

**WHAT DOES *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*
REALLY MEAN FOR THE RIGHT OF STUDENT GROUPS
TO BE RECOGNIZED BY THEIR HOST INSTITUTIONS**

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Extracurricular activities, and the student organizations that typically sponsor them, have long been a critical part of higher education in America. Indeed, the first fraternity, Phi Beta Kappa, appeared on American college campuses in the year our nation was born – 1776.

Special attention has long been given to First Amendment rights, freedom of speech and freedom of association on American college campuses. Some believe that *Christian Legal Society v. Martinez*, 130 S.Ct. 2971, 561 U.S. ____ (June 28, 2010), and its 5-4 decision upholding Hastings College of Law’s policy requiring that student groups have open membership in order to be recognized and receive benefits from the College has changed that favored recognition.

“Sometimes, equality should trump diversity, but context matter(s), this case didn’t involve a soda fountain in the 1960’s south. It involved a religious student group at a public law school in 2010 San Francisco. CLS is not a public accommodation, a public entity or a public good. It is a private association. Recognition would have brought modest benefits available to any other student organization.

. . . and the Court’s decision doesn’t silence CLS - it destroys it.”

~John D. Inazu
Visiting Assistant Professor
Duke University, School of Law

“James Madison, who insisted on the separation of church and state, and excluded no one from the First Amendment, would have rebuked the ACLU and the ‘Liberal’ wing of the Supreme Court for this embrace of political correctness.”

~Nat Hentoff
Nationally Known
1st Amendment Authority

BACKGROUND

Hastings, a part of the University of California State System, is a public institution. The Christian Legal Society (“CLS”) is part of a national organization that had existed at Hastings as a recognized student organization since 1994. CLS members must accept a statement of faith, which includes the belief that sexual activity may only happen in a marriage between a man and a woman. CLS specifically bans from membership those who engage in “unrepentant homosexual conduct” or hold different religious convictions.

Hastings has a non-discrimination policy which prohibits “discrimination unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.” In 2004, CLS sought an exemption from that policy. Hastings declined, saying:

“CLS must open its membership to all students irrespective of their religious beliefs or sexual orientation.”

While Hastings would continue to provide access to certain college facilities and would not attempt to oppress CLS, neither would Hastings provide the level of support to CLS that recognized student organizations received.

What became critical in the litigation was the stipulation entered into by the parties that:

“Hastings requires that RSOs allow any student to participate, become a member, or seek leadership positions in the organization regardless of [her] status or beliefs.”

The stipulation supported Hastings' position that its policy was, in short, an "all comers" policy. However, in the Supreme Court, CLS argued that the policy as written was the issue. That policy prohibited discrimination based only on what has become certain protected classifications. CLS argued that a political group could discriminate based on belief, but a religious group could not. Therefore, according to CLS, the policy violated their First Amendment freedom of religion rights. The majority of the Court rejected that position as an "unseemly" attempt to escape the stipulation which focused on the "all comers" policy applied to all recognized groups.

The controversy, having been decided in Hastings' favor in both the Northern District of California and the Ninth Circuit Court of Appeals, involved this core issue:

"May a public law school condition its official recognition of a student group – and the attendant use of school funds and facilities – on the organization's agreement to open eligibility for membership and leadership to all students?"

CLS POSITION

CLS relied on two arguments. First, the forum analysis. What limits on speech may a forum place on the use of its property? That required an analysis of whether or not the use was for the purpose to which the forum was dedicated and whether or not, even if Hastings was found to be a limited public forum, were the imposed barriers reasonable and viewpoint neutral. Second, CLS argued that regulations imposed by Hastings restricted associational freedom and lacked the compelling state interest which must be found that are unrelated to the suppression of ideas (citing both *Roberts v. Jaycees*, 468 U.S. 609 (1984) and *Boy Scouts v. Dale*, 530 U.S. 640 (2000).)

