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REASSOCIATING STUDENT RIGHTS: GIVING IT THE OLE COLLEGE TRY

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I. INTRODUCTION

At the beginning of 2020, the World Health Organization ("WHO") declared Coronavirus disease 2019 ("COVID-19") a "public health emergency of international concern."[1] Governments around the world began instituting citywide and even nationwide "lockdowns."[2] In the United States, the approach was far more splintered. While there was no nationwide lockdown, states across the country instituted varying measures ranging from "shelter-in-place" and "stay at home" orders, to school closures, limits on the size of public gatherings, "mask mandates," and even some states allowing restaurants and bars to

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1. *WHO Director-General's Statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV)*, WORLD HEALTH ORG. (Jan. 30, 2020), [https://perma.cc/A2WW-MCQZ].

2. *See, e.g.*, *Coronavirus: India Enters 'Total Lockdown' After Spike in Cases*, BBC NEWS (Mar. 25, 2020), [https://perma.cc/QDS6-MTDN]; Michael Levenson, *Scale of China's Wuhan Shutdown Is Believed to Be Without Precedent*, N.Y. TIMES (Jan. 22, 2020), [https://perma.cc/42W6-R32W]; *Emmanuel Macron annonce l'interdiction des déplacements non essentiels dès mardi midi*, MAG. MARIANNE (Mar. 17, 2020, 8:10 AM), [https://perma.cc/PM2V-X3XU]; Eric Sylvers & Giovanni Legorano, *As Virus Spreads, Italy Locks Down Country*, WALL ST. J., [https://perma.cc/HA3T-FWD2] (Mar. 9, 2020, 6:42 PM); Ndanki Kahiurika, *Countdown to Lockdown*, NAMIBIAN (Mar. 27, 2020), [https://perma.cc/S2EJ-NRL4]; Calla Wahlquist, *Australia's Coronavirus Lockdown—The First 50 Days*, GUARDIAN (May 1, 2020, 4:00 PM), [https://perma.cc/PGK9-255K].

remain open.[3] Across the United States, these measures have resulted in the most pervasive governmental regulation of American citizens' private affairs since World War II.[4]

During the early stages of COVID-19, universities nationwide frantically closed their doors to students and scrambled to adopt online teaching curricula.[5] As COVID-19 restrictions began to relax across the country over the summer months, many universities decided to reopen their campuses for the fall 2020 semester.[6] To the seeming astonishment of university administrators, upon returning to campus, young, impressionable students who had not seen their friends in months decided they did not want to sit in their dorm rooms all day every day.[7] As COVID-19 cases surged on campus, universities adopted policies—often incorporated into their disciplinary codes—designed to curb the spread of the virus, including, among other things: mask mandates, required completion of "daily

3. James G. Hodge, Jr., *COVID-19 Emergency Legal Preparedness Primer*, NETWORK FOR PUB. HEALTH L. (Mar. 24, 2020), [https://perma.cc/LF5X-EWBE]; Lawrence Gostin & Sarah Wetter, *Why There's No National Lockdown*, ATLANTIC (Mar. 31, 2020), [https://perma.cc/AZ6U-GVM3]; *Gov. Northam Announces Statewide Mask Mandate to Begin Friday*, NBC12 NEWSROOM, [https://perma.cc/FB72-D9AP] (May 27, 2020, 6:37 AM); Josh Shannon, *Face Mask Mandate Takes Effect in Delaware*, NEWARK POST (Apr. 29, 2020), [https://perma.cc/6KJN-3N6K].

4. *See generally* Korematsu v. United States, 323 U.S. 214 (1944) (upholding the authority of the executive to force American citizens of Japanese descent to evacuate their homes and relocate to government internment camps).

5. Mike Baker et al., *First U.S. Colleges Close Classrooms as Virus Spreads. More Could Follow*, N.Y. TIMES, [https://perma.cc/9DMN-D45W] (Mar. 11, 2020); Abigail Johnson Hess, *How Coronavirus Dramatically Changed College for Over 14 Million Students*, CNBC (Mar. 26, 2020, 2:07 PM), [https://perma.cc/S58Y-5JMR] (stating that as of March 26, 2020, more than 1,100 colleges and universities had closed their doors to students as a result of COVID-19).

6. *See, e.g.*, Anemona Hartocollis, *Fever Checks and Quarantine Dorms: The Fall College Experience?*, N.Y. TIMES, [https://perma.cc/JZ4V-F8P8] (Aug. 18, 2020); Elinor Aspegren & Samuel Zwickel, *In Person, Online Classes or a Mix: Colleges' Fall 2020 Coronavirus Reopening Plans, Detailed*, USA TODAY (June 22, 2020, 5:36 PM), [https://perma.cc/7N27-7ZC8]; Jacquelyn Elias et al., *Here's Our List of Colleges' Reopening Models*, CHRON. HIGHER EDUC., [https://perma.cc/9WBA-SJKL] (Oct. 1, 2020, 2:04 PM) (providing the fall 2020 reopening plans of nearly 3,000 colleges and universities).

7. *See, e.g.*, Scottie Andrew, *The Psychology Behind Why Some College Students Break Covid-19 Rules*, CNN, [https://perma.cc/SSB4-5KTY] (Sept. 9, 2020, 12:37 PM); *More Suspensions Possible as NYU Investigates Massive Party in Washington Square Park*, NBC N.Y., [https://perma.cc/AFX2-34WC] (Sept. 7, 2020, 12:43 PM); Natasha Singer, *College Quarantine Breakdowns Leave Some at Risk,* N.Y. TIMES, [https://perma.cc/RC3H-NNDD] (Sept. 16, 2020) (detailing how many students refused to remain in quarantine).

health checks," prohibitions of in-person registered student organization ("RSO") meetings, limits on the size of student gatherings on and off campus, reporting measures for student violations, virus tracking apps, etc.[8]

Unfortunately, for many students, it did not take long for them to discover that these policies were not idle threats; disciplinary action was swift and relentless, often making national headlines.[9] The obvious question for many students and their

8. *See, e.g.*, E-mail from Charles F. Robinson, Interim Provost, Univ. of Ark., to Univ. of Ark. Cmty. (Sept. 4, 2020, 12:50 PM CST) [hereinafter Appendix A] (appended below); UNIV. OF NOTRE DAME, COVID-19 POLICY (2021), [https://perma.cc/S39U-V6GP]; *COVID-19: Essential Information*, MIDDLEBURY COLL., [https://perma.cc/C92L-FJVS] (last visited Oct. 19, 2021); *UC Berkeley Keep Berkeley Healthy Pledge*, UC BERKELEY, [https://perma.cc/WV7B-LBP8] (last visited Oct. 19, 2021); Rebecca Blank, *Chancellor Directs 14-Day Student Restrictions for Health, Safety*, UNIV. OF WIS.-MADISON (Sept. 7, 2020), [https://perma.cc/W5A4-5Z7Y]; *Policy on Health Requirements Related to COVID-19 Pandemic*, NYU (Aug. 27, 2021), [https://perma.cc/6KLD-3BEZ]; *Protect Texas Together*, UNIV. OF TEX., [https://perma.cc/M28K-W8DQ] (last visited Oct. 19, 2021); *Healthy Together Community Commitment Violations*, WM. & MARY, [https://perma.cc/49KQ-V62L] (last visited Oct. 19, 2021). Indeed, the interim dean of students of Northwestern University requested that even non-university-affiliated residents of the communities surrounding Northwestern report student violations of COVID-19 policies off campus to university administrators. Elyssa Cherney, *'There's Been an Awful Lot of Partying': Northwestern University Asks Evanston Residents to Report Students Who Ignore COVID-19 Precautions in Off-Campus Gatherings*, CHI. TRIB. (Aug. 26, 2020), [https://perma.cc/EY4G-E9HK].

9. *See, e.g.*, Bobby Maldonado & Marianne Thomson, *Additional Information About Last Night's Quad Gathering*, SYRACUSE UNIV. (Aug. 20, 2020), [https://perma.cc/77QC-CS8E] (suspending twenty-three students for gathering with scores of others in the university quad); Ian Thomsen, *Northeastern Dismisses 11 Students for Gathering in Violation of COVID-19 Policies*, NEWS@NE (Sept. 4, 2020), [https://perma.cc/243M-H9MT] (dismissing eleven students from Northeastern for congregating in a hotel room in violation of Northeastern's COVID-19 conduct policies); Riddhi Andurkar, *UPDATE: Two MU Students Expelled, Three Suspended for COVID-19 Safety Violations*, COLUM. MISSOURIAN (Sept. 15, 2020), [https://perma.cc/895P-87KH] (discussing how the University of Missouri expelled two students, suspended three others, and began an investigation of eleven student organizations as a result of reported violations of the university's COVID-19 policies); Annie Grayer, *36 Purdue Students Suspended After Breaking Social Distancing Rules*, CNN (Aug. 21, 2020, 3:32 PM), [https://perma.cc/7P4B-J6GS] (reporting on Purdue University administrators' decision to suspend thirty-six students for attending a party off campus and not following the university's COVID-19 policies); Rachel Treisman, *More Than 200 Ohio State University Students Suspended for Violating Pandemic Rules*, NPR (Aug. 25, 2020, 9:17 PM), [https://perma.cc/UA4H-H37A] (reporting on Ohio State University administrators' decision to temporarily suspend 228 students before classes even began as a result of the students' violations of the University's COVID-19 safety protocols); *Pi Kappa Alpha Chapter and Its Leaders Receive Summary Suspensions*, PENNSTATE, [https://perma.cc/7ZCK-V6LV] (Sept. 22, 2020) (suspending a fraternity and members of its executive board for hosting a gathering with approximately seventy people in attendance); Elissa Nadworny, *Despite Mass Testing, University of Illinois Sees Coronavirus Cases Rise*,

parents thus became, can public[10] universities do this in light of the United States Constitution's guarantee of the First Amendment right to freely associate?[11] Not much controversy surrounded administrators' decisions to discipline students for on-campus violations of COVID-19 policies, but the discipline of students for their off-campus behavior left many enraged and none with answers. This is largely because the Supreme Court has never addressed the extent to which public universities may regulate the off-campus associational activities of their students. Indeed, the Court has barely touched the First Amendment right to association in the university context at all, even on campus.[12]

The jurisprudence of university students' associational rights, like that of its speech counterpart, may aptly be described as "a mixture of muddled reasoning and inconsistent decisions,"[13] so muddled, in fact, "that even 'lawyers, law professors, and judges' are unclear what standards apply."[14] As the law currently stands, there is no one clear approach that courts may uniformly apply to review the constitutionality of university regulations of students' associational rights. Although there is a robust body of scholarship regarding the impacts of university restrictions on First Amendment rights, particularly speech, to date, no scholar has attempted to unravel the extraordinarily murky patchwork of case law to identify a clear approach to the student associational

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NPR (Sept. 3, 2020, 10:39 AM), [https://perma.cc/BA9Y-SJXG] (stating that as of September 3, 2020, about 100 students and organizations were facing disciplinary action—including suspension—for violating the University of Illinois at Urbana-Champaign's COVID-19 policies).

10. Because the Constitution requires state action before its provisions are applicable, I will not address private universities throughout the rest of this Comment. *See generally* The Civil Rights Cases, 109 U.S. 3 (1883). However, it is likely that even most private universities today are subject to the directives of the Constitution given their continuous reception of massive amounts of federal funding. *See* Richard Vedder, *There Are Really Almost No Truly Private Universities*, FORBES (Apr. 8, 2018, 8:00 AM), [https://perma.cc/UV8X-YVGC]. I will leave this question for another day.

11. *See* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988) ("A state university without question is a state actor.").

12. *See infra* Section II.B.2.b.

13. Frank D. LoMonte, *"The Key Word is Student":* Hazelwood *Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 341 (2013).

14. Meggen Lindsay, Tinker *Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students*—Tatro v. University of Minnesota, 38 WM. MITCHELL L. REV. 1470, 1500 (2012) (quoting Doninger v. Niehoff, 642 F.3d 334, 353 (2d Cir. 2011)).

rights analysis. In light of the critical gap in the Court's associational rights jurisprudence, this Comment proposes a three-tiered, sliding scale of judicial scrutiny analytical framework for reviewing the constitutionality of university regulation of students' associational rights.

In the first tier, the university is at the height of its authority to regulate students' associational rights. When the targeted activity is on campus and school sponsored,[15] the courts should review a university's regulations of its students' associational activities under the rational basis test. In the second tier, the university retains a significant amount of authority to regulate associational activities that are either off campus and school sponsored or on campus and not school sponsored. The courts should review university regulations of students' associational activities that fall into this second tier under the intermediate scrutiny test. Finally, in the last tier, the university's authority to regulate is at its trough where the regulation impacts off-campus, non-school-sponsored associational activities. University attempts to regulate associational activities that fall into this third tier should be reviewed under the strict scrutiny test.

Importantly, the three tiers are not rigid, unforgiving concepts, but rather, they are meant to be guideposts for the Court along a sliding scale of judicial scrutiny. Indeed, I realize, as often happens in the law, there exist gray areas in which student conduct does not neatly fit into any one of the three tiers. A flexible approach such as this one would allow the Court to consider the idiosyncrasies of each case while also providing clear guidance to university administrators and lower courts.

