DISASTER: THE WORST RELIGIOUS FREEDOM CASE IN FIFTY YEARS

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I. INTRODUCTION TO A DISASTER

Christian Legal Society v. Martinez[1] was the worst constitutional decision of the Supreme Court during the 2009 Term. But that's nothing. *Christian Legal Society* is a strong candidate for the title of "Worst First Amendment Free Speech Decision of the Past Fifty Years"—and that's saying something.[2] Indeed, it is probably one of the dozen or so worst

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[1] 130 S. Ct. 2971 (2010).

[2] Besides *Christian Legal Society*, there are other nominees for this ignominious award. *See, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000) (upholding a content-based, viewpoint-based prohibition of leafleting and interpersonal communications on public sidewalks, plainly targeted at pro-life advocates seeking to dissuade women entering abortion clinics from having abortions and justified on the grounds that it protected a right to be free from undesired messages); Madsen v. Women's Health Ctr., 512 U.S. 753 (1994) (a forerunner of *Hill*, upholding a content-based, viewpoint-based judicially-crafted injunction against anti-abortion advocacy near abortion clinics and inventing a lessened standard of scrutiny for the seeming purpose of upholding such an injunction); Locke v. Davey, 540 U.S. 712 (2004) (upholding explicitly content-based discrimination in a state program that excluded from eligibility for a state low-income scholarship program anyone who would use the scholarship to pursue a degree in theology or ministry; case primarily addressed the meaning of the Free Exercise Clause but also rejected a Free Speech Clause claim); McConnell v. FEC, 540 U.S. 93 (2003) (upholding a content-based restriction of core political speech in election campaigns on the ground that doing so is desirable as a public policy matter to better enable the government to balance and manage political campaign speech). *McConnell* cannot win the award because that decision (and *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990)) was largely repudiated by *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010). *Locke v. Davey* is an idiotic, idiosyncratic decision that contradicts other well-established principles. But hopefully, *Locke* is simply an unprincipled exception to a sound rule and is of relatively minor consequence—a stupid blip, rather than a fundamental repudiation of all that is right and true. Chief Justice Rehnquist's majority opinion reads, transparently, as a damage-control opinion designed to limit the rationale to the case's own facts and perhaps to sow within a deliberately weak opinion the seeds of its own destruction.

I cheated, subtly, in the statement made in the text: By limiting my proposition to free *speech* cases, I exclude from the Worst in Fifty Years category some atrocious Free *Exercise* Clause decisions. But as my title suggests (and as my analysis below endeavors to show), there is a strong case to be made that *Christian Legal Society* is the worst religious freedom case of the past half-century as well. Its principal rivals for this title are *Employment Division v. Smith*, 494 U.S. 872 (1990) (government may prohibit the free exercise of religion, as long as it does so through the vehicle of facially neutral laws of general application that cannot be *proven* to have been targeted at religion) and *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988) (government does not

Supreme Court First Amendment decisions *of all time*, and there have been some real doozies in that competition.[3]

An occasion as celebratory as the twenty-fifth anniversary of the birth of an evangelical Christian law school deserves an article more cheerfully titled than *"Disaster*." I wish I could be a bearer of Good News.

But alas, *Christian Legal Society* is a disaster. The case holds, by a vote of 5–4, that Christian student groups at public universities do not have the First Amendment right to maintain a distinctive Christian identity or to have a statement of faith to which their members—or even just their leaders—can be expected, by others in the group, to subscribe. Simply stated, student religious groups on state university campuses do not possess First Amendment rights to freedom of association for expressive purposes. That holding is a fundamental negation of the right of Christian campus groups to freedom of speech, to freedom of association, and to the collective free exercise of religion—a First Amendment disaster trifecta.

It is possible, as discussed below, that the holding is broader: *No* campus student groups possess the First Amendment right to freedom of association. It is not just religious groups that lack such rights; no group has them. That would at least acquit the case of the charge of special hostility to *religious* campus groups in particular, and of targeting religious association specifically. But that prospect should not cheer anybody up. It would mean that *Christian Legal Society v. Martinez* creates a rather different disaster—the evisceration of freedom of

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even burden the free exercise of religion by Native Americans when it takes action to destroy a religious sacred site; we stole their land fair and square, so destroying the sacred site does not pose any cognizable injury protected by the Free Exercise Clause). One could reasonably proclaim *Smith* the worst religious freedom case of the past fifty years. It is an immensely consequential and unfortunate decision, wrongly interpreting the Free Exercise Clause. Yet it is not an entirely implausible reading of the Free Exercise Clause and is not as sinister as *Christian Legal Society*. *Lyng v. Northwest Indian Cemetery Protective Ass'n* is a foolish, obtuse decision, but a decision that is relatively limited in its impact. By going back only fifty years, I steer clear of such awful decisions as *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) (holding that schoolchildren may be compelled to engage in a patriotic nationalist affirmation contrary to their sincere religious beliefs). I regard *Gobitis* as the worst First Amendment opinion ever, mitigated only slightly by the fact that it was overruled (on the free speech point) by *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), just three years later.

[3] In addition to the cases listed in the preceding note, consider *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), *overruled by West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), *Debs v. United States*, 249 U.S. 211 (1919), *Frohwerk v. United States*, 249 U.S. 204 (1919), *Schenck v. United States*, 249 U.S. 47 (1919), *Berea College v. Kentucky*, 211 U.S. 45 (1908), and too many Establishment Clause decisions to list separately without overtaxing the cite-checking capabilities of the staff of the *Regent University Law Review*.

expressive association as a general proposition. Misery may love company, but not that much.[4]

Perhaps there is a way to be a bit less dour. Maybe *Christian Legal Society v. Martinez*, although an awful decision, will prove to be of limited scope, an idiosyncratic blip, or First Amendment hiccup, limited to its specific (and somewhat contrived) facts.[5] Maybe it will prove to be a ticket for this day and this train only, like some other bad First Amendment decisions seem to have become.[6] I am not terribly optimistic on this score, as I explain below, but there is at least some reason for hope.

Moreover, and in further mitigation of my uncheerfulness, *Christian Legal Society* does *not*—at least, not in explicit terms—undo the magnificent decisions protecting the First Amendment rights of religious persons and groups to associate and to engage in religious expression on public university campuses, free from government discrimination or exclusion on the basis of the religious content or viewpoint of their messages, or their religious identities. The year 2011 marks the thirtieth anniversary of a magnificent, turning-point constitutional decision concerning the rights of campus student religious groups: *Widmar v. Vincent*, one of the best and brightest, pivotal, and most important religious freedom-of-speech cases of the modern era, lives on. *Widmar* held that government, including state universities, may not exclude religious speakers and groups from public forums for expression, based on their religious nature or the religious content of their messages.[7] That is a magnificent, supremely important principle, and nothing in *Christian Legal Society* directly contradicts it (though, I shall argue, the logic of *Widmar* refutes the illogic of *Christian Legal Society*). *Rosenberger v. Rector and Visitors of the University of Virginia*, an

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[4] In the final section of this Article, I explore whether it is possible to "cabin" *Christian Legal Society* as stating a rule limited to its peculiar, stipulated facts. *See infra* Part IV.

[5] As I will discuss briefly below, the Court proceeded from premises framed by a stipulation of the parties that Hastings College of the Law required every campus group to accept "all comers" for membership—a facially neutral rule, but one that did not accord with factual reality. *Christian Legal Society*, 130 S. Ct. at 2984. The consequence of this framing of the issue would appear to be that, in the view of the Court, *no* campus student groups at state universities possess an affirmative right to freedom of association for expressive purposes, if the university wishes to deny such rights across the board. That conclusion would in effect overrule *Healy v. James*, 408 U.S. 169 (1972), which the Court denied it had any intention of doing. *See Christian Legal Society*, 130 S. Ct. at 2987–88.

