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# CHURCH AND STATE AT THE CROSSROADS: CHRISTIAN LEGAL SOCIETY V. MARTINEZ

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## INTRODUCTION

One of the recurrent battlegrounds in American constitutional law concerns the vexed relationship between church and state. At an abstract level, the discussion is often cast as a disagreement between those who wish to retain a strong wall of separation between the two and those who think that some accommodation between them better fits the national landscape. To be sure, this account is somewhat overdrawn. The strictest separationist recognizes that some public services must be supplied to private churches, and the most ardent accommodationist recognizes the need to place some limits on the level of interaction between church and state. The disagreements often come over just how all that is to be achieved. These crosscurrents recently came to a head in the bitterly contested decision of *Christian Legal Society v. Martinez*, issued on the last day of the October 2009 term.<sup>1</sup> The decision illustrates both the built-in tension between the Free Exercise and Establishment clauses and the important role that the doctrine of unconstitutional conditions may play in setting the ground rules for state interaction with religious organizations.

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<sup>1</sup> *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S., 130 S. Ct. 2971 (2010) [hereinafter “CLS”].

As with many great cases, the facts of *CLS* were stark in their simplicity. The Christian Legal Society applied for the privileges that Hastings Law School, a public institution, normally affords to all “Registered Student Organizations,” and was turned down because of its unwillingness to admit into its ranks those students who did not share its fundamental commitments, which included a rejection of homosexuality and a strong commitment to sex only within marriage.

*CLS* held that the Hastings Law School was within its rights to exclude CLS from most of the privileges that it routinely extended to RSOs. Justice Ruth Bader Ginsburg, writing for an uneasy five-member coalition, vindicated Hastings’s position, at least for the moment, on the ground that its exclusion of CLS rested on a permissible “all-comers” policy that required all Hastings RSOs to admit all interested students to their ranks, regardless of any clash in belief or worldview. She insisted that its policy could be rationally defended on the ground that it “encourages tolerance, cooperation, and learning among students.”<sup>2</sup> She also remanded the case to see if CLS could still pursue its claim that Hastings had used its all-comers policy as a pretext for impermissible viewpoint discrimination.<sup>3</sup> The preservation point will prove knotty on remand, but it will not be examined in any detail here, except to say that no one knows whether an exception to a theory is preserved when the theory itself was never argued.

Justice Ginsburg’s majority decision was accompanied by two uneasy concurrences by Justices John Paul Stevens and Anthony Kennedy, who fretted about the possible implications of this decision. Ginsburg’s decision also provoked a strong dissent from Justice Samuel Alito, who insisted that the record had already shown that the all-comers policy was, in fact, a sham used to conceal Hastings’s animus toward CLS.<sup>4</sup> As so often happens in constitutional law, the level of scrutiny applied to government policies often determines the outcome of the case. Justice Ginsburg ended up where she did because she took a deferential view toward how Hastings ran its law school, on the ground that the case “merely” involved a benefit that the school could, but need not, confer on CLS. Justice Alito ended up on the opposite side because he exercised far higher scrutiny of Hastings’s policy. There is no ironclad resolution to the deference/ oversight controversy that works in all cases. But in the instant context, judicial deference had the unfortunate consequence of letting Hastings run roughshod over a weak and defenseless religious organization under its banner of toleration, cooperation, and learning. It was not the Court’s finest hour.

To put the case in context, the Hastings chapter of CLS contains fewer than a dozen students whose distinctive religious views were, and are, out of step with the majority

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<sup>2</sup> *CLS*, 130 S. Ct. at 2990.

<sup>3</sup> “Neither the district court nor the Ninth Circuit addressed an argument that Hastings selectively enforces its all-comers policy, and this Court is not the proper forum to air the issue in the first instance. On remand, the Ninth Circuit may consider CLS’s pretext argument if, and to the extent, it is preserved.” *Id.* at 2995.

<sup>4</sup> *CLS*, 130 S. Ct. at 3001.

of the administration, faculty, and students at Hastings Law School. In early September 2004, CLS applied to become an RSO at Hastings, a California public institution of higher learning that has about 426 students per class. Hastings had long followed a policy that offered recognition and tangible support to all student organizations on a nondiscriminatory basis. These benefits included the use of the Hastings name and logo, the use of its bulletin boards and email systems, funding for activities and travel, and office space on the campus. After a prolonged internal review, however, Hastings refused to certify CLS as an RSO, thereby cutting it off from these benefits, which were routinely afforded to about 60 other RSOs with widely disparate views on legal, political, social, and moral issues.<sup>5</sup> At the time, Hastings based its refusal to register CLS on the ground that key provisions of CLS's charter conflicted with the school's nondiscrimination policy, which bars discrimination on grounds of sexual orientation. CLS requires its members and officers to abide by key tenets of the Christian faith and comport themselves to serve CLS's fundamental mission as followers of Jesus Christ in the law. That commitment, in turn, requires its members and officers to abstain from extramarital sexual relations and bars from membership any person who engages in "unrepentant homosexual conduct."<sup>6</sup> CLS imposes these restrictions only on membership and governance; its meetings have always been open to all members of the Hastings community. By way of offsetting the effects of its decision to exclude CLS from RSO membership, Hastings was prepared to allow CLS to use its facilities for certain meetings, but refused to go any further. In essence, Hastings preferred a policy of discrimination to one of total exclusion. On September 23, 2004, CLS lawyers sent Hastings a letter demanding full recognition. After a tense exchange of letters between the two sides, this lawsuit followed.

At first look, it appears as though the issue raised in *CLS* was whether Hastings's nondiscrimination policy could trump CLS's claim of associational autonomy. It turns out, however, that the exact articulation of the Hastings policy as it applied to CLS was itself a major source of disagreement. Justice Ginsburg, speaking for the majority, held that the case was, by stipulation, to be examined on the assumption that the all-comers policy held sway. Justice Alito's dissent insisted that the nondiscrimination policy, as it related to sexual orientation, governed.

In order to analyze *CLS*, it is necessary to proceed as follows. I first examine which of these two policies controlled Hastings's rejection of CLS. After these procedural wrangles are sorted out, I next analyze the First Amendment claims for freedom of speech and the

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<sup>5</sup> Here was a brief rundown from Justice Alito: During the 2004–2005 school year, Hastings had more than 60 registered groups, including political groups (*e.g.*, the Hastings Democratic Caucus and the Hastings Republicans), religious groups (*e.g.*, the Hastings Jewish Law Students Association and the Hastings Association of Muslim Law Students), groups that promote social causes (*e.g.*, both pro-choice and pro-life groups), groups organized around racial or ethnic identity (*e.g.*, the Black Law Students Association, the Korean American Law Society, La Raza Law Students Association, and the Middle Eastern Law Students Association), and groups that focus on gender or sexuality (*e.g.*, the Clara Foltz Feminist Association and Students Raising Consciousness at Hastings). *Id.* at 3001–02.

