

**UNIVERSITIES AS CONSTITUTIONAL LAW MAKERS  
(AND OTHER HIDDEN ACTORS IN OUR CONSTITUTIONAL  
ORDERS)**

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In the stories told by opinion makers and many law professors, American constitutional law is concerned with two things—individual rights and the powers of government—and it is settled by the Court, which was established by Article III of our national Constitution. In those now-familiar tales, the United States Supreme Court creates constitutional law when heroic individuals assert their fundamental rights against an overreaching state and when Congress, state legislatures, and executive agencies are called upon to justify their expert enactments to an overreaching judiciary. To settle these constitutional disputes the Court looks either to the text of the written Constitution or to a Living Constitution, which looks something like the textual Constitution plus Justice Kennedy’s morning prandial consumption.

These stories are so familiar to us that we know the case names from memory—on the side of individual rights, *Dred Scott v. Sandford*,<sup>1</sup> *Brown v. Board of Education*,<sup>2</sup> *Miranda v. Arizona*,<sup>3</sup> *Roe v. Wade*,<sup>4</sup> *Lawrence v. Texas*,<sup>5</sup> and those concerning (limits on) the powers of government to promote the public good, *McCulloch v. Maryland*,<sup>6</sup> *Lochner v. New York*,<sup>7</sup> *Wickard v. Fillburn*,<sup>8</sup> *United States v. Morrison*,<sup>9</sup> *National Fed-*

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1 60 U.S. (19 How.) 393 (1857).

2 347 U.S. 483 (1954).

3 384 U.S. 436 (1966).

4 410 U.S. 113 (1973).

5 559 U.S. 558 (2003).

6 17 U.S. (4 Wheat.) 316 (1819).

7 198 U.S. 45 (1905).

8 317 U.S. 111 (1942).

9 529 U.S. 598 (2000).

eration of *Independent Business v. Sebelius*.<sup>10</sup> Like Bunker Hill, Gettysburg, Omaha Beach, and Gulf of Tonkin, these names are written in our nation's history in bold print, designating the places where our national identity was forged and our ideals were vindicated, or not.

But these stories are not entirely accurate. For one thing, much of what we know as constitutional law is settled by institutions other than the Supreme Court and derives from sources other than the written Constitution. For example, the Supreme Court recognizes as fundamental rights those rights that are deeply rooted in the history, legal traditions, practices, and conscience of the American people.<sup>11</sup> Those traditions and that conscience are generally expressed in federal and state statutes, other state and local laws, customs, the ethical codes of professional associations, and the laws of other institutions outside the national government. *Those* institutions settle and specify the contours of the rights and duties.<sup>12</sup> The Supreme Court of the United States merely describes what has already taken place.

So, even if we were to accept that constitutional law is concerned only with individual rights and government powers, we must look to legislation, state law, common law, and private law to find the foundations and the raw materials of constitutional law. Public law is built upon the foundation laid by the common law using materials constructed not only by legislatures but also by institutions of private ordering.

It is strange that the primacy of private law and common law has been so long neglected. As James Stoner has observed, many terms and concepts in our written Constitution are defined by common law doctrines.<sup>13</sup> Understanding those terms and doctrines requires us to understand how juries, private institutions, legislatures, judges, and other common law institutions of rulemaking have defined them and continue to shape their meaning.

Furthermore, the written Constitution does not answer every question. The Framers gave us a Constitution that leaves much of the definition of rights, wrongs, duties, and obligations to private law and state common law. As Justice Alito argued in his dissent in *Snyder v. Phelps*, it is a mistake to read the Constitution to secure individuals'

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<sup>10</sup> 132 S. Ct. 2566 (2012).

<sup>11</sup> *Washington v. Glucksberg*, 521 U.S. 702, 710, 720–21 (1997).

<sup>12</sup> See generally GRÉGOIRE C.N. WEBBER, *THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS* (2009).