[6] Locke v. Davey, 540 U.S. 712, 715 (2004); Regan v. Taxation With Representation of Wash., 461 U.S. 540, 551 (1983).

[7] Widmar v. Vincent, 454 U.S. 263, 267–70, 277 (1981). *See generally* Michael Stokes Paulsen, *The Most Important Religious Liberty Case of the Past Thirty Years*, THE WITHERSPOON INST. (Dec. 8, 2011), http://www.thepublicdiscourse.com/2011/12/4413.

important extension of *Widmar*, also survives.[8] *Rosenberger* held that government may not exclude campus student religious organizations from equal access to *funds* for expressing their messages, simply because of their religious viewpoint.[9]

Christian Legal Society does not alter these decisions or erase these fundamental First Amendment freedoms. But it does hold, perniciously and maliciously, that government may *condition* these Free Speech Clause rights to equal access on a campus religious group's forfeiture of its First Amendment freedom of expressive association—the right of a group to define its expressive identity by defining the set of views with which members of the group agree and which they unite in embracing.

And *that* is a disaster. Make me an Evil Campus Administrator, intent on destroying the presence of religious student groups on my public university (or high school) campus but saddled with the holdings of *Widmar* and *Rosenberger* (and *Board of Education v. Mergens*[10]). I can still achieve my sinister objectives, armed solely with *Christian Legal Society v. Martinez*. All I need to do is require those wretched religious groups to accept members and leaders who do not share their faith, and I can destroy or subvert them from within. I can encourage or even enlist students who *oppose* the group's messages—on morality, on sexuality, on salvation, on God's purposes and commands—to infiltrate the group, to sap its strength, to frustrate its objectives, and to outvote the faithful remnant for control of the group's leadership and direction. There will be plenty such opponents, if the student religious group has any core religious integrity. A faithful Christian group, for example, will by its teaching and example inevitably call forth the resistance of opponents who despise its message. My "anti-discrimination" stance will provide plenty of incentive for them to compromise their principles, rather than cease to exist as a student group on campus. ("C'mon guys, just be a little bit more inclusive, and we'll let you exist. You can do that, can't you?"). The same is true for any committed Jewish or Muslim student group. *I can subvert them all!* The Christian group will be forced to abandon, slowly but surely, its Christian principles, to whatever degree they conflict with the university's "principles." The same holds true for the other religious groups. Either they will have to compromise, or they will have to get off my campus.

Christian Legal Society is a disaster but perhaps not an unmitigated disaster. The decision is, in terms, peculiarly limited by its somewhat odd, almost hypothetical, and decidedly unreal, stipulated facts. It is also

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[8] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

[9] *Id.* at 834–35.

[10] 496 U.S. 226, 253 (1990).

limited, probably, by the terms of Justice Kennedy's strange "yes-I-agree-as-long-as-bad-things-don't-happen" concurrence. This does not make the holding of *Christian Legal Society* any less unprincipled and insidious; it just means that the magnitude of impact of the unprincipled holding may be limited by other, equally unprincipled, limitations in the opinion or in future cases. Also, as noted, *Christian Legal Society* does not directly impair *Widmar* or *Rosenberger*. It thus *might* prove to be a blip, or a hiccup, in First Amendment jurisprudence—a case that does not make sense in the overall fabric of free speech law and comes to be either not taken seriously or regarded as an exception. But if *Christian Legal Society v. Martinez* proves to be a mitigated disaster, it is a disaster nonetheless.

In this short diatribe—"essay" or "article" seems too august a label—I will vent my First Amendment rage against *Christian Legal Society*. Hopefully, the rage is fired by sound First Amendment analysis, and motivated by righteous indignation rightfully directed. But it is rage, nonetheless, at one of the great First Amendment outrages of our time. Part II sets forth why the result of the case is wrong as a matter of what should have been regarded as fundamental, well-accepted principles of First Amendment law. Part III collects several specific, miscellaneous objections to Justice Ginsburg's Opinion of the Court (and a few to Justice Kennedy's concurrence). Justice Ginsburg's majority opinion concocts some new, pernicious doctrines to try to weasel out from under the logical force of the principles that I set forth in Part II. These are harmful in and of themselves. Part IV ends on a (slightly) more upbeat note, suggesting ways in which the reasoning of *Christian Legal Society* might be cabined by its assumed facts, and therefore, hopefully, distinguished into oblivion (or even overruled) and rendered an odd museum-piece of discarded judicial nonsense, like *Lochner v. New York*.[11]

II. THE CORRECT ANALYSIS

It is easy enough to explain the basic error of the Court's holding in *Christian Legal Society*. The argument consists simply of stringing together several fairly basic, and reasonably well-accepted, propositions of First Amendment law, and then not creating a destructive, *ad hoc* exception to those First Amendment basics.

Start with the core proposition of the First Amendment's Freedom of Speech Clause: Government may not prohibit, punish, or penalize speech (or expressive conduct) because of its message, content, or

[11] 198 U.S. 45 (1905).

viewpoint.[12] There are certain exceptions to this principle, as well as "compelling-interest" overrides, but this is the core rule.[13] A well-established corollary is that *religious* expression by private speakers and groups is treated like expression on any other subject; there is no "religion exception" to the freedom of speech. Thus, government may not prohibit, punish, or penalize speech because of its *religious* message, content, or viewpoint.[14] *Widmar* is the modern paradigm case for this proposition, but the cases that stand for this proposition are legion.[15]

The next step is to recognize the rights of *groups* of people to communicate their views or to join their voices together. The freedom of speech is a freedom possessed by each individual, but individuals can band together to express a common message. Nothing in the First Amendment limits the freedom of speech to individuals or forbids them from speaking together, and it would be absurd—antithetical to every principle of the First Amendment—to create such a limitation. Nobody would think of it, not in America at least, and such a notion is not supported by any strand of judicial doctrine interpreting the First Amendment.[16] People get to form groups to express common messages. And the groups they form get to speak, the same as individuals do. The right to free speech thus extends to group expression as fully as it extends to individual expression. Where a group, rather than an

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[12] *See Rosenberger*, 515 U.S. at 828–29; Police Dep't v. Mosley, 408 U.S. 92, 101–02 (1972). *See generally* Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1919–22 (2001) [hereinafter Paulsen, *Scouts, Families, and Schools*].

[13] *See generally* MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 950–58, 967–68 (2010).

[14] Widmar v. Vincent, 454 U.S. 263, 277 (1981).

[15] *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001); *Rosenberger*, 515 U.S. at 837; Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 685 (1992); *Mergens*, 496 U.S. at 250; Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 576 (1987); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953); Niemotko v. Maryland, 340 U.S. 268, 272 (1951); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940); Schneider v. State, 308 U.S. 147, 160 (1939).

[16] One possible exception is the area of political campaign finance regulation, where certain legislative restrictions on spending for collective advocacy have been sustained by the courts and others have been struck down. *Compare* Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (holding governmental restrictions on corporations' independent political expenditures unconstitutional), *with* McConnell v. FEC, 540 U.S. 93, 143, 154, 157 (2003) (upholding restrictions on financing political campaign speech as justified by government interest as preserving integrity of elections), *overruled by Citizens United*, 130 S. Ct. at 913 (2010), *and* Buckley v. Valeo, 424 U.S. 1, 16–17, 143 (1976) (per curiam) (holding that some limits on campaign contributions are constitutional). In my view, government restrictions on individual or group financial support for political candidates, political parties, or dissemination of political views are presumptively unconstitutional. Paulsen, *Scouts, Families, and Schools*, *supra* note 12, at 1920 & n.30.

individual, is the speaker, the First Amendment can be said to protect the free speech rights *of the group, as a group*.

