

**THE ROBERTS COURT AND FREE SPEECH ON CAMPUS:
EXAMINING CLS, WESTBORO, CITIZENS UNITED, AND MORE**

**STUDENT ORGANIZATIONS AND INSTITUTIONAL NON-DISCRIMINATION
POLICIES (*CHRISTIAN LEGAL SOCIETY V. MARTINEZ*)**

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I. Introduction

Issues of access, discrimination and diversity on campus are reflected in debates about whether, and to what extent, student organizations can or must be forced to abide by institutional non-discrimination policies. Does it matter if the institution is public (and therefore subject to constitutional law principles) or private? Should it matter if an organization receives some sort of formal recognition, funding, space, administrative support, or other resources from the institution? Does it matter if student fees, or some other type of public funds, are used to support the activities of these organizations? Are these organizations purely private groups of like-minded students who should be free to do whatever they like, and to include or exclude anyone they want? Is the marketplace of ideas on campus best served with a wide variety of institutionally-sanctioned expressive organizations in which some of the groups insist that students subscribe to a series of beliefs or tenets to protect the integrity and clarity of the groups' messages, so long as other groups with differing views are open to other students? Or is the mission of higher education better served when all officially recognized student organizations are open to all potentially interested students, regardless of those students' backgrounds or beliefs?

The rights of people to choose with whom they associate, and under what circumstances, are critically important in a democracy—but so are the rights of people to be free from discrimination. The Supreme Court recently wrestled with a case involving student organizations that raised important questions about fundamental constitutional rights related to free association, free exercise and establishment of religion, free expression, and anti-discrimination. In *Christian Legal Society v. Martinez*, 130 S.Ct. 2971 (2010), the Court provided some much-needed guidance on these issues in a case that attracted attention from institutions and organizations across the country. The constitutional provisions discussed by the Supreme Court apply to public institutions only, so its decision is not binding on private institutions. Consistent with their educational mission, however, private institutions might decide to follow constitutional principles on issues such as free expression, freedom of association, and freedom of religion (even if they are not legally required to do so) in developing their policies and procedures with regard to

student organizations. Private institutions are also subject to federal and state anti-discrimination statutes that apply to students.

This outline will provide an overview of the Court’s decision and its implications for student organizations and institutional policies and procedures.

II. *Christian Legal Society v. Martinez* (2010)

The U.S. Supreme Court ventured into this thicket of legal issues when it decided the case of *Christian Legal Society v. Martinez*, 130 S.Ct. 2971 (2010). The Supreme Court took the case after several cases had been percolating in the lower federal courts, leading to differing outcomes with regard to the application of institutional non-discrimination policies to religious organizations on campus. The Christian Legal Society (“CLS”) and other national organizations had actively challenged institutional policies around the country that would have prevented local chapter of such national organizations from requiring students to subscribe to statements of faith as a criterion for membership or leadership. Prior to the Supreme Court’s decision, public colleges and universities had handled this issue in a variety of ways. Some, for example, had created exceptions from generally applicable non-discrimination policies for religious organizations seeking to ensure that members and leaders subscribed to the basic faith tenets of those religious organizations. Others had insisted that all student organizations abide by institutional non-discrimination policies and accept all students who expressed an interest in joining.

The Facts

The case arose at Hastings College of the Law, a public institution within the University of California system. The parties stipulated to a set of facts that were set forth before the Supreme Court as described here.¹ Hastings extends official recognition to student groups through its “Registered Student Organization” (RSO) program. This school-approved status includes several benefits, including use of school funds, facilities, and channels of communication, as well as Hastings’ name and logo. *Id.* at 2973. In exchange for recognition, RSOs must comply with certain conditions, including the institution’s Nondiscrimination Policy.² The Nondiscrimination Policy tracks state law barring discrimination on a number of bases, including religion and sexual orientation. Hastings interprets this policy to mandate “all comers” with respect to RSOs—i.e., RSOs

¹ CLS disputed some of the stipulated facts before the Supreme Court, but the Court found that the parties are bound by their own stipulations. CLS had urged the Court to review Hastings’ Nondiscrimination Policy, which CLS contended targets solely those groups that organize around religious beliefs or that disapprove of particular sexual behavior, and leave other associations free to limit membership to persons committed to the group’s ideology. The parties had stipulated, however, that RSOs must allow any student to participate, regardless of his or her status or beliefs. “Thus, for example, the Hastings Democratic Caucus cannot bar students holding Republican political beliefs from becoming members or seeking leadership positions in the organization.” *Christian Legal Society*, 130 S.Ct. at 2982 (citations omitted).