<sup>13</sup> JAMES R. STONER, *COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM* (2003); James R. Stoner, *Why You Can't Understand the Constitution Without the Common Law*, LIBRARY OF LAW AND LIBERTY (Dec. 2, 2012), available at <http://www.libertylawsite.org/liberty-forum/why-you-cant-understand-the-constitution-without-the-common-law/>.

rights to perform actions that private lawmakers have judged wrongful and about which the text of the Constitution is silent.<sup>14</sup> So, for example, a jury, the common law repository of practical wisdom, which is charged with resolving private-law disputes, has judged that to “launch[] a malevolent verbal attack” upon the family of a dead Marine at that Marine’s funeral constitutes intentional infliction of emotional distress, a wrong which tort law condemns.<sup>15</sup> Given that judgment and the Constitution’s own silence on what constitutes protected speech, why should the Court extend to the thugs who launch such an attack a First Amendment “right to brutalize”<sup>16</sup> the family with words?

In reality, the law that governs our various constitutional orders—state, federal, and non-governmental—is much more expansive than our constitutional texts and the judicial opinions interpreting them. Much of the law that governs our constitutional orders never finds its way to the United States Supreme Court, never implicates the text of the Constitution, and does not involve the relationship between the individual and the state. The prevailing narrative’s dichotomy between individuals and state actors, and its near-obsession with the power of our Supreme Court, blinds us to hidden actors who are doing much of the work in creating and preserving ordered liberty.

These hidden actors in our constitutional orders are groups, associations, and private and civic communities, which determine the rights and duties of their members, and shape the rights of their neighbors, as they order their affairs in pursuit of a common good. It is easy to overlook the role of those institutions and groups in constituting ordered liberty because they perform their work quietly, outside the national spotlight. They do not deliberate on C-Span. The products of their deliberations are not published in bound volumes for law students to study. Instead, they create law and order privately, around kitchen tables, at congregational and associational meetings, and in boardrooms.

Why does this matter? Overlooking the role of private law makers in our constitutional orders is like coming into a movie when it is already half over. You might pick up some aspects of the plot. You might even figure out who the good guys and bad guys are supposed to be, and what genre of predicament they find themselves in. But you won’t know how they got there: what cultures, institutions, circumstances, and moral agents led them to this momentous juncture.

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14 131 S. Ct. 1207, 1222 (2011) (Alito, J., dissenting).

15 *Id.*

16 *Id.*

Indeed, there might be important characters and subplots that you know nothing about. Therefore, you might not appreciate the complexity of the situation at hand.

Where can we look to find these hidden law makers at work? Occasionally they show up in Supreme Court decisions. Associations, civic institutions, and other makers of private and civic order require constitutional protections against unlawful incursions, just as individuals do. So, many of the important cases in American Constitutional Law, the most foundationally important to ordered liberty perhaps, are those that protect or jeopardize the authority and autonomy of private and civic institutions to settle and specify the rights and duties of their communities' members. Alas, these cases tend to be less well-known than those mentioned above—*Dartmouth College v. Woodward*,<sup>17</sup> *Prince v. Massachusetts*,<sup>18</sup> *Pennsylvania Coal Co. v. Mahon*,<sup>19</sup> *Boy Scouts of America v. Dale*,<sup>20</sup> *Healy v. James*.<sup>21</sup>

But we need not turn to Supreme Court decisions to see the primacy of private ordering in our constitutional orders. Its priority is evident from the text of the Constitution itself. This is not the place to point out all of the terms and provisions of the Constitution which presuppose, preserve, and incorporate by reference the law created within domains of ordering other than the national government. This essay will confine itself to two such domains: (1) domains of religious freedom and (2) domains of private property ownership.

A growing number of scholars—notably Mary Ann Glendon and Richard Garnett—are calling attention to the communal and institutional nature of religious exercise.<sup>22</sup> If the freedom secured by the religion clauses of the First Amendment is cast as a matter of individual rights and state power exclusively, then the contest over religious freedom becomes a contest between individual interests and state interests. The wall of separation between public and private leaves reli-

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17 17 U.S. (4 Wheat.) 518 (1819).

18 321 U.S. 158 (1944).

19 260 U.S. 393 (1922).