Three Prior Cases

- *Healy v. James*, 408 U.S. 169 (1972)
Students for a Democratic Society (SDS) could not be banned because of abhorrent beliefs, but could be obligated to comply with reasonable standards of conduct.
- *Widmar v. Vincent*, 404 U.S. 263 (1981)
Imposed strict scrutiny when school attempted to refuse benefits to religious groups.
- *Rosenberger v. Rector and Visitors of Va.*, 515 U.S. 819 (1995)
Could not discriminate against a given viewpoint and refuse funding to a Christian student newspaper.

THE IMPORTANCE OF EXTRA CURRICULAR ACTIVITIES AND DEFERENCE TO UNIVERSITY OFFICIALS

Importantly, the Court recognized that the college experience is not limited to the classroom – “extracurricular programs are, today, essential parts of the educational process.” But the majority went on to note great deference should be given to school officials.

But, the majority expressed “special caution” in reviewing this issue “with appropriate regard for school administrator’s judgment” and were “cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist ‘substitute[ing] their own notions of sound educational policy for those of the school authorities which they reviewed.’”

HASTINGS POSITION

Hastings’ Policy Justifications:

- (1) Ensure opportunities to all students.
 - But ... loss of opportunity to create groups students want.

- (2) “All comers” requirement helps police policy.
 - But law same as state and almost federal.
- (3) Encourages tolerance and learning.
 - But many religious groups impose limits.
- (4) Adopts state policy against discrimination – won’t subsidize discrimination.
 - But Hastings does not sponsor.

The Court recognized that the deprivation CLS encountered was limited. CLS still had use of rooms, chalkboards and bulletin boards, but not the other means of communication provided to recognized groups. According to the Court, CLS had other social networks available to it with which to communicate. And the majority noted that “private groups, from fraternities and sororities to social clubs and secret societies, commonly maintain a presence at universities without official affiliation.” How accurate that claim by the majority was is certainly subject to debate. It is not common for fraternities and sororities to exist on a college campus without official recognition. In fact, today it is rare.

CLS warned that the restriction eliminated the diversity of viewpoints in the forum because groups cannot form around viewpoints. Thus, the exchange of ideas in the forum became limited. CLS also warned that the policy could create situations in which there were hostile takeovers of student organizations by those opposed to the very purpose for which the organizations existed and that Hastings had no legitimate interest in interfering with who may be the members of any particular organization.

The majority -- Justices Ginsburg, Stevens, Sotomayor, Breyer and Kennedy – joined in the decision opposed by Chief Justice Roberts, Alito, Scalia and Thomas. The five-member

majority found that Hastings' policy was viewpoint neutral and therefore does not impact on the free speech or expressive association claim. It did leave CLS standing for the moment on the question of whether or not the policy was adopted as a pretext in order to discriminate against CLS. The court allowed that argument to go back to the Ninth Circuit.¹

Justice Alito wrote, as is typical, a harsh dissent, calling the decision "deeply disappointing." Alito challenges the facts of the "so-called accept-all-comers policy":

- It didn't exist in any form until a former dean used it in his deposition.
- Hastings written anti-discrimination policy – not the "all comers" policy – was basis for denial of recognition – but ignored by minority.
- Hastings' answer admitted the written Policy permits political, social and cultural organizations to select officers and members dedicated to their organization's ideals and beliefs.

But Hastings does not follow the "all comers" policy regarding admissions and hiring.

Routinely, registered other groups with restrictive membership policies like the Hastings Democratic Caucus, Association of Trial Lawyers.

Criticizes the majority's adherence to stipulation but not answer.

CLS had only limited access to space, failure to respond to requests for space - could not even set up table on patio.

Ironically, the conservative minority relied most heavily on a decision by the liberal majority in the closing days of the Vietnam War Era in *Healy v. James*, 408 U.S. 169 (1972). In that case, Students for a Democratic Society (SDS) could not be banned even because of its abhorrent beliefs, but could be obligated to comply with reasonable standards of conduct. The minority reminded today's majority that the *Healy* court had refused to defer to the college

¹ The 9th Circuit Court of Appeals wasted little time in putting the pretext issue to bed holding on _____ that it had not been preserved; therefore, the court dismissed the case. CLS v. _____.

president's judgment regarding the compatibility of "sound educational policy" and free speech rights.