<sup>6</sup> *Id.* at 2974.

free exercise of religion under *both* the more focused anti-discrimination policy and the broader all-comers policy. That inquiry proceeds in two stages. Its first part asks how these policies would fare under the First Amendment if the government had *by direct regulation* imposed them on all groups in society. That novel approach, of course, did not happen here, as all the disputed regulations and policies applied only to students who were selected for admission into Hastings Law School. Accordingly, the second portion of that analysis invokes the doctrine of unconstitutional conditions to see how that fact changes the overall analysis.<sup>7</sup> Under that doctrine, the government does not have a free hand when it decides to confer licenses, benefits, or privileges on various groups. To be sure, it must be allowed to attach some conditions on its various dispensations of power, given the budget constraints under which all such organizations necessarily labor. But while some conditions are acceptable, others are not. No state, for example, can allow a foreign corporation to do business within its boundaries on condition that it abandons all access to federal courts.<sup>8</sup> A state also may not condition private entry to a public highway on its willingness to waive its First Amendment right to freedom of speech or its Fourth Amendment right to be free from unreasonable searches and seizures.<sup>9</sup> Yet, by the same token, the state can condition private entry on the willingness of drivers to abide by the appropriate traffic rules and to litigate accidents on the highways in state court.<sup>10</sup>

The situation at Hastings is, of course, not exactly on all fours with the highway cases, given that the state must use the school for its own educational purposes. To capture the differences between the highway and the campus, the analysis must further consider the way in which the doctrine of unconstitutional conditions applies to what is commonly termed a “limited public forum,” a category into which the Court explicitly placed Hastings.<sup>11</sup> These locations, as their name suggests, lie somewhere between the private and public poles. Finally, I explore some of the ramifications of *CLS* for other recent and ongoing controversies relating to religion, speech, and sex discrimination.

My conclusions are as follows: First, Justice Ginsburg was wrong to assume that the all-comers policy governed this case by stipulation. Second, she understated the level of protection that intimate private associations, of which *CLS* is one, receive from direct government regulation. Third, by ignoring the unconstitutional conditions doctrine, she allowed Hastings far too much discretion in how it treated its student organizations. More specifi-

<sup>7</sup> For my systematic analysis of the doctrine, see Richard A. Epstein, *Bargaining with the State* 5 (1993) (“Stated in its canonical form, this doctrine holds that even if a state has absolute discretion to grant or deny any individual a privilege or benefit, it cannot grant the privilege subject to conditions that improperly coerce, pressure, or induce the waiver of that person’s constitutional rights.”).

<sup>8</sup> *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922) (noting that a state cannot require a foreign corporation to waive its access to federal courts in diversity cases as a condition for doing business within the state).

<sup>9</sup> See, e.g., *Frost & Frost Trucking Co. v. R.R. Comm’n*, 271 U.S. 583 (1926). This point is discussed at length in Epstein, *supra* note 7, at 162–70.

<sup>10</sup> *Opinion of the Justices*, 147 N.E. 681 (Mass. 1925).

<sup>11</sup> See, for the definition, *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44–45 (1983) (stating that a limited public forum lies somewhere between a government building dedicated to private purposes only and the public roads).

cally, she drew all the wrong implications from her correct classification of Hastings as a limited public forum. That classification allows the state to make policy choices, governed by a rational basis standard of review, in running its organizations. But to the extent that its nonessential facilities – such as after-hours use of classrooms – are used by students, its power to exclude or discriminate remains as restricted as it is in any open public forum. Justice Ginsburg wrongly concluded that Hastings should, by its all-comers policy, treat all student groups as de facto common carriers. The correct analysis runs in precisely the opposite direction: Hastings itself functions as a limited common carrier that must admit into its ranks all groups regardless of their substantive positions. The net effect of these mistakes is to legitimate intolerance against small and isolated religious groups – an error that has had, and will continue to have, negative consequences on key issues dealing with the treatment of speech and religion under a wide range of anti-discrimination norms.

## I. FINDING THE RELEVANT HASTINGS POLICY

Many First Amendment challenges to government policies or rules often turn on a distinction between those policies that single out or target certain religious or speech practices for special sanction, and those that apply a general and neutral condition to those same practices. The rationale behind that distinction is clear enough.<sup>12</sup> Those policies that single out certain parties for their speech or religious activities carry within them greater peril to their interests in individual and institutional autonomy. The application of general policies poses less of a threat in that regard, at least in theory, because the only way that the state can attack the religious or speech activities of one group is to impose similar limitations on all others. The group whose freedom of speech or religion may well be impaired thus has natural allies whose influence on the political process can easily counteract the political or legal isolation of the religious group in question. No one, in principle, could ever deny that a general nondiscrimination norm is an important form of protection for what are commonly called “discrete and insular minorities.”<sup>13</sup>

It is, therefore, of some importance that the initial dispute in *CLS* depended on the articulation of the policy that applied to the case. The district court affirmed Hastings’s decision to limit CLS’s access to the law school’s facilities under the nondiscrimination policy, which reads in full as follows:

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<sup>12</sup> See generally Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46 (1987); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189 (1983).

<sup>13</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

[Hastings] is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, [Hastings]-owned student residence facilities and programs sponsored by [Hastings], are governed by this policy of nondiscrimination. [Hastings's] policy on nondiscrimination is to comply fully with applicable law.

[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.<sup>14</sup>

In the view of the district court, this policy counted as both “neutral” and “reasonable” because it “requires that student groups be open to all interested students, without discrimination on the basis of any protected status.”<sup>15</sup> That argument did not deny that the policy applied to religious organizations. Rather, it held that this generalized prohibition was insulated from a First Amendment challenge that treated the policy as a burden on an “expressive association,” that is, one devoted to the advance of certain personal and moral beliefs, in contradistinction to business or commercial ends. In effect, its position was that the general nondiscrimination policy should be regarded as neutral and reasonable because it was not directed solely toward religious groups. Every student organization at Hastings had to meet these conditions in order to gain access to the listed facilities and treatment. At this point, it looks as if the question is whether, under the First Amendment, disparate *treatment* of religious groups is required or whether it suffices that the disparate *impact* of the rule hits religious groups far harder than anyone else.

On the record, moreover, there is little doubt that this nondiscrimination policy governed the negotiations between Hastings and CLS from September 2004 to May 2005, when all its applications to stage events and use facilities were either ignored or rejected by the Hastings administration.<sup>16</sup> The definition of neutrality during these tense discussions was that the anti-discrimination norm that applied to CLS was that which applied to all other organizations. Under that policy, 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.”<sup>17</sup>

Up to this point, there is no mention of a different general policy, the more inclusive all-comers rule. The first mention of this policy was in the deposition of Mary Kay Kane, then the Hastings dean, who 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

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<sup>14</sup> CLS, 130 S. Ct. at 2979.

<sup>15</sup> *Christian Legal Soc’y v. Kane*, 2006 U.S. Dist. LEXIS 27347 at \*45 (N.D. Cal. 2006).

<sup>16</sup> See CLS, 130 S. Ct. at 3002 (noting that Hastings’s director of student services, Judy Hansen Chapman, relied on that policy in correspondence with CLS).

<sup>17</sup> *Id.* at 3003.

they want to.”<sup>18</sup> There was, of course, no all-comers policy on the books comparable to that of the nondiscrimination policy. None had been debated, discussed, or approved by the faculty.

The new all-comers policy was first advanced as an extemporized gloss on the official nondiscrimination policy, from which, as Justice Alito points out, it plainly differed. The nondiscrimination policy identifies, in the fashion of the Civil Rights Acts, an explicit set of grounds on which it is forbidden to discriminate. The all-comers policy requires all individuals to be admitted into all groups. Any grounds for discrimination, not just those listed in the nondiscrimination policy, are off-limits. The effect of this policy is to treat all voluntary organizations under the Hastings umbrella as common carriers, required to take all traffic on equal terms.<sup>19</sup> Indeed, as drafted, the duty to serve is still broader than that because it does not make way even for the traditional “for cause” reasons that allow common carriers to refuse service: the unwillingness of customers to follow the rules of the organization, to pay dues, or to behave in an orderly manner. In addition, the nondiscrimination policy is capable of universal application within Hastings, which is why it covers both admissions and hiring, for all its actions can refuse to take into account certain student traits. But the all-comers policy plainly cannot be universal: even if it is possible (although unwise) to admit all registered students into all Hastings RSOs, it is just not possible to hire all applicants to the faculty or to admit all applicants into the student body under that kind of rule. The only context in which that rule can work at all is *after* the hiring or admissions process is over, so that the privileges are extended only to the limited group of individuals that have been chosen under an overtly exclusionary regime.

