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SMITH, CHRISTIAN LEGAL SOCIETY, AND SPEECH-BASED CLAIMS FOR RELIGIOUS EXEMPTIONS FROM NEUTRAL LAWS OF GENERAL APPLICABILITY

William P. Marshall*

INTRODUCTION

Does proscribing discrimination on the basis of religion itself discriminate against religion? In Christian Legal Society v. Martinez,1 the Supreme Court, in a 5-4 decision, recently dodged this question, holding instead that Hastings College of the Law’s anti-discrimination policy, which apparently required student organizations to admit or allow any student to participate in its activities (an “all-comers policy”), did not violate the First Amendment rights of a student organization that sought to exclude students on the basis of religion and sexual orientation.2

But, because there was some dispute as to whether the law school actually had an all-comers policy or whether its anti-discrimination requirements were limited to prohibiting discrimination “on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation,” as set forth in the school’s written policy (“nondiscrimination policy”),3 the question of whether this latter type of anti-discrimination measure would survive constitutional scrutiny was very much on the minds of the Justices.4 Justice Alito, writing for the four dissenting Justices, in fact concluded that the law school’s nondiscrimination policy violated the First Amendment on grounds that it discriminated against religious expression by allowing ideological

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1 130 S. Ct. 2971 (2010).
2 Id. at 2978.
3 See id. at 2979, 2982-84 & nn.6-10.
4 This question was specifically addressed in the concurring opinion of Justice Stevens, see id. at 2995-98 (Stevens, J., concurring), and the dissenting opinion of Justice Alito, see id. at 3000-13 (Alito, J., dissenting).
organizations to discriminate against those who did not share their views, but prohibiting religious organizations from doing the same.\footnote{\textit{See id.} at 3003-04, 3010-11 (Alito, J., dissenting).}

At one level, of course, Justice Alito’s observation is accurate. The nondiscrimination policy ostensibly allows secular groups to discriminate in favor of students who share their beliefs while it presumably prohibits religious organizations from doing the same. But whether this result stems from the fact that anti-religious discrimination laws discriminate against religion or simply reflects the impact of an otherwise neutral law, as Justice Stevens argued in his concurrence,\footnote{\textit{See id.} at 2996 (Stevens, J., concurring).} is a matter of some debate.

Further, Justice Alito’s solution, exempting religious organizations from nondiscrimination policy requirements,\footnote{\textit{See id.} at 3012, 3014 (Alito, J., dissenting).} creates inequalities as well. After all, the nondiscrimination policy also prevents secular groups from discriminating on the basis of religion. A pro-choice group, for example, could not deny membership to a person who held religious objections to abortion. Why should religious-group discrimination be allowed but secular-group discrimination prohibited?\footnote{Similarly, the nondiscrimination policy prevents a race-based organization from excluding a person of a different race just as much as it bars a religious organization from discriminating on the basis of religion. Again, under Justice Alito's formulation, why should only religious discrimination be allowed?} Seen in this light, Justice Alito’s argument is one for a special exemption for religion and not one for equal treatment. As such, his opinion raises the question of whether an exemption for a religious organization from a neutral law of general applicability can be required under the Speech Clause, even as similar claims for an exemption are no longer cognizable after \textit{Employment Division v. Smith}\footnote{494 U.S. 872 (1990).} under the Free Exercise Clause.

This Article attempts to unpack the claim for a special exemption for religious organizations advanced in Justice Alito’s \textit{Christian Legal Society} opinion. Part I introduces the issue by identifying two facets of religion that are implicated by religious discrimination issues—the notion of religion as a set of ideas and the notion of religion as a fundamental aspect of self-identity. As will be shown, distinguishing between these two aspects of religion can assist in navigating the inordinately complex issues raised by the application of anti-religious discrimination law to religious organizations. Part II then addresses and ultimately rejects Justice Alito’s claim that Hastings’ nondiscrimination policy constitutes viewpoint-based discrimination. Rather, it concludes that the policy is a content-neutral measure that prohibits religious and secular anti-religious discrimination equally; and, therefore, the
Christian Legal Society’s (CLS) First Amendment claim must be understood as a claim for a free speech exemption from a neutral law. Proceeding from this conclusion, Part III identifies and engages the arguments that support claims for a free speech exemption for religious organizations from neutral laws. Part IV then examines the broader concerns that surround the issue of whether religious speech should be entitled to special exemptions from neutral laws and, following from this analysis, contends that the claim for a religious speech exemption should be rejected as not only inconsistent with Smith and free exercise law, but also with fundamental principles of free speech jurisprudence.

One caveat: This Article does not analyze the issue actually resolved in Christian Legal Society, i.e., whether Hastings’ purported all-comers policy violates the First Amendment. Rather, it focuses entirely on the type of specific anti-religious discrimination provision that is in Hastings’ written non-discrimination policy and that is far more commonly found in civil rights statutes in general.

I. CONCEPTUALIZING RELIGIOUS DISCRIMINATION

In a previous writing, I suggested that it might be helpful in understanding Religion Clause issues to examine what it is about religion that merits constitutional concern.10 As discussed in that article, the constitutional significance of religion can be characterized in two ways.11 The first is that we are concerned with religion because of the ideas that it presents and the answers that it provides. That is, the constitutional import of religion is that, like philosophy or politics, religion is valuable as a set of ideas (“religion as ideas”).12 The second is that religion plays a particularly important role in an individual’s sense of self.13 That is, religion, like race or gender, has constitutional import because of the role it plays in self-identity (“religion as identity”). To be sure, religion includes both elements of identity and ideas. When a hypothetical believer, for example, asserts, “I am a Christian,” he is likely saying something about the ideas he holds as well as something about his sense of who he is.14 Nevertheless,

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11 Id. at 391-92.
14 See Marshall, supra note 10, at 391.
viewing religion through an ideas or identity lens might help us develop a framework from which to approach difficult Religion Clause issues.