If the majority had focused on Hastings' answer, which acknowledged that its policy allowed "political, social and cultural student organization, to select officers and members dedicated to their organization's ideals and beliefs," would the result have been the same? CLS was a religious group engaged in expressive association. The Supreme Court in *Boy Scouts v. Dale*, held the right of expressive association permits a group to exclude a member if the admission of that person would "affect in a significant way the group's ability to advocate public or private viewpoints." Arguably, admitting members who wanted to advocate against the viewpoint of CLS would have harmed CLS's advocacy position. In that respect, it was similar to the Boy Scouts, whose right to exclude a gay assistant scout master because his conduct was inconsistent with the values of the scouts who were expected to be "morally straight."

The minority sharply criticized Hastings because of their shifting policies throughout the course of the litigation, the timing of the imposition of the lack of recognition, its lack of documentation, and non-enforcement of the provisions of its policy against other groups. In conclusion, Justice Alito argued, "today's decision is a serious setback for Freedom of Expression in this country ... I can only hope that this decision will turn out to be an aberration."

The critical question becomes what does it mean for student organizations on campuses. It certainly does not appear to be a green light for the arbitrary exclusion of student groups, at least not at public universities. The case may indeed be limited because of somewhat confused facts. There are at least three interpretations of the policy offered by Hastings. There remains a question as to whether or not there would have been a different result in the Supreme Court had

there been no stipulation that Hastings employed an across-the-board “all-comers” policy. What if instead the focus had been on Hastings’ admission in its Answer?

There is no doubt that the decision moves away from the historical deference given to speech and associational First Amendment Rights at public educational institutions.

“The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools.” *Shelton v. Tucker*, 364 U.S. 479 (1960).

“Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.” *Sweezy v. New Hampshire*, 355 U.S. 852 (1957).

“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate.” *Tinker v. Des Moines*, 393 U.S. 503 (1969).

Board of Regents of Wisconsin v. Southworth
529 U.S. 217 (2000)

Universities may fund with student fees, extracurricular student speech provided viewpoint neutrality in funding allocation is maintained.

- University mission served by dynamic discussions of wide variety of issues.

Rosenberger v. University of Virginia
515 U.S. 819 (1995)

University could not refuse funding for a student Christian religious newspaper when it funded a wide variety of other student publications.

FREEDOM OF ASSOCIATION RIGHTS

Fraternities and sororities and other student groups may yet have a Freedom of Association argument.

Griswald v. Connecticut, 381 U.S. 479 (1965) focused on the intimate association rights of a family, recognizing that they are typically small, highly selective and exclude others from

critical aspects of their relationship. Those characteristics may be typically found in the fraternal relationship. *Roberts v. Jaycees*, 468 U.S. 609 (1984) recognized

“We have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in the pursuit of a wide variety of political, social, economic, educational and cultural ends.”

FRATERNAL ORGANIZATIONS IN ALL THOSE ACTIVITIES

Such arguments of intimate and expressive association did not save the members of Jaycees and Rotary which lost their defense of their single sex membership policies, yet others were successful. *Pacific Union v. Superior Court*, 232 Cal. App. 3060 (1991) and *Louisiana Debating v. New Orleans*, 42 F.3d 1483 (5th Cir. 1995).

But certainly, fraternities and sororities do not have an easy road these days in defending these rights. In a decision that was somewhat shocking, the Second Circuit overturned a district court decision which had rejected the College University of New York at Staten Island’s efforts to refuse to recognize the Chi Iota Colony of Alpha Epsilon Pi because it prohibited women members. Alpha Epsilon Pi regards itself as “The Jewish Fraternity” and had argued that it was an intimate association, with which the district court agreed and found no compelling state interest in enforcing the anti-gender discrimination policy against AEPi. The Court of Appeals reversed making it clear that in its opinion, CUNY’s rule did not greatly burden the associational interests of the fraternity.

