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Discrimination and Association

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DISCRIMINATION AND ASSOCIATION

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INTRODUCTION

In September 2016, the United States Commission on Civil Rights issued a report entitled *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*. In that report, the Commission argued that the law permits—and justice requires—that decision-makers prioritize nondiscrimination over civil liberties like freedom of religion and freedom of association. For example, the report endorsed the view that religious liberty should be limited as much as possible to freedom of belief; conduct "should conform to law."[1] This is because religion is discriminatory and can be used as a front for discriminatory activities.[2] Nondiscrimination policies, in contrast, "are of preeminent importance."[3] Religious exemptions should therefore be read as "narrowly as applicable law requires" and perhaps amended to further protect against discrimination.[4]

The report, as one would expect, has encountered sharp criticism.[5] But what developments influenced the conclusions of the report? There are

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* J.D. Candidate, Harvard Law School; B.A. in Political Science, Auburn University. I first wrote this essay for Professor Paul Horwitz's First Amendment course at Harvard Law School, and I am sincerely grateful for his keen insight on an earlier draft. I am also thankful for feedback from this journal's editors. All remaining errors are, of course, my own.

[1] *See* U.S. COMM'N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 25–27 (2016); *cf.* Reynolds v. United States, 98 U.S. 145, 166–67 (1878) (adopting a strict distinction between conduct and belief).

[2] *See* U.S. COMM'N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 20–21 (2016) ("[R]eligious doctrines accepted at one time later become viewed as discriminatory, with religions changing accordingly . . . . [W]ithout exemptions [from nondiscrimination laws], groups would not use the pretext of religious doctrines to discriminate.").

[3] *Id.* at 25.

[4] *Id.* at 26.

[5] *See, e.g.*, 162 CONG. REC. S5828 (daily ed. Sept. 15, 2016) (statement of Sen. Sasse); Anugrah Kumar, *Leith Anderson, Russell Moore, Other Faith Leaders Ask Obama to Reject Gov't Report Saying Religious Freedom Is Code for Discrimination*, CHRISTIAN POST (Oct. 12, 2016), http://www.christianpost.com/news/leith-anderson-russell-moore-faith-leaders-obama-report-religious-freedom-code-discrimination-170750/#IhuSAaK0ebs Tj4qE.99; Charles C. Haynes, *The Deeply Troubling Federal Report Targeting Religious Freedom*,

innumerable reasons that a government body might take such an extreme position. Nevertheless, we can begin to understand this decision by considering one of the report's central sources: the opinion in *Christian Legal Society v. Martinez*.[6] This Essay will examine the United States Supreme Court's discussions in *Christian Legal Society* as a foundation of the policies encapsulated in the report.

In 2004, the Christian Legal Society (CLS) applied to become a "Recognized Student Organization" (RSO) at the University of California, Hastings College of the Law (Hastings).[7] Hastings denied CLS's application because, under CLS's interpretation of its bylaws, individuals engaged in "unrepentant homosexual conduct" could not become members or officers.[8] According to Hastings, CLS's bylaws violated the school's Nondiscrimination Policy.[9] Hastings' interpretation of the Nondiscrimination Policy prohibited RSOs from denying membership or leadership roles to any Hastings student based on categories such as religion or sexual orientation.[10]

CLS challenged this "all-comers policy," but the district court upheld the policy both as a reasonable, viewpoint-neutral restriction on a limited public forum, and as a valid restriction of expressive association.[11] The Ninth Circuit, which only considered the case from a free speech perspective, affirmed the district court's holding that the policy was a valid restriction on entry to a limited public forum.[12] In a 5–4 decision, the Supreme Court affirmed the decisions of the lower courts.[13] CLS had argued that the Court should consider speech and association independently, [14] but Justice

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WASH. POST (Sept. 16, 2016), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/09/16/the-deeply-troubling-federal-report-highlighting-religious-freedom.

[6] *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 1, at 9–13 (discussing the case).

[7] Christian Legal Soc'y v. Martinez, 561 U.S. 661, 672 (2010).

[8] *Id.* at 672–73.

[9] *Id.*

[10] *See* David Masci, *In Brief: Christian Legal Society v. Martinez*, PEW RESEARCH CTR. (Apr. 6, 2010), http://www.pewforum.org/2010/04/06/in-brief-christian-legal-society-v-martinez.

[11] Christian Legal Soc'y v. Kane, No. C04-04484, 2006 WL 997217, at *10–24 (N.D. Cal. May 19, 2006). The district court also upheld the policy under *United States v. O'Brien*, 391 U.S. 367 (1968), and against free exercise and equal protection arguments. *Id.* at 17. Those arguments are irrelevant here.