² RSO also were required to be non-commercial organizations, to limit membership to Hastings students, and to comply with Hastings’ “Policies and Regulations Applying to College Activities, Organizations and Students” (addressing a wide range of matters, e.g., alcoholic beverages at campus events, bake sales, and blood drives). *Id.*

must allow any student to participate, become a member, or seek leadership positions, regardless of his or her status or beliefs.

At the start of the 2004-05 academic year, the leaders of an existing Christian RSO formed a campus chapter of the Christian Legal Society, a national organization with student chapters at law schools across the country. These chapters are required by the national organization to adopt bylaws that require members and officers to sign a “Statement of Faith” and to conduct their lives in accord with prescribed principles—including the belief that sexual activity should not occur outside of marriage between a man and a woman. CLS interprets its bylaws to exclude from affiliation anyone who engages in “unrepentant homosexual conduct” or holds religious convictions different from those in the Statement of Faith. Hastings rejected CLS’s application for RSO status on the ground that the group’s bylaws did not comply with Hastings’ open-access policy because they excluded students based on religion and sexual orientation.

The Decision

CLS challenged the law school’s refusal to grant the group RSO status on the grounds that it allegedly violated the group’s First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion. Hastings prevailed in the trial and appellate courts, both of which held that the all-comers condition on RSO recognition was reasonable and viewpoint neutral. The lower courts found that Hastings did not order CLS to admit any student, and that it did not proscribe any speech; it merely placed conditions on the use of school facilities and funds.

The Supreme Court considered the specific question of “whether [a public institution’s] conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution.” *Id.* at 2984 (citation omitted). In a 5-4 decision authored by Justice Ginsburg (joined by Justices Stevens, Kennedy, Breyer and Sotomayor), the Court found the all-comers policy to be a reasonable, viewpoint-neutral condition on access to the RSO forum, and therefore not violative of First Amendment rights.

The Court applied “limited public forum” analysis in assessing CLS’s free-speech and expressive-association claims. A limited public forum is established when a public entity opens property that is “limited to use by certain groups or dedicated solely to the discussion of certain subjects.” *Id.* at 2984, n.11. Under this framework, a governmental entity, in regulating its own property, may impose restrictions on speech that are reasonable in light of the purposes of the forum and viewpoint neutral. *See, e.g., Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The Court noted that speech and expressive associational rights are closely linked in a limited public forum, and that these intertwined rights must therefore be treated together in this context.

Citing cases that distinguish “between policies that require action and those that withhold benefits,” *id.* at 2986 (citations omitted), the Court noted that “[ap]plication of the less-restrictive limited-public-forum analysis better accounts for the fact that Hastings,

through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition.” *Id.* (citation omitted). Hastings was not compelling CLS to include unwanted members; instead, it was merely requiring CLS to abide by the Nondiscrimination Policy if the CLS chapter wanted to receive the benefits of being an official RSO on campus. CLS clearly had the choice not to register as an RSO at Hastings (and instead to operate on its own, without any institutional subsidy), a choice that many other student organizations in fact made. Had it done so, the Nondiscrimination Policy would not have applied to it, and it could have excluded individuals from membership as it so chose. Indeed, Hastings indicated to CLS that if it chose to operate outside the RSO program, it could use Hastings facilities for meetings and activities, and “would also have access to chalkboards and generally available campus bulletin boards to announce its events.” *Id.* at 2981. The Court thus refused to rely in this instance upon expressive-association precedents in which private associations (outside of the context of educational institutions) were forced to include unwanted members, with no choice to opt out. *See, e.g., Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

In three previous cases, the Supreme Court held that public universities had unconstitutionally singled out student groups for disfavored treatment because of their points of view. *See Healy v. James*, 408 U.S. 169 (1972) (state college denied school affiliation to a student group that wished to form a local chapter of Students for a Democratic Society, which the college characterized as violent and disruptive and as having a “repugnant” philosophy); *Widmar v. Vincent*, 454 U.S. 263 (1981) (singling out religious organizations for disadvantaged treatment); and *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995) (striking down university’s denial of student-activity-fee funding to a publication that discussed issues from a Christian perspective). In this instance, however, the Court found Hastings’ restriction to be reasonable, and cited the authority of public educational institutions (rather than judges) to determine educational policy both in and outside the classroom:

Cognizant that judges lack the on-the-ground expertise and experience of school administrators, ... we have cautioned courts in various contexts to resist ‘substitut[ing] their own notions of sound educational policy for those of the school authorities which they review. (citations omitted)

...