This Comment will proceed as follows. In Part II, I will discuss the various (and often inconsistent) frameworks that courts currently apply to university students' associational rights. Part III subsequently re-introduces the proposed three-tiered

15. For the purposes of this Comment, I use the definition of "school-sponsored" expounded by the Court in *Hazelwood School District v. Kuhlmeier*. 484 U.S. 260, 271 (1988) (explaining that "school-sponsored" means those "activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."). Importantly, the Court has emphasized that even "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so." Rumsfeld v. F. for Acad. & Inst. Rts., Inc., 547 U.S. 47, 65 (2006).

framework and justifies its adoption as the test the Court should employ moving forward. Following this section, in Part IV, I will use the proposed framework to review the constitutionality of the University of Arkansas's COVID-19 policy. Finally, in Part V, I will call upon the Court to remedy the incoherent and unworkable state of university student associational rights jurisprudence and urge it to adopt a clear framework moving forward.

II. BACKGROUND

The Court's university student associational rights jurisprudence is nearly incomprehensible. To fully appreciate the lack of a coherent approach, it is necessary to understand how the Court got to where it is today. University student associational rights principles draw from the right to association and primary and secondary speech precedent. In this section, I will analyze each of these predecessors in turn and explain the current state of university student associational rights.

A. The Right to Association

The right to association is not express in either the Constitution or the Bill of Rights.[16] Nonetheless, since the founding era, it has long been recognized as vital to both the effective functioning of the United States government and the preservation of individual liberties.[17] Despite the founders'

16. U.S. CONST. amend I; Mark D. Bauer, *Freedom of Association for College Fraternities After* Christian Legal Society *and* Citizens United, 39 J. COLL. & U. L. 247, 248 (2013).

17. Bauer, *supra* note 16, at 272 (discussing James Madison's proposal that "[t]he people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances, for redress of their grievances," as well as *The Federalist*'s assertion that the freedom of association is necessary to the proper functioning of a republic) (quoting THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 217 (Neil H. Cogan ed., 1997)); Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (asserting that "[t]hose who won our independence believed that . . . without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine[,]" and "they amended the Constitution so that free speech and assembly should be guaranteed."); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First

insistence on the fundamentality of the right to association, the Supreme Court did not recognize the right as protected by the First Amendment to the United States Constitution until 1958.[18] In the landmark case of *NAACP v. Alabama ex rel. Patterson*, the Court highlighted the "close nexus" between the freedoms of speech and association, emphasizing that one cannot exist without the other.[19] Furthermore, the Court unequivocally asserted that the right to association is entitled to the most onerous of constitutional protections in holding that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . state action which may have the effect of curtailing the freedom to associate is subject to the *closest scrutiny*."[20] The right to association remained a bulwark against government regulation for decades as the Court continually reaffirmed its importance and occasionally even expanded it.[21]

However, the right began to deteriorate in response to the civil rights era and the general push for equality in the United States throughout the 1960s-80s, as private groups throughout this period continually tried to keep racial minorities and women out of their organizations by asserting right to association claims, only to have the courts consistently invalidate them.[22] This

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Amendment of the Bill of Rights."). The freedom of association is deeply rooted in human history. However, for the purposes of this Comment, I will only discuss the United States constitutional beginnings of the right to association. For a more in-depth historical analysis of the right, see generally CHARLES E. RICE, FREEDOM OF ASSOCIATION (1962).

18. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958); Scott Patrick McBride, *Freedom of Association in the Public University Setting: How Broad Is the Right to Freely Participate in Greek Life?*, 23 U. DAYTON L. REV. 133, 136 (1997).

19. *Patterson*, 357 U.S. at 460.

20. *Id.* at 460-61 (emphasis added).

21. Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (asserting that "[t]he right of 'association,' like the right of belief . . . is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means[,]" and that "[a]ssociation in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful."); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 624 (1980) (stating that "[b]efore *Griswold* was decided, the notion of constitutional protection of the freedom of association was a First Amendment doctrine and little more."); *see also* Eisenstadt v. Baird, 405 U.S. 438, 447, 453 (1972) (extending *Griswold*).

22. *See, e.g.*, Sigma Chi Fraternity v. Regents of Univ. of Colo., 258 F. Supp. 515, 524-27 (D. Colo. 1966).

culminated in the Supreme Court's overhauling of the right to association in *Roberts v. United States Jaycees*.[23] In *Roberts*, the United States Jaycees ("Jaycees"), a non-profit membership corporation dedicated to the growth and fostering of young men's civic organizations, brought an action against the Minnesota Department of Human Rights ("MDHR"), claiming that the MDHR's demand that it admit women as regular members to its organization violated its constitutional right to association.[24] The Court began its analysis of the Jaycees' right to association claim by breaking the right down into two sub-rights: the right to intimate association and the right to expressive association.[25]

First, the Court discussed the right to intimate association.[26] This right is protected "as a fundamental element of personal liberty."[27] Indeed, the right "reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."[28] The Court went on to explain that this right is designed to protect the formation of only certain kinds of highly personal relationships and provided some guidance on how to interpret this limitation.[29]

The "highly personal relationships" limitation requires that the relationship in question contain those "personal bonds [which] have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and

23. 468 U.S. 609, 618 (1984).

24. *Id.* at 612-13, 615.

25. *Id.* at 617-18 (stating that "[o]ur decisions have referred to constitutionally protected 'freedom of association' in two distinct senses."). However, the Court made sure to clarify that these two rights are not always mutually exclusive, rather, in most instances "freedom of association in both of its forms may be implicated." *Id.* at 618. *But see*, John D. Inazu, *The Unsettling "Well Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 155-56 (2010) (arguing that the *Roberts* opinion "suggest[s] four possible categories of associations: (1) intimate expressive associations, (2) intimate nonexpressive associations, (3) nonintimate expressive associations, and (4) nonintimate nonexpressive associations.").

26. *Roberts*, 468 U.S. at 617-18.

27. *Id.* at 618.

28. *Id.* at 619.

29. *Id.* at 618-20.

beliefs[.]"[30] In other words, it must be along the lines of a familial relationship.[31] The Court ultimately established a spectrum framework, where the State's authority to regulate is contingent upon how intimate the association is.[32] The more intimate the association, the more significant the State's interest must be for it to regulate that association.[33] In providing further guidance on gauging the placement of a given association along this spectrum, the Court suggested several factors be taken into consideration: size, selectivity, purpose, and seclusion.[34] Using these factors, the Court ultimately decided that the Jaycees were not entitled to protection under the right to intimate association because the chapters were not small or selective, and many women and other non-members regularly attended meetings and participated in social functions.[35]

Second, the Court discussed the right to expressive association.[36] The right to expressive association is the "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[37] Expressive association is thus a correlative right of sorts. In establishing this right as distinct from the right to intimate association, the Court reasoned that "[a]ccording protection to collective effort on

30. *Id.* at 618-19.

31. *Roberts*, 468 U.S. at 619 (asserting that "[t]he personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family").

32. *Id.* at 620; McBride, *supra* note 18, at 146 ("The continuum of groups for intimate association analysis has at one end the family, possessing the most highly protected intimate relationships, and at the other end a large, profit-motivated corporation, having no chance of claiming intimate associational rights.").

33. *See Roberts*, 468 U.S. at 620 ("Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.").

34. *Id.*

35. *Id.* at 621.

36. *Id.* at 621-22.

37. *Id.* at 618. The establishment of the right to expressive association is a recognition of the fact that "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts*, 468 U.S. at 622.

behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."[38] While recognizing that the right to expressive association is indeed entitled to the most onerous of constitutional protections, the Court held that it is not absolute, and that "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[39] In other words, government regulation of expressive association must generally meet the arduous demands of the strict scrutiny test in order to comport with the Constitution.

While the MDHR's demand that the Jaycees admit women to the organization infringed upon the group's right to expressive association,[40] the State of Minnesota nonetheless prevailed.[41] The Court reasoned that because (1) Minnesota had a compelling interest in eradicating gender discrimination, (2) the regulation was the least restrictive means of assuring Minnesota's citizens "equal access to publicly available goods and services," and (3) the regulation imposed only a limited burden on the associational freedoms of the Jaycees, the Jaycees' right to expressive association claim failed.[42]

1. Intimate Association

Although the Supreme Court's most in-depth treatment of the right to intimate association occurred in *Roberts*,[43] the right was first articulated in Kenneth Karst's law review article, *The*

38. *Id.* at 622; *see also* Rumsfeld v. F. for Acad. & Inst. Rts., Inc., 547 U.S. 47, 68 (2006) (asserting that the right to expressive association developed because "[t]he right to speak is often exercised most effectively by combining one's voice with the voices of others[,]" and "[i]f the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect.").

39. *Roberts*, 468 U.S. at 623.

40. *Id.*

41. *Id.*

42. *See id.* at 623-26.

43. *See supra* notes 26-35 and accompanying text.

Freedom of Intimate Association, a mere four years prior to the right's constitutional debut.[44] Karst's article and the *Roberts* opinion are astoundingly similar.[45] Justice Brennan noticeably omitted any citation to Karst's article in his *Roberts* opinion.[46] However, several commentators have suggested that the Supreme Court adopted much of Karst's intimate association framework,[47] one even suggesting that the Supreme Court "lifted the right to intimate association from Karst's article."[48]

Thus, while Karst's article did not determine the parameters of the right to intimate association, it is highly instructive, as it was almost certainly the Supreme Court's inspiration of the right.[49] Karst defined an intimate association as "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship. An intimate association, like any group, is more than the sum of its members; it is a new being, a collective individuality with a life of its own."[50] Karst argued that the right to intimate association is an expansive, broad right, protected not only under the First Amendment, but also under substantive due process and equal protection principles of the Fifth and Fourteenth Amendments.[51] Importantly, he also argued that the right to

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44. Karst, *supra* note 21, at 624; Gwynne L. Skinner, *Intimate Association and the First Amendment*, 3 L. & SEXUALITY 1, 3 (1993).

45. For a comprehensive analysis of the similarities between Karst's article and the Supreme Court's *Roberts* opinion, see Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. CIV. RTS. L.J. 269, 278-79 (2006).

46. Inazu, *supra* note 25, at 165; *Roberts*, 468 U.S. 609. Justice Brennan is lucky he did not have a faculty advisor reviewing his opinion. Although, I suppose Professor Karst is not too upset, his idea has become enduring constitutional law after all.

47. *See, e.g.*, Marcus, *supra* note 45, at 276; Inazu, *supra* note 25, 158-68 ("Brennan's *Roberts* opinion never cites Karst's article, but the intellectual debt is apparent."); Joshua P. Roling, *Functional Intimate Association Analysis: A Doctrinal Shift to Save the* Roberts *Framework*, 61 DUKE L.J. 903, 909 (2012) ("[M]any of Professor Karst's values were reflected in the Court's rationales for protecting intimate associations."); Skinner, *supra* note 44, at 3-8; *see generally* Collin O. Udell, *Intimate Association: Resurrecting a Hybrid Right*, 7 TEX. J. WOMEN & L. 231, 233-39 (1998).

48. Udell, *supra* note 47, at 232.

49. *See supra* notes 43-48.

50. Karst, *supra* note 21, at 629.

51. *Id.* at 652-67.

intimate association was not limited to traditional relationships,[52] a point where he and Justice Brennan diverged.[53]

In the thirty-six years since the Supreme Court initially recognized the right to intimate association in *Roberts*, it has not once taken up another case in which it has devoted extensive attention to clarifying the right.[54] There was an initial attempt by Justice Blackmun to invoke the right in defense of LGBT rights in *Bowers v. Hardwick*,[55] a mere two years after *Roberts* was decided, but to no avail, as the majority opinion in that case did not even acknowledge the right to intimate association in formulating its holding.[56]

Nonetheless, the Supreme Court has provided a limited amount of guidance on "what [an intimate association] is not[.]"[57] A few years after *Roberts* was decided, another very similar case came before the Supreme Court: *Board of Directors of Rotary International v. Rotary Club of Duarte*.[58] Much like in *Roberts*, here, Rotary International, an umbrella organization controlling 19,788 local rotary clubs, had a policy limiting official membership to men.[59] The Rotary Club of Duarte, California ("Duarte Chapter") decided to start admitting women, to which Rotary International responded by revoking the club's charter.[60] The Duarte Chapter then sued Rotary International, asserting that its policy limiting membership to men violated California's Unruh Civil Rights Act ("UCRA").[61] Rotary International then claimed that the UCRA violated its right to association.[62]

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52. *Id.* at 629, 662, 671, 686-87 (claiming that even "close friendship" may be included in the right to intimate association).

53. Udell, *supra* note 47, at 238-39 (suggesting that Justice Brennan was "hesitant to do more than vaguely suggest that the right might move beyond traditional relationships").

54. *See generally id.* at 239; Marcus, *supra* note 45, at 283-84.

55. 478 U.S. 186, 202-03 (1986) (Blackmun, J., dissenting) ("I believe that Hardwick has stated a cognizable claim that [the Georgia sodomy statute] interferes with constitutionally protected interests in privacy and freedom of intimate association.").

