

Written Testimony of John D. Inazu

United States Commission on Civil Rights Briefing:

Peaceful Coexistence? Reconciling Non-discrimination Principles with Civil Liberties

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Thank you for the invitation to address the Commission on the important issue of civil liberties and antidiscrimination principles.

I am an associate professor of law and political science at Washington University in St. Louis. My research and scholarship focuses on the First Amendment rights of speech, religion, and assembly.¹

I'd like to begin by calling attention to the punctuation in the Commission's title for this briefing: "Peaceful coexistence?" The question mark—a kind of qualification—helpfully points us to the limits of politics, to the recognition that our most difficult laws and policies unavoidably trade costs and benefits. That is certainly the case with the subject of today's briefing. On the one hand, our government is formally committed to equality of opportunity for all citizens, regardless of characteristics like race, gender, and sexual orientation. On the other hand, our constitutional tradition displays a vibrant and longstanding commitment to the right of individuals to form and participate in private groups of their choosing, free from state orthodoxy and coercion. Significant constitutional values are at stake on both sides, and whether these values can peacefully coexist is not a foregone conclusion.

I would like to focus on three points in my testimony: (1) the constitutional importance of groups; (2) the importance of specifying the harms caused by groups and the costs of addressing those harms; and (3) the dangers of the "all-comers" logic endorsed by *Christian Legal Society v. Martinez*.²

¹Portions of this testimony draw from John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (2012).

²*Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2980 (2010). The relevant facts of *Martinez* will likely be set forth in other testimony in this briefing, but I will rehearse them briefly in this footnote. The litigation leading up to *Martinez* began in 2004, when the Christian Legal Society ("CLS") chapter at the University of California, Hastings College of the Law in San Francisco sought to become a recognized student organization. Hastings typically granted "official recognition" to private student groups, making clear that it "neither sponsor[ed] nor endorse[d]" the views of those groups and insisting that they inform third parties that they were not sponsored by the law school. Hastings withheld recognition from CLS because the group's Statement of Faith violated the religion and sexual orientation provisions of the school's Nondiscrimination Policy. Specifically, CLS required that its members adhere to a theological creed, which included a belief in Christianity and compliance with a sexual conduct code that limited sexual activity to marriage between a man and a woman. Because of these views, the school denied CLS travel funds and funding from student activity fees. It also denied them the use of the school's logo, use of a Hastings email address, the opportunity to send mass emails to the student body, participation in the annual student organizations fair, and the ability to reserve meeting spaces on campus. Hastings subsequently asserted that its denial of recognition stemmed from an "accept-all-comers" policy that required student organizations to accept any student who desired to be a member of the organization. CLS filed a federal lawsuit

1. The Constitutional Importance of Groups

We value groups for many reasons, but we value them constitutionally—under the First Amendment—because we believe that they help secure self-realization, self-governance, and dissent from majoritarian politics. Most of us believe the groups that we form (or at least some of them) are for us and not for the state to control—they are, in a sense, private. And we control our private groups by deciding for ourselves on their meaning and value. We are rightly skeptical of the government’s ability to interpret the significance of the practices of our groups—too often, what looks like a public disturbance is a civil rights protest, what sounds like a wail is a prayer, what tastes like bread is a Eucharistic celebration.

We guard against uncharitable interpretations of the internal practices of private groups by creating and enforcing strong pluralist protections for our ability to form and gather as groups. This pluralist vision draws upon our constitutional text and the history that informs it. We see it embedded in the Madisonian notion of faction.³ It is captured in debates in the First Congress over the language of the First Amendment.⁴ It embraces Justice Jackson’s challenge that:

We apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse, or even contrary, will disintegrate the social organization. . . . Freedom 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.⁵

This pluralist vision confronts the façade of the well-ordered and stable society that thrives on an imagined consensus. It reveals that our politics are dynamic rather than static and that the complexities of living together are always contingent and open-ended.

