Religious Liberties

Christian Legal Society v. Martinez: Religious Student Groups, Nondiscrimination Rules, and the Constitution

*By Gregory S. Baylor**

In *Christian Legal Society v. Martinez*,[1] the United States Supreme Court will decide whether the Constitution permits a public university law school to exclude a religious student organization from a forum for speech solely because the group requires its officers and voting members to share its core religious commitments. The student chapter of the Christian Legal Society (CLS) at Hastings College of the Law draws its officers and voting members from among those who voluntarily sign its Statement of Faith and who strive to abide by CLS's religiously-rooted moral conduct standards. The CLS chapter welcomes all students to attend its meetings and events. Hastings concluded at the beginning of the 2004-2005 school year that CLS's voting membership and officership requirements violated the religion and sexual orientation provisions of its Policy on Nondiscrimination. It accordingly refused to confer Registered Student Organization (RSO) status upon CLS. Contradicting the Seventh Circuit's decision in a virtually identical case,[2] the Ninth Circuit rejected CLS's claims that Hastings violated its constitutionally protected rights of free speech, expressive association, free exercise of religion, and equal protection of the laws. The Supreme Court presumably granted review to resolve the conflict between the Seventh and Ninth Circuits in both their analytical approaches and their outcomes.

I. Factual and Procedural Background

A. Registered Student Organizations at Hastings

The University of California-Hastings College of the Law encourages a broad array of student organizations to meet, express their views, and conduct activities on campus. In the 2004-2005 academic year, when the dispute arose, Hastings recognized approximately 60 RSOs.

RSOs are entitled to meet in university rooms, to apply for funding to support various group activities, and to access multiple channels for communicating with students and faculty—including posting on designated bulletin boards, sending mass emails to the student body, distributing material through the Student Information Center, appearing on published lists of student organizations, and participating in the annual Student Organizations Fair. Although it provides resources and facilities to all of these groups, Hastings makes clear that it "neither sponsor[s] nor endorse[s]" the views of any RSO.

B. The Christian Legal Society

Founded in 1961, the Christian Legal Society is a nationwide association of lawyers, law students, law professors, and judges who share a common faith and seek to honor Jesus Christ in the legal profession. CLS provides opportunities for fellowship, as well as moral and spiritual guidance, for Christian lawyers; encourages and mentors Christian law students; promotes justice, religious liberty, and biblical conflict resolution; and encourages lawyers to furnish legal services to the poor.

The national Christian Legal Society maintains attorney and law student chapters across the country. Student chapters, such as that at Hastings, invite speakers to give public lectures addressing how to integrate Christian faith with legal practice, organize transportation to worship services, and host occasional dinners. The signature activities of the chapters are weekly Bible studies, which, in addition to discussion of the text, usually include prayer and other forms of worship.

CLS welcomes all Hastings students—regardless of "race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation"—to attend and participate in its meetings and other activities. However, to be officers or voting members of CLS—and to lead its Bible studies—students must affirm their commitment to the group's core beliefs by signing the national CLS Statement of Faith and pledging to live their lives accordingly.

The CLS Statement of Faith provides:

> Trusting in Jesus Christ as my Savior, I believe in:
>
> • One God, eternally existent in three persons, Father, Son and Holy Spirit.
>
> • God, the Father Almighty, Maker of heaven and earth.
>
> • The Deity of our Lord, Jesus Christ, God's only Son, conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
>
> • The presence and power of the Holy Spirit in the work of regeneration.
>
> • The Bible as the inspired Word of God.

The chapter's constitution also sets forth guiding principles for the chapter and those who publicly associate with it. "Officers must exemplify the highest standards of morality as set forth in Scripture" in order "that their profession of Christian faith is credible." To confirm its position amid contemporary religious controversies regarding sexuality, national CLS adopted a resolution in March 2004, which explains: "In view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership." The resolution applies to "all acts of sexual conduct outside of God's design for marriage between one man

** Senior Legal Counsel, Alliance Defense Fund, Washington, DC. The author is one of the attorneys representing the CLS chapter in the U.S. Supreme Court. Parts of this article are drawn from the Brief for Petitioners filed on January 28, 2010.*

and one woman, which acts include fornication, adultery, and homosexual conduct."

Voting members are entitled to vote on chapter policies and programs, as well as amendments to the chapter constitution, to participate in choosing the group's officers, and to stand for election to those officer positions. Voting members share the responsibility of teaching CLS's weekly Bible studies.

C. Hastings Rejects CLS's Attempt to Register

At the beginning of the 2004-2005 school year, CLS sought to register with Hastings. Invoking its Policy on Nondiscrimination, Hastings withheld RSO status from CLS, thereby depriving it of the benefits available to other student organizations. Hastings concluded that CLS's officership and voting membership requirements constituted discrimination on the basis of religion and sexual orientation.

D. Litigation in the Lower Federal Courts

CLS filed a civil rights lawsuit under 42 U.S.C. § 1983 in federal district court. Among other things, CLS asserted that Hastings' refusal to accept its registration was viewpoint discriminatory (and thus a prima facie violation of the Free Speech Clause) because Hastings allowed groups to organize around secular ideas but not religious ones. In their answer and interrogatory responses, the Hastings defendants confirmed that their Policy on Nondiscrimination "permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs."

However, during their subsequent depositions, two Hastings officials asserted that student groups, in order to receive RSO status, must allow *all* students to serve as voting members and officers, even if those students reject the group's core principles. The law school dean testified that, for example, the Hastings Democratic Caucus could not deny voting membership or eligibility for an officer position to a Republican and the Clara Foltz Feminist Association could not refuse membership to a chauvinist, even though the text of Hastings' Policy on Nondiscrimination does not impose such restrictions.

