EMBRACING CONSTITUTIONALISM: THE COURT AND THE FUTURE OF HIGHER EDUCATION LAW

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[A] new nation, conceived in liberty, and dedicated to the proposition that all . . . are created Equal—Abraham Lincoln[1]

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[1] Abraham Lincoln, President of the United States, The Gettysburg Address (Nov. 19, 1863).

I. INTRODUCTION

Lincoln's words reaffirm the uniqueness of the American Experiment.[2] Our Nation is defined not by blood, soil, language, or culture, but by "the belief in the principles of freedom and equality that this country stands for."[3] As Dr. King reminded us, the self-evident truths of the Declaration of Independence[4] constitute "a promissory note to which every American was to fall heir. This note was the promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness."[5] It matters not whether you just took the citizenship oath, your family came through Ellis Island, your ancestors arrived in chains, your four great-grandfathers fought the Red Coats, or your heritage extends to the tribes that inhabited the continent long before

[2] *See generally* GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1992) (arguing that Lincoln's Gettysburg Address rededicated the Nation to the proposition espoused in the Declaration).

[3] Antonin Scalia, Scalia Speaks: Reflections on Law, Faith, and Life Well Lived 17 (2017).

[4] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). For a commentary on the significance of the Declaration, *see* GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE (1978) (arguing that Jefferson's original draft of the Declaration of Independence forms the social contract for America). As Professor Strang explained: "Scholars across the ideological spectrum have argued for a unique role for the Declaration of Independence in constitutional interpretation. These scholars' arguments fall into two general categories: (1) the Declaration is the 'interpretive key' to the Constitution's text's meaning; and (2) the Declaration is itself part of the Constitution." Lee J. Strang, *Originalism's Subject Matter: Why the Declaration of Independence is Not Part of the Constitution*, 89 S. CAL. L. REV. 637, 637–38 (2016) (footnotes omitted).

[5] Martin Luther King, Jr., "I Have A Dream" Address at Washington, D.C. (Aug. 28, 1963).

Columbus. Because of these constitutional principles, "we are just one race here. It is American."[6]

To be sure, American ideals of freedom and equality—while universal[7]—reflect the British experience after the Magna Carta,[8] but the Road from Runnymede[9] took a distinctly American fork.[10] The American fork was a written Constitution. We The People "split the atom of sovereignty" between the States and the National Government,[11] divided power among the three branches of the government,[12] and withdrew "certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials[.]"[13] Because our elected officials are imperfect humans prone to sin,[14] there will be times "where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution[.]"[15] In those instances, the judiciary must

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[6] Adarand Constructors v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

[7] As former President Obama observed:

> In 1964, before he received the sentence that condemned him to die in prison, [Nelson Mandela] explained from the dock that, "The Magna Carta, the Petition of Rights, the Bill of Rights are documents which are held in veneration by democrats throughout the world." In other words, he didn't say well, those books weren't written by South Africans so I just – I can't claim them. No, he said that's part of my inheritance. That's part of the human inheritance. That applies here in this country, to me, and to you. And that's part of what gave him the moral authority that the apartheid regime could never claim, because he was more familiar with their best values than they were. (Laughter.) He had read their documents more carefully than they had. And he went on to say, "Political division based on color is entirely artificial and, when it disappears, so will the domination of one color group by another." That's Nelson Mandela speaking in 1964, when I was three years old. (Applause.)
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> What was true then remains true today. Basic truths do not change. It is a truth that can be embraced by the English, and by the Indian, and by the Mexican and by the Bantu and by the Luo and by the American. It is a truth that lies at the heart of every world religion – that we should do unto others as we would have them do unto us. (Applause.) That we see ourselves in other people. That we can recognize common hopes and common dreams. And it is a truth that is incompatible with any form of discrimination based on race or religion or gender or sexual orientation. And it is a truth that, by the way, when embraced, actually delivers practical benefits, since it ensures that a society can draw upon the talents and energy and skill of all its people.

Barack Obama, Address on the Centennial of Nelson Mandela's Birth (July 17, 2018). *See generally* NELSON MANDELA, LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA (1995).

[8] *See* DANIEL HANNAN, INVENTING FREEDOM: HOW THE ENGLISH-SPEAKING PEOPLES MADE THE MODERN WORLD 49-50 (2013) (explaining the author's admiration for the British and American constitutional traditions).

[9] Runnymede is the place where the Barons forced King John to sign the Magna Carta. ROBERT TOMBS, THE ENGLISH AND THEIR HISTORY 73-74 (2014).

[10] *See generally* A.E. Dick Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America (1968).

[11] United States Term Limits v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). By dividing sovereignty, the Constitution "protects us from our own best intentions" by preventing the concentration of "power in one location as an expedient solution to the crisis of the day." New York v. United States, 505 U.S. 144, 187 (1992).

[12] *See* THE FEDERALIST NO. 51 (James Madison).

[13] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[14] *See* Jeffrey A. Brauch, Flawed Perfection: What it Means to Be Human and Why It Matters for Culture, Politics, and Law 165-173 (2017).

[15] THE FEDERALIST NO. 78 (Alexander Hamilton).

intervene.[16] Since the U.S. Supreme Court is "supreme in the exposition of the law of the Constitution,"[17] and since no legislative or executive official "can [wage] war against the Constitution without violating his undertaking to support it[,]"[18] the Court's decisions obligate "other governmental institutions to follow the Court's interpretations, not just in the particular case announcing those interpretations, but in similar cases as well[.]"[19] These are the principles of American Constitutionalism.

Today, those principles are under attack and university campuses are the center of the battle. Large segments of our society, particularly within academe, define themselves not by a common commitment to Free Speech, Religious Liberty, or Individual Equality, but by "their skin color, sex, and sexual preference[.]"[20] Identity politics insists "discrimination based on those characteristics has been the driving force in Western Civilization,"[21] and our Nation "remains a profoundly bigoted place, where heterosexual white males continue to deny opportunity to everyone else."[22]

Those who embrace identity politics reject the principles of American Constitutionalism. Instead of having universities "follow truth wherever it may lead" while tolerating "any error so long as reason is left free to combat it[,]"[23] identity politics "equate(s) non-conforming ideas with 'hate speech,' and 'hate speech with life-threatening conduct that should be punished, censored, and repelled with force if necessary."[24] Instead of recognizing "the religious and philosophical objections" to prevailing opinions—which "are

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[16] *Id*. *See also* Martin Luther King, Jr., Letter from Birmingham Jail (Aug. 1963) (arguing that a human law which is contrary to the moral law should not stand).

[17] Cooper v. Aaron, 358 U.S. 1, 18 (1958). For a more comprehensive analysis of Cooper, *see* Josh Blackman, *The Irrepressible Myths of Cooper v. Aaron*, 107 Geo. L.J. (forthcoming 2019).

[18] *Cooper*, 358 U.S. at 18.

[19] STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 62 (2010). S*ee also* Blackman, *supra* note 17, at 17 (discussing Justice Breyer's view of *Cooper*).

[20] HEATHER MAC DONALD, THE DIVERSITY DELUSION: HOW RACE AND GENDER PANDERING CORRUPT THE UNIVERSITY AND UNDERMINE OUR CULTURE 2 (2018). For a discussion of Mac Donald's work, *see* Jillian Kay Melchior, *The Scourge of 'Diversity': A Onetime liberal, Heath MacDonald now believes identity politics threatens higher education and civilization itself*, WALL STREET J., Oct. 13, 2018, at A15.

[21] MAC DONALD, *supra* note 20, at 2.

[22] *Id*.

[23] Letter from Thomas Jefferson to William Roscoe (Dec. 27, 1820) (describing Jefferson's view of the newly created University of Virginia). As the best contemporary statement of academic freedom explains, universities should not "shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive." *Free Expression: Report of the Committee on Freedom of Expression*, U. OF CHIC. (Jan. 2015), https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf. Indeed, "concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some" individuals. *Id.*

The Chicago Statement arguably is the twenty-first century's best and the most influential statement of individual academic freedom. Numerous other institutions have adopted the University's statement, and FIRE is urging its adoption nationwide. *See Hard to Say: A Statement at the Heart of the Debate Over Academic Freedom*, ECONOMIST (Jan. 30, 2016), http://www.economist.com/news/united-states/21689603-statement-heart-debate-over-academic-freedom-hard-say.

[24] MAC DONALD, *supra* note 20, at 3.

protected views and in some instances protected forms of expression"[25] — identity politics seeks to "vilify Americans who are unwilling to assent to the new orthodoxy."[26] Instead of judging individuals by the "content of their character[,]"[27] identity politics insists that "those who aren't like you—because they're white, or because they're male— . . . somehow . . . lack standing to speak on certain matters."[28] In short, identity politics rejects constitutional principles and calls for "vindictive protectiveness"—the silencing and shaming those who dare to dissent.[29]

Although the rise of identity politics is an existential threat to our constitutional principles, the Supreme Court has clearly and decisively rejected identity politics and embraced constitutionalism.[30] In case after case, the Roberts Court has reaffirmed, and even expanded, individual liberty and equality. The Court has promoted "freedom for the thought that we hate[,]"[31] ensured "religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths,"[32] and insisted "[r]ace may not be considered unless the admissions process can withstand strict scrutiny."[33] By doing so, the Court has presented an alternative vision for American society in general and higher education in particular.

This Article's purpose is to explain the Supreme Court's embrace of constitutionalism and the significance of that embrace for higher education law. This Article has three Parts. Part II details the challenges to Constitutionalism on campus in the context of Free Speech, Religious Liberty, and Individual Equality. Part III explains how the Court's recent decisions embrace Constitutionalism in the areas of Free Speech, Religious Liberty, and Individual Equality. Part IV explores implications of the Court's recent decisions for the future of higher education law.

