

Boston University School of Law Scholarly Commons at Boston University School of Law

Faculty Scholarship

2011

Religious and Political Virtues and Values in Congruence or Conflict?: On Smith, Bob Jones University, and Christian Legal Society

Linda McClain

Boston University School of Law

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship

 Part of the [First Amendment Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Linda McClain, *Religious and Political Virtues and Values in Congruence or Conflict?: On Smith, Bob Jones University, and Christian Legal Society*, 32 *Cardozo Law Review* 1959 (2011).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/524

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.



**RELIGIOUS AND POLITICAL VIRTUES AND VALUES IN
CONGRUENCE OR CONFLICT?:
ON *SMITH, BOB JONES UNIVERSITY*, AND
*CHRISTIAN LEGAL SOCIETY***

32 *Cardozo Law Review* 1959 (2011, No. 5)

Boston University School of Law Working Paper No. 11-18
(May 6, 2011)

Linda C. McClain

This paper can be downloaded without charge at:

<http://www.bu.edu/law/faculty/scholarship/workingpapers/2011.html>

RELIGIOUS AND POLITICAL VIRTUES AND
VALUES IN CONGRUENCE OR CONFLICT?:
ON *SMITH*, *BOB JONES UNIVERSITY*, AND
CHRISTIAN LEGAL SOCIETY

Linda C. McClain*

“Laws,” we said, “are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”

—Justice Scalia, *Employment Division, Department of Human Resources of Oregon v. Smith*¹

“Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment [religious] freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.”

—Justice O’Connor, *Employment Division, Department of Human Resources of Oregon v. Smith*²

INTRODUCTION

A basic tension in the United States constitutional and political order exists between two important ideas about the relationship between civil society and the state: (1) families, religious institutions, and other parts of civil society are foundational sources, or “seedbeds,” of virtues and values that undergird constitutional democracy; and (2) these same

* Professor of Law and Paul M. Siskind Research Scholar, Boston University School of Law. Thanks to Professor Marci Hamilton and the editors of the *Cardozo Law Review* for inviting me to participate in the conference that led to this Symposium. Thanks to Hallie Marin for valuable research assistance and to Boston University School of Law for supporting this project with a summer research grant. Comments are welcome: lmcclain@bu.edu.

¹ 494 U.S. 872, 879 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878)).

² *Id.* at 895 (O’Connor, J., concurring in the judgment) (quoting *Bowen v. Roy*, 476 U.S. 693, 728 (1986) (O’Connor, J., concurring in part and dissenting in part)).

institutions are places that guard against governmental orthodoxy and overweening governmental power by generating their own distinctive virtues and values and by being independent locations of power and authority.³ The first idea envisions a comfortable *congruence* between nongovernmental associations and government. By this, I mean that the values and virtues of each, the habits and skills cultivated in each domain, are in agreement. Families, schools (including post-secondary institutions), and religious institutions all enjoy recognition as prominent sites for nurturing virtues and values and engaging in social reproduction that sustain democracy. So too, the many voluntary associations that adults and young people join enjoy constitutional protection as places where there is freedom of expressive association. Political theorist Nancy Rosenblum refers to the “logic of congruence,” or the premise that civil society supports a liberal democratic order, as a “liberal expectancy.”⁴ In his account of political liberalism, for example, John Rawls describes the “background culture” of civil society as a “fund of implicitly shared ideas and principles” that undergird a shared political conception of justice.⁵ They “establish[] a social world within which alone we can develop with care, nurture, and education, and no little good fortune, into free and equal citizens.”⁶ Similarly, Rawls’s idea of an overlapping consensus reflects the conviction, or liberal expectancy, that, although civil and political society each have values and virtues distinct and appropriate to them, civil society underwrites constitutional democracy because citizens can affirm a political conception of justice as “derived from, or congruent with, or at least not in conflict with, their other values.”⁷ The alternative formulation (“or at least not in conflict with”) suggests a more relaxed criterion: Civil and political society are distinct, and one’s personal values and virtues need not be identical to those of constitutional democracy, but harmony is possible so long as the former somehow support the latter. Rosenblum refers to the idea that the institutions of civil society serve as “mediating associations,” sites for the cultivation not of specifically “liberal democratic dispositions,” but

³ I discuss this familiar tension in other work: LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (2006); Linda C. McClain, *Negotiating Gender and (Free and Equal) Citizenship: The Place of Associations*, 72 *FORDHAM L. REV.* 1569 (2004); Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 *FORDHAM L. REV.* 1617 (2001); Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 *CHI.-KENT L. REV.* 301 (2000).

⁴ NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* 36-41 (1998).

⁵ JOHN RAWLS, *POLITICAL LIBERALISM* 14 (1993).

⁶ *Id.* at 43.

⁷ *Id.* at 11.

of “a whole range of moral dispositions, presumably supportive of political order.”⁸

What happens, however, when values and virtues generated by other nongovernmental institutions are in seeming conflict with political values and virtues? The second idea about the relationship between civil society and government recognizes this potential for conflict. Government’s formative project of cultivating good citizenship may clash with the formative tasks of religious institutions and voluntary associations. To use the parlance of civil society, what if certain associations sow bad seeds or are weedbeds of vice instead of seedbeds of civic virtue?⁹ The United States constitutional order builds on this tension between civil society as congruent with, as opposed to a buffer against, the state by recognizing the fundamental right—and responsibility—of parents for the care, custody, and education of their children, even as it recognizes education of the young as perhaps the most important function of government.¹⁰ Classic parental liberty cases affirm that the state can go “very far indeed”¹¹ in inculcating good citizenship in children, but may not rely on measures that veer toward coercive imposition of a governmental orthodoxy. The possibility of this conflict invites the question of how much pluralism a healthy constitutional democracy can sustain in a system in which there coexist multiple sites of sovereignty¹² and the ideal of unity amidst diversity. What limits must government respect, for example, when it regulates behavior to advance political values, such as a principle that free and equal citizenship requires being free from discrimination on certain bases?

When the issue is tensions between religious and political values, one obvious constitutional limit is that government may not compel

⁸ ROSENBLUM, *supra* note 4, at 41.

⁹ There is a lack of consensus among proponents of renewing civil society on the issue of congruence. See McClain & Fleming, *supra* note 3, at 313 (“Commentators on civil society find themselves in sharp conflict over ‘congruence’—the idea that the internal structures and norms of voluntary associations should (or must) be democratic, participatory, and civil if they are to promote broader societal aims of political democracy.” (quoting NAT’L COMM’N ON CIVIC RENEWAL, A NATION OF SPECTATORS: HOW CIVIC DISENGAGEMENT WEAKENS AMERICA AND WHAT WE CAN DO ABOUT IT 41 (1998)) (internal quotation marks omitted)). I borrow the term “weedbeds of vice” from Eileen McDonagh, who suggested it in conversation.

¹⁰ Compare *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (noting Fourteenth Amendment liberty of parents to “bring up children” and, “[c]orresponding to the right of control,” “the natural duty of the parent to give his children education suitable to their station in life”), and *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (striking down statute that “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control”), with *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (describing education as “perhaps the most important function of state and local governments”).

¹¹ *Meyer*, 262 U.S. at 399-400.

¹² See Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 CHI.-KENT L. REV. 477 (2000).

religious belief. This offends the principle of toleration, reflected in the constitutional protection of the free exercise of religion. Political liberalism, for example, maintains that given the “fact of reasonable pluralism” that results when persons are free to exercise their moral powers, uniformity of belief—or orthodoxy—would be possible only by the exercise of “intolerable” governmental power (the “fact of oppression”).¹³ Nor does our constitutional scheme permit government to favor one religious message over another or become entangled with religion. This violates the First Amendment’s prohibition on the establishment of religion. The robust protection of religious belief, however, does not extend entirely to religious practice, or religiously motivated conduct. Religious exemptions are one pressure valve in the system: Government may afford religious institutions exemptions from certain laws in order to protect religious freedom. Whether the U.S. Constitution requires such exemptions is another matter, and the subject of the landmark case that forms the basis for this Symposium: *Employment Division, Department of Human Resources of Oregon v. Smith*.¹⁴ Writing for the majority, Justice Scalia, quoted above, warns that unfettered freedom of religious practice—and a constitutional entitlement to religious exemptions from general laws—would allow each person “to become a law unto himself,” exempt from all manner of “civic obligations.”¹⁵ Concurring in the judgment, but not the majority’s reasoning, Justice O’Connor warns that abandoning the compelling state interest test for encroachments on religious liberty risks unjustified sacrifices of religious freedoms “as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.”¹⁶ And Justice Blackmun, in dissent, stresses the basic congruence between the values and interests underlying Oregon’s anti-drug law, which was at issue, and the values and interests of the persons seeking a religious exemption from those laws (and the values of the Native American Church to which they belonged).¹⁷

In this Article, I take up the question of where *Smith* fits into the political and constitutional dilemma over congruence. I argue that a close examination of the majority and dissenting opinions in *Smith* yields instructive views on congruence, on pluralism, and on how to resolve the clash between distinct constitutional values. I then consider another significant Supreme Court case involving religious liberty and its limits: *Bob Jones University v. United States*,¹⁸ in which the Court

¹³ RAWLS, *supra* note 5, at 37.

¹⁴ 494 U.S. 872 (1990).

¹⁵ *Id.* at 885, 888.

¹⁶ *Id.* at 895 (O’Connor, J., concurring in the judgment) (quoting *Bowen v. Roy*, 476 U.S. 693, 728 (1986)).

¹⁷ *Id.* at 914 (Blackmun, J., dissenting).

¹⁸ 461 U.S. 574 (1983).

upheld the Internal Revenue Service's revocation of the university's tax exempt status because of its racially discriminatory policies. I contend that both cases are about the problem of congruence: the relationship between private and public, or associational and governmental, values and virtues. Granted, *Smith* involved an outright prohibition of a religious practice, while *Bob Jones University* involved denial of a subsidy (tax exemption), but both well illustrate tensions over the place of associations—and of pluralism—in a constitutional democracy. Both continue to feature in contemporary considerations of these issues. Neither of these cases lacks for legal commentary, but I believe that considering them together in the context of the challenges posed by congruence and pluralism will add something of value to that commentary. To suggest the continuing relevance of these cases, I evaluate the various opinions in *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez*.¹⁹ I analyze this case because it squarely presents the issue of congruence, in the form of the clash between a public university's attempts to carry out its educative mission through enforcing norms of antidiscrimination and a student organization's freedom to choose its members and promote a particular message about sexuality.

I. READING *SMITH* AS A CASE ABOUT CONGRUENCE

Smith, I suggest, reads instructively as a case about congruence. But first, a basic recital of the issue and holding: Justice Scalia, writing for the Court, frames the issue as:

[W]hether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.²⁰

Smith's controversial holding was that the application of a neutral, generally applicable law to religiously motivated action is not subject to a compelling state interest test, and that an exemption from such a law was not constitutionally required. Like Justices O'Connor and Blackmun, many legal commentators (including some contributors to this Symposium) contend that this was a radical—and unjustified—departure from the Court's well-settled free exercise jurisprudence.²¹

¹⁹ 130 S. Ct. 2971 (2010).

²⁰ *Smith*, 494 U.S. at 874.

²¹ *Id.* at 891 (O'Connor, J., concurring in the judgment) (“[T]oday’s holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation’s fundamental commitment to individual

By contrast, other contributors counter that *Smith* followed logically from prior Supreme Court precedents and that “the persistent claim that *Smith* radically altered free *exercise* doctrine is simply wrong.”²² In either case, *Smith* triggered more than one effort by Congress to overturn it by restoring religious freedom, and states continue to consider (and sometimes approve) their own religious freedom restoration acts.²³

In this Article, I do not weigh in on the question of whether *Smith* was sound as a matter of constitutional interpretation. Rather, in keeping with the Symposium’s aim of assessing its continuing relevance some twenty years later, I propose that it is of considerable contemporary interest on the issue of congruence and how to address the evident clash between religious liberty and government’s formative purposes, as well as the clash between religious values and virtues and political values and virtues.

A. *When Religious and Civic Obligations Conflict:
Obedience to General Laws as a Strategy for
Handling Religious Diversity*

On this clash point, I begin with Justice Scalia’s invocation of the negative consequences both for duties of responsible citizenship and for government’s formative ends under a rule that would subject to strict scrutiny every general law that burdened religiously motivated conduct. In support, he turns to Justice Felix Frankfurter’s statement in the first flag salute case, *Minersville School District v. Gobitis*:²⁴

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a

religious liberty.”); *id.* at 908-09 (Blackmun, J., dissenting) (“[The Court’s] distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a ‘luxury’ that a well-ordered society cannot afford . . .”). For an instructive list of critical commentary, see Marci A. Hamilton, *Employment Division v. Smith at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671, 1671 n.2 (2011) (citing numerous articles). For criticisms of *Smith* in this Symposium, see Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 CARDOZO L. REV. 1755 (2011); Steven D. Smith, *Religious Freedom and Its Enemies, or Why The Smith Decision May Be a Greater Loss Now than It Was Then*, 32 CARDOZO L. REV. 2033 (2011).

²² See Hamilton, *supra* note 21.

