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***Confident Pluralism:
Surviving and Thriving Through Deep Difference***

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Introduction

It was just a thought experiment.

My class on Religion and the Constitution had turned to the relationship between school funding and the First Amendment's prohibition on the establishment of religion. The big question in this area of the law is where to draw the line between "appropriate" and "inappropriate" government funding of religious schools. The key case is a 1947 Supreme Court decision about whether taxpayer dollars could reimburse parents for the cost of bus fares to transport their children to Catholic schools. The intellectual puzzle has confounded courts for decades: if tax dollars can pay for buses, then what about textbooks, prayer books, and Bibles? Conversely, if they can't pay for buses, then what about public roads and crossing guards near the schools?¹

Law professors make a living out of posing hypotheticals, and I threw one out to the class. The Catholic Church, as most people know, restricts its priestly office to men. That position puts it at odds with some contemporary norms about gender equality. Suppose that a city government provided crossing guards to all of its public and private schools because it had good evidence that fewer schoolchildren would be hurt or killed with those guards in place. The guards cost taxpayer dollars. Could the city refuse to pay for guards at the Catholic school because of the school's views about gender?

I had expected some back-and-forth, but I was surprised when one student dug in: "Yes, absolutely. The school has chosen to place itself outside of the acceptable bounds of society—it is not entitled to any services of the state." I pressed further: "What if the school catches on fire? Can the fire department refuse to answer the call?" "Yes," the student responded. "The school has made a choice. It can try to put out the fire on its own." "Well," I asked, "what if there is an active shooter in the school? Should the SWAT team just stand by and wait for the shooter to finish up?" The student replied, "I don't see why not."

To be sure, it was just a classroom hypothetical. There was also a certain logic to my student's responses: if we're serious about disentangling government from any "support" of anti-orthodox positions, then maybe we should go all the way. And even if most of us would not go that far, plenty of people call for the marginalization of their fellow citizens in other ways. Some of us make comments that push in the direction of my student's answers: we may not want to see schools burning or SWAT teams standing down, but we would just as soon see those with whom we disagree shut up, move away, or disappear.

These kinds of views are especially prominent in political commentary. Conservative newsman Bill O'Reilly says that professional athletes who join protests about racial injustice "[aren't] smart enough to know what they're doing." Theatre critic Michael Feingold suggests that Republicans "should be exterminated before they cause any more harm." Talk show host Rush Limbaugh calls law student Sandra Fluke a "slut" because she supported contraception coverage under the Affordable Care Act. *Slate* editor J. Bryan Lowder writes that "it would be enough for me if those people who are so ignorant or intransigent as to still be anti-gay in 2014 would simply shut up." Former Obama speechwriter Jon Lovett has dubbed our political discourse "the culture of shut up."²

Our antipathy for the viewpoints and values of others extends beyond words. Consider the following examples:

- In 2012, North Carolina voters passed an amendment that constitutionalized the state's definition of marriage between a man and a woman and invalidated other forms of "domestic legal union." The amendment potentially jeopardized protections for gays and lesbians in family law, domestic violence law, estate planning, and employee benefits.³
- Across the state of California today, many conservative religious student groups are no longer welcome on the campuses of many public colleges and universities. And it's not just a West Coast thing. Vanderbilt University, Bowdoin College, and a number of other schools have also kicked out

conservative religious groups. These schools rely on “all-comers” policies that require student groups to admit as members—and even leaders—any student who wishes to participate. The Republican club must accept Democrats. The pro-choice club must accept pro-lifers. Conservative religious groups with membership or leadership restrictions are unable to comply. These policies send a clear message to conservative religious groups: change or leave.⁴

- In November 2014, Alabama voters passed a constitutional amendment prohibiting state courts from applying foreign law that would violate state or federal law. The amendment had no legal consequences; it was, as University of Alabama law professor Paul Horwitz noted, “completely redundant” of existing laws. But it was not without symbolic effect. Capitalizing on a growing suspicion of Muslim immigrants who follow sharia law, the Alabama amendment traded on anti-Muslim hostility to draw voters to the ballot box. Thirty states have considered similar amendments or legislation.⁵