The private groups of civil society foster communities of meaning that enable individuals to challenge, and even to reject, prevailing consensus norms. This dissenting function sustains critiques of state-enforced orthodoxy. The alternative sphere of meaning created by dissenting groups has played a central role in many of the country’s most important social movements, including the abolitionist, suffragist, labor, and civil rights movements. While the ideals of these movements fit comfortably within contemporary political discourse, in their time they posed significant threats to prevailing norms and state orthodoxy.

asserting violations of expressive association, free speech, free exercise of religion, and equal protection. On appeal, a divided Supreme Court rejected these arguments. Justice Ginsburg’s majority opinion asserted that CLS’s speech and association claims “merged,” which allowed her to resolve the dispute entirely within a free speech limited-public-forum analysis. She concluded that Hastings’ all-comers policy was “a reasonable, viewpoint-neutral condition on access to the student-organization forum.” Detailed citations are available in John D. Inazu, “Justice Ginsburg and Religious Liberty,” 63 *Hastings Law Journal* 1213 (2012).

³See James Madison, *Federalist* No. 10.

⁴See generally, Inazu, *Liberty’s Refuge*, at 21-25 (describing debates over the First Amendment’s assembly clause).

⁵*West Virginia Board of Education v. Barnette*, 319 U. S. 624, 641-642 (1943).

As these movements demonstrate, the emergence and development of our dynamic political ideals depends upon strong constitutional protections for private groups. This insight is recognized in our own era as well. Kenneth Karst insists that “one of the points of any freedom of association must be to let people make their own definitions of community.”⁶ William Galston suggests that “liberalism requires a robust though rebuttable presumption in favor of individuals and groups leading their lives as they see fit, within a broad range of legitimate variation, in accordance with their own understanding of what gives life meaning and value.”⁷ And David Richards reflects: “the best of American constitutional law rests, I have come to believe, on the role it accords resisting voice, and the worst on the repression of such voice.”⁸

Religious groups have often exemplified this pluralist vision. As Michael McConnell has noted, religious freedom embodies “counter-assimilationist” ideals that allow people “of different religious faiths to maintain their differences in the face of powerful pressures to conform.”⁹ Professor McConnell has also observed that “genuine pluralism requires group difference, and maintenance of group difference requires that groups have the freedom to exclude, as well as the freedom to dissent.”¹⁰ Secretary of State Hillary Clinton recently reinforced this same idea:

Religious freedom is not just about religion. It’s not just about the right of Roman Catholics to organize a mass or Muslims to hold a religious funeral or Baha’is to meet in each other’s homes for prayer, or Jews to celebrate high holy days together. As important as those rituals are, religious freedom is also about the right of people to think what they want, say what they think and come together in fellowship without the state looking over their shoulder.¹¹

This pluralist vision requires that we extend broad protections not only to formal, political, expressive groups but also to groups that are informal, pre-political, and organized for other than expressive purposes. Without these protections, the grand experiment of permitting genuine political difference comes to an end. Because while some political expressions occur spontaneously, most do not. Most expressions flow out of groups of people who gather to eat and talk and share and pray long before they make political speeches or enact agendas. Indeed, almost every important social movement in our nation’s history began not as an organized

⁶Kenneth L. Karst, “The Freedom of Intimate Association,” 89 *Yale Law Journal* 629, 688 (1980). See also *Roberts v. United States Jaycees*, 468 U.S. 609, 633 (1984) (O’Connor, J., concurring) (“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.”).

⁷William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* 3 (2002).

⁸David A. J. Richards, *Fundamentalism in American Religion and Law: Obama’s Challenge to Patriarchy’s Threat to Democracy* 13 (2010).

⁹Michael W. McConnell, “Free Exercise Revisionism and the Smith Decision,” 57 *University of Chicago Law Review* 1109, 1139 (1990).

¹⁰Michael W. McConnell, “The New Establishmentarianism,” 75 *Chicago-Kent Law Review* 453, 466 (2000).