²³ Congress passed the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2006), which was declared unconstitutional by the Supreme Court in *Boerne v. Flores*, 521 U.S. 507 (1997). For a discussion of subsequent laws, see Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907 (2011).

²⁴ 310 U.S. 586, 594-95 (1940), *overruled by* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

general law not aimed at the promotion of restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizens from the discharge of political responsibilities.²⁵

In this passage, Justice Frankfurter speaks of the obligations of citizenship in terms of carrying out “political responsibilities.”²⁶ He posits a lack of congruence when he refers to “religious convictions which contradict the relevant concerns of a political society.”²⁷ But he imagines the lack of congruence can be overcome at the level of conduct: A religious person, even if his or her beliefs do not support political values, must still obey the law.

In further support, Justice Scalia cites to *Reynolds v. United States*,²⁸ in which the Court upheld, against a religious freedom challenge, criminal laws against polygamy.²⁹ In *Reynolds*, the Court addressed the negative impact on citizenship of granting a religious exemption from those laws:

Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.³⁰

Scalia returns later in the *Smith* opinion to *Reynolds*'s warning about allowing a man “to become a law unto himself,” when he declares that this risk would follow from a rule that could *only* insist that a person obey the law if there were a lack of congruence between his religious beliefs and the law when the state's interest was compelling.³¹ Such a rule, he argues, “contradicts both constitutional tradition and common sense.”³²

When Justice Scalia refers to the obligation to obey the law—and the risk posed by a constitutionally-mandated religious exemption from this obligation—he refers not only to laws aimed at preventing harmful conduct (such as the anti-drug law at issue) but also to laws carrying out a wide range of public policies. He states: “The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on measuring the effects of a governmental action of a religious

²⁵ *Smith*, 494 U.S. at 879 (quoting *Minersville*, 310 U.S. at 594-95).

²⁶ *Minersville*, 310 U.S. at 594-95.

²⁷ *Id.*

²⁸ 98 U.S. 145 (1878).

²⁹ *Id.* at 166.

³⁰ *Id.* at 166-67.

³¹ *Emp't Div. v. Smith*, 494 U.S. 872, 885 (1990) (quoting *Reynolds*, 98 U.S. at 167).

³² *Id.* at 885.

objector's spiritual development."³³ He warns against transplanting the compelling state interest tests from familiar fields like differential treatment on the ground of race or content-based regulation of speech to a more general test for governmental regulation: "What it produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly."³⁴ Applying a compelling interest test across the board to all actions "thought to be religiously commanded"³⁵ would risk anarchy and, in effect, impair good citizenship; it would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."³⁶ The varied civic obligations he lists (each supported by a citation to a prior Supreme Court case, but called a "parade of horrors" by Justice O'Connor in her concurring opinion³⁷) range from

compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, . . . and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.³⁸

For this last civic obligation, "laws providing for equality of opportunity for the races," Justice Scalia cites *Bob Jones University v. United States*,³⁹ to which I turn in Part III.

For Justice Scalia, cabining the compelling state interest test is a necessary consequence of America's sheer religious diversity. Rather than assuming a basic congruence between these diverse religious beliefs and civil laws, he assumes inevitable conflict of such laws with at least some religious beliefs. Thus, given this diversity, an across the board application is an unaffordable "luxury":

Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of

³³ *Id.* (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988)). Scalia also invokes *United States v. Lee*, 455 U.S. 252 (1982), which rejected a claim for a tax exemption by an Amish employer based on religious objection to Social Security. *Smith*, 494 U.S. at 880. There, the Court observed that the tax system "could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.* (internal quotation marks omitted) (citing *Lee*, 455 U.S. at 260).

³⁴ *Smith*, 494 U.S. at 886.

³⁵ *Id.* at 888.

³⁶ *Id.*

³⁷ *Id.* at 902 (O'Connor, J., concurring in the judgment).

³⁸ *Id.* at 889 (majority opinion) (citations omitted).

³⁹ 461 U.S. 574 (1983).

them. Precisely because “we are a cosmopolitan nation made up of people of almost every conceivable religious preference,” and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.⁴⁰

When a generally applicable law is at stake (rather than a law targeting religion), the compelling state interest test should be reserved for what Scalia refers to as “hybrid” situations, where a person conjoined a free exercise claim with another constitutional protection, such as freedom of speech or parental liberty.⁴¹ A famous example of such a “hybrid” case (mentioned by Scalia and discussed in Justice Blackmun’s *Smith* dissent) is *Wisconsin v. Yoder*,⁴² where the Court invalidated a compulsory school attendance law as applied to Amish parents who had religious grounds for not sending their children to high school.⁴³ Another case he envisions is one “in which a challenge on freedom of association grounds would . . . be reinforced by Free Exercise concerns.”⁴⁴ But he concludes that the present case is not a “hybrid situation,” but “a free exercise claim unconnected with any communicative activity or parental right.” The absence of a hybrid claim in *Smith*—that is, that the drug law attempts “to regulate religious beliefs, the communication of religious beliefs, or the raising of one’s children in those beliefs”—seems to reinforce Scalia’s conclusion that *Reynolds* should control. Again, he returns to the language of *duty* and the strategy of resolving a lack of congruence by insistence upon obedience to law: “Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.”⁴⁵

Smith’s contemplation of a “hybrid situation” itself is the source of confusion and controversy, including among lower courts applying *Smith*, and may account for the migration of free exercise claims into freedom of expressive association ones.⁴⁶ Indeed, as I discuss in Part

⁴⁰ *Smith*, 494 U.S. at 888 (citing *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)).

⁴¹ *Id.* at 881-82.

⁴² 406 U.S. 205 (1972).

⁴³ *Id.* at 207.

⁴⁴ *Smith*, 494 U.S. at 882 (analogizing to *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), which stated: “An individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed.”).

⁴⁵ *Id.* (citing *Gillette v. United States*, 401 U.S. 437, 461 (1971)).

⁴⁶ Richard Schragger, *The Politics of Free Exercise After Employment Division v. Smith: Same-Sex Marriage, the “War on Terror,” and Religious Freedom*, 32 CARDOZO L. REV. 2009 (2011); see also *Parker v. Hurley*, 514 F.3d 87, 97-98 (1st Cir. 2008) (“What the Court meant by its discussion of ‘hybrid situations’ in *Smith* has led to a great deal of discussion and

IV, the Christian Legal Society chapter at Hastings combined a Free Exercise objection to Hastings's antidiscrimination policy with free speech and freedom of association claims.⁴⁷

Finally, another notable aspect of Justice Scalia's majority opinion is his conclusion that religious objectors to general laws may seek exemptions through the democratic process. He assures: "Values that are protected against governmental interference through enshrinement in the Bill of Rights are not thereby banished from the political process."⁴⁸ He opines that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation."⁴⁹ At the time of his writing, many states did have such exemptions, as did the federal government. His point, however, is that such exemptions are permissible, but not constitutionally required. His ultimate observation is about reliance on the democratic process, which he acknowledges could place minority religious practices at a "relative disadvantage."⁵⁰ Nonetheless, "that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."⁵¹

This final observation raises the question of whether the majority opinion's concern about each conscience being a law unto itself pertained particularly to "minority" religions, be it the nineteenth century Mormons or the contemporary members of the Native American Church. Did Smith and Black lose because they belonged to an unfamiliar, or "weird religion," whose ceremonial ingestion of peyote seemed worlds apart from the ceremonial ingestion, by Christians, of wine for communion?⁵² Did the Amish, a minority religion, win in *Yoder* because the Court found in their way of life traces of America's own rural roots and a basic congruence between their values and those of good citizenship? As we shall see, Justice Blackmun invokes *Yoder* in his emphasis on congruence.

disagreement. . . . No published circuit court opinion . . . has ever applied strict scrutiny to a case in which plaintiffs argued they had presented a hybrid claim.").

⁴⁷ Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010); *infra* Part III.

⁴⁸ 494 U.S. at 890.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Justice Blackmun, in dissent, argues that "respondents' use of peyote seems closely analogous to the sacramental use of wine by the Roman Catholic Church," which, during Prohibition, was exempted from the general ban on possession and use of alcohol. *Id.* at 913 n.6 (Blackmun, J., dissenting).

B. *Justice O'Connor's Concurrence: What Sacrifices Must Religious Persons Make for the Benefits of Citizenship?*

Justice O'Connor concurred in the judgment of the Court, but wrote separately, joined in parts of her opinion by three dissenting Justices—liberals Brennan, Marshall, and Blackmun—to stress her disagreement with its First Amendment analysis. She rejects the Court's extraction from its free exercise precedents of "the single categorical rule that 'if prohibiting the exercise of religion . . . [is] merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.'"⁵³ She draws on *Yoder* for the point that "[b]elief and action cannot be neatly confined in logic-tight compartments."⁵⁴ She argues that "[b]ecause the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause."⁵⁵ She rejects the Court's distinction between laws "that are generally applicable and laws that target particular religious practices," saying the First Amendment does not make such a distinction.

Of particular relevance to the consideration of congruence is her discussion of citizenship and sacrifice. She notes that established First Amendment jurisprudence recognizes that "the freedom to act, unlike the freedom to believe, cannot be absolute." Here, she cites to *Reynolds*. The compelling state interest and narrow tailoring test respect the First Amendment as well as governmental interest in regulating conduct.⁵⁶ She articulates the value of this test in terms of citizenship, namely, to guard against undue sacrifice by religious persons of their freedoms as the price of equal citizenship. She states:

The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests "of the highest order[.]" "Only an especially important government interest pursued by narrowly tailored means can justify exacting a sacrifice

⁵³ *Id.* at 892 (O'Connor, J., concurring in the judgment).

⁵⁴ *Id.* at 893 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1973)).

⁵⁵ *Id.*

⁵⁶ *Id.* at 894.

of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.”⁵⁷

This statement implies that there may be situations in which such a sacrifice is justified, but that a strict test gives due weight to the constitutional value of religious liberty. In other words, O’Connor contemplates that there may not be congruence between religious beliefs and practices and the obligations of citizenship, and argues that our constitutional order permits this lack of congruence to stand unless what is at stake are governmental interests “of the highest order.”⁵⁸

O’Connor rejects the majority’s casting of decisions like *Yoder* as “hybrid” in order to distinguish them. Rather, she counters that so-called hybrid cases are part of the “mainstream” of free exercise jurisprudence.⁵⁹ Thus, in the cases cited by the majority as examples of its categorical rule about laws of general application, the Court “rejected the particular constitutional claims before us only after carefully weighing the competing interests.”⁶⁰

O’Connor, whose jurisprudence often reflected a concern about a person’s standing in a community, returns to the themes of sacrifice of freedom and the price of inclusion. For example, she rejects the majority’s distinction between direct and indirect burdens on religious practice, stressing instead the effect of both kinds of restrictions on the religious person’s place in the “civil community”:

[T]he essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one’s own religion or conformity to the religious beliefs of others the price of an equal place in the civil community.⁶¹

Pertinent both to *Bob Jones University* and *Christian Legal Society*, she also rejects the distinction between a state’s affirmative prohibition of religious conduct and a state’s conditioning receipt of benefits on conduct prohibited by religious beliefs. Both those cases involve the latter type of regulation. She contends that “[t]he *Sherbert* compelling interest test applies in both kinds of cases.”

O’Connor’s stance is similar to the majority’s in recognizing that duty and social order are legitimate bases for regulation. In this sense, she recognizes the tension between the norms and practices of civil society and democratic norms and practices. She differs in insisting that

⁵⁷ *Id.* at 895 (citations omitted) (quoting *Yoder*, 406 U.S. at 215; *Bowen v. Roy*, 476 U.S. 693, 728 (1987)).

⁵⁸ *Id.* (quoting *Yoder*, 406 U.S. at 215).

⁵⁹ *Id.* at 896.

⁶⁰ *Id.*

⁶¹ *Id.* at 897.

when Free Exercise is involved, the Constitution requires government to show an overriding interest:

Legislatures, of course, have always been “left free to reach actions which were in violation of social duties or subversive of good order.” Yet because of the close relationship between conduct and religious belief, “[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.” . . . To me, the sounder approach . . . is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling. . . . Given the range of conduct that a State might legitimately make criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the first Amendment *never* requires the State to grant a limited exemption for religiously motivated conduct.⁶²

More so than the majority opinion, O’Connor stresses that competing constitutional rights and values are at stake. Freedom of religion is a favored activity, entitled to special protection. Far from being a constitutional “anomaly,” it is as much a “constitutional nor[m]” as freedom of speech or freedom from race discrimination.⁶³ She reiterates that religious conscience can be violated by general laws or laws aimed at religion:

There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion. . . . We have in any event recognized that the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause. As the language of the Clause itself makes clear, an individual’s free exercise of religion is a preferred constitutional activity.⁶⁴

She takes on Scalia’s “parade of horrors”—the numerous civic obligations supposedly at risk if the compelling state interest test applies to all Free Exercise claims. She argues that this list fails to demonstrate a reason for abandoning the compelling state interest test. To the contrary, it demonstrates the opposite: “that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests.”⁶⁵

⁶² *Id.* at 899-900 (internal citations omitted) (quoting *Reynolds v. United States*, 98 U.S. 145 (1878); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940)).

⁶³ *Id.* at 901.

⁶⁴ *Id.* at 901-02.