[12] Christian Legal Soc'y v. Kane, 319 F. App'x 645, 645–46 (9th Cir. 2009) (mem.).

[13] *Christian Legal Soc'y*, 561 U.S. at 661. To avoid confusion, I refer to the group as "CLS" and the case as "*Christian Legal Society*." This Essay focuses on pages 678–683 of the majority opinion (plus the related portions of the dissent).

[14] Brief for Petitioner at 21–36, Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010)

Ginsburg's majority held that the Court's "limited-public-forum precedents suppl[ied] the appropriate framework for assessing both CLS's speech and association rights."[15] The dissent, written by Justice Alito, seemingly agreed by applying free speech case law.[16]

But as this Essay argues below in Part I, the reasons invoked by the majority for applying only free speech jurisprudence cannot bear the weight placed upon them. Instead, just beneath the surface of both opinions lurks a subversive conflict between freedom of association and nondiscrimination. Differing views on those issues divided the Justices. By understanding the Justices' views—the subject of Part II—one discovers the majority opinion is somewhat better than Justice Alito thought, yet also more pernicious than he indicated. And as discussed in Part III, this in turn explains *Christian Legal Society*'s legacy, including the *Peaceful Coexistence* report.

I. FREE SPEECH VS. FREE ASSOCIATION

The Court gave three rationales for analyzing the case solely through free speech precedent instead of applying free association precedent.[17] But these rationales are flawed—each ultimately descends into an analysis of the nature of expressive associations.

A. *The "Lowest Common Denominator" Rationale*

First, the Court said that "speech and expressive-association rights are closely linked," and therefore "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."[18] But taking this seriously would reduce the constitutional calculus to the lowest common denominator.[19] Restrictions on speech in limited public forums must meet a threshold level of constitutionality (that is, they must be reasonable and viewpoint neutral), but this does not, or at least

(No. 08-1371).

[15] *Christian Legal Soc'y*, 561 U.S. at 680.

[16] *Id.* at 706–41.

[17] *Id.* at 680.

[18] *Id.* at 680–81.

[19] *See* Chapin Cimino, *Campus Citizenship and Associational Freedom: An Aristotelian Take on the Nondiscrimination Puzzle*, 20 WM. & MARY BILL RTS. J. 533, 561 (2011).

should not, automatically eviscerate other constitutional rights, such as the freedom of association.

In other words, it should be possible for a policy to survive under one clause and fail under another. This principle is shown elsewhere in constitutional law. For example, in *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*,[20] the airport's ban on "First Amendment activities" was a neutral and generally applicable policy, and thus it would survive under post-*Employment Division v. Smith* Free Exercise Clause jurisprudence.[21] Nevertheless, the airport's policy was blatantly invalid on free speech grounds.[22] Thus, before the Court can say that speech always trumps association, far more than a "lowest common denominator" argument is needed.

B. *The "Inapplicability" Rationale*

Second, the Court hinted that expressive association was not actually implicated. It wrote that because CLS was only being forced to choose between changing its membership policies and accepting "a state subsidy"—instead of being punished for its position or being forced to accept an unwanted member—free speech doctrine was appropriate.[23]

CLS is an expressive association—a fact the majority did not dispute.[24] As CLS explained to the Court, each CLS chapter is part of "a nationwide association of lawyers, law students, law professors, and judges who share a common faith and seek to honor Jesus Christ in the legal profession."[25] CLS chapters host Bible studies and provide "moral and spiritual guidance."[26] As the Court wrote in *Boy Scouts of America v. Dale*:[27] "It seems indisputable that an association that seeks to transmit such a system

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[20] Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987).

[21] *See id.* at 571 (explaining that the language in the statute applies the restrictions on speech to all individuals and entities).

[22] *Id.* at 574–77 (invalidating policy on overbreadth grounds); *see also* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2232 (2015) (holding that the government violated the free speech clause without violating the free exercise clause).

[23] *Christian Legal Soc'y*, 561 U.S. at 682.

[24] *Id.* at 680.

[25] Brief in Opposition for Hastings Coll. of the Law Respondents at 5, Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010) (No. 08-1371).

[26] Brief for Petitioner at 4–5, Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010) (No. 08-1371).

[27] Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

of values engages in expressive activity."[28] Therefore, as an expressive association, CLS had an inherent interest in regulating membership.