IMPACT ON FRATERNITIES AND SORORITIES

What is the practical impact of the CLS decision? Greek life is an important aspect of extra curricular activities on campuses throughout the country and almost all of those fraternities

and sororities are single sex in their membership policies. On some 822 campuses, more than 350,000 student members belong to men's groups, while over a quarter of a million women are members on some 650 campuses. And it should be recognized that fraternities and sororities have been typically founded around interests of their members' religions and national backgrounds. There are nine strong national Pan-Hellenic Council (historically African American) groups and more and more frequently there are fraternities organizing around Asian, Latino, sexual orientation and multi-cultural backgrounds. There is no doubt that carried to an extreme, the Hastings-style policy could have a significant impact on fraternities and sororities. However, given the programming, services and frequently housing that fraternities and sororities provide to over three quarters of a million students, it is unlikely and unwise for universities to impose an all-comers policy on fraternities and sororities, any more than they do on their sports teams, honoraries or other competitively selective organizations.

To impose a prohibition against anti-gender discrimination would conflict with the single sex membership policies of the vast majority of Greek organizations. Even the United States Congress has recognized that fraternities and sororities which employ a gender requirement in their membership policies do not violate federal anti-discrimination law.

20 U.S.C. 1681

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that: . . .

(6) Social fraternities or sororities; voluntary youth service organizations
this section shall not apply to membership practices --

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

Congress has also recognized that student speech and associational rights should be recognized by their host institutions.

20 U.S.C. 1011a

§ 1011a. Protection of student speech and association rights

(a) Protection of rights

(1) It is the sense of Congress that no student attending an institution of higher education on a full- or part-time basis should, on the basis of participation in protected speech or protected association, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction under any education program, activity, or division of the institution directly or indirectly receiving financial assistance under this chapter, whether or not such program, activity, or division is sponsored or officially sanctioned by the institution.

(2) It is the sense of Congress that -

(A) the diversity of institutions and educational missions is one of the key strengths of American higher education;

(B) individual institutions of higher education have different missions and each institution should design its academic program in accordance with its educational goals;

(C) an institution of higher education should facilitate the free and open exchange of ideas;

(D) students should not be intimidated, harassed, discouraged from speaking out, or discriminated against;

(E) students should be treated equally and fairly; and

(F) nothing in this paragraph shall be construed to modify, change, or infringe upon any constitutionally protected religious liberty, freedom, expression, or association.

* * *

(c) Definitions

For the purposes of this section:

(1) Official sanction

The term "official sanction"-

(A) means expulsion, suspension, probation, censure, condemnation, reprimand, or any other disciplinary, coercive, or adverse action taken by an institution of higher education or administrative unit of the institution; and

(B) includes an oral or written warning made by an official of an institution of higher education acting in the official capacity of the official.

(2) Protected association

The term "protected association" means the joining, assembling, and residing with others that is protected under the first and 14th amendments to the Constitution, or would be protected if the institution of higher education involved were subject to those amendments.

(3) Protected speech

The term "protected speech" means speech that is protected under the first and 14th amendments to the Constitution, or would be protected if the institution of higher education involved were subject to those amendments.

It should be noted that 20 U.S.C. 1011 has no enforcement mechanisms, yet it is an expression of Congress that provides some hope that the student groups do indeed have First Amendment rights to be recognized.

The bottom line is the CLS is certainly not helpful to student organizations, particularly those which on one basis or another discriminate in their membership policies against one or another of the typically protected classes of individuals. Nonetheless, CLS not determinative.

Schools that feel the need to adopt policies similar to Hastings should:

- (1) Clearly decide and articulate what the policy is.
- (2) Provide some access.

- (3) Consider impact on political groups or other similar groups where some confidentiality may be important.
- (4) Consider same distinction as Congress did - exempt fraternities and sororities from the gender discrimination prohibition.

Practical considerations include housing, alumni support, litigation or loss of oversight.

If faced with Hastings' policy, Greek groups should:

- (1) Unify.
- (2) Negotiate.
- (3) Weigh options between litigation or accepting withdrawal of recognition.
- (4) If litigation is only option, carefully select strongest plaintiffs.
 - Clean disciplinary record.
 - Impressive philanthropic activity.
 - Program unique to gender.
 - Housing issue.
 - Expressive activities.
 - Able to demonstrate intimacy.

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