56. *See generally id.* at 186 (majority opinion).

57. Marcus, *supra* note 45, at 283.

58. 481 U.S. 537, 537 (1987).

59. *Id.* at 539-41.

60. *Id.* at 541.

61. *Id.* at 541-42.

62. *See id.* at 537.

In applying the *Roberts* framework to analyze Rotary International's intimate association claim,[63] the Court acknowledged that "[w]e have not attempted to mark the precise boundaries of this type of constitutional protection."[64] It then went on to cite a plethora of substantive due process cases in order to exemplify the kinds of relationships deserving constitutional protection under the right to intimate association.[65] However, ultimately, in employing the *Roberts* intimate association factors to Rotary International, the Court held that neither Rotary International nor its individual Rotary Clubs were entitled to *any* degree of intimate association protection.[66] In reaching this conclusion, the Court highlighted several facts: membership ranged from fewer than twenty to more than nine hundred, about ten percent of the membership moved away or dropped out every year, the clubs' policies stated that they were inclusive, guests attended meetings, and members from other Rotary Clubs were required to be admitted to any Rotary Club meeting.[67]

Surprisingly, the very next year, the Court decided an almost identical case: *New York State Club Ass'n v. City of New York*.[68] Yet again, private clubs sought to enjoin the enforcement of a human rights law prohibiting discrimination, asserting their right to association as a defense.[69] In analyzing the New York State Club Association's claims, the Court failed to even mention the right to intimate association by name,[70] instead choosing to refer to the vague notion of "private association."[71] Nonetheless, the Court still employed the *Roberts* framework and denied the New York State Club Association's intimate association claim based on the facts that most of the clubs were more than four hundred

63. *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 545-46.

64. *Id.* at 545.

65. *Id.* (first citing Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); then citing Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (decision to have children); then citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (child-rearing and education); and then citing Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (cohabitation with relatives)).

66. *Id.* at 546-47.

67. *Id.*

68. 487 U.S. 1, 1 (1988).

69. *Id.* at 7.

70. Marcus, *supra* note 45, at 284; *N.Y. State Club Ass'n*, 487 U.S. 1.

71. *N.Y. State Club Ass'n*, 487 U.S. at 6, 12.

members strong, and they all regularly provided service to and received payments from nonmembers.[72] The Court also emphasized, albeit implicitly, that the regular presence of strangers at club meetings strongly counsels against the finding of an intimate association.[73]

Following *New York State Club Ass'n*, it seems that large private clubs learned their lesson (at least for a time), as there was not another large private club intimate association case to reach the Supreme Court for another decade.[74] However, this did not stop the Court from invalidating intimate association claims elsewhere. The year after *New York State Club Ass'n*, the Court denied another intimate association claim in *City of Dallas v. Stanglin*.[75] In *Stanglin*, the owner of a skating rink brought a challenge to a city ordinance that prohibited teenagers from entering the skating rink at certain hours and socializing with those outside their age group.[76] He alleged that the ordinance interfered with his patrons' right to associate with persons outside their age bracket.[77] The Court found that the Constitution does not recognize "a generalized right of 'social association' that includes chance encounters in dance halls."[78] Indeed, Justice Rehnquist, writing for the majority, emphatically held that "[i]t is clear beyond cavil that dance-hall patrons, who may number 1,000 on any given night, are not engaged in the sort of 'intimate human relationships' referred to in *Roberts*."[79] However, he barely explained his reasoning in holding that "coming together to engage in recreational dancing" does not qualify as a form of intimate association.[80]

Continuing the trend of hearing one association focused case a year, in 1990, the Court reviewed *FW/PBS, Inc. v. City of Dallas*.[81] Like in *Stanglin*, here, owners of Dallas businesses

72. *Id.*
73. *Id.*
74. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).
75. 490 U.S. 19, 20-21 (1989).
76. *Id.* at 21-22.
77. *Id.* at 22.
78. *Id.* at 25.
79. *Id.* at 24.
80. *Stanglin*, 490 U.S. at 25.
81. 493 U.S. 215 (1990).

brought intimate association claims on behalf of their patrons against a city licensing scheme that, among other things, required motel owners to obtain a license if they were to rent rooms for fewer than ten hours.[82] Justice O'Connor, perhaps a bit sarcastically, held that "we do not believe that limiting motel room rentals to 10 hours will have any discernible effect on the sorts of traditional personal bonds to which we referred in *Roberts*[,]" and that "[a]ny 'personal bonds' that are formed from the use of a motel room for fewer than 10 hours are not those that have 'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.'"[83] Thus, again, the Court refused to take advantage of an opportunity to clarify the parameters of the right to intimate association. Since the Court's decision in *FW/PBS, Inc.*, there have been no Supreme Court intimate association cases defining the doctrine to any appreciable extent.[84]

In the absence of any clear guideposts, the Circuit Courts of Appeals have largely been left to their own devices when it comes to the right to intimate association.[85] This has created wide and varying gaps in the application of the right.[86] The central thesis of one of the most comprehensive legal commentaries on the right to intimate association to date was that "[w]ith *Lawrence* [*v. Texas*] shining new light on intimate association rights, the Court could soon decide[] . . . that the time has finally come to clarify the parameters and protections that define the freedom of intimate association."[87] Indeed, the Court had a golden opportunity to do

82. *Id.* at 220-21.

83. *Id.* at 237 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 618-19 (1984)).

84. *See* Marcus, *supra* note 45, at 286-87 (first citing Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); then citing Troxel v. Granville, 530 U.S. 57 (2000); and then citing Overton v. Bazzetta, 539 U.S. 126 (2003), and discussing how, in each case, the Court did not take advantage of the opportunity to clarify or define the right to intimate association).

85. *Id.* at 287.

86. *Id.* at 288-98 (identifying upwards of ten different tests the Circuit Courts of Appeals have applied to the right of intimate association since *Roberts* and describing the variance as "mind-boggling") (citing Udell, *supra* note 47, at 233-39). Professor Marcus also discusses the "[c]lear cries for clarity" coming from the Circuit Courts of Appeals, providing as an example a somewhat comical reference to the Second Circuit's citation of a Bible verse "to describe its lack of knowledge of the unfixed boundaries of intimate association." *Id.* at 297.

87. *Id.* at 299.

exactly that in the recent landmark decision of *Obergefell v. Hodges*.[88] *Obergefell* was a major step forward in terms of the right to intimate association, as it finally broke away from the age old traditional relationships approach in its holding that "[s]ame-sex couples have the same right as opposite-sex couples to enjoy intimate association," echoing a more Karstian view of the right.[89] However, aside from a couple of quick references to the right to intimate association, the Court yet again refused to clarify its parameters or provide any meaningful analysis of it.[90] Thus, in line with the rest of its post-*Roberts* intimate association decisions, the Court has allowed the gates of the doctrine of intimate association to remain wide open, refusing to shut them for almost forty years.[91]

2. Expressive Association

The Supreme Court's most in-depth analysis of the right to expressive association was also laid out in *Roberts*.[92] The *Roberts* definition of an expressive association "requires both an organization (the association itself) and a purpose (a First Amendment activity)."[93] The right to expressive association essentially allows an organization to be considered an individual for purposes of the First Amendment and grants it all the First Amendment rights and corresponding limitations of such rights that are bestowed upon the individual.[94] Just like the intimate association jurisprudence, the Supreme Court has provided little

88. 576 U.S. 644 (2015).

89. *Id.* at 646.

90. *See id.* at 646, 667.

91. My sympathies go out to Professor Marcus. I have only just begun researching the right to intimate association and I am quite frustrated with the Court's lack of guidance, while I know she has watched the Court refuse to define the right for at least fourteen years now.

92. *See supra* notes 36-42 and accompanying text.

93. Randall P. Bezanson et al., *Mapping the Forms of Expressive Association*, 40 PEPP. L. REV. 23, 24-25 (2012).

94. *Id.* For example: viewpoint and content restrictions; prior restraints; public forum doctrine; time, place, and manner restrictions; etc. *See id.* That being said, the right still protects the individuals that participate in these associations, so in a sense, it is also an individual right. Roberts v. U.S. Jaycees, 468 U.S. 609, 618-19 (1984).

guidance on what exactly qualifies an organization as an expressive association.[95]

The first expressive association case to come to the Supreme Court after *Roberts* was *Board of Directors of Rotary International*.[96] Although the UCRA's interference with Rotary International's right to expressive association seemed to warrant the application of strict scrutiny,[97] the Court gave short shrift to Rotary International's claim, asserting that "the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes."[98] The Court indicated that Rotary International was not an expressive association at all, seemingly because the Rotary Clubs did not take positions on political issues.[99] Moreover, the Court went on to say that even if the UCRA interfered with Rotary International's right to expressive association, the UCRA was "unrelated to the suppression of ideas" and "serv[ed] the State's compelling interest in eliminating discrimination against women."[100]

A nearly identical result occurred in the next expressive association case to reach the Court, *New York State Club Ass'n*.[101] In this case, however, the New York State Club Association sought to bring the expressive association claim on behalf of individual club members, as opposed to on behalf of each organization as a whole.[102] The Court affirmed that the right is also held by individuals, but unfortunately for the New York State Club Association, it held that the public accommodations law did "not affect 'in any significant way' the ability of individuals to form associations that will advocate public or private viewpoints."[103] The Court went on to justify its decision and lay

95. Bezanson et al., *supra* note 93, at 25-27.

96. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); *see supra* notes 58-62 and accompanying text (providing the pertinent facts).

97. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

98. *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 548.

99. *Id.*

100. *Id.* at 549.

101. N.Y. State Club Ass'n v. City of New York, 487 U.S. 1 (1988); *see supra* notes 68-72 and accompanying text (providing the pertinent facts).

102. *N.Y. State Club Ass'n*, 487 U.S. at 1, 13.

103. *Id.* at 13 (citing *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 548).

the groundwork for future expressive association litigants in explaining that:

> It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion.[104]

Following *New York State Club Ass'n*, the Court briefly analyzed the right to expressive association in *Stanglin*.[105] Again, the Court limited the right. Here, the Court held that social gatherings of strangers do not "involve the sort of expressive association that the First Amendment has been held to protect."[106] Because the "hundreds of teenagers who congregate each night at this particular dance hall [were] not members of any organized association[,]" they were not entitled to the protections of the right to expressive association.[107] The Court noted that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[108]

After a decade of consistently striking down expressive association claims, the Court finally upheld an organization's right to expressive association in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc*.[109] In *Hurley*, the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") sought to march in the 1993 Boston St. Patrick's Day parade as a way for its members to express their pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate the existence of such individuals, and to express solidarity with individuals like themselves who were at the time seeking to march in the very similar New York St. Patrick's Day

104. *Id.*

105. City of Dallas v. Stanglin, 490 U.S. 19, 24-25 (1989); *see supra* notes 75-78 and accompanying text (providing the pertinent facts).

106. *Stanglin*, 490 U.S. at 24.

107. *Id.*

108. *Id.* at 25.

109. 515 U.S. 557, 557 (1995).

parade.[110] However, the organizer of the parade, the South Boston Allied War Veterans Council ("SBVC"), refused to allow them to march as a group behind their own banner in the parade.[111] GLIB filed suit under the Federal Constitution, Massachusetts Constitution, and Massachusetts public accommodations laws.[112] SBVC asserted its right to expressive association in justifying its exclusion of GLIB.[113]

The Court began its analysis of SBVC's expressive association claim by acknowledging that parades are indeed a form of expressive action.[114] For once, the Court seemed to broaden the right, in finding that "a narrow, succinctly articulable message is not a condition of constitutional protection."[115] Additionally, the Court found that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."[116] In combining these principles, the Court found that, although there were a multitude of different groups with different ideas in the parade, because SBVC "decided to exclude a message it did not like from the communication it chose to make, . . . that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another."[117] Thus, although Massachusetts had a compelling interest in eliminating discrimination based on sexual orientation, it could not defeat SBVC's right to expressive association.[118]

The Court again expanded the right to expressive association in the case of *Boy Scouts of America v. Dale*.[119] Here, the Boy Scouts of America ("BSA") sought to exclude an assistant

110. *Id.* at 561.

111. *Id.* at 560, 572. Importantly, SBVC was a private organization, however, the parade still involved state action in that the City of Boston authorized the SBVC to organize it. *Id.* at 560. It is also important to note that the parade had been a state-sponsored event from as early as 1737 to as late as 1947. *Id.* at 560.

112. *Hurley*, 515 U.S. at 561.

113. *Id.* at 563.

114. *Id.* at 568.

115. *Id.* at 569 (citing Spence v. Washington, 418 U.S. 405, 411 (1974) (per curiam)).

116. *Id.* at 569-70.

117. *Hurley*, 515 U.S. at 569, 574.

118. *Id.* at 572, 575.