The all-comers policy is not mentioned once in the long district court opinion, which stressed only the generality of the nondiscrimination policy that it upheld. The all-comers policy makes its official debut in a cryptic Ninth Circuit decision affirming the result below, which in its entirety reads:

The parties stipulate that Hastings imposes an open membership rule on all student groups – all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable.<sup>20</sup>

The key stipulation that was mentioned in the Ninth Circuit opinion reads as follows:

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<sup>18</sup> *Id.*

<sup>19</sup> For an early discussion of common carrier obligations, see H. W. Chaplin, *Limitations upon the Right of Withdrawal from Public Employment*, 16 Harv. L. Rev. 555, 556–57 (1903).

<sup>20</sup> 319 Fed. Appx. 645, 646 (9th Cir. 2009). The opinion cited *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 649–50 (9th Cir. 2008), which dealt only with the refusal to certify a high school Christian organization under the school’s nondiscrimination policy. No all-comers policy was mentioned in that case.

Hastings requires that registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs. Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization.<sup>21</sup>

Justice Ginsburg held that that stipulation necessarily insulated the underlying factual record from playing any role in the case.<sup>22</sup> Consistent with her aggressive policy of procedural preclusions, she did not discuss these principles, even though the Hastings officials that handled the matter acted under the written nondiscrimination policy. In her view, the word “any” (which she duly italicized) limited the scope of the litigation so that the written nondiscrimination policy no longer mattered. The greater scope of the reformulated rule could only strengthen the generality and neutrality of the rule, which in turn increases its ability to survive a constitutional attack relating either to speech or to free exercise.

The impressive weight that Justice Ginsburg attaches to the stipulation is questionable in light of the surrounding circumstances. The stipulation is written in the timeless present tense; the key verb is “requires.” That stipulation did not, in so many words, say that Hastings “required” – past tense – all organizations to follow the all-comers policy at the time the critical decisions were made about CLS, before the all-comers policy had been formulated. Nor does the stipulation say that the actual decision in this case had been made pursuant to this all-comers policy, when clearly that was not possible. In addition, the statement does not take into account the wrinkle that this policy did not quite mean what it said. At the Supreme Court level, the implicit for-cause limitations available to common carriers to refuse service were built back into the record (saying that the policy “does not foreclose neutral and generally applicable membership requirements unrelated to “status or beliefs”),<sup>23</sup> presumably to take into account the usual grounds that allow common carriers to refuse service. Finally, the stipulation clashes with the position that Hastings took in the answer to the complaint, by insisting that Hastings had no all-comers policy in place, but rather permitted “political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs.”<sup>24</sup> On issues of this importance, it seems most unwise to truncate the substantive examination by a stipulation that could be read more narrowly in ways that are more consistent with the record. Both versions of the policy raise real questions of principle, and it is to those issues that I now turn.

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<sup>21</sup> CLS, 130 S. Ct. at 2982 (emphasis in original).

<sup>22</sup> *Id.* at 2982–84.

<sup>23</sup> *Id.* at 2980 n.2.

<sup>24</sup> *Id.* at 3003.



## II. GOVERNMENT REGULATION OF ASSOCIATIONAL FREEDOM

One fundamental distinction that runs through all areas of constitutional law concerns the government's role as regulator on the one hand and manager on the other. Traditionally, most constitutional doctrine asks what restrictions the government-as-regulator can impose on the private conduct of individuals undertaken on their own property and with their own resources when engaged in certain forms of protected conduct – in this instance, involving a cross between speech and religion. The level of protection that these activities receive against government intrusion is normally quite high in these two contexts because the Supreme Court prizes the interests in question.

That basic attitude does not, of course, translate into an absolutist position, even in pure regulation cases. The laws against incitement to riot, fraud, defamation, industrial espionage, and conspiracy to kill people or fix prices remain in place, as does the law that prohibits human sacrifice and pollution in the name of religious liberty. This article is no place to examine each of these areas in detail, but it is important to note one key thread in the analysis. This emphasis on force, fraud, and monopoly lines up well with the standard classical liberal justifications for overriding private choice. As such, the model of limited government prevails, which puts the jurisprudence on the First Amendment in obvious tension with the judicial attitudes that are taken toward the protections of property and contract, for which the Supreme Court offers far more limited protection from direct government regulation.

The point where the small-government approach to freedom of speech and religion receives perhaps its greatest pressure is with freedom of association. As an initial matter, associational freedom has received strong protection in a wide variety of contexts. The famous decision in *NAACP v. Alabama* allowed the NAACP to keep its membership records from the prying eyes of Alabama's attorney general.<sup>25</sup> In a similar fashion, it is clearly beyond argument that the free exercise of religion allows people not only to think and pray as they choose but also to associate through churches and other organizations in pursuit of their common ends. In recent times, one great counterweight to these associational freedoms has been the ever more popular anti-discrimination laws dealing with race, sex, age, disability, and, of course, sexual orientation. There is no question that common carriers were long subject to take-all-comers rules that prohibited them from engaging in certain forms of invidious discrimination in dealing with their customers. Yet, by the same token, the common-law rule always allowed those firms that did not have common carrier status, and the monopoly power that went along with it, to choose their trading partners free from these restraints.<sup>26</sup> The same is

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<sup>25</sup> *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

<sup>26</sup> See, e.g., *Allnut v. Inglis*, 104 Eng. Rep. 206 (K.B. 1810), which was carried over into American law in *Munn v. Illinois*, 94 U.S. 113 (1876); see also *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989) (stating the modern synthesis).

true of antitrust law, a central tenet of which is that one competitor ordinarily may refuse to deal with another for any reason at all.<sup>27</sup> The only exceptions are the few cases of “essential facilities” that give one competitor a monopoly position vis-à-vis the other.<sup>28</sup> The scope of the all-comers doctrine is, therefore, limited. Freedom of association and contract are the norm for market firms as well as private clubs and churches.

The modern anti-discrimination laws are in many ways patterned on the earlier rules applicable to common carriers. However, their application is not limited to common carriers, but extends to cover all sorts of public accommodations that exercise no hint or whisper of monopoly power.<sup>29</sup> These rules necessarily interfere with the rights of freedom of association because they truncate the right *not* to associate, which Justice Ginsburg, in line with conventional theory, recognizes as part of the basic right.<sup>30</sup> In dealing with the clash between these associational rights and the general anti-discrimination law, Justice Ginsburg notes the level of “close scrutiny” that is applied to these regulations.<sup>31</sup> In dealing with these points, she cites two cases to which she gives but passing attention: *Roberts v. United States Jaycees*<sup>32</sup> and *Boy Scouts of America v. Dale*.<sup>33</sup> She then quickly sidesteps their implications by noting that both are cases where the states applied an anti-discrimination law “that *compelled* a group to include unwanted members, with no choice to opt out.”<sup>34</sup>

For the moment, it is best to treat *Roberts* and *Dale* on their own terms to see how anti-discrimination laws in general fare against challenges based on freedom of association. Once that is done, we can turn to the distinction between compulsion and benefits that drives her opinion. In dealing with the regulation of private organizations, the Court has stuck with the three-part classification that it announced in *Roberts*: economic associations, expressive associations, and intimate associations. For economic activities, the modern synthesis recognizes, without question, the dominance of the antidiscrimination laws over any claim of freedom of association. That position is inconsistent with the classical liberal view, which treats the principle of freedom of association (subject to the limitations already noted) as paramount in all areas of life. Put otherwise, any anti-discrimination law that undermines the preservation of a competitive economic system falls outside the scope of the state’s traditional police powers.<sup>35</sup>

For these purposes, however, this claim has been put to rest, but in ways that leave untouched the analysis of the two forms of associational freedoms outside the economic

<sup>27</sup> *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

<sup>28</sup> See, e.g., *Florida Fuels, Inc. v. Belcher Oil Co.*, 717 F. Supp. 1528 (S.D. Fla. 1989) (giving a narrow reading of the doctrine).