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[25] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018).

[26] Obergefell v. Hodges, 135 S. Ct. 2584, 2642 (2015) (Alito, J., dissenting). *See also* Tish Harrison Warren, *The Wrong Kind of Christian*, CHRISTIANITY TODAY (Aug. 27, 2014), www.christianitytoday.com/ct/2014/september/wrong-kind-of-christian-vanderbilt-university.html (describing Vanderbilt University's treatment of religious groups that espouse orthodox doctrine).

[27] *See generally* King, supra note 5.

[28] Obama, *supra* note 7.

[29] Greg Lukianoff et al., The Coddling of the American Mind: How Good Intentions and Bad Ideas Are Setting Up A Generation for Failure 10–11 (2018).

[30] Christian Legal Soc. v. Martinez, 561 U.S. 661, 696–97 (2010). Ironically, perhaps the best explanation of the Court's approach comes not from an opinion of the Court, but from a four-justice dissent: "Our country as a whole, no less than the [state university] 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 [constitutional] rights." Id*. at 734 (Alito, J., dissenting) (internal citations omitted) (emphasis added).

[31] United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

[32] Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

[33] Fisher v. Univ. of Texas (*Fisher I*), 570 U.S. 297, 309 (2013).

II. THE CHALLENGE TO CONSTITUTIONALISM ON AMERICAN CAMPUSES

A. Free Speech

In the sphere of Free Speech, identity politics poses three challenges. First, the identity politics' spirit of "vindictive protectiveness" requires punishing offensive speech.[34] Second, faculty and administrators mandate conformity by requiring students to affirm certain ideas.[35] Third, by imposing mandatory student fees and then using the proceeds to subsidize student speech, public universities force students to subsidize speech with which they disagree.[36]

1. Punishing Offensive Speech

Identity politics "fuels the sometimes violent efforts to shut down speech that challenges campus orthodoxies."[37] In *Unlearning Liberty: Campus Censorship and the End of American Debate*,[38] Greg Lukianoff, chronicles identity politics' challenges to free speech on contemporary campuses.[39] "On college campuses today, students are punished for everything from mild satire, to writing politically incorrect short stories, to having the 'wrong' opinion on virtually every hot button issue, and, increasingly, simply for criticizing the college administration[.]"[40] Public university faculty and administrators "are ambivalent about free speech, imagining that if they really did allow all opinions to be expressed, the result would be a nightmarish landscape of nonstop bigotry and ignorance."[41] Faculty and administrators encourage a "crusade against intolerance, insensitivity, and ignorance."[42] For their part, students expect to be insulated from ideas that might be offensive to them[43] and routinely engage in censorship.[44] Consequently, "the threat of punishment for expressing the wrong thoughts, the omnipresence of codes warning students to be careful about what they say, and the politicized, self-serving redefinition of tolerance and civility all reinforce the social pressure" to avoid debate all together.[45]

2. Mandating Conformity

Public institutions not only punish offensive speech, but also require conformity. Many professors require their students to adopt certain

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[34] *See infra* Part II-A-1.
[35] *See infra* Part II-A-2.
[36] *See infra* Part II-A-3.
[37] MAC DONALD, *supra* note 20, at 4.
[38] *See generally* Greg Lukianoff, Unlearning Liberty: Campus Censorship and the End of American Debate (2012).
[39] For a review of Lukianoff's work, *see* William E. Thro, Betraying Freedom: A Review of Lukianoff's Unlearning Liberty and Powers' The Silencing, 42 J.C. & U.L. 523 (2016).
[40] LUKIANOFF, *supra* note 38, at 4.
[41] *Id.* at 245.
[42] *Id.* at 111.
[43] *Id.* at 232–34.
[44] *Id.* at 219–42.
[45] *Id.* at 243.

assumptions,[46] mandate students lobby for certain left wing causes,[47] are intolerant of students who disagree with their views,[48] evaluate students' "dispositions,"[49] and punish student writing that makes them uncomfortable.[50] Indeed, in some instances, students who aspire to be professionals are punished for failing to conform to professional norms.[51]

3. Forced Subsidy of Student Speech

Many, if not most, public institutions force students to subsidize speech that they find objectionable. All students are required to pay a student activity fee (a tax), and then the proceeds of these fees are distributed to recognized student groups. Thus, a Democrat subsidizes the College Republicans, an atheist subsidizes the Christian groups, a Muslim subsidizes the Jewish students, and LGBTQ students subsidize traditional marriage advocacy groups. Although such direct payments from the general government to political parties, religious organizations, or advocacy groups would be constitutionally questionable, in *Board of Regents of the Univ. of Wisconsin v. Southworth*,[52] the Supreme Court upheld the practice[53] as long

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[46] *Id.* at 186–88.
[47] *Id.* at 191–93.
[48] *Id.* at 193–94
[49] *Id.* at 195–98.
[50] *Id.* at 198–200.
[51] Keefe v. Adams, 840 F.3d 523, 533 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 1448 (2017). For a brief commentary on the case, *see* Zach Greenberg, *Eighth Circuit Decision Opens the Door for Violations of Students' Speech Rights*, FIRE (Nov. 1, 2016), https://www.thefire.org/eighth-circuit-decision-opens-door-for-violations-of-students-speech-rights/.
[52] 529 U.S. 217 (2000).
[53] As the Court explained:

> The University must provide some protection to its students' First Amendment interests, however. The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support. Viewpoint neutrality was the obligation to which we gave substance in Rosenberger v. Rector and Visitors of the Univ. of Va. There the University of Virginia feared that any association with a student newspaper advancing religious viewpoints would violate the Establishment Clause. We rejected the argument, holding that the school's adherence to a rule of viewpoint neutrality in administering its student fee program would prevent "any mistaken impression that the student newspapers speak for the University." While Rosenberger was concerned with the rights a student has to use an extracurricular speech program already in place, today's case considers the antecedent question, acknowledged but unresolved in Rosenberger: whether a public university may require its students to pay a fee which creates the mechanism for the extracurricular speech in the first instance. When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others. There is symmetry then in our holding here and in Rosenberger: Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected. We conclude that the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle.

Id. at 233–34 (internal citations omitted).

as the method of distributing funds was viewpoint neutral.[54]

B. Religious Liberty

The rise of identity politics challenges Religious Liberty on college campuses in three ways. First, university administrators may refuse to fund certain activities of religious groups.[55] Second, as part of preparation for certain professional careers, faculty may force students of faith to engage in expression or conduct that violates their faith.[56] Third, college officials may force religious groups to admit non-believers.[57]

1. Refusal to Fund the Certain Activities of Student Religious Groups

Under existing Supreme Court precedent involving student organizations, there is "no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."[58] A public university may not favor those groups that support the institution's views and it may not penalize those groups with which it disagrees.[59] Similarly, the Court has ruled that disagreement with a student organization's views does not justify denial of access[60] or funding.[61] Indeed, the practice of requiring

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[54] Of course, this begs the question of what constitutes viewpoint neutrality. In subsequent proceedings in *Southworth*, the Seventh Circuit focused on the amount of discretion given to the student government association to allocate fees. Southworth v. Bd. of Regents of the Univ. of Wis, 307 F.3d 566, 581–82 (7th Cir. 2002). If the student government association had unbridled discretion (a term that was developed in the Supreme Court's jurisprudence involving the denial of licenses and permits), then the requirement of viewpoint neutrality was violated. *Id.* at 581.
Assuming the Seventh Circuit's analysis is correct, then viewpoint neutrality essentially requires a mechanical approach. Some general observations can be made. First, if funding decisions are made using a mathematical formula, then viewpoint neutrality is achieved. For example, if funding requests are approximately twice the amount of the available funds and a university gives each student organization one-half of the amount requested, then the funding allocation is viewpoint neutral. Second, since the Supreme Court has recognized that scarce resources, such as access to money or the ability to participate in a political debate, can be denied to those who do not demonstrate a certain level of support. *See* Ark. Educ. TV Comm'n v. Forbes, 523 U.S. 666, 693–94 (1998). The student organizations with large memberships could receive more money than student organizations with small memberships. For example, an organization with 300 members could be given more money than an organization with ten. Third, because the Court has suggested that viewpoint neutrality is lost when the decisions are based on politics, the practice of student politicians meeting and negotiating an acceptable allocation of student fees is not acceptable. Viewpoint neutrality means that an organization should not have to worry about its influence in the student government.

[55] *See infra* Part II-B-1.

[56] *See infra* Part II-B-2.

[57] *See infra* Part II-B-3.

[58] Widmar v. Vincent, 454 U.S. 263, 268–69 (1981).

[59] Almost fifty years ago, the Court declared:

> The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of "destruction" thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.

Healy v. James, 408 U.S. 169, 187–88 (1972).

[60] *Widmar*, 454 U.S. at 267–70.

[61] Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995).

students to pay mandatory fees that are then distributed to student groups is permissible only if the institution does not favor particular viewpoints.[62] Quite simply, the "avowed purpose" for recognizing student groups is "to provide a forum in which students can exchange ideas."[63] Thus, a group that holds racist, sexist, homophobic, anti-Semitic, or anti-Christian views is entitled to recognition, access to facilities, and funding.[64]

However, officials often refuse to fund activities of student religious groups that, in the judgment of the institution, are "worship activities" or proselytizing while expressly permitting funding for virtually identical activities by secular groups.[65] For example, administrators might allow the French Club to buy bread and wine for its functions, but deny the Roman Catholic Club's request to do the same. They might subsidize the community outreach activities of political groups or advocacy groups, but refuse to subsidize the evangelism activities of religious groups.[66]

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[62] Bd. of Regents v. Southworth, 529 U.S. 217, 233–34 (2000).