20 530 U.S. 640 (2000).

21 408 U.S. 169 (1972).

22 See, e.g., Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 501 (1991) (describing Chief Justice Burger's majority opinion in *Walz v. Tax Commission*, 397 U.S. 664 (1970), as a rare instance in which the Court has acknowledged that the Free Exercise Clause has "associational, institutional, as well as individual, dimensions"); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 274 (2008) ("The freedom of religion is not only lived and experienced through institutions, it is also protected and nourished by them."); Matthew J. Franck, *Individual, Community, and State: How to Think About Religious Freedom*, 41 IMPRIMIS 1, 1-4 (Sept. 2012) (discussing the role of institutions in defending religious freedoms).

gious actors to appeal to one branch of government—the courts—for freedom from incursions by the other branches of government. Put differently, the rights and duties of religious actors are, on the prevailing view, determined by state actors. The only question is which branch of the government will specify the rights and duties that protect religious freedom.

This binary conception of religious freedom is reflected in our current free exercise law, which treats religious freedom as a matter of striking the correct balance between the public good and the interests of religious individuals who are burdened by general laws. For the last two decades, since the Court's landmark decision in *Employment Division, Department of Human Resources of Oregon v. Smith*,<sup>23</sup> Congress and the Supreme Court have battled over the question of whether the interests of governments or of religious individuals should weigh more heavily. But both Congress and the Court share the contestable premise that religious individuals and state actors are the only stakeholders in the matter.

Against the binary view, Mary Ann Glendon has argued for a more historically-based understanding of religious freedom, which she calls “structural free exercise.” Viewing “the institutional and associational, as well as the individual, aspects of religious freedom,” she has said, makes us aware “of the role of America's religions in the cultural foundations” of our constitutional order.<sup>24</sup> The history of religious exercise from before the time of our founding suggests that “individual free exercise cannot be treated in isolation from the need of religious associations and their members for a protected sphere within which they can provide for the definition, development, and transmission of their own beliefs and practices.”<sup>25</sup>

The Supreme Court recently vindicated this protected sphere *in part* in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*.<sup>26</sup> The Court unanimously ruled, over the protests of many law professors and the *New York Times*, that federal non-discrimination law does not reach the decisions of religious organizations to hire and fire their religious leaders.<sup>27</sup> The

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<sup>23</sup> 494 U.S. 872 (1990).

<sup>24</sup> Glendon & Yanes, *supra* note 22, at 537.

<sup>25</sup> *Id.* at 544.

<sup>26</sup> 132 S. Ct. 694 (2012). See also Richard W. Garnett & John M. Robinson, *Hosanna-Tabor, Religious Freedom, and the Constitutional Structure*, 2012 CATO SUP. CT. REV. 307, 309 (2012) (noting that *Hosanna-Tabor* “provides a crucial starting point and touchstone” for understanding the scope of this sphere).

<sup>27</sup> See, e.g., Editorial, *The Ministerial Exception*, N.Y. TIMES, Jan. 12, 2012, at A22 available at <http://www.nytimes.com/2012/01/13/opinion/the-ministerial-exception.html?ref=us&version=meter+at+5&region=FixedCenter&pgtype=Article&priority=true&module>

Court thus preserved a space within which religious organizations are free to constitute themselves, free of the interference of public law and political actors. But this space is small, an exception to the general rule that the boundaries of religious freedom are specified by the government or by individual initiative.

The sphere of religious freedom, which Garnett has called “a social space within which persons are formed and educated”<sup>28</sup> resembles another, more expansive domain of freedom which also predates our Constitution, namely private property. Our private property norms and institutions were not created by the United States Constitution but rather were transmitted to us by the common law that the American colonies inherited from Great Britain. In the common law tradition, property is created, and property rights are specified, by families, civic institutions, and local communities before those rights are delimited and curtailed by exercises of government powers. Primarily, property rights are specified within families as they deliberate and choose how to use, manage, and distribute the resources available to them, and how to acquire more resources. Also, property rights are specified by neighbors, religious assemblies, businesses, juries, and other associations and institutions of private and civic ordering. As they resolve the question of what should be done with the resources available to them, these groups specify property rights and duties. Unless unreasonable, their judgments are binding upon the deliberations of judicial actors.<sup>29</sup>

The U.S. Constitution acknowledges the pre-constitutional definition and establishment of property rights in several places.

