
A CONFIDENT PLURALISM

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In February 2014, the Kansas House of Representatives proposed a bill that would have permitted business owners with religious objections to deny some customers services and accommodations.¹ Sixty years after *Brown v. Board of Education*,² Kansas legislators would have allowed citizens of Topeka to refuse restrooms, restaurants, and water fountains to other citizens.

Across the state of California today, conservative religious student groups are no longer welcome on public school campuses like Hastings College of the Law.³ And it's not just the West Coast. Vanderbilt University, Bowdoin College, and a number of other schools have also kicked out conservative religious groups.⁴ These schools rely on "all-comers" policies that require student groups to accept any student who

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1. H.R. 2453, 2014 Leg., 85th Sess. (Kan. 2013).

2. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

3. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010). See also Michael Paulson, *Colleges and Evangelicals Collide on Bias Policy*, N.Y. TIMES (June 9, 2014), <http://www.nytimes.com/2014/06/10/us/colleges-and-evangelicals-collide-on-bias-policy.html>.

4. See Paulson, *supra* note 3; Jay Lindsay, *Schools Work to Balance Gay, Religious Rights*, BOSTON.COM (Feb. 22, 2012), http://www.boston.com/news/education/k_12/articles/2012/02/22/schools_work_to_balance_gay_religious_rights/.

wants to join, irrespective of a student's beliefs or actions.⁵ Conservative religious groups with creedal membership or leadership requirements are unable to comply.⁶

The Kansas bill and the all-comers policy both pit religious liberty against gay rights. Neither explicitly names the opposition: Kansas legislators styled their bill as a broader religious liberty measure, and Hastings administrators defended the all-comers policy as pedagogically warranted. But each of these initiatives has unavoidable (and perhaps intended) consequences. Religious conservatives in Kansas would have had the legal right to close their businesses to gays and lesbians. Progressives in California and Tennessee are able to rid their campuses of conservative religious groups with traditional beliefs about sexuality. We can readily multiply the list of examples: the suspension of the star of Duck Dynasty,⁷ the threats by local officials to deny Chick-fil-A permits,⁸ the forced resignation of Mozilla's CEO,⁹ and the legislative efforts in Arizona¹⁰ have also made headlines in recent months.

5. *Martinez*, 561 U.S. at 671–72. Some schools like Vanderbilt exempt fraternities and sororities, honors societies, and performance groups. Vanderbilt also permits groups to impose numerical limits on members, require members to pay dues or regularly attend meetings, and require members to participate in the group for a minimum amount of time before serving in leadership. See *Nondiscrimination FAQ*, VANDERBILT U., <http://vanderbilt.edu/about/nondiscrimination/faq.php> (last visited Feb. 12, 2015).

6. The implications of the all-comers logic are illustrated in two Ninth Circuit opinions issued around the time of *Martinez*. In *Truth v. Kent School District*, 543 F.3d 634, 645 (9th Cir. 2008), the court concluded that a high school Bible club violated a school district's nondiscrimination policies because the club's requirement that its members "possess a 'true desire to . . . grow in a relationship with Jesus Christ' inherently excludes non-Christians." In *Alpha Delta Chi—Delta Chapter v. Reed*, 648 F.3d 790, 796 (9th Cir. 2011), the court suggested that a public university might deny official recognition to Christian student groups that limit "their members and officers [to those who] profess a specific religious belief, namely, Christianity."

7. Traci G. Lee, *Duck Dynasty Star Suspended 'Indefinitely' for Anti-Gay Comments*, MSNbc.COM (Dec. 18, 2013, 2:45 PM), <http://www.msnbc.com/thomas-roberts/duck-dynasty-anti-gay-comments>.

8. Kim Bhasin, *The Mayor of Boston Has Vowed to Block Chick-fil-A from Entering the City*, BUS. INSIDER (July 20, 2012, 4:46 PM), <http://www.businessinsider.com/the-mayor-of-boston-has-vowed-to-block-chick-fil-a-from-ever-entering-the-city-2012-7>; Hal Dardick, *Alderman to Chick-fil-A: No Deal*, CHI. TRIB. (July 25, 2012), http://articles.chicagotribune.com/2012-07-25/news/ct-met-chicago-chick-fil-a-20120725_1_1st-ward-gay-marriage-ward-alderman.

9. Taylor Casti, *Anti-Gay Marriage Mozilla CEO Resigns After Backlash*, HUFFINGTON POST (Apr. 3, 2014, 3:58 PM), http://www.huffingtonpost.com/2014/04/03/brendan-eich-anti-gay-moz_n_5085006.html.

10. Michael Sorrentino, *Michele Bachmann: Gays 'Bullied' Americans, Politicians over Arizona Bill*, N.Y. DAILY NEWS (Mar. 11, 2014, 6:05 PM), <http://www.nydailynews.com/news/politics/michele-bachmann-gays-bullied-pols-ariz-bill-article-1.1718232> (discussing reactions to the veto of proposed Arizona legislation that "would have allowed businesses to refuse service to gay and lesbian people by citing religious beliefs").

The ongoing tension between religious liberty and gay rights is perhaps the most prominent example today of the profound and deep differences in our country. But we are also divided over many other issues: immigration, criminal justice, abortion and contraception, poverty, and education, to name a few. Each of these differences pulls at the threads of our purported unity in pursuit of a “common good.”¹¹ We might question whether the people of the United States ever had a coherent notion of the common good, or whether those in positions of power merely assumed its existence by consciously or unconsciously suppressing difference and dissent. But regardless of how one answers that historical question, the contemporary case for an articulable good that we all hold in common is difficult to sustain.¹²

In light of our contemporary situation, this Article argues that we can and must live with deep and irresolvable differences in our beliefs, values, identities, and groups. We can do so through “[a] confident pluralism that conduces to civil peace and advances democratic consensus-building.”¹³ Those words come from a legal brief written against the all-comers policy by the group Gays and Lesbians for Individual Liberty (“GLIL”).¹⁴ When Hastings kicked the Christian groups off campus—a decision ultimately endorsed by the Supreme Court in *Christian Legal Society v. Martinez*¹⁵—GLIL recognized the importance of arguing for pluralism.

They are not alone. More recently, fifty-eight well-known supporters

11. Cf. Rebecca L. Brown, *Common Good and Common Ground: The Inevitability of Fundamental Disagreement*, 81 U. CHI. L. REV. 397, 399 (2014) (“We can indeed aspire to areas of what Professor John Rawls called ‘overlapping consensus,’ but that terrain must remain quite thin, not probing too deeply into the disparate fundamental value systems that produce the areas of political consensus.” (footnote omitted)).

12. See BERNARD WILLIAMS, *Pluralism, Community, and Left Wittgensteinianism*, in *THE BEGINNING WAS THE DEED: REALISM AND MORALISM IN POLITICAL ARGUMENT* 29, 31 (Geoffrey Hawthorn ed., 2005) (characterizing Mill’s conception of modernity as one that “at least so far as its pluralism is concerned, . . . represents a form of progress from societies which, in contrast to the typically modern condition, were held together by some more unifying and concrete conception of the good itself, and not merely by procedural arrangements for negotiating the coexistence of different conceptions of the good”). Earlier articulations of interest group pluralism raised similar critiques. See, e.g., Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1508 (1988) (“[I]n pure pluralist vision, good politics does not essentially involve the direction of reason and argument towards any common, ideal, or self transcendent end.”); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32–33 (1985) (“The pluralist conception treats the republican notion of a separate common good as incoherent, potentially totalitarian, or both.”).

13. Brief of Gays & Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner at 35, *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010) (No. 08-1371).

14. *Id.* Justice Alito’s dissent quoted the language of a “confident pluralism” from the brief. *Martinez*, 561 U.S. at 734 (Alito, J., dissenting).

15. *Martinez*, 561 U.S. at 669.

of same-sex marriage issued a statement denouncing the “deeply illiberal impulse” to mute objectors to same-sex marriage, calling such efforts “both wrong in principle and poor as politics.”¹⁶ These supporters of gay rights argue for a tradition of pluralism that has offered important protections to progressive movements throughout our nation’s history, including protections for gay social clubs and gay student groups that were vital to the early gay rights movement.¹⁷ Pluralist commitments have also undergirded protections for many other progressives, including suffragists, abolitionists, and labor activists.¹⁸ Today these same commitments continue to inform rhetorical and constitutional arguments not only for conservative religious groups, but also for progressive groups ranging from labor unions to the Occupy Movement.¹⁹

The underpinnings of a confident pluralism are also advanced by a number of prominent scholars. Kenneth Karst insists that “[o]ne of the points of any freedom of association must be to let people make their own definitions of community.”²⁰ William Eskridge reaches a similar conclusion: “The state must allow individual nomic communities to flourish or wither as they may, and the state cannot as a normal matter become the means for the triumph of one community over all others.”²¹

16. *Freedom to Marry, Freedom to Dissent: Why We Must Have Both*, REAL CLEAR POL. (Apr. 22, 2014), http://www.realclearpolitics.com/articles/2014/04/22/freedom_to_marry_freedom_to_dissent_why_we_must_have_both_122376.html.

17. See *Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652, 661–62 (1st Cir. 1974) (upholding associational rights of a gay student group); *One Eleven Wines & Liquors Inc. v. Div. of Alcoholic Beverage Control*, 235 A.2d 12, 19 (N.J. 1967) (upholding rights of gays to congregate in bars); Brief of Gays and Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner at 11, *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010) (No. 08-1371) (noting that gay organizations “have relied on exclusively gay environments in which to feel safe, to build relationships, and to develop political strategy,” including “many exclusively gay social and activity clubs, retreats, vacations, and professional organizations”); Lawrence A. Wilson & Raphael Shannon, *Homosexual Organizations and the Right of Association*, 30 HASTINGS L.J. 1029, 1046–62 (1979).

18. See generally JOHN D. INAZU, LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 29–60 (2012) (explaining how dissenting groups that expressed views contrary to those of the political power were historically protected).