A vital corollary of this proposition is that a group, engaged in the exercise of its First Amendment rights of group expression*, has the right to control the content of its own messages*, including the right to exclude messages it does not wish to express and persons who do not fully embrace the views or message-identity of the group. Of course, the group itself—and not the state—gets to define what set of messages comprise the group's expressive identity. This corollary is sometimes given the fancy name "the freedom of expressive association," as if there were a separate Freedom of Association Clause of the Constitution. But it is really nothing much more than the proposition that groups may form to express the shared messages and identity of the individuals who comprise the group—that this is a legitimate and natural exercise of the freedom *of speech* itself.[17]

Religious speech is, once again, no exception to these principles. Individuals get to join together to engage in religious speech and expressive conduct, just as they may join together to engage in speech or expressive conduct on other topics. *Widmar* stands for this proposition, as do many other cases.[18] Religious groups possess the right to speak as a group, to associate for expressive purposes, and to exclude from their expression views and voices not in accord with the group's message and identity.

Does the right of freedom of speech, for individuals and for groups, and the allied right of expressive association, apply to *student* groups at state university campuses? That is the next step in the argument, and it is an easy one: Student groups at public universities possess the same First Amendment right to freedom of association for expressive purposes as do any other groups formed to engage in expression. The existence of

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[17] The freedom of expressive association has been held, somewhat controversially, not to extend to entities that are essentially non-expressive business associations. Roberts v. U.S. Jaycees, 468 U.S. 609, 629–31 (1984). This is a plausible, if tenuous, exception. Where a group is *not* actually formed around an expressive identity of any sort but is a *non-expressive, commercial* enterprise, it makes a certain amount of sense to say that the First Amendment is not actually in play: The exception limits "the freedom *of speech*" to groups actually engaged *in speech*—expression—of some kind. One can concede the propriety of this exception without necessarily agreeing with all the purported applications of it. *See generally* Paulsen, *Scouts, Families, and Schools*, *supra* note 12, at 1924–28, 1932–39 (collecting and discussing cases relating to expressive association); Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 677–97 (1996) [hereinafter Paulsen, *A Funny Thing Happened*] (collecting and discussing cases involving freedom of expressive association).

[18] *See Good News Club*, 533 U.S. at 111–12; *Rosenberger*, 515 U.S. at 831–32; *Lamb's Chapel*, 508 U.S. at 394; *Widmar*, 454 U.S. at 269.

a general right of campus student groups to freedom of association is the holding of *Healy v. James* in 1972, an early landmark in the law of the First Amendment freedom of expressive association.[19] *Healy* held that state university officials could not ban Students for a Democratic Society ("SDS") from campus just because the officials did not like what SDS stood for or because of the group's association with the national organization of the same name.[20] *Healy* held, explicitly, that campus student groups possess the full First Amendment freedom to form around a common message or identity, whether or not state university officials like that message or identity, and to affiliate with whom they wish for purposes of advancing their shared message and identity: "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. . . . There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right."[21] The Court held in *Healy* that a state university could not deny recognition to a campus student group based on the group's views, or the group's association with the specific tenets or principles of a national organization with which it was affiliated: "The mere disagreement of the President [of the college] with the group's philosophy affords no reason to deny it recognition. . . . 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."[22]

One is tempted to observe, snidely, that *Christian Legal Society* overrules *Healy* on these foundational principles of freedom of speech and association for campus groups. But *Christian Legal Society* does not do so, or at least does not purport to do so. *Christian Legal Society* purports not to contradict *Healy* and indeed explicitly affirms its continued validity.[23] It suffices, for now (I will return to the point below), to note and flag the rather obvious tension, if not outright conflict, between the two cases. If *Healy* is right, it is very, very hard for *Christian Legal Society* to be right as well. One can reconcile the two decisions only if one reads *Christian Legal Society* as *assuming*—without actually deciding—that a state university could deny freedom of expressive association to *all* campus student groups, if it does so uniformly.[24] Given that artificial premise, the Court then proceeded to

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19 408 U.S. 169, 170, 181, 187–88 (1972).

20 *Id.* at 170, 186–88.

21 *Id.* at 181.

22 *Id.* at 187–88 (emphasis added).

23 *Christian Legal Society*, 130 S. Ct. at 2987–88.

24 *Contra Healy*, 408 U.S. at 184.

reject Christian Legal Society's claim of discriminatory treatment: The Christian Legal Society had simply been accorded the same expressive-association rights as other student groups—that is, *no* expressive-association rights, at least none with respect to ideological or doctrinal requirements for membership or leadership of the organization.

But assuming *Healy* is still valid, campus student groups possess the freedom of expressive association. That proposition extends to religious student groups. *Widmar v. Vincent* makes that corollary abundantly clear. *Widmar* straightforwardly noted that *Healy*'s principles—that campus student groups possess the First Amendment rights of freedom of speech and association—apply fully to campus *religious* groups just as any other.[25] That, as we shall see, is of direct relevance to *Christian Legal Society v. Martinez*.

Widmar adds one important thing concerning the free speech and association rights of campus student groups. Student groups may have certain free speech and association rights at public universities precisely by virtue of being *campus* student groups.[26] *Widmar* is notable for its careful formulation of the "limited public forum" doctrine: where government has made property, or a program, generally available for expression or participation by a certain subcategory of speakers or beneficiaries, defined *not* by the content or viewpoint of the speakers' expression but rather by their particular status in relation to the property or program at issue (considered apart from their expressive message or identity)—students and student groups at a public university being a classic, almost perfect example—government then may not exclude a speaker or group based on the content or viewpoint of its expression, including religious expression.[27] Thus, even though it need not have opened its property, program, or fund for expression by anyone in the first place, a state university's decision to invite such participation by its natural constituency—students and student organizations—means that First Amendment principles of free speech and association apply fully to such groups as are naturally embraced in the "forum" thus created.[28]

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

[26] *Id.* at 267–69.

[27] *Id.* at 267–69, 276. While the majority affirmed the First Amendment's broad protection against content-based discrimination in limited public forums, *id.* at 277, Justice Stevens's concurring opinion would have narrowed the protection to viewpoints only, not content. *Id.* at 280 (Stevens, J., concurring).

[28] The idea behind the doctrine of a "*limited* public forum" is to describe the bounds of the constituencies designed to be served by the particular property or program at issue. It was originally a variation on the idea of the "public forum," which means that government could not restrict speech or expression on certain public property that

The specific holding of *Widmar* was that a state university, having made the decision to open up its facilities for use by student groups and organizations for expressive purposes, could not constitutionally exclude a student *religious* group based on its religious character and the religious nature of its expression, such as prayer, worship, singing, and evangelism.[29] Religious student groups have the right to freedom of speech and association on campus, the Court held, following and extending *Healy*.[30] The Free Speech Clause protected such rights of expression and association in the "limited public forum" created by the university on its campus, and the Establishment Clause could not properly be construed to nullify the equal First Amendment free speech rights of student religious groups on public university campuses.[31]

Widmar was reaffirmed and extended in *Rosenberger v. Rector & Visitors of the University of Virginia*, decided in 1995.[32] In *Rosenberger*, the Court held that the University of Virginia had created a "limited public forum" in the form of a limited pool of funding from student

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traditionally has been understood to be open for such expression—public sidewalks, streets, and parks being the classic examples. The basic idea is that the fact that property is government-owned does not mean government may suppress or deny free speech on such property. On the contrary, the fact of government ownership often means just the reverse, depending in part on the nature and function of the property: It is *public* property, available for use by *the public*.