⁶⁵ *Id.* at 902.

Finally, O'Connor stresses that the compelling interest test preserves religious liberty in a pluralistic society. She rejects Justice Scalia's argument that "disfavoring of minority religions is an 'unavoidable consequence' under our system of government and that accommodation of such religions must be left to the political process."⁶⁶ Instead, she points out that "the history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish."⁶⁷ The First Amendment "was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."⁶⁸ While Justice Scalia cites to *Gobitis*, the first flag salute case, Justice O'Connor quotes Justice Jackson's famous words in the second flag case, *West Virginia State Board of Education v. Barnette*, which overruled *Gobitis*:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.⁶⁹

O'Connor then turns to another 1940s precedent about the Founders' understanding of the need for religious toleration as a strategy for avoiding violent disagreement over religious creeds. The idea expressed in that case is akin to Rawls's emphasis on toleration as arising out of the Wars of Religion and as a contemporary necessity in light of the facts of reasonable pluralism and of coercion:

The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views.⁷⁰

This passage also contemplates, similar to Rawls's political liberalism, that it is possible to have an organized political order (a shared political conception of justice) without a unified, shared religious philosophy (or what Rawls calls a comprehensive view).⁷¹ O'Connor concludes: "The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 903 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

⁷⁰ *Id.* (quoting *United States v. Bullard*, 322 U.S. 78, 87 (1944)).

⁷¹ RAWLS, *supra* note 5, at 10-15, 99, 206.

pluralistic society. For the Court to deem this command a 'luxury,' is to denigrate '[t]he very purpose of a Bill of Rights.'"⁷²

It bears mentioning that O'Connor believes established free exercise jurisprudence leads to the same result as the majority in *Smith*: The criminal prohibition of peyote does impose a "severe burden" on free exercise of respondents' religion, since peyote is a "sacrament" and "vital" to religious practice, but Oregon has a "significant" interest in enforcing drug laws, given the problem of drug abuse.⁷³ Congress has found "high potential for abuse" of peyote, as evidenced by its status as a controlled substance.⁷⁴ Given that the Court has held the government's interests in income tax collection, Social Security, and military conscription are compelling, so too Oregon has a "compelling interest" in prohibiting peyote possession by its citizens.⁷⁵ What about the requested exemption? She describes it as a "close" question, but finds that Oregon's uniform application of its law is "essential" to accomplish its purpose.⁷⁶ Health effects exist regardless of motive of users, so that "the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them."⁷⁷ Uniformity of application is necessary to prevent trafficking. Selective exemption would impair the state's compelling interest in prohibiting possession.⁷⁸

O'Connor distinguishes *Yoder*. There, the Court found that accommodation would not "impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society."⁷⁹ Here, "a religious exemption . . . would be incompatible with the State's interest in controlling use and possession of illegal drugs."⁸⁰ In other words, there is a *lack of congruence* between exempting this religious practice and the state's goals. Like the majority, she observes that the fact that the federal government and several states provide exemptions is not the point: They may do so, but are not required to do so by the First Amendment.⁸¹ By contrast, as I now elaborate, Justice Blackmun stresses the basic congruence between religious practice and Oregon's goals.

⁷² *Smith*, 494 U.S. at 903 (O'Connor, J., concurring in the judgment) (citation omitted).

⁷³ *Id.* at 903-04.

⁷⁴ *Id.* at 904.

⁷⁵ *Id.* at 904-05.

⁷⁶ *Id.* at 905.

⁷⁷ *Id.*

⁷⁸ *Id.* at 906.

⁷⁹ *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1973)).

⁸⁰ *Id.* at 906.

⁸¹ *Id.*

C. *Justice Blackmun's Congruence Argument: Why Members of the Native American Church Are Like the Amish*

Justice Blackmun dissented in *Smith*, joined by Justices Brennan and Marshall. Like O'Connor, he argues that the majority opinion offers a "distorted view" of the Court's precedents, by suggesting a distinction between laws of general applicability and laws singling out religion, and "effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution."⁸² That settled law is: "[A] statute that burdens the free exercise of religion. . . . may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means."⁸³ Also like O'Connor, he sharply disagrees with Scalia's assessment of the compelling state interest test as a "'luxury' that a well-ordered society cannot afford," and with his implication that "the repression of minority religion is an 'unavoidable consequence of democratic government.'"⁸⁴ To the contrary, tolerance is part of the constitutional framework: "[T]he Founders thought their dearly bought freedom from religious persecution [not] a 'luxury,' but an essential element of liberty"⁸⁵

Justice Blackmun parts company with Justice O'Connor, however, in his answer to the "critical question . . . whether exempting respondents from the State's general criminal prohibition 'will unduly interfere with fulfillment of the governmental interest.'"⁸⁶ In effect, Justice Blackmun argues there is congruence between the state's values and interests and those of the persons seeking a religious exemption. Rather than framing the state's interest in very general terms (fighting the war on drugs), the frame should be in the specific terms of what the state's "narrow interest" is in refusing to make an exception for the religious, ceremonial use of peyote. In support, he cites *Yoder*, which focused on the specific question of how the sought exemption would impede state's objectives. As scholars of Free Exercise warn, he notes:

The purpose of almost any law can be traced back to one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue. To measure an individual

⁸² *Id.* at 908-09 (Blackmun, J., dissenting).

⁸³ *Id.* at 907.

⁸⁴ *Id.* at 908-09.

⁸⁵ *Id.* at 909.

⁸⁶ *Id.*

interest directly against one of these rarified values inevitably makes the individual interest appear the less significant.⁸⁷

Turning to this more narrowly framed question, Blackmun points out that Oregon has not tried to prosecute religious use of peyote, so what seems to be at issue is “symbolic preservation of an unenforced prohibition.”⁸⁸ But governmental interest in symbolism “cannot suffice to abrogate the constitutional rights of individuals.”⁸⁹ Evidence of harm is “speculative” since the state offered no evidence of harm from ceremonial use of peyote. Moreover, the federal government and twenty-three states have statutory or judicially created exemptions for religious use of peyote (the fact that exemptions are common seems to distinguish the case from *Reynolds*, where the federal government and the states uniformly outlawed polygamy).

Justice Blackmun stresses the basic harmony, or congruence, between the values and interests advanced by the drug laws and those of the Native American Church. For one thing, the “carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs.”⁹⁰ He draws an analogy between this ritual use and the sacramental use of wine in the Roman Catholic Church, which was exempted from Prohibition-era laws banning alcohol.⁹¹ In his congruence argument, he stresses both the harmony between the values of the Native American Church and those behind Oregon’s drug laws and the basic similarity between the Native American Church and the Amish. To appreciate this latter analogy, recall Chief Justice Burger’s reference, in the majority opinion in *Yoder*, to the Amish as self-sufficient, “productive,” “very law-abiding” members of society, who reject public welfare, and reminiscent of the “sturdy yeoman” of America’s past, celebrated by Thomas Jefferson.⁹² Blackmun explains the analogy:

Moreover, just as in *Yoder*, the values and interests of those seeking a religious exemption in this case are congruent, to a great degree, with those the State seeks to promote through its drug laws. Not only does the church’s doctrine forbid nonreligious use of peyote, it

⁸⁷ *Id.* at 910 (quoting J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 330-31 (1969)). Justice Blackmun also quotes Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943). See *Smith*, 494 U.S. at 910 (Blackmun, J., dissenting) (“When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane . . . [or else] we may decide the question in advance of our very way of putting it” (alterations in original) (internal quotation marks omitted)).

⁸⁸ *Smith*, 494 U.S. at 911 (Blackmun, J., dissenting).

⁸⁹ *Id.*

⁹⁰ *Id.* at 913.

⁹¹ *Id.* at 913 n.6.

⁹² *Wisconsin v. Yoder*, 406 U.S. 205, 222, 225-26 (1972).

also generally advocates self-reliance, familial responsibility, and abstinence from alcohol.⁹³

In support, Blackmun invokes the role the Church plays in fighting alcoholism and cites to an amicus brief explaining that the Church's "ethical code" has four parts: brotherly love, care of family, self-reliance, and avoidance of alcohol.⁹⁴ He stresses the basic congruence between religious and governmental values, and how the former can support the latter:

There is considerable evidence that the spiritual and social support provided by the church has been effective in combating the tragic effects of alcoholism on the Native American population. . . . Far from promoting the lawless and irresponsible use of drugs, Native American Church members' spiritual code exemplifies values that Oregon's drug laws are presumably intended to foster.⁹⁵

Blackmun then stresses another analogy to *Yoder*: Just as with the Amish's claim for a religious exemption from schooling, few religious groups other than the Native American Church could successfully get a religious exemption from the anti-drug laws without undermining the state's goals. Thus, the Court should reject Oregon's floodgates argument—that granting this exemption will lead to a "flood of other claims to religious exceptions."⁹⁶ The state's "apprehension" about a flood of other religious claims is "purely speculative," given that the experience of the many states that maintain an exemption is to the contrary.⁹⁷ Implicitly, Blackmun seems to be appealing to *Yoder* here too: Only Native Americans have successfully received religious exemption from drug laws in other states, hence granting this exemption will not undermine the state's general educational goals. Again, he reiterates the basic harmony between the state's interest and this religious practice: "The unusual circumstances that make the religious use of peyote compatible with the State's interests in health and safety and in preventing drug trafficking would not apply to other religious claims."⁹⁸

Blackmun returns explicitly to *Yoder* when he emphasizes the special circumstances that make religious use of peyote by this religion different, such that the state granting this religion an exemption for

⁹³ *Smith*, 494 U.S. at 914 (Blackmun, J., dissenting) (internal citation omitted) (citing *Yoder*, 406 U.S. at 224, 228-230 (since the Amish accept formal schooling up to 8th grade, and then provide "ideal" vocational education, State's interest in enforcing its law against the Amish is "less substantial than . . . for children generally"))).

⁹⁴ *Id.* (citing Brief Amici Curiae Ass'n on American Indian Affairs et al. in Support of Respondents, *Smith*, 494 U.S. 872 (No. 88-1213)).

⁹⁵ *Id.* at 915. He also notes that there is "practically no illegal traffic in peyote," even though the state appeals to an interest in abolishing drug trafficking. *Id.* at 916.

⁹⁶ *Id.*

⁹⁷ *Id.* at 917.

⁹⁸ *Id.* at 918.

religious peyote use but “deny[ing] other religious claims arising in different circumstances, would not violate the *Establishment Clause*.”⁹⁹ The state fulfills its obligation to “treat all religions equally, and not favor one over another . . . by the uniform application of the ‘compelling interest’ test to all free exercise claims, not by reaching uniform results as to all claims.”¹⁰⁰ Accordingly,

[a] showing that religious peyote use does not unduly interfere with the State’s interests is “one that probably few other religious groups or sects could make.” [T]his does not mean that an exemption limited to peyote use is tantamount to an establishment of religion.¹⁰¹

Blackmun draws a further analogy between the Amish and members of the Native American Church as special cases when he stresses the “potentially devastating impact” that Oregon’s law might have on members of the Native American Church: “If Oregon can constitutionally prosecute them for this act of worship, they, like the Amish, may be ‘forced to migrate to some other and more tolerant region.’”¹⁰² Blackmun fortifies this impact argument by taking note of “the federal policy—reached in reaction to many years of religious persecution and intolerance—of protecting the religious freedom of Native Americans.”¹⁰³ He concludes that, lest Congressional policy and the First Amendment offer “merely an unfulfilled and hollow promise,” the Court should “scrupulously apply its free exercise analysis to the religious claims of Native Americans, however unorthodox they may be.”¹⁰⁴

This reference to “unorthodox” religious claims at the end brings to mind the criticism that the claimants lost in *Smith* because they belonged to a “weird” religion, while the Amish won in *Yoder* because Chief Justice Berger saw in them the yeoman farmers of America’s past, virtuous and admirable in their self-sufficiency. Yet the point Blackmun advances in his dissent is that the members of the Native American Church are like the Amish in having religious practices that are more congruent with than harmful to important state purposes. Thus, he makes both a congruence argument in defense of the exemption as well as a plea for religious tolerance of the unorthodox, to the extent the religious practices are *different but not harmful to the*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (citation omitted).

¹⁰² *Id.* at 920 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)).

¹⁰³ *Id.* at 920-21 (citing the legislative history of 42 U.S.C. § 1996 (1982), which protects religious freedom of Native Americans and includes Congressional recognition of ceremonial use of peyote and its necessary role in the “cultural integrity of the tribe, and, therefore, religious survival” (quoting H.R. REP. NO. 95-1308, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1262)).

¹⁰⁴ *Id.* at 921.

state's interest. The Amish and the Native American Church are also special cases because of the potential for “devastating impact” if they are forbidden to engage in their religious practice. This idea of the Amish as presenting a special case, such that few others could successfully claim an exemption, echoes in many contemporary Free Exercise challenges.¹⁰⁵ After all, Scalia mentioned *Yoder* as a successful “hybrid” claim that warranted more searching review than the rule announced in *Smith*. Typically, however, courts invoke the Amish to reject the Free Exercise challenge because the religious parties are not similarly situated to the Amish.¹⁰⁶ The special case seems, then, to have two features: (1) there is harmony between religious values and practice and the state's interests, at least to the extent that the former are “compatible” with the state's interest; and (2) to deny the exemption would have uniquely harmful consequences to the claimants.

