AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

**Christian Legal Society Chapter v. Martinez, 561 U.S. 661** (2010)

*Hastings Law School of the University of California allowed registered student organizations to make use of campus facilities and a fund derived from student activities fees on an equal basis. Registered student organizations had to be non-commercial organizations limited to Hastings students. In addition, groups had to agree to a nondiscrimination policy that specified that groups could not discriminate on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. In practice, this policy, adopted in 1990, meant that groups must accept any student who wished to be a member and must allow any student to seek a leadership position in the group.*

*In 2004, the Christian Legal Society sought an exemption from the nondiscrimination policy. This newly formed group was a chapter of a national organization, and the national organization required that all student members and officers sign a statement of faith. The implication of the statement of faith was that students who held conflicting religious principles or who engaged in “unrepentant homosexual conduct” were in violation. The law school rejected the requested exemption. The school allowed the group to operate without registered student organization status, which gave them some access to campus facilities, and it operated under those terms for a year.*

*In 2004, the group filed suit in federal district court arguing that the school’s policy violated the students’ First Amendment rights. The school won in district court and in circuit court. In a 5-4 decision, the U.S. Supreme Court affirmed those rulings.*

JUSTICE GINSBURG delivered the opinion of the Court.

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. . . . in a progression of cases, this Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech. Recognizing a State's right "to preserve the property under its control for the use to which it is lawfully dedicated," the Court has permitted restrictions on access to a limited public forum, like the RSO program here, with this key caveat: Any access barrier must be reasonable and viewpoint neutral. *Rosenberg v. Rector and Visitors of University of Virginia* (1995).

Second, as evidenced by another set of decisions, this Court has rigorously reviewed laws and regulations that constrain associational freedom. In the context of public accommodations, we have subjected restrictions on that freedom to close scrutiny; such restrictions are permitted only if they serve "compelling state interests" that are "unrelated to the suppression of ideas"—interests that cannot be advanced "through ... significantly less restrictive [means]." *Roberts v. United States Jaycees* (1984). "Freedom of association," we have recognized, "plainly presupposes a freedom not to associate." Insisting that an organization embrace unwelcome members, we have therefore concluded, "directly and immediately affects associational rights."

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. . . . Application of the less restrictive limited-public-forum analysis better accounts for the fact that Hastings, through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition.

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Our inquiry is shaped by the educational context in which it arises: "First Amendment rights," we have observed, "must be analyzed in light of the special characteristics of the school environment." This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question. Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist "substitut[ing] their own notions of sound educational policy for those of the school authorities which they review." . . .

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. Schools, we have emphasized, enjoy "a significant measure of authority over the type of officially recognized activities in which their students participate." . . .

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. . . . Just as "Hastings does not allow its professors to host classes open only to those students with a certain status or belief," so the Law School may decide, reasonably in our view, "that the ... educational experience is best promoted when all participants in the forum must provide equal access to all students." . . .

Second, the all-comers requirement helps Hastings police the written terms of its Nondiscrimination Policy without inquiring into an RSO's motivation for membership restrictions. To bring the RSO program within CLS's view of the Constitution's limits, CLS proposes that Hastings permit exclusion because of *belief* but forbid discrimination due to *status.* But that proposal would impose on Hastings a daunting labor. . . .

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Third, the Law School reasonably adheres to the view that an all-comers policy, to the extent it brings together individuals with diverse backgrounds and beliefs, "encourages tolerance, cooperation, and learning among students." . . .

Fourth, Hastings' policy, which incorporates—in fact, subsumes—state-law proscriptions on discrimination, conveys the Law School's decision "to decline to subsidize with public monies and benefits conduct of which the people of California disapprove." . . .

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The Law School's policy is all the more creditworthy in view of the "substantial alternative channels that remain open for [CLS-student] communication to take place." *Perry Education Association v. Perry Local Educators’ Association* (1983). If restrictions on access to a limited public forum are viewpoint discriminatory, the ability of a group to exist outside the forum would not cure the constitutional shortcoming. But when access barriers are viewpoint neutral, our decisions have counted it significant that other available avenues for the group to exercise its First Amendment rights lessen the burden created by those barriers.