[63] *Widmar*, 454 U.S. at 271 n.10. *See also Southworth*, 529 U.S. at 229 (student activity fee was designed to facilitate "the free and open exchange of ideas by, and among, its students."); *Rosenberger*, 515 U.S. at 834 (university funded student organizations to "encourage a diversity of views from private speakers.").

[64] However, while the institution may not refuse recognition because of the student organization's viewpoint, the institution may require the organization to (1) obey the campus rules; (2) refrain from disrupting classes; and (3) obey all applicable federal, state, and local laws. *See generally* WILLIAM KAPLIN & BARBARA LEE, THE LAW OF HIGHER EDUCATION (5th ed. 2013) (interpreting *Healy*).

As a practical matter, this means that the institution can impose some neutral criteria for recognition, such as having a faculty advisor, having a constitution, and having a certain number of members. However, the institution cannot deny recognition simply because the institution or a significant part of the campus community dislikes the organization. Moreover, *Healy* also states that the institution may not deny recognition because members of the organization at other campuses or in the outside community have engaged in certain conduct. *Healy,* 408 U.S. at 185–86.

[65] *See* Roman Catholic Found., v. Regents of Univ. of Wis. Sys., 578 F. Supp. 2d 1121, 1134–36 (W.D. Wis. 2008), *aff'd sub nom.,* Badger Catholic, Inc. v. Walsh, 620 F.3d 775 (7th Cir. 2010) (invalidating state university's refusal to fund certain activities of religious groups).

[66] Drawing such distinctions is problematic. As a federal trial court observed:

> [T]he issue in the present case is not whether activities that could reasonably be labeled worship, proselytizing, or sectarian religious instruction serve the forum's limited purposes, but whether the specific activities that RCF actually engaged in serve such purposes. The labels affixed to an activity are not necessarily dispositive of whether the activity serves the forum's purposes, especially when the labels are broad, as are labels such as worship, proselytizing, inculcation, dialogue, discussion and debate. Rather than relying on highly abstract labels, the University must examine the specific content of each disputed activity in light of the forum's purposes. Further, worship, proselytizing and sectarian religious instruction, and dialogue, discussion and debate, are not mutually exclusive. An activity can integrate elements of worship and discussion, proselytizing and debate, and instruction and dialogue. An activity that includes some worship cannot be excluded on the ground that it is not "dialogue, discussion or debate" if that activity in fact includes some dialogue, discussion, or debate[.]
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> Proselytizing is essentially advocacy from a religious viewpoint. If the University excluded all advocacy from the forum, perhaps it could also exclude religious proselytizing. But so long as it funds political, environmental and other advocacy, it is hard to see a viewpoint neutral reason for excluding religious advocacy, although I do not foreclose the possibility that one exists.

Roman Catholic Found., 578 F. Supp. 2d at 1134–36.

2. Forcing People of Faith to Violate Their Beliefs

Certain professional groups, such as psychological counselors or social workers, impose ethical requirements on those who are part of the profession.[67] Yet, adhering to those ethical requirements may require People of Faith to violate their religious beliefs.[68] As part of training students to enter the profession, public university faculty may insist students conform to the profession's ethics and ignore their faith convictions.[69]

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[67] As DeMitchell, Hebert, and Phan explained:

> What do professionals do that separates them from individuals in other occupations? William J. Goode, in his study of professions, asserts that there are two generating qualities that define professions. They are "(1) a basic body of abstract knowledge, and (2) the ideal of service." He asserts that professionals fashion solutions based on the needs of the client, "not necessarily [on] the best material interest or needs of the professional himself." Professional actions taken in pursuit of the best interest of clients involves "a high degree of self-control of behavior through codes of ethics." Members of a profession are required to adhere to the code of ethics of their profession as a condition of membership. For example, the American Counseling Association (ACA) Code of Ethics serves five goals. Goal Three states that the Code "establishes the principles that define the ethical behavior and best practices" of its members. Goal Four states the purpose for the ethical behavior. It reads: "The Code serves as an ethical guide designed to assist members in constructing a professional course of action that best serves those utilizing counseling services and best promotes the values of the counseling profession." Therefore, professionals must act in the best interests of their client, patient, or student. The ACA Code of Ethics further states that counselors, when faced with difficult-to-resolve ethical dilemmas, should base their decisions on that which "help[s] to expand the capacity of people to grow and develop." The emphasis is placed on the interests of the client, not on the interests of the professional counselor. As demonstrated by the ACA Code, ethical behavior and best practices are designed to help the client. The predicate of a profession is the best interests of the client, not the needs, interests, or desires of the professional.

Todd A DeMitchell et al., The University Curriculum and the Constitution: Personal Beliefs and Professional Ethics in Graduate School Counseling Programs, 39 J.C. & U.L. 303, 304–05 (2013) (internal citations omitted).

[68] As Laycock explained:

> [T]he opponents of religious liberty also insist that every individual application of their interests is compelling. They say there is a compelling interest in avoiding any inconvenience or affront; no potential customer should ever be referred elsewhere. They say that they are entitled to have personal services available even when the services are entirely unwanted. No same-sex couple in its right mind would want to be counseled by a counselor who believes that the couple's relationship is fundamentally wrong. But supporters of gay rights insist that every counselor be available to same-sex couples. The purpose of such arguments is not to obtain counseling, but to drive conservative believers out of the profession.
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> The same logic is applied to every other occupation or profession in any way connected to one of these disputes. If you don't want to do abortions, do not work in obstetrics and gynecology. You should not be permitted to deliver babies unless you are also willing to kill babies on request. If you don't want to do same-sex weddings, don't be a wedding planner or a caterer or the owner of a bridal shop, however small. And even: if religious nonprofits don't want to provide contraception, they don't have to run "a hospital, school, or charity." Never mind that churches for centuries have treated education, and care of the sick and the destitute, as part of their missions.

Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 872–73 (2014) (internal citations omitted)

[69] As DeMitchell, Herbert, & Phan framed the issue:

When confronted with the issue, the lower federal appellate courts have agreed that religious students must conform to the profession's ethics,[70] but have insisted that students with religious objections be treated the same as secular students.[71] Nevertheless, the insistence that religious students conform to professional ethics that are antithetical to their beliefs can chill such students from even entering the profession.[72]

3. Forcing Religious Groups to Associate with Non-Believers

The right to express a particular viewpoint necessarily includes the right to associate with others who share that view. "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 unless a correlative freedom to engage in group effort toward those ends were

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> But what happens when there is a conflict between the established code of ethics of a profession (being taught in graduate programs of school counseling) and the deeply held beliefs of an aspiring practitioner? What must give way? Can aspirants compel the profession through the preparation program, to make room for their deeply held position, or can the profession compel the aspirant to demonstrate acceptance of and willingness to follow the complete Code of Ethics regardless of their convictions?

DeMitchell et al., *supra* note 67, at 305.

[70] For example, the Eleventh Circuit observed:

> As all graduate students in the program, regardless of their personal beliefs, must counsel clients in accordance with the ACA Code of Ethics and ASU's counseling curriculum, the remediation plan did not single out Keeton for disfavored treatment because of her point of view. All students are taught the ACA's fundamental principles, including that counselors must support their clients' welfare, promote their growth, respect their dignity, support their autonomy, and help them pursue their own goals for counseling. Further, ASU's curriculum requires that all students be competent to work with all populations, and that all students not impose their personal religious values on their clients, whether, for instance, they believe that persons ought to be Christians rather than Muslims, Jews or atheists, or that homosexuality is moral or immoral. As such, ASU's curriculum and the generally applicable rules of ethical conduct of the profession are not designed to suppress ideas or viewpoints but apply to all regardless of the particular viewpoint the counselor may possess. Thus, unlike the cases Keeton relies upon, this is not a case in which a forum was opened to a particular topic or expressive activity and disfavored views on that topic or forms of that activity were suppressed. Indeed, Keeton remains free to express disagreement with ASU's curriculum and the ethical requirements of the ACA, but she cannot block the school's attempts to ensure that she abides by them if she wishes to participate in the clinical practicum, which involves one-on-one counseling, and graduate from the program.

Keeton v. Anderson-Wiley, 664 F.3d 865, 874 (11th Cir. 2011).

[71] Ward v. Polite, 667 F.3d 727, 735–38 (6th Cir. 2012).

[72] As Professor Laycock observed:

> The same logic is applied to every other occupation or profession in any way connected to one of these disputes. If you don't want to do abortions, do not work in obstetrics and gynecology. You should not be permitted to deliver babies unless you are also willing to kill babies on request. If you don't want to do same-sex weddings, don't be a wedding planner or a caterer or the owner of a bridal shop, however small. And even: if religious nonprofits don't want to provide contraception, they don't have to run "a hospital, school, or charity." Never mind that churches for centuries have treated education, and care of the sick and the destitute, as part of their missions.