119. 530 U.S. 640, 661 (2000).

scoutmaster (Dale), who had been a longtime member of the BSA, upon discovering that he was openly gay.[120] Dale then filed suit under New Jersey's public accommodations law.[121] The Court established several universal rules for the right to expressive association. First, "[t]he First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private."[122] Relatedly, "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection."[123] Furthermore, instilling a system of values constitutes expression within the meaning of the right.[124] Finally, courts must give deference to an "association's assertions regarding the nature of its expression, [and its] view of what would impair its expression."[125]

Ultimately, the Court concluded that the New Jersey public accommodations law violated the BSA's right to expressive association.[126] However, it is unclear which test the Court applied to the law in striking it down. Although, in citing to the previous association cases, the Court made vague references to "compelling state interest[s]" and "serious burden[s]," it did not expressly state whether it was applying strict scrutiny, intermediate scrutiny, or something entirely different in analyzing the validity of the New Jersey public accommodations law.[127] Rather, the Court said that "[i]n *Hurley*, we applied traditional First Amendment analysis" and "the analysis we applied there is similar to the analysis we apply here."[128]

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120. *Id.* at 643-45.
121. *Id.* at 645.
122. *Id.* at 648.
123. *Id.* at 655.
124. *Dale*, 530 U.S. at 650.
125. *Id.* at 653.
126. *Id.* at 659.
127. *Id.* at 657-59 (referencing *Roberts*, *Bd. of Dirs. Int'l*, *N.Y. State Club Ass'n*, and *Hurley*).
128. *Id.* at 659.

Thus, the right to expressive association jurisprudence has, like the right to intimate association jurisprudence, left the lower courts in flux. Although the right has always been considered a correlative right of sorts,[129] it has become less of a freestanding right of its own over the years and increasingly more of a branch of free speech doctrine. Since the Court's decision in *Dale*, the Court has not yet decided another expressive association case outside of the education context, which I turn to next.[130]

B. First Amendment Education Jurisprudence

While the Supreme Court has rarely forayed into the realm of the First Amendment rights of students, *especially* university students, there are a few seminal cases that guide lower courts.[131] This section proceeds as follows: first, I will discuss the education quartet; second, I will review off-campus speech jurisprudence generally; and finally, I will examine the Court's treatment of university students' First Amendment associational rights specifically. This context is crucial to understanding how the Court's approach to university student associational rights developed and the many problems surrounding its practical application.

1. The Education Quartet

Because of the Supreme Court's lack of guidance in the education realm, there are not many cases governing the First Amendment rights of students, especially in the university setting. Indeed, the Court has provided so little guidance that the lower courts have consistently relied on the education quartet, a string of four First Amendment student rights cases that were decided in the primary and secondary education context.[132] The education

129. *See supra* note 38 and accompanying text.

130. *See infra* Section II.B.2.b. Unfortunately, the expressive association jurisprudence only gets more complex.

131. *See infra* notes 132-210 and accompanying text.

132. This reliance has engendered much scholarly commentary. Most commentators are staunchly opposed to the imposition of these primary and secondary education cases in the context of the public university setting. *See infra* note 167 and accompanying text.

quartet consists of: *Tinker v. Des Moines Independent Community School District*,[133] *Bethel School District No. 403 v. Fraser*,[134] *Hazelwood School District v. Kuhlmeier*,[135] and *Morse v. Frederick*.[136]

a. Tinker

The renowned line from Justice Fortas's opinion in *Tinker* that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[137] has been quoted so often that it has almost become a cliché.[138] In *Tinker*, elementary, junior high, and high school students planned to wear black armbands to class in protest of the Vietnam War.[139] Upon hearing about this plan, school administrators adopted a policy "that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband."[140] The students indeed wore the armbands to school and, not surprisingly, were suspended pursuant to the policy.[141] They then brought First Amendment claims against the school and its officials under 42 U.S.C. § 1983.[142]

The Court began by emphasizing "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools,"[143] seemingly

133. 393 U.S. 503 (1969).
134. 478 U.S. 675 (1986).
135. 484 U.S. 260 (1988).
136. 551 U.S. 393 (2007).
137. *Tinker*, 393 U.S. at 506.
138. *See, e.g.*, Healy v. James, 408 U.S. 169, 180 (1972); Lindsay, *supra* note 14, at 1489; Andrew R. Kloster, *Speech Codes Slipping Past the Schoolhouse Gate: Current Issues in Students' Rights*, 81 UMKC L. REV. 617, 617 (2013); Marcia E. Powers, *Unraveling* Tinker*: The Seventh Circuit Leaves Student Speech Hanging by a Thread*, 4 SEVENTH CIR. REV. 215, 219 (2008). That of course is not going to stop me from quoting it anyways, as you may have noticed.
139. *Tinker*, 393 U.S. at 504; *id.* at 516 (Black, J., dissenting).
140. *Id.* at 504 (majority opinion).
141. *Id.*
142. *Id.*
143. *Tinker*, 393 U.S. at 507.

signaling defeat of the students' claims. However, it went on to find that:

> In our system, *state-operated schools may not be enclaves of totalitarianism*. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[144]

Thus, the Court found that the First Amendment remains a bulwark against governmental authority even in the classroom setting. However, in acknowledging that First Amendment rights must be "applied in light of the special characteristics of the school environment,"[145] the Court did establish a limitation to its protections: school administrators may discipline students for conduct that "materially and substantially interfer[es]" with the operation of the school.[146]

b. Fraser

Following *Tinker*, the Court decided *Fraser*. In *Fraser*, a high school student gave a sexually explicit, "indecent, lewd, and offensive" speech at a school assembly, in front of 600 other students, many of whom were fourteen-years-old.[147] School

144. *Id.* at 511 (emphasis added).

145. *Id.* at 506.

146. *Id.* at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). However, the school may not seek to discipline the student on the basis of her viewpoint alone. *Id.* at 509, 511 ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

147. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677-78 (1986).

officials then suspended the student for three days.[148] The student subsequently brought an action under 42 U.S.C. § 1983 based on the violation of his First Amendment rights.[149] In holding that the "School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech,"[150] the Court reasoned that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[151] Furthermore, the Court established an additional rule for future First Amendment education cases: the First Amendment does not prohibit schools from regulating speech that "would undermine the school's basic educational mission."[152]

c. Hazelwood

Following *Fraser*, the Court gave even more power to schools and their officials to regulate the First Amendment rights of their students. In *Hazelwood*, high school journalism students sought to publish certain articles about teen pregnancy and divorce in their student-run newspaper.[153] However, because the articles contained identifying information about students and references to sexual activity and birth control, the principal prohibited their publication.[154] The students then sued the school and its officials, seeking a declaration that their First Amendment rights had been violated.[155] The Court unequivocally denied the students' request for relief in holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related

148. *Id.* at 678.
149. *Id.* at 679.
150. *Id.* at 685.
151. *Id.* at 682.
152. *Fraser*, 478 U.S. at 685.
153. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262-63 (1988). Importantly, the newspaper was part of the school's journalism curriculum. *Id.* at 262.
154. *Id.* at 263-64.
155. *Id.* at 264.

to legitimate pedagogical concerns."[156] Importantly, however, the Court limited this holding to the primary and secondary context in stating that "[w]e need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the *college and university level*."[157]

d. Morse

Finally, in *Morse*, a high school principal suspended a student for ten days after the student waived a banner that said "BONG HiTS 4 JESUS" at an off-campus, school-approved event.[158] After exhausting his administrative appeals, the student brought a 42 U.S.C. § 1983 action alleging that the principal and the school board violated his First Amendment rights.[159] *Morse* was a much different case than the other three of the education quartet in that the student's speech in this case occurred off campus.[160] However, the Court reasoned this extremely pertinent fact away in finding, among other things, that:

> The event occurred during normal school hours. It was sanctioned by Principal Morse "as an approved social event or class trip," and the school district's rules expressly provide that pupils in "approved social events and class trips are subject to district rules for student conduct[.]" Teachers and administrators were interspersed among the students and charged with supervising them.[161]

Because of these factual findings, the Court ultimately decided that the school had authority over the student's speech and that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[162] Although

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156. *Id.* at 273. One is left wondering what school administrators could not identify as a "legitimate pedagogical concern."

157. *Hazelwood Sch. Dist.*, 484 U.S. at 273 n.7 (emphasis added).

158. Morse v. Frederick, 551 U.S. 393, 397-98 (2007). Technically it was "off campus," although it was right across the street from the school. *Id.* at 397.

159. *Id.* at 398-99.

160. *Id.* at 397.

161. *Id.* at 400-01 (internal citations omitted).

162. *Morse*, 551 U.S. at 401, 403.

the Court ultimately decided that the school had the authority to discipline the student here, it was cautious in issuing this opinion, noting that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents . . . but not on these facts," clearly indicating that the school's authority to regulate students' off-campus First Amendment rights is not synonymous with on-campus authority.[163] Indeed, the Court confirmed this when it referenced its earlier decision in *Fraser*, stating that "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected."[164]

Given this important on-campus/off-campus dichotomy the Court explicitly created in the *Morse* opinion, one would think that the Court would have taken up an off-campus speech case in the thirteen years since the decision. Despite numerous opportunities to do so, the Court has refused to provide any guidance. Indeed, since its decision in *Morse*, the Supreme Court has remained silent on the authority of school administrators to regulate the off-campus speech rights of their students both in the primary/secondary and university settings.[165] Thus, the Court has again left the lower courts to their own devices, resulting in a myriad of different approaches.[166]

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163. *Id.* at 401.

164. *Id.* at 405.

165. Benjamin A. Holden, Tinker *Meets the Cyberbully: A Federal Circuit Conflict Round-Up and Proposed New Standard for Off-Campus Speech*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 233, 285 (2018); Marcus Hauer, Note, *The Constitutionality of Public University Bans of Student-Athlete Speech Through Social Media*, 37 VT. L. REV. 413, 427 (2012); Darryn Cathryn Beckstrom, *Who's Looking at Your Facebook Profile? The Use of Student Conduct Codes to Censor College Students' Online Speech*, 45 WILLAMETTE L. REV. 261, 290 (2008) ("[T]he Court has remained silent on several issues related to college speech. These issues include, among others, whether college administrators can discipline college students for off-campus speech, what constitutes off-campus speech, and whether student publications receiving financial support from the college or university can be afforded First Amendment protection."); Kloster, *supra* note 138, at 618; Emily Deyring, *"Professional Standards" in Public University Programs: Must the Court Defer to the University on First Amendment Concerns?*, 50 SETON HALL L. REV. 237, 241 (2019) ("[T]he Supreme Court has not yet addressed the specific issue of university student speech off-campus."); Lindsay, *supra* note 14, at 1483 ("[T]he Supreme Court has never upheld a student-speech restriction at the university level.").

166. For an absolutely fantastic description of the current Circuit Courts of Appeals' approaches to the question of the authority of primary and secondary public schools to regulate the off-campus speech of their students, see Holden, *supra* note 165, at 257-79.

2. The University

I am sure at this point you are wondering what a bunch of free-speech primary and secondary education cases have to do with the university and associational rights. You are not alone; many legal commentators have questioned, even challenged, the imposition of *Tinker* and its progeny in the university context.[167] However, the federal circuits have not been so hesitant; indeed, many of them have applied *Tinker* and its progeny to the university context, at least in speech cases, both on and off campus.[168] Although it did not expressly so hold, the Supreme

167. *Id.* at 250 n.85 ("[T]he applicability of *Tinker*'s holding to public colleges remains open."); Beckstrom, *supra* note 165, at 307 ("*Tinker* is a K-12 student speech standard, and therefore, this standard should not be applied to college student speech."); Deyring, *supra* note 165, at 253 ("Courts must not look to the standards set forth in *Tinker* and *Hazelwood* but must treat students in professional university programs as mature adults who are not in need of the same paternalistic stance."); Lindsay, *supra* note 14, at 1480, 1483 (arguing that college students are entitled to the same First Amendment protections as other adults and stating that "[t]he Supreme Court has not yet held explicitly that *Tinker* or its progeny do not apply to college speech, but the Court also has never applied *Tinker* in a post-secondary-speech case."); LoMonte, *supra* note 13, at 306, 342-43 (arguing that none of the purposes animating *Hazelwood* apply in the university setting and stating that "[i]t is incongruous with the law's otherwise consistent treatment of adult-aged college students—who are eligible to vote, join the military, purchase firearms, sign contracts, incur civil and criminal liability in adult court and otherwise bear the legal indicia of adulthood—to regard them as 'constitutional children' whose speech is of no greater legal dignity than that of an eighth-grader."). However, LoMonte concedes that *Tinker* applies in the university setting. *Id.* at 311.