<sup>29</sup> See, e.g., the broad definition of a public accommodation in *New Jersey’s Law Against Discrimination*, N.J. Stat. Ann. § 10:5-4 (2010).

<sup>30</sup> CLS, 130 S. Ct. at 2984–85.

<sup>31</sup> *Id.* at 2985.

<sup>32</sup> *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

<sup>33</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

<sup>34</sup> CLS, 130 S. Ct. at 2975.

<sup>35</sup> See Richard A. Epstein, *Forbidden Grounds: The Case against Employment Discrimination Laws* 98–108 (1992).

arena – globally expressive, and deeply intimate. *Roberts* gives the highest value to the intensely personal arrangements involved with CLS, matters that go to the core of individual identity. Justice Brennan’s decision intimates quite clearly that the anti-discrimination law could *not* apply to those situations because “the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.”<sup>36</sup> The question that matters is where to draw the line. Justice Brennan had no hesitation about putting family relationships on the intimate side of the line and those of large commercial enterprises on the other. But he also had little hesitation in allowing Minnesota’s public accommodation law<sup>37</sup> to apply to the Jaycees, a broad-based service organization that does not exhibit the social cohesion and moral commitment to its mission that define groups like CLS.<sup>38</sup> Yet he said nothing about the large terrain that exists between the Jaycees and the family unit, leaving that issue for another day.

A classical liberal theory of freedom of association does not have to decide which type of associations matter or why. It is enough that all of these associations generate gains from cooperation for their members – gains that, outside the common carrier setting, are likely to be systematically larger than losses to excluded parties who are able to form or join other organizations on grounds of mutual consent. But the modern tripartite synthesis requires some theory to delineate between noncommercial operations like the Jaycees and intimate operations by the family, and to make that line clear enough to sort out the interim cases. Justice Brennan sought to supply this theory by noting that subjective values count for much more in intimate settings than in larger, all-purpose organizations lacking such focused beliefs.

The question of whether to draw the line was still unanswered. When it came up to the Supreme Court in *Dale*, the side of protected, “intimate” organizations was drawn more broadly than Justice Brennan was likely to accept. The precise question in the case was this: do the Boy Scouts, who have certain definite moral principles that they impose on their broad membership, merit protection as an intimate, expressive organization that falls on the other side of the line from *Roberts*?<sup>39</sup> The line-drawing problem does not have an easy solution. The New Jersey Supreme Court had rejected the Boy Scouts’ claim of intimate association because its “large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not “sufficiently personal or private to warrant constitutional protection” under the freedom of intimate association.”<sup>40</sup> The New Jersey Supreme Court

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<sup>36</sup> *Roberts*, 468 U.S. at 617–18.

<sup>37</sup> Minn. Stat. §§ 363.01 et seq. (1982).

<sup>38</sup> *Roberts*, 468 U.S. at 621–23.

<sup>39</sup> *Dale*, 530 U.S. at 649–50 (listing Boy Scout principles).

<sup>40</sup> *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1221 (N.J. 1999) (quoted in *Dale*, 530 U.S. at 646).

also held that “the reinstatement of *Dale* does not compel the Boy Scouts to express any message.”<sup>41</sup>

The first claim is plausible; the second is wishful thinking. In the Establishment Clause area, the Supreme Court – especially its liberal members – has been quick to find that any involvement of the state in the activities of religious organizations counts as an endorsement of their views.<sup>42</sup> In this context, it is not just a matter of false appearances. It is an explicit requirement of forced membership by openly gay individuals in key positions within the Boy Scouts. Of course, that appearance conveys the message that the Boy Scouts approve of homosexual conduct, when they do not. What an organization says depends on the people to whom it chooses to say it. So a deeply divided Supreme Court, through Chief Justice William Rehnquist, took the Boy Scouts at their word and allowed them to resist the application of New Jersey’s Law Against Discrimination, a result with which I agree.<sup>43</sup> The Court emphatically and repeatedly stated that the evaluation of the group’s goals and purposes necessarily resided with the group itself, and it refused to reject that position, pointing to the internal divisions within the group’s ranks that led, from time to time, to deviations in practice from its core principles.<sup>44</sup> More concretely, the Court treated the Boy Scouts’ mission statement as unassailable proof of its core beliefs.<sup>45</sup> Nor was the Boy Scouts’ right of intimate association lost because the Boy Scouts had declined to include any explicit references to its opposition to homosexual activity in its handbook.

Judged by this metric, *CLS* is a far easier case for freedom of association than was *Dale*. The *CLS* chapter at Hastings is small and cohesive. It has no ambiguity about its meaning or purposes. It is a charter member of the class of intimate associations that every justice who participated in the *Roberts* decision placed beyond the pale of the anti-discrimination laws. In the context of direct regulation, at least, *CLS* enjoys strong protection of its associational, speech, and religious interests as intimate expression associations.

The next question, then, is what kinds of restrictions might pass muster? The obvious case is any effort to single out religious beliefs for extra scrutiny. But I have no doubt that if the government imposed an all-comers statute on all organizations, it would be struck down. The only question is how. The enormity of the rule would leave every organization in the United States in an untenable position because it could not take refuge behind an admission-and-hiring system that independently limits the scope of that all-comers obliga-

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<sup>41</sup> *Dale*, 734 A.2d at 1229 (quoted in *Dale*, 530 U.S. at 647).

<sup>42</sup> See, e.g., *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985).

<sup>43</sup> Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 *So. Cal. L. Rev.* 119 (2000). The case has been heavily commented on. See, e.g., Louis Michael Seidman, *The Dale Problem: Property and Speech under the Regulatory State*, 75 *U. Chi. L. Rev.* 1541 (2008) (noting how difficult it is to have strong speech rights with weak property rights); Andrew Koppelman, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, 23 *Cardozo L. Rev.* 1819 (2002) (decrying expansive reach of *Dale*’s view of expressive associations); David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 *Mo. L. Rev.* 83 (2001) (noting how religious schools could use free speech guarantees to defeat employment discrimination laws).

<sup>44</sup> *Dale*, 530 U.S. at 648–49.

<sup>45</sup> *Id.* at 649.

tion. Businesses would have to hire without limit, or take people on a first-come, first-served basis. All sorts of voluntary associations would find themselves stuffed to the gills. The rate-making implementation of this mad proposal alone would be sufficient to doom it to perdition. Does any court want to decide the rates at which unwelcome applicants can join the organizations whose members don't want them? This system works with common carriers because of their monopoly position, their clear capacity restraints, their ability to set rates, and the simple fact that passengers are, generally, pretty fungible. Queuing is tolerable for all sorts of common carriers, at least when price can shorten the queue to match capacity. No one hires employees or forms partnerships this way. Quite literally, this unheard-of rule could never pass in a legislature because it would produce no net winners.