¹¹Hillary Rodham Clinton, Address to Carnegie Endowment for Peace (July 30, 2012). See also *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) (“For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.”).

political party but as an informal group that formed as much around ordinary social activity as extraordinary political activity.¹²

2. Underspecifying Rights and Harms

Given the significant constitutional values at stake, our laws and policies should specify compelling reasons for coercively imposing consensus norms upon private groups *and* account honestly for the rights and values that would be sacrificed by the imposition of those norms. To be sure, the autonomy of private groups will sometimes yield to important antidiscrimination goals. The norms and laws that arose during the Civil Rights Era led to significant advances in equality of opportunity (though that goal is far from fully realized). Employment discrimination and public accommodations laws played an important role in these developments. The social changes enabled by and reflected in these laws helped to break coercion in public and commercial spaces. With respect to racial integration during the Civil Rights Era, the law also broke the segregationist hold in some private spaces, including private educational institutions. But the social changes connected with antidiscrimination norms do not by themselves justify the application of those norms across all groups and institutions.

The Supreme Court has sometimes failed to specify the values at stake in cases pitting antidiscrimination norms against the constitutional value of pluralism, most recently in *Christian Legal Society v. Martinez*.¹³ Let me address first the problem of underspecifying the harms caused by private group autonomy. *Martinez* never detailed the particular harms caused by exclusion from membership in this small group of Christian law students. It never explained why those harms approximated the political, economic, and social harms addressed by civil rights legislation and precedent. Such harms could, of course, exist. For example, I have argued in my scholarship that antidiscrimination laws might justifiably limit the autonomy of private noncommercial groups when exclusion from membership meaningfully curtails access to broader social or economic participation.¹⁴ If membership in the Christian Legal Society at Hastings College of the Law was a prerequisite to the most desirable legal jobs—a feather in the cap surpassing even membership on the *Hastings Law Journal*—then the Christian Legal Society might well lose its constitutional protections.

But these situations will be exceedingly rare among the private noncommercial groups in civil society today, and it is hard to imagine that they were at play with a small Christian group at a public law school in San Francisco. The state’s reasons for constraining these groups should be defended with precision rather than with broad platitudes. Equality of opportunity is a crucial

¹²See, e.g., John Hope Franklin and Alfred A. Moss Jr., *From Slavery to Freedom: A History of African Americans* 377 (1994) (describing “moments of informality” spread across clubs, literary parties, and other events that created “a cohesive force” among the leaders of the Harlem Renaissance); Linda Lumsden, *Rampant Women: Suffragists and the Right of Assembly* 3 (1997) (describing suffragist gatherings organized around banner meetings, balls, swimming races, potato sack races, baby shows, meals, pageants, and teatimes); Brief of Gays & Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner at 11, *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971 (2010) (No. 08-1371) (describing “gay social and activity clubs, retreats, vacations, and professional organizations” that fostered “exclusively gay environments in which to feel safe, to build relationships, and to develop political strategy.”).

¹³*Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2980 (2010).

¹⁴See Inazu, *Liberty’s Refuge*, at 166-175.

part of our constitutional ethos, but it is not self-justifying in all of its applications. Moreover, equality of opportunity ought to focus on genuine access to power and resources, not on the important but distinct interests in dignity and self-respect.¹⁵ Even very real injuries to dignity and self-respect seldom trump the First Amendment.¹⁶

Martinez not only failed to specify the harms caused by exclusion from membership in the Christian Legal Society; it also failed to account for the constitutional values at stake in the group's right to exist on its own terms in the public forum. In this regard, it is useful to highlight with some precision the facts underlying *Martinez*. In addition to withholding modest funding and the use of its logo, Hastings College of the Law denied the Christian Legal Society the opportunity to send mass e-mails to the student body, to participate in the annual student organizations fair, and to reserve meeting spaces on campus.¹⁷ These activities do not amount to sponsorship or state support. They are means of participation in the free exchange of ideas.¹⁸ As the Supreme Court noted in an earlier case:

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.¹⁹

¹⁵Nor did the Christian Legal Society at Hastings College of the Law threaten to undermine the democratic theory of free speech advanced by Owen Fiss and others. *See, e.g.,* Owen M. Fiss, *The Irony of Free Speech* 16 (1996) (expressing concern for private expression that would "make it impossible for . . . disadvantaged groups even to participate in the discussion."). In fact, given the prevailing orthodoxies at Hastings and in San Francisco, the democratic theory of free speech may well have been best served by protecting rather than constraining the Christian Legal Society. *See* Catholic League for Religious and Civil Rights v. City and County of San Francisco, 624 F.3d 1043 (2010) (en banc) (discussing San Francisco resolution calling the Catholic position on the adoption of children by gay couples "absolutely unacceptable," "hateful and discriminatory," "both insulting and callous," showing "a level of insensitivity and ignorance which has seldom been encountered by this Board of Supervisors").

¹⁶*See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (speech may not be restricted "because [it] may have an adverse emotional impact on the audience"); Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2670 (2011) ("Speech remains protected even when it may stir people to action, move them to tears, or inflict great pain." (quoting Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011))). *See also* Village of Skokie v. National Socialist Part of America, 373 N.E.2d 21, 24 (Ill. 1978) (permitting the wearing of swastikas in parade through village with high concentration of Holocaust survivors) ("We do not doubt that the sight of [the swastika] is abhorrent to the Jewish citizens of Skokie, and that the survivors of the Nazi persecutions, tormented by their recollections, may have strong feelings regarding its display. Yet it is entirely clear that this factor does not justify enjoining defendants' speech.").

¹⁷The monetary subsidy to the Christian Legal Society at Hastings totaled \$250 in travel funds, which were financed by vending machine sales commissions. Joint Stipulation of Facts for Cross-Motions for Summary Judgment ¶ 37, Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. C 04-04484 JSW, 2006 WL 997217 (N.D. Cal. May 19, 2006).

¹⁸*See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 840 (1995) ("Student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission.").

¹⁹*Healy v. James*, 408 U.S. 169, 181-82 (1972).

As the Court stressed in that case, “the college classroom, with its surrounding environs, is peculiarly the ‘marketplace of ideas.’”²⁰ The university ought to be about inquiry, not orthodoxy.

These core ideas of the public forum doctrine were not the only constitutional values ignored in *Martinez*. Neither free exercise nor association rights offered *any* protection to the religious group. The practical irrelevance of these two rights in *Martinez* cannot be overstated—in each case, it wasn’t that the Christian Legal Society lost on a balancing analysis; rather, the Court didn’t even bother to apply the analysis.

3. The All Comers Logic

My comments thus far have focused on general constitutional principles and values. But it is important in the context of this briefing to highlight the particular dangers of the “all-comers” policy that requires recognized student groups to accept any student who wants to be a member of the group. As a practical matter, most groups will have little problem with such a policy.²¹ The Black Law Students Association, the Women’s Law Students Association, and the Law School Republicans can generally agree to open membership policies because their membership largely self-selects. Nothing in their organizational documents requires that they maintain a formal exclusionary position. But groups that require a commitment to certain beliefs or practices for membership—groups like conservative religious organizations—will face significant consequences. Because these groups will be unwilling to alter their commitments, the all-comers policy will operate against them like a classic prior restraint—ensuring that they are forced out of the forum before their ideas and values ever manifest.²² When implemented at public universities, the all-comers policy undermines the fundamental principles of the public forum doctrine.

The consequences of the all-comers rationale are spreading. Two recent Ninth Circuit opinions echo its logic. In *Truth v. Kent*, 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-

²⁰Healy v. James, 408 U.S. 169, 180 (1972).

²¹It is true that the litigation surrounding the all-comers policy occasionally invoked arguments and counterarguments about “takeover” scenarios in which a majority of students hostile to a group’s mission would flood its membership and destroy the group—Republican students would take over the Democratic student group, pro-choice students would take over the pro-life group. But those scenarios, while not impossible, are largely implausible. Most people have better things to do with their time, and in a genuine public forum, interest groups coalesce most naturally and most efficiently around more constructive goals.