168. *See, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1289-90 (10th Cir. 2004) (applying *Hazelwood* to a university student's First Amendment claims); Hosty v. Carter, 412 F.3d 731, 734 (7th Cir. 2005) (same); Esfeller v. O'Keefe, 391 F. App'x 337, 341 (5th Cir. 2010) (same); DeJohn v. Temple Univ., 537 F.3d 301, 304, 317 n.17 (3d Cir. 2008) (citing *Tinker*, *Fraser*, and *Hazelwood* in analyzing a graduate student's First Amendment claims); Keeton v. Anderson-Wiley, 664 F.3d 865, 865, 875-76 (11th Cir. 2011) (applying *Hazelwood* to a graduate student's First Amendment claims); Ward v. Polite, 667 F.3d 727, 733-34 (6th Cir. 2012) (noting that "[n]othing in *Hazelwood* suggests a stop-go distinction between student speech at the high school and university levels, and we decline to create one."); Keefe v. Adams, 840 F.3d 523, 531-32 (8th Cir. 2016) (holding that college administrators could discipline a nursing student for his off-campus speech so long as their actions were "reasonably related to legitimate pedagogical concerns.") (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)). *But see, e.g.*, Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass., 868 F.2d 473, 480 n.6 (1st Cir. 1989) ("*Hazelwood* . . . is not applicable to college newspapers."); Amidon v. Student Ass'n of State Univ. of N.Y. at Albany, 508 F.3d 94, 105 (2d Cir. 2007) ("[C]ases like *Hazelwood* explicitly reserved the question of whether the 'substantial deference' shown to high school administrators was 'appropriate with respect to school-sponsored expressive activities at the college or university level."); Oyama v. Univ. of Haw., 813 F.3d 850, 863 (9th Cir. 2015) (declining to

Court's decision in *Papish v. Board of Curators*[169] indicated that the First Amendment rights of university students are far more expansive than those of primary and secondary education students.[170]

a. Papish

In *Papish*, a graduate student at the University of Missouri School of Journalism was expelled for distributing a non-school-sponsored newspaper on campus because it depicted policemen raping the Statue of Liberty and the Goddess of Justice and contained an article with the headline "Motherfucker Acquitted."[171] The Court, "while recognizing a state university's undoubted prerogative to enforce reasonable rules governing student conduct," reaffirmed that "state colleges and universities are not enclaves immune from the sweep of the First Amendment."[172] Indeed, although the Court cited to *Tinker*, there was no mention of its "material and substantial interference" test here.[173] Arguably, the Court did not apply *Tinker*'s test because the University of Missouri was discriminating on the basis of Papish's viewpoint,[174] and thus, the Court did not dispel *Tinker*'s application to the university setting. Nonetheless, the Court certainly would not require primary and secondary school administrators to permit their students to bring something to school depicting a rape, accompanied by a word like

extend the education quartet to the university setting because they "fail[] to account for the vital importance of academic freedom at public colleges and universities.").

169. 410 U.S. 667 (1973).

170. *See infra* notes 171-75 and accompanying text.

171. *Papish*, 410 U.S. at 667.

172. *Id.* at 669-70 (quoting Healy v. James, 408 U.S. 169, 180 (1972)).

173. *Id.* at 670; Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

174. The Court stated that while it has "repeatedly approved [the University's] regulatory authority" to "enforce reasonable regulations as to the time, place, and manner of speech and its dissemination[,]" the only reason Papish was expelled was "because of the disapproved *content* of the newspaper rather than the time, place, or manner of its distribution." *Papish*, 410 U.S. at 670 (emphasis added). This is indeed in line with those circumstances in which the Court has held that even in the primary and secondary education context, *Tinker*'s test would not apply. *See supra* note 146 and accompanying text.

"Motherfucker."[175] Thus, *Papish* stands for the proposition that the First Amendment rights of university students are not coextensive with those of primary and secondary students, even if *Tinker* and its progeny apply.

b. University Association

Support for the proposition that *Tinker* applies in the university setting, even to college students' associational rights, rests in *Healy v. James*.[176] In *Healy*, the President of Central Connecticut State College ("CCSC") denied official recognition to a group of students who desired to form a local chapter of Students for a Democratic Society ("SDS") because the organization would constitute a "disruptive influence" on campus, and perhaps a little ironically, because the group "openly repudiate[d]" CCSC's dedication to academic freedom.[177] After exhausting their administrative remedies, the students brought a First Amendment right to association claim seeking to force CCSC and its administrators to officially recognize SDS.[178] The Court began by proclaiming that "state colleges and universities are not enclaves immune from the sweep of the First Amendment."[179]

Immediately after, it confirmed that *Tinker* applies to the university setting.[180] Indeed, the Court quoted *Tinker* to emphasize the need for deference to school administrators.[181] Despite this confirmation, the Court nonetheless found that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections

175. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685-86 (1986) (upholding suspension of student for making sexual innuendos during his speech at a school assembly in which fourteen-year-olds were in the audience).

176. 408 U.S. 169, 180-81 (1972).

177. *Id.* at 170-72, 174-76, 179.

178. *Id.* at 177.

179. *Id.* at 180.

180. *Id.* (quoting *Tinker* extensively and applying it to the university setting).

181. *Healy*, 408 U.S. at 180 ("And, where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct *in the schools*.'") (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969)) (emphasis added).

should apply with less force on college campuses than in the community at large."[182]

Thus, the Court's opinion began quite paradoxically. On the one hand, a primary and secondary education case controls the First Amendment rights of full-grown adult college students and university administrators must receive "comprehensive" judicial deference,[183] but on the other hand, the First Amendment applies with the same amount of force on college campuses as it does everywhere else.[184] The confusion did not end there. Throughout the opinion, the Court announced at least two different tests that could be applicable in the university association context. First, the Court noted that "[w]hile a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such a restraint, a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."[185] This test in itself could be construed as rational basis review, rational basis plus, or even one of the multitudinous versions of intermediate scrutiny.

Second, although the first test proposed by the Court indicated that university students have powerful associational rights on campus, the Court went on to say that "[a]lso prohibitable are actions which 'materially and substantially disrupt the work and discipline of the school.'"[186] If you are thinking this is not a high threshold to meet, you would be right, as "[a]ssociational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."[187] Importantly, the Court does not define the bounds of what constitutes a "reasonable campus rule[]," even in its holding that "[a] college administration may impose a

182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 184.
186. *Healy*, 408 U.S. at 189 (quoting *Tinker*, 393 U.S. at 513).
187. *Id.* Although, in line with *Tinker*, university administrators cannot restrict these associational activities based on an "undifferentiated fear or apprehension of disturbance." *Id.* at 191 (quoting *Tinker*, 393 U.S. at 508). Rather, there must be "substantial evidence" that there will be a *Tinker* violation. *Id.* at 190-91.

requirement . . . that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law."[188]

Despite the highly deferential sounding language of the second test, in a footnote, the court tacked onto the end of it that:

> It may not be sufficient merely to show the existence of a legitimate and substantial state interest. Where state action designed to regulate prohibitable action also restricts associational rights—as nonrecognition does—the State must demonstrate that the action taken is reasonably related to protection of the State's interest and that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[189]

The Court ultimately reversed the lower courts and remanded the case in light of all the new standards.[190] Thus, although the standards coming out of the *Healy* opinion appear to be quite confusing, the principle that may be derived from the case is that, while college students have strong First Amendment associational rights generally, on campus, these rights are subject to reasonable campus rules, and the Court will defer to university administrators as to what counts as a reasonable campus rule.[191] Seemingly, as long as the university does not discriminate on the basis of the organization's viewpoint, the Court will likely side with the decisions of its school officials.[192]

The Court has repeatedly reaffirmed *Healy* in similar cases.[193] It has also continued the trend of deferring to university administrators' on-campus regulations, provided that they do not discriminate on the basis of a student's viewpoint.[194] The Court has afforded so much deference, in fact, that legal commentators have said that "the Supreme Court's deference to educational

188. *Id.* at 189, 193.

189. *Healy*, 408 U.S. at 189 n.20 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

190. *Id.* at 194.

191. *Id.* at 180, 189.

192. *See id.* at 189-93.

193. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 264-65, 276-77 (1981); *see generally* Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010).

194. *Widmar*, 454 U.S. at 267 n.5, 668 (asserting in the association context that "[a] university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.").

judgment involving college students is an honor."[195] This is hard to square with the equally repetitive maxim that the Court employs in university cases, that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[196]

The proverbial nail in the coffin of university students' on-campus associational rights occurred in the Court's most recent university association case, *Christian Legal Society v. Martinez*.[197] In *Christian Legal Society*, Hastings College of Law ("Hastings") refused to grant official recognition to a religious student organization, the Christian Legal Society ("CLS"), because the CLS refused to change its by-laws to accord with Hastings' "all-comers" policy.[198] CLS then sued Hastings, claiming that Hastings violated the CLS's First Amendment rights to free speech and expressive association.[199] In an unprecedented opinion,[200] the Court held that CLS's "expressive-association and free-speech arguments merge[,]" and that it "makes little sense to treat CLS's speech and association claims as discrete."[201] It reasoned that Hastings' registered student organization ("RSO") program was a limited public forum and that three observations provide the basis for why the association claim should also be analyzed under the limited public forum doctrine.[202] First, "speech and expressive-association rights are closely linked," and "[w]hen these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association."[203]

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195. J. Wes Kiplinger, *Defining Off-Campus Misconduct that "Impacts the Mission": A New Approach*, 4 U. ST. THOMAS L.J. 87, 112 (2006).

196. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

197. 561 U.S. 661 (2010).

198. *Id.* at 669, 672-73. The CLS's by-laws required its members and officers to sign a "Statement of Faith," affirming certain beliefs and promising to live their lives in accordance with the Statement. *Id.* at 672. The by-laws excluded from affiliation members of different faiths and those of the LGBTQ community. *Id.*

199. *Id.* at 668. I told you we would get back to it eventually.

200. Pun intended.

201. *Christian Legal Soc'y*, 561 U.S. at 680.

202. *Id.* at 680-82.

203. *Id.* at 680-81.

Second, applying the strict scrutiny that the Court typically affords expressive association claims in this context would destroy "a defining characteristic of limited public forums—the State may 'reserv[e] [them] for certain groups.'"[204] Third, the Court found that "this case fits comfortably within the limited-public-forum category, for CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition."[205]

Following its justification for employing the limited public forum doctrine here, the Court went on to hold that Hastings' policy was both "reasonable and viewpoint neutral."[206] In the analysis of the reasonableness of Hastings' policy, Justice Ginsburg cited to the (hopefully) now familiar precedents of *Hazelwood* and *Tinker*.[207] In line with the increasingly substantial amount of deference the Court has provided to university administrators in their regulation of students' constitutional rights, Justice Ginsburg discussed how "[s]chools, we have emphasized, enjoy 'a significant measure of authority over the type of officially recognized activities in which their students participate.' We therefore 'approach our task with special caution,' mindful that Hastings' decisions about the character of its student-group program are due decent respect."[208]

Thus, the unifying principle derivable from the university association precedents is that university administrators may regulate the associational rights of their students on campus so long as their regulations are reasonable, and the Court will defer to the university in determining what is reasonable. Indeed, the Court has even indicated that this general principle applies to

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204. *Id.* at 681 (quoting Rosenberger v. Rector, 515 U.S. 819, 829 (1995)).

205. *Id.* at 682. This final reason is quite surprising given Justice Powell's description of the myriad detriments that the SDS would have suffered, and did suffer, as a result of CCSC's denial of official recognition in *Healy*. *See* Healy v. James, 408 U.S. 169, 181-84 (1972).

206. *Christian Legal Soc'y*, 561 U.S. at 697.

207. *Id.* at 686.

208. *Id.* at 686-87 (first quoting Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 240 (1990); and then quoting *Healy*, 408 U.S. at 171) (internal citations omitted).

RSOs off campus,[209] and potentially even off-campus, non-RSO, school-sponsored associational activities.[210] Yet, the Supreme Court has never expressly so held. Thus, important questions remain unanswered: may public universities regulate their students' on-campus associational activities that are not school sponsored? What about associational activities that are off campus but school sponsored? Associational activities that are off campus but that have nothing to do with the school? What framework should the Court apply? These questions are what I turn to next.

III. PROPOSED THREE-TIERED FRAMEWORK

The inevitable conclusion one must draw from analyzing these numerous and often conflicting bodies of law is that there is not a clear test for courts to apply when reviewing the constitutionality of university regulations impacting their students' associational rights. The Court has simply not adequately developed the law in this area. Thus, in this section, I propose that the Court adopt a three-tiered framework for reviewing the constitutionality of these regulations. Importantly, the three tiers are not rigid, unforgiving concepts, but rather, they are meant to be guideposts for the Court along a sliding scale of judicial scrutiny.[211] Indeed, I realize, as often happens in the law, that there exist gray areas in which student conduct does not neatly fit into any one of the three tiers. A flexible approach such as this one allows the Court to take into account the idiosyncrasies of each case while also providing clear guidance to university administrators and lower courts. My approach is consistent with

209. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 234 (2000) ("We make no distinction between campus activities and the off-campus expressive activities of objectionable RSO's.").

210. *See Christian Legal Soc'y*, 561 U.S. at 686-87 ("A college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process.").

211. The concept of a sliding scale of judicial scrutiny is not new to First Amendment analysis, as the Court has explicitly recognized that "not every interference with speech triggers the same degree of scrutiny under the First Amendment." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994).

the values and realities acknowledged by the Court in its prior jurisprudence and represents principles extracted from existing law.

In the first tier, the university is at the height of its authority to regulate when the associational activity is on campus and school sponsored. The courts are to review university regulations of students' associational activities which fall into this tier under the rational basis test. In the second tier, the university retains a significant amount of authority to regulate. Situations that fall into the second tier are those in which the associational activities are either off campus and school sponsored, or on campus and not school sponsored. The courts are to review university regulations of students' associational activities which fall into this second tier under the intermediate scrutiny test. Finally, in the last tier is off-campus, non-school-sponsored associational activities, where the university's authority to regulate is at its trough. University attempts to regulate associational activities which fall into this third tier must be reviewed under the strict scrutiny test.