Laycock, *supra* note 68, at 872–73.

not also guaranteed."[73] "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."[74] "If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the *First Amendment* is intended to protect."[75] This freedom of association "is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private."[76]

"Freedom of association . . . plainly presupposes a freedom not to associate."[77] "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being."[78] "The 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."[79]

Therefore, government may intrude on the freedom of association only "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas that cannot be achieved through means significantly less restrictive of associational freedoms."[80] Courts are required to "examine whether or not the application of the state law would impose any 'serious burden' on the organization's rights of expressive association."[81] Judges "give deference to an association's assertions regarding the nature of its expression" and "to an association's view of what would impair its expression."[82] It is not necessary for the organization's core purpose to be expressive, or for all members to agree with all aspects of the message.[83] Under this framework, the Court has upheld statutes requiring civic organizations to admit women,[84] but has allowed both parade organizers[85] and the Boy Scouts to exclude homosexuals.[86] The cases have turned on whether the "the enforcement of these [policies]" would "materially interfere with the ideas that the organization sought to express."[87]

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[73] Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).
[74] Boy Scouts of Am. v. Dale, 530 U.S. 640, 647–48 (2000).
[75] Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47, 68 (2006).
[76] *Dale*, 530 U.S. at 648.
[77] *Roberts*, 468 U.S. at 623.
[78] Democratic Party of U.S. v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 122 n.22 (1981) (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW 791 (1978)). *See also* Cal. Democratic Party v. Jones, 530 U.S. 567, 574–75 (2000).
[79] *Dale*, 530 U.S. at 648.
[80] *Roberts,* 468 U.S. at 623.
[81] *Dale*, 530 U.S. at 658.
[82] *Id.* at 653.
[83] *Id.* at 655.
[84] Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544 (1987); *Roberts*, 468 U.S. at 623–27.
[85] Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston, Inc., 515 U.S. 557, 572–73 (1995).
[86] *Dale*, 530 U.S. at 655–60.
[87] *Id.* at 657.

However, with respect to student religious groups at public universities, different rules often apply. In *Christian Legal Society v. Martinez*,[88] a sharply divided Supreme Court upheld—as a matter of Federal Constitutional law—policies at public institutions requiring student groups to admit "all comers."[89] Under this precedent, as a condition of becoming recognized student organizations, a status affording them such benefits as access to campus facilities and some funding, religious groups must admit "all comers," including those who disagree with their deeply held religious beliefs and values.[90]

Put another way, in *Christian Legal Society*, the Supreme Court declared that the government, through university officials, could force faith-based groups to choose between compromising their religious values and receiving benefits that other student groups receive as a matter of constitutional right.[91] While one can hope that government officials "surely could not demand that all Christian groups admit members who believe that Jesus was merely human[,]" they "may impose these very same requirements on students who wish to participate in a forum that is designed to foster the expression of diverse viewpoints."[92]

Moreover, at some institutions, secular student groups may exclude those who disagree with their views, but religious organizations are required to refrain from what they described as religious discrimination as they sought to preserve their faith-based identities.[93] For example, the Young Democrats may have excluded Republicans, but Evangelical Christian Clubs could not have denied membership to atheists.[94]

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[88] 561 U.S. 661 (2010), *remanded to* Christian Legal Soc'y Chapter of Univ. of Cal. v. Wu, 626 F.3d 483, 485, 488 (9th Cir. 2010) (rejecting the remaining claims of organizational leaders that university officials violated their rights to religious freedom on the basis that they failed to preserve their argument that officials selectively applied the disputed policy).

[89] *Id.* at 698.

[90] *Christian Legal Soc'y*, 561 U.S. at 667–69.

[91] *Id.*

[92] *Id.* at 731 (Alito, J., dissenting). For commentary on Christian Legal Society, see Charles J. Russo, Mergens v. Westside Community Schools at Twenty-Five and Christian Legal Society v. Martinez: From Live and Let Live to My Way or the Highway, 2015 BYU EDUC. & L. J. 453 (2015); Charles J. Russo & William E. Thro, Another Nail in the Coffin of Religious Freedom? Christian Legal Society v. Martinez, 12 EDUC. L. J. 20 (2011); William E. Thro & Charles J. Russo, A Serious Setback for Freedom: The Implications of Christian Legal Society v. Martinez, 261 EDUC. L. REP. 473 (2010).

[93] *See* Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 804–05 (9th Cir. 2011) (upholding a policy allowing secular groups to exclude students who disagreed with their objectives, but expressly prohibiting religious groups from doing the same on the basis that this constituted discrimination).

[94] In describing one state university's policy, the Ninth Circuit observed:

> Indeed, San Diego State stipulates that some officially recognized student groups at the university restrict membership to those who believe in the group's purpose, or "agree with the particular ideology, belief, or philosophy the group seeks to promote." For example, the Immigrant Rights Coalition requires members to "hold the same values regarding immigrant rights as the organization." The San Diego Socialists at San Diego State require students to be in "agreement with our purpose." The Hispanic Business Student Association opens membership to those "who support the goals and objectives" of the organization. Plaintiffs argue that San Diego

C. Individual Equality

The Equal Protection Clause,[95] "is essentially a direction that all persons similarly situated . . . be treated alike[,]"[96] and that the Constitution protects "*persons*, not *groups*."[97] Indeed, the "rights created by the first section of the *Fourteenth Amendment* are, by its terms, guaranteed to the individual. The rights established are personal rights."[98] If a statute or regulation treats everyone equally, there is no equal protection violation.[99]

Yet, the Equal Protection Clause does not prohibit all governmental classifications.[100] "Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern."[101] "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[102]

However, this general rule gives way when the Government treats people differently because of race.[103] Quite simply, race is constitutionally radioactive. "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[104] Indeed, because racial distinctions "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality"[105] and are "contrary to our traditions and hence constitutionally suspect[,]"[106] "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[107] Consequently, the

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> State is discriminating against their viewpoint by allowing these secular groups to discriminate on the basis of belief, while prohibiting Plaintiffs from doing so on the basis of their religious beliefs.

Id. at 800–01.

[95] U.S. CONST. amend. XIV, § 1.

[96] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

[97] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279–80 (1986) (Powell, J.)

[98] Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

[99] Romer v. Evans, 517 U.S. 620, 623 (1996).

[100] Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976).

[101] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271–72 (1979).

[102] City of Cleburne, Tex. V. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (citing Schweiker v. Wilson, 450 U.S. 221, 230 (1981)).

[103] *Id.* at 440. *See also* Graham v. Richardson, 403 U.S. 365, 371–72 (1971); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626–27 (1969).

[104] Rice v. Cayetano, 528 U.S. 495, 517 (2000).

[105] Shaw v. Reno, 509 U.S. 630, 643 (1993) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

[106] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[107] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (Powell, J.). *See also* Adarand Constructors, Inc. v. Pena, 505 U.S. 200, 227 (1995) ("Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a

Constitution imposes special rules for any racial classification.[108]

First, instead of presuming that governmental action is constitutional[109] and requiring the challenger to demonstrate otherwise,[110] "the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'"[111] In the context of racial preferences in higher education, "[s]trict scrutiny requires the university to demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.'"[112] "It remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes 'ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'"[113] Furthermore, "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight.' Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice."[114]

Second, the Government's use of race is limited to extraordinary circumstances—remedying the present day effects of identified past intentional discrimination by a particular governmental unit or obtaining the educational benefits of a diverse student body in higher education.[115] Just as significantly, the Court has rejected, as a matter of constitutional law, a number of other justifications offered by state and local governments for race-conscious measures: remedying societal discrimination; maintaining racial

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reviewing court under strict scrutiny."); Loving v. Virginia, 388 U.S. 1, 11 (1967) ("the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny[.]'").

[108] Recognizing that "racial characteristics so seldom provide a relevant basis for disparate treatment,'" Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989). Racial classifications "are constitutional only if they are narrowly tailored to further compelling governmental interests." Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (citations omitted). *See also Croson*, 488 U.S. at 493 (O'Connor, J.). "Absent searching judicial inquiry into the justification for such race-based measures, we have no way to determine what 'classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.*

Moreover, the desire of the government to *help* racial minorities does not change the analysis. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982) ("[T]he analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable[.] While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change."). Indeed, the Court has "insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies, . . . race-based preferences in government contracts, . . . and race-based districting intended to improve minority representation[.]" Johnson v. California, 543 U.S. 499, 505 (2005) (internal citations omitted).

[109] Lyng v. Int'l Union, 485 U.S. 360, 370 (1988).

[110] F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

[111] *Johnson*, 543 U.S. at 505 (quoting *Adarand Constructors*, 515 U.S. at 227).

[112] *Fisher I*, 570 U.S. at 309 (quoting *Bakke*, 438 U.S. at 305 (opinion of Powell, J.)).

[113] *Id*. at 311–12 (quoting *Grutter*, 539 U.S. at 337).

[114] *Id*. at 313 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989)).

[115] *See, e.g.*, *Grutter*, 539 U.S. at 328–30; *Richmond*, 488 U.S. at 504–05.

balance; and providing faculty role models for students.[116] The Court also disapproved the rationale of increasing the number of physicians practicing in under-served areas where the institution did not prove that race-conscious admissions would "promote better health-care delivery to deprived citizens."[117]

Third, consideration of race must be a last resort.[118] In the context of higher education, the university must prove there are "no workable race-neutral alternatives [that] would produce the educational benefits of diversity."[119] If there is a workable race neutral alternative, "then the university may not consider race."[120]

For institutions of higher education, achieving racial and ethnic diversity is sacrosanct. Yet, the emphasis on diversity focuses almost exclusively on what Cashin calls "optical diversity."[121] As long as the class picture contains a significant number of people of color, the university can trumpet the triumph of its diversity policy.[122] It does not matter that these students of color come from upper class families or attended elite private schools.[123] It does not matter that their parents are highly educated recent immigrants from Africa, the Caribbean, or South America.[124] The only thing that matters is that their skin tone creates an image of a diverse class.[125] Conversely, a student who grew up in poverty, the student who attended the failing public school, or the child of the high school dropout who never knew her father, may not change the optics.[126]

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[116] *See Grutter,* 539 U.S. at 323–24; Wygant v. Jackson Bd. Of Educ., 476 U.S. 267, 274–76 (1986) (plurality opinion); *Bakke*, 438 U.S. at 307–10.