A college’s commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process. (citations omitted)

Christian Legal Society, 130 S.Ct. at 2988-89.

The justifications for the all-comers requirement included the following that were mentioned as reasonable by the Court:

1. The open-access policy ensures that “leadership, educational, and social opportunities afforded by [RSOs] are available to all students.” *Id.* at 2988-89. Thus, “no Hastings student is forced to fund a group that would reject her as a member.” *Id.* at 2989.
2. It helps “Hastings police the written terms of the Nondiscrimination Policy without inquiring into an RSO’s motivation for membership restrictions.” *Id.* at 2990. (CLS had proposed that the school permit exclusion because of *belief* but forbid discrimination due to *status*, a proposal that the Court rejected because it would be difficult to apply in practice.)
3. To the extent it brings together individuals with diverse backgrounds and beliefs, the policy “encourages tolerance, cooperation, and learning among students.” *Id.* “And if the policy sometimes produces discord, Hastings can rationally rank among RSO-program goals development of conflict-resolution skills, toleration, and readiness to find common ground.” *Id.*
4. The policy followed state-law proscriptions on discrimination, reflecting a reasonable decision by the law school “to decline to subsidize with public monies and benefits conduct of which the people of California disapprove.” *Id.* (citation omitted)

The Court also found that CLS had access to substantial alternative channels of communication. Hastings had offered access to school facilities to conduct meetings and the use of chalkboards and generally available bulletin boards to advertise events. Reflecting its recognition of the realities of 21st-Century technology, the Court also cited the ready availability of electronic media and social-networking sites. *Id.* at 2991. As the Court noted, many private groups (including, e.g., fraternities, sororities, social clubs, and secret societies) are able to maintain a presence at universities without official school affiliation. *Id.* (citation omitted)

The Court rejected the argument that an all-comers policy will facilitate “hostile takeovers” of student organizations by individuals who want to subvert the mission and message of these organizations, noting the scant evidence of such hostile takeovers in light of the existence of thousands of student organizations focused on a wide variety of issues and concerns on campuses across the country. *Id.* at 2992. Students tend to self-sort into organizations consistent with their own interests and beliefs, and organizations have neutral options to prevent such takeovers by conditioning “eligibility for membership and leadership on attendance, the payment of dues, or other neutral requirements designed to ensure that students join because of their commitment to a group’s vitality, not its demise.” *Id.* As the Court noted, “[i]f students begin to exploit an all-comers policy by hijacking organizations to distort or destroy their missions, [an educational institution] presumably would revisit and revise its policy.” *Id.* at 2993.

In finding the all-comers policy to be viewpoint-neutral, the Court drew a contrast with previous cases mentioned above (*Healy*, *Widmar*, and *Rosenberger*) “in which

universities singled out organizations for disfavored treatment because of their point of view.” *Id.* at 2993. A policy requiring *all* student groups to accept *all* comers was characterized by the Court as “textbook viewpoint neutral.” *Id.* The Court also rejected the notion that the policy would predictably harm groups “whose viewpoints are out of favor with the campus mainstream,” because the policy serves purposes unrelated to expression. *Id.* at 2994 (citations omitted).

Finally, the Court remanded the question back to the lower federal courts as to whether the all-comers policy served as a pretext under which the institution engaged in selective enforcement against particular groups or viewpoints. *Id.* at 2995. The 9th Circuit Court of Appeals subsequently dismissed this claim by the CLS, stating that the group had not raised the new claim early enough in the litigation process. *See Christian Legal Society v. Wu*, No. 06-15956 (9th Cir. Nov. 17, 2010).

In a concurring opinion in the Supreme Court, Justice Kennedy underscored that an all-comers policy reinforces the educational mission of a university and the marketplace of ideas. Kennedy (considered the key swing vote on these cases in the current Court) offered a strong defense of this educational mission:

Law students come from many backgrounds and have but three years to meet each other and develop their skills. They do so by participating in a community that teaches them how to create arguments in a convincing, rational, and respectful manner and to express doubt and disagreement in a professional way. A law school furthers these objectives by allowing broad diversity in registered student organizations. But these objectives may be better achieved if students can act cooperatively to learn from and teach each other through interactions in social and intellectual contexts. A vibrant dialogue is not possible if students wall themselves off from opposing points of view.