A. Tier 1: Rational Basis

Under the first tier of the proposed framework, university regulation of on-campus, school-sponsored associational activity must be reviewed under the rational basis test. The rational basis test requires that university regulations "be rationally related to legitimate government interests."[212] Although it is the lowest standard of judicial review, and almost any regulation will pass constitutional muster under this test,[213] it makes sense to employ it in the context of on-campus, school-sponsored associational activity for several reasons.

First, the Court already provides an enormous degree of deference to the decisions of university administrators when it comes to on-campus regulations, even in the associational

212. Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

213. *See* Christen Sproule, *The Pursuit of Happiness and the Right to Sexual Privacy: A Proposal for a Modified Rational Basis Review for Due Process Rights*, 5 GEO. J. GENDER & L. 791, 809 (2004).

context.[214] Second, on campus, the Court has consistently recognized that all that is required of university administrators is that their regulations of students' First Amendment rights be "reasonable."[215] Third, simply by definition, the right to intimate association will almost certainly never be implicated in the context of an on-campus, school-sponsored association, and therefore, the balancing test prescribed by the *Roberts* Court will not apply in this first tier.[216] Fourth, in citing to *Hazelwood* in her *Christian Legal Society* opinion,[217] Justice Ginsburg implied that,

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214. Healy v. James, 408 U.S. 169, 180 (1972) ("And, where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the *comprehensive* authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct *in the schools*.'") (emphasis added) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969)); Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) (asserting in the association context that "[a] university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission *upon the use of its campus and facilities*.") (emphasis added); *Southworth*, 529 U.S. at 232 ("It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning."); *Christian Legal Soc'y*, 561 U.S. at 686-87 ("Schools, we have emphasized, enjoy 'a significant measure of authority over the type of *officially recognized* activities in which their students participate.'") (emphasis added) (quoting Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 240 (1990)); Kiplinger, *supra* note 195, at 112 (stating that "the Supreme Court's deference to educational judgment involving college students is an honor."); Beckstrom, *supra* note 165, at 278; Chapin Cimino, *Campus Citizenship and Associational Freedom: An Aristotelian Take on the Nondiscrimination Puzzle*, 20 WM. & MARY BILL RTS. J. 533, 548 (2011) ("[W]hen the association is a student group meeting on a public university campus, the university receives more deference from the court than would the state regulator if the association met off campus."); Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1815 (2017) ("[W]hile the Court has not directly held that universities are entitled to a measure of deference when they restrict student speech on campus, in recent years the Court has expressly embraced deference in the affirmative action and freedom of association contexts.").

215. *Widmar*, 454 U.S. at 267 n.5 ("A university's mission is education, and decisions of this Court have never denied a university's authority to impose *reasonable* regulations compatible with that mission upon the use of its campus and facilities.") (emphasis added); Papish v. Bd. of Curators, 410 U.S. 667, 669-70 (1973) (recognizing a public university's "undoubted prerogative to enforce *reasonable* rules governing student conduct.") (emphasis added); *Healy*, 408 U.S. at 189 ("Associational activities need not be tolerated where they infringe *reasonable* campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.") (emphasis added); *Christian Legal Soc'y*, 561 U.S. at 697.

216. Roberts v. U.S. Jaycees, 468 U.S. 609, 619-20 (1984); *see also* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 2-3, 7-9 (1974) (holding that even a group of six college students who shared a home together off campus were not entitled to any substantive due process protection).

217. *Christian Legal Soc'y*, 561 U.S. at 686.

at least for on-campus, school-sponsored associations, university "educators do not offend the First Amendment . . . so long as their actions are reasonably related to legitimate pedagogical concerns."[218]

Fifth, the Court established in *Christian Legal Society* that when an on-campus, school-sponsored student organization brings an expressive association claim, this claim cannot be disaggregated from speech because "[w]hen these intertwined rights arise in exactly the same context, it would be anomalous for a restriction on speech to survive constitutional review under our limited-public-forum test only to be invalidated as an impermissible infringement of expressive association."[219] Therefore, the Court in that case implicitly concluded that any on-campus, school-sponsored expressive association claim must not be reviewed under anything more than rational basis review, as this analysis would invalidate the requisite limited public forum analysis of the speech claim.[220] Finally, even the rational basis test would prohibit the university from blatantly discriminating against a particular association based on its viewpoint.[221]

B. Tier 2: Intermediate Scrutiny

Under the second tier of the proposed framework, university regulation of (1) off-campus, school-sponsored or (2) on-campus, non-school-sponsored associational activity must be reviewed under the intermediate scrutiny test. The intermediate scrutiny test requires that the university's regulations further an important state interest and do so by means that are substantially related to

218. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

219. *Christian Legal Soc'y*, 561 U.S. at 680-81.

220. *See id.* at 679-81.

221. *See generally* Healy v. James, 408 U.S. 169, 187-88 (1972) ("[T]he State[] may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."); Papish v. Bd. of Curators, 410 U.S. 667, 669-70 (1973); *Christian Legal Soc'y*, 561 U.S. at 667-68, 683-84; Bd. of Regents of Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217, 233 (2000). *See also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93 (1993); Rosenberger v. Rector, 515 U.S. 819, 836 (1995) ("For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.").

that interest.[222] Although intermediate scrutiny is largely associated with the Equal Protection context,[223] it has found a home in several tenets of First Amendment doctrine as well.[224] Thus, its application to the associational rights of university students, a First Amendment right, is not unprecedented.[225]

1. Off-Campus, School-Sponsored

Many of the reasons justifying the use of rational basis review in the context of on-campus, school-sponsored associational activities also apply in this context. For example, because these associational activities are still school sponsored, Justice Ginsburg's indication that *Hazelwood* applies in the university setting suggests that even off campus, "educators do not offend the First Amendment . . . so long as their actions are reasonably related to legitimate pedagogical concerns."[226] However, in the off-campus context, this justification would only apply in limited circumstances. For example, the university would have substantially more authority to regulate a school-sponsored organization's activities at a regional competition, where the organization is officially representing the school, than it would if the school-sponsored organization was simply meeting off campus to socialize.[227] Yet, because the organization in this

222. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994).

223. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985) (associating intermediate scrutiny with equal protection claims related to race, alienage, national origin, gender, and illegitimacy).

224. *See, e.g.*, *Turner Broad. Sys., Inc.*, 512 U.S. at 636-37, 661-62 (applying intermediate scrutiny to "must-carry provisions" intruding on "cable speech" by requiring cable operators to carry the signals of a specified number of local broadcast television stations); Ward v. Rock Against Racism, 491 U.S. 781, 796-803 (1989) (applying a heightened version of intermediate scrutiny to a city's volume control regulation); United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (applying intermediate scrutiny to a law imposing criminal penalties for destroying selective service cards); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564-66 (1980) (applying a version of intermediate scrutiny to commercial speech).

225. This is especially true given Justice Powell's quoting of *O'Brien* in his *Healy* opinion. *Healy*, 408 U.S. at 189 n.20 (quoting *O'Brien*, 391 U.S. at 377).

226. *Christian Legal Soc'y*, 561 U.S. at 686; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

227. Naturally, the university's interest in regulating would be much stronger in the former as opposed to the latter.

context is still school sponsored, the university retains entitlement to significant judicial deference in regulating its activities.[228] Further, as before, by definition, a school-sponsored association is almost certainly never going to qualify as intimate, even if it is off campus.[229]

The main difference between the first tier, and this first category of the second tier is, of course, that the associational activities are occurring off campus. This distinction is enormously important. Even in the context of primary and secondary education, the Court has noted in dicta that First Amendment activity off campus is entitled to far greater protection than it would have on campus.[230] Many legal commentators agree.[231] However, the Court has also noted that there is "no distinction between [on-]campus activities and the off-campus expressive activities of objectionable RSO's," and that the university "is free to enact viewpoint neutral rules restricting off-campus travel or other expenditure by RSO's, for it may create what is tantamount to a limited public forum if the principles of viewpoint neutrality are respected."[232]

Given this holding, the associational rights of university students in this context clearly could not be subjected to strict scrutiny. Thus, on the one hand, associational activities in this context are entitled to more protection than rational basis review

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228. *See supra* notes 208-10, 214 and accompanying text.

229. *See supra* note 216 and accompanying text.

230. *See supra* notes 163-64 and accompanying text. *But see* Bd. of Regents of Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217, 234 (2000) (noting that "[u]niversities, like all of society, are finding that traditional conceptions of territorial boundaries are difficult to insist upon in an age marked by revolutionary changes in communications, information transfer, and the means of discourse.").

231. *See, e.g.*, Lindsay, *supra* note 14, at 1488-89 ("The very premise of *Tinker*—that students do not shed their First Amendment right to free speech at the 'schoolhouse gate'—indicates that the restrictions at stake occur at school.") (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)); Beckstrom, *supra* note 165, at 299-300 ("[F]ederal courts should . . . adopt an unequivocal standard that . . . universities cannot discipline college students for off-campus speech unless such speech constitutes a true threat or a crime under existing law."); Cimino, *supra* note 214, at 550-51 ("[G]iven the Court's expressive association cases, it seems that associational freedom is more likely to prevail off campus rather than on campus . . . ."); Hauer, *supra* note 165, at 433 ("[T]he Supreme Court has not fully addressed whether a school has the power to restrict off-campus speech, but the decision in *Morse* suggests that such restrictions will face high scrutiny and may be found to fall outside the realm of school regulation.").

232. *Southworth*, 529 U.S. at 234.

by virtue of their being off campus. However, on the other hand, they are not entitled to strict scrutiny review because of the school-sponsored nature of the organizations. Therefore, intermediate scrutiny is the best test to apply to student associational activity falling into this category because it adequately balances both the off-campus nature of the associational activities and the university's interests, while not providing too much weight to either. Again, the university would never be permitted to discriminate against an association based on its viewpoint alone.[233]

2. On-Campus, Non-School-Sponsored

The primary reason justifying the maintenance of heightened deference to the university in this context is the fact that the associational activity is occurring on campus. One of the most oft-quoted lines from *Tinker* and the Court's education jurisprudence is that "First Amendment rights must be analyzed 'in light of the special characteristics of the school environment.'"[234] Associational activities are often loud, rambunctious, or at the very least involve many people. "[I]n light of the special characteristics of the [university] environment," then, universities must have substantial authority to regulate these activities in order to prevent disruption on campus.[235] Indeed, the Court in *Healy* held that, "[w]hile a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a '*heavy burden*' rests on the college to demonstrate the appropriateness of that action."[236] The Court went on to further define the contours of this holding in stating that:

233. *See supra* note 221 and accompanying text.

234. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) (quoting *Tinker*, 393 U.S. at 506); Christian Legal Soc'y v. Martinez, 561 U.S. 661, 685-86 (2010) (same); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (same); Healy v. James, 408 U.S. 169, 180 (1972) (same).

235. *Tinker*, 393 U.S. at 506, 513.

236. *Healy*, 408 U.S. at 184 (emphasis added).

> The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." . . . . Also prohibitable are actions which "materially and substantially disrupt the work and discipline of the school." Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.[237]

However, the university is not at the height of its authority to regulate in this context, as it was in the first tier, because the association is not school sponsored. The associational activities do not implicate a "legitimate pedagogical concern[]" beyond the disruption of classes because the organizations are not supported by the school.[238] Additionally, unlike in the first tier, here, because the organizations are not school sponsored, they have several arguments potentially implicating the right to intimate association. Furthermore, the expressive association claims of these organizations are not necessarily confined to the limited public forum analysis of their school-sponsored counterparts.[239] Indeed, many spaces on college campuses could be considered truly public forums, where no such limitations can exist.[240] Thus, the intermediate scrutiny test is again the best test to apply in these circumstances because it adequately balances the "special characteristics of the school environment" and the university's interests in preventing disruption with the student's more extensive associational rights.[241]

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237. *Id.* at 188-89 (first quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); and then quoting *Tinker*, 393 U.S. at 513) (internal citations omitted).

238. *Hazelwood Sch. Dist.*, 484 U.S. at 273.

239. *See supra* notes 197-208, 219-21, 232-33 and accompanying text.

240. Widmar v. Vincent, 454 U.S. 263, 267 n. 5 (1981) ("This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum."); *id.* at 267-68 ("The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.").

241. *Tinker*, 393 U.S. at 506.