[117] *Bakke*, 438 U.S. at 310–11 (opinion of Powell, J.). *See also Grutter*, 539 U.S. at 324.

[118] Courts must inquire "into whether a university could achieve sufficient diversity without using racial classifications." *Fisher I*, 570 U.S. at 312. As Heriot explained:

> The bottom line, however, is that if capturing the educational benefits of diversity is the goal, the academic judgments that must be made in fashioning an actual policy are numerous and never-ending. Those judgments cannot be simple-minded sentimental ones and they definitely cannot be political in nature. Reason and principle must prevail.
>
> If Fisher does nothing else, it should force colleges and universities to confront the research on mismatch in a detached and scientific manner. That means using ideologically diverse teams of qualified, independent investigators—persons whose job and prestige are not dependent on maintaining the status quo. It means adequately funding and supporting the investigation with access to data. It means following standard scientific procedures by making the data available to qualified researchers who wish to critique the work.

Gail Heriot, Fisher v. University of Texas: The Court (Belatedly) Attempts To Invoke Reason and Principle, 2012–13 CATO SUP. CT. REV 63, 90 (2013) (footnotes omitted).

[119] *Fisher I*, 570 U.S. at 312.

[120] *Id.*

[121] Sheryll Cashin, Place Not Race: A New Vision of Opportunity in America 41-62 (2014).

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

Higher education's focus on "optical diversity" has significant implications for the constitutional value of individual equality. First, at best it is debatable whether the benefits of racial preferences outweigh the costs.[127] Derek Bok and William Bowen argued racial preferences have substantial benefits to universities and few downsides,[128] but Russell K. Nieli presents a very different view.[129] Drawing upon substantial social science data, Nieli shows: (1) deep resentment of preferences among Whites and Asians;[130] (2) lower academic performance among minorities who are admitted under racial preferences;[131] (3) little impact on future earnings of minorities who benefit from preferences;[132] (4) increased self-segregation by race on campuses;[133] (5) no real economic benefits to Whites and Asians that attend racially diverse institutions;[134] and (6) in the context of law schools, higher drop out and bar failure rates.[135]

Second, racial preferences in admissions do not necessarily help those who are disadvantaged in contemporary society.[136] "Race-based affirmative action buys some diversity for a relative few, but not serious inclusion[.]"[137] However, race does not, by definition, capture those who suffer the structural disadvantages of segregated schools and neighborhoods.[138] Fifty years ago, "race and gender were appropriate markers for the type of exclusion practiced by most predominately white universities. Today, place is a more appropriate indicator of who gets excluded from consideration by admissions officers at selective institutions."[139]

III. THE COURT'S EMBRACE OF CONSTITUTIONALISM

In the face of the challenges posed by identity politics in society at large, the Court has embraced constitutionalism in the spheres of Free Speech, Religious Liberty, and Individual Equality. This Part details the cases in all three spheres.

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[127] *See* Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291, 315–16 (2014) (Roberts, C.J., concurring).

[128] *See generally* Derek Bok & William Bowen, The Shape of the River (1998).

[129] *See generally* Russell K. Nieli, Wounds That Will Not Heal: Affirmative Action and Our Continuing Racial Divide (2012).

[130] *Id.* at 172–79.

[131] *Id.* at 163–72.

[132] *Id.* at 143–48.

[133] *Id.* at 186–87.

[134] *Id.* at 215–22.

[135] *Id.* at 222–32.

[136] *See generally* CASHIN, *supra* note 121. Cashin argues preferences should emphasize:

> [P]lace, rather than race, as the focus of affirmative action for the pragmatic reason that it will foster more social cohesion and a better politics[.] Those who suffer the deprivations of high-poverty neighborhoods and schools are deserving of special consideration. Those blessed to come of age in poverty-free havens are not.

Id. at xv.

[137] *Id.* at xx.

[138] *Id.* at xvi.

[139] *Id.*

A. Free Speech

In the sphere of Free Speech, the Court's embrace of constitutionalism has four aspects. First, the government may not punish offensive speech.[140] Second, the government may not compel speech.[141] Third, the government may force individuals to subsidize the speech of others.[142] Fourth, the government may not force the surrender of constitutional rights as a condition of receiving a public benefit.[143]

1. The Government May Not Punish Offensive Speech

While large segments of the university community wish to punish offensive speech, two recent Supreme Court decisions reaffirm that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[144]

First, in *Snyder v. Phelps*,[145] the Court, by a vote of eight to one,[146] held a State could not impose civil liability for intentional infliction of emotional distress resulting from provocative and inflammatory comments made at a military funeral.[147] Despite the incendiary nature of the comments and the sensitive context, the Court found the speech addressed "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy[,]"[148] and thus, touched on a matter of public concern.[149] Because the speech was on a matter of public concern, it receives "special protection" and "cannot be restricted simply because it is upsetting or arouses contempt."[150]

Second, in *Matal v. Tam*,[151] the Court unanimously found Congress violated the Constitution when it enacted a statute prohibiting the registration of trademarks that may disparage or bring into contempt or disrepute any persons, living or dead.[152] Such a restriction "offends a bedrock *First Amendment* principle: Speech may not be banned on the ground that it expresses ideas that offend."[153] Consequently, the government must allow a

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[140] *See infra* Part III-A-1.
[141] *See infra* Part III-A-2.
[142] *See infra* Part III-A-3.
[143] *See infra* Part III-A-4.
[144] Matal v. Tam, 137 S. Ct. 1744, 1763 (2017) (quoting Street v. New York, 394 U.S. 576, 592 (1969)). *See also* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the *First Amendment*, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").
[145] 562 U.S. 443 (2011).
[146] *See id.* at 463–75 (Alito, J., dissenting).
[147] *Id.* at 460–61.
[148] *Id.* at 454.
[149] *Id.* at 454–57.
[150] *Id.* at 458.
[151] 137 S. Ct. 1744 (2017).
[152] *Id.* at 1764–65. *See also* 15 U.S.C. § 1052(a) (2012).
[153] *Matal*, 137 S. Ct. at 1751.

musical group to trademark "Slants" even though that term is a racial slur of Asians.[154]

In sum, there are "few categories of speech that the government can regulate or punish" and "[a]side from these and a few other narrow exceptions, it is a fundamental principle of the *First Amendment* that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys."[155]

2. The Government May Not Compel Speech

In *Nat'l Inst. of Family & Life Advocates v. Becerra*,[156] the Court held California's legislature violated the Constitution by requiring professionals "to inform women how they can obtain state-subsidized abortions[.]"[157] The constitutional challenge involved a group of professionals who were opposed to abortion and who actively tried to persuade women form pursuing abortion.[158] By compelling the professionals to speak a particular message, the government was "alter[ing] the content" of the professionals speech.[159] Most significantly, the Court rejected the notion, embraced by some of the courts of appeals,[160] that strict scrutiny does not apply to content based regulation of "professional speech."[161] This aspect of the holding broadens the freedom of speech for professionals and aspiring professionals speaking in their professional context.[162]

3. The Government May Not Force Individuals to Subsidize Speech

While public universities force students to subsidize the expressive activities of student organizations, the Constitution protects the right "to refrain from speaking at all"163 and the "right to [eschew] association for

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[154] See generally id.
[155] *Id*. at 1765 (Kennedy, J., concurring).
[156] 138 S. Ct. 2361 (2018).
[157] *Id.* at 2371.
[158] *Id*. at 2370.
[159] *Id.* at 2371.
[160] *See, e.g.*, King v. Governor of N.J., 767 F.3d 216, 232 (3d Cir. 2014); Pickup v. Brown, 740 F.3d 1208, 1227–1229 (9th Cir. 2014); Moore-King v. Cty. of Chesterfield, 708 F.3d 560, 568–570 (4th Cir. 2013). As the Supreme Court explained:

> These courts define "professionals" as individuals who provide personalized services to clients and who are subject to "a generally applicable licensing and regulatory regime." "Professional speech" is then defined as any speech by these individuals that is based on "[their] expert knowledge and judgment," or that is "within the confines of [the] professional relationship." So defined, these courts except [sic] professional speech from the rule that content-based regulations of speech are subject to strict scrutiny.

Becerra, 138 S. Ct. at 2371 (citations omitted).
[161] *Becerra*, 138 S. Ct. at 2371–75.
[162] Casey Mattox, *Three New Supreme Court Decisions Protect Speech on Campus*, NAT'L REV. (Aug. 14, 2018), https://www.nationalreview.com/2018/08/supreme-court-decisions-clarify-campus-free-speech-protections/amp.
[163] Wooley v. Maynard, 430 U.S. 705, 714 (1977).

expressive purposes."[164] "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned."[165] Yet, the Court historically has approved public employee's forced subsidy of labor unions[166] and public university student's forced subsidy of private student organizations.[167]

In *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*,[168] the Court ended "the oddity of privileging compelled union support over compelled party support and [brought] a measure of greater coherence to our First Amendment law."[169] "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning[,]" and "[c]ompelling a person to *subsidize* the speech of other private speakers raises similar *First Amendment* concerns."[170] Therefore, any forced subsidy "violates the *First Amendment* and cannot continue" unless the individuals "affirmatively consents to pay."[171]

4. The Government May Not Require the Surrender of Constitutional Rights as a Condition of Receiving a Public Benefit

In *Agency for International Development v. Alliance for Open Society International, Inc.*, the Court revived and redefined the unconstitutional conditions doctrine.[172] Because the "government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit[,]'"[173] there are circumstances where "a funding condition can result in an unconstitutional burden on First Amendment rights."[174] In determining whether a funding condition is unconstitutional, "the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to

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[164] Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate").