II. ANOTHER SIGNIFICANT CASE ABOUT CONGRUENCE: *BOB JONES UNIVERSITY V. UNITED STATES*

In *Bob Jones University v. United States*,¹⁰⁷ the United States Supreme Court rejected a challenge brought by Bob Jones University, a Christian school, to the Internal Revenue Service's (IRS) denial of 501(c)(3) tax-exempt status to the university because of its racially discriminatory practices. One immediate link between *Smith* and this case is that Justice Scalia cites to it in his cautionary list in *Smith* of the types of laws that a constitutional right to a religious exemption from a neutral, generally applicable law would threaten (“laws providing for equality of opportunity for the races”).¹⁰⁸ But a deeper link is that, like

¹⁰⁵ Although it is beyond the scope of the present Article, I should note that *Yoder* is not without its critics, most famously Justice Douglas, in dissent. In this Symposium, James Dwyer argues that while the “central holding of *Smith* is very congenial to the family law academy,” because its limiting of a right to religious exemptions is supportive of the use of state power to protect vulnerable persons in private, *Smith's* apparent “reaffirmation of *Yoder*” and “suggestion that [*Smith's*] central principle simply would not apply to religious parenting cases” (so-called “hybrid” cases) has undermined its holding in the family law realm. James G. Dwyer, *The Good, the Bad, and the Ugly of Employment Division v. Smith for Family Law*, 32 CARDOZO L. REV. 1781, 1781-82 (2011). Also in this Symposium, Leslie Griffin discusses why *Smith* is “necessary to support women's equality in the family and reproductive rights,” and criticizes courts and legislatures for not taking *Smith* seriously. Leslie C. Griffin, *Smith and Women's Equality*, 32 CARDOZO L. REV. 1831, 1835 (2011).

¹⁰⁶ See, e.g., *Parker v. Hurley*, 514 F.3d 87, 100 (1st Cir. 2008) (discussing the applicability of *Smith* and distinguishing the situation of parents challenging Massachusetts's diversity curriculum from that of parents in *Yoder* because the former do not face a threat to a “distinct community and lifestyle”).

¹⁰⁷ 461 U.S. 574 (1983).

¹⁰⁸ *Smith*, 494 U.S. at 889.

Smith, Bob Jones University may be read instructively as a case about congruence.

A. *Congruence Between Public and Civil Society Purposes*

A central reason that the Court affirmed the IRS's denial is that the Court's own prior decisions "stated that a public charitable use must be 'consistent with local laws and public policy.'"¹⁰⁹ Here, the relevant public policy is "a firm national policy to prohibit racial segregation and discrimination in public education."¹¹⁰ The Court, in a majority opinion written by Chief Justice Warren Burger, emphasized that this particular public policy is fundamental. But it also acknowledged that until fairly recently, racial segregation was part of public education, legitimated in part by the Court's own precedents. However, *Brown v. Board* "signalled an end to that era" and the emergence of a "firm national policy" against segregation and discrimination in education.¹¹¹ Chief Justice Burger recounted this shift:

[T]here can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice. Prior to 1954, public education in many places still was conducted under the pall of *Plessy v. Ferguson*; racial segregation in primary and secondary education prevailed in many parts of the country. This Court's decision in *Brown v. Board of Education* signalled an end to that era. Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a *firm national policy* to prohibit racial segregation and discrimination in public education.¹¹²

The very fact that the Nation struggled with and repudiated racial segregation fortified the Court's conviction that current practices of discrimination were not congruent with public values and, therefore, not charitable. Precisely because of the Nation's extensive and vigorous debates over racial discrimination, and "the stress and anguish of the history of efforts to escape from the shackles of the 'separate and equal' doctrine of *Plessy v. Ferguson*, it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising 'beneficial and stabilizing influences in community life.'"¹¹³

¹⁰⁹ *Bob Jones Univ.*, 461 U.S. at 591 (quoting *Perin v. Carey*, 65 U.S. (24 How.) 465, 501 (1861)).

¹¹⁰ *Id.* at 593.

¹¹¹ *Id.*

¹¹² *Id.* at 593 (emphasis added) (citations omitted).

¹¹³ *Id.* at 595 (citation omitted) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970)).

Part of the emergence of this “firm national policy” is the recognition that racial discrimination also violates the “rights of individuals.”¹¹⁴ The Court detailed its long line of cases asserting a “fundamental” and “pervasive” right of a student “not to be segregated in racial grounds in schools.”¹¹⁵

How do Bob Jones University’s practices clash with this fundamental, “firm,” national policy? The University’s sponsors “genuinely believe that the Bible forbids interracial dating and marriage,” leading it, initially, to exclude “Negroes” from admission, then to admit only Negroes married within their race, and, later, to admit Negroes, but subject to a disciplinary rule prohibiting interracial dating and marriage.¹¹⁶ The Court rejected the University’s Free Exercise claim. It observes that “[n]ot all burdens on religion are unconstitutional The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.”¹¹⁷ The Court also observed that, by contrast to some applications of this test that upheld outright prohibition of religious conduct (“such as ‘neutrally cast’ child labor laws applied to prohibit street preaching by religious children”¹¹⁸), this case involved denial of a tax exemption. The Court stated: “[D]enial 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.”¹¹⁹ Recall that in *Smith* Justice O’Connor argued that religious practice could be burdened just as seriously by the conditioning of benefits upon refraining from the practice as from outright denial.

The Court explained that part of the reason that the government’s interest is so compelling—indeed, “fundamental” and “overriding”—in the present case is government’s own participation in perpetuating racial discrimination: “[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation’s history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.”¹²⁰

Government, the Court continued, cannot accommodate the university’s practices consistent with pursuing that compelling governmental interest. Bob Jones University argued, for example, that

¹¹⁴ *Id.* at 593.

¹¹⁵ *Id.* (quoting *Cooper v. Aaron*, 358 U.S. 1, 19 (1958)).

¹¹⁶ *Id.* at 580-81.

¹¹⁷ *Id.* at 603 (quoting *United States v. Lee*, 455 U.S. 252, 257-58 (1982)).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 603-04.

¹²⁰ *Id.* at 604.

it allows all races to enroll, but just puts restrictions on their interracial association. The Court countered that its precedents, such as *Loving v. Virginia*,¹²¹ “firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination.”¹²²

Bob Jones University also argued that Congress had not explicitly referred to public policy in the definition of a 501(c)(3) corporation and the IRS overstepped its bounds in its rulings. The Court rejected this by ruling that Congress had, since the inception of the tax code, invested broad administrative authority in the IRS. The relevant point, for the Court, was that the IRS had consistently referred to principles of charitable trust law, that is, that a charity provides a truly “public” benefit.¹²³ While the IRS should only make determinations that an entity is not worthy of “charitable status” when there can be no doubt that its activities violate fundamental public policy, that test was met here:

[T]here can be no doubt as to the national policy. In 1970, when the IRS first issued the ruling challenged here, the position of all three branches of the Federal Government was unmistakably clear. . . . Clearly an educational institution engaging in practices affirmatively at odds with this declared position of the whole government cannot be seen as exercising a “beneficial and stabilizing influenc[e] in community life.”¹²⁴

Bob Jones University may continue with its discriminatory rule, the Court observed, but it may not be considered a tax-exempt charity so long as it does so. In effect, government must tolerate, but need not subsidize, religious practice that offends fundamental national policies. Here, the Court stressed the importance of congruence when a tax exemption is sought. Charitable trust laws, or common law standards of charity, require “that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.”¹²⁵ The Court elaborated on the need for harmony or compatibility between a tax-exempt organization’s purposes and public purposes, explaining the place of charities in the political order:

Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues. History buttresses logic to make clear that to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably

¹²¹ 388 U.S. 1 (1967).

¹²² *Bob Jones Univ.*, 461 U.S. at 605.

¹²³ *Id.* at 596-99.

¹²⁴ *Id.* at 599 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970)).

¹²⁵ *Id.* at 586.

serve and *be in harmony with the public interest*. The institution's purposes must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.¹²⁶

Striking here is the Court's notion of tax-exempt charities as filling gaps—either by providing benefits not supplied by “society or the community”—and as supplementing, or complementing, the work of “public institutions.” Decades after this case, national political leaders champion the place of faith-based and community-based institutions in filling such gaps and as vital partners with government to provide important public services and advance public policies.¹²⁷ Also noteworthy is how the Chief Justice alternated between “harmony” with “the public interest” and not being “at odds” with “the common community conscience.” Both of these expressions not only reiterate the importance of congruence, but also imply a unitary, rather than pluralistic, conception of the public interest or conscience.

B. *Justice Powell's Vision of Pluralism and the Public Good*

Justice Powell's concurring opinion in *Bob Jones University* aptly brings out another vision of the functions of the institutions of civil society: They are places in which pluralism is nourished, even through associations that honor values in conflict with current democratic values. He suggested that congruence, or harmony between democratic and associational values, may *not* be key to government providing a benefit, that is, tax exempt status. He agreed with the majority that the national policy against racial discrimination is sufficiently strong to override tax exemption in this particular case, but he disagreed with the Court's reliance on common law rules about charities as a guide to tax-exempt status; that is, “[c]haritable exemptions are justified on the basis that the exempt entity confers a public benefit.”¹²⁸ Why? He doubted that “all or even most of those [501(c)(3)] organizations could prove that they ‘demonstrably serve and [are] in harmony with the public interest’” or that they are “beneficial and stabilizing influences in community life.”¹²⁹ Even a racially discriminatory institution, he argued, can contribute something to the community, namely, educational benefits, evident from “the substantially secular character of

¹²⁶ *Id.* at 591-92 (emphasis added).

¹²⁷ See Linda C. McClain, *Unleashing or Harnessing “Armies of Compassion”?: Reflections on the Faith-Based Initiative*, 39 LOY. U. CHI. L.J. 361 (2008).

¹²⁸ *Bob Jones Univ.*, 461 U.S. at 608 (Powell, J., concurring in part and concurring in the judgment).

¹²⁹ *Id.* at 609.

the curricula and degrees offered” by Bob Jones University.¹³⁰ Thus, he raises a general question about whether there is, or need be, harmony between a charity’s ends and the articulated public interest.

Powell sounds the theme of associations guarding against governmental orthodoxy, an idea in tension with the “liberal expectancy” of congruence between civil society and the political order. His view of the proper understanding of pluralism is that such a lack of congruence is a salutary check on state power:

Far from representing an effort to reinforce any perceived “common community conscience,” the provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life. Given the importance of our tradition of pluralism, “[t]he interest in preserving an area of untrammelled choice for private philanthropy is very great.”¹³¹

Tolerance for diversity animates Powell’s emphasis on civil society’s buffering role. Benignly, it seems, government sets up a scheme that facilitates this diversity. This vision is in sharp contrast to the majority’s interpretation of the tax exemption laws as requiring congruence between associational ends and a seemingly unitary public interest and community conscience. Powell remarked upon the enormous diversity among the thousand-page list of tax exempt organizations, named a few dozen (including the American Friends Service Committee, the Jehovah’s Witnesses in the United States, Union of Concerned Scientists Fund, Inc., and both the National Right to Life Educational Foundation and the Planned Parenthood Federation of America), and concluded:

It would be difficult indeed to argue that each of these organizations reflects the views of the “common community conscience” or “demonstrably . . . [is] in harmony with the public interest.” In identifying these organizations, largely taken at random from the tens of thousands on the list, I of course do not imply disapproval of their being exempt from taxation. Rather, they illustrate the commendable tolerance by our Government of even the most strongly held divergent views, including views that at least from time to time *are* “at odds” with the position of our Government.”¹³²

Powell quoted his own dissent in *Mississippi University for Women v. Hogan*, in which the Court, in the previous term, struck down Mississippi University for Women’s policy of admitting only female students to its nursing school.¹³³ There, he observed: “A distinctive

¹³⁰ *Id.*

¹³¹ *Id.* at 609-10 (quoting *Jackson v. Statler Found.*, 496 F.2d 623, 639 (2d Cir. 1974) (Friendly, J., dissenting from denial of reconsideration en banc)).

¹³² *Id.* at 610 n.3.

¹³³ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 733 (1982).

feature of America's tradition has been respect for diversity. This has been characteristic of the peoples from numerous lands who have built our country. It is the essence of our democratic system."¹³⁴ He added that sectarian schools make an "important contribution" to this tradition by providing an "educational alternative for millions of young Americans" and "often afford[ing] wholesome competition with our public schools."¹³⁵ This notion of civil society's institutions competing with governmental ones is a salient one in contemporary debates over the proper reach of public norms and antidiscrimination laws, where scholars inclined to Powell's view of diversity call for a "moral marketplace" in which government is one actor, not a monopolist.¹³⁶

Is there no place, on this view, for governmental orthodoxy? Or must government fund regardless of how sharp the conflict between public and private values? Powell acknowledged that these considerations about diversity may not always be dispositive and that, sometimes, governmental orthodoxy should prevail.¹³⁷ Thus, with respect to Bob Jones University, he agreed with the Court that "Congress has determined that the policy against racial discrimination in education should override the countervailing interest in permitting unorthodox private behavior."¹³⁸

In Powell's concurrence is the seed of an idea that features in contemporary debates over the U.S. constitutional order's commitments to diversity and pluralism: Are these commitments best served by requiring that all institutions be open to all and practice no discrimination in membership or its terms and conditions, so that every group is a microcosm of the whole? Or are they better served by allowing groups to pursue their distinctive goods and purposes, including exercising discrimination in who may be members, so that the macrocosm is diverse in the sense that it is made up of so many distinct groups? Side-by-side with these questions is that of the role of government in subsidizing, or supporting, diversity and pluralism. The majority's distinction between tolerating and subsidizing associations whose values are not congruent with national commitments clashes with Powell's vision of a form of toleration that includes subsidies for unorthodox associations because of their contribution to pluralism. The

¹³⁴ *Bob Jones Univ.*, 461 U.S. at 610 n.4 (Powell, J., concurring in part and concurring in the judgment) (quoting *Hogan*, 458 U.S. at 745 (1982) (Powell, J., dissenting)).