This dichotomy between religion as ideas and religion as identity is a good starting point for working through the difficult issues presented by religious discrimination,\textsuperscript{15} as the ideas/identity dichotomy comes into play with respect to two central issues in the religious discrimination controversy: Why do religious organizations discriminate along religious lines, and why do anti-discrimination provisions such as Hastings’ written policy or laws like Title VII\textsuperscript{16} typically protect religious adherents, but not secular ideological adherents, from discrimination against them?\textsuperscript{17}

The answer to why governments tend to protect religion, and not secular ideologies, from discrimination is the more straightforward of the two questions. Using the ideas/identity dichotomy, the purpose of such laws is, virtually by definition, to curb identity-based discrimination.\textsuperscript{18} Anti-discrimination laws have traditionally been intended to prohibit discrimination against people who suffered from prejudice based upon such intractable characteristics of self as race, gender, or nationality. Although not immutable,\textsuperscript{19} religion has traditionally been included in this category. History is unfortunately replete with instances of discrimination against particular religions, and American history, specifically, has witnessed periodic outbreaks of serious anti-Semitism,\textsuperscript{20} anti-Catholicism,\textsuperscript{21} and anti-Mormonism,\textsuperscript{22} to name but a few examples. Accordingly, because unpopular and

\textsuperscript{15} Indeed, in this regard, it is notable that some of the Justices in \textit{Christian Legal Society} appeared to engage in a parallel analysis in attempting to distinguish between discrimination on the basis of status and discrimination on the basis of belief. \textit{See} Christian Legal Soc’y v. Martinez, 130 S. Ct. 2971, 2990 (2010); \textit{id.} at 2996 n.1 (Stevens, J., concurring); \textit{id.} at 3011 n.5 (Alito, J., dissenting).


\textsuperscript{18} Anti-discrimination laws typically do not prevent discrimination on the basis of ideas or ideology, although, as Noah Feldman points out, there have been some ideologies, such as Communism, whose adherents have suffered from substantial discrimination. Noah Feldman, \textit{From Liberty to Equality: The Transformation of the Establishment Clause}, 90 CALIF. L. REV. 673, 714-15 (2002).

\textsuperscript{19} Several scholars, however, have regarded religion as an immutable characteristic as much as is race. That is to say that religion is not a choice, but something that people are born with or are compelled by a higher being to adhere to. \textit{See}, e.g., Timothy L. Hall, \textit{Religion, Equality, and Difference}, 65 TEMP. L. REV. 1, 62 (1992).

\textsuperscript{20} \textit{See generally} ANTI-SEMITISM IN AMERICA (Jeffrey S. Gurock ed., 1998) (noting the various periods of anti-Semitism in American history).

\textsuperscript{21} \textit{See}, e.g., PHILIP HAMBURGER, \textit{SEPARATION OF CHURCH AND STATE} (2002) (tracing how the metaphor of the separation between church and state gained traction in American legal thought in the nineteenth century because of a wave of anti-Catholicism).

minority religions have historically suffered the same types of invidious
discrimination that have plagued racial and ethnic minorities, they have
been included in the civil rights laws’ protected classes.23

Why religious organizations choose to discriminate along religious
lines is more variable. Some religious organizations may choose to
discriminate because of ideas. A religious organization may choose to
exclude those who do not share its tenets because it believes the
inclusion of nonbelievers will weaken or dilute its message. When this
is the case, the organization’s actions are similar to those of an
environmental organization choosing to exclude members who do not
believe in protecting the environment.

But religious discrimination can also be based on the classic form
of anti-identity animus that anti-discrimination provisions are designed
to redress. Religion, as noted earlier, plays a fundamental role in
framing an individual’s identity.24 Identity, however, as numerous
writers have noted, is a two-edged sword, and its downside is that it
often includes a strong dis-identity from opposite groups.25 This dis-
identity has often led to discrimination or worse against those groups
perceived as the “other.”26

One further point: Conceptualizing religious discrimination as
based on anti-religious animus does not mean that it necessarily falls
outside the scope of protected expression. As long as the organization’s
anti-religion animus is perceived as part of the message of the
organization, cases like Roberts v. United States Jaycees27 and Boy
Scouts of America v. Dale28 hold that membership exclusions do
implicate First Amendment concerns.29 Seeing religious discrimination
as based on animus towards religion or religions, however, does
demonstrate why Justice Alito’s initial comparison of religious
organizations that want to discriminate along religious lines with secular

the Constitution: Similarities and Differences, 79 CORNELL L. REV. 491, 492 (1994) (explaining
that conduct associated with religious discrimination, such as “public (and private) stereotyping,
stigma, subordination and persecution,” is sufficiently similar to discriminatory conduct based on
race as to draw a rational parallel for treatment under the Constitution).

24 See supra notes 13-14 and accompanying text.

25 See ERIC H. ERIKSON, LIFE HISTORY AND THE HISTORICAL MOMENT 176-77 (1975);
Daniel Bell, Ethnicity and Social Change, in ETHNICITY: THEORY AND EXPERIENCE 141 (Nathan
Glazer & Daniel P. Moynihan eds., 1975); Karst, supra note 13, at 370; see also Frederick Mark
Gedicks, The Recurring Paradox of Groups in the Liberal State, 2010 UTAH L. REV. 47
(discussing the negative aspect of group fostering of an individual’s self-identity).

(“Sooner or later our tribe always comes to ask us to agree to murder.”).


29 Conduct alone, however, may not trigger First Amendment protection, even if based on
enhancements for hate crimes do not violate the First Amendment).
groups that want to discriminate along secular lines is a misguided equation. Because the focus of Hastings’ nondiscrimination policy is to combat anti-religious animus, the comparable secular group to the religious group that wants to discriminate on the basis of religion is not the group that does not want its own message diluted by the inclusion of non-adherents, e.g., the environmental group that wants to exclude those who do not want to protect the environment. Rather, the religious group’s secular counterpart is the one that seeks to exclude members of a particular religion or set of religions, e.g., the environmental group that does not want to admit Jews or Christians.