But do this mental experiment: suppose that some adventurous legislature passed a universal all-comers statute for all firms. Manifestly, the courts would strike it down *in toto*, which in turn would allow all religious organizations to tuck themselves into the lee of all the business organizations that would lead the general charge against this rule. But what happens next with a rule that knocks out some selective grounds for refusing to associate, as is done with the civil rights laws? There is no question that this type of regime is far more sustainable because it negates only a few possible reasons for not hiring without creating a free-for-all. But the question of which grounds are appropriate for which organizations is troublesome. That said, no court in the land would say to a church or other religious organization, "You may keep out rich people or poor, but you cannot keep out those people who detest your faith and are determined to overthrow it." The organization is allowed to have its viewpoint determine its membership under the *Roberts* formulation. An organization can discriminate on the basis of status, on the basis of belief, on the basis of neither, or on the basis of both. But this is a case where the anti-discrimination norm comes out second best.

### III. FROM COERCION IMPOSED TO BENEFIT DENIED

#### A. The Right/Privilege Distinction

We thus come up with the situation where a religious organization is protected against compelled membership that might be ordered under either the all-comers policy or the selective admission standard. The critical transitional question is what happens when we move from the government-as-regulator to the government-as-owner of certain forms of property? It is a fair reading of Justice Ginsburg's opinion in *CLS* that the sole ground that distinguishes *Dale* turns on the mode of state involvement. In a critical passage, she notes that *Hastings* does not impose any positive restrictions on what *CLS* can do off campus with

its own resources, but only indicates that it has to accept reasonable conditions in order to be eligible for the benefits that Hastings metes out to the various registered student organizations. In essence, the denial of the privilege should not be regarded as compulsion, so that the special protection for intimate associations recognized in *Roberts* and *Dale* is simply beside the point under this mocked up version of the long-discredited right/privilege distinction. In *Commonwealth v. Davis*, then-Massachusetts Supreme Court Justice Oliver Wendell Holmes put the issue as follows:

For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes, the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses.<sup>46</sup>

When the case got to the U.S. Supreme Court, Justice Edward White gave it a slightly different version that put the distinction in terms of the greater/lesser power: “The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser.”<sup>47</sup> This version of the doctrine did not survive. Indeed, in 1939, that view was decisively repudiated in *Hague v. CIO*, which held that the government ownership of the streets did not preclude their use as a public forum.<sup>48</sup> That theme was endorsed in the academic literature as well. For example, whatever was left of the older right/privilege distinction was the object of a well-known 1968 attack by William Van Alstyne, who observed that “[i]f this view were uniformly applied, the devastating effect it would have on any constitutional claims within the public sector can be readily perceived.”<sup>49</sup>

Ironically, in *CLS*, Justice Ginsburg writes as if none of these developments had taken place when she holds that CLS has no constitutional claims against Hastings, a public institution, when it merely refuses to supply this packet of benefits to CLS. Thus, suppose in this case that Hastings Law School did not admit any students into its entering class who refused to accept all the tenets of the school’s nondiscrimination policy, or to sign on to an oath to that effect. Does anyone think that this refusal to admit members of CLS into the law school would be acceptable?

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<sup>46</sup> *Commonwealth v. Davis*, 39 N.E. 113, 113 (1895).

<sup>47</sup> *Davis v. Massachusetts*, 167 U.S. 43, 48 (1897).

<sup>48</sup> *Hague v. CIO*, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”).

<sup>49</sup> William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1441 (1968).

## **B. Open Public Forums**

So the next question asks how the unmentioned doctrine of unconstitutional conditions ties into the decision of Hastings to deny CLS most of the benefits routinely conferred on other RSOs. In order to answer that question, Justice Ginsburg quickly motored past *Roberts* to evaluate the CLS claim in connection with the doctrine of a limited public forum that lies, as noted earlier, midway between the public square and the use of Hastings facilities for its core missions of teaching and research. It is here that Justice Ginsburg's argument falls apart, whether we consider the case under the rubric of either the nondiscrimination policy or the all-comers approach.

To see why, start with actions on the public square. The state must be able to stop some speech in some cases, but it could not restrict access to public forums on either of the two policies in play in *CLS*. To do so on the strength of the nondiscrimination policy would count as a form of viewpoint discrimination that prefers groups with some positions over groups that hold other positions. Instead, these highway cases adopt an all-comers policy, which, in this instance, imposes a duty to take all comers subject to time, place, and manner that are neutral in both form and effect. One position that is manifestly precluded by this approach is the insistence that the users of the public forum adopt take-all-comers policies similar to those that Hastings imposed. Just imagine a similar requirement that all vehicles that use the public highways take all comers, even if they do not choose to act as a common carrier.

This issue made it to the Supreme Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, which held that the South Boston Allied War Veterans Council did not have to admit into its St. Patrick's Day parade a gay, lesbian, and bisexual (GLIB) group that sought to march as a separate contingent under its own banner as part of the council's larger St. Patrick's Day celebration.<sup>50</sup> The Supreme Court held that the private organization's First Amendment associational and expressive rights trumped a Massachusetts statute that banned discrimination on account of sexual orientation.<sup>51</sup> This issue was somewhat clouded because the Court also held that the anti-discrimination law applied to the extent that it permitted individual members of GLIB to join the float so long as they did not march under their GLIB banner or profess their own views. Still, that concession to the anti-discrimination laws is of no relevance here because it applies only to nonexpressive activities. Indeed, CLS was prepared to go further than this exception required, by its willingness to let any nonmember attend its meetings and say whatever he or she liked. But the essential point remains: state ownership over the roads does not add to the power of Massachusetts to tell the Veterans Council how to select its members and project its own message. Needless to say, the usual time, place, and manner restrictions

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<sup>50</sup> *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995).

<sup>51</sup> See Mass. Gen. Laws Ann. ch. 272, § 98 (1992).

allow the state to control for nuisance-like behavior, just as it can with activities on private property.<sup>52</sup>

In an open public forum, therefore, the state cannot impose either a nondiscrimination policy or an all-comers policy on private associations for matters that pertain to speech and religion. The state has to act as the common carrier. It cannot force the veterans to project messages with which they disagree. Whatever the rule in pure economic relationships, the principle of freedom of association keeps the state from using its monopoly power over the highway to run roughshod over the Veterans Council. Indeed, it is possible that it could not impose its all-comers policy even in economic affairs. Thus, it is doubtful that even standards of minimal constitutional rationality are met by a rule that requires IBM or any other corporation to hire all job applicants because the company makes use of public roads from which it could, in principle, be excluded. In some instances, the generality of a rule protects it from constitutional invalidation, simply because everyone is made worse off. But in this case, its perverse consequences are manifest whether it applies to one company or a hundred.

It takes little ingenuity to see that these general considerations carry over to religion and speech. No one could be told that he is only allowed to enter the public highways if he will provide transportation to members of rival religious groups on the same terms and conditions that he supplies it to members of his own group. And it would not reduce the sting in the slightest if this requirement were at the same time imposed on bridge club members to the benefit of chess club members. The all-comers policy and the nondiscrimination policy, which do not work as forms of direct regulation, do not work when transformed into conditions for entry onto public roads.

### C. Limited Public Forums

The next step in the argument is to determine whether the rules that apply to a open public forum like the roads could carry over to a limited public forum like Hastings Law School. Justice Ginsburg takes the position that it cannot, saying 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.”<sup>53</sup> Clearly, there are obvious distinctions between open and limited public forums.

Unfortunately, Justice Ginsburg turns the analysis upside down when she seeks to account for that difference. Her key mistake is to argue that the limited nature of the public

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<sup>52</sup> See, e.g. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (allowing “narrowly tailored” regulations to deal with noise and other time, place, and manner issues).