¹³⁵ *Id.* (quoting *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part)).

¹³⁶ See, e.g., ROBERT VISCHER, *CONSCIENCE AND THE COMMON GOOD* (2010).

¹³⁷ *Bob Jones Univ.*, 461 U.S. at 610 (Powell, J., concurring in part and concurring in the judgment).

¹³⁸ *Id.* However, Justice Powell emphasizes that "the balancing of these substantial interests is for Congress to perform" and resists any suggestion that the IRS is "invested with authority to decide which public policies are sufficiently 'fundamental' to require denial of tax exemptions." *Id.* at 611.

recent case of *Christian Legal Society v. Martinez* revisits these vexing questions, as I now discuss.

III. ANTIDISCRIMINATION LAW AS A VEHICLE FOR TEACHING
SOCIAL COOPERATION AMIDST DIVERSITY:
CHRISTIAN LEGAL SOCIETY V. MARTINEZ

What is the import of *Smith* and *Bob Jones University* for contemporary challenges to governmental efforts to promote, as it were, an orthodoxy about antidiscrimination: that discrimination on certain bases is wrong and harms the individuals subject to it as well as society? Blackmun's dissent in *Smith* emphasized that the Amish were a special case, and that the Native American Church offered a similar special case where a religious exemption would be in harmony with governmental aims. The majority, by contrast, emphasized that, given America's sheer religious diversity, many of government's objectives might not be in harmony with religious beliefs and practices, and society would court anarchy if government had to satisfy a compelling state interest test to justify carrying out a myriad public policies. Only a "hybrid case" warranted closer scrutiny.

One reading of *Bob Jones University* is that racial discrimination is a special case, manifested by a "firm national policy" rectifying a shameful past practice of segregation. This history and legacy distinguish it in kind from some other antidiscrimination policies that target, by deeming them "public accommodations," private entities and associations, particularly those adopted by states or localities. The "purpose" of the civil rights legislation of the 1960s, including Title II's bar on discrimination in public accommodations based on race, the Supreme Court has observed, was "to obliterate the effect of a distressing chapter of our history."¹³⁹ However, in *Roberts v. United States Jaycees*, upholding Minnesota's public accommodations law barring sex discrimination against the freedom of association claim of the Jaycees, the Court analogized the stigmatic injuries and denial of dignity stemming from denial of access to public accommodations based on race to dignitary injuries due to denials based on sex.¹⁴⁰ The Court characterized Minnesota's "historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services" as "compelling state interests of the

¹³⁹ *Hamm v. City of Rock Hill*, 379 U.S. 306, 315 (1964) (holding that, in light of the passage of Title II, pre-passage convictions under state trespass laws for sit-in demonstrations in luncheon facilities of retail stores should be abated).

¹⁴⁰ 468 U.S. 609, 625 (1984).

highest order.”¹⁴¹ The Court cited *Heart of Atlanta Motel v. United States*, which upheld Title II of the Civil Rights Act of 1964, the “object” of which “was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’”¹⁴² It also invoked as its own anti-stereotyping Equal Protection sex equality jurisprudence.¹⁴³ Invoking *Jaycees*, lower courts may admit sex discrimination as another special case, along with race, reflecting a governmental interest of the highest order.¹⁴⁴ Nonetheless, Martha Minow observes that, by contrast to race-based discrimination, the treatment of “gender-based distinctions in law and in society” is “more ambiguous,” perhaps due to “the pervasiveness of gender-based roles in religious practice and teachings.”¹⁴⁵

What about discrimination based on sexual orientation? Jonathan Turley finds the ruling in *Bob Jones University* incompatible with “the pluralistic ideals of our society,” and foresees that “gay rights and same-sex marriage” will “reignite” this “controversy over tax-exempt status.” Society will “have to choose between the ideals of pluralism and equal treatment.”¹⁴⁶ He grants that racially discriminatory policies of the sort followed by Bob Jones University are “bad for society,” observing that, “thankfully relatively few organizations follow racially discriminatory policies and those organizations tend to be fringe groups.”¹⁴⁷ By contrast, “[i]t is far more common for mainstream religious and civil groups to discriminate on the basis of sexual orientation” and the potential for those groups to be “disenfranchised,” (i.e., have their Section 501(c)(3) status challenged), applying the logic of *Bob Jones*

¹⁴¹ *Id.* at 624.

¹⁴² *Id.* at 625 (quoting *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964)). I consider the import of *Heart of Atlanta Motel* for challenges to contemporary antidiscrimination law in Linda C. McClain, *Involuntary Servitude, Public Accommodations Law, and the Legacy of Heart of Atlanta Motel v. United States*, 71 MD. L. REV. (forthcoming 2011).

¹⁴³ *U.S. Jaycees*, 468 U.S. at 625 (citing, *inter alia*, *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

¹⁴⁴ See *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 714 (9th Cir. 1999) (citing *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *U.S. Jaycees*, 468 U.S. 609) (“Only twice has the Supreme Court recognized the prevention of discrimination as an interest compelling enough to justify restrictions on constitutional rights.”), *withdrawn*, 192 F.3d 1208 (9th Cir. 1999). In the subsequent en banc opinion, the Ninth Circuit held that religious landlords’ free speech and free exercise challenges to state and local antidiscrimination laws that protected unmarried persons against discrimination in housing were not ripe for review. *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134 (9th Cir. 2000).

¹⁴⁵ Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 814 (2007) (observing similar ambiguous treatment for discrimination based on sexual orientation).

¹⁴⁶ Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups and Unpopular Practices*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 59, 67-68 (Douglas Laycock et al. eds., 2008) [hereinafter SAME-SEX MARRIAGE].

¹⁴⁷ *Id.* at 68.

University, is “quite large.”¹⁴⁸ On the other hand, Douglas Kmiec observes that “the IRS has refused explicitly to push *Bob Jones* beyond the topic of race” and there is simply not the same sort of “fundamental public policy” supporting same-sex marriage as that against racial discrimination.¹⁴⁹

Like Turley, Robin Wilson also warns about the possible import of *Bob Jones University*’s rulings about tax-exempt organizations complying with “fundamental” public policy for religious objections to same-sex marriage and to providing goods and services to same-sex couples.¹⁵⁰ Her analysis treats race as a special case. Observing that many state public accommodations laws now include sexual orientation as a protected category, she notes the legislative concern for protecting dignity, but argues:

While the parallels between racial discrimination and discrimination on the basis of sexual orientation should not be dismissed, it is not clear that the two are equivalent in this context. The religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination.¹⁵¹

Of course, the objections to racial integration at Bob Jones University were religiously motivated. Moreover, historically, opponents of interracial marriage invoked the Bible and God’s created order to support bans on such marriages.¹⁵² This raises the question of Wilson’s criteria for evaluating religious and moral convictions.

One distinction is clear: In contrast to a firm national policy against ending racial discrimination and sex discrimination, no such firm national policy yet exists with respect to discrimination based on sexual orientation, and certain federal laws (such as the Defense of Marriage Act) explicitly require such discrimination. Indeed, federal law lags behind the law of many states, as it did with both race and sex discrimination. When the Supreme Court, in *Boy Scouts of America v. Dale*, upheld the Scouts’ claim that compelling it to admit a homosexual scoutmaster pursuant to the “public accommodations” provisions of New Jersey’s antidiscrimination violated its constitutional rights to freedom of association, the Court simply stated, without elaboration: “The state interests embodied in New Jersey’s public accommodations

¹⁴⁸ *Id.*

¹⁴⁹ Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns*, in SAME-SEX MARRIAGE, *supra* note 146, at 103, 109-10.

¹⁵⁰ Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Health Care Context*, in SAME-SEX MARRIAGE, *supra* note 146, at 77.

¹⁵¹ *Id.* at 101.

¹⁵² See *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting the trial judge’s statement that: “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix.”).

law do not justify such a severe intrusion on the Boy Scouts' right to freedom of expressive association."¹⁵³ Of course, with the recent repeal of the "Don't Ask, Don't Tell" policy in the military and the Obama Administration's announcement that it will no longer defend the Defense of Marriage Act, because of its judgment that the Act violates the equal protection clause by discriminating on the basis of sexual orientation, federal policy may be in a state of transition.¹⁵⁴ And the Court's own jurisprudence, both in *Romer v. Evans*¹⁵⁵ and *Lawrence v. Texas*,¹⁵⁶ reflects an evolution toward finding constitutionally problematic the singling out of persons for disfavored treatment on the basis of sexual orientation.¹⁵⁷ With this as a backdrop, I now turn to how the Court assessed a recent challenge by a student chapter of the Christian Legal Society to Hastings University College of Law's antidiscrimination policy.

A. *The University's Educational Mission and the Distinction Between Carrots and Sticks*

In this case, petitioner excludes students who will not sign its Statement of Faith or who engage in "unrepentant homosexual conduct." The expressive association argument it presses, however, is hardly limited to these facts. Other groups may exclude or mistreat Jews, blacks, and women—or those who do not share their contempt for Jews, blacks, and women. *A free society must tolerate such groups.* It need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities.¹⁵⁸

Tolerance, cooperation, learning, and the development of conflict-resolution skills . . . are obviously commendable goals, but they are not undermined by permitting a religious group to restrict membership to persons who share the group's faith. . . . Such practices are not manifestations of "contempt" for members of other faiths. Nor do they thwart the objectives that Hastings endorses.

¹⁵³ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

¹⁵⁴ Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. 111-321, 124 Stat. 3515; Letter from Eric E. Holder, Jr., Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives 4 (Feb. 23, 2011) [hereinafter Letter from Eric E. Holder], available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

¹⁵⁵ 517 U.S. 620 (1996).

¹⁵⁶ 539 U.S. 558 (2003).

¹⁵⁷ *Romer* suggests the limits on states attempting to thwart local efforts to protect against discrimination on the basis of sexual orientation: no "singling out" of a "certain class of citizens for disfavored legal status" or making "a class of persons a stranger to [state] law." *Romer*, 517 U.S. at 633, 635.

¹⁵⁸ *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2998 (2010) (Stevens, J., concurring) (emphasis added).

Our country as a whole, no less than the Hastings College of Law, values tolerance, cooperation, learning, and the amicable resolution of conflicts. But we seek to achieve those goals through “[a] confident pluralism that conduces to civil peace and advances democratic consensus building,” not by abridging First Amendment rights.¹⁵⁹

Last term, in *Christian Legal Society v. Martinez*, the Supreme Court, by a narrow margin (5-4), upheld a public university’s antidiscrimination policy against a student group’s challenge that the university’s failure to grant it an exemption from the policy violated the group’s rights to expressive association, free speech, and free exercise of religion. The Court had occasion to consider the question of the relationship among various forms of discrimination, as well as the import of both *Smith* and *Bob Jones University* for a public university’s efforts to advance its educational mission through an antidiscrimination policy applicable not just to the classroom but to campus life as well. The several opinions by the Justices offer sharply contrasting visions of the importance of congruence between democratic and associational values and of the best understanding of diversity and pluralism.

Justice Ginsburg, writing for the majority, prefaces her opinion by stating the general rule that “the First Amendment generally precludes public universities from denying student organizations access to school-sponsored forums because of the groups’ viewpoints.”¹⁶⁰ But the “novel question” presented in this case was: “May a public law school condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization’s agreement to open eligibility for membership and leadership to all students?”¹⁶¹

Hastings Law School had a Nondiscrimination Policy, to which all registered student organizations (RSOs) were subject. It stated, in relevant part:

[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’] 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

¹⁵⁹ *Id.* at 3015-16 (Alito, J., dissenting) (citation omitted) (quoting Brief of Gays & Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner, *Christian Legal Soc’y*, 130 S. Ct. 2971 (No. 08-1371)).

¹⁶⁰ *Id.* at 2978 (majority opinion).