The "public forum" doctrine, including the "limited public forum" variation on the theme, has become needlessly, and unhelpfully, jargonized and complicated in the years since *Widmar*. Recent cases have multiplied categories and subcategories of forums to the point of absurdity. At the risk of being professor-like and boring (feel free to skip the rest of this paragraph, because I confess that it bores me): There are (1) *traditional* public forums (streets, sidewalks, and parks being the classic examples), (2) *designated* public forums (where government has opened property or programs for essentially indiscriminate use), and (3) *limited* public forums (where government has opened its property or program to a limited class of users, not defined by their viewpoints but by their legitimate and natural relationship to the property or program at issue, such as student groups at a university). Unfortunately, the Court, in its inartful attempts to distinguish the "limited" subcategory from the "designated" category, drifted in the direction of saying that the government could make "content-based" decisions (but not "viewpoint-based" decisions) with respect to how a "limited" forum is defined. That would come to prove problematic in *Christian Legal Society,* with the Court using the content-based/viewpoint-based dichotomy as a wedge with which to pry religious student groups out of the forum by "defining" the forum as "limited" to student groups willing to abide by a "take-all-comers" policy. *See infra* Part III.

But the essential principles remain as stated: Government may not open a forum for expression by a certain category of persons or groups and then discriminate on the basis of the content or viewpoint of such persons' or groups' expressive messages.

[29] *Widmar*, 454 U.S. at 267–69.

[30] *Id.* at 276–77.

[31] *Id.* at 267–71.

[32] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

activity fees for the activities of campus student groups.[33] The Court held that, having created this forum, the university could not exclude religious student groups from eligibility for funding simply on the basis of the religious content of their expressive identity and activities.[34] A student-activity-fee funding pool "is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable," the majority concluded.[35] Thus, the University of Virginia was forbidden from denying funding to a Christian student newspaper simply because of its religious content and viewpoint.[36]

Reviewing the basics so far: The Free Speech Clause prohibits government from penalizing or discriminating against expression on the basis of its content, including religious content. Groups possess free speech rights, just as individuals do, and religious groups possess these rights no less than any other group. Thus, neither an individual nor a group may be penalized, or discriminated against, by the government based on the content of the message the speaker or group wishes to express, including religious content. These First Amendment rights of freedom of expression and association extend to student groups at public university campuses—and extend to religious student groups.

There is one final step in the analysis leading up to the situation in *Christian Legal Society*. A long- and well-accepted aspect of a group's freedom of association for expressive purposes, already alluded to above, is what has been termed the freedom of expressive *disassociation*, or the right of a group to define itself and its membership so as to maintain its message. Groups may define the uniting expressive principles of the group, and by doing so, may define who is and is not part of the group's expressive purposes. Thus, the Democratic Party can exclude Republicans from its primaries if it wants to.[37] That is the holding of the *Democratic Party v. Wisconsin* case: "[T]he freedom to associate for the common advancement of political beliefs necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only."[38] It is *the Democrats' party* after all.[39] The Republicans can also keep the Democrats out of their

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[33] *Id.* at 829–30, 837.

[34] *Id.* at 825–26, 829–31.

[35] *Id.* at 830.

[36] *See id.* at 825–26, 835.

[37] *See* Democratic Party of the U.S. v. Wisconsin, 450 U.S. 107, 122 (1981).

[38] *Id.* (citation omitted) (internal quotation marks omitted).

[39] I call this the "It's-my-party-and-I'll-cry-if-I-want-to" principle. The #1 hit song was an oldie even when I was young, and today's students often do not get the reference. Filipeschuler, *Lesley Gore—It's My Party*, YOUTUBE (Jan. 8, 2008), http://www.youtube.com/watch?v=XsYJyVEUaC4 (performed in Hollywood in 1965).

party, if they choose. As to campus student groups, this principle means that Students for a Democratic Society, the group involved in *Healy v. James*, can, as part of the group's First Amendment freedom of association, exclude from its membership those who do not share its politically liberal, anti-war political purposes.

Groups formed around a specific expressive identity or ideology may very well wish to limit themselves to persons who share that identity and ideology, in order to maintain the integrity of their intended message. That idea is the essence of the *Democratic Party v. Wisconsin* case, and it was also the central holding of the *Boy Scouts v. Dale* case, which recognized the Boy Scouts' freedom-of-association right to exclude from the ranks of assistant scoutmaster someone they determined was not a proper spokesman of their group's intended messages to young males, on account of the fact that he was openly gay.[40] The Boy Scouts did not need to have a hard-edged ideological message opposing gay rights in order to possess a freedom to express only the messages it wished to convey and control what messages its leaders might communicate to young boys, the Court held.[41] Groups may form around a specific expressive identity that is *not* particularly ideological, and such groups might well wish to exclude speakers who would make the group's expression *more* ideological than the membership as a whole desires, which is really just a different version of the same thing. This principle is also central to the holding of the Court's unanimous decision in *Hurley v. GLIB,* the famous Boston Saint Patrick's Day Parade case, upholding the right of parade organizers to exclude a contingent that wished to display a pro-gay-rights political banner that the organizers thought inappropriate to the character of the parade they wished to sponsor.[42] Again, it's *their* parade, and they can march who they want to. (The *Boy Scouts* case can be understood in this way, too. The Boy Scouts wished to have a more subdued, generic message and felt that the message conveyed by Mr. Dale being a scoutmaster would alter that character.)

The limiting cases, or hard cases, arise where a group is not really organized for expressive purposes, but for essentially *non-expressive*, *commercial* purposes, and excludes participants for reasons unrelated to any true expressive purpose. The business-club cases can be defended—if they can be defended—on this ground, as not actually falling within

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[40] Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000). *See generally* Paulsen, *Scouts, Families, and Schools*, *supra* note 17, at 1919–39.

[41] *See Boy Scouts*, 530 U.S. at 655.

[42] 515 U.S. 557, 574–75 (1995).

the scope of the First Amendment's protection of expression.[43] For slightly different reasons, *government itself* may not properly claim a First Amendment right to expressive disassociation—to exclude from a public forum views or speakers it deems incompatible with *its* desired message. First Amendment rights are held by private citizens and groups *against* the government, but the government itself does not possess a "constitutional right" to freedom of expressive association and disassociation. It would obviously contradict *Widmar* to permit government to create a "limited" public forum or "government expressive association," consisting of speaker-members who all agree with the government's messages and excluding all those who disagree.[44]

Political parties, student groups, clubs, scouting organizations, and even parades might wish to be broadly inclusive. That might be part of their whole purpose, even of their expressive identity. But they might also *not* wish to be broadly inclusive. They might wish to limit their membership more tightly to people who agree on common core principles of what the group is all about. Such criteria might be an integral part of their expressive identity. It is up to the group, or should be up to the group, just how inclusive or restrictive it chooses to be.

It follows from this proposition, combined with the ones already discussed, that *a campus student group at a state university possesses the freedom of expressive disassociation as an aspect of its First Amendment rights as a group*. That means that campus student groups, including religious groups, have the First Amendment constitutional right to maintain their expressive identity by requiring that their members and officers subscribe to the principles that define the expressive identity of the group. "Campus Democrats" has a First Amendment right to limit its membership to Democrats. "Students for Choice" has a First Amendment right to require that its members support abortion rights. *And Christian*

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[43] *See* Paulsen, *A Funny Thing Happened*, *supra* note 17, at 685–89; Paulsen, *Scouts, Families, and Schools, supra* note 17, at 1924.