II. ARE ANTI-RELIGIOUS DISCRIMINATION PROVISIONS VIEWPOINT-BASED?

Hastings’ nondiscrimination policy provides that the school “shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.” The provision is fairly typical of most anti-discrimination measures in that it focuses on protecting what are perceived to be vulnerable classes from adverse treatment. Like most anti-discrimination statutes, the policy does not prevent organizations from discriminating on the basis of ideology. The question is whether, as Justice Alito argues, the policy should therefore be considered viewpoint-based.

To Justice Alito, the discrimination exercised by a religious organization seeking to exclude non-adherents is religion as ideas. As he sees it, when a religious group seeks to exclude non-members, they are simply trying to protect their ideas from dilution or abridgement. Conceptualizing religious discrimination in this manner leads Justice Alito to conclude that, because the nondiscrimination policy allows a secular organization to discriminate on the basis of ideology but prevents religious organizations from doing the same, the law school has engaged in impermissible, content-based regulation against religious groups. As he explains:

31 See Volokh, supra note 17, at 1930-31.
32 See Christian Legal Soc’y, 130 S. Ct. at 3009 (Alito, J., dissenting) (“In an unbroken line of decisions analyzing private religious speech in limited public forums, we have made it perfectly clear that “[r]eligion is [a] viewpoint from which ideas are conveyed.”” (alterations in original) (citing Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112 & n.4 (2001); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995); Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393-94 (1993); Widmar v. Vincent, 454 U.S. 263, 277 (1981))).
33 See id. at 3010.
The policy singled out one category of expressive associations for disfavored treatment: groups formed to express a religious message. Only religious groups were required to admit students who did not share their views. An environmentalist group was not required to admit students who rejected global warming. An animal rights group was not obligated to accept students who supported the use of animals to test cosmetics. But CLS was required to admit avowed atheists. This was patent viewpoint discrimination.34

The first problem, of course, is whether, as a factual matter, religious discrimination by religious organizations can be so readily classified as based upon ideas. As noted earlier, religious discrimination may often be the result of anti-religious animus based on the identity of the target of the discrimination, and not an expression of theological principle.35 And, interestingly enough, Justice Alito appears to characterize religious discrimination by secular organizations exactly in that light—anti-religious animus.36 Justice Alito’s approach then is apparently to assume, without explanation, that religious discrimination by religious groups is based on ideology, and therefore constitutionally protected,37 but that religious discrimination by secular groups is based on anti-religious animus, and so is not.38

But aside from unexplained assumptions, there are serious doctrinal implications in equating prohibitions on religious discrimination by religious organizations with viewpoint discrimination. As Professors Brownstein and Amar point out, characterizing anti-religious discrimination provisions in this way suggests that many civil rights statutes, such as Title VII,39 constitute viewpoint discrimination because they disallow discrimination against religious adherents but not

34 Id.
36 To Justice Alito, groups that are dedicated to expressing a viewpoint on a secular topic (for example, a political or ideological viewpoint) would have no basis for limiting membership based on religion because the presence of members with diverse religious beliefs would have no effect on the group’s ability to express its views. Christian Legal Soc’y, 130 S. Ct. at 3012 (Alito, J., dissenting).
37 To be sure, Justice Alito does indicate that if a religious group were to discriminate on religious grounds based solely on the identity of the target group, such discrimination would not raise constitutional concern. Id. at 3011 & n.5.
38 Actually, Justice Alito may be too quick in asserting that a secular group “would have no basis for limiting membership based on religion because the presence of members with diverse religious beliefs would have no effect on the group’s ability to express its views.” See id. at 3012. Whether the secular group’s message would be infringed by having to admit persons of particular religions depends entirely on whether the group’s discriminatory behavior is somehow tied to its message. See infra notes 47-48 and accompanying text.
against adherents to non-religious ideologies.\textsuperscript{40} Under Title VII, an employer, if it chooses, can discriminate against environmentalists or Republicans, but it cannot discriminate against Baptists. As such, to follow Justice Alito’s logic, Title VII is unconstitutional.

There is, of course, an easy response to which I have already alluded. Title VII and similar measures, such as Hastings’ nondiscrimination provision, were not designed to prohibit discrimination against ideas. The purpose of these measures was to guard against those who would discriminate against individuals on the basis of the latter’s identities.\textsuperscript{41} Thus an employer who discriminates against Baptists is prohibited from doing so because he has an invidious bias against Baptists and not because he disagrees with Baptist theology. Laws that prevent discrimination against religion but not secular ideologies thus escape content-based scrutiny because they are not treating two viewpoints differently—forbidding discrimination against religious belief while allowing discrimination against secular belief. Rather, such laws do not address viewpoint discrimination at all.

But while seeing anti-religious discrimination provisions as content neutral may be helpful in upholding Title VII, it is not helpful in supporting the case that religious organizations such as CLS should be excused from anti-religious discrimination requirements.\textsuperscript{42} If a law that

\textsuperscript{40} See Alan Brownstein & Vikram Amar, Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action, 38 HASTINGS CONST. L.Q. 505, 530-31, 537-38 (2011); see also Volokh, supra note 17, at 1933 (“[A]ntidiscrimination law . . . bans discrimination based on targets’ religion and not discrimination based on targets’ other ideologies . . . .”).