¹⁶¹ *Id.*

sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.¹⁶²

Hastings interpreted this policy to mandate an “acceptance of all comers” by RSOs. School-approved groups must “allow any student to participate, become a member, or seek leadership positions.”¹⁶³

The Hastings chapter of the Christian Legal Society, an association of Christian lawyers and law students, which charters chapters at law schools throughout the county, sought an exemption from this policy.¹⁶⁴ The source of the conflict necessitating an exemption was that the chapters must adopt bylaws requiring members and officers to sign a “Statement of Faith” and to conduct their lives in accord with prescribed principles, including the tenet that “sexual activity should not occur outside of marriage between a man and a woman.”¹⁶⁵ CLS interpreted this to exclude from the group anyone who engages in “unrepentant homosexual conduct.”¹⁶⁶ It also excluded students with religious convictions different from those in the Statement of Faith.¹⁶⁷ (Notably, by contrast to the Boy Scouts of America’s “secret” policy opposing homosexuality as contrary to its mission, this policy is very public and very clear.¹⁶⁸)

Hastings rejected the request for an exemption. It took the position that if CLS wished to operate within Hastings’ program of student groups, it must “open its membership to all students irrespective of their religious beliefs or sexual orientation.”¹⁶⁹ The benefits attendant upon being an RSO included seeking financial assistance from the school, “which subsidizes their events using funds from a mandatory student-activity fee imposed on all students.”¹⁷⁰ RSOs could also use law school channels to communicate with students (such as a weekly newsletter, advertising on bulletin boards, and an annual student organization fair), apply to use Law School facilities for meetings and office space, and use the Law School’s name and logo.¹⁷¹

When Hastings denied CLS’s request for an exemption, it indicated that if CLS chose to operate outside the RSO system, it could

¹⁶² *Id.* at 2979 (quoting BD. OF DIRS. OF THE UNIV. OF CAL., HASTINGS COLL. OF LAW, POLICIES AND REGULATIONS APPLYING TO COLLEGE ACTIVITIES, ORGANIZATIONS AND STUDENTS § 20 POLICY ON NONDISCRIMINATION (2002)).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 2980.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 672 (2000) (Stevens, J., dissenting) (characterizing Boy Scouts’ alleged policy against homosexuality as a “secret” policy).

¹⁶⁹ *Christian Legal Soc’y*, 130 S. Ct. at 2980-81.

¹⁷⁰ *Id.* at 2979.

¹⁷¹ *Id.*

still use Hastings facilities for meetings and activities and use chalkboards and campus bulletin boards to announce its events. “In other words, Hastings would do nothing to suppress CLS’s endeavors, but neither would it lend RSO-level support for them.”¹⁷² As this line-drawing noted by Justice Ginsburg indicates, this case illustrates a way, other than outright prohibition, that government may have an impact on a religious group: denial of a status to which benefits attach. In this sense, it is more of a subsidy case (like *Bob Jones*) than a prohibition case.

CLS declined to alter its bylaws, and, operating without RSO status, held weekly meetings and sponsored several events. It sued Hastings for violation of federal constitutional rights to free speech, expressive association, and free exercise of religion. It lost on all three claims in the federal district court and then, on appeal, in the Ninth Circuit.¹⁷³ Rejecting CLS’s expressive association claim, the district court observed that Hastings was not “directly ordering CLS to admit” students; it was instead denying official recognition, and putting limits on funds and facilities, if it did not.¹⁷⁴ Moreover, CLS met without this official status, suggesting the rule was “not a substantial impediment.”¹⁷⁵ In a brief opinion, the Ninth Circuit affirmed, concluding that Hastings’s open membership rule was “viewpoint neutral and reasonable”; it required that “all groups must accept all comers as voting members even if those individuals disagree with the mission of the group.”¹⁷⁶

Christian Legal Society might well have expected, given the Supreme Court’s prior precedents on religious freedom in universities and freedom of association, that victory was likely. How, after all, can Hastings’ open membership rule be squared with protection of freedom of expressive association? How can a group “stand for” particular values, if it must admit as members persons who disagree with those values? Why make the cost of official recognition be such unwanted association? (Recall, for example, Justice O’Connor’s cautioning in *Smith* about making sure the price religious persons must pay to participate in society is constitutionally justified.) What policy goal could Hastings be furthering that sufficiently outweighed this expressive freedom? For example, what sense does it make to require the Hastings Democratic Caucus to allow students with Republican

¹⁷² *Id.* at 2981.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (quoting Christian Legal Soc’y Chapter of the Univ. of Cal., *Hastings Coll. of the Law v. Kane*, 319 F. App’x 645 (2009)).

political beliefs become members and seek leadership positions (an example used in the litigation)?

Why, then, did the Court rule against the student organization? Justice Ginsburg began the majority opinion by observing that because Hastings is a public university, the relevant constitutional inquiry is when a governmental entity may place limits on speech occurring on its property. Here, the precedent requires that “[a]ny access barrier must be reasonable and viewpoint neutral.”¹⁷⁷

The majority also looked to its public accommodations decisions, such as *Dale* and *Jaycees*, stating that restrictions on associational freedom are permitted only if they serve “compelling state interests” that are “unrelated to the suppression of ideas,” and cannot be advanced by “significantly less restrictive [means].”¹⁷⁸ *Roberts v. United States Jaycees*, after all, as Justice Ginsburg noted, observed that “freedom of association . . . presupposes a freedom not to associate.”¹⁷⁹ That observation shaped the Court’s reasoning in favor of the Boy Scouts in *Dale*. “Insisting that an organization embrace unwelcome members,” the precedents teach, “directly and immediately affects associational rights.”¹⁸⁰

Of what import are those precedents when applied to Hastings’ policy and denial of an exemption?¹⁸¹ CLS relied on *Dale* to support its case, but Justice Ginsburg distinguished between *compelling* a group to include unwanted members, “with no choice to opt out” (the public accommodations law at issue in *Dale* would have forced the Boy Scouts to accept members it did not desire) and *denying* a group a “state subsidy” if it did not do so.¹⁸² The line between coercion and persuasion is critical: “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 foregoes the benefits of official recognition.”¹⁸³

Relevant here are both the distinction between carrots and sticks and the distinction between tolerating and supporting discrimination. Requiring someone to take action is different, the Court observed, than withholding benefits if they do not. For this proposition, Ginsburg cited both *Bob Jones University*, in which, as described in Part III, the Court

¹⁷⁷ *Id.* at 2984.

¹⁷⁸ *Id.* at 2985 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (citing *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000)).

¹⁸¹ The Court treats the student group’s speech and association claims as related: “*Who* speaks on its behalf, CLS reasons, colors *what* concept is conveyed.” *Id.* at 2985. The Court applies its “limited-public-forum precedents” as the appropriate framework for assessing CLS’s speech and association claims. *Id.*

¹⁸² *Id.* at 2986.

¹⁸³ *Id.*

upheld denial of tax-exempt status due to the university's racially discriminatory policies, and *Grove City College v. Bell*, where the Court held that a private religious college's receipt of federal financial aid made it subject to compliance with Title IX's prohibition of sex discrimination.¹⁸⁴ Hastings was "dangling the carrot of subsidy, not wielding the stick of prohibition."¹⁸⁵ Ginsburg explained the constitutional significance of the distinction: "That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination."¹⁸⁶

The majority's reasoning here is consistent with what I describe elsewhere as the anti-compulsion rationale for toleration: Toleration requires that the state not compel, but it may persuade in favor of the conduct it seeks to promote, and decline to support the disfavored conduct.¹⁸⁷ Notably, given the question of the relationship among forms of discrimination, the Court cited a decades-old precedent about racial discrimination, in which the Court held that a state textbook-purchasing program that provided free textbooks even to private schools that discriminated on racial grounds was constitutionally infirm. Chief Justice Burger stated that, because the Constitution clearly bars racial discrimination in state-operated schools, "it is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."¹⁸⁸

The Court then considered CLS's speech and expressive association rights, guided by its limited-public-forum decisions. Summarizing its precedents on clashes between public universities and student groups, Ginsburg explained that once a public university has opened up a limited public forum, it "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 viewpoint."¹⁸⁹ So, is the "accept-all-comers" rule reasonable, given the function of the RSO forum and the circumstances? The notion of a university's authority to advance its educational mission features centrally in the majority's conclusion that it is. Ginsburg placed the instant clash in the context of the educational mission of schools and

¹⁸⁴ *Grove City Coll. v. Bell*, 465 U.S. 555 (1984). The only evident failure of compliance in this case was a refusal, on the grounds of conscience, to complete the required affirmance; the college had a nondiscrimination policy and there was no evidence of discrimination.

¹⁸⁵ *Christian Legal Soc'y*, 130 S. Ct. at 2986.

¹⁸⁶ *Id.* (quoting *Norwood v. Harrison*, 413 U.S. 455, 463 (1973)).

¹⁸⁷ Elsewhere, I distinguish between "empty toleration" and "toleration as respect," critiquing the Court's abortion jurisprudence for reflecting empty toleration. See *MCCLAIN*, *supra* note 3, at 242-48.

¹⁸⁸ *Norwood*, 413 U.S. at 465 (quoting *Lee v. Macon Cnty. Bd. of Educ.*, 267 F. Supp. 458, 475-76 (M.D. Ala. 1967)).

¹⁸⁹ *Christian Legal Soc'y*, 130 S. Ct. at 2988 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)).

reiterates that courts should not substitute their own notions of sound educational policy for those of school authorities they review. Perhaps surprisingly, given that the educational institution before the Court is a law school, she quoted *Hazelwood School District v. Kuhlmeier* for the “oft-expressed view that the education of the Nation’s youth is primarily the responsibility of parents, teachers, and State and local officials, and not of federal judges.”¹⁹⁰ Of course, Hastings Law School is not educating children, but (generally) young adults. But the Court, like many lower courts, drew on precedents about elementary and secondary school when considering the educational mission of institutions of higher learning. First off, the Court stressed that a college’s “commission—and its concomitant license to choose among pedagogical approaches” extends beyond the classroom to extracurricular programs, which are “today, essential parts of the educational process.”¹⁹¹ Schools “enjoy” a “significant measure of authority over the type of officially recognized activities in which their students participate.”¹⁹²

Hastings defended its policy on several grounds. Most relevant here are three such grounds. First, it analogized the forum provided by student groups to the law school classroom: Professors are not permitted to admit or exclude students based on their status or belief, so it is reasonable for the law school to decide that the educational experience afforded by student groups is “best promoted when all participants in the forum . . . provide equal access to all students.”¹⁹³ Second, it made a *tolerance* and *diversity* argument that is pertinent to the question of how to prepare young people for participation in the democratic process and for citizenship:

The Law School reasonably adheres to the view that an all-comers policy, to the extent it brings together individuals with diverse backgrounds and beliefs, “encourages tolerance, cooperation, and learning among students.” And if the policy sometimes produces discord, Hastings can rationally rank among RSO-program goals development of conflict-resolution skills, toleration, and readiness to find common ground.¹⁹⁴

Third, Hastings also defended its policy as conveying its decision “to decline to subsidize with public monies and benefits conduct of which the people of California disapprove.”¹⁹⁵ The embodiment of the voice of the people of California is, in this case, California’s educational code, which forbids discrimination. Although the Court did not cite *Bob*

¹⁹⁰ *Id.* (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

¹⁹¹ *Id.* at 2988-89.

¹⁹² *Id.* at 2989.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 2990 (citation omitted).

¹⁹⁵ *Id.*

Jones University, and the case before it involved a firm *state* policy, it is reminiscent of the *Bob Jones* distinction between permitting discriminatory conduct that conflicts with public policy and giving financial support to it. On the logic of *Bob Jones University*, conduct contrary to California's antidiscrimination law would not be in the public interest or of public benefit.

The Court concluded that Hastings' justifications are reasonable "in light of the RSO forum's purposes."¹⁹⁶ It observed that the policy allowed "substantial alternative channels" for CLS to communicate its message.¹⁹⁷ This lessens the burden on First Amendment rights.¹⁹⁸ For example, CLS met without RSO status and had an increased number of students at its events and meetings.¹⁹⁹

The majority and concurring opinions differed sharply with Justice Alito's dissent over the issue of diversity and the threat posed to it by Hastings's policy. Does diversity mean (1) that each group can form around its own distinctive views, and exclude those who do not share such views, thus creating a diverse whole out of distinct parts, or (2) that each group must reflect the diversity of the whole? CLS argued (and Alito agreed) that Hastings' policy was "frankly absurd" because there "can be no diversity of viewpoints in a forum . . . if groups are not permitted to form around viewpoints."²⁰⁰ CLS raised the specter of hostile takeovers, where "saboteurs [would] infiltrate groups to subvert their mission and message."²⁰¹ The Court found this too hypothetical and noted that the school's policy did not prevent groups from having rules that protect against such outcomes, and that its own code of conduct, which extended to RSO activities, prohibited "obstruction or disruption, disorderly conduct, and threats."²⁰²

B. Smith's Featured Role

Smith made an appearance when the majority concluded that the Constitution does not require a religious exemption.²⁰³ CLS argued that the Law School lacked any legitimate interest, or any interest reasonably related to the forum's purpose, in urging "religious groups

¹⁹⁶ *Id.* at 2991.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 2992 (quoting Brief for Petitioner at 49-50, *Christian Legal Soc'y*, 130 S. Ct. 2971 (No. 08-1371)).

²⁰¹ *Id.*

²⁰² *Id.* (quoting Brief of Hastings College of the Law Respondents at 43 n.16, *Christian Legal Soc'y*, 130 S. Ct. 2971 (No. 08-1371)).