[44] In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court held that when a private healthcare provider received public funds to carry out a government program, the government could restrict the speech of healthcare providers occurring within the government program in such fashion as to limit what messages are conveyed within the context of the government program itself. Specifically, the government could forbid counseling or referrals for abortion within the government-funded program because such restrictions simply were restricting the scope of the program funded by the government. *Id.* at 193–94. *Rosenberger*'s sensible limitation on *Rust* recognizes that when the government funds a private entity to disperse the government's own message, the government can take appropriate measures, including restrictions on speech, to ensure that the message is properly delivered. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

Legal Society has the First Amendment right to insist that its officers subscribe to core Christian beliefs.

It follows that *Christian Legal Society* is wrongly decided. This conclusion, I submit, follows from the above basic premises of First Amendment law. To repeat and compress: Government may not discriminate against private expression because of its content. This content includes religious expression. This includes group expression, including group religious expression. A group's First Amendment freedom of expression rights include the right to control the content of its message by deciding what common views or messages define the group itself and by excluding competing voices and messages—the freedom of "expressive association" (and disassociation). Campus student groups at state colleges and universities possess the First Amendment rights to expression and association.

Christian Legal Society is wrong, unless one (or more) of these building-block basic principles of First Amendment law is wrong.

III. THE INCORRECT ANALYSIS

A. Unconstitutional Conditions and Creatively-Limited, Limited Forums

The majority in *Christian Legal Society* did not dispute any of these underlying propositions,[45] but nonetheless denied the correctness of the conclusion. The Court's reasoning was that a state university may *condition* a religious student group's First Amendment right of access to a limited public forum (recognized in *Widmar* and *Rosenberger*) on a repudiation of the group's First Amendment freedom of expressive association (recognized in *Widmar* and *Healy*).[46] At least, it may do so where the university has "defined" its "limited" forum as one limited by a policy excluding *all* student groups' rights to the freedom of expressive association—assuming it can do such a thing (a large and rather dubious assumption, as we shall see).[47] The parties stipulated—apparently in conflict with the actual facts—that Hastings College of Law in fact had such a policy, and the majority decided the case on that premise.[48] The dissent contested whether the case properly could be decided on such a premise, and whether the litigation stipulation really meant what the majority said it meant,[49] but I set that debate to one side for present purposes.

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45 *See Christian Legal Society*, 130 S. Ct. at 2986.

46 *Id.* at 2994–95.

47 *Id.*

48 *Id.* at 2982, 2984.

49 *Id.* at 3005 (Alito, J., dissenting).

Armed with this factual premise of a "take-all-comers" policy—a premise that in effect transformed the case into an abstract, law-school hypothetical rather than a real-world fact pattern involving a law school—the majority squeezed the case into a rather different doctrinal hole: The case involved a viewpoint-neutral "time, place, and manner" regulation of expressive activity.[50] The "take-all-comers" requirement (put another way, the law school's elimination of the right of expressive association for student groups at the school) was *neutral*, in that it applied to all groups. The policy did not (directly) regulate groups' expression; it merely regulated when, where, how, and by whom such expression might take place.

Or at least this was the majority's theory of the case. The premise, even were it factually justified, is almost certainly not *legally* justified. A state university cannot "neutrally" define its forum so as to define away the right of expressive association for those who otherwise would be entitled to inclusion in the forum.

In a moment, I will circle back to the majority's strange hypothetical premise, or pretense, and show why, even accepting the premise, the majority's conclusion does not follow. But to get there, I first start with the more basic proposition: *Without* this (weird) stipulated premise, it is clear that the Hastings College of Law's position would be a violation of the First Amendment. Hastings's position was, in essence, that it could condition equal access rights on restrictions of a student group's control of its expressive identity. Such a stance, however, runs headlong into the problem of "unconstitutional conditions," another standard doctrine of First Amendment law and constitutional law generally. Simply put, one constitutional right (here, a student religious group's First Amendment right, under *Widmar,* to equal access) cannot be conditioned on forfeiture of another constitutional right (a group's First Amendment right to expressive association, under *Healy* and subsequent cases, and recognized in *Widmar*). If the government could not impose either deprivation of rights independently, it may not condition the exercise of one right on the loss of the other right.[51]

That, reduced to its essential terms, is the unconstitutional conditions doctrine. While the outermost limits of that doctrine can sometimes seem mysterious, its core is relatively stable: *Government may not condition one legal right, benefit, or privilege on the*

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[50] *Id.* at 2978 (majority opinion).

[51] For classic formulations of this doctrine, see *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) ("'[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.") and *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

abandonment of another legal right, benefit, or privilege, the relinquishment of which the government could not command directly, unless the condition is so directly and unavoidably a part of the benefit or privilege bestowed as to be "non-severable."[52]

The application of the unconstitutional conditions doctrine in this context is entirely straightforward: *Widmar* establishes a baseline of First Amendment free speech rights. Building on cases before it that had embraced the principle that there is "an 'equality of status in the field of ideas,'"[53] *Widmar* holds that religious student groups have a First Amendment *right* to equal access to state university facilities for their student meetings, by virtue of their status as a student group and by the university's action in opening up its facilities to other student groups, without discrimination based on the content or viewpoint of the group's religious expression.[54] This is not a mere privilege or benefit to be conferred or withheld on such terms as the university sees fit. It is a First Amendment constitutional right.

Likewise, it is clear—another irreducible baseline proposition—that a state cannot directly regulate the membership practices or expressive-association affiliations of a religious group or any other private group whose purposes are fundamentally expressive (rather than commercial[55]): *Healy v. James, Democratic Party v. Wisconsin, Hurley v. GLIB,* and *Boy Scouts v. Dale,* all stand unequivocally for this proposition.[56] Even in cases where, for other reasons, a claimed constitutional right of expressive association was not accepted, the proposition was still announced (sometimes in dicta). These cases include *Roberts v. United States Jaycees*,[57] and other "business club" cases,[58] and, most recently, *Rumsfeld v. FAIR*.[59]

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[52] This formulation is essentially identical to one that I used fifteen years ago, when I first saw this issue coming. *See* Paulsen, *A Funny Thing Happened*, *supra* note 17, at 664–66 (collecting analysis and slightly varying formulations).

[53] Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).

[54] Widmar v. Vincent, 454 U.S. 263, 276–77 (1981).

[55] As noted, the distinction between "commercial" and "non-commercial" has problems of its own. *See* Paulsen, *Scouts, Families, and Schools*, *supra* note 17, at 1926–27 & n.49.

[56] *See supra* Part II.

[57] 468 U.S. 609, 622 (1984) (holding that application of anti-discrimination portions of state public accommodations law to business club was constitutional).

[58] N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13–14 (1988) (holding that application of anti-discrimination portions of a state public accommodations law to a business club was constitutional); Bd. of Dir. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 548–49 (1987) (same).

[59] 547 U.S. 47, 68–70 (2006).

In a case like *Christian Legal Society*, it is clear that government cannot condition First Amendment "*Widmar* rights" on the loss of First Amendment freedom-of-expressive-association rights. Conversely, government may not condition the freedom of expressive association on the loss of *Widmar* rights of equal access. It thus follows that a state university may not impose, as a condition of access to a forum for student groups, unconstitutional restrictions on such groups' expressive identity and association.

