takes the liberal notions of freedom and diversity, and demands these be strictly followed throughout society. Accordingly, in the public university context, each institution should demand an orthodoxy of disbelief and relativism. This is precisely what Hastings did in *Martinez* and the Supreme Court supported that position.

A postmodernist should find it objectionable that a public institution may be permitted to exclude an orthodoxy from the public square on the basis that its viewpoint is incompatible with what is socially and

139. *Id.*

politically acceptable. In a true postmodern world, I can be entirely convinced of my position and no institution can tell me that my viewpoint is wrong. In a hyper-modern world, I cannot be so sure of my position. In this case, CLS stood firm on its position and communicated to the school: “our beliefs are certain and we will not amend our views to be consistent with the school’s viewpoint.” From the school’s point-of-view, and the Court for that matter, a group’s views should be amendable or relative to the school’s views.

While the Martinez decision offends postmodernism and more accurately reflects the modern, it does not resemble classical liberalism. The watchword for liberalism is freedom, and that includes freedom from tradition, religion, and institution. The classic liberal would say, “Hand’s Off! Don’t try to control what I think; don’t try to control what I believe; don’t try to control what I do.” To some degree, liberalism is anti-institutional. Accordingly, a classic liberal would strongly disagree with Martinez and oppose any institutional constraints on CLS. It is safe to say that John Locke would be highly offended by the Martinez decision, especially in light of the Court’s discussion of “toleration.”

The liberal/modern notion of freedom is not what makes Martinez a hyper-modern reflection; instead, it is the affirmation of one ideology as the dominant ideology that makes the decision hyper-modern.

The Martinez decision should sound strikingly similar to the modern notion that religion must play within the bounds of reason. The Court concluded that government only is required to recognize and fund those student groups that comport with its preferred orthodoxy. If reason was the orthodoxy of the modern era, then non-discrimination is the orthodoxy of the hyper-modern era. According to the Martinez Court, these student religious groups must play within the bounds of the government’s mandated orthodoxy: non-discrimination. A true postmodernist would never impose a hegemonic orthodoxy in the public square. The so-called rise in postmodern jurisprudence was derailed this

141. SMITH, supra note 72, at 98.
142. Id.
143. Id.
144. Christian Legal Soc. Chapter of Univ. of Cal. v. Martinez, 130 S. Ct. 2971, 2990 (2010). The Court recognized that Hastings Law School’s anti-discrimination policy was reasonable because it encouraged “tolerance.” Id. Additionally, the Court favorably referred to the school’s policy as “dangling the carrot of subsidy, not wielding the stick of prohibition.” Id. at 2986. While the Court acknowledged that the government may be required to tolerate instances of private discrimination, it was not required to support such discrimination. Id. (citing Norwood v. Harrison, 413 U.S. 455, 463 (1973)).
past summer when the Supreme Court handed down *Martinez*. It seems as though the so-called rise in postmodernism may be *over-stated* and the emergence of hyper-modernism may be *under-stated*.

V. CONCLUSION

Compared to postmodernism, hyper-modernism is not as friendly to religious freedom. Christians should be concerned about the precedent set by *Martinez*. As one critic observed:

> Hastings-like policies intentionally sterilize one of the few remaining fertile fields for discourse — student organizations — for the sake of marginalizing religion. In doing so, these schools shoot themselves in the foot at a time when they can ill afford the injury. Hastings, and like-minded administrations, who adopt policies that restrict all speech in the name of free speech, gut the conscience of the law school . . . .

Hyper-modern thought will allow for the expansion of a government ideology that will impose its will upon religious groups. The government will be permitted to say “play by our rules, or else . . . .” For this reason, Christians and other religious groups should prefer the postmodern public square to hyper-modernism.

It seems as though Christians find themselves in a challenging position after the *Martinez* decision. On the one hand, if Christians assert their values too forcefully in the public square, then the government will constrain them. On the other hand, if Christians do not seek hegemony, then someone else will. This is why Stanley Fish encourages Christians to take advantage of their newfound place in the public square and “impose their will after attaining influence.” Inevitably, competing orthodoxies will seek cultural domination. This is exactly what happened in *Martinez*. The Court reinforced an expansion and domination of the State’s ideology at the expense of CLS. To make matters worse, CLS was not even “imposing its will” on other students in the public square. CLS was not jockeying its ideology as superior to others. Instead, it was the State that overreached by establishing a super-text: its “all-comers” policy. And as we know, the establishment of a super-text is completely contradictory to postmodern thought.

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146. Fish, supra note 78, at 929.

147. See id.
After Martinez, we should seriously question whether postmodern sensibilities will continue to provide breathing room for religious freedom in the public square. If the hyper-modern notion of ideological hegemony continues to gain traction, then the prospects of religious freedom in America may be compromised. As government continues to expand, its voice will grow more dominant in the public square, slowly eroding the postmodern "competing orthodoxy" era. A hyper-modern majority on the Court will continue to allow government-imposed orthodoxies to stifle other orthodoxies in the public square. This should cause concern for Christians and proponents of religious freedom.

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