19. See TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 25–64 (2009) (discussing public expression in the United States); Marion Crain & John D. Inazu, *Re-Assembling Labor*, ILL. L. REV. (forthcoming 2015) (discussing modern forms of labor activism); Jeremy Kessler, *The Closing of the Public Square*, NEW REPUBLIC (Jan. 12, 2012), <http://www.tnr.com/book/review/the-closing-the-public-square-john-inazu-timothy-zick> (discussing the government’s reaction to the Occupy Movement).

20. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 688 (1980). See also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 633 (1984) (O’Connor, J., concurring in part and concurring in the judgment) (“Protection of the association’s right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.”).

21. William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and*

And David Richards reflects, “The best of American constitutional law rests . . . on the role it accords resisting voice, and the worst on the repression of such voice.”²²

This Article builds upon these historical antecedents and normative intuitions to sketch some preliminary ideas for a confident pluralism.²³ Part I sets out the meaning and scope of the concept. Part II considers three aspirations of a confident pluralism: tolerance, humility, and patience. Part III examines the pluralist argument in the current political moment, and Part IV addresses its relationship to antidiscrimination norms. Part V suggests some of the legal and constitutional implications of a confident pluralism. Part VI explores more tentatively its implications for institutional pluralism, private monopolies, boycotts, and speech.

I. THE CONTOURS OF A CONFIDENT PLURALISM

Because pluralism’s earlier and contemporary meanings are varied and contested, it is important to specify what I mean by pluralism and to what I mean the concept to apply.²⁴

A. THE MEANING OF A CONFIDENT PLURALISM

The intuition for a confident pluralism flows out of what John Rawls famously called “the fact of pluralism”—the recognition that we live in a society of a “plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life.”²⁵ The fact of pluralism creates a political and social question of whether and how we can live with these deep differences. A confident pluralism maintains that we can do so; in fact, we must embrace a “right to differ” from state and

Collisions of Liberty and Equality in American Public Law, 106 YALE L.J. 2411, 2415 (1997).

22. DAVID A. J. RICHARDS, FUNDAMENTALISM IN AMERICAN RELIGION AND LAW: OBAMA’S CHALLENGE TO PATRIARCHY’S THREAT TO DEMOCRACY 13 (2010). See also David A. J. Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281, 1318 (1977) (“[T]he values of freedom of association, which protect the right of social clubs to engage in racial and religious discrimination, should apply *a fortiori* to the depth of human significance derived by lovers from this form of association.” (footnotes omitted)).

23. I will develop a more comprehensive version of the argument in a forthcoming book.

24. For a consideration of earlier pluralist arguments ranging from the British Pluralists to the postwar pluralism of interest group liberalism, see generally INAZU, *supra* note 18, at 96–114. For contemporary considerations, see, for instance, WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE (2004); JOHN KEKES, THE MORALITY OF PLURALISM 3–15 (1996); NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 14–29 (1998).

25. John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4 (1987). See also WILLIAMS, *supra* note 12, at 29, 29–39 (summarizing Rawls’s approach to pluralism).

majoritarian norms.²⁶ It is not an *aggressive* pluralism that knows no boundaries, but a *confident* pluralism rooted in the conviction that protecting the integrity of one's own beliefs and normative commitments does not depend on coercively silencing opposing views.

A confident pluralism seeks to maximize the spaces where dialogue and persuasion can coexist alongside deep and intractable differences about beliefs, commitments, and ways of life. It suggests that we ought to resist coercive efforts aimed at getting people to "fall in line" with the majority. There are, of course, limits to this resistance. Some limits, like enforcing majority norms against human sacrifice, are obvious. Others, like criminalizing marijuana use, are more contested. But a confident pluralism presumes a broad capacity to differ meaningfully from state and majoritarian norms.

A confident pluralism is based upon two normative premises. The first is a suspicion of state power, and it is directed primarily as a constraint upon government. The second is a commitment to letting differences coexist, unless and until persuasion eliminates those differences. The second premise includes three aspirations that I will explore later in this Article: tolerance, humility, and patience. My argument is that it is often better to tolerate than to protest, better to project humility than certainty, and better to wait patiently for the fruits of persuasion than to force the consequences of coercion (including non-state coercion like economic, social, or psychological pressures on others).

These two normative premises do not suggest that pluralism is itself an intrinsic good, or that difference is privileged for its own sake.²⁷ Most of us do not in fact embrace open-ended difference. We do not really want a thousand flowers blooming.²⁸ But we worry even more, alongside Robert Cover and those influenced by him, of "the power and practice of a government that rules by displacing, suppressing, or exterminating values

26. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943) ("[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.").

27. In this way, the thin consensus underlying a confident pluralism departs from Rawls's framework of "reasonable pluralism," which claims intrinsic value. See Thomas Nagel, *Rawls and Liberalism*, in *THE CAMBRIDGE COMPANION TO RAWLS* 62, 73 (Samuel Freeman ed., 2003) ("Rawls believes . . . that pluralism and toleration with regard to ultimate ends are conditions of mutual respect between citizens that our sense of justice should lead us to value intrinsically and not instrumentally.").

28. The phrase evolved from Mao Tse-Tung's oft-used line: "Let a hundred flowers bloom; let a hundred schools of thought contend." OXFORD REFERENCE, *A DICTIONARY OF CONTEMPORARY WORLD HISTORY* (3d ed. 2008), available at <http://www.oxfordreference.com/view/10.1093/acref/9780199295678.001.0001/acref-9780199295678-e-1081>.

that run counter to its own.”²⁹

Because an appeal to a confident pluralism is premised on the descriptive claim of a lack of a common good, it confronts a kind of paradox: If we really have so little in common, then how can we be expected to agree about the importance of pluralism? The answer is that an agreement about pluralism is akin to one of the procedural mechanisms or background practicalities we need to “get on” with society. On a practical level, most of us actually do find common ground about the need for things like public roads, national defense, and fire departments. We also agree today on many basic features of democratic society: the right to vote, the right to due process of law, and the right to free speech. We disagree—sometimes sharply—about the contours of these rights, but we have enough of a baseline to recognize the nature of our disagreement.

Importantly, we also share broad agreement about the relatively uncontested boundaries of what Frederick Schauer calls “constitutional salience,” which he defines as “the often mysterious political, social, cultural, historical, psychological, rhetorical, and economic forces that influence which policy questions surface as constitutional issues and which do not.”³⁰ Some of these forces are so strong and so obvious to us that we find little trouble acquiescing in them. Most of us accept laws protecting life and property, the payment of taxes, and the operation of courts and prisons. But all of this agreement tells us little about who we are as a people, what our goals should be, or what counts as progress. In other words, it tells us little about what goods we hold in common.³¹

B. THE SCOPE OF A CONFIDENT PLURALISM

A second and distinct question is the scope of a confident pluralism. Here I offer two perspectives, which I address in Parts IV and V, respectively. The first is what we ought to ask of government. The second, more tentatively, is what we might ask of ourselves. This initial division between public (government) and private (us) reflects my general acceptance of the state action doctrine. I recognize, of course, that the

29. Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 1–2* (Martha Minow et al. eds., 1993).

30. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 *HARV. L. REV.* 1765, 1768 (2004). Schauer’s inquiry highlights expressive restrictions that usually pass unnoticed, like our outlawing of perjury, antitrust violations, and insider trading. *Id.* at 1766–67.

31. *Cf.* *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) (“Even if we can agree, therefore, that ‘family’ and ‘parenthood’ are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do.”).

premises of the state action line are contested.³² But they are not unworkable, and they serve an important function in implementing the constitutional dimensions of a confident pluralism.³³

Turning to the first question—within what we might think of as the “public” side of the state action line—I focus the arguments in this Article on governmental regulation directed at the noncommercial groups of civil society.³⁴ I have argued elsewhere that this line between commercial and noncommercial is a pragmatic compromise that cannot be fully justified on principled or constitutional grounds.³⁵ It leaves open and unresolved some difficult examples like hospitals, universities, and private accreditation entities that are formally “noncommercial” but nonetheless implicate important concerns about market and political power.³⁶ On the other side of

32. See, e.g., Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101 (2004) (arguing that the First Amendment should apply to enjoin some forms of private suppression of speech in times of national emergency); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 789–91 (2004) (arguing that the state action doctrine is about the constitutional implications of distribution of rights such as property, contract, and tort).

33. Here I largely agree with the defense of the state action doctrine set forth in Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767 (2010).

34. A number of other scholars have suggested a similar line. Michael McConnell argued on behalf of the Christian Legal Society that “[a]ll noncommercial expressive associations, regardless of their beliefs, have a constitutionally protected right to control the content of their speech by excluding those who do not share their essential purposes and beliefs from voting and leadership roles.” Brief for Petitioner at 2, *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010) (No. 08-1371). See also Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1000–01 (2011) (arguing that “certain associations whose primary goals are immaterial to democracy,” including business associations, may not merit full First Amendment protections); Michael W. McConnell, *Freedom by Association*, FIRST THINGS, August/September 2012, at 39, 40 (reviewing INAZU, *supra* note 18, and arguing that excessive focus on the free speech text of the First Amendment diminishes groups’ associational rights). Cf. Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NORTHWESTERN J.L. & SOC. POL’Y 274, 280 (2010) (“The [public-private] distinction reflects widely shared and legally embodied beliefs about the exercise of authority by individuals, intermediate associations, and state institutions.”).

35. Scholars like Lyman Johnson and Robert Vischer have persuasively argued that some of these groups can embody expressive and religious dimensions in ways similar to noncommercial groups. See, e.g., Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215 (1992) (book review); Robert K. Vischer, *The Morally Distinct Corporation: Reclaiming the Relational Dimension of Conscience*, 5 J. CATHOLIC SOC. THOUGHT 323 (2008). As Johnson and Vischer show, the caricature of commercial groups as monolithic profit maximizers is overstated. See also *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354, slip op. at 18 (S. Ct. June 30, 2014) (explaining that “protecting the free-exercise rights of corporations like Hobby Lobby . . . protects the religious liberty of the humans who own and control [such] companies”); *id.* at 23 (“If for-profit corporations may pursue such worthy objectives [like donating to charities and promoting energy-conservation], there is no apparent reason why they may not further religious objectives as well.”).