- Article I, Section 8, Clause 8 gives Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors *the exclusive Right* to their respective Writings and Discoveries.”<sup>30</sup> This provision is known as the Intellectual Property Clause, which authorizes copyright and patent protections. The

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=RegiWall-Regi&action=click (noting that Hosanna-Tabor’s “sweeping deference to churches does not serve them or society wisely”); Adam Liptak, *Religious Groups Given ‘Exception’ to Work Bias Law*, N.Y. TIMES, Jan. 11, 2012, at A1, available at <http://www.nytimes.com/2012/01/12/us/supreme-court-recognizes-religious-exception-to-job-discrimination-laws.html> (noting objections of Professor Douglas Laycock).

28 Richard W. Garnett, *Mary Ann Glendon and the Structure of Religious Freedom*, PUBLIC DISCOURSE (July 23, 2013), <http://www.thepublicdiscourse.com/2013/07/10506/>.

29 See generally Adam J. MacLeod, PROPERTY AND PRACTICAL REASON (forthcoming 2014) (discussing the role of institutions of private ordering in specifying the norms of property—the duties, rights, and limitations on rights that guide and bind the practical deliberations of those who encounter owned things).

30 U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

“exclusive right” which it references is the full set of rights that attaches to property ownership at common law.

- Article I, Section 10 prohibits states from passing laws impairing the obligation of contracts.<sup>31</sup> This clause presupposes that citizens have the freedom to exchange their property and to make promises of exchange, and the Constitution insists that the states must not interfere in this important domain of private ordering.
- The Third Amendment protects the sanctity of the family home by giving homeowners an absolute veto over the quartering of soldiers within a house in times of peace.<sup>32</sup> The special protections afforded to the family home at common law, which are recognized and preserved in the United States Constitution, provide a significant ground for the right that has in recent decades come to be known as the general right to privacy.
- The Fourth Amendment recognizes the pre-existing right of the people, shaped and protected by the common law prohibitions against trespass, “to be secure in their persons, houses, papers, and effects.”<sup>33</sup>
- The Fifth and Fourteenth Amendments prohibit state actors from depriving any person of property without due process of law.<sup>34</sup> In an unbroken chain of precedents, the Supreme Court has stated that “property” here means what *state law* says it means.<sup>35</sup> And in the absence of contrary legislation, the states define property with reference to its common law dimensions.<sup>36</sup> In other words, the Fifth Amendment accepts the dimensions of property that are

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31 U.S. CONST. art. I, § 10, cl. 1. (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”).

32 U.S. CONST. amend. III. (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner.”).

33 U.S. CONST. amend IV.

34 U.S. CONST. amend. V; U.S. CONST. amend XIV, § 1.

35 *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998) (“Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to ‘existing rules or understandings that stem from an independent source such as state law.’”) (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (applying Pennsylvania law to establish property interest in land estate).

36 *Phillips*, 524 U.S. at 165 (“The [property] rule that ‘interest follows principal’ . . . has become firmly embedded in the common law of the various States.”); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027–31 (1992) (arguing any taking authorized by statute or decree must effectively be supported by state common law, such that the courts would come to the same conclusion absent the statute or decree); *Kaiser Aetna v. United States*, 444 U.S. 164, 178–79 (1979) (referring to common law authority to analyze ownership interest in a dredged marina).

established by institutions of private and civic ordering within common law institutions.

- The same is true of the Takings Clause of the Fifth Amendment, which provides, “nor shall private property be taken for public use, without just compensation.”<sup>37</sup> In the case *Lucas v. South Carolina Coastal Council*, the Supreme Court ruled that this clause impedes states from altering by regulation those rights which property owners enjoy at common law.<sup>38</sup> If a state wishes to regulate away the property rights which the owner enjoys under common law then the state must compensate the owner for the loss.