For this reason, the Court's distinction between "regulations that compel[] a group to include unwanted members" and "policies . . . that withhold benefits" is one without a difference.[29] CLS refused to accept certain prospective members while Hastings wanted CLS to be open to all students. Even though there was no evidence CLS had turned away any students, Hastings wanted all students to be eligible for membership, and RSO status was the carrot (or stick) Hastings used against CLS in this struggle. In short, the all-comers policy was an "intrusion into the internal structure or affairs of an association."[30]

In supporting its distinction between "subsidy" and "punishment," the Court cited *Bob Jones University v. United States*,[31] which allowed the government to condition tax-exempt status on eschewing race discrimination,[32] and *Grove City College v. Bell*,[33] which conditioned federal educational assistance on Title IX compliance.[34] The Court's analogy to these cases is clear: CLS could still meet on campus, but Hastings would not have to subsidize CLS's meetings through the RSO program.

However, this analogy has several weaknesses. First, securing official recognition as a student organization is critical; denying recognition substantially impedes a group's success. Refusing to "subsidize" a student organization because of disfavored beliefs is far more detrimental than similar actions vis-à-vis a full-fledged university.[35] The institutions in *Bob Jones* and *Grove City* would have continued to exist without the "subsidy"; they were not forced to choose between operating an educational institution and complying with nondiscrimination policies. In contrast, CLS's continued

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[28] Id. at 650 (holding that instilling values "both expressly and by example" is an expressive activity).

[29] *See Christian Legal Soc'y*, 561 U.S. at 664–82.

[30] *Boy Scouts of Am.*, 530 U.S. at 648 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).

[31] Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

[32] *Id.* at 603–04 ("Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.").

[33] Grove City Coll. v. Bell, 465 U.S. 555 (1984).

[34] *Id.* at 575 ("Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept.").

[35] *See Bob Jones Univ.*, 461 U.S. at 574; *Grove City Coll.*, 465 U.S. 555.

existence was quite possibly on the line, suggesting that the more apt analogy is banning universities that support race or sex discrimination.[36]

Second, and more significantly, the subsidy–punishment distinction is entirely irrelevant here, and its application undermines the "neutrality" prong of the limited-public-forum analysis. The RSO program was analyzed as a limited public forum.[37] Thus according to existing doctrine on limited public forums, Hastings should not have been able to withhold privileges from disfavored speakers any more than it could have imposed punishments on those same speakers. Hastings was exercising its gate-keeping authority in choosing who had access to the limited public forum. As a result, CLS should not have been seen as seeking funding but as seeking access.[38] Bob Jones University and Grove City College would still be colleges without federal funds; CLS would not be a student organization without meeting Hastings' demands.[39]

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[36] There was supposedly no malicious intent to kick CLS off campus. *Christian Legal Soc'y*, 561 U.S. at 706 (Kennedy, J., concurring) (finding a lack of intent to purposefully kick CLS off campus). The Ninth Circuit, on remand, held CLS waived any "pretext" argument. Christian Legal Soc'y v. Wu, 626 F.3d 483, 488 (9th Cir. 2010).

[37] *Christian Legal Soc'y*, 561 U.S. at 682 (stating that "this case fits comfortably within the limited-public-forum category").

[38] The majority disagreed with this assessment on a factual basis, writing that "Hastings offered CLS access to school facilities to conduct meetings and the use of chalkboards and generally available bulletin boards to advertise events." *Id.* at 690. I find it hard to believe that the absence of these resources would have persuaded the Court to agree with Justice Alito. After all, Justice Alito pointed out evidence that CLS actually was not being given access to the campus because every time that CLS requested to meet on campus the administration offered no response. *Id*. at 716–17 (Alito, J., dissenting). And, the majority's rationale allows withholding access even if there are no financial benefits to be had. Moreover, Professor Paulsen argues that "university officials cannot force . . . groups to abdicate their rights of expressive association as a condition of 'equal access' to a limited public forum for expression." Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 682 (1996). That would constitute an "unconstitutional condition." *Id. But see* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1938–41 (2008) (rejecting this argument). Paulsen's argument presumably does not consider that expressive association would be possible outside the forum.

[39] CLS's ability to use some school facilities is a way to limit the opinion's reach. Under *Healy v. James*, 408 U.S. 169 (1972), the argument goes, organizations must be allowed to meet; under *Christian Legal Soc'y*, 561 U.S. 661, those groups need not receive funding. But construing the opinion as being about government subsidies ignores that the majority reached its conclusion under the limited-public-forum doctrine. Moreover, the fact that CLS was not completely silenced should be constitutionally irrelevant. *See Christian Legal Soc'y*, 561 U.S. at 717–18 (Alito, J., dissenting) ("We have never before taken the view that a little

Christian Legal Society is not a subsidy case, but rather a case about access to a limited public forum itself.[40] Thus, the majority had to find a neutral criterion upon which to exclude CLS.