Here’s another example, with less overt hostility but deep tensions just below the surface. Wellesley College, an all-women’s school just west of Boston, now confronts internal challenges around its growing transgender student population. Even though Wellesley admits only women, a number of its current students have transitioned to men after matriculation. As a recent *New York Times* story asks: “What’s a women’s college to do? Trans students point out that they’re doing exactly what these schools encourage: breaking gender barriers, fulfilling their deepest yearnings and forging ahead even when society tries to hold them back. But yielding to their request to dilute the focus on women would undercut the identity of a women’s college.” One student reasoned: “I realized that if we excluded trans students, we’d be fighting on the wrong team. We’d be on the wrong side of history.” A recent graduate reached the opposite conclusion: “Sisterhood is why I chose to go to Wellesley.” The *New York Times* noted that this woman “asked not to be identified for fear she’d be denounced for her opinion.”⁶

This last example exposes a particularly acute challenge: Wellesley cannot remain a women's college whose identity in some ways rests on gender exclusivity and at the same time welcome transgender students who self-identify as men. It will have to choose between two competing views. But perhaps even more important than *what* decision Wellesley reaches is *how* it reaches that decision. Will Wellesley be able to choose its own institutional identity, or will the government impose a norm on the private school through law and regulation? Will other citizens tolerate Wellesley's choice, or will they challenge its accreditation, boycott its events, and otherwise malign its existence? Will the process through which Wellesley reaches its decision be one of open engagement across deep difference, or will students, faculty, and administrators speak only under the cover of anonymity?

Our Deep Differences

The examples that I've recounted point to some of our differences over questions of politics, religion, and sexuality. We could all name many other issues that divide us. These deep and often irresolvable differences call into question our constitutional aspiration for "a more perfect union," our national metaphor of a great "melting pot," and the promise of our nation's seal, *E pluribus unum* ("Out of many, one").

Our differences pervade our beliefs, preferences, and allegiances. They affect not only what we think, but also *how* we think, and how we see the world. The philosopher John Rawls called it the "fact of pluralism"—the recognition that we live in a society of "a plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life."⁷

Not all of our differences are problematic. Most of us think some difference is good, that this variety of perspective makes life more interesting. I think the world is a better place because I pull for the Duke Blue Devils and some of my friends cheer for lesser basketball teams. March Madness would be less interesting if

everybody liked Duke and nobody cheered against them. We might reach a similar conclusion about beauty, taste, and humor. Some of these differences enrich our lives. Some of them lead to sharper thinking and greater creativity.⁸

On the other hand, most of us do not think that all difference is good. We can all name things that we think the world would be better off without. This is especially true when it comes to our moral beliefs. We might prefer a society in which everyone agreed about what counts as a justifiable homicide, a mean temperament, or a good life.

To complicate matters, we also disagree over the nature of our disagreements, and over how much disagreement is a good thing. Moreover, at least some of our most important beliefs cannot be reconciled with one another. It cannot be the case that the act of abortion is both morally acceptable and morally intolerable. It cannot be the case that God exists and that God does not exist. And these differences matter far more than basketball allegiances. What are we to do in light of our deeply held disagreements?