The important role of private ordering within constitutional ordering was on display in *Christian Legal Society v. Martinez*.<sup>39</sup> In that case, the Supreme Court affirmed the authority of the University of California at Hastings to exclude from its law school campus a chapter of the Christian Legal Society. Some friends of religious liberty have worried that the Supreme Court in the *Martinez* case created a new right for state universities to exclude Christians.<sup>40</sup> But the new law in *Martinez* was not made by the Supreme Court. Rather, it was made by the policies of the two groups who opposed each other in the case—the University of California at Hastings and the Hastings Law chapter of the Christian Legal Society. One of those policies was grounded in the ancient rights of private property. The other was grounded in a particular expression of our first freedom of religious exercise. The Court took a laissez-faire posture toward the conflict between these policies, allowing the University to exercise the dominion of its property ownership to shape the rights and duties of its constituents.<sup>41</sup> The University’s decision then became constitutional law.

The policy of Christian Legal Society is to require its officers to be, and therefore to act like, Christians. In particular, officers of CLS

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<sup>37</sup> U.S. CONST. amend V.

<sup>38</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027–31 (1992).

<sup>39</sup> 130 S. Ct. 2971 (2010).

<sup>40</sup> See, e.g., Hadley Arkes, *Vast Dangers—Confirmed*, FIRST THINGS (June 29, 2010) (“The way has been prepared now to push Christian groups off the ‘better’ campuses in this country, private or public . . . .”), <http://www.firstthings.com/web-exclusives/2010/06/vast-dangers-confirmed>; Robert Shibley, *The Fallout from Christian Legal Society*, NATIONAL REVIEW ONLINE (Feb. 6, 2012), <http://www.nationalreview.com/articles/290199/fallout-ichristian-legal-society-i-robert-shibley> (“Groups like the Christian Legal Society . . . could be required to . . . admit ‘all comers,’ or else face ‘derecognition’ . . . . To lack recognition is basically not to exist at all on today’s college campus.”). Arguably, the decision was novel in one respect, that the Court merged Christian Legal Society’s associational freedom argument into its free speech argument. But, for better or worse, the Court found ample precedent for this elision of associational rights. *Martinez*, 130 S. Ct. at 2984–86.

<sup>41</sup> See *infra* note 55 and accompanying text.



must agree to conform their conduct to Christian teaching on a number of ethical matters, including sexuality and marriage.<sup>42</sup> U.C. Hastings' policy is a bit more difficult to pin down. As written and applied to CLS, the policy prevents a registered student organization from requiring its leaders to share the organization's convictions on religion or sexual conduct.<sup>43</sup> Hastings' policy thus singles out religious groups for unfavorable treatment. This written policy is supposed to track California state law, which prohibits discrimination on the basis of, among other criteria, religion and sexual orientation.<sup>44</sup>

During litigation before the Supreme Court, U.C. Hastings insisted that it interprets the policy to apply to all student organizations, not just religious groups, and that this interpretation of the policy requires "all student organizations to accept all comers."<sup>45</sup> Registered student groups must "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of her status or beliefs."<sup>46</sup> So, for example, the California University Democrats must allow to stand for the office of club president a student who is a registered Republican and must permit all of that student's fellow Republicans to join the group. A majority of the Supreme Court treated this all-comers policy as authoritative and refused to consider the policy as it was written and applied; that is, to single out religious organizations and to exclude CLS.<sup>47</sup>

Hastings' interpretation of the policy as a so-called "all-comers" requirement is problematic in itself. An all-comers policy makes it difficult for student organizations to constitute themselves around ideas, especially normative truth claims. Students would form a group called the California University Democrats because they believe that the commitments and proposals of the Democratic Party are true, valuable, and normative. If the California University Democrats must allow a student to serve as their president who rejects the commitments of the Democratic Party, and who is actively engaged in defeating the proposals of the Democratic Party, then their Democratic identity is in jeopardy. Similarly, if the Christian Legal Society must accept as president a student who rejects Christian teaching and is actively engaged in persuading others to do the same, there is little

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42 See Martinez, 130 S. Ct. at 2980.