²⁰³ *Id.* at 2993 n.24.

not to favor co-religionists for purposes of their religious activities.”²⁰⁴ The Court disagreed: “Exclusion, after all, has two sides. Hastings, caught in the crossfire between a group’s desire to exclude and students’ demand for equal access, may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership.”²⁰⁵ The Court observed that whether or not Hastings might, by analogy to Title VII, provide an exemption for religious association, *Smith* “unequivocally answers no” to the question of whether Hastings must grant an exemption.²⁰⁶

Ginsburg stressed the harms of exclusion that the “accept-all-comers” rule seeks to avoid. It is here that analogies to race and sex discrimination play a role. CLS argued that Hastings’ policy was vulnerable to constitutional attack because it “systematically and predictably burdens most heavily those groups whose viewpoints are out of favor with the campus mainstream” and favors “politically correct” student expression.²⁰⁷ Similarly, Justice Alito, in dissent, countered that “the Court arms public educational institutions with a handy weapon for suppressing the speech of unpopular groups.”²⁰⁸ But, Justice Ginsburg rejoined, the policy is still neutral even if “has an incidental effect on some speakers or messages but not others.”²⁰⁹ Further, if the differential impact is on groups who wish to enforce exclusionary membership policies, so long as the state does not target conduct on the basis of expressive content, “acts are not shielded from regulation merely because they express a discriminatory idea of philosophy.”²¹⁰ Here, the Court cited to *Roberts* and to other precedents upholding public accommodations laws barring sex discrimination against freedom of association claims.²¹¹ Hastings’ policy aims at conduct: “rejecting would-be members.”²¹² It aims to redress the perceived harms of exclusionary membership policies. (Recall that states can try to promote alternatives to harmful behavior.) It is CLS’s conduct, not its Christian perspective, that stands—from Hastings’s view point—“between the group and RSO status.”²¹³

The Court briefly discussed—and rejected—CLS’s Free Exercise Clause claim. Here it said *Smith* “forecloses that argument,” because it

²⁰⁴ *Id.* at 2993.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 2993 n.24.

²⁰⁷ *Id.* at 2994.

²⁰⁸ *Id.* at 3001 (Alito, J., dissenting).

²⁰⁹ *Id.* at 2994 (majority opinion) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

²¹⁰ *Id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992)).

²¹¹ *Id.* (citing *R.A.V.*, 505 U.S. at 390; *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

²¹² *Id.* at 2994.

²¹³ *Id.*

“held that the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct. In seeking an exemption from Hastings’ across-the-board all-comers policy, CLS, we repeat, seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause.”²¹⁴

C. *Justice Stevens’s Concurrence: The University’s Educational Mission: Why the Campus Is Not the Public Square*

Three features of Stevens’s concurrence warrant mention. First, *Smith* features in support of his observation that “it is a basic tenet of First Amendment law that disparate impact does not, in itself, constitute viewpoint discrimination.”²¹⁵ The predicate for this observation is that Hastings’ “accept-all-comers” policy was viewpoint neutral. Even though it “may end up having greater consequence for religious groups [T]here is . . . no evidence that the policy was intended to cause harm to religious groups, or that it has in practice caused significant harm to their operations.”²¹⁶

Second, Stevens stressed that the educational mission of Hastings, a public university, justifies its antidiscrimination policy. He analogized the discrimination at issue (on the basis of sexual orientation) to other forms of objectionable discrimination. He brought out the idea that educational policies reflect and promote values, including tolerance. Stevens interpreted the policy as reflecting a judgment by the school “that discrimination by school officials or organizations on the basis of certain factors, such as race and religion, is less tolerable than discrimination on the basis of other factors,” which is a “reasonable choice” in the context of the RSO program, even if not the “wisest” one.²¹⁷ The RSO policy serves “pedagogical objectives” pertaining to promoting tolerance and other values:

Academic administrators routinely employ antidiscrimination rules to promote tolerance, understanding, and respect, and to safeguard students from invidious forms of discrimination, including sexual orientation discrimination. Applied to the RSO context, these values can, in turn, advance numerous pedagogical objectives.²¹⁸

²¹⁴ *Id.* at 2995 n.27 (citation omitted) (citing *Emp’t Div. v. Smith*, 494 U.S. 872, 878-82 (1990)).

²¹⁵ *Id.* at 2997 (Stevens, J., concurring).

²¹⁶ *Id.* at 2996.

²¹⁷ *Id.* at 2997.

²¹⁸ *Id.*

Stevens distinguished a public university campus from a “wholly public setting,” in which a religious association or secular association “must be allowed broad freedom to control its membership and its message, even if its decisions cause offense to outsiders.”²¹⁹ He agreed with Alito’s dissent that “profound constitutional problems would arise if the State of California tried to ‘demand that all Christian groups admit members who believe that Jesus was merely human.’”²²⁰

But he explained that the campus setting is different from the public square: Even though, “to some ‘university students, the campus is their world,’ it does not follow that the campus ought to be equated with *the public square*.”²²¹ CLS “does not want to be just a Christian group,” but “aspires to be a recognized student organization.”²²² Hastings is “not a legislature”—and “no state actor has demanded that anyone do anything outside the confines of a discrete voluntary academic program.”²²³

The university’s formative role includes inculcating norms and values. Thus, by contrast to the public square, public universities have a “distinctive role” in modern democratic societies; religious organizations, and all other organizations “must abide by certain norms of conduct when they enter an academic community.”²²⁴ Is the public university, on this view, more like an institution of civil society, even though public, or more like an arm of government? On the one hand, rhetoric about freedom of speech refers to schools—academic communities—as important marketplaces of ideas, suggesting an absence of direction about norms and values.²²⁵ On the other hand, Stevens stated that the public university has a distinctive role that justifies its imposition of certain norms and entails value judgments:

Public universities serve a distinctive role in a modern democratic society. Like all specialized government entities, they must make countless decisions about how to allocate resources in pursuit of their role. Some of those decisions will be controversial; many will have differential effects across populations; virtually all will entail value judgments of some kind. As a general matter, courts should respect universities’ judgment and let them manage their own affairs.²²⁶

²¹⁹ *Id.*

²²⁰ *Id.* (quoting *id.* at 3000 (Alito, J., dissenting)).

²²¹ *Id.* (emphasis added) (quoting *id.* at 3007 (Alito, J., dissenting)).

²²² *Id.* at 2997.

²²³ *Id.*

²²⁴ *Id.* at 2997-98.

²²⁵ Here we could draw an interesting analogy to Justice O’Connor’s statement in *U.S. Jaycees* that “an association must choose its market”—that of commerce or that of ideas. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (O’Connor, J., concurring in part and concurring in the judgment).

²²⁶ *Christian Legal Soc’y*, 130 S. Ct. at 2997-98.

Like the majority, Stevens urged judicial deference to a university's understanding of its own mission and its attendant values. Accordingly, the RSO program is "not an open commons that Hastings happens to maintain. It is a mechanism through which Hastings confers certain benefits and pursues certain aspects of its educational mission."²²⁷ A university need not—and cannot—"remain neutral" in "determining which goals" to pursue through its program and how best to promote those goals (although the rule implementing these value choices is allegedly neutral because it does not single out religious groups).²²⁸ The university can consider, in effect, the lack of congruence between those goals and the goals of an organization: "When any given group refuses to comply with the rules, the RSO sponsor need not admit that group at the cost of undermining the program and the values reflected therein."²²⁹

Congruence is also an implicit consideration when Stevens emphasized the difference between tolerating and subsidizing groups whose exclusion or treatment of others conflicts with public goals. Here, Stevens pressed an analogy: exclusion on the basis of sexual orientation/sexual conduct brings to mind exclusion or mistreatment of other groups subjected to discrimination but now protected by anti-discrimination laws (such as Jews, blacks, and women). This argument is a bit like a slippery slope or a "where will it stop" argument, provoking a strong retort by Justice Alito. Justice Stevens stated:

In this case, petitioner excludes students who will not sign its Statement of Faith or who engage in "unrepentant homosexual conduct." The expressive association argument it presses, however, is hardly limited to these facts. Other groups may exclude or mistreat Jews, blacks, and women—or those who do not share their contempt for Jews, blacks, and women. *A free society must tolerate such groups.* It need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities.²³⁰

This passage brings to mind classic race discrimination cases like *Shelley v. Kraemer*,²³¹ *Palmore v. Sidoti*,²³² and the more recent *Romer v. Evans*,²³³ concerning sexual orientation discrimination, which offer

²²⁷ *Id.* at 2998.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 2998 (emphasis added).

²³¹ 334 U.S. 1 (1948) (holding that state courts may not enforce racially restrictive land use covenants).

²³² 466 U.S. 429, 433 (1984) (holding that state court erred in denying mother custody because of her interracial marriage and likely prejudice against her child and stating that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

²³³ 517 U.S. 620, 623, 632 (1996) (stating that "the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens,'" and concluding that

similar statements about the Constitution or government not supporting or giving effect to private prejudice. Also notable is Stevens's reference to religious, racial, and sex discrimination as things that must be tolerated but not supported or subsidized, with the clear implication that these forms of discrimination are *not in sync with public goals and values*. Even though a goal of antidiscrimination law is full and equal access, Stevens is saying that when an organization's rules are not in sync with a university's antidiscrimination policies, the university need not give it equal access to school facilities. This is, in other words, a permissible form of discrimination, explained as the difference between tolerating and subsidizing.

D. *Justice Kennedy's Concurring Opinion: Reaching Students Where Learning Takes Place*

Justice Kennedy's concurring opinion also stressed the latitude afforded universities to pursue their educational missions, even as he acknowledged the practical difficulty that the "accept-all-comers" rule poses, "even if not so designed or intended," for "certain groups to express their views in a manner essential to their message."²³⁴ This seems, he noted, in evident tension with prior Court precedents (such as *Dale*): "A group that can limit membership to those who agree in full with its aims and purposes may be more effective in delivering its message or furthering its expressive objectives; and the Court has recognized that this interest can be protected against governmental interference or regulation."²³⁵ Kennedy also noted, but distinguished, earlier Supreme Court cases about campus student groups, which observed, for example: "By allowing like-minded students to form groups around shared identities, a school creates room for self-expression and personal development."²³⁶ Hastings, in fact, like "[m]any educational institutions," recognizes the formative role of student groups: students "may be shaped as profoundly by their peers as by their teachers."²³⁷ This observation resonates with recent legal scholarship calling for greater attention to the formative role of space "between home and school,"²³⁸ with the "between" here being the

Amendment 2 lacked a rational relationship to legitimate state interests and seemed "inexplicable by anything but animus toward the class that it affects" (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)).

²³⁴ *Christian Legal Soc'y*, 130 S. Ct. at 2999 (Kennedy, J., concurring).

²³⁵ *Id.*

²³⁶ *Id.* (citing *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000)).

²³⁷ *Id.* at 2999.

²³⁸ Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833 (2007).

university campus. Kennedy quoted Justice Powell's concurrence in *Regents of University of California v. Bakke*:

[A] great deal of learning . . . occurs through interactions among students . . . who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world.²³⁹

Thus, programs like the Hastings RSO program "facilitate interactions between students, enabling them to explore new points of view, to develop interests and talents, and to nurture a growing sense of self."²⁴⁰

Is this self-exploration best achieved through maximum diversity among different groups or by promoting diversity *within* groups? Even though Justice Powell, for example, earlier stressed the importance of diversity among groups (as did Justice Alito, in dissent here), Justice Kennedy argued that law students, inside and outside the classroom, "develop their skills" over the three years not by walling themselves off, but by

participating in a community that teaches them how to create arguments in a convincing, rational, and respectful manner and to express doubt and disagreement in a professional way. A law school furthers these objectives by allowing broad diversity in registered student organizations. But these objectives may be better achieved if students can act cooperatively to learn from and teach each other through interactions in social and intellectual contexts. A vibrant dialogue is not possible if students wall themselves off from opposing points of view.²⁴¹

In other words, the "accept-all-comers" policy protects against such walling off. Kennedy further stated that, "[t]he era of loyalty oaths is behind us," and that

[a] school quite properly may conclude that allowing an oath or belief-affirming requirement, or an outside conduct requirement, could be divisive for student relations and inconsistent with the basic concept that a view's validity should be tested through free and open discussion. The school's policy therefore represents a permissible effort to preserve the value of its forum.²⁴²

²³⁹ *Christian Legal Soc'y*, 130 S. Ct. at 2999 (Kennedy, J., concurring) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312, 313 n.48 (1978) (Powell, J.)).

²⁴⁰ *Id.*

²⁴¹ *Id.* at 2999-3000.

²⁴² *Id.* at 3000. Justice Kennedy observes that if membership is conditioned on avowing particular beliefs or disclosing private, off campus behavior, "[s]tudents whose views are in the minority at the school would likely fare worse in that regime." *Id.* He states that there has been no showing yet that an accept-all-comers policy "was either designed or used to infiltrate the group or challenge its leadership in order to stifle its views." *Id.*

For Kennedy, then, the educative end of fostering student interaction across difference justifies the burdens the school's policy places on groups' self-expression.