The philosopher Jean-Jacques Rousseau offered one response: “it is impossible to live at peace with those we regard as damned.” We see echoes of Rousseau’s bleak pronouncement in recent skirmishes between conservative religious beliefs and gay rights. Consider the ferocious debate that erupted over a religious liberty law in Indiana in March of 2015. Conservative radio host Mark Levin contended that opponents of the law “hate America.” Family Research Council President Tony Perkins argued that any changes to the law “would gut religious freedom in Indiana.” In the other direction, Apple CEO Tim Cook was just as hyperbolic, calling the law a “very dangerous” effort to “enshrine discrimination” and “rationalize injustice.” And journalist Ben Kepes worried that the law “feels very much like a prelude to another Kristallnacht.” Meanwhile, the crux of the actual legal debate seemed to be whether a few Christian florists and cake bakers (and, apparently, one hapless pizza joint) could refuse to provide their services for a same-sex wedding. That question is not trivial. But regardless of one’s view of

the merits, the policy implications do not come close to the accompanying rhetoric or the ends to which that rhetoric points.⁹

Other parts of the world experience far worse than irresponsible rhetoric. Rousseau's prediction has played out more concretely in places like Rwanda, Somalia, South Africa, and the Middle East. As author Shadi Hamid has argued, we cannot dismiss the developments in Gaza, Syria, and Iraq as rooted in "ancient hatreds." Rather, the deterioration in the Middle East results from a "collective loss of faith in politics." We see even more striking examples of Rousseau's claim in the slaughter of innocents by groups like Al Qaeda and ISIS. The impossibility of living in peace with those we think are damned ultimately leads to what Hamid calls "the end of pluralism."¹⁰

The end of pluralism is a nightmare.

Confident Pluralism insists that Rousseau was wrong: our shared existence is not only possible, but also necessary. Confident Pluralism offers a political solution to the practical problem of our deep differences. Instead of the elusive goal of *E pluribus unum*, it suggests a more modest possibility—that we can live together in our "many-ness." That vision does not entail Pollyannaish illusions that we will solve all of our differences and live happily ever after. Few people think that all of our differences will go away—we are stuck with the good, the bad, and the ugly of pluralism. But Confident Pluralism remains possible in both law and society.

Confident Pluralism takes both *confidence* and *pluralism* seriously. Confidence without pluralism misses the reality of politics. It suppresses difference, sometimes violently. Pluralism without confidence misses the reality of people. It ignores or trivializes our stark differences for the sake of feigned agreement and false unity. Confident Pluralism allows genuine difference to coexist without suppressing or minimizing our firmly held convictions. We can embrace pluralism precisely because we are confident in our own beliefs, and in the groups and institutions that sustain them.

This confidence in our own convictions reinforces our differences and increases the risk of friction. For this reason, Confident Pluralism differs from a number of other proposals that seek consensus across difference, including various strands of Rawlsian liberalism and, before that, mid-twentieth century liberalism. It comes much closer to law professor Abner Greene’s claim that consensus proposals seek a “false solace” in attempting to overcome difference and “we do better by recognizing difference as something we can’t get past.” Confident Pluralism does not suppress or ignore conflict—it invites it.¹¹

At the same time, Confident Pluralism recognizes that we have better and worse ways to live out our own confidence and to negotiate the pluralism around us. Confident Pluralism should not be misread as the rejection of any consensus at all—it is not an invitation to anarchy. Like any serious proposal of how to live together in society, it draws upon certain shared resources and aspirations. We retain some modest unity in our diversity.¹²

The origins of the phrase “Confident Pluralism” point toward these possibilities. In 2010, the United States Supreme Court upheld the validity of an “all-comers” policy at a public law school in San Francisco. That decision, *Christian Legal Society v. Martinez*, rejected the First Amendment claims of a Christian group whose membership policies required celibacy outside of heterosexual marriage. The case triggered a wave of similar policies that have removed conservative religious groups from college campuses. During the litigation, the group Gays and Lesbians for Individual Liberty (GLIL) filed a brief highlighting some of the problems with the “all-comers” policy. Founded in 1991, GLIL promotes “tolerance and acceptance of homosexuals among members of the wider society,” and it strongly disagreed with the membership policies of the Christian group. But it argued that the “all-comers” policy unwisely sacrificed associational freedom. The brief concluded that “the First Amendment envisions a better way: *A confident pluralism* that conduces to civil peace and advances democratic consensus-building.”¹³