36. Nelson Tebbe highlights some of these examples and the ambiguity in my previous work about them. See Nelson Tebbe, *Associations and the Constitution: Four Questions About Four*

the line-drawing, challenges arise in the context of closely-held businesses that are commercial but have “corporate creeds” similar to those found in private, noncommercial groups.³⁷ Notwithstanding these concerns, the proposed line between commercial and noncommercial groups may well be preferable to either a strong libertarianism that seeks protection of all commercial groups³⁸ or a strong egalitarianism that imposes current majoritarian norms on noncommercial groups.³⁹ It also leaves the class of rights-holders largely undisturbed by loosely approximating our historical and cultural understandings of “civil society” as that concept has been framed by thinkers from Tocqueville to Robert Putnam.⁴⁰

Freedoms, 92 N.C. L. REV. 917, 927, 941 (2014).

37. The Supreme Court recently recognized that religious liberty protections offered under the Religious Freedom Restoration Act apply to some closely-held for-profit corporations. *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354, slip op. at 1–2 (S. Ct. June 30, 2014). Hobby Lobby is a craft store that has 500 locations and more than 13,000 employees. *Id.* at 13. It is owned and operated by a Christian family. *Id.* at 13–14 (“Hobby Lobby’s statement of purpose commits the [family] to ‘[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.’”).

38. See *id.* at 1–2; Richard A. Epstein, *Forgotten No More. A Review of Liberty’s Refuge: The Forgotten Freedom of Assembly by John D. Inazu*, ENGAGE, Mar. 2012, at 139–40 (“[T]he effort to take a notion of assembly or association and assume that it cannot or should not apply to commercial institutions, broadly conceived, shows what I regard as the central deficit of modern constitutional theory: the willingness to divide constitutional rights into first and second class rights, depending on tests that have no grounding in first principles.”); Robert K. Vischer, *How Necessary Is the Right of Assembly?*, 89 WASH. U. L. REV. 1403, 1414–15 (2012) (“If a for-profit corporation dissents from the moral norms embodied in a particular law, and we are confident that the dissent is not solely related to the avoidance of an economic burden, why should we not want to protect its right of assembly?”). *But see, e.g.*, *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 372–73 (1974) (Marshall, J., dissenting) (“The values of pluralism and diversity are simply not relevant when the private company is the only electric company in town.”).

39. See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 124–33 (1989) (discussing the concept that “the personal is political”); Ruth Abbey, *Back Toward a Comprehensive Liberalism? Justice as Fairness, Gender, and Families*, 35 POL. THEORY 5, 16 (2007) (arguing that Rawls’ theory of justice allows for little or no distinction between the public and the private realms).

40. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve trans., 1835); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000). Unlike most scholars who endorse a line between commercial and noncommercial groups, I argue for an antimonopolistic principle that would in rare circumstances constrain noncommercial groups. See INAZU, *supra* note 18, at 14. Nelson Tebbe maintains that my line between commercial and noncommercial nevertheless remains an ill-suited proxy even with the antimonopolistic principle: “Why would [Inazu] refuse to allow a bowling club to exclude members of out groups if it were monopolistic, yet exempt Harvard or similar universities simply because less (or other) prestigious alternatives are available? Which exclusion imposes greater harm?” Tebbe, *supra* note 36, at 940. I would not want to answer Nelson Tebbe’s hypothetical without knowing more about the particulars of the bowling club and the context in which it operates. But he is right to observe that my line-drawing will inevitably miss the mark in discrete instances. I do not mean to suggest that I have identified a perfect line, but it may be a reasonable one to draw. Stated differently, the relevant normative debates are better focused on Harvard University and monopolistic bowling leagues than on either robust protections for the Boeing Company (the consequence of the libertarian proposal) or illusory

The second application of a confident pluralism is directed toward private action that lies beyond the constraints of the First Amendment. Because I largely embrace the state action doctrine, this second application is normative rather than constitutional. It also moves away from the primary rationale that I have offered in support of pluralism—a skepticism of state and majoritarian power. But the second application is not wholly unrelated to these primary concerns. In the absence of any shared common good, we might still agree that tolerance, humility, and patience are worth pursuing in the face of our deep differences. And by embracing the aspirations of pluralism in our non-state settings, we may reinforce the normative commitments that ultimately help to constrain state power.⁴¹

II. THE ASPIRATIONS OF A CONFIDENT PLURALISM

A confident pluralism rests on three aspirations: tolerance, humility, and patience. I frame these as “aspirations” rather than as “virtues” to signal their contingency and their fragility. Tolerance, humility, and patience are also virtues, but virtues emerge out of traditions and practices that presume a degree of coherence and continuity.⁴² Tolerance is largely (though not entirely) an Enlightenment virtue; humility is largely (though not entirely) a Christian virtue. At some point the traditions and practices that sustain these virtues may be mutually incommensurable. If we have reached that point as a sociological fact—and perhaps we have—then an appeal to shared virtues asks too much. Aspirations, on the other hand, may require far less agreement to cohere across disparate traditions. And if enough of us embrace these aspirations, we may sustain a consensus for a confident pluralism, even as we draw from eclectic and blended antecedents.⁴³

protections for the Christian Legal Society (the consequence of the egalitarian proposal).

41. This connection between culture and law is one of the key insights of Vincent Blasi’s seminal article on “the pathological First Amendment.” Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 450–52 (1985). Blasi believed that the best way—and perhaps the only way—to strengthen the First Amendment in anticipation of cultural pressure on minority rights is to ensure that “the appeal to constitutionalism evokes genuine sentiments of long-term commitment or aspiration.” *Id.* at 453. *Cf. id.* at 467 (suggesting that the key to guarding against a pathological shift is “to promote an attitude of respect, devotion, perhaps even reverence, regarding those central norms”). For a similar but less sanguine argument about religious liberty and arguments rooted in “religious exceptionalism,” see John D. Inazu, *More is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485 (2014).

42. See generally ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (3d ed. 2007).

43. For an example of the blended nature of aspirations that depart from tradition-dependent virtues, consider the role that “humility” plays in contemporary reflections about “epistemic humility.” See, e.g., Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 L. &

The aspirations of a confident pluralism are ideologically crosscutting, and they require something from each of us. To see why this is the case, I will describe them using two stock characters: the Liberal Egalitarian and the Conservative Moralist.⁴⁴ I assume that the Liberal Egalitarian desires “progressive equality” in the fashion of contemporary liberalism. Relatedly, he or she finds troubling the traditional gender and sexual norms reinforced by certain illiberal groups. In similar fashion, I assume that the Conservative Moralist seeks “traditional morality” along the lines of many conservative religious traditions. Relatedly, he or she finds troubling the relaxed sexual norms reinforced by certain progressive groups. Importantly, these stock characters are not stand-ins for activists and extremists. Rather, they represent millions of ordinary citizens—they represent *us*. Most of us are not advocates, lobbyists, or pundits. But most of us do have deeply held beliefs and values, and some of those beliefs and values likely align with either the Liberal Egalitarian or the Conservative Moralist.⁴⁵

A. TOLERANCE

The tolerance of a confident pluralism means a willingness to accept genuine difference, including profound moral disagreement. Tolerance is not an easy aspiration: “The aggressive impulse to be intolerant of others resides within all of us.”⁴⁶ Tolerance also means moving beyond the platitudes of free speech to the more difficult questions posed by embodied ways of life.⁴⁷ The Liberal Egalitarian must tolerate illiberal groups. The Conservative Moralist must tolerate progressive groups. As Justice Brennan once wrote, “We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide

LITERATURE 20, 28 (2013) (suggesting that judges should adopt “a kind of epistemological humility” in evaluating fair use claims in copyright).

44. I borrow the idea of the “stock character” from Alasdair MacIntyre’s *After Virtue: A Study in Moral Theory*. The “Conservative Moralist” is taken directly from MacIntyre’s prologue to the third edition. MACINTYRE, *supra* note 42, at xv.

45. Of course, most of us are not reducible to either stock character. There are Liberal Moralists and Conservative Egalitarians, and many people blend complex beliefs and values. Moreover, concepts of egalitarianism and moralism do not fully specify or even reach many of the issues that divide us. But the stock characters reflect something about our approaches to some of the most contested cultural issues.

46. Blasi, *supra* note 41, at 457.

47. Cf. John D. Inazu, *Factions for the Rest of Us*, 89 WASH U. L. REV. 1435, 1454 (2012) (“The hard questions begin when speech and assembly start to matter. It costs us little to protect deeply offensive but politically irrelevant groups like the Westboro Baptists. We may face more difficult challenges with the Tea Party, the Occupy Movement, and the groups they inspire.” (footnotes omitted)).

someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncracies."⁴⁸

Tolerance does not mean embracing all beliefs or viewpoints.⁴⁹ That kind of tolerance is likely only possible in a society that shares a cognizable common good. It is far less plausible in a society like ours. And for this reason, tolerance admits that individuals in voluntarily chosen groups may in fact suffer moral harms, at least as perceived from the perspective of outsiders to the group.⁵⁰ For tolerance to flourish, both the Liberal Egalitarian and the Conservative Moralist must bear the cost of knowing that unaddressed moral harms persist within the private groups of civil society.

The aspiration of tolerance also requires the hard work of distinguishing *people* from *ideas*. Every one of us in this country holds ideas that others find unpersuasive, inconsistent, or downright loopy. More pointedly, every one of us holds ideas that others find morally reprehensible. The tolerance of a confident pluralism does not impose the fiction of assuming that all ideas are equally valid or morally benign. It does mean respecting people, aiming for fair discussion, and allowing for the right to differ about serious matters.⁵¹

48. Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

49. I recognize that others have defined tolerance differently in other contexts. My use is intended to recognize the fact of diversity, not to celebrate diversity for its own sake. Cf. JOHN RAWLS, POLITICAL LIBERALISM 144 (2d ed. 1996) (describing "pluralism as such" as "an unfortunate condition of human life" that includes "doctrines that are not only irrational but mad and aggressive"). Rawls distinguishes "reasonable pluralism" from "pluralism as such." *Id.* at 37–38, 144.