E. *Justice Alito's Dissent: How Not to Promote
Genuine Tolerance, Diversity, and Pluralism*

In his lengthy dissent, joined by Chief Justice Roberts, Justice Scalia (the author of *Smith*), and Justice Thomas, Justice Alito cast the majority opinion as a departure from freedom of speech—and the protection of “the freedom to express ‘the thought that we hate’”—and a slide into limiting freedom of expression for speech that offends “prevailing standards of political correctness in our country's institutions of higher learning.”²⁴³ In the space of this Article, I will focus only on those arguments in his opinion that join issue sharply with the majority and concurrence over congruence, toleration, and the best understandings of diversity and pluralism.²⁴⁴ Neither *Smith* nor *Bob Jones University* appear in his dissent, although the Court's freedom of expressive association precedents, such as *Roberts* and *Dale*, feature prominently.

Alito challenged the majority's emphasis on the distinction between outright prohibition and subsidy. He asserted that subsidy, or funding, has little to do with the issue: “[M]ost of what CLS sought and was denied . . . would have been virtually cost free.”²⁴⁵ He warned that characterizing desired student activity as “a matter of funding” will threaten the First Amendment rights of students for whom “the campus is their world.”²⁴⁶ Alito pressed the analogy between the campus and the town square in its importance to students' ability to communicate (again quoting CLS):

The right to meet on campus and use campus channels of communication is at least as important to university students as the right to gather on the town square and use local communication forums is to the citizen.²⁴⁷

He contended that the Court departs from prior campus speech cases, such as *Healy*, in which a public college refused to recognize a

²⁴³ *Id.* (Alito, J., dissenting) (quoting *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting)).

²⁴⁴ Thus, I am not discussing Justice Alito's lengthy discussion of when Hastings actually adopted the policy at issue or whether it enforced it uniformly. *Id.* at 3000-06.

²⁴⁵ *Id.* at 3006-07.

²⁴⁶ *Id.* at 3007 (citing Reply Brief for Petitioner at 13, *Christian Legal Soc'y*, 130 S. Ct. 2971 (No. 08-1371)).

²⁴⁷ *Id.* (quoting Reply Brief for Petitioner at 13, *Christian Legal Soc'y*, 130 S. Ct. 2971 (No. 08-1371)).

local chapter of the Students for a Democratic Society.²⁴⁸ He concluded that the only way to distinguish *Healy*, in which the student group prevailed, seemed to be “identity of the student group.”²⁴⁹ He cited further precedents to contend that in the present case, Hastings is violating the rule against viewpoint discrimination by singling out religious viewpoints.

Alito argued that even if analyzed under the limited public forum cases, Hastings’ actions are not constitutional. He stressed the significance of the university setting, where “the State acts against a background of tradition of thought and experiment that is at the center of our intellectual and philosophical tradition.”²⁵⁰ The Court’s precedents state that the university “must maintain strict viewpoint neutrality,” but Hastings itself engaged in viewpoint discrimination when it claimed that the CLS bylaws impermissibly discriminated on the basis of religion and sexual orientation.²⁵¹

Where the majority and concurring opinions stressed the authority of a university to carry out an educational mission that entails value judgments, Justice Alito invoked the Court’s freedom of expressive association cases (such as *Dale*) and its recognition that “[t]he forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”²⁵² Hastings, he claimed, singled out one category of expressive association for disfavored treatment: “[G]roups formed to express a religious message . . . were required to admit students who did not share their views.”²⁵³ This conflicts with *Dale* and *Roberts* and the other club cases: “It is now well established that the First Amendment shields the right of a group to engage in expressive association by limiting membership to persons whose admission does not significantly interfere with the group’s ability to convey its views.”²⁵⁴ Alito argued that Hastings’ policy, “as interpreted by the law school, also discriminated on the basis of viewpoint regarding sexual morality”—“that sexual conduct outside marriage between a man and a woman is wrongful.”²⁵⁵ But nothing would prohibit a group, for example, Free

²⁴⁸ *Healy v. James*, 408 U.S. 169 (1972).

²⁴⁹ *Christian Legal Soc’y*, 130 S. Ct. at 3008 (Alito, J., dissenting).

²⁵⁰ *Id.* at 3009 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995)).

²⁵¹ *Id.* at 3009-10.

²⁵² *Id.* at 3010-11 (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000)).

²⁵³ *Id.* at 3010. He gives examples of other groups not obligated to accept students who supported the antithesis of their message. *Id.*

²⁵⁴ *Id.* at 3011.

²⁵⁵ *Id.* at 3012.

Love Club, from limiting membership to persons willing to endorse the group's beliefs.

A central point of disagreement between Alito, on the one hand, and the majority and concurring opinions, on the other, is their assessment of whether the university's policy fosters diversity and is consonant with pluralism. Here Alito's dissent, like the other opinions, shares the beginning premise that universities properly take interest in facilitating student groups. The parties stipulated, for example, that the RSO forum "seeks to promote a diversity of viewpoints *among* registered student organizations, including viewpoints on religion and human sexuality."²⁵⁶ Noting the existence of some sixty RSOs, "each with its own independently devised purpose," Alito concluded: "In short, the RSO forum, true to its design, has allowed Hastings students to replicate on campus a broad array of private, independent, noncommercial organizations that is very similar to those that nonstudents have formed in the outside world."²⁵⁷

However, the accept-all-comers policy is "antithetical to [this] design" for the same reason as if it applied to private groups off campus: "Forced inclusion" of members whose presence would affect in a significant way the group's ability to advocate public or private viewpoints burdens a group's First Amendment right of expressive association.²⁵⁸ Hastings may not do this without a compelling interest, "unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."²⁵⁹ Again, Alito stressed the analogy between the campus and the general public square. A state could not have a "generally applicable law mandating that private religious groups admit members who do not share the groups' beliefs," for example, the State of California mandating that Christian groups admit members who believe Jesus was merely human.²⁶⁰ Alito then switched from what the State of California may not do to what Hastings may not do on campus. He asserted: "Religious groups like CLS obviously engage in expressive association, and no legitimate state interest could override the powerful effect that an accept-all-comers law would have on the ability of religious groups to express their views."²⁶¹

What of Hastings' argument that the policy, "by bringing together students with diverse views, encourages tolerance, cooperation, learning, and the development of conflict-resolution skills"?²⁶² Alito

²⁵⁶ *Id.* at 3013.

²⁵⁷ *Id.* at 3013-14.

²⁵⁸ *Id.* at 3014.

²⁵⁹ *Id.* (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at 3015.

counters that these are “obviously commendable goals, but they are not undermined by permitting a religious group to restrict membership to persons who share the group’s faith.”²⁶³ Many religious groups impose such restrictions, (for example, “regularly differentiate between Jews and non-Jews”).²⁶⁴ “Such practices” (contra Justice Stevens’s rhetoric about contempt for blacks, Jews, and women) “are not manifestations of ‘contempt’ for members of other faiths” and do not “thwart the objectives that Hastings endorses.”²⁶⁵ Strikingly, Alito asserted that CLS’s restrictive practices and Hastings’ goals are in harmony or congruent in the sense that the former will not thwart the latter. This conclusion relates to his vision of pluralism, which allows diverse groups to flourish by controlling their own memberships:

Our country as a whole, no less than the Hastings College of Law, values tolerance, cooperation, learning, and the amicable resolution of conflicts. But we seek to achieve those goals through “[a] confident pluralism that conduces to civil peace and advances democratic consensus-building,” not by abridging First Amendment rights.²⁶⁶

Alito’s model of pluralism, in effect, is that we do not need congruence to support democracy. It is similar to Powell’s vision in his *Bob Jones University* concurrence. Receiving no attention in Alito’s dissent is the proposition that the university’s educational mission, which necessarily entails value judgments, distinguishes the campus from the public square.

Finally, Alito warned that the “most important effect” of the Court’s holding is the “marginalization” of certain groups, those who “cannot in good conscience agree in their bylaws that they will admit persons who do not share their faith.”²⁶⁷ He cited to amicus briefs for conservative and orthodox religious groups, predicting their exclusion or relegation to second-class status.²⁶⁸ He concluded that the majority’s opinion is a serious setback to freedom of expression, and, under the First Amendment, to a “profound national commitment to the principle that debate of public issues should be uninhibited, robust, and wide-

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 3015-16 (citing Brief of Gays & Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner at 35, *Christian Legal Soc’y*, 130 S. Ct. 2971 (No. 08-1371)).

²⁶⁷ *Id.* at 3019.

²⁶⁸ *Id.* at 3019-20 (citing, e.g., Brief of Amici Curiae Evangelical Scholars et al. in Support of Petitioner at 19, *Christian Legal Soc’y*, 130 S. Ct. 2971 (No. 08-1371)) (asserting that affirmance will “allow every public college and university in the United States to exclude all evangelical Christian organizations”); Brief of Amicus Curiae Agudath Israel of America in Support of Petitioner at 3, 8, *Christian Legal Soc’y*, 130 S. Ct. 2971 (No. 08-1371) (noting that affirmance would “point a judicial dagger at the heart of the Orthodox Jewish community in the United States” and permit that community to be relegated to the status of a “second-class group”).

open.” He cautioned that even those who find CLS’s views objectionable should be concerned about the way the group has been treated.”²⁶⁹ Alito’s concern here is illustrative of the concern voiced that as the aims of antidiscrimination law expand, the potential for its conflict with religious and associational freedom expands as well.²⁷⁰

CONCLUSION

In this Article, I have looked back at *Employment Division v. Smith* as a case that raises the problem of congruence or conflict between religious and political values and the related puzzle of how to understand and address pluralism in our constitutional democracy. I then trained a similar lens on *Bob Jones University v. United States*, and the tension between the majority opinion and Justice Powell’s concurring opinion. My third illustration was the resolution of these issues in *Christian Legal Society v. Martinez*. The various opinions in this case offer a fresh example of conflicts between claims to freedom of religion and association, on the one hand, and on the other, the aims of antidiscrimination laws and policies. This tension arises in part from our constitutional and political order’s simultaneous commitment to two orienting ideas about the relationship between civil society and the state: (1) the institutions of civil society are foundational sources of values and virtues that undergird constitutional democracy; and (2) civil society’s institutions are important buffers against overbearing governmental power and are places that generate their own distinctive (and sometimes conflicting) virtues and values.

The relevance of analogy is an ongoing issue in the newest generation of clashes between rights to free exercise of religion and association and antidiscrimination laws enacted to advance the free and equal citizenship of all members of society. What is the relationship among discrimination based on race, sex, and sexual orientation? In *Christian Legal Society*, for example, the majority opinion drew freely on precedents about prohibiting race and sex discrimination in education to support Hastings’ use of carrots, rather than sticks, to prohibit student groups from discriminating based on sexual orientation.²⁷¹ Justice Stevens’s concurrence drew similar analogies, pointing out that an expressive association “may exclude or mistreat

²⁶⁹ *Christian Legal Soc’y*, 130 S. Ct. at 3020.

²⁷⁰ See generally SAME-SEX MARRIAGE, *supra* note 146. In *Dale*, the majority observed that as public accommodations laws have expanded to cover more places, “the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000).

²⁷¹ *Christian Legal Soc’y*, 130 S. Ct. at 2986.

Jews, blacks, and women—or those who do not share their contempt for Jews, blacks, and women”: “[A] free society must tolerate such groups,” but “need not subsidize them.”²⁷² In contrast, Justice Alito sharply objected to applying this label of “contempt” to a religious group’s exclusionary membership policies, and countered that “our country” pursues such values as “tolerance” through a “confident pluralism” that respects associational rights.²⁷³

My own view, which I must leave for elaboration elsewhere, is that analogies need not be perfect in order to be persuasive, or at least instructive. It is possible to appeal to the dignitary harms of discrimination on the basis of sexual orientation, without denying the unique harms perpetuated by public and private race discrimination.²⁷⁴ Moreover, important themes from the Court’s equal protection jurisprudence about race and sex, such as the role of stereotypes and prejudice in rationalizing laws and policies that have hindered the full participation of persons in society, have force when applied to discrimination on the basis of sexual orientation. This is evident, for example, in the Attorney General’s letter announcing that the Obama Administration would not defend DOMA in the newest round of challenges to it, where he intermingles citations to such jurisprudence about race and sex with citations to opinions, such as *Lawrence* and *Romer*, in which the Court reveals growing awareness of how such prejudice and stereotypes unconstitutionally single out homosexuals.²⁷⁵

Finally, a remaining challenging question is whether religious exemptions from antidiscrimination laws, even if not constitutionally required (in light of *Smith*), are nonetheless appropriate. Again, I can only make a brief observation. Due respect for securing free and equal citizenship may justify insisting that, when associations enter the commercial sphere or are fairly deemed to be public accommodations, they must abide by public norms of antidiscrimination. At the same time, due respect for pluralism, along with prudential concerns over “backlash”—mobilizing religious groups to “fight against civil rights reforms” instead of working out “practical accommodations,” may counsel against too strong an insistence on congruence.²⁷⁶

²⁷² *Id.* at 2998 (Stevens, J., concurring).

²⁷³ *Id.* at 3015-16 (Alito, J., dissenting).

²⁷⁴ On such dignitary harm, see Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in SAME-SEX MARRIAGE, *supra* note 146, at 123, 153 (arguing that denial of public accommodations on the basis of sexual orientation is an “assault” on “dignity” and “a sense of safety in the world”).

²⁷⁵ Letter from Eric E. Holder, *supra* note 154.

²⁷⁶ Minow, *supra* note 145, at 823-24.