C. *The "Limited Nature" Rationale*

This brings us to the Court's third rationale: applying strict scrutiny would "invalidate a defining characteristic of [the] limited public forum"—its *limited* nature.[41] This third rationale explains the majority's choice of free speech over freedom of association.

It is true that limited-public-forum doctrine allows for the exclusion of speakers who do not meet entry criteria.[42] As *Rosenberger* explained, government actors can restrict access to a limited public forum in two ways: (1) they can limit it to "certain groups," and (2) they can limit it "to the discussion of certain topics."[43] But government "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint."[44]

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viewpoint discrimination is acceptable."); *see also Healy*, 408 U.S. at 183 (quoting Bates v. City of Little Rock, 361 U.S. 516, 523 (1960)) ("Freedom [is] protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.").

[40] In *Rosenberger*, the Court stated:

> When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. . . . It does not follow, however, . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833–34 (1995). *Christian Legal Society* denied that it called *Rosenberger* into question. *Christian Legal Soc'y*, 561 U.S. at 682 n.13. But the tension is evident to me. At the very least, it demonstrates that courts can hop back and forth between the doctrines to achieve the desired result. *See* Toni M. Massaro, Christian Legal Society v. Martinez*: Six Frames*, 38 HASTINGS CONST. L.Q. 569, 617–18 (2011) (discussing the difference that categorization makes).

[41] *Christian Legal Soc'y*, 561 U.S. at 681.

[42] *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–93 (1993).

[43] *Rosenberger*, 515 U.S. at 829.

[44] *Id.* (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985)).

The first permissible *Rosenberger* limitation, speaker identity, was not in question because CLS was composed of Hastings students. The Court hypothesized about a group of non-students seeking RSO status,[45] but that was a poor example. A nonstudent "is not a member of the class of speakers for whose especial benefit the forum was created,"[46] and it is fully consistent with the RSO program to only recognize *student* organizations.

The second permissible *Rosenberger* limitation, the "purpose served by the forum," is therefore the relevant inquiry in this case.[47] The definition of this purpose is critical. As the Court has repeatedly implied, purpose is closely related to the "topic" of discussion for which the forum is created.[48] For example, in *Lamb's Chapel v. Center Moriches Union Free School District*,[49] the school district opened its classrooms after-hours for "social, civic and recreational meetings and entertainments."[50] Also, in *Rosenberger*, the student funding process supported "student news, information, opinion, entertainment, [and] academic communications media groups."[51] In this case, "Hastings encourage[d] students to form extracurricular associations that 'contribute[d] to the Hastings community and experience.'"[52] The all-comers policy, therefore, must be reasonable in light of the "community and experience" purpose of the forum.

There are two ways to construe this purpose. The first way is the "liberal individualist" or "egalitarian–inclusivist" approach.[53] Under this conception, the RSO program is a forum where individuals come unconstrained by group identity. This requires a fundamental norm of nondiscrimination because each individual must be treated as a single unit.

The majority adopted this approach. Hastings considered "exclusionary membership policies" harmful because it wanted to "bring[] together individuals with diverse backgrounds" and thus "encourage[]

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[45] *Christian Legal Soc'y*, 561 U.S. at 681.

[46] *Cornelius*, 473 U.S. at 806.

[47] *See id.*

[48] *See, e.g.*, *Rosenberger*, 515 U.S. at 829; *Cornelius*, 473 U.S. at 806; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 49 (1983).

[49] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

[50] *Id.* at 386.

[51] *Rosenberger*, 515 U.S. at 824.

[52] Christian Legal Soc'y v. Martinez, 561 U.S. 661, 669 (2010).

[53] I thank Professor Horwitz for this phrasing and for the "pluralist-exclusivist" phrasing that follows. *See* E-mail from Paul Horwitz, Gorden Rosen Professor of Law, University of Alabama, to author (Apr. 17, 2016, 12:20 EST) (on file with author).

tolerance, cooperation, and learning among students."[54] This implies that the program was essentially about homogenization. In this context, homogenization means that individual differences were isolated such that they became virtually invisible.[55] By leveling out individual differences, Hastings "ensur[ed] that the leadership, education, and social opportunities afforded by registered student organizations [we]re available to all students."[56]

The second approach to defining the purpose of the RSO program is quite different from the majority's. This is the "communitarian" or "pluralist–exclusivist" approach, and it treats the RSO program as simply facilitating group meetings.[57] It is "communitarian" or "pluralist" because it fosters associations centered around group identities or certain traditions. Although certain norms can be required simply to ensure order and a place for the free exchange of ideas, a strict all-comers policy is an impermissible limit on admission to the forum.