<sup>53</sup> CLS, 130 S. Ct. at 2986.



forum necessarily alters the calculus under both the nondiscrimination policy and the all-comers policy from how it comes out on the public highway. She is right that the change of place matters, but it still must be understood what those differences are. Initially, no one would care to deny that Hastings University need not follow the all-comers policy that it wishes to impose on CLS in deciding which applicants to admit. Nor does it have to take people in on a first-come, first-served basis until its class is filled. Nor is it required to sell places in its class to the highest bidder. The ability for Hastings to function as a law school depends, of course, on its power to exclude – and on its power to admit. Even though it is a government agency, it has to receive a fair measure of management discretion to run its essential programs. Justice Stevens sounds the same theme when he writes, “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.”<sup>54</sup>

Once Justices Ginsburg and Stevens treat Hastings as a limited public forum, they have two tasks: First, they must identify situations in which Hastings can exercise its ordinary right to exclude like a private owner. Second, they must also identify the public forum aspects of its operations in which it functions like the proprietor of a public forum lacking that right to exclude, because otherwise a limited public forum just becomes a form of government-run private property. On the former point, Hastings clearly does not have complete power to hire faculty and admit students for whatever reason it sees fit. The Equal Protection Clause, for example, prevents the school from refusing to admit students into the law school on the grounds of race or sex. I have no doubt that it would also prevent Hastings from adopting a policy that excluded members of CLS because of their religious beliefs. The clear implication is that some neutral criteria of academic excellence, fitness to study law, and ability to pay tuition are part of that mix.

Justice Ginsburg makes a modest concession to Justice Alito when she concedes that Hastings would be on thin constitutional ice 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.<sup>55</sup>

There is a certain irony in drawing a distinction between a legislature and a school, for that distinction could have been used in *United States v. Virginia* to spare the Virginia Military Institute from an order to admit women, which Justice Ginsburg imposed.<sup>56</sup> The point, of course, is that institutions that manage complex programs need more discretion than legislatures, and that it is somewhat odd to require a school to admit women under the

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<sup>54</sup> *Id.* at 2997 (emphasis in original).

<sup>55</sup> *Id.* (internal citation omitted).

<sup>56</sup> *United States v. Virginia*, 518 U.S. 515 (1996).

Equal Protection Clause, only to recognize that, once admitted, they must receive, in practice, separate treatment on a wide number of issues. Make no mistake about it, compared to *CLS*, the level of intrusion was far greater in *Virginia*, where Justice Ginsburg required (but did not find) an “exceedingly persuasive justification” for the exclusion of women from VMI.<sup>57</sup> *CLS* makes, at most, modest demands on Hastings for routine services. At VMI, an educational program had to be revamped from top to bottom. At Hastings, there is merely a need to create a new email portal.

The importance of getting the boundaries right is clear. Initially, *CLS* cannot demand that Hastings construct its academic program in line with its own beliefs. But in this case, none of its demands concern anything other than how the various facilities of Hastings should be allocated when they are not dedicated to the school’s educational mission. This problem comes all the time in connection with high schools and universities where the rule is that religious groups cannot be excluded from the use of facilities outside the regular academic program so long as other groups within the institution are allowed to use the facilities.<sup>58</sup>

Here are some of the relevant precedents:

In *Rosenberger v. Rector and Visitors of the University of Virginia*, the University of Virginia was not obligated to fund any student publications.<sup>59</sup> But it could not refuse to cover the printing costs of an explicitly Christian publication if it were prepared to fund printing costs for other campus publications dealing with similar religious and social issues. To the extent that the university was not engaged in its distinctive academic mission, it had to treat all groups in the same fashion, without discrimination.

Similarly, in *Widmar v. Vincent*, the Court overturned a decision of the University of Missouri at Kansas City to deny religious groups access to its facilities after hours when it held those same facilities open to nonreligious groups.<sup>60</sup> There seems to be no meaningful distinction between the cases. Interestingly enough, the Court rejected the view that this restriction was needed to promote a greater separation of church and state. As a common carrier, it had to be impartial with respect to the ends of its constituent organizations, and thus was under a duty not to “inhibit” the advancement of religion.<sup>61</sup> There is no reason to think that the adoption of any self-serving nondiscrimination policy would have altered the outcome.

Finally, in *Lamb’s Chapel v. Center Moriches Union Free School District*, the same basic principles prevented the Central Moriches school district from refusing to let Lamb’s Chapel

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<sup>57</sup> *Id.* at 524.

<sup>58</sup> DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 965 (9th Cir. 1999) (“The government may limit expressive activity in nonpublic fora if the limitation is reasonable and not based on the speaker’s viewpoint.”).

<sup>59</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

<sup>60</sup> *Widmar v. Vincent*, 454 U.S. 263 (1981) (cited in *Rosenberger*, 515 U.S. at 834–35).

<sup>61</sup> See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

use its facilities after hours to run a religiously oriented film series that stressed the importance of family values.<sup>62</sup> As a limited public forum, the district did not need to allow any group to use its facilities after hours. But once the district opened its doors to some outside organizations, it could not discriminate against others. Thus, the Court held, first, that the equal access policy to this limited public forum did not create an establishment of religion and, second, that the district's rules impermissibly authorized viewpoint discrimination that cut against Lamb's Chapel. The articulation of formal regulations here did not save the policy.

As these cases indicate, Hastings is properly treated as a limited public forum to which common carrier obligations *do* attach so long as it is *not* engaged in its essential academic mission. Put otherwise, the classrooms and the bulletin boards, when used after hours, function as a public square limited to all Hastings students. These internal public features of Hastings Law School are like the public roads in *Hurley* or the public classrooms in *Lamb's Chapel*. Thus, if other student groups could use, for a fixed fee, the Hastings auditorium to run a meeting on a Sunday afternoon, so too could CLS, even though outsiders to the Hastings community could be excluded. Hastings is the common carrier that has to take all comers, not CLS.

It is not availing in this context, moreover, to change the example by stating that parity is restored if the auditorium is open only to those student groups that satisfy an all-comers policy, which CLS does not. At this point, the question should be whether there is any reasonable basis to exclude those groups that fail to sign the all-comers policy, which has only been used against common carriers and never against ordinary associational groups. Hastings bears at least some burden to explain why it adopts, in such a haphazard manner, a policy that is never used anywhere else. If it states that the reason is to prevent organizations like CLS from using facilities because they discriminate on grounds of sexual orientation, the all-comers policy becomes a pretext for a much more focused discriminatory activity that runs headlong into the conventional First Amendment prohibition against viewpoint discrimination in the distribution of university funds.<sup>63</sup> But if it denies that explanation, what other reason does it have for imposing this restriction, knowing that it has a disparate impact on isolated groups like CLS?

There is, of course, a tradition that indicates that neutral rules that limit speech are valid so long as they do so without regard to the beliefs of that organization. "Incidental" – I hate that word – burdens get little traction in First Amendment cases. In the best-known case of this sort, *United States v. O'Brien*, the Supreme Court held that the United States could punish people for burning draft cards to protest the Vietnam War. Its need to preserve the integrity of the Selective Service System was said to be "unrelated to the suppression of free expression."<sup>64</sup>

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<sup>62</sup> *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

<sup>63</sup> See, e.g., *Rosenberger*, 515 U.S. at 819.