[165] Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463 (2018).

[166] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977).

[167] Bd. of Regents v. Southworth, 529 U.S. 217, 221 (2000).

[168] 138 S. Ct. 2448 (2018).

[169] *Id.* at 2484.

[170] *Id.*at 2464 (emphasis added).

[171] *Id.* at 2486.

[172] *See generally* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205 (2013). For a commentary on this case, *see* Annie G. McBride, Note, *Agency for International Development v. Alliance for Open Society International, Inc.: Balancing Congress's Spending Power Against First Amendment Liberties*, 59 LOY. L. REV. 1049 (2013).

[173] *Agency for Int'l Dev.*, 570 U.S. at 214 (quoting Rumsfeld v. Forum for Acad. Inst. Rights, Inc., 547 U.S. 47, 59 (2006)).

[174] *Id*.

subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself."[175]

Although *Alliance for Open Society* concerned the Freedom of Speech, its holding is not limited to Free Speech claims.[176] Indeed, a few days after the decision in *Alliance for Open Society*, the Court recognized "an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."[177] Thus, the principles of *Alliance for Open Society* apply to all of the enumerated rights articulated in other[178] constitutional provisions.[179]

B. Religious Liberty

In the sphere of Religious Liberty, the Court's embrace of constitutionalism has three aspects. First, the government must be neutral toward people of faith.[180] Second, when the government confers a public benefit, the government may not exclude religious organizations or individuals.[181] Third, the government may not interfere with a religious organization's institutional autonomy.[182]

1. The Government Must Be Neutral Toward People of Faith

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*,[183] the Court had to reconcile "the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services" and "the right of all persons to exercise fundamental freedoms under the *First Amendment*[.]"[184] Specifically, when a decorative cake artist has religious objections to same-sex marriage, may the government, through the enactment of a non-discrimination statute, force the artist to create a cake celebrating a same-sex wedding? Although the Supreme Court of the United Kingdom found in favor of religious liberty in a similar case,[185] the Court ultimately avoided the issue by focusing on "elements of a clear and impermissible

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[175] *Id*. at 214–15. As the Court acknowledged, "[t]he line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition." *Id*. at 215.

[176] See generally *id.*

[177] Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604 (2013).

[178] Indeed, *Koontz* did not involve the First Amendment, but rather centered on the Fifth Amendment Takings Clause. *See generally id.*

[179] Presumably, this includes Second Amendment rights related to the individual ownership of firearms. *See generally* McDonald v. City of Chi., 561 U.S. 742 (2010).

[180] *See infra* Part III-B-1.

[181] *See infra* Part III-B-2.

[182] *See infra* Part III-B-3.

[183] 138 S. Ct. 1719 (2018).

[184] *Id.* at 1723.

[185] *See* Lee v. Ashers Bakery [2018] UKSC 49 (reference by the Att'y Gen. of N. Ir.).

hostility toward the sincere religious beliefs motivating [the] objection."[186] Quite simply, "the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices."[187] As Justice Gorsuch noted in his concurrence, "we know this with certainty: when the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble."[188] *Masterpiece* ensures that the government treats people of faith no worse—and no better—than those who reject religious belief.[189]

2. When the Government Creates a Public Benefit, Religious Organizations and Individuals Cannot be Excluded

In *Trinity Lutheran Church v. Comer*,[190] the Court announced a new constitutional rule: except where such an action would violate the Establishment Clause, the Free Exercise Clause prohibits constitutional actors from conferring or denying a benefit solely because of an individual's or entity's religious exercise.[191] While four justices joined a footnote suggesting the result was limited to context of the program at issue,[192] the language of the Opinion of the Court establishes broad general principles,[193] which "do not permit discrimination against religious exercise—whether on the playground or anywhere else."[194]

3. The Government May Not Interfere with a Religious Organization's Institutional Autonomy

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Court recognized that the First Amendment "gives special solicitude to the rights of religious organizations."[195] Further, the Court stated that they could not "accept the remarkable view that the *Religion Clauses* have nothing

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[186] *Masterpiece,* 138 S. Ct. at 1721.
[187] *Id.* at 1731.
[188] *Id.* at 1734 (Gorsuch, J., concurring).
[189] See *id.*
[190] 137 S. Ct. 2012 (2017). For commentary on the education law implications of the case, *see generally* Charles J. Russo & William E. Thro, *Cracks in the Wall: Trinity Lutheran and the Potential Transformation of Religious Freedom in the United States*, 27 EDUC. & L. J. 174 (2018); William E. Thro & Charles J. Russo, Expanding the Rights of Student Religious Groups on College and University Campuses: The Implications of Trinity Lutheran Church v. Comer, 7 LAWS 11 (2018); William E. Thro & Charles J. Russo, *Odious to the Constitution: The Educational Implications of Trinity Lutheran Church v. Comer*, 346 EDUC. L. REPORTER 1 (2017); Charles J. Russo & William E. Thro, *Blessed Trinity: The Implications of Trinity Lutheran v. Comer for Religious Liberty*, 44 RELIGION & EDUC. 247 (2017).
[191] *Trinity Lutheran*, 137 S. Ct. at 2024–25.
[192] *Id*. at 2024 n.3 (Roberts, C.J.). The footnote states, "[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." *Id.*
[193] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 25 (2004) (Rehnquist, C.J., concurring).
[194] *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring).
[195] Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 189 (2012).

to say about a religious organization's freedom to select its own [leaders]."[196] "By imposing an unwanted minister, the state infringes the *Free Exercise Clause*, which protects a religious group's right to shape its own faith and mission through its appointments."[197] "According to the state the power to determine which individuals will minister to the faithful also violates the *Establishment Clause*, which prohibits government involvement in such ecclesiastical decisions."[198]

Hosanna-Tabor establishes that religious groups have a right of absolute discretion to determine who their leaders will be.[199] Logically, if an organization can restrict its leadership to those who adhere to the faith and basic principles, then the organization ought to be able to impose a similar requirement on membership. Consequently, the necessary inference of *Hosanna-Tabor* is that religious organizations, through the Religion Clauses,[200] have greater associational freedoms than their secular counterparts.[201]

C. Individual Equality

In the sphere of Individual Equality, the Court's initial decision in *Fisher v. University of Texas (Fisher I)*[202] represents an embrace of constitutionalism in three ways.[203] First, the Court reaffirmed "the decision to pursue 'the educational benefits that flow from student body diversity' . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper[,]"[204] but also stressed: a "university is not permitted to define diversity as some specified percentage of a particular group merely because of its race or ethnic origin. That would amount to outright racial balancing, which is patently unconstitutional."[205] Second, even when an institution utilizes this broad definition of diversity, it still "must

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[196] *Id.*

[197] *Id.* at 188.

[198] *Id.* at 188–89.

[199] See *id.*

[200] "Responding somewhat incredulously to the government's theory that whatever rights the church might have derive only from freedom of association, [Justice Scalia] said that 'there, black on white in the text of the Constitution are special protections for religion.'" Douglas Laycock, *The Federalist Society National Lawyers Convention–2011*: *Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 855 (2012).

[201] Because the government may favor religion and religious entities over non-religion and non-religious entities, such a result would not violate the Establishment Clause. *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 719–24 (2005); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 18 n.8 (1989); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987).

[202] 570 U.S. 297 (2013).

[203] To be sure, the Court's most recent decision in *Fisher II* suggests "merely invoking 'the educational benefits of diversity' is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests." Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2215 (2016) (Alito, J., dissenting) (However, this greater deference in *Fisher II* does not undermine the core holding of *Fisher I*).

[204] *Fisher I*, 570 U.S. at 310.

[205] *Id.* at 311 (internal citations omitted).

prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference."[206] "[I]t remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes 'ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'"[207] Third, Courts must inquire "into whether a university could achieve sufficient diversity without using racial classifications."[208] Put another way, the university must prove there are "no workable race-neutral alternatives would produce the educational benefits of diversity."[209] If there is a workable race neutral alternative, "then the university may not consider race."[210]

IV. THE IMPACT ON EDUCATION LAW

A. Free Speech

The Court's embrace of Free Speech has four significant implications for higher education. First, university officials may not punish offensive speech.[211] Second, faculty and administrators may not compel speech.[212] Third, university administrators may not force students to subsidize the speech of others.[213] Fourth, as a condition of receiving a benefit, university officials may not require the surrender of constitutional rights.[214]

1. University Officials May Not Punish Offensive Speech

Although students are "[t]aught to believe they are at existential threat from circumambient bias" and thus demand that offensive speech be punished,[215] the decisions in *Snyder* and *Matal* require public university officials to reject those demands.[216] To do otherwise is to violate clearly established law and subject the individual to monetary damages.[217]

2. Faculty and Administrators May Not Compel Speech

Although faculty and administrators may seek to compel an affirmation of certain views, *Nat'l Inst. of Family & Life Advocates* reaffirms the State "must not be allowed to force persons to express a message contrary

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[206] *Id.*
[207] *Id.* at 311–12 (quoting Grutter v. Bollinger, 539 U.S. 306, 337 (2003)).
[208] *Id.* at 312.
[209] *Id.*
[210] *Id.*
[211] *See infra* Part IV-A-1.
[212] *See infra* Part IV-A-2.
[213] *See infra* Part IV-A-3.
[214] *See infra* Part IV-A-4.
[215] MAC DONALD, *supra* note 20, at 3.
[216] Snyder v. Phelps, 562 U.S. 443 (2011).
[217] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

to their deepest convictions. Freedom of Speech secures freedom of thought and belief."[218] Similarly, to the extent that public university administrators seek to punish speech of aspiring professionals for failing to adhere to professional norms, *Nat'l Inst. of Family & Life Advocates'* rejection of lesser scrutiny for "professional speech" precludes such actions.[219] In sum, all members of the university community are free from compulsion. Just as speech from professionals will be the same as speech from ordinary citizens for constitutional purposes, speech from students who aspire to a particular profession must be treated the same as speech from ordinary students.