The goal of Confident Pluralism is not to settle which views are right and which views are wrong. Rather, it proposes that the future of our democratic experiment requires finding a way to be steadfast in our personal convictions, while also making room for the cacophony that may ensue when others disagree with us. Confident Pluralism allows us to function—and even to flourish—despite the divisions arising out of our deeply held beliefs. These observations are consistent with Harvard Law Dean Martha Minow’s assertion that “whether through a principled commitment to tolerate others or a pragmatic commitment to survive, we who live in plural worlds must exhibit enough mutual respect at least to coexist.”¹⁴

This book is an argument for mutual respect and coexistence. It is built around the two-fold premise that Confident Pluralism remains possible for both law and society. We can think of these possibilities in terms of constitutional commitments and civic practices, respectively. The first part of the book (Chapters 1-4) sets out the constitutional commitments. The second part of the book (Chapters 5-8) turns to the civic practices.

Constitutional Commitments

Chapters 1-4 contend that recent constitutional doctrine has departed from our longstanding embrace of pluralism and the political arrangements that make pluralism possible. The arguments in these first four chapters are meant to engage scholars, judges, and policymakers who have undervalued and weakened protections for the voluntary groups of civil society, the public forum, and certain forms of generally available funding. They are also meant to educate citizens about the poor state of the current legal doctrine in these areas, and to encourage political solutions where judicial ones have failed.

Chapter 1 begins with the modest unity that allows us to coexist in political community rather than in anarchy. One reason that Confident Pluralism is possible is that we retain some minimal agreement about our society even in the midst of our deep differences. Part of this agreement recognizes the wisdom of individual

rights that guard against state-enforced orthodoxy and allow us to create meaning apart from majoritarian norms. Our modest also unity includes two premises, inclusion and dissent. The inclusion premise is that we seek for those within our boundaries to be part of the political community. The dissent premise is that we allow for people to dissent from the norms established by that community.

Chapter 2 sets out the cornerstone of Confident Pluralism’s constitutional commitments: the protections for individuals to form and gather in groups of their choosing. These protections are under pressure from modern changes to the right of association focusing on intimacy and expressiveness. Intimate association protects very few actual groups. Expressive association, which emerges most clearly in two Supreme Court decisions—*Roberts v. United States Jaycees* and *Boy Scouts of America v. Dale*—lacks a coherent framework and leaves certain groups deemed “non-expressive” particularly vulnerable. Chapter 2 explores these ideas through the Top Hatters Motorcycle Club and Muslim Student Associations. It explores the importance of strengthening protections for the voluntary groups of civil society. Let’s call this the Voluntary Groups Requirement.

Chapter 3 introduces the related concept of the public forum through the popular television show *Parks & Recreation*. Real-life public forums, like the forums depicted in *Parks & Rec*, are government-provided spaces where viewpoints become voices. They are an essential part of Confident Pluralism because they allow citizens and the groups that they form to advocate, protest, and witness in common spaces—and they are insufficiently protected under current constitutional doctrine. We have seen these weaknesses exposed in a variety of settings, including the crackdown of protests in Ferguson, Missouri, restrictions against labor activism, and regulation of anti-abortion protesters. A separate challenge arises because public forums are not the only places where we enact the aspirations of Confident Pluralism—privately owned spaces like coffee shops, parks, and online service providers increasingly serve this function. Ordinary citizens need either spaces provided and facilitated by the government or “private public forums” to come together for purposes of dissent, disagreement, and diversity. Let’s call this the Public Forum Requirement.

Chapter 4 shows how some forms of government funding are indispensable to the vision of Confident Pluralism. Using as a case study the 1970s magazine, *Big Mama Rag*, Chapter 4 explains why the government’s discretion with its money—or rather, with our money—is not unlimited. Confident Pluralism argues that when government actors create and maintain generally available funding that facilitates a diversity of viewpoints and ideas, they may not constrain that funding based on viewpoint or ideology. This principle applies to the scheme of federal tax exemption at issue not only in *Big Mama Rag* but also in a well-known Supreme Court decision, *Bob Jones University v. United States*. And it encompasses the kinds of forums for student organizations on public college and university campuses underlying the Court’s decision in *Christian Legal Society v. Martinez*. Let’s call this the Public Funding Requirement.