<sup>64</sup> *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

*O'Brien* is an unpersuasive decision for two reasons. First, the burning of the draft card was known by everyone to be symbolic speech of the sort that is strongly protected. Second, the purported state interest in administrative order can be easily satisfied in so many other ways. Burning the card does not remove the registrant from the system. The simple requirement that the protestor keep a copy of the original card should allow for ready identification of the individual if necessary. The powerful expressive element is overwhelmed by the obvious fixes to the administrative problems. The case rationale is flimsy and utterly unworthy of extension. When the decision came down it was subject to widespread criticism that remains valid today.<sup>65</sup>

Yet, let it be supposed that *O'Brien* is correct. The United States at least offered what the Court regarded as sufficient reasons for imposing criminal sanctions on draft card burners. By parity of reasoning, the United States should have to offer similar justifications to criminalize private religious organizations that meet and pray on private property, or even to impose on them duties not to discriminate, subject to civil sanctions. But it can do neither so long as *Roberts* and *Dale* remain the law. It is, therefore, one thing for the state to refuse to supply benefits to people who burn draft cards, given that their actions are criminal. It is quite another to refuse to supply benefits to CLS, given that its underlying actions receive the highest level of constitutional protection. There is quite simply no parallel between criminal and fully protected conduct. In other words, if the twin rationales of toleration and cooperation cannot justify imposing the nondiscrimination norm on private parties on their own premises, it does not justify imposing that norm when they enter a limited public forum. To do otherwise is to revive the discredited privilege/ right distinction.

There is a second confusion with Justice Ginsburg's argument, when taken on its own terms. Her stated justification for the all-comers policy and the nondiscrimination policy is the desire to advance toleration and cooperation that students will need in some larger environment.<sup>66</sup> But she fundamentally misconstrues the social meaning of both terms. The term "toleration" in religious affairs has a precise meaning: individuals "tolerate" the right of other people to practice a religion with which they profoundly disagree. The historical account here always stressed the position that mutual noninterference is the only way in which people of different faiths can get along. My dictionary puts the point as follows: "Toleration: The recognition of the rights of the individual to his own opinions and customs, as in matters pertaining to religious worship, when they do not interfere with the rights of others or with decency and order."<sup>67</sup>

That definition, stressing negative liberties, is consistent with the historical record. In speaking about toleration, John Locke wrote: "It is not the diversity of opinions (which cannot be avoided), but the refusal of toleration to those that are of different opinions (which

<sup>65</sup> See, e.g. Dean Alfange Jr., *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 Sup. Ct. Rev. 1.

<sup>66</sup> See CLS, 130 S. Ct. at 2990.

<sup>67</sup> Funk & Wagnalls *New Int'l Dictionary of the English Language* 1320 (1996).

might have been granted), that has produced all the bustles and wars that have been in the Christian world upon account of religion.”<sup>68</sup> Locke’s letter was written in 1689, the same year as the passage of the Act of Toleration, whose title was “An Act for Exempting their Majestyes Protestant Subjects dissenting from the Church of England from the Penalties of certaine Lawes.”<sup>69</sup> In this instance, toleration was needed to allow Protestants (but not others) to deviate from the Book of Common Prayer, whose dangers of excessive orthodoxy and centralization were neatly summed up by Justice Hugo Black as follows:

Powerful groups representing some of the varying religious views of the people struggled among themselves to impress their particular views upon the Government and obtain amendments of the Book [of Common Prayer] more suitable to their respective notions of how religious services should be conducted in order that the official religious establishment would advance their particular religious beliefs.<sup>70</sup>

The doctrine of unconstitutional conditions is one safeguard against that risk.

Read in context, therefore, the lesson of toleration at Hastings Law School is best achieved by letting CLS go about its own business. The opponents of CLS need to learn, if they do not already know, that they will not wilt by being present in the same building in which CLS conducts its meetings. Toleration requires adopting a live-and-let-live attitude about those with whom you disagree. It does not require any religious group to suffer a forced surrender of essential group characteristics, by admitting non-believers into its ranks. This purported justification for the rule gets matters exactly backward.

Justice Ginsburg does no better when she defends the Hastings policy for fostering cooperation. Cooperation, for its part, requires only that a group be prepared to work with other groups on common issues. It does not require that any group sacrifice its core identity or admit members of other groups, whose principles it does not accept, into its own ranks. That is, these twin virtues presuppose that organizations are allowed to maintain their separate identities, and then explains how different groups and individuals should think about and interact with others. Forced association in important extracurricular activities done in a limited public forum turns toleration into feigned agreement, and turns cooperation into forced association. Toleration outside the confines of Hastings has never had the connotation that Justice Ginsburg gives it in *CLS*. Her Orwellian abuse of language does not supply the needed justification for Hastings’s all-comers policy.

Justice Ginsburg and Justice Stevens also relied on *Employment Division v. Smith* to support the proposition that a neutral rule of general application could not be resisted on free exercise grounds.<sup>71</sup> In their view, *Smith* explained why Hastings could not be required to

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<sup>68</sup> Letter from John Locke, A Letter Concerning Toleration (1689), available at <http://www.constitution.org/jl/tolerati.htm>.

<sup>69</sup> 1 Will. & Mar. c. 18 (1689).

<sup>70</sup> *Engel v. Vitale*, 370 U.S. 421, 426–27 (1962).

<sup>71</sup> *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990).

grant the exemption from the all-comers policy to CLS even if it were allowed to do so.<sup>72</sup> But *Smith* does not so hold. The key holding from Justice Antonin Scalia reads: “We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”<sup>73</sup> That last clause is critical because the state is *not* free to regulate the activities of religious groups on private property insofar as they relate to religious beliefs and practices. That observation is consistent with *Smith*’s holding, which allowed for the direct enforcement of a criminal law that forbade all individuals to smoke peyote, against a member of the Native American Church who smoked peyote for ritual purposes. The disparate impact of the law on religious activities was an “incidental” burden that could not defeat the general rule. It therefore followed that if the criminal law were valid, Oregon could deny Smith unemployment benefits for engaging in what was criminal action.

The narrow objection to the use of *Smith* is the same as the objection to the application of *O’Brien*. The doctrine of unconstitutional conditions may not protect people who engage in criminal activity in seeking government benefits. But it does protect those, like CLS, whose conduct has constitutional immunity from suit. If the state cannot punish private meetings of CLS, it cannot withhold benefits from them. The cases are distinguishable.

The second argument goes to the weakness of *Smith* on its own terms. *Smith* has been widely attacked for its rigid approach. Justice Scalia’s insistence on neutrality made little sense when a modest accommodation, limited to allowing the use of peyote in these sacramental activities, posed no threat of systematic drug abuse, which is why the statute was never, in practice, criminally enforced. *Smith* also raised enormous hackles from liberals and conservatives alike who could not understand why the Free Exercise and Establishment Clauses should be reduced to a weak form of equal protection pabulum. That sorry episode provoked congressional efforts to undo the statute, first in the form of the Religious Freedom Restoration Act<sup>74</sup> – which was promptly struck down<sup>75</sup> – and then in the Religious Land Use and Institutionalized Persons Act,<sup>76</sup> which has thus far escaped constitutional challenge.

*Smith* is no decision worthy of emulation and expansion. The brutal truth is that this neutrality rule does a very bad job of reconciling the relevant interests in free exercise cases. The disparate treatment test is manifestly underinclusive of First Amendment concerns in areas that call not for judicial deference, but for strict scrutiny of state actors. There are no intolerable demands on judicial competence, for the application of a disparate impact case in these settings yields a simple and straightforward result. There is no excuse for us-

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<sup>72</sup> CLS, 130 S. Ct. at 2993, 2997 n.2.

<sup>73</sup> *Smith*, 494 U.S. at 878–79.

<sup>74</sup> 42 U.S.C. § 2000bb (2006).

<sup>75</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>76</sup> Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq. (2006).

ing the disparate impact test to prop up an all-comers policy that has nothing to condemn outside the area of common carriers.