3. University Administrators Likely May Not Force Students to Subsidize the Speech of Others

Although *Southworth* remains binding precedent until overruled,[220] *Janus* appears to contradict *Southworth*.[221] If an employee cannot be forced to financially support the activities of labor unions with which he disagrees, then it is difficult to see how a student can be forced to financially support the activities of a student organization with which he disagrees.

4. As a Condition of Receiving a Benefit, University Officials May Not Require the Surrender of Constitutional Rights

As explained in Part II-B-3, student religious groups often are required to admit non-believers as a condition of receiving recognition or funding.[222] Some university officials require secular student groups to admit students who disagree with the group's objectives.[223]

Yet, after *Alliance for Open Society*, a condition requiring a student group to admit those who do not share its beliefs is unconstitutional.[224] To explain, after *Alliance for Open Society*, the constitutionality of a condition on receiving a subsidy turns on whether the condition defines the program or reaches outside of the program.[225] As the Supreme Court observed, state university officials recognize and fund student organizations so that "students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall."[226] While state university administrators may be tempted to adopt a different and broader rationale for recognizing and funding

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[218] Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).
[219] *See generally* Mattox, *supra* note 162.
[220] *See* Agostini v. Felton, 521 U.S. 203, 237–38 (1997) (discussing the implications of stare decisis).
[221] *See generally* Mattox, *supra* note 162.
[222] *See supra* notes 73–94 and accompanying text.
[223] *Id.*
[224] *See* Agency for Intl Dev., 570 U.S. 205.
[225] *Id.* at 213–15.
[226] Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 233 (2000).

student organizations, public institutions "cannot recast a condition on funding as a mere definition of its program in every case, lest the *First Amendment* be reduced to a simple semantic exercise."[227]

Assuming that the purpose of recognizing and funding student organizations on campuses is to foster dynamic discussions among students, then public university administrators may impose conditions that facilitate those purposes. For example, it likely is appropriate to require student organizations to follow university accounting procedures, have a faculty advisor, reserve meeting space in advance, and open some of its educational events to the entire campus.[228] Similarly, state university officials likely can require that most of the members and all of the officers in a student group actually be enrolled.[229] These conditions are fully consistent with the reasons why state universities recognize and fund student groups.[230]

Conversely, requiring a student organization to accept those who reject its core beliefs has nothing to do with the promotion of dynamic discussions. Indeed, "where such a policy might be relevant, it could as easily be completely counterproductive, indeed nonsensical—e.g., forcing a Jewish club to allow Muslim or Christian officers."[231] It undermines, rather than promotes, dynamic discussions among students.[232] Like the statute invalidated in *Alliance for Open Society*, a requirement to admit non-believers "is an ongoing condition on recipients' speech and activities, a ground for terminating [participation in the program] after selection is complete."[233] The condition is nothing more than an attempt to compel an organization to conform to the state university's desires.[234] The requirement goes beyond defining the limits of the program; it affects the organization's constitutional rights outside of the program.[235]

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[227] Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 547 (2001).

[228] Of course, "[s]tudents and faculty are free to associate to voice their disapproval of the [student organization's] message[.]" Rumsfeld v. Forum for Acad. Institutional Rights, Inc., 547 U.S. 47, 69–70 (2006). If one finds a particular viewpoint disagreeable, the solution is to promote an alternative viewpoint, not to suppress the disagreeable viewpoint.

[229] Of course, a requirement that most of the members and all of the officers be students represents an interference with religious autonomy rights; such an interference is consistent with the purpose of recognizing student organizations—to promote dialogue among *students*.

[230] A requirement that a student organization choose its officers through democratic elections likely would not be consistent with the purposes of recognizing student groups. Many religious organizations—notably the Roman Catholic Church and the Church of Jesus Christ of Latter Day Saints—choose leaders through mechanisms other than democratic elections. If a student religious organization's core beliefs require selection of leaders through a method other than democratic elections, then that belief must be respected.

[231] Brief for American Center for Law & Justice as Amici Curiae Supporting Petitioners at 9, Agency for Int'l Dev. v. All. for Open Soc'y, Int'l, Inc., 570 U.S. 205 (2013) (No. 12-10).

[232] Brief of Beckett Fund for Religious Liberty and Christian Legal Soc'y Supporting Respondents at 10–11, Agency for Int'l Dev. v. All. for Open Soc'y, Int'l, Inc., 570 U.S. 205 (2013) (No. 12-10).

[233] Agency for Int'l Dev. v. All. for Open Soc'y, Int'l, Inc., 570 U.S. 205, 218 (2013).

[234] *Id*.

[235] *Id*.

Additionally, requiring an organization to admit those who do not share its beliefs seems more intrusive than the statute at issue in *Alliance for Open Society*.[236] The statute at issue in *Alliance for Open Society* simply required the organization to adopt the government's view on a particular issue; on all other issues, the organization could do as it pleased.[237] In contrast, forcing an advocacy organization to accept those who disagree with its core tenets is to begin the process of changing the nature of the organization.[238] If a Democrat organization is forced to accept Republicans, then the organization will be less Democrat and, in time, may not be Democrat at all.

B. Religious Liberty

The Court's embrace of constitutionalism has significant implications for Religious Liberty on campus. First, student religious organizations must be treated no better or no worse the than secular organizations.[239] Second, people of faith have greater freedom to dissent from professional speech requirements.[240] Third, while it remains binding precedent, recent decisions undermine *Christian Legal Society*.[241]

1. Equal Treatment for Student Religious Organizations

The constitutional rule of *Trinity Lutheran*—except where such an action would violate the Establishment Clause, the Free Exercise Clause prohibits constitutional actors from conferring or denying a benefit solely because of an individual's or entity's religious exercise—has significant implications for education.[242] First, by expanding the scope of the federal Free Exercise Clause, *Trinity Lutheran* diminishes state sovereignty concerning the establishment of religion.[243] The States have less "play in the joints" to adopt a more restrictive view of establishment.[244] Second, *Trinity Lutheran* ensures equal treatment between private secular schools and private religious schools.[245] A State does not have to provide any special benefits to private schools, but if the State chooses to do so, it must include private

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[236] *Id*.

[237] *But see generally* Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt., 721 F.3d 264 (4th Cir. 2013) (en banc) (suggesting that government may require a private, non-commercial organization, opposed to abortion, to convey a government authored message that undermines the organization's message).

[238] *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 577–78 (2000) (discussing the impact of allowing non-party members to participate in a political party's primary).

[239] *See infra* Part IV-B-1.

[240] *See infra* Part IV-B-2.

[241] *See infra* Part IV-B-3.

[242] See Trinity Lutheran, 137 S. Ct. 2012.

[243] William E. Thro & Charles J. Russo, Odious to the Constitution: The Educational Implications of Trinity Lutheran Church v. Comer, 346 EDUC. L. REP. 1, 19-23 (2017).

[244] *Id.*

[245] *Id.*

religious schools.[246] Third, *Trinity Lutheran* enhances the rights of student religious groups on public university campuses.[247] If a public university gives broad funding for the activities of secular groups, it may not refuse to fund similar activities for religious groups simply because the money may be used for worship activities or proselytizing.[248] Similarly, if pubic university officials allow student secular groups to exclude those who disagree with the groups' objectives, the administrators must allow religious groups to exclude those who disagree with the groups' faith tenets.[249]

2. Religious Dissent from Professional Speech

Although faculty sometimes require religious students to violate their beliefs as a condition of fulfilling certain academic requirements in professional programs, *Nat'l Inst. of Family & Life Advocates* seems to preclude such actions.[250] As discussed above in Part IV A-2, the decision impacts all students, both secular and religious. However, because of the "special solicitude" accorded religious beliefs by the Religion Clauses, religious students arguably have greater right to resist a public university faculty member's command to conform.

3. Undermining Christian Legal Society

Of course, *Christian Legal Society* remains controlling constitutional precedent unless, or until, it is explicitly overruled.[251] Even so, *Hosanna-Tabor, Alliance for Open Society International*, and *Trinity Lutheran* collectively undermine the result in *Christian Legal Society*.[252]

First, *Hosanna-Tabor* establishes the principle that religious groups have a right of religious autonomy—absolute discretion to select their leaders.[253] While *Hosanna-Tabor* involved an incorporated church, rather than an unincorporated student religious group, there is no reason to think that the rights of church members or student group members depend upon the

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[246] *Trinity Lutheran*, 137 S. Ct. 2024–25.

[247] Thro & Russo, *supra* note 243, at 18, 25–32.

[248] This analysis is limited to discrimination based upon belief and does not apply to discrimination based on race or sex. If a public institution required all student organizations to refrain from race or sex discrimination, then, under the reasoning of *Christian Legal Society*, the institution would not violate the Federal Constitution. *See generally* Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010).