C. Tier 3: Strict Scrutiny

Lastly, under the third and final tier of the proposed framework, university regulation of off-campus, non-school-sponsored associational activities should be subject to the most rigorous standard of judicial review: strict scrutiny. The strict scrutiny test requires the university to affirmatively demonstrate that the regulation "furthers a compelling [state] interest and is narrowly tailored to achieve that interest," meaning that the regulation employs the least restrictive means possible.[242] In proposing the adoption of the strict scrutiny test, I do mean *strict* scrutiny. I emphatically do not mean a test that is merely "strict in theory but feeble in fact."[243]

One of the primary justifications driving the adoption of the strict scrutiny test in this context is the fact that the students' associational activities are occurring off campus, where the university's authority to regulate is already diminished, even for school-sponsored associational activities.[244] Additionally, because these associational activities are not school sponsored, in theory, there is no risk that the community at large will impute the activities of the organizations to the university.[245] There is also the common sense justification that it does not make any sense to grant universities broad authority to regulate their students' off-campus, non-school-sponsored associational activities, because they have absolutely nothing to do with school. Judicial deference to university authority in this context is unwarranted and simply "becomes a matter of deference for deference's sake."[246]

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242. Citizens United v. FEC, 558 U.S. 310, 340 (2010) (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)); McCullen v. Coakley, 573 U.S. 464, 478 (2014). The strict scrutiny standard has an extensive history in First Amendment jurisprudence. *See generally* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800-01 (2006).

243. Fisher v. Univ. of Tex., 570 U.S. 297, 314 (2013).

244. *See supra* Section II.B.1.

245. Indeed, even on campus, the Court has acknowledged that "an open forum in a public university does not confer any imprimatur of state approval on [First Amendment activities]." *Widmar*, 454 U.S. at 274.

246. LoMonte, *supra* note 13, at 341.

Furthermore, although the right to intimate association typically requires a balancing test,[247] strict scrutiny is warranted in this context because the university has no business whatsoever regulating an off-campus, non-school-sponsored intimate association. It would be nonsensical to assert that a university has any say over how one of its students raises her children,[248] who she decides to marry,[249] who she chooses to have sex with,[250] or any other of the kinds of relationships which have been recognized as protected by the right to intimate association.[251] Indeed, even if the more expansive Karstian definition of the right is invoked, no one would seriously argue that a university has the authority to regulate a student's choice of who she decides to become close friends with outside of school.[252]

Regarding the right to expressive association, strict scrutiny is the test that is applied to the community at large.[253] Therefore, there is no reason why university students should have less expressive associational rights off campus, while in the community at large, when their associational activities are not school sponsored. Ultimately, because the university should only be permitted to regulate the off-campus, non-school-sponsored associational activities of their students in the gravest of circumstances, strict scrutiny is the best test for this final tier.

IV. COVID-19 AND THE THREE-TIERED FRAMEWORK

Having now described and justified the three-tiered, sliding scale of judicial scrutiny approach to university associational

247. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984).

248. *See generally* Pierce v. Soc'y of Sisters, 268 U.S. 510, 518 (1925) ("[T]he child of man is his parent's child and not the State's.").

249. *See generally* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."); Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

250. *See generally* Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("It suffices for us to acknowledge that adults may choose to enter [into sexual] relationship[s] in the confines of their homes and their own private lives and still retain their dignity as free persons.").

251. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987).

252. Karst, *supra* note 21, at 629 (claiming that even "close friendship" may be included in the right to intimate association).

253. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

rights, I will apply it to the University of Arkansas's COVID-19 disciplinary policy.[254] The policy provides that, first, "on-campus events are suspended, other than official events conducted by University academic and administrative units, which are still subject to approval on a case by case basis."[255] Second,

> if the Office of Student Standards and Conduct receives a report of large parties and similar social gatherings involving 10 or more student guests, without very clearly maintained safety elements such as social distancing and mask-wearing, and the report is verified, the University will treat the event as a violation of the Code of Student Life by organizers and by attendees. Organizing and conducting such an event will be considered a serious matter and students will be held accountable.[256]

Third, it provides that "if the Office of Student Standards and Conduct receives a report of students in the Dickson Street entertainment district or elsewhere congregating in large groups to socialize, not maintaining social distancing and mask-wearing, the matter will be treated as a Code of Student Life violation."[257]

A. Tier 1: Rational Basis

The first part of the University policy, stating that "on-campus events are suspended, other than official events conducted by University academic and administrative units, which are still subject to approval on a case by case basis,"[258] implicates the first tier of the three-tiered approach. Under the first tier of the proposed framework, university regulation of on-campus, school-sponsored associational activity must be reviewed under the rational basis test. The rational basis test

254. To view a copy of the actual policy, see Appendix A provided below. I apply my approach to the University of Arkansas's policy only because I attend law school there, not because of any animus toward the school. Furthermore, the University of Arkansas's policy is a representative sample of many public universities' COVID-19 policies nationwide. *See supra* notes 8-9 and accompanying text. Thus, the application of my approach to the University of Arkansas's COVID-19 policy is applicable across the country. Do note that the University's policy has since changed.

255. Appendix A, *supra* note 8.

256. *Id.*

257. *Id.*

258. *Id.*

requires that the university regulations be rationally related to a legitimate government interest.[259] Rational basis is the lowest standard of judicial review, and almost any regulation will pass constitutional muster under this test.[260] Indeed, the Court has held that under rational basis review, it is "entirely irrelevant" what end the government is actually seeking and regulations can be based on "rational speculation unsupported by evidence or empirical data."[261]

One of the primary functions of government is to protect the safety and well-being of its citizens.[262] In furtherance of this paramount objective, the Court has held that the states have an interest in regulating the spread of infectious and contagious diseases.[263] Indeed, from the very beginning, the Court has adhered to the principle that states have legitimate interests in promulgating "quarantine laws [and] health laws of every description . . . ."[264] In *Jacobson v. Massachusetts*, the Court stated that, "of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[265] Recently, the Court confirmed that preventing the spread of COVID-19 is not only a legitimate state interest, but also a compelling one.[266] Thus, here, one cannot seriously argue that the University does not have a legitimate interest in preventing the spread of COVID-19.

In terms of the second prong of the rational basis test, the University's policy of restricting on-campus, school-sponsored

259. Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

260. *See* Sproule, *supra* note 213, at 809.

261. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

262. United States v. Salerno, 481 U.S. 739, 755 (1987); *see also* Cruzan *ex rel.* Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 280 (1990).

263. *See generally* Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health, 186 U.S. 380, 387-88 (1902); Jacobson v. Massachusetts, 197 U.S. 11, 12-13, 39 (1905) (holding that Massachusetts had the authority to require its citizens to receive smallpox vaccinations to prevent the spread of the disease).

264. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 205 (1824).

265. 197 U.S. at 27.

266. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Kagan, J., in chambers) (Kavanaugh, J., dissenting) (stating that "California undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens.").

events to only those which have been officially sanctioned is almost certainly rationally related to preventing the spread of COVID-19. First, empirical evidence is not even necessary, as the University "has the right to pass [regulations] which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases."[267] Indeed, it is common sense that preventing large groups of people from congregating in close spaces helps prevent the spread of communicable diseases. Beyond the common sense justification, the Centers for Disease Control and Prevention ("CDC") COVID-19 guidelines emphasize that large gatherings result in the rapid transmission of COVID-19.[268] Thus, the restriction of on-campus, school-sponsored events to only those which the University has officially sanctioned is unquestionably a "reasonable campus rule[]"[269] that meets the rational basis test in light of the University's interest in preventing the spread of COVID-19. Further, the policy applies to all on-campus, school-sponsored events,[270] meaning that it is content neutral and cannot be struck down on the basis of viewpoint discrimination.

B. Tier 2: Intermediate Scrutiny

The second part of the University policy states:

> if the Office of Student Standards and Conduct receives a report of large parties and similar social gatherings involving 10 or more student guests, without very clearly maintained safety elements such as social distancing and mask-wearing, and the report is verified, the University will treat the event as a violation of the Code of Student Life by organizers and by attendees. Organizing and conducting such an event will be considered a serious matter and students will be held accountable.[271]

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267. *Jacobson*, 197 U.S. at 35.

268. *Guidance for Organizing Large Events and Gatherings*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://perma.cc/QYE4-VBE3] (Mar. 8, 2021).

269. Healy v. James, 408 U.S. 169, 189 (1972).

270. Appendix A, *supra* note 8.

271. *Id.*

This implicates both prongs of the second tier. Under the second tier of the proposed framework, university regulation of (1) off-campus, school-sponsored or (2) on-campus, non-school-sponsored associational activity must be reviewed under the intermediate scrutiny test. The intermediate scrutiny test requires that the university's regulation furthers an important state interest, and does so by means that are substantially related to that interest.[272] There is no single definition of what constitutes an important state interest, though the Court has provided a multitude of examples.[273] A substantial relation requires only that the regulation be an effective way to achieve the stated objective, not necessarily the optimal way, and that it ultimately "avoid unnecessary abridgment" of First Amendment rights.[274]

1. Off-Campus, School-Sponsored

The University policy targets "large parties and similar social gatherings involving 10 or more student guests," regardless of whether they occur on or off campus.[275] In the university environment, off-campus social gatherings and large parties involving ten or more students often occur at fraternity houses. Universities consider fraternities as RSOs, requiring them to go through various official recognition processes, and universities retain the authority to regulate the organizations' conduct, revoke official recognition, and even ban the organizations from

272. Craig v. Boren, 429 U.S. 190, 197 (1976).

273. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 296 (1984) (upholding a ban on sleeping in public parks against a First Amendment challenge because the government had a "substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition"); United States v. O'Brien, 391 U.S. 367, 380 (1968) (upholding criminal sanction for destruction of Selective Service cards against a First Amendment challenge because the government had an important interest in "preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and willfully destroy or mutilate them"); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662-63 (1994) (finding that "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming" are all important governmental interests); Davis v. FEC, 554 U.S. 724, 737 (2008) (identifying "preventing corruption and the appearance of corruption" as an important governmental interest).

274. McCutcheon v. FEC, 572 U.S. 185, 199 (2014).

275. Appendix A, *supra* note 8.

returning to campus.[276] Thus, fraternities are school sponsored. However, in addition to fraternities, the University of Arkansas's policy implicates any off-campus RSO meeting at which more than ten people are in attendance, regardless of the purpose of the meeting.[277]

Given the analysis of the State's interest in preventing the spread of communicable diseases above,[278] the University's policy regulating off-campus, school-sponsored gatherings certainly serves an important interest. Moreover, the policy is likely substantially related to the State's interest in preventing the spread of COVID-19. The policy does not outright restrict associational conduct, but rather, it simply requires students organizing in groups of more than ten to follow nationally mandated and empirically tested CDC COVID-19 best practice guidelines.[279] Thus, the University policy serves the important state interest in preventing the spread of COVID-19 while also "avoid[ing] unnecessary abridgment" of students' First Amendment rights in participating in off-campus, school-sponsored activities.[280]

2. On-Campus, Non-School-Sponsored

As stated in the previous section, the University's policy targets "large parties and similar social gatherings involving 10 or more student guests," regardless of whether they occur on or off campus.[281] Given the analysis of the State's interest in

276. *See generally, e.g.*, INTERFRATERNITY COUNCIL, COLL. OF WM. & MARY, THE CONSTITUTION OF THE INTERFRATERNITY COUNCIL AT WILLIAM & MARY (2020), [https://perma.cc/7AM6-Z29B]; UNIV. OF ARK. INTERFRATERNITY COUNCIL, UNIVERSITY OF ARKANSAS INTERFRATERNITY COUNCIL CONSTITUTION (2019), [https://perma.cc/P65H-W4SS]; *Chapter Conduct Status*, STOCKTON UNIV., [https://perma.cc/8WNW-6QEZ] (last visited Nov. 12, 2021); UNIV. OF CAL. AT BERKELEY, THE ALL-GREEK SOCIAL CODE (2009), [https://perma.cc/9H94-VRAZ]; *Policies and Resources for Members*, NYU, [https://perma.cc/6AEG-RQ6H] (last visited Nov. 12, 2021).

277. Appendix A, *supra* note 8.

278. *See supra* notes 262-66 and accompanying text.

279. Appendix A, *supra* note 8; *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://perma.cc/K5J9-LCMQ] (Mar. 8, 2021) (advocating social distancing, mask wearing, avoiding large gatherings, among other things).

280. McCutcheon v. FEC, 572 U.S. 185, 199 (2014).

281. Appendix A, *supra* note 8.

preventing the spread of communicable diseases above,[282] the University's policy regulating on-campus, non-school-sponsored gatherings surely serves an important interest. This is especially true in the on-campus context because university campuses are "at risk to develop an extreme incidence of COVID-19 and become superspreaders for neighboring communities."[283]

Moreover, it is almost certain that the policy is substantially related to the achievement of the State's interest in preventing the spread of COVID-19. First, the CDC emphasized that, "measures are needed to reduce transmission at institutes of higher education and could include reducing on-campus housing density, ensuring adherence to masking and other mitigation strategies, increasing testing for SARS-CoV-2, and discouraging student gatherings."[284] The policy seeks to implement many of these recommendations as it encourages students to avoid large gatherings, wear masks, and practice social distancing techniques.[285] Empirical data suggests that these kinds of actions on the part of university administrators are effectual in stemming the spread of COVID-19.[286] Furthermore, the policy says nothing about gatherings of less than ten people, essentially respecting students' intimate association rights. Finally, as discussed in the prior section, the policy does not outright ban large gatherings, but rather, it simply requires students organizing in groups of more than ten to follow nationally mandated and empirically tested CDC COVID-19 best practice guidelines.[287] Thus, the University policy serves the important state interest of preventing the spread of COVID-19 while also "avoid[ing] unnecessary

282. *See supra* notes 262-66 and accompanying text.