The case for the all-comers rule is, moreover, not salvaged by the observation from both Justice Ginsburg and Justice Stevens that Hastings is not required to offer a subsidy to groups like CLS. No subsidy is said to be a far cry from the use of coercion. But to call the payments and benefits supplied to CLS a “subsidy” ignores the larger context in which Hastings makes these payments. Justice Ginsburg puts the situation this way: “RSOs are eligible to seek financial assistance from the Law School, which subsidizes their events using funds from a mandatory student-activity fee imposed on all students.”<sup>77</sup>

This simple sentence explains what is wrong with her argument. This supposed subsidy is not manna from heaven, courtesy of an anonymous Hastings alumnus who is antagonistic to CLS. It is collected by taxes on all students, including members of CLS. To make this an economic subsidy requires proof that it is paid by others to CLS. But viewed in context, the subsidies run the other way. CLS members must put money into a pot from which they are not allowed to withdraw cash. They are systematic net losers from a policy that requires them to subsidize all other groups. Only if we turn a blind eye to the source of the money does the subsidy argument make sense. That is not what First Amendment law is about. In the end, the usual rules for a limited public forum apply: if the state cannot sanction the activity when done privately, it cannot refuse to extend benefits to persons who engage in those activities in a limited public forum.

## **CONCLUSION: WHERE DO WE GO FROM HERE?**

The *CLS* case is a peculiar amalgam that in some instances follows old precedent, in other instances repudiates precedent, and in other instances goes beyond precedent. The question is, what lies in the future?

At this juncture, the case has two separate strands. The first is case-specific: on remand, can CLS make out that the all-comers policy was an effort to target CLS? The record on this point seems to be clear: There has at no time been a formal all-comers policy. The Hastings administration routinely gave CLS the runaround on dates and places. The policy was adopted by the dean during litigation, but never systematically implemented. The clear inference was that it was an effort to throw a viewpoint-neutral facade on a viewpoint-biased policy. Unless the notion of pretext is given a narrowness that it has nowhere else

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<sup>77</sup> CLS, 130 S. Ct. at 2979.

in the law, the case should come out in favor of CLS. But, of course, anything is possible, including a hostile decision coupled with a new application in which the policies will be monitored for consistency across other organizations. Whatever the outcome in the case, the causes of toleration and cooperation will not be served.

Second, *CLS* also has real implications for larger social issues, including the constitutional status of gay marriage in connection with Equal Protection Clause challenges. As matters now stand, the Supreme Court in *Lawrence v. Texas* held that the state could not criminalize homosexual sodomy as a form of “deviate sexual intercourse.”<sup>78</sup> The majority of the Court did not decide *Lawrence* on equal protection grounds, however; that is, on the ground that the Texas law covered not only homosexual sodomy but also heterosexual sodomy. Instead, it found in an application of substantive due process that all persons had a constitutional liberty interest in sexual relations free from state interference to engage in a “transcendent” personal experience. The opinion thus has serious libertarian overtones because it defines a broad sphere of sexual autonomy into which the state cannot enter. But the next question on the agenda is that if homosexual sodomy cannot be criminalized, why do the liberty interests of gay couples not allow them to marry on the same terms and conditions of heterosexual couples? The Supreme Court has thus far ducked this question – in part because of the furor that it would create however the Court rules – but it will not be able to do so for long.

So let us assume that *Lawrence* states the law of the land. If so, it is hard to think of a solid doctrinal justification that explains why these arrangements cannot be blessed by the state. Once the first step is taken in *Lawrence* on criminalization, it is difficult not to take the second step on same-sex marriage. After all, the state has a monopoly on the ability to issue licenses and should not be able to use that to benefit one group of persons at the expense of others. Churches and other organizations should not, on this view, be forced to accept gay couples in their ranks, or for that matter straight couples, if they so choose. The doctrine of unconstitutional conditions rightly applies, carrying *Lawrence* to the next step.

Or does it, after *CLS*? At this point, the grand question is whether the right/privilege distinction in *CLS* will have some renaissance. That rebirth is surely not evidenced in the two recent decisions in Massachusetts, *Gill v. Office of Personnel Management*<sup>79</sup> and *Massachusetts v. HHS*,<sup>80</sup> in which Judge Joseph Tauro struck down key provisions of the Defense of Marriage Act, which had, for the purposes of federal benefit programs, defined marriage as a union between one man and one woman.<sup>81</sup> His two decisions blew by, at breakneck speed,

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<sup>78</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>79</sup> *Gill v. Office of Pers. Mgmt.*, 2010 U.S. Dist. LEXIS 67874 (D. Mass. 2010).

<sup>80</sup> *Massachusetts v. United States Dep’t of Health and Human Serv.*, 698 F. Supp. 2d 234 (D. Mass. 2010). For sheer intellectualchutzpah, this Tenth Amendment argument takes the cake. First, it is held that the Equal Protection Clause requires that the states admit same-sex married couples. Clearly, Congress could enforce that command if it were valid under Section 5 of the Fourteenth Amendment. Nonetheless, these rights are reserved to the states, none of which, after *Gill*, may choose to keep to the traditional definitions of marriage.

<sup>81</sup> Defense of Marriage Act, § 1 U.S.C. § 7 (2006) reads: In determining the meaning of any Act of Congress, or of any ruling, regulation,



the right/privilege distinction with the categorical judgment that all rationales in favor of the traditional definition of marriage lacked even the most minimal level of rationality<sup>82</sup> to fend off any sort of an equal protection challenge under either the Fourteenth Amendment or the Fifth Amendment, which has long read equal protection into due process.<sup>83</sup> Not to be outdone, Judge Vaughn Walker, in *Perry v. Schwarzenegger*, recently struck down California's gay-marriage ban (Proposition 8) on the grounds that its definition of marriage as between one man and one woman could not be defended on any rational grounds.<sup>84</sup> It is worth noting that neither the U.S. government nor Governor Schwarzenegger chose to defend their respective laws on the merits.

The question is whether that juggernaut will be stopped in the Supreme Court, given that it appears that there are at least five firm votes in favor of the legalization of gay marriage: four liberal justices – Ginsburg, Breyer, Sotomayor, and Kagan – plus Kennedy. Doctrine is, of course, a transient thing at the Supreme Court level, but it appears that the only line that could possibly hold back that outcome is *CLS*. Under *CLS*, the state does not have to “subsidize” gay marriage through its recognition, even though it need not criminalize it. Of course, no one knows how this will play out as the attacks on DOMA and Proposition 8 march onward through the legal system. But the betting here is that *CLS* will provide little resistance against an attack on traditional morals legislation that, when read against the early background of the Fourteenth Amendment, was squarely within the state power.

Still, doctrine is, as previously mentioned, a malleable thing, even a bird of passage. No one doubts that the move toward the constitutionalization of gay marriage is hopeless under any originalist reading of the Fourteenth Amendment. But in the end my prediction is that constitutional politics will conquer what is left of constitutional law. The doctrine of unconstitutional conditions that lay in ruins after *CLS* will rise again.

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or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

<sup>82</sup> “This court need not address these arguments [for heightened scrutiny based on abridgment of fundamental rights and suspect classes], however, because DOMA fails to pass constitutional muster even under the highly deferential rational basis test. As set forth in detail below, this court is convinced that “there exists no fairly conceivable set of facts that could ground a rational relationship” between DOMA and a legitimate government objective. DOMA, therefore, violates core constitutional principles of equal protection.” Gill, 699 F. Supp. 2d 374 at 387 (internal citation omitted). The categories, at this point, are completely malleable.

<sup>83</sup> See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

<sup>84</sup> *Perry v. Schwarzenegger*, 2010 U.S. Dist. LEXIS 78817 (N.D. Cal. 2010).