Is the answer different if, as hypothesized in *Christian Legal Society*, the school imposes such unconstitutional restrictions across the board, on everybody? It should not be. There is no logical, constitutional reason why *an across-the-board unconstitutional condition* is any less unconstitutional just because it is imposed across the board. *If* groups, including student groups, have a constitutional right to expressive association—assuming, that is, that *Healy* remains good law and assuming it stands for this proposition—there is no sensible reason to think that such right is extinguished by the exercise of what would otherwise be thought a constitutional right under *Widmar* to use university facilities, as other student groups do, without regard to a group's religious nature or the religious content of its expression or activities. Indeed, it would seem that *Healy*'s expressive-association right and *Widmar*'s "non-exclusion-on-the-basis-of-group-expression-and-identity" right *converge*, and overlap substantially.

Only if the "limited public forum" doctrine permits government essentially to *manipulate the baseline any way it likes*—to circumvent the requirement of "equal access" simply by defining its forum criteria how it wishes and thereby justify any exclusion on the ground that all groups *are* treated equally, in the sense that the same criteria are being applied to all alike—can the government evade the unconstitutional condition problem. But if the state can avoid *Widmar* simply by redefining the scope of its forum, it can eliminate *Widmar* rights at will. It could simply define its "limited" forum as embracing "all student groups that are not religious," or "all student groups that do not define themselves in religious terms," or "all student groups except those that apply religious criteria to membership," or "all student groups that do not maintain certain religious doctrines," or finally, "all student groups that do not limit their membership to students who subscribe to the purposes and ideals of the group." Each of these formulations excludes a campus student group based on its First Amendment identity, or the content and nature of its expression and/or association. If the state can do this, *Widmar* is a meaningless cipher. Campus administrators need not worry about allowing access to disfavored student groups. They can simply limit their "limited" forum in such a way as to gerrymander them out.

Widmar does not mean this, obviously, and *Christian Legal Society* did not disavow *Widmar*. It simply embraced a principle incompatible with *Widmar*.

The conflict with *Widmar* is of course most obvious if a college defines its forum in explicitly religion-excluding terms (as in the first several of my examples above). The trick in *Christian Legal Society* was that Hastings purportedly defined its forum not in *religion-excluding* terms but in broader, *expressive-association-excluding* terms (the last of my examples). This fooled the majority: It made the whole thing feel somehow more "neutral."[60] But the supposedly neutral basis of exclusion was one Hastings should not have been able to impose in the first place, because it denies to student groups—all of them—the First Amendment freedom of expressive association. The fact that all such groups have their First Amendment rights restricted may be "neutral," in a perverse sense, but it is not the kind of neutrality that the First Amendment permits the government to impose.

Consider a few examples by way of analogy. Could a state university condition all student groups' right to meet on campus, or obtain other privileges of recognized campus groups, on the neutral, across-the-board requirement that their groups not discuss politics? This condition is a subject-matter exclusion, not a viewpoint exclusion. Could the university limit the topics for student discussion in such a fashion? Could it condition access or recognition on the students' agreement not to discuss *campus* politics? Could it condition access on students' agreement not to print or distribute any written matter to other students? (If imposed on all, is that not a neutral "manner" regulation of student expression?) Could it condition access or recognition on the agreement of student groups not to create their own websites?

In each case, the restriction is a facially "neutral" subject-matter limitation on the "forum" or a "viewpoint-neutral time, place, or manner" restriction on what a student club that has been granted access may do. In each case, the limitation restricts what would otherwise be, outside the limits of the limited forum, the groups' First Amendment rights.

How is "neutral" restriction of student groups' membership criteria any different? Such criteria and the decisions made pursuant to them are within a group's core First Amendment rights of expressive association. If campus officials may not condition *Widmar* rights on a neutral requirement that groups abandon First Amendment rights in other respects, such as not discussing politics or campus politics, not

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[60] Of course, the cynical observer might argue that the majority may have wanted to be fooled. I set the question of the majority's subjective motivation aside for present purposes.

producing printed or written material, and not using the Internet, then campus officials may not condition *Widmar* rights on a neutral requirement that groups abandon First Amendment rights of expressive association. The majority's premise that an "all-comers" policy removes the Hastings situation into an utterly different doctrinal category does not accomplish the magic trick it seeks to perform. Like the woman sawed in two, it is an illusion. (And if it is *not* an illusion, then the Court has sawed *Widmar,* or *Healy*, or both, in two.)

B. Other Unconstitutional Gambits

Perhaps recognizing, in its heart of hearts, the doctrinal sleight of hand it was performing, the majority attempted to dress up its deception with a few rhetorical flourishes. None of them is persuasive, however. Indeed, quite the contrary, each one, when taken seriously, is itself a serious impairment of First Amendment principles. The Court probably does *not* take these propositions seriously, and they are, in all likelihood, simply makeweight points thrown in for effect. The real argument is the one addressed above: that university officials may condition First Amendment *Widmar* access-to-a-forum rights on relinquishment of the *Healy-Roberts-Hurly-Boy Scouts* freedom-of-expressive-association rights. But the miscellaneous arguments are present in *Christian Legal Society*, and it is worth the time and attention to puncture them.

First, the majority in *Christian Legal Society* advanced a separate argument—less of an argument, really, than a conclusory, misleading label—in an attempt to justify its exclusion of the Christian Legal Society student group: "subvention." The majority referred to equal-access rights for religious student groups, under *Widmar,* as government *subsidization* of the groups: "The First Amendment shields CLS against state prohibition of the organization's expressive activity, however exclusionary that activity may be," Justice Ruth Ginsburg's majority opinion reads, from the beginning, "*[b]ut CLS enjoys no constitutional right to state subvention of its selectivity*."[61] Later, the opinion tries to leverage that label into an argument that Hastings's policy imposes no real burden on the freedom of expressive association: "*CLS, in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies . . . .*"[62]

Could anyone possibly be fooled by this? The very premise of the Establishment Clause holdings in *Widmar* and in *Rosenberger* is that inclusion of religious groups in forums for expression or general benefit programs, without discrimination because of their religious nature, is

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[61] *Christian Legal Society*, 130 S. Ct. at 2978 (2010) (emphasis added).

[62] *Id.* at 2986 (emphasis added).

not "subsidization" in any legally meaningful sense; it is recognition of a constitutional right.[63] The right of the student religious group to meet at university facilities, the issue in *Widmar*, was not thought to be a subsidy. If it were thought to be a subsidy, the benefit could have been withheld on such ground. The right of the student religious newspaper to equal access to student-activity-fees funding, the issue in *Rosenberger*, was also not thought a subsidy. If it were thought to be a subsidy, the benefit could have been withheld on such a ground. If a First Amendment right could be withheld from a student group on the ground that access to facilities, funds, or recognition constitutes a "subsidy" to which different rules apply, the results in *Widmar* and *Rosenberger* would have been wrong. The subsidy slur would be offensive were it not so preposterous. The Court in *Christian Legal Society* could not possibly have meant what it said.

A second transparently illegitimate argument (and one that again seeks to use the "subsidy" tack) is that the *government's interests in suppressing disfavored speech*, because of the views thereby expressed, weigh in favor of upholding the power to exclude groups because of their membership practices. I am not making this up. Included in its laundry list of reasons why Hastings's exclusion of CLS was "reasonable" is the following: "Fourth, Hastings' policy, which incorporates . . . state-law proscriptions on discrimination, conveys the Law School's decision 'to decline to subsidize with public monies and benefits conduct of *which the people of California disapprove*.'"[64]

Talk about a bootstrap! The state's interest in excluding Christian Legal Society, based on its expressive identity, from a public forum, is supported by the state's interest in excluding Christian Legal Society, based on its expressive identity, because the state disapproves of the students' interpretation and application of scriptural principles to its own membership practices. To state the argument is to refute it. The majority opinion, unblinkingly (and seemingly unthinkingly) quoting Hastings's brief, actually embraces the position that *because the Christian Legal Society group is an expressive association of which the government disapproves, it may "reasonably" be excluded from access to benefits, and from an expressive forum*.[65] Again, the Court cannot possibly mean this. It is contrary to the first principle of the First

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[63] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845–46 (1995); Widmar v. Vincent, 454 U.S. 263, 276–77 (1981).