\textsuperscript{41} The United States Commission on Civil Rights’ 1979 consultation entitled “Religious Discrimination: A Neglected Issue” provides a helpful distinction between religion as ideas and religion as identity. The Commission, which is, among other things, charged with reviewing the efficacy of the Civil Rights Act of 1964, including Title VII, see generally Mission, U.S. COMMISSION ON CIV. RTS., http://www.usccr.gov (follow “Mission” hyperlink) (last visited Feb. 27, 2011), noted in its consultation that it was concerned with religious civil rights . . . [which] cluster around the equal protection and due process clauses of the 14th amendment, which prohibit discrimination against individuals which denies them equal protection of the laws, equality of status under the law, equal treatment in the administration of justice, and equality of opportunity and access to employment, education, housing, public services and facilities, and public accommodations because of their exercise of their right to religious freedom.

U.S. COMM’N ON CIVIL RIGHTS, Preface to RELIGIOUS DISCRIMINATION: A NEGLECTED ISSUE (1980). According to the Commission, the issues of religious civil rights are distinct from, “[r]eligious civil liberties issues, which] cluster around the first amendment right to individual freedom of religion, including such issues as the right to hold or not to hold a religious faith, and the prohibition against the establishment of a religion by government.” Id. Thus, religious civil rights concern religion as identity while religious civil liberties concern religion as ideas.

\textsuperscript{42} Alternatively, it could be maintained that laws that prevent discrimination against religion but not against secular ideologies are content-based but nevertheless survive constitutional scrutiny because they are supported by a compelling state interest. Discrimination against religion, it might be argued, has historically been a particularly vile form of bias, and the state has a compelling interest in singling out this form of prejudice for redress, which does not apply to
prohibits discrimination against religion but not secular ideologies is content neutral, it cannot at the same time be content-based, even if it has the effect of preventing religious organizations from discriminating on the basis of shared beliefs while not preventing secular organizations from doing the same.

Professors Brownstein and Amar make this point remarkably effectively:

CLS argued that it is viewpoint discrimination to prohibit religious organizations from discriminating on the basis of religious belief while permitting secular political organizations to discriminate on the basis of nonreligious belief. But it is not viewpoint discrimination to prohibit secular political organizations from discriminating on the basis of religious belief while permitting religious organizations to discriminate on the basis of secular beliefs. Religious student organizations receive more associational autonomy than their secular counterparts and religious students receive more protection for their beliefs than students who hold secular beliefs. Unfortunately for CLS, that is not the way free speech doctrine works. The prohibition against viewpoint discrimination is, and has to be, fiercely even-handed. If religion is going to be construed as a viewpoint of speech in freedom of association cases, it is difficult to see how anti-discrimination policies can treat religion differently than secular belief systems or religious groups differently than those that adhere to secular beliefs. To conform to viewpoint neutrality, government would have to prohibit discrimination based on both religious and secular beliefs or decline to prohibit discrimination based on either belief system.43

CLS, in short, cannot claim that a law is content neutral when it protects religion but not secular ideology from adverse discrimination, but that the same law is content-based when it prevents religious organizations from discriminating on religious grounds while allowing secular ideological organizations to discriminate on secular ideological grounds. A law is either content neutral or it is not. And because Hastings’ nondiscrimination policy prohibits all speakers (and non-speakers) from anti-religious discrimination, it is content neutral.

This is not to deny that the effects of an anti-religious discrimination provision may be harsher on a religious organization

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bias against secular ideologies. *But see* Feldman, *supra* note 18, at 718 (noting that secular ideologies have also been subject to serious bias).

Although describing the state’s interest in combating religious discrimination as compelling may again be helpful in insulating anti-discrimination laws such as Title VII from constitutional attack, it is not helpful to religious groups seeking exemption from anti-religious discrimination law. If the state has a compelling interest in proscribing religious discrimination, that interest should apply as much to preventing religious discrimination by religious groups as it does to preventing religious discrimination by secular organizations.

than on a secular one (if we assume religious organizations are more likely to want to choose to discriminate along religious lines). Nor does it refute that the end result of having anti-religious discrimination requirements, as Justice Alito suggests, is that unlike secular ideological organizations, religious organizations cannot limit their membership to only those who share their beliefs. But these consequences only signify that a content neutral law can have disparate effects on different speakers. And, as Justice Stevens noted in his *Christian Legal Society* concurrence, the First Amendment does not protect against disparate impacts.

### III. THE ARGUMENTS IN FAVOR OF A SPEECH CLAUSE-BASED EXEMPTION FOR RELIGIOUS DISCRIMINATION

Concluding that anti-religious discrimination laws are content neutral does not end the inquiry. Content neutrality is not absolute and there are arguments that religious discrimination by religious organizations is sufficiently distinct from religious discrimination by secular organizations to merit different constitutional consideration, and therefore possible exemption from anti-religious discrimination requirements. This Part will review these arguments.

#### A. Anti-Religious Discrimination Laws Have a More Severe Effect on the “Messages” of Religious Groups than Those of Secular Organizations

A first possible line of attack is to suggest that religious discrimination by religious groups merits greater constitutional protection than religious discrimination by secular organizations because the constitutional rights of religious organizations are more severely affected by anti-religious discrimination laws than are the rights of secular organizations. Justice Alito, in fact, appears to offer this argument in his *Christian Legal Society* dissent when he states:

> [G]roups that are dedicated to expressing a viewpoint on a secular topic (for example, a political or ideological viewpoint) would have no basis for limiting membership based on religion because the presence of members with diverse religious beliefs would have no

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44 See Volokh, *supra* note 17, at 1931-32.
effect on the group’s ability to express its views. But for religious
groups, the situation is very different.46

This proposition, however, is debatable. The message of a
religious organization is not automatically diluted by the presence of
non-co-religionists. It may be true that having Baptists in a Catholic
organization, for example, dilutes the latter’s message, but that is not
necessarily so.47 It depends upon what the Catholic group’s underlying
message is.