50. The voluntariness premise assumes meaningful rights of exit. See, e.g., Oonagh Reitman, *On Exit*, in MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY 189, 190 (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005) ("[A] right of exit is essentially the opportunity for a member of a particular cultural community to be or become a member of society in an unmediated manner, without going through the group and without becoming subject to its regulatory power. The basic right of exit exists when there is a direct regulatory link between the individual and the state."); George Crowder, *Two Concepts of Liberal Pluralism*, 35 POL. THEORY 121, 122 (2007) (arguing that value pluralism generates arguments that decisively favor pro-autonomy liberalism); Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165, 166–67 (1998) (rejecting the idea that within voluntary social groups, rights of exit are an adequate substitute for basic liberties).

51. See Minow, *supra* note 29, at 1, 11 ("Whether through a principled commitment to tolerate others or a pragmatic commitment to survive, we who live in plural worlds must exhibit enough mutual respect at least to coexist."). These themes are powerfully displayed in Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). Dean Minow notes that "Cover faced up to the fact that some of the particular visions and norms rejected by the state may themselves be at odds with his own notions of human equality and liberty." Minow, *supra* note 29, at 1, 7.

B. HUMILITY

The aspiration of humility requires even greater self-reflection and self-discipline than tolerance. Within a confident pluralism, humility leads both the Liberal Egalitarian and the Conservative Moralist to recognize that their own beliefs and intuitions depend upon tradition-dependent values that cannot be empirically proven or fully justified by forms of rationality external to particular traditions.⁵² The liberal notion of “equality” and the conservative notion of “morality” emerge from within particular traditions and practices whose basic premises are not endorsed by all members of the polity or by all of the private groups of civil society.⁵³ Humility recognizes that we cannot presume these shared foundations within our current political practices and their epistemic limits.

It is critical to emphasize that this aspiration of humility is epistemic rather than ontological. For this reason, it should not be mistaken as either relativism or pragmatism. Humility leaves open the possibility that there is right and wrong and good and evil and that in the fullness of time the liberal notion of equality (and conservative challenges to it) and the conservative notion of morality (and liberal challenges to it) will be objectively known.

C. PATIENCE

The final aspiration of a confident pluralism is patience, which recognizes that contested moral questions are best resolved through persuasion rather than through coercion. Our decisions about which actions to restrict are always a matter of contingent politics, and they are often effected through the violence of the law, rather than through an appeal to shared norms.⁵⁴ Here it is important to recognize that both the Liberal Egalitarian and the Conservative Moralist think that they are *right* in a profoundly deep way. That is one of the reasons that our differences are so deeply and painfully felt. Our two stock characters (and the millions of real citizens they represent) structure much of their lives around their commitments to their moral values. And they usually want their normative views to prevail on the rest of society. But the aspiration of patience favors persuasion over coercion in most ordinary cases.

52. See, e.g., SABA MAHMOOD, *POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT* xi (2005) (critiquing “secular-liberal and progressive sensibilities” through an exploration of Islamic revival movements). See also MACINTYRE, *supra* note 42, at 21–34.

53. MACINTYRE, *supra* note 42, at 6–22.

54. Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1607–08 (1986).

III. WHY PLURALISM NOW?

The argument for a confident pluralism is cast in a unique political moment. Pluralist arguments have traditionally come from those on the Left who have challenged dominant (and sometimes pervasive) Christian, white, masculine, and heterosexual norms. But political power has shifted in recent years, and nowhere more visibly than in the area of gay rights. To be sure, gay and lesbian citizens continue to confront significant prejudice and bigotry, and they remain politically disadvantaged in many communities.⁵⁵ Moreover, as the proposed Kansas legislation demonstrates, political efforts to restrict the civil liberties of gays and lesbians remain quite real. But gay and lesbian citizens and their supporters have gained an upper hand in the important realm of elite political and cultural discourse. That was not true ten years ago, but as a string of high profile events over the past few years have shown us, it is the case today. This shift in political power will continue, and it will remain an important dimension in arguments about pluralism.⁵⁶

It is also important to observe in the midst of this shift that many religious conservatives did not aspire toward tolerance, humility, and patience in an earlier era when *they* held political power. Some religious conservatives who previously supported coercive state action to regulate the conduct of those with whom they disagreed will rightly confront questions of whether their emerging pluralist sympathies flow out of genuine commitment or political opportunism. But it is also crucial to express at least two cautions about the *critique* of opportunism. First, it may well be that some religious conservatives have been persuaded by the pluralist argument in recent years. That change may be attributable to a variety of reasons, and it would be at the very least uncharitable to assume opportunism.

There is an equally important reason to resist the charge of opportunism against religious conservatives *as a class*: many religious conservatives embraced a confident pluralism even when those who shared more of their normative commitments held political power. This

55. These ongoing challenges are especially true for gay youth. *See, e.g.*, ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? 96 (2009) (“Gay adolescents often are rejected, not only by their peers, but by their parents as well. This extreme rejection and isolation produces a disproportionately high incidence of suicide attempts.” (footnote omitted)).

56. A related phenomenon is the loss of political power by those formerly occupying majoritarian roles. Conservative Protestants may represent the clearest example. Unlike other religious adherents, Protestants have long occupied positions of political power, and the social and cultural dimensions related to the loss of that power are complex and ongoing.

observation is another way of saying that the category of “religious conservative” is as underspecified as any other broad label cast in the culture wars. Consider, by way of example, theologian David Gushee’s identification of millions of Americans in the “evangelical center” who are socially conservative (and who would reject important assumptions underlying liberal egalitarianism and progressive sexuality) but whose theological and cultural views are entirely consistent with a confident pluralism.⁵⁷

Of course, not everyone on the Left or the Right cares about pluralism or related First Amendment values—many on both sides want political victory at all costs. One alternative (advocated by some on both ideological extremes) is a radical sameness that refuses to sanction or even permit difference, or at least difference viewed by those in power as “closed-minded” or “bigoted” (or, in an earlier era, as “disgusting”).⁵⁸ But many

57. DAVID P. GUSHEE, *THE FUTURE OF FAITH IN AMERICAN POLITICS: THE PUBLIC WITNESS OF THE EVANGELICAL CENTER* 215–17 (2008). Gushee suggests that representative examples include the National Association of Evangelicals, Evangelicals for Social Action, the Council for Christian Colleges and Universities, the Center for Public Justice, and the magazine *Christianity Today*, as well as pastors like Rick Warren, Joel Hunter, and Rich Nathan. *Id.* at 92–117. The landscape is further complicated by black evangelicals like John Perkins and Tony Evans, whom Gushee classifies as “center-left and center-right black evangelicals respectively,” and Hispanic evangelicals represented by groups like the National Hispanic Christian Leadership Conference. *Id.* at 105–11. See generally CHRISTIAN SMITH, *CHRISTIAN AMERICA?: WHAT EVANGELICALS REALLY WANT* (2000) (offering a textured account of the beliefs and practices of American evangelicals).

The influential theologian Stanley Hauerwas offers one example of a kind of theological account critical of many liberal premises but consistent with a confident pluralism. See John D. Inazu, *Foreword—Stanley Hauerwas and the Law: Is There Anything to Say?*, 75 L. & CONTEMP. PROBS. *i passim* (2012).

58. For examples of the bigotry rhetoric, see Jesse Bering, *What do Homophobic Bigots Really Think?*, SLATE (Aug. 23, 2012, 12:02 PM), http://www.slate.com/articles/health_and_science/science/2012/08/anti_gay_bigotry_online_analyzing_homophobic_comments_can_disarm_the_hate_html (suggesting responses to the most “revolting” arguments against same-sex marriage); Michael Warren, *Piers Morgan: Opposition to Gay Marriage ‘Not American’*, WKLY. STANDARD BLOG (Mar. 27, 2013, 12:44 PM) http://www.weeklystandard.com/blogs/piers-morgan-opposition-gay-marriage-not-american_712045.html# (reporting that news anchor Piers Morgan described a debater’s support for traditional marriage as “a bit offensive,” “not fair,” “not tolerant,” and “not American”); Steve Williams, *Yes Matt Birk, You Are an Anti-Gay Bigot*, CARE2.COM (Oct. 4, 2012, 7:00 AM), <http://www.care2.com/causes/yes-matt-birk-you-are-an-anti-gay-bigot.html> (responding to a professional football player’s defense of traditional marriage).

Conversely, restrictions against gays and lesbians have historically been grounded in claims of immorality and deviance. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) (“Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.”), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Anti-sodomy laws, legal restrictions on gay marriage, and even the social pressures of bullying have been justified by notions of the sexual deviance of homosexuality. See generally WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999)

people recognize that real difference is part of our shared existence, and that in most cases, the best way to deal with difference is through tolerance, humility, and patience.

IV. DISCRIMINATION

A common objection to pluralist arguments that benefit “discriminatory”⁵⁹ groups is that contemporary equality and antidiscrimination norms are simply too important, and that these norms should trump any pluralist arguments that protect exclusionary groups. This objection typically undervalues the significance of ensuring meaningful resistance to state and majoritarian power. Given the dubious track record of those who have wielded coercive government power, protecting the boundaries of the private groups of civil society remains vitally important.

On the other hand, the objection rooted in equality and antidiscrimination norms gains a great deal of rhetorical traction when it is linked to racial discrimination in the Jim Crow South. I have elsewhere called this argument the “standard objection” to pluralism.⁶⁰ The standard objection is extremely important, and any serious argument for pluralism today must confront it.

I have suggested elsewhere that the standard objection will not be sufficiently answered by claiming religious exceptionalism (i.e., religiously motivated discrimination gets a pass because “religion is special”),⁶¹

(reflecting on the history of sexual and gender variation in America). These pressures and laws have also reinforced the “closet” phenomenon that encourages hiding and psychological dissociation. Jack Drescher, *The Psychology of the Closeted Individual and Coming Out*, PARADIGM, Fall 2007, at 16, 17; Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 778 (2002) (describing the U.S. military’s shift to a “don’t ask, don’t tell” policy for homosexual members as “the reverse of a progress narrative for gays”).

59. Cf. Patrick S. Shin, *Is There a Unitary Concept of Discrimination?*, in PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 163, 164 (Deborah Hellman & Sophia Moreau eds., 2013) (“The variability that seems to characterize our usages of the term ‘discrimination’ warrants theoretical attention because it is a word with significant normative power. No one calls an action discriminatory in order to endorse it. Claiming that an action is discriminatory is to raise an important moral concern about it. But the polysemous or polymorphic nature of the term ‘discrimination’ creates uncertainty about just what that concern is, and about whether charges of discrimination in different usage contexts raise a common set of moral problems.” (footnote omitted)).