Justice Alito's dissent adopted this view of the purpose of the RSO program. Instead of treating the RSO program as creating a homogenous space, the dissent saw the program as simply allowing groups to organize on campus.[58] Thus, the all-comers policy was unreasonable because it imposed a condition—nondiscrimination—unrelated to the forum's purpose of creating a place for student organizations to meet on campus. This is also why the dissent saw the all-comers policy as discriminatory against religion.[59] Certain communities were allowed to form and exclude members,[60] but exclusion based on religion or sexual orientation was forbidden.[61] This

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[54] *Christian Legal Soc'y*, 561 U.S. at 689.

[55] An analogy is homogenized milk: it still has fat molecules, but they are broken into tiny globules so that they cannot be detected. *Good Eats: Milk Made* (Food Network television broadcast June 6, 2007).

[56] *Christian Legal Soc'y*, 561 U.S. at 688.

[57] For instance, by making it easier for groups to reserve rooms or attend conferences.

[58] *Christian Legal Soc'y*, 561 U.S. at 730 (Alito, J., dissenting).

[59] *Id.* at 724.

[60] *Id.* at 711 (noting that in Hasting's answer to CLS's complaint, it admitted that "political, social, and cultural student organizations [could] select officers and members who are dedicated to a particular set of ideals or beliefs").

[61] *Id.* at 670 (majority opinion) (contrasting the ability to select members based on political, social, or cultural beliefs with the Nondiscrimination Policy which disallowed discrimination based on religion or sexual orientation).

affected the ability of groups like CLS—or, as Justice Alito argued, *only* CLS—to enter the public forum.[62]

In short, the choice between individualism and group identity is at the heart of this case.

II. ASSESSING THE MAJORITY'S CHOICE

There are several reasons to support the majority's interpretation of the purpose of the RSO program. For one, individual students fund all RSOs through mandatory fees.[63] Even beyond the cost of lighting and air conditioning the meeting rooms, an officially recognized CLS could request that their fellow students pay for proselytizing. Obviously, refusing to allow students to become members of an organization that they help fund is difficult to countenance. For example, why should an atheist student have to support religious organizations, or why should a homosexual student have to fund a group that will not let him become a member because of that student's sexual orientation?

Moreover, there is a valid educational reason to support an all-comers policy: attorneys must learn to interact with every type of person.[64] They must sometimes represent clients they dislike or even know are guilty of heinous crimes. From a pedagogical perspective, Hastings has an interest in training future lawyers to excel in a diverse environment—contrary to the dissent's protests, this educational decision should receive at least some deference.[65]

But the dissent's view is also well supported. First, as Justice Alito pointed out, Hastings hosted dozens of RSOs.[66] Several of these groups had conflicting missions.[67] There were Republican and Democratic groups, pro-

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[62] *Id.* at 724–27 (Alito, J., dissenting).

[63] *Id.* at 688 (majority opinion).

[64] *See id.* at 704–05 (Kennedy, J., concurring) (emphasizing the educational aspect of Hastings' policy); *see also* Grutter v. Bollinger, 539 U.S. 306, 331–33 (2003) (discussing the value of diversity in legal education).

[65] *See, e.g.*, PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 112–20 (2013) (supporting deference to educational institutions); Massaro, *supra* note 40, at 625 (also supporting deference to educational institutions); *see also* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment.").

[66] *Christian Legal Soc'y*, 561 U.S. at 709 (Alito, J., dissenting).

[67] *Id.*

choice and pro-life groups, and many others.[68] In this sense, Hastings had facilitated a *debate*—not just groups of individuals interested in certain topics. After all, the groups were not called "Students Interested in Politics" or the like. Republican students were required to contribute to the Hastings Democratic Caucus, and pro-life students helped fund the pro-choice organization.[69] CLS would receive funds from students who did not support CLS's mission, but CLS members would also have to contribute to other antithetical groups.[70]

Second, Hastings' student groups almost certainly do not imagine themselves as collections of lone individuals. These groups are student-formed and student-led, often with little guidance from campus administration.[71] What often unites them is not the subject of discussion but rather the viewpoint from which the organization engages that debate.[72] This was also true of CLS: it was a group of law students organized around the *Christian* viewpoint—not simply a group of students interested in "spirituality" in a general sense. The majority even acknowledged this when it said there could possibly be an anti-takeover policy,[73] demonstrating that CLS did possess some interest in maintaining group identity.