The school’s objectives thus might not be well served if, as a condition to membership or participation in a group, students were required to avow particular personal beliefs or to disclose private, off-campus behavior. Students whose views are in the minority at the school would likely fare worse in that regime. Indeed, were these sorts of requirements to become prevalent, it might undermine the principle that in a university community—and in a law school community specifically—speech is deemed persuasive based on its substance, not the identity of the speaker. The era of loyalty oaths is behind us. A school quite properly may conclude that allowing an oath or belief-affirming requirement, or an outside conduct requirement, could be divisive for student relations and inconsistent with the basic concept that a view’s validity should be tested through free and open discussion. The school’s policy therefore represents a permissible effort to preserve the value of its forum.

Id. at 2999-3000. Although Kennedy focused his comments on legal education in particular, the general principles he discussed could be seen as similarly applicable in other higher education settings. Justice Stevens filed his own concurrence, asserting that

the goals a university chooses for an RSO program to serve represent policy (rather than legal) judgments, and that courts should therefore respect these judgments and let universities manage their own affairs.

In a lengthy dissent, Justice Alito (joined by Roberts, Scalia and Thomas) disagreed with the majority's characterization of Hastings' policy as a true all-comers policy and argued that the law school had in fact discriminated against the Christian Legal Society on the basis of its viewpoint.

III. Implications for Institutional Policies and Practices

All-comers policies: The Court's decision does not mandate colleges and universities to adopt all-comers policies for registered student organizations. Instead, it makes clear that such a policy (so long as it is viewpoint-neutral on its face, and as applied) is permissible.

In order to provide clear guidance, an institution with such a policy should articulate the policy in writing and make it readily available to all students and student organizations. The policy should ideally include some mention of the educational rationale for the policy to reflect the educational judgment used in formulating the policy, and to reinforce the educational role that registered student organizations play and how that role relates to the institution's broader mission and approach to learning. For example, if an institution decides that student organizations are at least in part a way to introduce students to different issues, activities, or perspectives with which the students may be unfamiliar (or about which they might be curious) —and as settings in which students can meet and learn from students who have different backgrounds and perspectives—then the institution may be more likely to decide that an all-comers policy is consistent with its educational mission and philosophy. If, on the other hand, the institution believes that student organizations exist in part so that students can band together with other like-minded students to express or reinforce their already-formed ideas and perspectives, and that the overall learning environment is best served by a multiplicity of such organizations so that everyone can find one or more groups with which to affiliate—then the institution might reach a different conclusion about how to structure its recognition policies.

The Supreme Court's opinion does not appear to foreclose the ability of institutions to make special exceptions for religiously-based organizations under anti-discrimination policies if they decide that doing so is consistent with their educational mission. It does not mandate, however, that institutions single out religious or other organizations for exemptions from generally applicable policies in this manner. In reaching this result, the Court provided some latitude to public institutions in which they can exercise their educational judgment. As institutions deal with increasingly diverse student bodies, they may need to consider how best to structure student organization forums that facilitate educational interactions among students from different backgrounds in constructive ways. The exercise of this judgment is not unlimited, however, given the need for institutions to apply their choices carefully and in an even-handed manner (as discussed below).

Selective enforcement: If an institution has a viewpoint-neutral all-comers policy, it must take care to see that the policy is enforced in an even-handed way with regard to student organizations of varying viewpoints and perspectives (whether such organizations might be religious or political in nature, for example). In a letter to college and university presidents dated August 13, 2010, the Foundation for Individual Rights in Education (FIRE) indicated its disagreement with the Court’s decision and highlighted in particular the difficulty of ensuring that all-comers policies are evenly and fairly enforced.

In order to address potentially fact-intensive inquiries regarding selective enforcement of institutional policies, it would behoove a college or university to keep careful records of how and when decisions are made with regard to requested recognition of student organizations, and on what bases.

Anti-discrimination policies: Related to the previous point, the ruling indicates that institutional anti-discrimination policies can be applied to registered student organizations, and that institutions do not have to make special exceptions for religious organizations in this regard. *See also* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919 (2006). Such anti-discrimination policies need to be reasonable and viewpoint-neutral. Policies that track federal and state laws, and/or that are based on general status-based categories (e.g., race, gender, age, religion, etc.), should be defensible under this framework. The application of such policies would presumably be directed at a form of conduct—i.e., ensuring that organizations do not take actions to prevent individuals from joining based on those individuals’ status in particular categories—rather than at the content of these organizations’ speech or their viewpoints.