60. John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 793 (2014).

61. *Id.* at 830–35. See also Inazu, *supra* note 41, at 531 (“[C]laims for religious exceptionalism are unlikely to prevail against growing cultural resistance to the free exercise right.”). The argument for religious exceptionalism *might* be different under an interpretation of the free exercise clause that provides heightened scrutiny to constitutional arguments grounded in religious liberty. But current free exercise jurisprudence does not generally support that interpretation. Compare *Emp’t Div. v. Smith*, 494 U.S. 872 (1990) (concluding that neutral laws of general applicability need only pass rational basis

arguing for a distinction between conduct-based distinctions regarding sexuality and status-based distinctions regarding race,⁶² or arguing that “race is different” in some kind of metaphysical sense.⁶³ Consider the argument that “race is different.” That claim rings hollow to the woman or gay person who faces discrimination on the basis of gender or sexuality. It rests on the legal or moral premise that excluding a black person is “wrong” but excluding a woman or a gay person is “not wrong.” Many people do not share that premise, and many others recognize that the stigma of exclusion on an individual level can be hurtful and demeaning, regardless of the reason for exclusion.⁶⁴

There remains, however, a crucial difference between the race-based discrimination against African Americans in the Jim Crow South and *any* other form of discrimination or exclusion in our country. The pervasive impediments to equal citizenship for African Americans have not been matched by any other recent episode in American history. Our country has harmed many people (including my grandparents, who were stripped of all of their possessions and imprisoned for four years during World War II solely because they were Japanese Americans). But the systemic and structural injustices perpetrated against African Americans—and the extraordinary remedies those injustices warranted—remain in a class of their own.⁶⁵

V. IMPLEMENTING A CONFIDENT PLURALISM

I have to this point sketched a normative argument for embracing the

scrutiny to survive free exercise challenge), *with* *Sherbert v. Verner*, 374 U.S. 398, 406–09 (1963) (applying strict scrutiny in free exercise claim), *and* *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (same).

62. Inazu, *supra* note 60, at 835–37. *See also* William N. Eskridge, Jr., *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 711 (2011) (“Status, conduct, and message have been the holy trinity of religion-based discrimination and subordination of both citizens of color and homosexual citizens.”). I have argued elsewhere that the Supreme Court’s collapsing of this distinction between status and conduct in the context of the membership requirements of a private group is problematic. John D. Inazu, *Justice Ginsburg and Religious Liberty*, 63 HASTINGS L.J. 1213 (2012) [hereinafter Inazu, *Ginsburg and Religious Liberty*].

63. Inazu, *supra* note 60, at 837–42.

64. *See, e.g.*, Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 123, 153 (Douglas Laycock et al. eds., 2008) (“If I am denied a job, an apartment, a room at a hotel, a table at a restaurant, or a procedure by a doctor because I am a lesbian, that is a deep, intense, and tangible hurt.”).

65. It should be clear that the claim that “racial discrimination against African Americans in the generation after Jim Crow is different” is not the same as a claim that “race is different” in some timeless or ontological way.

aspirations of a confident pluralism. In this part, I offer three ways in which these ideas might play out in law and legal decisions: (1) by strengthening associational freedom; (2) by ensuring meaningful access to public forums to facilitate the pluralist vision; and (3) by insisting that some forms of public funding support the pluralist vision.

A. STRENGTHENING ASSOCIATIONAL FREEDOM

The most important implication of a confident pluralism is strengthening the constitutional protections for the private groups of civil society. I have written extensively about these issues elsewhere and will only have space to mention them briefly here.⁶⁶ One reason that associational freedom is the fundamental building block of a confident pluralism is that it shields groups and spaces from the reaches of state power. Without this initial sorting—which explains much of the need for a state action principle—the aspirations of a confident pluralism become functionally unworkable.

The protections for individuals to form and gather in groups are rooted in the First Amendment's right of assembly and the judicially recognized right of association.⁶⁷ These rights have protected many unpopular and vulnerable groups.⁶⁸ And they are distinct from the free speech right.⁶⁹ The Supreme Court's *Martinez* decision upholding the Hastings all-comers policy collapsed entirely that distinction. According to the Court, the rights of association and speech "merge[d]," with the clear implication that association added *nothing* to speech.⁷⁰ Instead, the Court contended that "expressive association in this case is 'the functional equivalent of speech itself'" to set up the idea that expressive association is entitled to no more and no different constitutional protection than speech.⁷¹ That cannot be right.⁷²

66. See generally INAZU, *supra* note 18, at 18 (arguing that "the current approach to constitutional protections for group autonomy fails historically, theoretically, and doctrinally").

67. I have elsewhere engaged in an extended critique of the judicially recognized right of association and its component parts of intimate and expressive association. *Id.* at 63–149. For purposes of the present argument, I adopt the *Martinez* Court's focus on the association claim.

68. *Id.* at 26–62.

69. *Id.* at 147–48. The right of assembly is also distinct from the right of petition. *Id.* at 22–25.

70. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 680 (2010).

71. *Id.* (quoting Brief for Petitioner at 35, *Martinez*, 561 U.S. at 661 (No. 08-1371)).

72. See Inazu, *supra* note 60, at 789 ("We have lost sight of the significance of the Four Freedoms [of speech, press, religion, and assembly embodied in the First Amendment], supplanting their unified distinctiveness with an undifferentiated free speech framework."). Michael McConnell has recently observed how far these developments stray from the First Amendment: "[T]he drafters of the First Amendment made one thing clear: [Its] freedoms are separate and warrant individual enumeration

The Court also erred in labeling the Christian group's exclusionary policy "conduct."⁷³ Some groups are incapable of existing—of manifesting and embodying a particular creedal statement—without the associational "conduct" of excluding members who do not adhere to that statement. The Harvard Faculty Club could not be the Harvard Faculty Club if it were required to admit all comers. The same is true of the St. Louis Cardinals, the Girl Scouts, and the Smith family. The "conduct" of exclusion is a logical necessity for the message (or "perspective") of many kinds of groups.⁷⁴

On this point, it is also important to distinguish between the state pronouncing the differences between conduct and message, on the one hand, and a private group setting internal norms that separate conduct from status, on the other. I suggested earlier that legal arguments attempting to parse these distinctions are unlikely to prevail. But the distinctions still carry normative weight within a theory of a confident pluralism. Neither Hastings College of the Law nor the U.S. Supreme Court should parse the difference between conduct and message for a private group. That is harnessing the coercive mechanism of public power to make an authoritative interpretive decision, which the state may not do absent an extraordinary justification (for example, "we think your claim of human sacrifice as liturgy is actually murder"). Conversely, a private group like the Christian Legal Society should be able to say that conduct is different

and protection. In the past thirty years, without offering any reason and without considering this history, the Supreme Court has committed the one error the drafters most clearly tried to prevent." McConnell, *supra* note 34, at 39, 40.

73. *Martinez*, 561 U.S. at 696 ("[The Christian Legal Society's] conduct—not its Christian perspective—is, from Hastings' vantage point, what stands between the group and [its] status" as a student organization recognized by the school.)

74. The inability to see the connections between membership and message formation is one of the most glaring weaknesses of the Court's decision in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (rejecting freedom of association claim by all-male civic organization, thus requiring it to admit female members). See AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* 40 (1995) ("Surely the Jaycees . . . will be a different organization. Surely that difference will be felt throughout an intricate web of relationships and different voices in immeasurable but nonetheless significant ways."); George Kateb, *The Value of Association*, in *FREEDOM OF ASSOCIATION* 35, 55 (Amy Gutmann ed., 1998) ("Brennan's claim that young women may, after their compulsory admission [to the Jaycees], contribute to the allowable purpose of 'promoting the interests of young men' is absurd."). Consider also the statement of the student leaders of Vanderbilt's Catholic organization when they decided that they could not comply with the university's all-comers policy: "While organizational skills and leadership abilities are important qualifications for leaders of [our group], the primary qualification for leadership is Catholic faith and practice. We are a faith-based organization. A Catholic student organization led by someone who neither professes the Catholic faith nor strives to live it out would not be able to serve its members as an authentically Catholic organization." Letter from Fr. John Sims Baker, Chaplain, to Alumni, Parents, and Friends of Vanderbilt Catholic (Mar. 26, 2012), available at <http://universitycatholic.org/index.cfm?load=page&page=274#sthash.l2OmNrUc.dpuf>.

than orientation, and it can prohibit conduct as a condition of membership no matter how central to any one particular person's identity that conduct may be. That prohibition is an internal norm enforced by a private group that requires certain identity claims to be placed above others. Adhering to that norm will undoubtedly be costlier and more identity-wrenching for some than for others, but the private group may impose those costs.⁷⁵ And under the same theory, the state may not impose those distinctions through its coercive law.⁷⁶

B. FACILITATING PLURALISM

The second way that the law might better reflect the aspirations of a confident pluralism is through a stronger defense of the public forum—the physical and metaphorical places where government allows viewpoints to become voices. When the Supreme Court first recognized the public forum in 1939, Justice Roberts wrote: “Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”⁷⁷ Harry Kalven underscored this theme a generation later: “[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.”⁷⁸

75. Cf. John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093, 1097 (2013) (“We exclude when we set formal or informal membership criteria that define the boundaries of our group. Our membership criteria may be good or bad, rational or emotive, objective or subjective. But they are *ours*. When the state commands that our membership must be open to certain people, it inhibits our ability to exclude.”).

76. In other words, the state of Texas may not claim that it is regulating only conduct but not status, see *Lawrence v. Texas*, 539 U.S. 558, 563 (2003), but the Christian Legal Society should be permitted to do so. See generally, Inazu, *Ginsburg and Religious Liberty*, *supra* note 62, at 1234–37 (elaborating on these ideas). I am not claiming that the Christian Legal Society is ontologically or morally correct to impose its distinction between status and conduct, but it is fully justified to do so under a theory of confident pluralism.

77. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (Roberts, J.). For an argument that Justice Roberts was wrong in his assertion, see McConnell, *supra* note 34, at 41 (“In Britain, the people were not free to assemble in the streets and parks without official permission. Unauthorized groups of twelve or more could be charged and prosecuted . . . for unlawful assembly. Colonial governors tried to suppress the Sons of Liberty on similar legal bases. America’s declaration of a freedom of assembly was a break from this history.”).

78. Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 11–12 (1965). Robert Post suggests that “[t]he phrase ‘public forum’ is traditionally attributed to Harry Kalven’s classic 1965 article . . .” Robert C. Post, *Between Governance and Management: The*

Today's public forum is vulnerable in a number of settings in which groups of people express their displeasure with or dissent from majoritarian norms.⁷⁹ Physical protests (including pickets, marches, and demonstrations) across the political spectrum encounter fierce governmental resistance and often struggle to endure, even though they follow some of the most effective and time-honored vehicles of social change in our country's history. We have seen examples of government suppression of the public forum in the recent protests in Ferguson, Missouri, in Occupy demonstrations, in anti-abortion protests, in new forms of labor unionism seeking to raise the minimum wage, and in civil rights groups challenging conservative legislative actions.⁸⁰ Not all of these protests have been contained to public forums, and the government rightly intervenes when Occupy protesters storm the lobbies of private buildings or when anti-abortion protesters physically block access to abortion clinics. But recent restrictions on physical protests in public forums far exceed these minimal constraints and pose significant dangers to the vision of a confident pluralism.

There are also governmental challenges to new kinds of public forums. As Justice Kennedy has observed: "Minds are not changed in streets and parks as they once were."⁸¹ One of the places where minds are now being changed is in the generally available facilities of public educational institutions. The Court recognized this shift in its 1972 decision in *Healy v. James*, noting that "[t]he college classroom with its surrounding environs is peculiarly the marketplace of ideas."⁸² It reinforced these ideas a generation later in *Rosenberger v. Rectors of Virginia*,⁸³ noting that while the Student Activities Fund in that case was "a forum more in a metaphysical than in a spatial or geographic sense . . . the same [public forum] principles are applicable."⁸⁴ When Hastings denied the Christian

History and Theory of the Public Forum, 34 UCLA L. REV. 1713, 1718 (1987).

79. See generally ZICK, *supra* note 19 (arguing that public forums face increasing restrictions).

80. *Id.* See also Crain & Inazu, *supra* note 19 (explaining the challenges labor activists face); Kessler, *supra* note 19 (discussing suppression of the Occupy demonstrations).

81. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 802–03 (1996) (Kennedy, J., concurring in part and dissenting in part).

82. *Healy v. James*, 408 U.S. 169, 180 (1972) (internal quotation marks omitted). The Court elaborated: "If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by the denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial." *Id.* at 181–82 (footnote omitted).

83. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

84. *Id.* at 830.

Legal Society official recognition, it denied the group access to avenues of communication, meeting space, and the student activities fair.⁸⁵ These are important means of participation in the free exchange of ideas. And their denial strikes at the heart of meaningful participation in the public forum.

C. FUNDING PLURALISM

Some scholars have asserted that even if the government must allow private groups to exist under a pluralist vision, it is under no obligation to fund their activities.⁸⁶ That argument underlies Justice Ginsburg's characterization of the *Martinez* decision as a subsidy case. In her view, the Christian Legal Society was "seeking what is effectively a state subsidy" and "Hastings, through its [student organization] program, is dangling the carrot of subsidy, not wielding the stick of prohibition."⁸⁷

Justice Ginsburg's argument is difficult to square with the funding realities in today's regulatory state, where government dollars are ubiquitous.⁸⁸ And while not every government funding decision is constitutionally problematic or in tension with a confident pluralism, some may be. We might be especially concerned when government imposes ideological constraints on generally available funding offered in settings that welcome and encourage a diversity of viewpoints and ideas. Put slightly differently, the contours of the public forum discussed in the previous section extend not only to the provision of space and nonmonetary

85. See *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 669–70 (2010) (describing the benefits of official recognition).

86. See, e.g., Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1942 (2006) ("The Court has routinely distinguished limits on how government assets are used from limits on who uses the assets or on what other behavior the user engages in with its own assets" (emphasis omitted)) Cf. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 553 (2001) (Scalia, J., dissenting) ("[T]he decision not to subsidize the exercise of a fundamental right does not infringe the right" (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)) (internal quotation marks omitted)).

87. *Martinez*, 561 U.S. at 682, 683. The monetary subsidy to the Christian Legal Society at Hastings College of the Law totaled 250 dollars in travel funds, which were financed by vending machine sales commissions. Joint Appendix Volume 1 at 213, 217 n.2, 227, *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010) (No. 08-1371), 2010 U.S. S. Ct. Briefs LEXIS 58 (reprinting parties' Joint Stipulation of Facts for Cross-Motions for Summary Judgment filed in the U.S. District Court for the Northern District of California in 2005).

88. See Dale Carpenter, *Unanimously Wrong*, 2005–2006 CATO SUP. CT. REV. 217, 232 ("We need a realistic understanding of how government power operates today. This power can be reined in, perhaps slightly, through robust substantive protection for speech and association, and through an unconstitutional conditions doctrine that fetters Congress' ability to eat away at federalism and liberty through funding conditions. A constitutional theory unable to account for and deal with this threat cannot be considered very protective of either federalism or liberty in the 21st century.").

resources, but also to funding itself.⁸⁹

Understanding the connection between the public forum and some forms of public funding is critical to recognizing the line between persuasion and coercion.⁹⁰ This is one reason that the Supreme Court's reasoning in its well-known decision in *Bob Jones University v. United States*, which upheld the denial of tax-exempt status to racially discriminatory schools because those schools violated "public policy," is conceptually wrong.⁹¹ I realize, of course, that questioning *Bob Jones* is normatively unappealing.⁹² And it may well be that the *Bob Jones* was a political necessity when the Court decided it in 1983. The decision came within a generation of *Brown v. Board of Education*, and its holding encompassed private secondary schools (including "segregationist academies") that resisted integration.⁹³ But whether the internal logic of

89. The vast reach of government dollars is one of two reasons that the distinction between funding and facilitation is imprecise. The other is that almost all facilitation has a financial component—use of classroom space not only facilitates a group's meetings, but also subsidizes the costs of those meetings (for example, by paying lighting and maintenance costs). For this reason, the state's willingness to "facilitate" but not to "subsidize" viewpoints that it doesn't endorse is difficult to enforce as a practical matter.

90. The arguments in this section draw from John D. Inazu, *The First Amendment's Public Forum*, 55 WM. & MARY L. REV. (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404014##.

91. *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983).

92. Indeed, even scholars generally sympathetic to versions of the pluralism argument go out of their way to endorse *Bob Jones*. See, e.g., COREY BRETTSCHEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?: HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY 137 (2012) (describing *Bob Jones* as "a prime illustration of when a religious organization should not be given the tax privileges of non-profit status"); GALSTON, *supra* note 24, at 112–13 (assuming the unassailability of *Bob Jones*).

93. See, e.g., DAVID NEVIN & ROBERT E. BILLS, THE SCHOOLS THAT FEAR BUILT: SEGREGATIONIST ACADEMIES IN THE SOUTH 12–14 (1976). The *Bob Jones* decision, in other words, is linked inextricably with the Civil Rights Era. This does not mean that "race is different." But it acknowledges a necessary exceptionalism for the legal and judicial measures to further equality for African Americans during the Civil Rights Era. Cf. *Bob Jones*, 461 U.S. at 607 (Powell, J., concurring in part and concurring in the judgment) ("[A]s the Court notes, if any national policy is sufficiently fundamental to constitute such an overriding limitation on the availability of tax-exempt status . . . , it is the policy against racial discrimination in education."). The historical and social context is even starker with respect to earlier and more substantial restrictions on nonreligious, racially discriminatory private schools that were closer in time to the initial desegregation effort. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 168–75 (1976) (prohibiting nonreligious racially discriminatory private schools). Cf. Douglas Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEX. L. REV. 259, 276 (1982) ("[W]hen private schools drain off most of the whites in a school system, as has happened in some cities, they preclude any meaningful public school desegregation. Moreover, they can no longer be described as enclaves; they have largely replaced the public school system. In that circumstance, even if they are pervasively religious, they should lose their right to discriminate against blacks, because they are imposing substantial harm on persons who have made no effort to affiliate themselves with the church."); Jeff Spinner-Halev, *A Restrained View of Transformation*, 39 POL. THEORY 777,

Bob Jones is defensible is another matter, and that is the inquiry that I undertake here.⁹⁴

In my view, *Bob Jones* cannot be justified in light of the system of tax deductions operative in 1983 and continuing today. The federal tax code's recognition of deductions for contributions made to charitable, religious, and educational organizations is functionally pluralistic—it effectively allows individual taxpayers to direct federal dollars to nonprofits of their choosing.⁹⁵ Organizations and ideas wither or thrive not by government fiat, but rather based on what John Colombo and Mark Hall have characterized as “the values and the choices of private givers.”⁹⁶ As Justice Powell noted in his concurrence in *Bob Jones*, “the provision of tax exemptions to nonprofit groups is one indispensable means of limiting the

782 (2011) (“The *Bob Jones* case was a matter of invidious discrimination because of the time and place in which it took place. . . . This case emerges out of the 1960s, with the U.S. Government’s attempts to outlaw school segregation, and its worries about the common Southern response of establishing private schools in order to preserve de facto segregation.”).

94. The limited subsequent applications of *Bob Jones* also suggest reasons to question its generalizability: the Internal Revenue Service has not expanded its “public policy” constraint beyond race-based discrimination. See *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 829, 832 (9th Cir. 2006) (en banc) (upholding private school’s Hawaiian-only admissions policy against a 42 U.S.C. § 1981 challenge).