Conversely, a secular group that wants to discriminate on the basis
of religion may have its message diluted by the compelled admission of
religious members. This would most obviously be true with respect to a
“We Hate Religious People Society,” but it also might be the case with
respect to groups in which anti-religion bias is not the prime focus.
Consider a pro-choice group that refuses admission to Catholics because
of the latter’s opposition to abortion, or a gay rights group that denies
membership to Mormons because of the latter’s opposition to same-sex
marriage. In both cases, the discriminating organization may believe
that its message would be diluted if it were required to accept those with
religious objections to its message. The question of message dilution, in
short, depends completely on the basis of the group’s exclusionary
policies and not categorically, as Judge Alito would have it, on whether
the organization is religious or secular.

This point, moreover, should not have been a revelation. The
proposition that it is the nature of the message that determines whether
an organization’s discriminatory policies implicate the right of
expressive association had already been recognized by the Court prior
to Christian Legal Society. In Boy Scouts of America v. Dale,48 the
Court held that the determination of whether an anti-discrimination
provision diluted an organization’s message depended upon the group’s
self-characterization of the meaning of its discriminatory policies.49

B. The State’s Interest in Combating Religious Discrimination by
Religious Organizations Is Less Compelling than Its Interest in
Combating Religious Discrimination by Secular Groups

A second argument distinguishing between anti-religious
discrimination by religious and secular groups is that applying anti-

46 See id. at 3012 (Alito, J., dissenting).
47 Indeed, a religious group might welcome non-adherents so that it can disseminate its
message to those outside its membership.
49 See id. at 653 (“As we give deference to an association’s assertions regarding the nature of
its expression, we must also give deference to an association’s view of what would impair its
expression.”).
religious discrimination laws to religious groups is less compelling than applying those laws to secular organizations. Justice Alito seems to advance this position as well when, quoting the brief of a Muslim, Christian, Jewish, and Sikh coalition, he states: “Of course there is a strong interest in prohibiting religious discrimination where religion is irrelevant. But it is fundamentally confused to apply a rule against religious discrimination to a religious association.”

Some support for this proposition might be found in a general notion that discriminating in favor of members of one’s own group seems more benign than discriminating against the members of another. And, perhaps for that reason, some anti-discrimination laws, such as Title VII, allow religious groups to discriminate in favor of co-religionists in certain employment decisions.

But the assertion that the state has a lesser constitutional interest in prohibiting religious discrimination by religious groups than it does in preventing religious discrimination by secular groups is also problematic. After all, one of the unfortunate lessons of history is that some of the most virulent discrimination against religion has been perpetrated by other religion. Excluding religious organizations from anti-religious discrimination requirements thus misses one of the most important reasons why protection of religious individuals and religious groups from discrimination is needed in the first place.

Nor is it always the case that when a religious organization discriminates in favor of its own adherents, its actions are more benign than when it discriminates against members of another faith. To begin with, distinguishing between benign and pernicious discrimination can be difficult, if not impossible. If a country club or even a law school social club only allows Christians, is it benign? Or is it anti-Semitic or anti-Islam? And how, in any event, can it be determined whether its exclusionary policies are intended to protect Christian ideals or to engage in anti-Semitism or anti-Islamic bias? Justice Ginsberg’s

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50 See Christian Legal Soc’y, 130 S. Ct. at 3012 (Alito, J., dissenting) (quoting Brief for American Islamic Congress et al. as Amici Curiae Supporting Petitioners at 3, Christian Legal Soc’y, 130 S. Ct. 2971 (No. 08-1371)).
51 The Court, of course, has been remarkably distrustful in other contexts of any notions of “benign” discrimination. See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 742 (2007).
52 See Civil Rights Act of 1964 § 702, 42 U.S.C. § 2000e-1(a) (2006), which, as amended, provides that Title VII of the Act, id. §§ 2000e to 2000e-17, “shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” This provision was upheld against an Establishment Clause challenge in Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338 (1987).
parallel example of gender discrimination in her Christian Legal Society opinion is telling:

If a hypothetical Male-Superiority Club barred a female student from running for its presidency, for example, how could the Law School tell whether the group rejected her bid because of her sex or because, by seeking to lead the club, she manifested a lack of belief in its fundamental philosophy?54

Furthermore, the state’s interests in combating discrimination do not completely evaporate even when the discrimination at issue is relatively benign. As the Court explained in Roberts v. United States Jaycees,55 anti-discrimination law serves two distinct purposes: It combats debilitating stereotypes and it provides access to equal opportunities.56 Denying membership in organizations solely because of a person’s religious affiliation can undercut both of these concerns regardless of the reasons underlying the organization’s discriminatory policy.

C. Protecting Religious Association Is Necessary to Protect Individual Self-Identity

A third argument in favor of protecting a religious organization’s right to discriminate against non-adherents takes us back to the religion as identity/religion as ideas distinction discussed earlier. The formation of self-identity, as we have seen, necessarily involves disassociation, and a religious organization’s exclusion of non-adherents can therefore be pivotally important in fostering a sense of self. On this basis, then, it might be contended that, regardless of whether a religious organization’s membership exclusion imparts a message, it nevertheless merits constitutional protection because of the important role religion plays in the fostering the self-identity of the believer.57

Certainly, there are reasons to view the Christian Legal Society case in this light—as more about a religious organization’s ability to control its own identity than its ability to control its message. After all, it is far less likely that outsiders would perceive CLS’s Christian message as diluted if CLS admitted non-Christians than CLS members would see their self-identity diluted by the presence of outsiders in their organization. But although characterizing the religious organization’s

54 See Christian Legal Soc’y, 130 S. Ct. at 2990.
56 Id. at 625-26.
57 A right for religious organizations to discriminate along religious lines might also be supported by a constitutional theory of group rights. Cf. Gedicks, supra note 25 (discussing the arguments in favor of and against the recognition of group rights). As Gedicks notes, the Court has yet to accept such a doctrine. Id. at 49.
claim as an identity interest may more accurately explain the actual effects caused by the imposition of anti-discrimination requirements on a religious organization, doing so has numerous disadvantages. First, such characterization detaches the constitutional claim from its current free speech moorings. In order to implicate the right of expressive association, an organization must be seen as furthering a message. The right to choose with whom you want and do not want to associate does not alone arise to First Amendment significance, even if identity-related.