Restrictions based on other types of membership requirements: The Court made clear that student organizations can maintain neutral and generally applicable membership requirements unrelated to an individual’s status or beliefs. Such requirements could include, for example, the payment of dues, maintenance of good attendance at the organization’s meetings, a prohibition on gross misconduct (i.e. boilerplate good-behavior standards), or a skills-based test (e.g., such as the writing competition administered by law journals). *See Christian Legal Society*, 130 S.Ct. at 2980. Organizations requiring some form of skill (athletic, musical, etc.) can therefore require students interested in membership to meet that skills requirement in order to participate. Institutions should take care to ensure that such provisions are enforced in an even-handed way (i.e., not in a manner that suggests that it has become a subterfuge for discrimination on some basis).

Hostile takeovers: The Court clearly indicated that colleges and universities could revisit their membership and leadership requirements (and presumably make them more stringent) if it turns out that existing policies are enabling “hostile takeovers” of student organizations by individuals who do not support the core mission or values of those organizations, and instead are trying to undermine them. Presumably, therefore, an institution (or a student organization) facing such a situation could strengthen its requirements on attendance, conduct, or other viewpoint-neutral bases.

Ensuring a diversity of viewpoints: Colleges and universities might want to put policies in place making it relatively easy and quick for students to form new registered organizations, assuming there is a sufficient demonstration of interest within the student body. Providing some flexibility and responsiveness can help to combat the concern with the possibility of hostile takeovers by students who might seek to undermine existing organizations.

Avenues for other, non-registered organizations: Institutions might want to examine, or at least be aware of, the resources available to non-registered student organizations, as well as any barriers that make it difficult for such organizations to form and interact in meaningful ways. While such organizations might not be officially sanctioned and therefore not eligible for special institutional resources (such as student fee money), it is helpful to understand the circumstances under which these groups operate (and therefore to assess the impact of decisions not to recognize certain organizations).

IV. Some Additional Rules of Thumb

The Court's decision in *Christian Legal Society v. Martinez* followed on the heels of a number of other previous decisions setting forth basic principles about the recognition and funding of student organizations. These basic principles flow from constitutional provisions, which from a legal perspective apply to public institutions only. Many private institutions have policies protecting academic freedom and other student rights, however, and have therefore followed these basic principles as a matter of policy. Private institutions might also be subject to state or local civil rights laws that prohibit various forms of discrimination against students, therefore providing some protections for student organizations or their members to be free from discriminatory treatment. *See, e.g., Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1 (D.C. 1987).

The basic constitutional principles include the following:

General Right to Organize and Be Recognized: Students in public colleges and universities “have a general right to organize, to be recognized officially whenever the school has a policy of recognizing student groups; and to use meeting rooms, bulletin boards, computer terminals, and similar facilities open to campus groups.” William A. Kaplin & Barbara A. Lee, *The Law of Higher Education* at 1050 (4th ed. 2006) (citation omitted).

Denial or Limitation of Recognition: Student organizations at public institutions cannot be denied recognition based solely on their viewpoint or philosophy. *See Healy v. James*, 408 U.S. 169 (1972) (involving college president's denial of recognition to a local Students for a Democratic Society chapter based on its philosophy). In *Healy*, however, the Court set forth three broad bases on which public institutions may decline to recognize student organizations:

1. Groups can be asked to affirm in advance their willingness to adhere to reasonable campus rules. *Id.* at 193.
2. Student organizations' activities should not "interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Id.* at 189.
3. Institutions can act to prevent activities that are themselves illegal under local, state or federal laws, or that are directed (and are likely) to incite or produce "imminent lawless action." *Id.* at 188, *see also Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

As with other rules where constitutional principles are at stake, these general principles must be applied evenly to groups with various goals and views. Decisions to deny or limit recognition should be based on careful analysis of actual facts rather than fear, suppositions or stereotypes.

Mandatory Student Activity Fees: Public institutions are permitted to charge mandatory student activity fees that are used to fund various student expressive activities. *See Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000). Such programs must allocate funding in a viewpoint-neutral way. To protect viewpoint neutrality, such fees should not be allocated through student referenda that essentially become a popularity contest with regard to various organizations' views. Institutions are not required to provide an opt-out or refund mechanism for students who object to the funding of particular groups with whose viewpoints they disagree, but they may choose to do so. *Id.* at 235.