95. See 26 U.S.C. § 170(c) (2012) (authorizing deductions); *id.* § 501(c)(3) (specifying which tax-exempt organizations are eligible to receive deductions). The 501(c)(3) designation conveys tax-exempt status, but it is the 170(c) deduction that provides tangible financial benefits to tax-exempt organizations because “nonprofit organizations, as their name suggests, do not ordinarily generate the profits that are the base of the corporate income tax.” RICHARD SCHMALBECK & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION 443 (2d ed. 2007). Each qualifying deduction claimed by taxpayers provides an indirect government subsidy to the organization receiving the donation. A taxpayer who itemizes her deductions sees her tax liability reduced at the amount equal to her donation multiplied by her income tax rate. That forgone tax revenue can be viewed as an indirect government subsidy of the organization, and the amount and direction of the subsidy is largely a function of the individual taxpayer. By way of example, suppose that Sally donates 100 dollars to the Girl Scouts and itemizes her deduction on her federal income taxes. Suppose further that her income is taxed by the federal government at a 30 percent rate. Under § 170(c), and because the Girl Scouts are a tax-exempt organization under § 501(c)(3), Sally pays 30 dollars less in income tax based on her 100 dollar donation. That means, in effect, that the government paid (or subsidized) 30 dollars of Sally’s 100 dollar donation. Sally is out-of-pocket only 70 dollars for the 100 dollars that the Girl Scouts received.

96. JOHN D. COLOMBO & MARK A. HALL, THE CHARITABLE TAX EXEMPTION 155 (1995). Colombo and Hall argue that allowing each individual “to pursue his own notion of the good” is an “elemental freedom [that] constitutes a basic constraint on the political sphere.” *Id.* at 154. The charitable exemption is “born out of the ‘spirit of classic liberalism,’ whose ‘dominant tenets . . . were distrust of government and faith that the progress and well-being of mankind could best be achieved by natural forces, harmonizing the individual actions of men who were left untrammelled.’” *Id.* (alteration in original) (quoting Chauncy Belknap, *The Federal Income Tax Exemption of Charitable Organizations: Its History and Underlying Policy*, in RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 2025, 2031 (U.S. Dep’t of the Treasury ed. 1977)).

influence of governmental orthodoxy on important areas of community life.”⁹⁷

Here it is useful to distinguish discretionary funding provided through government contracts or grants from government funding available to a diversity of viewpoints and ideas. The federal tax code’s recognition of deductions for contributions made to charitable, religious, and educational organizations falls within the latter category. The meanings of “charitable” and “educational” are deliberately broad, and “religious” organizations are not even defined.⁹⁸ Together, these three categories of tax-exempt organizations encompass a vast array of groups in civil society—so vast that every one of us could find among them not only groups we think belong, but also groups we find morally repugnant and harmful to society.⁹⁹ And, of course, our lists of reprehensible groups would differ. The pro-choice group and the pro-life group, religious groups of all stripes (or no stripe), hunting organizations and animal rights groups—the tax

97. *Bob Jones*, 461 U.S. at 609 (Powell, J., concurring in part and concurring in the judgment). Powell linked his views to “the importance of our tradition of pluralism.” *Id.* at 610. *See also* *Walz v. Tax Comm’n of the City of N.Y.*, 397 U.S. 664, 689 (1970) (Brennan, J., concurring) (“[G]overnment grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.”).

98. 26 U.S.C. § 501(c)(3) (listing “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purpose” as “exempt organizations”). According to IRS regulations, the term “charitable” is used “in its generally accepted legal sense” and is not limited by the other tax-exempt purposes listed in § 501(c)(3). 26 C.F.R. § 1.501(c)(3)-1(d)(2) (2014). The regulations state that the term includes “[r]elief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.” *Id.* An educational organization under the regulations is one that relates to (a) “[t]he instruction or training of the individual for purpose of improving or developing his capabilities,” or (b) “[t]he instruction of the public on subjects useful to the individual and beneficial to the community.” *Id.* § 1.501(c)(3)-1(d)(3). Over 1.1 million organizations qualify as exempt under § 501(c)(3). *Scope of the Nonprofit Sector*, INDEP. SECTOR, http://www.independentsector.org/scope_of_the_sector (last visited Feb. 12, 2015) (citing statistics as of 2011). That figure excludes 327,000 religious congregations. *Id.* Section 508(c) creates the legal presumption that religious congregations qualify for tax-exemption without having to apply for recognition of § 501(c)(3) status. 26 U.S.C. § 508(c)(1)(A). Section 6033(a) exempts churches from having to file a Form 990. 26 U.S.C. § 6033(a)(3)(A)(i).

99. *Cf. Bob Jones*, 461 U.S. at 609 (1983) (Powell, J., concurring in part and concurring in the judgment) (“I find it impossible to believe that all or even most [501(c)(3)] organizations could prove that they ‘demonstrably serve and [are] in harmony with the public interest’ or that they are ‘beneficial and stabilizing influences in community life.’” (second alteration in original)).

deductions benefit them all.¹⁰⁰ The resulting mosaic is neither thematic nor tidy, but it is in at least one sense, beautiful: It enacts the aspirations of a confident pluralism. And it does so with government dollars.

VI. EMBODYING A CONFIDENT PLURALISM

The second and more tentative implication of the approach that I have sketched here is how we might adopt the aspirations of a confident pluralism in our own lives and institutions. Because these applications apply to non-state actors, they do not trigger constitutional or legal constraints. They are instead normative suggestions that we might decide to embrace on our own. In this part, I consider four possibilities: (1) reinforcing the importance of institutional pluralism; (2) imposing normative barriers on private monopolies; (3) discouraging at least some coercive boycotts; and (4) working toward more careful speech.

A. INSTITUTIONAL PLURALISM

The example of the all-comers policies on a number of different college campuses illustrates the importance of what some have called

100. See also, e.g., *The American Cheese Education Foundation (ACEF)*, AM. CHEESE SOC'Y, <http://www.cheesesociety.org/donate/> (last visited Feb. 12, 2015) (“[T]he American Cheese Education Foundation . . . supports existing and new educational efforts to further educational opportunities for all those interested in producing, marketing, selling, and appreciating North America’s artisan, farmstead, and specialty cheeses.”); *About BENS*, BUS. EXECUTIVES FOR NAT’L SECURITY, <http://www.bens.org/page.aspx?pid=406> (last visited Feb. 12, 2015) (“For thirty years, [Business Executives for National Security] has served as the primary channel through which senior American business leaders contribute special experience and talent to help build a more secure nation.”); *CHILD’S PLAY*, <http://www.childisplaycharity.org/> (last visited Feb. 12, 2015) (“Child’s Play seeks to improve the lives of children in hospitals around the world through the generosity and kindness of the video game industry and the power of play.”); *Welcome*, CRITTER CONNECTION, <http://www.ctguineapigrescue.org/> (last visited Feb. 12, 2015) (“The Critter Connection, Inc., is a non-profit group dedicated to the rescue and rehabilitation of abandoned and neglected guinea pigs.”); *About*, LONGECITY: ADVOCACY & RES. FOR UNLIMITED LIFESPANS, http://www.longecity.org/forum/page/index2.html/_feature/about-r28 (last visited Feb. 12, 2015) (“The LongeCity . . . is an international, not-for-profit, membership-based organization . . . Its mission is ‘to conquer the blight of involuntary death.’”); *About the Mormon Transhumanist Association*, MORMON TRANSHUMANIST ASS’N, <http://transfigurism.org/pages/about/> (last visited Feb. 12, 2015) (“The Mormon Transhumanist Association is an international nonprofit organization that promotes radical flourishing in compassion and creation through technology and religion”); *About the Order*, ORD. AZURE ROSE, <http://order-of-the-azure-rose.webs.com/> (last visited Feb. 12, 2015) (“The Order of the Azure Rose is a Medieval/Renaissance re-creation Guild that portrays an anachronistic Royal Court and Order of Chivalry.”); *About Tall Clubs International*, TALL CLUBS INT’L, <http://tall.org/about/about-tci-new/> (last visited Feb. 12, 2015) (“[Tall Clubs International] is a social organization for tall adults! Our stated purpose is ‘to promote tall awareness among tall men and women, and in the community.’”). All sites indicate that the organizations are tax-exempt under 501(c)(3).

“institutional pluralism.”¹⁰¹ At Hastings and other public school campuses, these all-comers policies depart not only from the aspirations of a confident pluralism, but also from longstanding *constitutional* constraints. But what about private schools like Vanderbilt University and Bowdoin College? Should these private schools enforce all-comers policies as a normative matter? This is to me a far more complicated question than cases involving public institutions. On the one hand, Vanderbilt and Bowdoin are hindering pluralism in the same way that Hastings is in adopting an all-comers policy. Perhaps even more egregiously, their adoption of an all-comers policy cuts against the academic inquiry purportedly at the heart of institutions of higher learning.¹⁰² All of these failures suggest strong normative reasons to criticize Vanderbilt and Bowdoin for adopting the all-comers policy.¹⁰³

On the other hand, Vanderbilt and Bowdoin are themselves private actors, and they contribute to the landscape of institutional pluralism. For this reason, those who are critical of the substantive policies might nevertheless defend the ability of these institutions to implement them. Private actors like universities reinforce the First Amendment insofar as they limit the power of the state, even when they internally neglect those values. That is another reason that the state action doctrine matters—it preserves the integrity of non-state power players because of, rather than in spite of, the power that they wield.

B. MONOPOLIES

One reason that institutional pluralism fits within the broader aspirations of a confident pluralism is that it facilitates a kind of market choice by allowing for differently minded institutions to coexist.¹⁰⁴ This

101. During his term as president of the American Association of Law Schools, John Garvey advocated for greater attention to a diversity among law schools, including affirming the role of religiously affiliated law schools. See John Garvey, *Introduction, AALS Symposium on Institutional Pluralism: The Role of Religiously Affiliated Law Schools*, 59 J. LEGAL EDUC. 125, 125 (2009) (arguing that integrating faith with philosophy, art, literature, politics, and science will add “comprehensive wisdom” to legal education).

102. Cf. ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPEDIA, GENEALOGY, AND TRADITION* 230–31 (1990) (describing the ideal university “as a place of constrained disagreement, of imposed participation in conflict, in which a central responsibility of higher education would be to initiate students into conflict”).

103. Vanderbilt’s decision to exempt fraternities and sororities, honors societies, and performance groups, is a particularly egregious inconsistency with its purported reasons for the all-comers policy. See John Inazu, *The Perverse Effects of the “All-Comers” Requirement*, LIBR. L. & LIBERTY BLOG (Sept. 15, 2014), <http://www.libertylawsite.org/2014/09/15/the-perverse-effects-of-the-all-comers-requirement/>.