283. Hannah Lu et al., *Are College Campuses Superspreaders? A Data-Driven Modeling Study*, 24 COMPUT. METHODS IN BIOMECHANICS & BIOMEDICAL ENG'G 1136, 1136 (2021), [https://perma.cc/U3MZ-5TGS]; *see also* Erica Wilson et al., *Multiple COVID-19 Clusters on a University Campus—North Carolina, August 2020, in* 69 MORBIDITY & MORTALITY WKLY. REP., CTRS. FOR DISEASE CONTROL & PREVENTION 1416, 1416 (2020), [https://perma.cc/92TF-UBBN]; Danielle Ivory et al., *Young People Have Less COVID-19 Risk, but in College Towns, Deaths Rose Fast*, N.Y. TIMES, [https://perma.cc/7FZH-CVFR] (Mar. 2, 2021) (finding that "deaths in communities that are home to colleges have risen faster than the rest of the nation").

284. Wilson et al., *supra* note 283, at 1418.

285. Appendix A, *supra* note 8.

286. *See, e.g.*, Wilson et al., *supra* note 283, at 1413; Lu et al., *supra* note 283, at 1144.

287. *See supra* note 279 and accompanying text.

abridgment" of its students' First Amendment rights while on campus participating in non-school-sponsored activities.[288]

C. Tier 3: Strict Scrutiny

Finally, the last part of the University policy provides that "if the Office of Student Standards and Conduct receives a report of students in the Dickson Street entertainment district or elsewhere congregating in large groups to socialize, not maintaining social distancing and mask-wearing, the matter will be treated as a Code of Student Life violation."[289] This aspect of the policy implicates the third tier of the three-tiered approach, as it restricts off-campus, non-school-sponsored associational activities. Under this final tier, university regulation of off-campus, non-school-sponsored associational activities is subject to the most rigorous standard of judicial review: strict scrutiny. The strict scrutiny test requires the university to affirmatively demonstrate that the regulation "furthers a compelling interest and is narrowly tailored to achieve that interest," meaning that the regulation employs the least restrictive means possible.[290]

Although there is no single definition of what constitutes a compelling state interest, the Court has provided a multitude of examples.[291] Indeed, beyond that, it has explicitly held that "[s]temming the spread of COVID-19 is *unquestionably* a

288. McCutcheon v. FEC, 572 U.S. 185, 199 (2014).

289. Appendix A, *supra* note 8.

290. Citizens United v. FEC, 558 U.S. 310, 340 (2010) (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)); McCullen v. Coakley, 573 U.S. 464, 478 (2014).

291. *Compare* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (2015) (finding that states have a compelling interest "in preserving public confidence in the integrity of the judiciary"); Roberts v. U.S. Jaycees, 468 U.S. 609, 623-24 (1984) (holding that states have a compelling interest in eradicating gender discrimination); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (same); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 702 (2007) (finding that "remedying the effects of past intentional discrimination is a compelling interest under the strict scrutiny test"); Fisher v. Univ. of Tex., 570 U.S. 297, 308 (2013) (reiterating that student body diversity is a compelling state interest); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572 (1995) (discussing the state's interest in eliminating discrimination on the basis of sexual orientation), *with* Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015) (suggesting that neither preserving a town's aesthetic appeal nor traffic safety were compelling state interests).

compelling interest . . . ."[292] Thus, the compelling state interest prong of the strict scrutiny test is certainly met here.

The narrowly tailored prong is a closer question. On the one hand, the "Constitution principally entrusts" state officials with broad latitude to guard and protect health and safety when there are medical and scientific uncertainties and "[w]here those broad limits are not exceeded, they should not be subject to second-guessing by [the courts] which lack[] the background, competence, and expertise to assess public health and [are] not accountable to the people."[293] However, on the other hand, "even in a pandemic, the Constitution cannot be put away and forgotten."[294] Thus, although the University has implemented the policy in the face of an unprecedented crisis, caution is still warranted. As aptly stated by Judge Stickman of the Western District of Pennsylvania in discussing COVID-19 regulations:

> [G]ood intentions toward a laudable end are not alone enough to uphold governmental action against a constitutional challenge. Indeed, the greatest threats to our system of constitutional liberties may arise when the ends *are* laudable, and the intent *is* good—especially in a time of emergency. In an emergency, even a vigilant public may let down its guard over its constitutional liberties only to find that liberties, once relinquished, are hard to recoup and that restrictions—while expedient in the face of an emergency situation—may persist long after immediate danger has passed. Thus, in reviewing emergency measures, the job of courts is made more difficult by the delicate balancing that they must undertake. The Court is guided in this balancing by principles of established constitutional jurisprudence.[295]

The Court held in *Frisby v. Schultz* that "[a] [regulation] is narrowly tailored if it targets and eliminates no more than the

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292. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (emphasis added); *see also* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Kagan, J., in chambers) (Kavanaugh, J., dissenting) (stating that "California undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens.").

293. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613-14 (Kagan, J., in chambers) (Roberts, C.J., concurring).

294. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 68.

295. Cnty. of Butler v. Wolf, 486 F. Supp. 3d 883, 890 (W.D. Pa. 2020).

exact source of the 'evil' it seeks to remedy."[296] Here, on the one hand, the University policy does not define what constitutes a "large group[]" and it applies broadly to cover any student gathering, whether it be on public or private property, and without regard to its proximity to the University.[297] However, on the other hand, it only covers "socializ[ing]," indicating that many protected associational activities, such as protesting, are not even implicated.[298] Importantly, as discussed in the prior section, the policy does not outright ban large gatherings, but rather, it simply requires students to follow nationally mandated and empirically tested CDC COVID-19 best practice guidelines.[299] Thus, the University policy serves the compelling state interest in stemming the spread of COVID-19 while also "eliminat[ing] no more than the exact source of the 'evil' it seeks to remedy."[300] Ultimately, then, the University policy is likely constitutional even under the strict scrutiny test.

V. CONCLUSION

The COVID-19 pandemic has presented the United States with unprecedented challenges. Uncertainty abounds, and in the face of that uncertainty, federal, state, and local government actors have done the best they can to keep American citizens safe. Desperate times often call for desperate measures. Importantly, however, desperate times do not condone draconian measures. Indeed, "even in a pandemic, the Constitution cannot be put away and forgotten."[301] As government officials have taken unprecedented actions in attempting to stem the spread of COVID-19, many have raised novel constitutional questions, or highlighted areas of constitutional law that are severely

296. 487 U.S. 474, 485 (1988) (quoting Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984)).

297. Appendix A, *supra* note 8.

298. *Id.* Indeed, as Judge Van Tatenhove of the Eastern District of Kentucky recently opined, "it is the right to protest . . . that is constitutionally protected, not the right to dine out, work in an office setting, or attend an auction." Ramsek v. Beshear, 468 F. Supp. 3d 904, 919 (E.D. Ky. 2020). However, the right to intimate association is still implicated.

299. *See supra* note 279 and accompanying text.

300. *Frisby*, 487 U.S. at 485 (quoting *Taxpayers for Vincent*, 466 U.S. at 808).

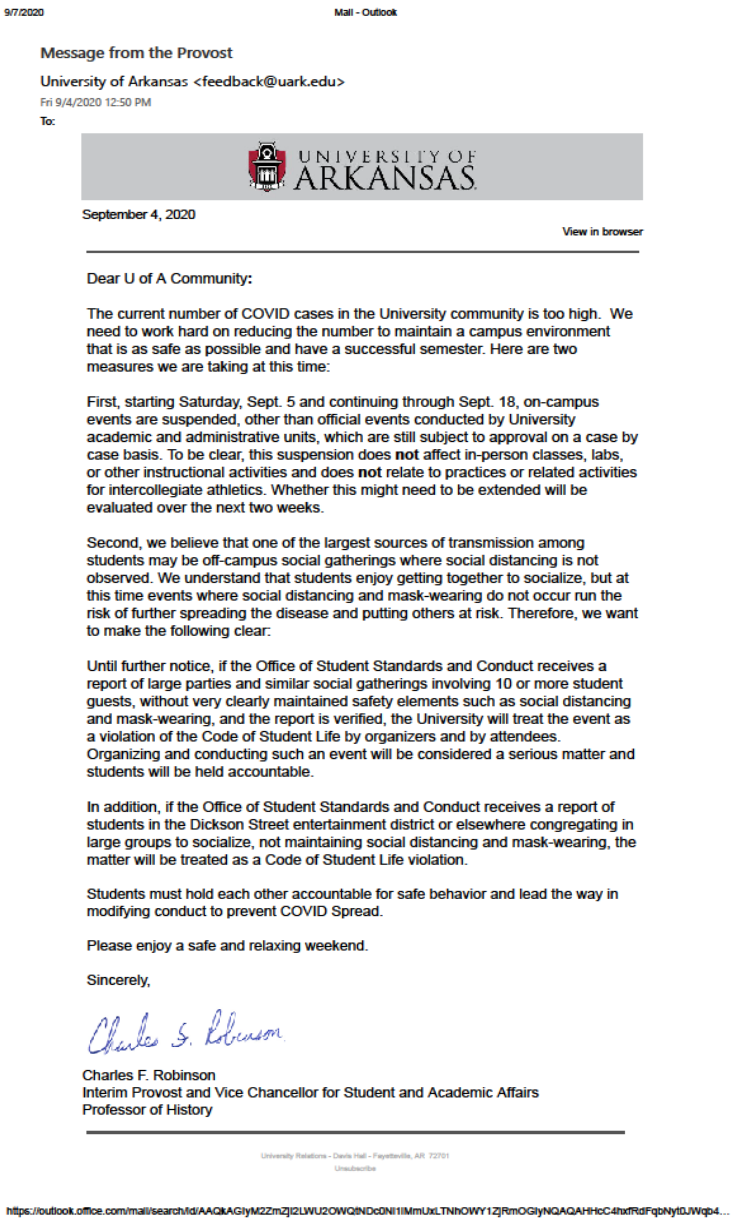
301. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68 (2020).

underdeveloped and in desperate need of a new approach. The university student associational rights jurisprudence is paradigmatic.

COVID-19 has presented the Court with the perfect opportunity to remedy the incoherent and unworkable state of university student associational rights jurisprudence. My three-tiered, sliding scale of judicial scrutiny approach provides the Court with a sound, precedent-based test that adequately weighs both student associational rights and the prerogatives of university administrators "in light of the special characteristics of the school environment,"[302] both on and off campus. It utilizes familiar standards and is easy to apply. Perhaps it is time an addition was made to Justice Fortas's oft-quoted line in *Tinker*, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech [or association] at the schoolhouse gate," *or beyond it*.[303]

302. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
303. *Id.*; *see supra* notes 137-38 and accompanying text.

APPENDIX A



9/7/2020 Mail - Outlook

Message from the Provost

University of Arkansas <feedback@uark.edu>
Fri 9/4/2020 12:50 PM
To:

UNIVERSITY OF ARKANSAS

September 4, 2020

View in browser

Dear U of A Community:

The current number of COVID cases in the University community is too high. We need to work hard on reducing the number to maintain a campus environment that is as safe as possible and have a successful semester. Here are two measures we are taking at this time:

First, starting Saturday, Sept. 5 and continuing through Sept. 18, on-campus events are suspended, other than official events conducted by University academic and administrative units, which are still subject to approval on a case by case basis. To be clear, this suspension does **not** affect in-person classes, labs, or other instructional activities and does **not** relate to practices or related activities for intercollegiate athletics. Whether this might need to be extended will be evaluated over the next two weeks.

Second, we believe that one of the largest sources of transmission among students may be off-campus social gatherings where social distancing is not observed. We understand that students enjoy getting together to socialize, but at this time events where social distancing and mask-wearing do not occur run the risk of further spreading the disease and putting others at risk. Therefore, we want to make the following clear:

Until further notice, if the Office of Student Standards and Conduct receives a report of large parties and similar social gatherings involving 10 or more student guests, without very clearly maintained safety elements such as social distancing and mask-wearing, and the report is verified, the University will treat the event as a violation of the Code of Student Life by organizers and by attendees. Organizing and conducting such an event will be considered a serious matter and students will be held accountable.

In addition, if the Office of Student Standards and Conduct receives a report of students in the Dickson Street entertainment district or elsewhere congregating in large groups to socialize, not maintaining social distancing and mask-wearing, the matter will be treated as a Code of Student Life violation.

Students must hold each other accountable for safe behavior and lead the way in modifying conduct to prevent COVID Spread.

Please enjoy a safe and relaxing weekend.

Sincerely,

Charles F. Robinson
Interim Provost and Vice Chancellor for Student and Academic Affairs
Professor of History

University Relations - Davis Hall - Fayetteville, AR 72701
Unsubscribe

https://outlook.office.com/mail/search/id/AAQkAGIyM2ZmZjI2LWU2OWQtNDc0Nl1lMmUxLTNhOWY1ZjRmOGIyNQAQAHHcC4hxfRdFqbNyt0JWqb4...