Civic Practices

Chapters 5-8 canvass the civic practices of Confident Pluralism that for the most part lie beyond the reaches of law. We can, of course, argue for the importance of constitutional commitments and then ignore the norms underlying those commitments in our own lives. But it is, I think, better to reflect our aspirations for the law in the way we live. Embracing Confident Pluralism in our civic practices can also reinforce our constitutional commitments. This connection between culture and law is one of the key insights of law professor Vincent Blasi’s argument that the best way, and perhaps the only way, to strengthen the First Amendment is to ensure that it “evokes genuine sentiments of long-term commitment or aspiration.” The civic practices of Confident Pluralism draw upon similar intuitions.¹⁵

Chapter 5 introduces three civic aspirations that move us closer toward a world of Confident Pluralism. *Tolerance* is the recognition that people are for the most part free to pursue their own beliefs and practices, even those beliefs and practices we find morally objectionable. *Humility* takes the further step of recognizing that others will sometimes find our beliefs and practices morally objectionable, and that

we can't always "prove" that we are right and they are wrong. *Patience* points toward restraint, persistence, and endurance in our interactions across difference. Importantly, we can pursue these aspirations without agreeing on the reasons for doing so. If enough of us embrace them, we may be able to sustain Confident Pluralism even as we disagree about the underlying justifications.

Chapter 6 looks at the implications of Confident Pluralism for our speech, including our use of name-calling and labeling. The First Amendment's free speech right allows us to say almost anything to almost anyone. But that freedom places a great deal of responsibility on us for what we choose to say. On most of the deeply contested issues at the core of our divisiveness, our efforts toward Confident Pluralism are especially hindered by two kinds of speech: the Hurtful Insult and the Conversation Stopper. Speech that breeds social intolerance by stigmatizing people instead of challenging ideas is at odds with the aspirations of Confident Pluralism. We can choose to avoid this stigmatizing speech and instead pursue what law professor James Boyd White calls "living speech." Let's call this the Speech Imperative.¹⁶

Chapter 7 considers the role of collective action (including boycotts, strikes, and protests) directed against our fellow citizens. Collective action reveals an inherent and perhaps irresolvable tension for Confident Pluralism. On the one hand, Confident Pluralism encourages collective action to resist and challenge forms of majoritarian power. On the other hand, collective action directed at other private citizens and their institutions exerts a kind of power that may be inconsistent with Confident Pluralism. Chapter 7 explores these tensions by considering a civil rights era boycott in Claiborne County, Mississippi, and the more recent Internet boycott of the Mozilla Corporation over its hiring of Brendan Eich. The aspirations of tolerance, humility, and patience do not point to a bright-line rule for our collective action, but they do offer some guidance. Let's call this the Collective Action Imperative.

Chapter 8 examines the implications of Confident Pluralism for our engagement with people who differ from us in important and often insurmountable ways.

Those relationships are not always possible—sometimes the best we can do is coexist. But in many cases, we can work together toward common ground in spite of our differences. In fact, these common efforts may not actually bridge any ideological differences—we may remain uncompromising or unchanged in our own views. That’s not to say that either compromise or change is impossible. But it does suggest that meaningful relationships for the sake of shared interests do not depend on either one. Let’s call this the Common Ground Imperative.

The discussion about civic practices is based as much on experience as it is on expertise. It arises out of some of my own encounters with pluralism and difference—a reminder that none of us speaks from a “neutral” position unencumbered by our backgrounds. Like many people, I would like to think of myself as part of the reasonable middle—patiently (and tolerantly and humbly) waiting for others to move toward me and my beliefs. But what counts as “the reasonable middle” is usually in the eye of the beholder. Plenty of people on all sides of me will see some of my views as extreme and offensive in one way or another, while others will think that I don’t go far enough. And plenty of people will think the same of your views.