104. This is, of course, an imperfect solution. The conservative Christian in Nashville may suffer a genuine loss at no longer feeling welcome at Vanderbilt; the progressive secularist in South Bend may

preservation of meaningfully divergent alternatives suggests why the aspirations of a confident pluralism might cut against certain forms of private action that assume monopolistic or quasi-monopolistic tendencies.¹⁰⁵ As a theoretical matter, nothing about a monopoly inherently violates the aspirations of a confident pluralism (for example, if everyone voluntarily agrees to the same underlying aspirations and if meaningful exit opportunities are preserved for those who change their minds). But in most actual situations, the “fact of pluralism” will warrant a rebuttable presumption that a private monopoly violates the aspirations of a confident pluralism.¹⁰⁶

C. BOYCOTTS

A more difficult question is the use of private boycotts, for which there is no shortage of examples. Conservative Christian organizations like the American Family Association and Focus on the Family have long organized boycotts against companies like Disney and Abercrombie & Fitch.¹⁰⁷ They have also targeted companies that support gay rights.¹⁰⁸ In

feel a similar loss toward Notre Dame.

105. In an extended analysis of the right of assembly, I suggested the following definition for the contours of the right: “The right of assembly is a presumptive right of individuals to form and participate in peaceable, noncommercial groups. This right is rebuttable when there is a compelling reason for thinking that the justifications for protecting assembly do not apply (as when the group prospers under monopolistic or near-monopolistic conditions).” INAZU, *supra* note 18, at 14. *Cf.* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982) (“The right of business entities to ‘associate’ to suppress competition may be curtailed.” (citing Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679 (1978))).

106. The possibilities and vulnerabilities of communities with widely shared agreement emerges most often in the religious context. *See, e.g.*, Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 690–91 (1994) (explaining that the town consists of a “religious enclave of Satmar Hasidim,” and that residents go to great lengths to avoid assimilation into the modern world by speaking Yiddish as their primary language, dressing in distinctive ways, segregating the sexes outside of the home, and educating their children in the Torah); Oregon v. City of Rajneeshpuram, 598 F. Supp. 1217 (D. Or. 1984) (describing an insular religious community in rural Oregon whose leaders were ultimately indicted for immigration fraud, election fraud, and attempted murder). The concern over exit rights is amplified in communities where children are raised and educated apart from the rest of society or in which members give all their possessions and money over to the group. Another example of a monopoly or quasi-monopoly that raises normative concerns is the private action of accrediting agencies and professional associations. These groups yield tremendous power but remain formally beyond the reach of constitutional constraints. Such entities should facilitate rather than hinder a confident pluralism. Too often, they have instead been employed as weapons to root out and hinder differing views. *See, e.g.*, Tebbe, *supra* note 36, at 941 n.105 (describing how the New York County Lawyers’ Association “was founded as an alternative to the only existing bar association in New York City, which discriminated on grounds of face, sex, religion, and ethnicity”).

107. *See, e.g.*, Dwayne Hastings, *AFA Ends Disney Boycott it Launched in Mid-1990’s*, BAPTIST PRESS (May 24, 2005), <http://www.bpnews.net/20841/afa-ends-disney-boycott-it-launched-in-mid1990s>; Rusty Pugh & Jenni Parker, *Decency Advocates Claim Victory As A&F Pulls Explicit*

the other direction, proponents of gay rights recently organized a successful boycott of Mozilla after learning that its recently-named CEO had donated money in support of California's Proposition 8.¹⁰⁹

The boycott reveals an inherent and perhaps irresolvable tension within the theory of a confident pluralism. On the one hand, private collective action is a paradigmatic example of elements of civil society coming together to resist and challenge forms of state or majoritarian power—think, for example of the Occupy demonstrations, labor strikes, and civil rights sit-ins. On the other hand, these actions are themselves coercive. When employed against other private citizens and institutions (as opposed to those directed at state actors), they harness forms of power that may be inconsistent with the aspirations of a confident pluralism.

One possible approach to the role of boycotts within a confident pluralism builds from the worry about monopoly power. In most reasonably diverse private markets, boycotts might be permissible or even normatively encouraged. However, when private markets reflect quasi-monopolistic characteristics, a confident pluralism might support boycotts by consumers and citizens representing minority viewpoints against majoritarian norms. Conversely, it would discourage boycotts that harness majoritarian power to squelch dissenting viewpoints. The precise line-drawing will be fuzzy, but we can at least recognize as an initial matter those situations in which markets have assumed quasi-monopolistic

Catalog, Ceases Publication, AM. FAM. ASS'N ONLINE (Dec. 10, 2003), <http://web.archive.org/web/20060827201613/http://headlines.agapepress.org/archive/12/afa/102003a.asp>. In 1993, the American Family Association bought full-page ads in national newspapers protesting the “steamy sex scenes” and “blood and guns and racy language” of the television show N.Y.P.D. Blue. Bill Carter, *Police Drama Under Fire for Sex and Violence*, N.Y. TIMES (June 22, 1993), <http://www.nytimes.com/1993/06/22/arts/police-drama-under-fire-for-sex-and-violence.html>.

108. E.g., *American Family Association Calls for Boycott of Google Over Company's Support of LGBT Rights*, HUFFINGTON POST (July 11, 2012, 5:11 PM), http://www.huffingtonpost.com/2012/07/11/american-family-association-google-video_n_1666218.html; Associated Press, *Christian Conservatives Push U.S. Companies on Gay Rights*, USA TODAY (Dec. 6, 2005, 9:22 AM), http://usatoday30.usatoday.com/money/industries/banking/2005-12-06-christian-conservatives_x.htm#.

109. Jolie Lee, *OkCupid Urges Boycott of Mozilla over CEO's Gay Marriage Views*, USA TODAY (April 1, 2014, 8:42 AM), <http://www.usatoday.com/story/news/nation-now/2014/04/01/okcupid-mozilla-firefox-antigay/7149461/>. After the controversy led to the CEO's resignation, a number of conservative and traditional marriage groups called for a boycott of Mozilla. See, e.g., National Organization for Marriage, *National Organization for Marriage Calls On Consumers to Remove Mozilla Firefox Browser in Protest of Removal of Mozilla's CEO For Supporting Marriage*, NAT'L ORG. FOR MARRIAGE BLOG (April 4, 2014, 5:04 PM), <http://www.nomblog.com/39041/>. Coming full circle, some members of the LGBTQ community are now boycotting OkCupid because of its lack of options for gender and sexual orientation on its site. Alex Berg, *Why These Queers Are Boycotting OkCupid—And You Should, Too*, HUFFPOST GAY VOICES BLOG (May 1, 2014, 7:12 PM), http://www.huffingtonpost.com/alex-berg/these-queers-are-boycotti_b_5248971.html.

characteristics, perhaps most paradigmatically in the Civil Rights Era.¹¹⁰

Of course, it may be that most contemporary boycotts pose more of a theoretical challenge than a practical one. Most of today's boycotts are relatively ineffective because consumer preferences are more determined by other factors. Hobby Lobby, an arts and crafts store, probably doesn't lose too much business from scrapbooking liberals. Abercrombie & Fitch probably doesn't worry about an exodus of religious conservatives who outfit their wardrobes with the company's spring line. As Megan McArdle has noted, "Almost all boycotts fail, but especially those staged as proxy battles in the culture wars."¹¹¹

D. SPEECH

Finally, we might consider the implications of a confident pluralism for our own speech, and our use of name-calling and labeling. This is a particularly tricky inquiry—rhetoric is important, and truthful speech sometimes requires courage. But it seems to me that on most of the deeply contested issues at the core of our divisiveness, sharply worded name-calling and stereotypical labeling are antithetical to the aspirations of a confident pluralism. Think back to our two stock characters, the Liberal Egalitarian and the Conservative Moralist. Each of them holds strong views about contested matters, but neither character (and no real person) is reducible to an ad hominem label. It does not help to call the Liberal Egalitarian a "baby murderer," and it does not help to call the Conservative Moralist a "bigot."¹¹²

110. An important marker for both the legal and normative limits of private boycotts against majoritarian private actors is *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982). The case involved a multi-year boycott of white-owned businesses by black individuals and organizations seeking racial equality and integration. *Id.* at 888–90. The white merchants sued to recover business losses from the boycott and to enjoin future boycott activity. *Id.* at 889. The Supreme Court denied relief for losses and harms related to nonviolent boycott activity. *Id.* at 915 ("We hold that the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment."). The Court recognized that some of the boycotters had been associated with individuals engaged in violence. *Id.* at 900–04. But it carefully distinguished the protected nonviolent activity. *See id.* at 908 ("The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."); *id.* at 910 ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."); *id.* at 913 ("While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case.").

111. Megan McArdle, *Hobby Lobby's Boycotters Aren't Crafty Enough*, BLOOMBERGVIEW (July 1, 2014, 5:02 PM), <http://www.bloombergvew.com/articles/2014-07-01/hobby-lobby-s-boycotters-aren-t-crafty-enough>.

112. There may be unavoidable implications in labeling abortion as a form of killing or religious-based exclusions as a form of discrimination. Sharp labels may stem from deeply rooted presuppositions about right and wrong, life, justice, and equality, and thus might appear justified within

These normative examples of how we might embody the aspirations of a confident pluralism are meant as suggestions and provocations for further reflection. But they are also an important part of the pluralist vision, because they play out in the midst of our lives to a far greater degree than occasional court decisions that too often preoccupy our greatest attention. Most of our lives and most of our interactions unfold outside the pages of the U.S. Reports.

VII. CONCLUSION

A confident pluralism recognizes that we can and must live with deep difference among our beliefs, values, identities, and groups. It points toward a tolerance for dissent, a skepticism of truth claims from government, a willingness to endure strange and offensive ways of life, and a recognition of our epistemic limits in judging the activities of others. These longstanding commitments challenge each of us to live out the aspirations of tolerance, humility, and patience in our politics and our society.

specific normative frameworks. In fact, some people may believe they have a normative responsibility to frame issues in these terms. But the aspirations of a confident pluralism suggest more considered, and ultimately more effective, language.