Third, and most importantly, the majority's focus on homogeneity is contrary to the core of expressive association: the "right to associate for the purpose of speaking."[74] Essential to expressive association is the group's ability to select its members. As the Court wrote in *Dale*, "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."[75] Complete nondiscrimination is therefore antithetical to expressive association, at least where the grounds of discrimination are rooted in one of the organization's

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[68] *Id.*

[69] *Id.* at 669 (majority opinion).

[70] *Id.*

[71] *See id.* at 669–70.

[72] *Id.* at 672 (explaining that CLS required members to sign a "Statement of Faith" and live within the group's beliefs, including limiting sexual activity to a married man and woman).

[73] *See id.* at 693.

[74] Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 68 (2006); *see also* Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

[75] Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000); *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp., 515 U.S. 557, 573 (1995).

core tenets. It would be bizarre to say that nullifying a core tenet of CLS's beliefs did not affect its ability to advocate. Indeed, *Dale* supports a holding that complete nondiscrimination would infringe on CLS's right to expressive association. In fact, a nondiscrimination norm could go so far as to completely prevent certain forms of expressive associations within a limited public forum.

Therefore, when the majority evaluated this case under free speech doctrines, it did so because it *had* to exclude expressive association. The majority's conception of the limited public forum as being about the homogenization of individuals required breaking down the discriminatory barriers formed by expressive associations. The Court was not required, as a doctrinal matter, to elevate speech over association. Instead, its conception of the purpose of the forum was contrary to the inherent spirit of expressive association. Thus, the majority deployed the "lowest common denominator" argument as a smokescreen to obscure the fact that the nondiscrimination requirement for entry to the public forum hindered expressive association.

III. IMPLICATIONS FOR FUTURE CASES

If the pivotal determination in this case was how to define the RSO program's purpose, then *Christian Legal Society* is perhaps a narrow ruling. The forum's purpose is always case-specific, and nothing in the majority opinion requires every school to adopt all-comers policies.[76] Plus, CLS still had access to campus, unlike the students in *Healy v. James*[77] who were barred.[78] Perhaps this explains why neither the district court nor the Ninth Circuit thought that *Christian Legal Society* was important.[79]

Still, Justice Alito's concerns are well-founded—the majority opinion is potentially disastrous.[80] As this case demonstrates, it is increasingly

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[76] An Op-Ed by the President of the University of California hints that change is possible. *See* Janet Napolitano, *It's Time to Free Speech on Campus Again*, BOS. GLOBE (Oct. 2, 2016), http://www.bostonglobe.com/opinion/2016/10/01/time-free-speech-campus-again/v5jDCzjuv710M c92AhaAqL/story.html?event=event25 ("I prefer a campus that is loud to one that is quiet.").

[77] Healy v. James, 408 U.S. 169 (1972).

[78] *Id.* at 175.

[79] Neither the District Court of Northern California nor the Ninth Circuit Court of Appeals published their opinions.

[80] *See* Michael Stokes Paulsen, *Disaster: The Worst Religious Freedom Case in Fifty Years*, 24 REGENT U. L. REV. 283, 286 (2012); Jack Willems, *The Loss of Freedom of Association in Christian Legal Society v. Martinez, 130 S. Ct. 2971 (2010)*, 34 HARV. J.L. &

difficult to separate into identity groups and exclude those who disagree with that group's mission. Today there is an ever-increasing belief that discrimination is always wrong.[81] Hastings' creation of a limited public forum to foster a homogenous population demonstrates that belief.

Discrimination is not inherently evil, however. At its amoral core, discrimination simply favors one thing over another.[82] We discriminate based on cleanliness when choosing roommates and restaurants; based on promptness when choosing co-authors and dry cleaners; and based on pleasantness when choosing friends and hairdressers. When we form organizations, we do so based on shared beliefs—that global warming is a threat; that the unborn are human persons; that campaign finance laws need reform; or that the law is structured to oppress minorities. Because these shared convictions define the organization, they form the basis for the inclusion or exclusion of potential members. If all discrimination were forbidden, then groups could not form around individual subjects (such as climate change, abortion, campaign finance, or racism), because restricting the conversation to any one topic itself requires discriminating against all other topics.

Hastings, then, could not honestly be comprehensively opposed to discrimination. Instead, Hastings was opposed to discrimination based on

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PUB. POL'Y 805 (2011); William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of* Christian Legal Society v. Martinez, 261 EDUC. L. REP. 473 (2010).