Second, the right of association to foster self-identity has not been recognized outside the First Amendment context except in the instance of “intimate association,” meaning deeply personal relationships such as family. Characterizing the religious organization’s associational interest as identity-based is therefore to leave it constitutionally unprotected. Third, even if the right of association were to be expanded to include membership in the types of groups that relate to fundamental aspects of self-identity, religious affiliations are not the only organizations that fit that description. Groups organized around ethnicity, gender, sexual orientation, or national origin also fulfill this function. The identity claim, in short, does not support a unique exemption for religious organizations.

Finally, as an observational note, characterizing religious discrimination as identity-based may weaken its claim for constitutional protection because it revives the problems associated with anti-religious discrimination. The problems created when people discriminate against others on account of identity are the exact reasons why anti-discrimination laws were enacted in the first place.

D. Protecting Religious Association Is Supported by Concerns for Religious Autonomy

A final argument in favor of exempting religious organizations from anti-religious discrimination requirements might rest on a general

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58 Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (“[T]o come within . . . [the] ambit of expressive association, a group must engage in some form of expression, whether it be public or private.”).
proposition that religious organizations are constitutionally entitled to some measure of autonomy in the way they structure their internal affairs. Doctrinal support for the proposition that religious organizations enjoy some rights of autonomy might be found in a series of cases in which the Court has asserted that the state is forbidden from interceding in internal church matters, such as church property disputes, that involve theological interpretation. Under this doctrine, for example, the state may not decide intra-church disputes on the basis of which disputing faction is theologically correct. Relatedly, church autonomy concerns have also been advanced in support of a “ministerial” exception to employment discrimination laws that exempts religious organizations from anti-discrimination laws for employment decisions involving theologically-related positions such as pastor or minister.

It is not clear, however, how much these decisions support the right of a religious organization to discriminate along religious lines. First, as Frederick Gedicks explains, the primary justification for the church autonomy doctrine is that civil authorities are not competent to make theological decisions. Enforcing non-discrimination requirements against religious organizations, however, does not enmesh the state in theological determinations, and therefore does not implicate this rationale. Second, although CLS’s claim might be supported by the same concern with excessive church-state entanglement that seems to underlie the church autonomy cases, the Court has made clear that the

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65 See McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972). Although the ministerial exemption has been recognized by the lower courts, the Supreme Court has yet to rule on the issue. See Michael P. Moreland, Religious Free Exercise and Anti-Discrimination Law, 70 ALB. L. REV. 1417, 1418 (2007). The Supreme Court will address the ministerial exemption for the first time this upcoming term in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, cert. granted, No. 10-553, ___ S.Ct. ___, 2011 WL 1103380 (Mar. 28, 2011).
66 See Note, The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test, 121 HARV. L. REV. 1776, 1788 (2008) (noting that the “ministerial exception” allows religious employers to avoid liability for discrimination when making employment decisions concerning employees who qualify as ministers).
67 Gedicks, supra note 25, at 57.
68 The Court has held that civil authorities may intervene in intra-church disputes as long as they rely on neutral principles of law. See Jones v. Wolf, 443 U.S. 595 (1979) (holding that a secular court could decide intra-church disputes by referencing “neutral principles of law”). Thus, even if anti-discrimination measures implicate autonomy interests, they are nevertheless neutral principles of law that can be applied—except perhaps in the case of priests or ministers—without religious inquiry.
69 See NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979) (construing a provision giving the NLRB jurisdiction over labor disputes as not applying to religious schools in order to avoid the presumed constitutional issues that might arise if the NLRB were to exercise jurisdiction over a religious organization).
autonomy assertion does not insulate religious organizations from most regulatory efforts. Thus, the Court has held that religious organizations can be subject to regulatory provisions such as the Fair Labor Standards Act, even for the employment of their own members,70 and that religious organizations may be investigated by the government for potential civil rights violations.71 Any autonomy interest raised by CLS or a similar religious organization, in short, does not on its own rise to constitutional significance, at least under current law.72

E. Summary

None of the reasons for distinguishing religious discrimination by religious groups from religious discrimination by secular groups are by themselves compelling. Religious organizations do not present stronger First Amendment interests than secular groups for engaging in religious discrimination. The state’s interest in combating religious discrimination may be lessened when the discrimination in question involves an organization engaging in discrimination in favor of co-religionists, but that is not always the case. A right of association to help preserve self-identity has not been recognized as implicating expressive association concerns, and even if it was, secular groups can present comparable identity claims. Finally, religious autonomy claims have not thus far been extended to negate the application of anti-discrimination provisions to membership requirements of religious organizations that do not require the state to engage in theological determinations.

It may be, however, that these arguments, taken cumulatively, can support a preliminary case that religious discrimination by religious groups is sufficiently distinct from religious discrimination by non-religious groups so as to merit different constitutional treatment and require a special exemption. But in order to prevail, this contention would also have to overcome the arguments as to why exempting religious organizations from laws regulating secular organizations is problematic. The following Part discusses these concerns.

IV. THE CASE AGAINST CONSTITUTIONALLY COMPELLED RELIGIOUS EXEMPTIONS

In Employment Division v. Smith, the Court held that religion and religious believers were not entitled to constitutionally-based exemptions from neutral laws under the Free Exercise Clause. Constitutionally required free exercise exemptions were problematic, according to the Court, because to excuse religious believers from otherwise valid laws “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”

Resistance to constitutionally compelled exemptions also runs strong in free speech jurisprudence. Because one of the central tenets of free speech law is that the government may not regulate speech on the basis of its content, free speech jurisprudence places an enormous constitutional premium on content-neutral laws, which are far more likely than content-based laws to survive First Amendment scrutiny. This means that a holding that a free speech exemption is required for some speech but not other speech literally turns one of Speech Clause jurisprudence’s most important principles on its head, as it effectively transforms a content-neutral provision into one that is content-based.