43 *Id.* at 2979–80.

44 *Id.* at 3016 (citing CAL. EDUC. CODE ANN. § 66270 (West Supp. 2010) (Alito, J., dissenting)).

45 *Id.* at 2993.

46 *Id.* at 2979.

47 *Id.* at 2984.

sense to the Christian Legal Society constituting itself as a *Christian* group.

Put differently, U.C. Hastings' policy elevates the individual at the expense of the group. In fact, it empowers individual students to leverage groups in their own, individual acts of self-constitution. It gives any individual student the right to destroy any student group's identity from within. The Republican has a right to implement his Republican agenda by making nonsense of the California University Democrats' group identity; the atheist has the right to implement his agenda by making nonsense of the Christian Legal Society's group identity. The policy enshrines the idea—the normative idea—that a student must have the right to constitute his identity by destroying the identity of the group if he so chooses.

Notice the irony here. U.C. Hastings is a group. It is a large group, but it is a group, which constitutes itself by committing to ideas, many of which are normative. U.C. Hastings has constituted itself as a group in part by adopting policies, which individual members of the group must obey. One of those policies is that groups may not constitute themselves by adopting policies when those policies conflict with the commitments of potential members, but must accept those potential members. To enforce its policy, U.C. Hastings has rejected a potential member of its community—the Christian Legal Society—whose commitments conflict with its policy. In short, U.C. Hastings has constituted itself as a group by committing itself to the norm that its member groups must be open to being thwarted in their efforts to constitute themselves as groups by committing themselves to norms.

This evidently did not puzzle Justice Ginsburg. Writing for the majority, Ginsburg argued that the Constitution allows U.C. Hastings to adopt any reasonable policy.<sup>48</sup> And, she insisted, its policy is reasonable.<sup>49</sup> She explained, “Hastings’ policy, which incorporates—in fact, subsumes—state-law proscriptions on discrimination, conveys the Law School’s decision ‘to decline to subsidize with public monies and benefits conduct of which the people of California disapprove.’”<sup>50</sup> That conduct, of course, is forming a group with other Christians.<sup>51</sup>

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48 *Martinez*, 130 S. Ct. 2971, 2984–88 (2010) (arguing that limited-public-forum decisions, under which speech limitations must be reasonable and viewpoint neutral, provide the appropriate analytical framework for the *Martinez* case).

49 *Id.* at 2991.

50 *Id.* at 2990.

51 This is a sleight of hand. Justice Ginsburg is not referring here to U.C. Hastings' stipulated all-comers policy. California law does not require student groups to accept all-comers.

So, the people of California disapprove of discrimination on the basis of religion. To prevent them being implicated in Christian Legal Society's religious discrimination, of which the people of California disapprove, U.C. Hastings discriminates against Christian Legal Society on the basis of . . . its religion. And this is constitutionally permissible, says Justice Ginsburg, because U.C. Hastings must have the freedom "to advance state law goals," such as eradicating religious discrimination, by whatever constitutionally-permissible means it can, including engaging in religious discrimination.<sup>52</sup>

This is an expansive freedom, indeed! U.C. Hastings is free to vindicate its non-discrimination commitments by violating those commitments. Where in the Constitution is this freedom to violate one's own commitments to be found? Justice Ginsburg grounded U.C. Hastings' freedom not in the Speech or Assembly Clauses of the First Amendment, nor in the Tenth Amendment's reservation of powers to the states. Indeed, she did not ground it in the United States Constitution at all (written or living) but rather in the university's "right to preserve the property under its control for the use to which it is lawfully dedicated."<sup>53</sup> This right of private property is among the oldest in our constitutional order. U.C. Hastings enjoys the rights of private property under common law, not in its capacity as a state actor but rather in its capacity as a private property owner. It frees the University to restrict access to the intellectual and social life of its campus. Because the University is also a state actor, it must ensure that its restrictions are reasonable and content-neutral. But subject to those conditions, the University may exclude from its property anyone it pleases, just like any other property owner.