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CLS also assails the reasonableness of the all-comers policy in light of the RSO forum's function by forecasting that the policy will facilitate hostile takeovers; if organizations must open their arms to all, CLS contends, saboteurs will infiltrate groups to subvert their mission and message. This supposition strikes us as more hypothetical than real. CLS points to no history or prospect of RSO hijackings at Hastings. Students tend to self-sort and presumably will not endeavor *en masse* to join—let alone seek leadership positions in—groups pursuing missions wholly at odds with their personal beliefs. And if a rogue student intent on sabotaging an organization's objectives nevertheless attempted a takeover, the members of that group would not likely elect her as an officer.

RSOs, moreover, in harmony with the all-comers policy, may condition eligibility for membership and leadership on attendance, the payment of dues, or other neutral requirements designed to ensure that students join because of their commitment to a group's vitality, not its demise. . . .

. . . . If students begin to exploit an all-comers policy by hijacking organizations to distort or destroy their missions, Hastings presumably would revisit and revise its policy.

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Hastings' requirement that student groups accept all comers, we are satisfied, "is justified without reference to the content [or viewpoint] of the regulated speech." The Law School's policy aims at the *act* of rejecting would-be group members without reference to the reasons motivating that behavior: Hastings' "desire to redress th[e] perceived harms" of exclusionary membership policies "provides an adequate explanation for its [all-comers condition] over and above mere disagreement with [any student group's] beliefs or biases." CLS's conduct—not its Christian perspective—is, from Hastings' vantage point, what stands between the group and RSO status. . . .

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Affirmed.

JUSTICE STEVENS, concurring.

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As written, the Nondiscrimination Policy is content and viewpoint neutral. It does not reflect a judgment by school officials about the substance of any student group's speech. Nor does it exclude any would-be groups on the basis of their convictions. Indeed, it does not regulate expression or belief at all. The policy is "directed at the organization's activities rather than its philosophy." . . .

. . . . [I]t is a basic tenet of First Amendment law that disparate impact does not, in itself, constitute viewpoint discrimination. . . .

What the policy does reflect is a judgment that discrimination by school officials or organizations on the basis of certain factors, such as race and religion, is less tolerable than discrimination on the basis of other factors. This approach may or may not be the wisest choice in the context of a Registered Student Organization (RSO) program. But it is at least a reasonable choice. . . .

It is critical, in evaluating CLS's challenge to the Nondiscrimination Policy, to keep in mind that an RSO program is a *limited* forum—the boundaries of which may be *delimited* by the proprietor. When a religious association, or a secular association, operates in a wholly public setting, it must be allowed broad freedom to control its membership and its message, even if its decisions cause offense to out-siders. Profound constitutional problems would arise if the State of California tried to "demand that all Christian groups admit members who believe that Jesus was merely human." But the CLS chapter that brought this lawsuit does not want to be just a Christian group; it aspires to be a recognized student organization. The Hastings College of Law is not a legislature. And no state actor has demanded that anyone do anything outside the confines of a discrete, voluntary academic program. . . .

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. . . . [The registered student organization forum] is not an open commons that Hastings happens to maintain. It is a mechanism through which Hastings confers certain benefits and pursues certain aspects of its educational mission. Having exercised its discretion to establish an RSO program, a university must treat all participants evenhandedly. But the university need not remain neutral—indeed it could not remain neutral—in determining which goals the program will serve and which rules are best suited to facilitate those goals. These are not legal questions but policy questions; they are not for the Court but for the university to make. . . .

JUSTICE KENNEDY, concurring.

To be effective, a limited forum often will exclude some speakers based on their affiliation (*e.g.,* student versus nonstudent) or based on the content of their speech, interests, and expertise (*e.g.,* art professor not chosen as speaker for conference on public transit). When the government does exclude from a limited forum, however, other content-based judgments may be impermissible. For instance, an otherwise qualified and relevant speaker may not be excluded because of hostility to his or her views or beliefs.

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*Rosenberger* is distinguishable from the instant case in various respects. Not least is that here the school policy in question is not content based either in its formulation or evident purpose; and were it shown to be otherwise, the case likely should have a different outcome. Here, the policy applies equally to all groups and views. And, given the stipulation of the parties [that the same open membership rule would apply to secular organizations like a student Democratic club], there is no basis for an allegation that the design or purpose of the rule was, by subterfuge, to discriminate based on viewpoint.