For this reason, Speech Clause exemptions from content-neutral laws are rare. They do, however, exist. In Brown v. Socialist Workers ’74 Campaign Committee, the Court held that a political party that had historically been the object of government and private party harassment was entitled to a free speech exemption from campaign disclosure requirements. More recently, in Boy Scouts of America v. Dale the Court held that an organization that expressed opposition to homosexual

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74 Id. at 878-79.
75 Id. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1878)) (internal quotation marks omitted).
77 See Police Dep’t of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”); Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. CHI. L. REV. 46 (1987).
78 See Stone & Marshall, supra note 76, at 592.
conduct could not be subject to an anti-discrimination law prohibiting discrimination on the basis of sexual orientation.\textsuperscript{82}

Both cases, however, are distinguishable from \textit{Christian Legal Society}. In \textit{Brown}, the Court was concerned that failure to exempt an unpopular political party from the disclosure requirements could have a devastating impact on the ability of that organization to survive.\textsuperscript{83} As such, the First Amendment claim of the party seeking exemption was qualitatively different than the message dilution claim presented in \textit{Christian Legal Society}.\textsuperscript{84}

\textit{Dale}, of course, is more like \textit{Christian Legal Society} in that it specifically addressed message dilution in the context of an anti-discrimination law requiring that an expressive organization admit members in opposition to its message. But \textit{Dale} also differs from \textit{Christian Legal Society} in a critical respect. \textit{Dale} suggested that any organization expressing an anti-gay message would be entitled to an exemption, and thus its result is content-neutral because it does not distinguish among groups presenting First Amendment interests.\textsuperscript{85} The result sought by Justice Alito in \textit{Christian Legal Society}, in contrast, is content-based because it favors religious objectors to anti-religious discrimination laws over secular objectors.\textsuperscript{86} Justice Alito’s argument in \textit{Christian Legal Society} therefore goes where \textit{Dale} (and \textit{Smith}) did not. It creates a constitutionally-based religious exemption from a neutral law.

Moreover, even though not directly blocked by \textit{Smith}’s free exercise holding, CLS’s Speech Clause claim for a religious exemption nevertheless faces another substantial hurdle. The Court has been particularly steadfast in its Speech Clause jurisprudence in requiring the equal treatment of religious and non-religious speech.\textsuperscript{87} Even before

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\item \textsuperscript{82} Id.
\item \textsuperscript{83} Stone & Marshall, supra note 76, at 610-11.
\item \textsuperscript{84} To be sure, Justice Alito’s dissent raised the possibility that Hastings’s all-comers policy could be used by outsiders to take over, and essentially eviscerate, an organization. See \textit{Christian Legal Soc’y v. Martinez}, 130 S. Ct. 2971, 3019 (2010) (Alito, J., dissenting). The majority, however, rejected this argument on the grounds that this possibility was purely conjectural, \textit{id}. at 2993 (majority opinion), leaving open the possibility that an exemption could be awarded if supported by a sufficient showing of risk to the viability of the organization.
\item \textsuperscript{85} Indeed, for this reason, there is some question as to whether \textit{Dale} is accurately characterized as a First Amendment exemption case at all since it does not exempt speakers from laws affecting other speakers, but “exempts” only those presenting First Amendment rights. But see Stone, supra note 79, at 43-44 (characterizing \textit{Dale} as an exemption case).
\item \textsuperscript{86} In \textit{Dale}, of course, the group challenging the anti-discrimination measure was a secular organization: the Boy Scouts.
\item \textsuperscript{87} Indeed, as I have argued elsewhere, this Court’s commitment to religion/non-religion equality in speech cases is helpful in understanding \textit{Smith} because these cases suggest that religion is not entitled to special constitutional protection above that allowed to parallel secular claims. See William P. Marshall, \textit{In Defense of Smith and Free Exercise Revisionism}, 58 U. CHI. L. REV. 308 (1991); William P. Marshall, \textit{Solving the Free Exercise Dilemma: Free Exercise as Expression}, 67 MINN. L. REV. 545 (1983); see also Christopher L. Eisgruber & Lawrence G.
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Smith, for example, the Court established that Speech Clause claims proffered by religious speakers could not prevail where comparable speech claims by secular speakers would be denied. Thus, in Heffron v. International Society for Krishna Consciousness, Inc., the Court rejected the position that the International Society for Krishna Consciousness (ISKCON) should be entitled to an exemption from a Minnesota State Fair rule that required literature distributions and solicitations to occur only at designated booth spaces when non-religious organizations would not be entitled to similar relief. Although the parties had stipulated that peripatetic solicitation was part of ISKCON’s religious ritual and required by its religious tenets, the Court ruled the fact ISKCON’s actions were based upon religious compulsion to be of no matter:

[ISKCON] and its ritual . . . have no special claim to First Amendment protection as compared to that of other religions who also distribute literature and solicit funds. None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize. These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature.

Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. CHI. L. REV. 1245, 1254-67 (1994) (arguing that not exempting religion from neutral laws under the Free Exercise Clause is supported by the Constitution’s regard for an equality of conscience between religious and non-religious beliefs).