[81] *See* THE BLACK EYED PEAS, *Where Is the Love?*, *on* ELEPHUNK (Interscope Records 2004) (stating that "to discriminate *only* generates hate") (emphasis added); Leanne Barnes, *There is Nothing Positive in Positive Discrimination*, UKIP DAILY (May 2, 2014), http://www.ukipdaily.com/nothing-positive-positive-discrimination ("Discrimination . . . is terribly wrong.").

[82] *See, e.g.*, *Discrimination*, BLACK'S LAW DICTIONARY 566 (10th ed. 2014) (defining discrimination as "[t]he intellectual faculty of noting differences and similarities"); *Discrimination*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY: DESK EDITION 186 (2012) (defining discrimination as "[p]erceiving or treating people, or things, differently from one another"); *Discriminate*, THE OXFORD ENGLISH DICTIONARY 758 (2d ed. 1989) (defining discriminate as "[t]o make or constitute a difference in or between; to distinguish, differentiate"); *Discriminate*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 564 (2d ed. 1987) (defining discriminate as "to make or constitute a distinction"); *Discriminate*, WEBSTER'S THIRD NEW INT'L DICTIONARY 648 (1981) (defining discriminate as "distinguish between or among").

To be sure, dictionaries also reflect that the word refers to wrongful discrimination. *See, e.g.*, *Discrimination*, BARRON'S LAW DICTIONARY 160 (6th ed. 2010) (defining discrimination as "the unequal treatment of parties who are similarly situated"). That imports moral judgment—that the parties are actually similarly situated—into the definition.

certain traits, like religion and sexual orientation. This requires an explanation of why those categories are unique.[83] And we *do* think they are unique, at least in certain circumstances. The law almost instinctively distinguishes between discrimination based on religion or sexual orientation and discrimination based on tidiness or promptness.[84] Perhaps the answer is that such discrimination targets an individual's basic human identity.[85]

But if this is a public forum case, how can we permit discrimination in regulating access to the forum, even if it is to prevent invidious discrimination against a would-be member's core identity? To do so is inconsistent with the rest of free speech doctrine, which expressly forecloses viewpoint discrimination.[86] Creating a "forum for nondiscrimination" simply lets viewpoint discrimination in through the back door, excluding certain groups based on the group's identity and the strength with which it holds its views.[87] In short, this approach exploits the baseline of "neutrality." An analogy would be creating a limited public forum for the purpose of promoting "pro-government views" and then claiming "neutrality" when denying an anarchist the chance to speak.[88] Limited public forums should

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[83] *See* Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, *in* MATTERS OF FAITH: RELIGIOUS EXPERIENCE & LEGAL RESPONSE 194, 197 (Austin Sarat ed., 2012) ("It is not 'discrimination' that is wrong; instead, it is *wrongful* discrimination that is wrong.").

[84] *See, e.g.*, EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2034 (2015) (regarding religious discrimination); United States v. Windsor, 133 S. Ct. 2675, 2693–96 (2013) (regarding sexual orientation discrimination).

[85] *See* Garnett, *supra* note 83, at 217; *cf.* Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 104 (2006) (rejecting a status/conduct distinction for both religion and sexuality, asking "What do they think being gay [or religious] *means*?" (emphasis added)).

[86] *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) (citing Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972)) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) ("[Government] has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.").

[87] *See* Garnett, *supra* note 83, at 200 (affirming that "'discrimination' on religious . . . grounds is a dimension of religious liberty that governments may, and sometimes must, accommodate"); *id.* at 219 (supporting CLS's discrimination). Professor Inazu notes the tension between viewpoint discrimination and the government's ability to make policy preferences, though he presumably applies the subsidization framework that I reject. John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 195 (2010).

[88] In a subsequent case, the Ninth Circuit Court of Appeals demonstrated the stark circularity here: "San Diego State's nondiscrimination policy is reasonable in light of the

facilitate the free exchange of ideas, something a nondiscrimination norm prevents when it excludes certain expressive associations (which are entitled to free speech) from the dialogue.