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Law students come from many backgrounds and have but three years to meet each other and develop their skills. They do so by participating in a community that teaches them how to create arguments in a convincing, rational, and respectful manner and to express doubt and disagreement in a professional way. A law school furthers these objectives by allowing broad diversity in registered student organizations. But these objectives may be better achieved if students can act cooperatively to learn from and teach each other through interactions in social and intellectual contexts. A vibrant dialogue is not possible if students wall themselves off from opposing points of view.

The school's objectives thus might not be well served if, as a condition to membership or participation in a group, students were required to avow particular personal beliefs or to disclose private, off-campus behavior. Students whose views are in the minority at the school would likely fare worse in that regime. Indeed, were those sorts of requirements to become prevalent, it might undermine the principle that in a university community—and in a law school community specifically—speech is deemed persuasive based on its substance, not the identity of the speaker. The era of loyalty oaths is behind us. A school quite properly may conclude that allowing an oath or belief-affirming requirement, or an outside conduct requirement, could be divisive for student relations and inconsistent with the basic concept that a view's validity should be tested through free and open discussion. The school's policy therefore represents a permissible effort to preserve the value of its forum.

In addition to a circumstance, already noted, in which it could be demonstrated that a school has adopted or enforced its policy with the intent or purpose of discriminating or disadvantaging a group on account of its views, petitioner also would have a substantial case on the merits if it were shown that the all-comers policy was either designed or used to infiltrate the group or challenge its leadership in order to stifle its views. But that has not been shown to be so likely or self-evident as a matter of group dynamics in this setting that the Court can declare the school policy void without more facts; and if there were a showing that in a particular case the purpose or effect of the policy was to stifle speech or make it ineffective, that, too, would present a case different from the one before us.

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JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

The proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate." Today's decision rests on a very different principle: no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning.

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The Court bases all of its analysis on the proposition that the relevant Hastings' policy is the so-called accept-all-comers policy. This frees the Court from the difficult task of defending the constitutionality of either the policy that Hastings actually—and repeatedly—invoked when it denied registration, *i.e.,* the school's written Nondiscrimination Policy, or the policy that Hastings belatedly unveiled when it filed its brief in this Court. Overwhelming evidence, however, shows that Hastings denied CLS's application pursuant to the Nondiscrimination Policy and that the accept-all-comers policy was nowhere to be found until it was mentioned by a former dean in a deposition taken well after this case began.

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In May 2005, Hastings filed an answer to CLS's first amended complaint and made an admission that is significant for present purposes. In its complaint, CLS had alleged that the Nondiscrimination Policy discriminates against religious groups because it prohibits those groups "from selecting officers and members dedicated to a particular set of religious ideals or beliefs" but "permits political, social and cultural student organizations to select officers and members dedicated to their organization's ideals and beliefs." In response, Hastings admitted that its Nondiscrimination Policy "permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." The Court states that "Hastings interprets the Nondiscrimination Policy, as it relates to the RSO program, to mandate acceptance of all comers." But this admission in Hastings' answer shows that Hastings had not adopted this interpretation when its answer was filed.

Within a few months, however, Hastings' position changed. In July 2005, Mary Kay Kane, then the dean of the law school, was deposed, and she stated: "It is my view that in order to be a registered student organization you have to allow all of our students to be members and full participants if they want to." . . .

Hastings claims that this accept-all-comers policy has existed since 1990 but points to no evidence that the policy was ever put in writing or brought to the attention of members of the law school community prior to the dean's deposition. Indeed, Hastings has adduced no evidence of the policy's existence before that date. . . .

Hastings' effort to portray the accept-all-comers policy as merely an interpretation of the Nondiscrimination Policy runs into obvious difficulties. First, the two policies are simply not the same: The Nondiscrimination Policy proscribes discrimination on a limited number of specified grounds, while the accept-all-comers policy outlaws all selectivity. Second, the Nondiscrimination Policy applies to everything that Hastings does, and the law school does not follow an accept-all-comers policy in activities such as admitting students and hiring faculty.