89 Id. at 652-53 (footnote omitted); see also Prince v. Massachusetts, 321 U.S. 158 (1944). In Prince, the Court was faced with a challenge to a child labor law brought by a Jehovah’s Witness who contended that prohibiting her child from engaging in proselytization violated the First Amendment. Conceding that the law was permissible under the Speech Clause, the Jehovah’s Witness instead based her claim solely on the Free Exercise Clause, alleging that allowing children to proselytize was mandated by religious belief. The Court, however, held that a free exercise challenge could not be maintained in circumstances where a parallel free speech claim would fail. As the Court stated:

If by this position [the Jehovah’s Witness] seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter’s prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living,
The Court’s commitment to the equality between religious and secular expression has also been strongly enforced in ways that protect religious speech. In a series of cases, the Court, relying on content neutrality principles, struck down measures that treated religious speakers adversely in relation to their secular counterparts.90 In *Widmar v. Vincent*,91 for example, the Court held that a state university could not allow secular groups access to its facilities for meetings but deny prayer groups similar rights, even though the university supported its policy by claiming that it excluded prayer groups in order to avoid the appearance of state support of religion. Similarly, in *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court ruled that a state university that provided funding to secular student organizations could not deny funds to a religious organization engaged in proselytization even though the university objected that funding religious activity cut at the heart of anti-establishment concerns.92 The argument in favor of treating religious speech differently from non-religious speech and creating a constitutionally compelled religious speech exemption from neutral laws thus faces a steep uphill climb.

It also creates an anomaly. It is difficult to see why special constitutional consideration should be given to religion under a constitutional provision that does not single out religion for special mention (the Speech Clause), while relief is denied under a clause that is religion-specific (the Free Exercise Clause).

But there is more at issue in this equation than mere irony. Creating speech-based exemptions for religion could lead to a fundamental rethinking of First Amendment issues. The anomaly created by a holding that religion can be entitled to special exemptions under the Speech Clause but not the Free Exercise Clause might suggest re-examining the free exercise issue. Exempting religion from neutral laws under the Speech Clause, in short, is a possible first step towards overturning *Smith*. Exempting religious speech from neutral laws also suggests that the cases protecting religious speech from adverse treatment should be reconsidered as well.93 After all, if religious and non-religious speech are deemed not equivalent in some areas, they may also not be in others.

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91 454 U.S. 263.
92 515 U.S. 819.
93 See supra notes 90-92 and accompanying text.
Of course, there are many who believe that a reformation of the First Amendment’s approach to religion is entirely in order. But before abandoning the commitment to treating religious and non-religious speech equally, it may be worthwhile to revisit what is at stake. As I have argued elsewhere, the importance of enforcing content neutrality between religions and non-religion is not based solely upon a simple notion that it is unfair to protect some types of beliefs but not others, although, to be sure, that is an important factor.

Rather, enforcing content neutrality between religion and non-religion is also supported by concern for their political and social effects. Religion is a powerful social and political force in American society and religious views compete with other ideologies on issues that are at the center of American political debate. The religious positions of some on issues such as social justice, abortion, capital punishment, civil rights, welfare, and the environment, for example, if accepted by enough others, could transform the nation’s political agenda.

And that is exactly the problem with religious exemptions. Religion has much to add to the nation’s political discourse. But freeing religion from rules that constrain other entities artificially empowers religion over its secular counterparts in the national discourse and skews political debate in its favor. The First Amendment’s

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94 See, e.g., Esbeck, supra note 72 (contending that the Establishment Clause should be re-conceptualized as a structural restraint on government action); Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. CHI. L. REV. 1109 (1990) (arguing that the Court’s free exercise jurisprudence is misguided); Smith, supra note 13 (arguing that Religion Clause jurisprudence is deficient because it does not sufficiently grapple with religiosity); see also Lamb’s Chapel, 508 U.S. at 398-99 (Scalia, J., dissenting) (harshly condemning the Court’s Establishment Clause test).

95 Marshall, supra note 87, at 321-23.

96 There is a simple unfairness in the result in Thomas v. Review Board, 450 U.S. 707 (1981), for example, which held that an exemption from unemployment insurance requirements would be available to an individual whose religious tenets prevented him from working in an armaments factory but an exemption would not be available to one whose objection to working in the factory was based upon “personal philosophical choice.” Id. at 713.

97 A most obvious example of this is the attempt to suggest that religious organizations should be exempt from the limits on political activity present as a condition for favorable tax treatment under section 501(c)(3) of the Internal Revenue Code. See, e.g., Lloyd Hitoshi Mayer, Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise, 89 B.U. L. REV. 1137 (2009) (arguing that religious organizations should be exempt from the political activity limitation). As Donald Tobin argues, however, providing special exemptions for political activity by religious organizations would severely distort and harm the integrity of the political process. Donald B. Tobin, Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy, 95 GEO. L.J. 1313 (2007). Any holding that religious organizations could be entitled to special exemption under the Speech Clause would, of course, provide substantial precedential support for arguing that religious organizations should be exempt from 501(c)(3) requirements.

98 The Establishment Clause, of course, suggests that, if anything, it is religion that should be disfavored in the public square. Preferring religious speech therefore gets the anti-establishment concern exactly backwards.
commitment to content neutrality between religion and non-religion is well-taken. It should not be readily undone.

CONCLUSION

In Employment Division v. Smith, the Court held that religion was not entitled to exemptions from neutral laws under the Free Exercise Clause. In Christian Legal Society v. Martinez, the Court faced the question of whether religion could nevertheless be entitled to exemption from neutral laws under the Speech Clause. Because of the manner in which the case was litigated, however, the Court was not pressed to decide, and did not decide, this specific issue. Justice Alito’s dissent in the case, however, did bring the matter to the fore, as the result for which he advocated would have effectively exempted a religious organization from the application of a neutral law.

But whether based on the Free Exercise or the Speech Clause, especially exempting religious organizations from neutral laws that regulate comparable philosophical, moral, and political belief systems offends the equality-of-ideas notion that is central to First Amendment jurisprudence and also improperly strengthens the ability of one type of ideology to compete in the political market against the others. On this basis, the Court was correct in Smith in rejecting free exercise claims for special exemption and it would be similarly correct if it were to directly reject free speech claims for exemptions for religious organizations as well.

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100 130 S. Ct. 2971 (2010).