It is fear of this non-neutral "nondiscrimination" that grounds Justice Alito's concerns. Justice Alito thought the all-comers policy was a tool for "suppressing the speech of [politically] unpopular groups," just as he feared the nondiscrimination norm would creep into religious liberty cases, marginalizing religious groups under the guise of "neutrality."[89] We see these fears in the public accommodation cases that have recently come into popular focus,[90] but the concerns reach beyond the present business context to *all* forms of association.[91]

Arguments that discrimination based on religion and sexual orientation should never be allowed in public forums are well supported. However, there are also benefits in allowing such discrimination. Allowing individuals to coexist in spite of differences—not forcefully sweeping them away by government fiat—is a good thing. Instead, mandatory homogenization requires that certain views triumph over freedom of association. Just like political parties oppose and try to persuade each other, letting religious groups like CLS compete with groups that oppose discrimination based on sexual orientation would demonstrate commitment to free discourse and impassioned persuasion.[92] Through co-existence and interaction, perhaps we can reach a greater understanding of each other.[93]

But for now, the majority in *Christian Legal Society* stands in opposition to this overarching goal. If the Court wanted to uphold the all-

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student organization program's purpose of promoting diversity and nondiscrimination." Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 799 (9th Cir. 2011).

[89] Christian Legal Soc'y v. Martinez, 561 U.S. 661, 707 (2010) (Alito, J., dissenting).

[90] *See, e.g.*, Washington v. Arlene's Flowers, Inc., No. 91615-2, 2017 WL 629181 (Wash. Feb. 16, 2017); Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015).

[91] U.S. COMM'N ON CIVIL RIGHTS, *supra* note 1, at 25 (using *Christian Legal Society* to support broad nondiscrimination policies despite religious objections).

[92] R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992) (holding that "reprehensible" conduct is protected by the First Amendment); Cohen v. California, 403 U.S. 15 (1971) (holding that a state cannot criminalize the use of particular words).

[93] My thoughts here have been broadly influenced by JOHN INAZU, CONFIDENT PLURALISM (2016); John Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587 (2015). There is also a Millian tint to this point. *See* JOHN STUART MILL, ON LIBERTY, UTILITARIANISM, AND OTHER ESSAYS 1, 19 (Mark Philp & Frederick Rosen eds., 2d ed. 2015) (defending free expression as a means of reaching the truth).

comers policy, it should have rejected the limited-public-forum analysis altogether and simply said that Hastings was engaged in state-sponsored speech.[94] It is possible that the RSO program *was* government speech—an unorthodox form of legal education. But, the RSO program does not perfectly meet the requirements for government speech. It is often difficult to draw the line between government speech and limited public forums.[95] Additionally, this approach risks the possibility that government might buy up disfavored speech by simply eliminating certain limited public forums.[96] But the benefit of this approach—preserving the purity of limited public forums—is likely worth the cost, and political pressures will continue to preserve the existence of such forums.[97]

Nevertheless, the Court characterized the program as a limited public forum, and its chosen approach of providing lesser scrutiny to invidious discrimination runs against our legal system's deep commitment to the notion that government does not have a monopoly on ideas.[98] Yes, this means that we must protect speech that we hate and is deeply offensive to some.[99] But that is the commitment we have made.[100] Indeed, the very idea of free speech

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[94] Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."); Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) (quoting Bd. of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 229 (2000)) ("A government entity has the right to 'speak for itself.'").

[95] *Pleasant Grove City*, 555 U.S. at 470 ("There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech."). For example, *compare Walker*, 135 S. Ct. at 2250 (holding that specialty license plates were government speech) *with id*. at 2262 (Alito, J., dissenting) (arguing that specialty license plates were private speech).

[96] *Cf.* Agency Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2332 (2013) (holding that the government cannot "compel[] as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program").

[97] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (articulating the nation's "profound national commitment" to free speech.).

[98] *See id.* at 269 (stating that government is responsive to the "will of the people" and that "political and social changes desired by the people" come about with "unfettered exchange of ideas").

[99] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992) (holding that "reprehensible" conduct is protected by the First Amendment).

[100] *See* Snyder v. Phelps, 562 U.S. 443, 461 (2011) ("As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."); Cohen v. California, 403 U.S. 15, 25 (1971) ("That the air may at times seem filled with verbal cacophony is . . . not a sign of weakness but of strength."); *cf.* United States v. Stevens, 559 U.S. 460, 470 (2010) ("The First Amendment's guarantee of

requires protecting unpopular ideas;[101] the majority needs no protection.[102] As a result, *Christian Legal Society* should have concluded along these lines:

> We are not, as we must not be, guided by our views of whether [CLS's] teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify [Hastings'] effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[103]

By ruling the opposite way, the Court endangered free speech for all. In other words, it helped birth the *Peaceful Coexistence* report by the U.S. Commission on Civil Rights.

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free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.").

[101] *See, e.g.*, *R.A.V.*, 505 U.S. 377 (invalidating a statute that criminalized speech that was discriminatory on the basis of race, color, religion, creed, or gender).

[102] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.").

[103] Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp., 515 U.S. 557, 579 (1995)).