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[T]he record is replete with evidence that, at least until Dean Kane unveiled the accept-all-comers policy in July 2005, Hastings routinely registered student groups with bylaws limiting membership and leadership positions to those who agreed with the groups' viewpoints. For example, the bylaws of the Hastings Democratic Caucus provided that "any full-time student at Hastings may become a member of HDC *so long as they do not exhibit a consistent disregard and lack of respect for the objective of the organization* as stated in Article 3, Section 1." . . . A student could become a member of the Vietnamese American Law Society so long as the student did not "exhibit a consistent disregard and lack of respect for the objective of the organization," which centers on a "celebrat[ion][of] Vietnamese culture." Silenced Right limited voting membership to students who "are committed" to the group's "mission" of "spread[ing] the pro-life message." La Raza limited voting membership to "students of Raza background." . . .

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The Court also distorts the record with respect to the effect on CLS of Hastings' decision to deny registration. . . . As Hastings' attorney put it in the District Court, Hastings told CLS: "`Hastings allows community groups to some degree to use its facilities, sometimes on a pay basis, I understand, if they're available after priority is given to registered organizations.' We offered that."

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This Court does not customarily brush aside a claim of unlawful discrimination with the observation that the effects of the discrimination were really not so bad. We have never before taken the view that a little viewpoint discrimination is acceptable. Nor have we taken this approach in other discrimination cases.

. . . . In fact, funding plays a very small role in this case. Most of what CLS sought and was denied—such as permission to set up a table on the law school patio—would have been virtually cost free. If every such activity is regarded as a matter of funding, the First Amendment rights of students at public universities will be at the mercy of the administration. . . .

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It is also telling that the *Healy v. James* (1972) Court, unlike today's majority, refused to defer to the college president's judgment regarding the compatibility of "sound educational policy" and free speech rights. The same deference arguments that the majority now accepts were made in defense of the college president's decision to deny recognition in *Healy.* Respondents in that case emphasized that the college president, not the courts, had the responsibility of administering the institution and that the courts should allow him "`wide discretion ... in determining what actions are most compatible with its educational objectives.'" . . .

The *Healy* Court would have none of this. Unlike the Court today, the *Healy* Court emphatically rejected the proposition that "First Amendment protections should apply with less force on college campuses than in the community at large." And on one key question after another—whether the local Students for a Democratic Society chapter was independent of the national organization, whether the group posed a substantial threat of material disruption, and whether the students' responses to the committee's questions about violence and disruption signified a willingness to engage in such activities—the Court drew its own conclusions, which differed from the college president's.

The *Healy* Court was true to the principle that when it comes to the interpretation and application of the right to free speech, we exercise our own independent judgment. We do not defer to Congress on such matters, and there is no reason why we should bow to university administrators.

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This leaves just one way of distinguishing *Healy*: the identity of the student group. In *Healy,* the Court warned that the college president's views regarding the philosophy of the SDS could not "justify the denial of First Amendment rights." Here, too, disapproval of CLS cannot justify Hastings' actions.

The Court pays little attention to *Healy* and instead focuses solely on the question whether Hastings' registration policy represents a permissible regulation in a limited public forum. While I think that *Healy* is largely controlling, I am content to address the constitutionality of Hastings' actions under our limited public forum cases, which lead to exactly the same conclusion.

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This requirement of viewpoint neutrality extends to the expression of religious viewpoints. In an unbroken line of decisions analyzing private religious speech in limited public forums, we have made it perfectly clear that "[r]eligion is [a] viewpoint from which ideas are conveyed." . . .

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The First Amendment protects the right of "`expressive association'" —that is, the "right to associate for the purpose of speaking." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (2006). And the Court has recognized that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."

With one important exception, the Hastings Nondiscrimination Policy respected that right. As Hastings stated in its answer, the Nondiscrimination Policy "permit[ted] political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." But the policy singled out one category of expressive associations for disfavored treatment: groups formed to express a religious message. Only religious groups were required to admit students who did not share their views. . . .

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. . . . This Court has held that the particular conduct at issue here constitutes a form of expression that is protected by the First Amendment. It is now well established that the First Amendment shields the right of a group to engage in expressive association by limiting membership to persons whose admission does not significantly interfere with the group's ability to convey its views. *Boy Scouts of America, Inc. v. Dale* (2000). . . .