²²There is, of course, one other kind of student group that is obviously vulnerable under an “all-comers” policy: fraternities and sororities that make membership decisions on the basis of gender. But champions of all-comers policies across the country have usually exempted these groups. Vanderbilt University’s policy is illustrative—it has successfully forced a number of conservative religious groups out of its student forum, while exempting fraternities and sororities from the restriction on gender-based discrimination. See “Schools Work to Balance Gay, Religious Rights,” *Wall Street Journal* (February 22, 2012). Vanderbilt’s policy is described at <http://vanderbilt.edu/about/nondiscrimination/faq.php>. It is critiqued in a short video, “Exiled from Vanderbilt,” produced by the Foundation for Individual Rights in Education. The video features strong critiques from Vanderbilt Law Professor Carol Swain, country music star Larry Gatlin, and journalist Jonathan Rauch. The trio includes a gay man and an African-American woman—the all-comers policy doesn’t just threaten straight white men.

Christians.”²³ Four years later, the Ninth Circuit relied on *Martinez* in *Alpha Delta v. Reed* to suggest 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.”²⁴ The entire California State University system has instituted the all-comers policy blessed by *Martinez*.²⁵ And the “neutrality” rationale is spreading to other contexts as well: the Second Circuit has recently upheld a ban on religious worship as “viewpoint neutral” under the public forum doctrine.²⁶

Conclusion

The balance between the liberty of private, noncommercial groups and antidiscrimination principles may never reach a “peaceful coexistence.” But our constitutional commitments give us better and worse ways of attempting to strike that balance. At the very least, we should expect a constitutional discourse that openly acknowledges the various interests at stake in such decisions. But we should also hope for the robust constitutional protection of pluralism that allows private groups to flourish and holds open the possibility of genuine political difference.

Thank you for the opportunity to offer these comments.

²³*Truth v. Kent. Sch. Dist.*, 542 F.3d 634 (9th Cir. 2008).

²⁴*Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 795–96 (9th Cir. 2011), *cert denied*, 132 S.Ct. 1743 (2012).

²⁵*See* Memorandum from Chancellor Charles B. Reed, December 25, 2011 *available at* <http://www.calstate.edu/eo/EO-1068.html> (mandating all-comers policy for all campuses in the California State University system). It is worth noting that the California policy, like Vanderbilt’s policy, exempts fraternities and sororities (“The prohibition on membership policies that discriminate on the basis of gender does not apply to social fraternities or sororities or other university living groups.”). Unlike Vanderbilt, the California State University system is a government actor and subject to the constraints of the First Amendment. The exemption of fraternities and sororities likely makes the policy vulnerable to a *free exercise* challenge by student religious groups in spite of *Martinez* and even under the attenuated free exercise framework established by *Employment Division v. Smith*, 494 U.S. 872 (1990). For a roadmap for this kind of free exercise challenge, see Amicus Brief of Constitutional Law Professors in Support of Appellees (November 21, 2012) in *Stormans v. Selecky* (United States Court of Appeals for the Ninth Circuit, Nos. 12-35221, 12-35223).

²⁶*Bronx Household of Faith v. Board of Educ. of City of New York*, 650 F.3d 30 (2d Cir. 2011) (upholding public school board policy prohibiting use of school property for “religious worship services”). The Supreme Court has elsewhere imposed questionable limits on the predicate question of what constitutes a public forum. *See Locke v. Davey*, 540 U.S. 712, 715 (2004) (state-run scholarship program is not a public forum). *But cf. Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995) (public forum principles apply with equal force to fora that are “metaphysical,” as opposed to “spatial or geographic.”); *Putnam Pit v. City of Cookeville*, 221 F.3d 834 (6th Cir. 2000) (applying public forum analysis to a website).