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1. *Everson v. Board of Education*, 330 U.S. 1 (1947).
 2. Michael Feingold, “Foreman’s Wake-Up Call,” *Village Voice* (2004), quoted in Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided By Politics and Religion* (New York: Vintage Books, 2012), 335; Jon Terbush, “On Ferguson, Stop Telling Athletes to ‘Shut Up and Play,’” *TheWeek.com* (Dec. 4, 2014) (quoting Bill O’Reilly); Kim Geiger, “Rush Limbaugh’s ‘Slut’ Comment Draws Rebukes from All Sides,” *Los Angeles Times* (Mar. 2, 2012); J. Bryan Lowder, “No, It’s Not Too Soon To Condemn Public Figures for Being Anti-Gay,” *Slate.com* (April 7, 2014); Jon Lovett, “The Culture of Shut Up,” *TheAtlantic.com* (April 7, 2014).
 3. N.C. Const. art. XIV, § 6; David Zucchini, “Marriage Amendment Vote Puts National Focus on North Carolina,” *Los Angeles Times* (May 5, 2012). Not everyone agreed about the potential effects of the Amendment. See E. Gregory Wallace, “The Sky Didn’t Fall: The Meaning and Legal Effects of the North Carolina Marriage Amendment,” *22 American University Journal of Gender Social Policy and Law* 1 (2013) (arguing against “predictions of dire consequences that have yet to occur—and likely never will”). In 2014, a federal district court ruled North Carolina’s ban on same-sex marriage unconstitutional in *General Synod of the United Church of Christ v. Cooper*, No 3:14-cv-213 (W.D. N.C.) (October 10, 2014).
 4. Michael Paulson, “Colleges and Evangelicals Collide on Bias Policy,” *New York Times* (June 10, 2014), A1.
 5. Greg Garrison, “Amendment Banning ‘Foreign Law’ in Alabama Courts Passes; Will be Added to Alabama Constitution,” *AL.com* (November 4, 2014); Paul Horwitz, “Amendment One is Useless, Costly, and Wrong,” *AL.com* (October 30, 2014).
 6. Ruth Padawer, “When Women Become Men at Wellesley,” *New York Times* (October 15, 2014). In March 2015, Wellesley announced that it “will consider for admission any applicant who lives as a woman and consistently identifies as a woman.” Abby McIntyre, “Wellesley’s Decision to Admit Transgender Women Is Smart and Just,” *Slate* (March 5, 2015).
 7. John Rawls, “The Idea of an Overlapping Consensus,” *7 Oxford Journal of Legal Studies* 1, 4 (1987).
 8. See Robert D. Putnam, “*E Pluribus Unum*: Diversity and Community in the Twenty-first Century,” *30 Scandinavian Political Studies* 140 (2007). For making my basketball watching more pleasurable by their allegiances to less fortunate programs, I am indebted to David Dean, Ford Jordan, Don Fox, Drew Hill, David Kernodle, Ruthie McGinn, Jonathan Murfee, Amit Shanker, and Ian Smith.
 9. Jean-Jacques Rousseau, *The Social Contract*, trans. G.D.H. Cole (London: Dent, 1968), 114. Gabriel Arana, “Gays Hate America And Other Right-Wing Talking Points On Indiana,” *Huffington Post* (April 3, 2015) (quoting Mark Levin); Family Research Council, “Religious Freedom Should Not Be Held Hostage to Big Business, Family Research Council Urges Veto” (April 2, 2015 Press Release); Tim Cook, “Pro-discrimination ‘Religious Freedom’ Laws are Dangerous,” *Washington Post* (March 29, 2015); Ben Kepes, “Salesforce.com Makes A Stand Against Bigotry,” *Forbes.com* (March 26, 2015); Jon Healey, “The Backlash Against the Backlash Against Indiana’s New Religious Freedom Law,” *Los Angeles Times* (April 2, 2015) (describing the threats and boycotts against Memories Pizza after the owners said in response to a local television reporter’s question that they would not cater a gay wedding).
 10. Shadi Hamid, “The End of Pluralism,” *The Atlantic* (July 13, 2014).
 11. Abner Greene, *Against Obligation: The Multiple Sources of Authority in a Liberal Democracy* (Cambridge, Mass.: Harvard University Press, 2012), 23. See also Jonathan Sacks, *The Dignity of Difference: How to Avoid the Clash of Civilizations* (New York: Continuum, 2011) (arguing for the importance of taking difference seriously). For my critiques of the consensus aspirations of Rawlsian liberalism and mid-twentieth century liberalism, see John D. Inazu, *Liberty’s Refuge: The Forgotten Freedom of Assembly* (New Haven: Yale University Press, 2012), 97-117 (critiquing the “liberal consensus” of mid-twentieth century pluralist political theory), 153-162 (critiquing aspects of Rawlsian liberalism). Confident Pluralism is, however, similar to Rawls in its agnosticism about the moral justifications for and moral critiques of the fact of pluralism. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993). One key difference between Confident Pluralism and Rawls’s political pluralism is the normative value of institutions, which Rawls addressed sporadically and sometimes noncommittally in discussions of the rights of assembly, association, and religion. Confident Pluralism’s stronger embrace of institutional autonomy (in its commitment to the rights of assembly and association) potentially places it in tension with the Rawlsian project. I thank Larry Solum for insights along these lines.
 12. A number of recent works have advanced pluralistic political solutions. See, e.g., Chandran Kukathas, *The Liberal Archipelago* (New York: Oxford University Press, 2003); Nancy Rosenblum, *Membership and Morals* (Princeton: Princeton University Press, 1998); John Kekes, *The Morality of Pluralism* (Princeton: Princeton