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Here, the Nondiscrimination Policy permitted membership requirements that expressed a secular viewpoint. . . . But religious groups were not permitted to express a religious viewpoint by limiting membership to students who shared their religious viewpoints. Under established precedent, this was viewpoint discrimination. *Rosenberger v. Rector and Visitors of the University of Virginia* (1995).

It bears emphasis that permitting religious groups to limit membership to those who share the groups' beliefs would not have the effect of allowing other groups to discriminate on the basis of religion. It would not mean, for example, that fraternities or sororities could exclude students on that basis. As our cases have recognized, the right of expressive association permits a group to exclude an applicant for membership only if the admission of that person would "affec[t] in a significant way the group's ability to advocate public or private viewpoints." Groups that do not engage in expressive association have no such right. Similarly, groups that are dedicated to expressing a viewpoint on a secular topic (for example, a political or ideological viewpoint) would have no basis for limiting membership based on religion because the presence of members with diverse religious beliefs would have no effect on the group's ability to express its views. But for religious groups, the situation is very different. This point was put well by a coalition of Muslim, Christian, Jewish, and Sikh groups: "Of course there is a strong interest in prohibiting religious discrimination where religion is irrelevant. But it is fundamentally confused to apply a rule against religious discrimination to a religious association."

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Once a state university opens a limited forum, it "must respect the lawful boundaries it has itself set." Hastings' regulations on the registration of student groups impose only two substantive limitations: A group seeking registration must have student members and must be non-commercial. . . .

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Taken as a whole, the regulations plainly contemplate the creation of a forum within which Hastings students are free to form and obtain registration of essentially the same broad range of private groups that nonstudents may form off campus. That is precisely what the parties in this case stipulated: The RSO forum "seeks to promote a diversity of viewpoints *among* registered student organizations, including viewpoints on religion and human sexuality."

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The accept-all-comers policy is antithetical to the design of the RSO forum for the same reason that a state-imposed accept-all-comers policy would violate the First Amendment rights of private groups if applied off campus. As explained above, a group's First Amendment right of expressive association is burdened by the "forced inclusion" of members whose presence would "affec[t] in a significant way the group's ability to advocate public or private viewpoints." The Court has therefore held that the government may not compel a group that engages in "expressive association" to admit such a member unless the government has a compelling interest, "`unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'"

There can be no dispute that this standard would not permit a generally applicable law mandating that private religious groups admit members who do not share the groups' beliefs. Religious groups like CLS obviously engage in expressive association, and no legitimate state interest could override the powerful effect that an accept-all-comers law would have on the ability of religious groups to express their views. The State of California surely could not demand that all Christian groups admit members who believe that Jesus was merely human. Jewish groups could not be required to admit anti-Semites and Holocaust deniers. Muslim groups could not be forced to admit persons who are viewed as slandering Islam.

While there can be no question that the State of California could not impose such restrictions on all religious groups in the State, the Court now holds that Hastings, a state institution, may impose these very same requirements on students who wish to participate in a forum that is designed to foster the expression of diverse viewpoints. . . .

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CLS has made a strong showing that Hastings' sudden adoption and selective application of its accept-all-comers policy was a pretext for the law school's unlawful denial of CLS's registration application under the Nondiscrimination Policy.

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Since it appears that no one was told about the accept-all-comers policy before July 2005, it is not surprising that the policy was not enforced. The record is replete with evidence that Hastings made no effort to enforce the all-comers policy until after it was proclaimed by the former dean. . . .

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One final aspect of the Court's decision warrants comment. In response to the argument that the accept-all-comers-policy would permit a small and unpopular group to be taken over by students who wish to silence its message, the Court states that the policy would permit a registered group to impose membership requirements "designed to ensure that students join because of their commitment to a group's vitality, not its demise." With this concession, the Court tacitly recognizes that Hastings does not really have an accept-all-comers policy—it has an accept-some-dissident-comers policy—and the line between members who merely seek to change a group's message (who apparently must be admitted) and those who seek a group's "demise" (who may be kept out) is hopelessly vague.

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