[64] *Christian Legal Society*, 130 S. Ct. at 2990 (emphasis added) (quoting Brief of Hastings College of the Law at 35, *Christian Legal Society*, 130 S. Ct. 2971 (No. 08-1371)).

[65] *Id.* at 2989 (quoting Brief of Hastings College of the Law at 32, *Christian Legal Society*, 130 S. Ct. 2971 (No. 08-1371)).

Amendment: that government may not punish, prohibit, or penalize speech (or association) because of government's disagreement with the content, message, or stance of the speaker in question.

A third argument invoked by the *Christian Legal Society* majority opinion is an out-and-out laugher: Cast in the form of whether the exclusion of Christian Legal Society leaves open adequate "alternative channels" for communication, the Court says, in effect, that *Widmar-Rosenberger* First Amendment rights can be abridged if a student group could meet informally and use Facebook or other social media to promote its meetings. Although Christian Legal Society was denied use of media, recognition, and funding granted to other student advocacy groups, "[T]he advent of electronic media and social-networking sites reduces the importance of those channels."[66] And here we thought that Facebook and unauthorized social media were what activists in *repressive* regimes used to organize their activities! Apparently, Egypt and Iran do not abridge the freedom of speech, because social media exist as an alternative route through which disfavored or excluded advocacy might still find the ability to communicate. The argument, of course, is a familiar one that has appeared in several different forms in American legal history and has some (limited) intuitive, rhetorical appeal: If the complainer has another way of accomplishing his purpose, are his rights really violated in any meaningful sense when government limits only one avenue? Justice Ginsburg and the other Justices joining the majority opinion seemed to have embraced that view. One wonders if they would similarly argue that racial segregation is permissible as long as all train cars are going to the same destination.[67]

A variation on this theme, set forth in the very next paragraph of the Court's opinion, notes that the Christian Legal Society "hosted a variety of activities the year after Hastings denied it recognition, and the number of students attending those meetings and events doubled."[68] Well, then. Suppression is *good* for expression! Restricting the freedom of association creates *more* association and *more* freedom. Oppression is *good* for the soul and *good* for promoting group membership. Slavery is freedom. I love Big Brother.

So the majority opinion in *Christian Legal Society* appears to reason. Indeed, to argue that the Court's approach here is wrong *in*

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[66] *Id.* at 2991. The Court actually invoked the examples of "Yahoo!" and "MySpace," showing how hip and "with-it" it is. *See id.*

[67] *See* Plessy v. Ferguson, 163 U.S. 537, 548–49 (1896) (upholding segregation laws applied to railroad coaches on "separate but equal" grounds), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

[68] *Christian Legal Society*, 130 S. Ct. at 2991.

principle is to make an argument that itself ought to be suppressed: "It is beyond dissenter's license, we note again, constantly to maintain that nonrecognition of a student organization is equivalent to prohibiting its members from speaking."[69]

Beyond dissenter's license! Apparently, dissents too ought to be governed by licensing requirements. The majority opinion is indeed rather astonishing in its disregard for basic First Amendment principles. One would have thought, until June 28, 2010, that a group's ability to speak elsewhere was not a proper basis for suppression of speech in a limited public forum where the group wished to engage in speech and expressive association and that licensing requirements that denied recognition to engage in expressive activity in an otherwise proper venue *were* the legal equivalent of abridging the freedom of speech. As Justice Alito poignantly, and pointedly, concluded his dissent: "I do not think it is an exaggeration to say that today's decision is a serious setback for freedom of expression in this country. . . . I can only hope that this decision will turn out to be an aberration."[70]

IV. DAMAGE CONTROL, LESSONS LEARNED

So hope we all, Sam, so hope we all. For if *Christian Legal Society* is *not* an aberration—if the core of its analysis becomes generally accepted, if its collateral damage to basic First Amendment principles is allowed to fester, and if its holding is accepted outside its hypothesized facts—it could well become one of the most damaging First Amendment cases of all time.

Consider its likely impact on several fronts: First, and most immediately, the *Christian Legal Society* opinion declares "open season" on campus student religious groups at public universities. Those inclined to target campus religious groups, whether they be hostile (or indifferent) administrators or hostile student groups or other constituencies, have been armed with a powerful weapon. Under *Christian Legal Society*, all one has to do is press on a point of religious doctrine that a group takes seriously enough not to abandon and that poses a conflict with either the religious views of some other person (which is to say, potentially anything) or, better yet, current or evolving social and political norms concerning sexuality and sexual conduct. If a religious group discriminates on the basis of religion—and what religious group does not?—*Christian Legal Society* licenses its enemies to try to have it killed as a campus organization. The result in *Christian Legal Society* deprives even sympathetic campus administrators of the

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[69] *Id.* at 2991–92 (citation omitted).

[70] *Id.* at 3020 (Alito, J., dissenting).

response that religious groups *must* be permitted to be religious—that it is their legal *right*. No, it is not, the Supreme Court has said. If campus religious groups no longer enjoy that protection, they are easy game for their opponents. Religious beliefs are frequently unpopular with secular society as a whole, and all the more so with the dominant culture at most state universities in America. If campus religious groups do not have a *right* to maintain a distinctive religious identity, you can be sure that at a great many state universities they will not be allowed to maintain such an identity, for political reasons. For path-of-least-resistance state university administrators—and what state university administrator is not?—and for litigation-avoiding university general counsels, *Christian Legal Society* affords a safe harbor: Adopt a "take-all-comers" policy, and you are fine. Even without an "all-comers" policy, *Christian Legal Society*'s atmospherics make it the better bet to enforce a general anti-discrimination policy over a religious group's claim to expressive association in its membership criteria.[71]

But why stop at *university* religious groups? Under the Equal Access Act, public secondary schools must allow student religious groups to meet on campus if the school allows one or more other voluntary, non-curriculum student groups to meet on campus.[72] Such meetings have long met with resistance. *Christian Legal Society* arms opponents of such meetings with a powerful weapon: Require that each such group not have a religion-exclusive identity. It will not take long for a faith-based group to cease to operate as a faith-based group if it cannot be based on faith. Likewise, after-hours elementary school religious clubs, led by adults, can be effectively destroyed by requiring that the sponsoring group accept all comers and not have a statement of faith even for those leaders.[73] Finally, churches seeking to rent school facilities for their weekend worship meetings or seeking to use school facilities after hours on the same basis as other community groups can be shut out simply by

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[71] This has already happened. *See* Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 795, 805 (9th Cir. 2011) (upholding a university policy forbidding student organizations from "discriminating" on the basis of religion by using faith criteria for membership on the authority of *Christian Legal Society*), *cert. denied*, 80 U.S.L.W. 3381 (U.S. Mar. 19, 2012).

[72] Equal Access Act, 20 U.S.C. § 4071(a)–(b) (2006). The constitutionality of the Equal Access Act was upheld in *Board of Education v. Mergens*, 496 U.S. 226, 248–49, 253 (1990).