If a public institution chooses to fund various student publications, for example, it cannot exclude publications that have religious content on the basis of their religious content or viewpoint. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Likewise, in a broad-based forum for student organizations, a public institution cannot deny recognition to groups merely because they have a religious viewpoint or religious content in their messages. *See Widmar v. Vincent*, 454 U.S. 263 (1981). The law does not require public institutions to give special or preferential treatment to religious groups (e.g., with regard to access to campus facilities or resources), but it also ensures that such groups and viewpoints are not treated with special disfavor because of the content or viewpoints of their expression.

In a case decided after *Christian Legal Society v. Martinez*, a federal appellate court recently held that a public university cannot deny funding for religious activities by registered student organizations if the institution has opened a forum broadly that permits a wide range of similar activities. *See Badger Catholic v. Walsh*, 620 F.3d 775 (7th Cir. 2010). Badger Catholic is a registered student organization at the University of Wisconsin. To be eligible for reimbursement from the university, a student group must submit a budget for the approval of student government and eventually the administration. The university had created a broad forum for a variety of student

activities. It indicated that “[i]t is willing to use student activity fees for what it calls dialog, discussion, or debate from a religious perspective, but not for anything that it labels worship, proselytizing, or religious instruction.” *Id.* at 777. Accordingly, the university refused to reimburse Badger Catholic for certain expenditures which it asserted fell into these latter three categories. These activities included mentoring/counseling (which could include guidance or prayer with Catholic nuns or priests), as well as a summer retreat for leadership training where masses were said and communal prayer sessions were held. In a 2-1 decision, the 7th Circuit struck down the university’s denial of funding for these activities. The court noted the practical difficulties in distinguishing discussions about religious subjects from religious devotion. It found that the university generally permitted reimbursement to other organizations for the same general categories of activity (e.g., mentoring/counseling, and leadership training), and that it had therefore discriminated against Badger Catholic on the basis of that particular group’s religious viewpoint. The University submitted a petition for certiorari to the U.S. Supreme Court, asking the Court to overturn the 7th Circuit decision, on November 30, 2010.

From a practical perspective, Badger Catholic suggests that institutions must take special care in carving out categories of activities for which they will not provide funding with student activity fees. According to the 7th Circuit’s reasoning, it would appear reasonable for a college or university to exclude broad categories of activities from student-activity fee funding so long as such categories are not focused on (or defined by) religion. Thus, a school could decide not to fund general categories of activities such as retreats or counseling, but could not single out “spiritual” or “religious” retreats or counseling. The majority also expressed skepticism that the university’s policy in this instance would have been applied neutrally to all other religious groups (e.g., to Quakers, who view “a discussion leading to consensus as a religious exercise”). *Id.* at 781. The dissent argued that a general prohibition on the use of student activity fee funds for purely religious activities should be considered a categorical, neutral exclusion because it does not single out any particular religion. *Id.* at 786. In light of this opinion and its interpretation of *Christian Legal Society v. Martinez* and other precedents, institutions might want to look carefully at any categories of activities that are considered outside the scope of funding from student activity fees to see if those categories for exclusion are drawn in ways that suggest that they are focused on religious activities such as worship or prayer.

Other Nondiscrimination Requirements: Like the colleges and universities in which they exist, student organizations can also be subject to nondiscrimination laws and equal protection principles. *See, e.g., Joyner v. Whiting*, 477 F.2d 456, 463 (4th Cir. 1973) (“The equal protection clause forbids racial discrimination in extracurricular activities of a state-supported institution”). With certain limited exceptions (e.g., for social fraternities and sororities), the regulations under Title VI of the Civil Rights Act of 1964 (race discrimination) and Title IX of the Education Amendments of 1972 (sex discrimination) prohibit discrimination on the basis of race and sex by student organizations at both public and private institutions that receive federal funding. State nondiscrimination laws and regulations may also apply to student organizations. *See, e.g., Frank v. Ivy Club*, 576 A.2d 241 (N.J.U. 1990) (applying state nondiscrimination law to Princeton University eating club that excluded women on the basis of gender).

Student organizations are permitted to focus on issues related to race and gender, and to advocate for the rights of particular groups within the higher education context. Thus, for example, it is perfectly permissible for groups such as the Black (or Asian, e.g.) Law Students Association to be recognized and receive funding. While these organizations can advocate for particular views and interests, if recognized and funded by colleges and universities they should not discriminate on the basis of race or gender in the selection of members and officers.

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