University Press, 1993); Mark Warren, *Democracy and Association* (Princeton: Princeton University Press, 2001); William Galston, *Liberal Pluralism* (New York: Cambridge University Press, 2002); Victor Muniz-Fraticelli, *The Structure of Pluralism* (New York: Oxford University Press, 2014); James Skillen, *Recharging the American Experiment: Principled Pluralism for Genuine Civic Community* (Grand Rapids: Baker Publishing Group, 1994); Jacob Levy, *Rationalism, Pluralism, and Freedom* (New York: Oxford University Press, 2014). Confident Pluralism draws from some of these insights but does not adopt a previously established theory.

13. Brief of Gays & Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner, *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010) (No. 08-1371), 1, 2, 35 (emphasis added); *ibid.*, 34 (“It should come as no surprise that GLIL does not agree with CLS’s views regarding homosexuality.”). Justice Alito’s dissent quoted the language of “confident pluralism” from the brief. *Christian Legal Society v. Martinez*, 561 U.S. 661, 734 (2010) (Alito, J., dissenting). Other gay rights groups weighed in on the opposite side. See, e.g., Brief of Lambda Legal Defense and Education Fund, Inc., and Gay & Lesbian Advocates & Defenders as Amicus Curiae in Support of Respondents, *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010) (No. 08-1371).

14. Martha Minow, “Introduction: Robert Cover and Law, Judging, and Violence,” in *Narrative, Violence, and the Law: The Essays of Robert Cover*, eds. Martha Minow, et al. (Ann Arbor: University of Michigan Press, 1993), 11.

15. Vincent Blasi, “The Pathological Perspective and the First Amendment,” 85 *Columbia Law Review* 449, 450–52 (1985). See also Jeffrey Stout, *Democracy and Tradition* (Princeton: Princeton University Press, 2004), 3–15.

16. James Boyd White, *Living Speech: Resisting the Empire of Force* (Princeton: Princeton University Press, 2006).