The right to exclude others from one's property, which the Court has elsewhere called the most essential of all property rights,<sup>54</sup> protects a robust domain of constitutional freedom. The English jurist and scholar William Blackstone called property the owner's "despotic

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Instead, California law prohibits discrimination on the basis of religion and sexual orientation. *That* prohibition is incorporated in and subsumed by U.C. Hastings' *written* policy, the very policy that Justice Ginsburg insisted she would not consider; the very policy that discriminates against Christian Legal Society because it is a *religious* group. Justice Ginsburg secured for U.C. Hastings a favorable standard of review by treating the all-comers policy as the relevant law and ignoring the written policy, then allowed U.C. Hastings to *clear* the standard of review by treating the *written* policy as law and ignoring the all-comers policy.

<sup>52</sup> *Martinez*, 130 S. Ct. at 2990–91.

<sup>53</sup> *Id.* at 2984.

<sup>54</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 419 (1982) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (referring to the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property")).

dominion.”<sup>55</sup> Within this domain property owners, including universities, are not answerable to those outside. Blackstone’s description was a bit of an exaggeration, but not much. The point of private property is to free property owners, such as universities, and their collaborators, such as faculty, staff, and students, to choose and to act for their own purposes, to make their own commitments, and to free them from having to justify their choices and commitments to others. By choosing to act for purposes that others might not value, those within the property domain exercise freedom to commit themselves to certain obligations and norms, to constitute themselves in particular ways that they deem valuable.

So, property rights free a university to promote the intellectual and social life of its campus by restricting access to it. This freedom is constrained by reason, by common law doctrines which limit property rights, and by public law limitations. For example, because U.C. Hastings is also a state actor, it must ensure that its restrictions are reasonable and content-neutral. But subject to those conditions, the University may exclude from its property anyone it pleases, just like any other property owner.

Even those norms that are imposed on private property owners from without are largely determined by institutions of private ordering. When domains of property ownership come into conflict with other domains of property ownership, the rights and duties of each are settled and determined not only by legislatures but also by institutions other than governments. Neighbors create rights and duties by creating easements, covenants, and servitudes, or by forming condominium associations and other common-interest communities. Owners of common resources, such as lakes and rivers, distribute entitlements to the resources among their members in accordance with general common law standards of reasonable use. And when conflict cannot be avoided, a jury, that great common law institution of practical wisdom, resolves it. The jury draws its membership from the community of private citizens, and resolves disputes between private parties who hire their own lawyers and put on their own evidence. Private citizens thus settle the question of what should be done.

Those norms that are formed by and around property ownership become structural, institutional, and in a very real sense, constitutional. The norms become constitutional norms in both a private, internal sense and in a public, political sense. *Internally*, by exercising its right to exclude for particular reasons, the property owner constitutes itself as a particular kind of property owner. U.C. Hastings and

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55 2 WILLIAM BLACKSTONE, COMMENTARIES \*2.

other universities that have decided to exclude Christian groups, such as Vanderbilt University, have by that decision constituted themselves as communities that exclude Christians.<sup>56</sup> They have made a commitment to exclude Christians, and they would therefore fail to respect their own integrity if they thereafter accepted Christians. The norms of exclusion that they have adopted to govern their own conduct have become part of their institutional identities. They have made themselves into universities from which Christian organizations are excluded as a matter of conclusive reasons, a matter of right and obligation.

*Externally*, the actions of U.C. Hastings and Vanderbilt also have constitutional implications for those outside their communities. When it exercises its right to exclude, U.C. Hastings imposes legal obligations on those whom it excludes, just as it creates legal rights for those whom it allows on its property. The duty of self-exclusion which correlates with the right to exclude is, if not perfectly absolute, categorical. The particular reasons why U.C. Hastings and Vanderbilt have decided to exclude Christian groups are irrelevant to the practical deliberations of those Christian groups. It is enough for them to know that they are excluded from property that they do not own.