[249] As Robert George observed, "the right to religious freedom by its very nature includes the right to leave a religious community whose convictions one no longer shares and the right to join a different community of faith, if that is where one's conscience leads." Robert P. George, "*What is Religious Freedom?*," PUBLIC DISCOURSE (July 24, 2013), http:// www.thepublicdiscourse.com/ 2013/ 07/ 10622.

[250] *See Becerra*, 138 S. Ct. 2361.

[251] Agostini v. Felton, 521 U.S. 203, 237–38 (1997). For a commentary on this case, *see* Allan G. Osborne & Charles J. Russo, *The Ghoul is Dead, Long Live the Ghoul: Agostini v. Felton and the Delivery of Title I Services in Nonpublic Schools*, 119 EDUC. L. REP. 781 (1997).

[252] *See* William E. Thro, *The Limits of Christian Legal Society,* 2014 CARDOZO L. REV. DE NOVO 124 (2014); William E. Thro, *Undermining Christian Legal Society v. Martinez,* 295 EDUC. L. REP. 867 (2013).

[253] *See Hosanna-Tabor*, 565 U.S. 171.

organizational form.[254] Logically, if organizations can restrict their leadership to those who adhere to their faiths, then they ought to be able to establish similar requirements for membership. This is the opposite result of *Christian Legal Society*.[255]

Second, in *Alliance for Open Society*, the Supreme Court revived and redefined the unconstitutional condition doctrine permitting the government to impose conditions defining programs, but may not impose conditions reaching outside of the programs.[256] Assuming that the reasoning of *Alliance for Open Society* extends to a public university official's decisions on funding student groups, then university officials cannot force faith-based groups to surrender their rights to religious autonomy as a condition of receiving governmental subsidies or benefits—such as university recognition or access to student activity funds and campus facilities.[257] This outcome also stands in direct opposition to *Christian Legal Society*.[258]

Third, because *Trinity Lutheran* prohibits governmental officials from focusing on the religious identity of student organizations,[259] policies and/or practices treating them differently than their secular counterparts must cease. In deciding whether to fund refreshments or outreach activities, the religious nature of the organization is, or should be, rendered meaningless. Simply put, in the wake of *Trinity Lutheran*, in assessing the validity of membership policies, officials at public institutions cannot apply different standards to student religious groups.[260]

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[254] *Id.*

[255] Christian Legal Soc'y, 561 U.S. at 661.

[256] See generally Agency for Int'l Dev., 570 U.S. 205.

[257] See *id.*

[258] See *id.*

[259] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024–25 (2017).

[260] However, if a religious group's belief system required it to engage in sex discrimination, state law might protect such practices. A state court may interpret the State Constitution's Free Exercise Clause as allowing a group to engage in racial or sex discrimination. Indeed, after the U.S. Supreme Court diminished religious freedom in *Smith,* several state courts held that the State Constitutions provided greater protection for religious freedom. *See* Douglas Laycock, *Theology Scholarships, The Pledge Of Allegiance, And Religious Liberty: Avoiding The Extremes*, 118 HARV. L. REV. 155, 211–12 (2004) (discussing cases). *See also* Emp't Div. v. Smith 494 U.S. 872 (1990). Similarly, state Religious Freedom Restoration Acts prohibit the Government from imposing a substantial burden on the free exercise of religion, unless there is a compelling governmental interest pursued through the least restrictive means. *See* Christopher C. Lund, *Religious Freedom After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 476 (2010); James W. Wright, Jr., Note, *Making State Religious Freedom Restoration Amendments Effective*, 61 ALA. L. REV. 425, 426 (2010).
To date, more than twenty states have adopted religious freedom acts. *See*, *e.g.*, ARIZ. REV. STAT. §§ 41-1493–1493.02 (LexisNexis 2018); ARK. CODE ANN. § 16-123-404 (2018); CONN. GEN. STAT. ANN. § 52-571b (West 2018); Fla. STAT. ANN. §§ 761.01-.05 (LexisNexis 2018); IDAHO CODE ANN. §§ 73-401-404 (2018); 775 ILL. COMP. STAT. ANN. 35/15 (LexisNexis 2018); IND. CODE ANN. §§ 34-13-9-1 *et seq.* (LexisNexis 2018); KY. REV. STAT. ANN. § 466.350 (LexisNexis 2018); MO. ANN. STAT. §§ 1.302–307 (West 2018); N.M. STAT. ANN. §§ 28-22-1–28-22-5 (LexisNexis 2018); OKLA. STAT. ANN. tit. 51, §§ 251–258 (West 2018); 71 PA. STAT. AND CONS. STAT. ANN. §§ 2401–2407 (West 2018); 42 R.I. GEN. LAWS §§ 42-80.1-1–4.1 (2018); S.C. CODE ANN. §§ 1-32-10–60 (LexisNexis 2018); TENN. CODE ANN. § 4-1-407 (LexisNexis 2018); TEX. CIV. PRAC. & REM. CODE ANN §§ 110.001–012 (West 2018); UTAH CODE ANN. §§ 63L-5-10–403 (LexisNexis 2018); VA. CODE ANN. §§ 57-1–2.02 (2018).

C. Individual Equality

The Court's embrace of constitutionalism has implications for individual equality in higher education. First, there is a distinct possibility that the Court will reverse itself and declare that obtaining the educational benefits of a diversity is not a compelling governmental interest. Second, even if the Court preserves diversity as a compelling governmental interest, it may be more aggressive in enforcing the narrowly tailored requirement.

1. Diversity May Not Be a Compelling Governmental Interest

The Supreme Court may well reverse itself on the issue of whether obtaining educational benefits of diversity is a compelling governmental interest. Three current Justices—Chief Justice Roberts, Justice Thomas, and Justice Alito—have expressed, at least implicitly, their disapproval of diversity as a compelling governmental interest.[261] Although neither Justice Gorsuch nor Justice Kavanaugh addressed the issue while serving on the Court of Appeals, the similarities between their judicial philosophy and Justice Scalia's judicial philosophy suggest both of them may reject diversity as a compelling governmental interest.[262] If the three Justices opposed to diversity remain consistent and if Justices Gorsuch and Kavanaugh are opposed to diversity as a compelling interest, then the diversity rationale is doomed.

2. Less Deference on the Narrowly Tailored Requirement

Even if the Court preserves diversity as a compelling governmental interest, the Court may well apply less deference to higher education officials' efforts to achieve diversity. In other words, the narrowly tailored inquiry may actually have teeth. Although Justice Kennedy has accepted diversity as a compelling governmental interest, he generally was skeptical of the means to achieve the end.[263] Indeed, in *Fisher I*, Justice Kennedy—writing for the Court—deferred to university judgment as to whether to pursue diversity,[264] but refused to find that university officials were entitled to no deference as to the means of achieving that end.[265] Although Justice Kennedy—again writing for the Court—was far more deferential to the administrators in *Fisher II*,[266] he emphasized the "University's program is *sui generis*."[267] In a future case

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[261] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725–33 (Roberts, C.J.). *See also* Grutter v. Bollinger, 539 U.S. 306, 346–48 (Scalia, J., dissenting); *id.* at 352–54 (Thomas, J., dissenting).

[262] *See* Eric Citron, *Potential nominee profile: Neil Gorsuch*, SCOTUSBLOG (Jan. 13, 2017, 12:53 PM), http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/.

[263] *See Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

[264] *Fisher I*, 570 U.S. at 310.

[265] *Id.* at 311.

[266] *See* Peter N. Kirasnow, *Race Discrimination Rationalized Again*, 2015-16 CATO SUP. CT. REV. 59, 63–78 (2016).

[267] *Fisher II*, 136 S. Ct. at 2208.

involving a university program that is not inherently unique, the Court may well return to the non-deferential approach of *Fisher I*.[268]

V. CONCLUSION

When Lincoln reinvented America,[269] many doubted whether a Nation conceived and dedicated to Constitutionalism could "long endure."[270] The same doubts confront us in the third millennium. Since "[w]e are cultivating students who lack all understanding of the principles of the American Founding[,]"[271] there is little support for Free Speech, Religious Liberty, or Individual Equality on our campuses. "[F]ree speech is bred into the bones of a modern university,"[272] but "[u]nless the campus zest for censorship is combated now, what we have always regarded as a precious inheritance could be eroded beyond recognition, and a soft totalitarianism could become the new American norm."[273]

The judiciary is the least dangerous branch,[274] but it serves a vital role—ensuring the popular passions of our time do not contradict the timeless principles of the Constitution.[275] The Will of the People's Agents, as expressed in the statutes, regulations, and governmental actions, must conform to the Will of the People, as expressed in the words of the Constitution.[276] In recent years, the Roberts Court has risen to the challenge and embraced constitutionalism in the context of Free Speech, Religious Liberty, and Individual Equality. By doing so, it has reminded academe that "forward thinking" is not an embrace of the whims of identity politics, but a reaffirmation of timeless universal principles.[277]

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[268] *See Fisher I*, 570 U.S. 297.

[269] *See generally* James M. McPherson, Abraham Lincoln And The Second American Revolution (1990); Wills, *supra* note 2.

[270] Lincoln, *supra* note 1.

[271] MAC DONALD, *supra* note 20, at 17.

[272] Keith E. Whittington, Speak Freely: Why Universities Must Defend Free Speech 29 (2018).

[273] MAC DONALD, *supra* note 20, at 18.

[274] THE FEDERALIST NO. 78 (Alexander Hamilton).

[275] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[276] See generally supra note 274.

[277] As Justice Kennedy, joined by three other Justices observed:

> The California Legislature included in its official history the congratulatory statement that the Act was part of California's legacy of "forward thinking." But it is not forward thinking to force individuals to "be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable." It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.

Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2379 (2018) (internal citations omitted).