[73] *Cf.* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111–12 (2001) (holding that a school's interest in not violating the Establishment Clause did not outweigh a Christian club's interest in having equal access to school facilities).

insisting that the church or other religious organization have no "exclusive" tenets or faith criteria.[74]

And why stop there? If the reasoning of *Christian Legal Society* stands, a *religious private* school that accepts students who use state-funded vouchers for his or her education or even tax benefits, under a state's or community's "school choice" program, could be required to secularize itself as a condition of participation. The school could be required to take all comers, not merely as far as students are concerned, but also with respect to faculty hiring decisions. No religious hiring criteria exists for a religious school that accepts such government "subvention."

These results can be avoided only if *Christian Legal Society* is cabined—limited very narrowly to its peculiar set of hypothesized facts—and thereby becomes Justice Alito's hoped-for "aberration" in the law. Here is where the Court's decision to decide the case on hypothetical facts may be turned into a virtue. As noted, the Court decided *Christian Legal Society* on the assumption that a public university could uniformly deprive all campus student organizations of the "freedom of association" for expressive purposes. Arguably, the Court *assumed, but did not decide*, this point. On that assumed premise, the majority held that a neutral, suppress-all-groups-equally condition would not violate Christian Legal Society's right to equal access. But it should be open to the Court to reexamine that conclusion in a case in which such a stipulation was not made, or in which the point is actually contested. As discussed above, the assumption appears directly contrary to the longstanding precedent of *Healy v. James* and to a long line of cases following and building on it. It is therefore hard to believe that such a premise will long survive. *Christian Legal Society* could—one hopes, one prays—come to be regarded as an idiosyncratic, one-off special case.

CONCLUSION

There is much more that could be said about this disastrous decision, but I will end with some brief concluding observations and reflections.

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[74] *Cf.* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–94 (1993) (holding that an organization cannot be denied equal access to a forum to show a film series on child rearing solely on the basis that the film series would be presented from a Christian perspective, a result that would likely be the opposite if the administrators of the forum could simply have excluded organizations that had exclusive memberships from the limited public forum). *See also* Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30, 51 (2d Cir. 2011) (upholding the constitutionality of a policy excluding church rental of school facilities for "worship"), *cert. denied*, 80 U.S.L.W. 3334 (U.S. Dec. 5, 2011).

First, *Christian Legal Society* demonstrates, or at least illustrates, the problem with overly complex doctrinal formulations and "tests" in constitutional law. I have recited in this essay a number of core First Amendment principles myself: the rule that government may not discriminate against or punish speech because of its message, the derived rule protecting group expression and the corollary right of a group to define itself, and the sometimes inscrutable "unconstitutional conditions" doctrine. But as essential as such propositions are to explicate the meaning of "the freedom of speech," *constitutional law doctrine is dangerous stuff*. It can obscure as much as enlighten, and it is readily subject to manipulation. The "limited public forum" doctrine was always a tad fuzzy, and more recent cases have fuzzed it up considerably. What once was a rule that government could not open up a forum for some but not others—that there is an equality of status in the field of ideas—somehow, gradually, became transmogrified into an elaborate matrix for government defining the terms under which it will and will not be bound to honor the freedom of speech. It makes no sense to say that government's exclusions from a forum are governed by the strictest of strict-scrutiny standards but then add, in the next breath, that the government can decide what is embraced by the forum and what is not. That is doctrine gone awry. Doctrine is manipulable, of course, but this is manipulability on stilts. Couple that with the double doctrine permitting "reasonable, content-neutral, time, place, or manner" regulations of speech, and what you have is a house of mirrors. What began as a set of rules for clarifying and applying a constitutional command framed in absolutist terms—government may make no law abridging the freedom of speech—ends up as a set of tools for circumventing and manipulating legal categories to reach preferred outcomes. The Court either got tripped up by its own confusing categories or deliberately used the categories to trip up the First Amendment.

Second, *Christian Legal Society* illustrates an odd paradox. No doubt everyone has heard it said that bad facts make bad law, but *Christian Legal Society* says unto us that sometimes *good* facts make bad law. The fact that the student group was allowed to meet, informally and without recognition or permission, and that the consequence of Hastings's discrimination was to increase the fervor of student participation, worked against Christian Legal Society in the end. The Court, or at least the five-member majority, was able to regard this as a *reasonable* abridgment of the freedom of speech, so mild a violation of the First Amendment on its facts that it could certainly be upheld as a matter of constitutional law. The lesson seems to be, for First Amendment litigators, to make sure that the facts are stinking, rotten, and squalid. Only then can one be reasonably certain that the Court will

not lose sight of the principle involved. When I used to litigate student religious free-speech cases, I *wanted* students to be forcibly removed from classrooms, told they could not pray, suspended by the principal, or given failing grades for writing on religious topics. If a student is granted a partial accommodation or given a grade of "B-," the case is harder to win.

Third, *good* stipulations can make bad law. How strange is that? Doubtless, the attorney who succeeded in getting Hastings College of Law to stipulate that, in effect, it had violated *Healy v. James* by denying all student groups the freedom of expressive association thought that he had managed to get a public law school to blunder into the smoking-gun concession of the century. The fact that Hastings *had* blundered, however, somehow became the basis for the appellate courts, including the Supreme Court, deciding the case as a bizarre class hypothetical: "Let us assume that it is okay to violate the First Amendment and that everybody has stipulated to facts conceding that the government has done so. But is it *viewpoint*-based discrimination when the government violates the First Amendment *equally as to everyone*?" One would have thought such a framing of the question unimaginable. But beware the stipulation that turns "*good*" bad facts into a too-good-to-be-true abstraction that takes the case in a different direction.

Finally, a sad and regrettable observation (or rather, informed speculation): This opinion was written by a law clerk, not by Justice Ginsburg. To be sure, Justice Ginsburg signed on to it, and the conclusion doubtless faithfully reflects her vote as to her preferred outcome. But the opinion is so riddled with overly-clever logical tricks and so embarrassed by flat-out wrong propositions of basic First Amendment law, that it is impossible to believe that Ruth Bader Ginsburg was really and truly its author. Doubtless, she was distracted by other, more pressing personal matters. Her husband of many years, Martin Ginsburg, was dying, and he indeed died on June 27, 2010.[75] The *Christian Legal Society* opinion was announced on June 28, 2010. This was not the work of an attentive, focused Supreme Court Justice, and to the extent others in the majority might have been troubled by some of the reasoning in the opinion, there may have been a tendency not to press such points upon an understandably already-stressed, personally-distressed colleague of many years. "If the opinion is written as limited to these facts, I'm fine with it." Thus, a law clerk was left alone to write the opinion, employing the doctrinal gymnastics available for the job at

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[75] Gardiner Harris, *M.D. Ginsburg, 78, Dies; Lawyer and Tax Expert*, N.Y. TIMES, June 28, 2010, at B8.

hand and displaying the brilliance and wit of a freshly-minted Ivy League law school graduate with a mission.

The lesson here is two-fold. Law, including constitutional law, for all its abstractions and principles, remains very much a human enterprise. This is not to say that judicial interpretations of the Constitution turn on what a judge had for breakfast. But certainly the personal circumstances of an individual Justice can affect the way in which a particular opinion is written and perhaps even the final outcome of a case. The other side of this observation is simply that *bad law clerks* make bad law.

For whatever accounts for its inputs, the output that is the Court's decision in *Christian Legal Society v. Martinez* stands as one of the most atrocious First Amendment decisions of the United States Supreme Court in its history. Its pernicious holding, pernicious collateral holdings, and pernicious implications truly make *Christian Legal Society* a First Amendment disaster.