So, within the confines of the Constitutional text, U.C. Hastings has broad discretion to adopt policies which determine the rights and obligations of all those who participate in the life of the university *and* to shape the rights and duties of those would like to do so, and those who interact with the university—the university’s neighbors, creditors, employers of its graduates, and many others. The Constitution largely frees U.C. Hastings to reason about what is just and right, what rights and obligations potential members and collaborators will and will not have, even though, or perhaps because, its decisions will have profound consequences for those within its community and those within the political community of which it is part.

The categorical nature of the duty of self-exclusion is mitigated by property’s promotion of pluralism. Christian groups are free to acquire their own property and open their own universities. Not far from Vanderbilt sits Union University, a landowner that has consti-

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<sup>56</sup> See Vanderbilt University Dean of Students, *Student Organizations & Governance Equal Opportunity Policies*, available at <http://www.vanderbilt.edu/studentorganizations/registering-your-org/equal-opportunity-policies> (“Registered student organizations must be open to all students as members and must permit all members in good standing to seek leadership posts.”); Michael Stokes Paulsen, *Vanderbilt’s Right to Despise Christianity*, Public Discourse (Mar. 14, 2012), <http://www.thepublicdiscourse.com/2012/03/4930/> (“Last week, the [Vanderbilt] administration officially declared the policy that Vanderbilt will exclude student religious groups that ‘impose faith-based or belief-based requirements for membership or leadership.’”).

tuted itself around a distinctly Christian understanding of higher education. Domains of property ownership promote various and plural institutions of value, commitments, and order.

Private universities, such as Vanderbilt and Union, enjoy even broader freedom than state universities to constitute private and civic orders and to help shape our political orders.<sup>57</sup> Because they are not state actors, private universities are largely unconstrained by written constitutions. They are bound only by those reasonableness standards which preceded our written Constitution, those contained in the common law. Furthermore, private universities such as Vanderbilt and Union help to shape the common law itself. The common law is that body of customs and traditions by which our people and institutions have ordered their civic affairs for so long “that the memory of man runneth not to the contrary,” as Blackstone expressed it.<sup>58</sup> But customs and traditions change; they evolve to accommodate new ideas. So, it matters a lot which people, groups, and institutions shape our customs and traditions, and which ideas they act upon.

Who today is shaping the customs and traditions that will order the civic lives of future generations? It seems that universities play a leading role in this foundational aspect of constitutional ordering. Universities are leaders among those actors who create customs, rights and obligations, and among those who shape public views

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<sup>57</sup> Apart from the Thirteenth Amendment, the provisions of the United States Constitution constrain only state actors, not private property owners. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972) (holding that a private shopping center can prohibit distribution of handbills, even if such prohibition would violate First Amendment rights in a public space) (“It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist.”). But some state constitutions have been interpreted to place constitutional limits on private property owners, such as universities and shopping centers, which provide public forums. *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (“It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision.”); *State v. Schmid*, 423 A.2d 615, 632 (N.J. 1980) (“Regulations . . . devoid of reasonable standards designed to protect both the legitimate interests of the University as an institution of higher education and the individual exercise of expressional freedom cannot constitutionally be invoked to prohibit the otherwise noninjurious and reasonable exercise of such freedoms.”). Therefore, as a general rule, the policies of private institutions are constrained only by the general rational basis requirement which undergirds constitutional law in the common law tradition at least since *Dr. Bonham’s Case*, 8 Co. Rep. 114a, 77 Eng. Rep. 638 (C. P. 1610). Sir Edward Coke, Chief Justice of England’s Court of Common Pleas, stated that “when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.” 8 Co. Rep. at 118a, 77 Eng. Rep. at 652.

<sup>58</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*67.

about what customs, rights, and obligations ought to be given the force of law. Therefore they are influential creators of private, civic, and political order. We ought to consider how these actors exercise their considerable power. How do universities situate their campuses, and how does that affect their neighbors' property? What consequences do universities' actions have for those in their local communities and their states? Whom will these universities choose to educate? Whom will they hire to teach? What will they teach? What will they *not* teach? These are constitutional questions.