The district court ruled in Hastings' favor.[3] The court held that denying recognition to CLS had "no significant impact" on the ability of the CLS students to express themselves. This conclusion was based primarily on subsidiary judgments that (1) "despite Hastings' refusal to grant CLS recognized status," the group continued to meet without recognition and "CLS's efforts at recruiting members and attendees were not hampered"; and (2) "CLS has not demonstrated that its ability to express its views would be significantly impaired" by "requiring CLS to admit gay, lesbian, and non-Christian students." Even assuming that enforcement of the policy had a significant impact, however, the court held that "Hastings has a compelling interest in prohibiting discrimination on its campus."

The CLS students appealed to the Ninth Circuit, which affirmed in a two-sentence opinion, citing its own recent decision in *Truth v. Kent School District*,[4] a case involving a public high school's application of a non-discrimination rule to a student group. Significantly, the Ninth Circuit in *Truth* held that the application of expressive association doctrine was inappropriate in cases involving allegedly unconstitutional ejections from speech forums.

Instead, the Ninth Circuit's analysis rested on the understanding that "all groups must accept all comers as voting members even if those individuals disagree with the mission of the group." The Ninth Circuit held that Hastings' denial of recognition of CLS was "viewpoint neutral and reasonable." Consistent with *Truth*, the court did not analyze whether Hastings' refusal to accept CLS's registration infringed the chapter's right of expressive association or whether any such infringement was adequately justified.

II. Constitutional Questions the Court Will Face

CLS argues that Hastings has infringed its right of expressive association; improperly denied it access to a speech forum; committed viewpoint discrimination; and abridged its right to the free exercise of religion. CLS further contends that Hastings has not sufficiently justified these prima facie abridgements of its constitutionally protected rights. Hastings denies that it infringed CLS's constitutional rights. Hastings also asserts that its interests justify any impairment of CLS's rights. This article will focus on CLS's expressive association and viewpoint discrimination arguments, as well as Hastings' asserted justifications for infringing these rights.

A. Abridgment of Constitutionally Protected Rights

The Court's first task will be to determine whether Hastings' refusal to recognize CLS abridged the group's constitutionally protected interests.

1. The Right of Expressive Association

CLS argues that Hastings violated its right of expressive association, a right that the Supreme Court has held is implicit in the First Amendment freedoms of speech, assembly, and petition.[5] In so arguing, CLS relies primarily upon the Supreme Court's decisions in *Healy v. James*,[6] *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*,[7] and *Boy Scouts of America v. Dale*.[8] In *Healy*, the Court held that public universities violate the right of expressive association by withholding recognition from student groups without adequate justification. In *Hurley*, the Court held that forcing the private organizers of the Boston St. Patrick's Day parade to include a "gay pride" group in the parade would violate the First Amendment. In *Dale*, the Court held that forcing the Boy Scouts to retain an openly homosexual man as a Scoutmaster would substantially affect the Scouts' ability to communicate their chosen message regarding human sexuality.

CLS argues that *Healy* requires the Court to conclude that Hastings' refusal to confer the benefits of recognition upon the chapter infringed its right of expressive association. Hastings attempts to distinguish *Healy* on the ground that it has given CLS some permission to meet on campus, whereas the public college involved in *Healy* did not allow the group in question (Students for a Democratic Society, or SDS) to meet as an official group on campus. However, the *Healy* Court indicated that a college's refusal to extend other benefits—the sort Hastings has withheld from CLS—constitutes an independent abridgement of the right of expressive association. Moreover,

the members of SDS *were* permitted to meet on campus in *Healy*, just not "as SDS."

Hastings argued in the lower courts that the forced inclusion of individuals who reject CLS's religious commitments would not undermine the chapter's ability to formulate and communicate its messages. However, in *Roberts v. U.S. Jaycees*, the Supreme Court stated that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association" than forcing it to relinquish control to those who do not share its message.[9] Just as "the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice,"[10] forcing a group to offer leadership roles to outsiders entails the distortion or destruction of that voice.[11] And for religious groups, "[d]etermining that certain activities are in furtherance of an organization's religious mission, and that *only those committed to that mission should conduct them*, is . . . a means by which a religious community defines itself."[12] Moreover, the *Dale* Court declared that courts must "give deference to an association's view of what would impair its expression."[13]

In the lower courts, Hastings also attempted to distinguish *Dale* and *Hurley* on the ground that those cases involved police power rules whereas its rule governed access to a speech forum. Hastings essentially argued that if CLS did not want to comply with its rules, it could simply forego the benefits of recognition; it relatedly contended that forcing a group to choose between two constitutional rights (access to a speech forum and the right of expressive association) does not implicate the Constitution at all. However, the Supreme Court itself has rejected this argument.[14]

2. Viewpoint Discrimination

Hastings' written Policy on Nondiscrimination permits groups to exclude from leadership those individuals who reject its core beliefs. A number of groups exercised that apparent freedom in order to preserve their identities and messages. For example, the student chapter of the Association of Trial Lawyers of America, for example, required all members to "adhere to the objectives of the Student Chapter as well as the mission of [national] ATLA." The Hastings pro-life group stated that "[s]o long as individuals are committed to the goals set out by the leadership, they are welcome to participate and vote in Silenced Right elections." The bylaws of Outlaw reserve the right to remove any officer that "work[s] against the spirit of the organization's goals and objectives." (In its Ninth Circuit briefing, Hastings deemed these requirements "informational only" and inconsequential.)

Hastings' written Policy on Nondiscrimination forbids religious groups like CLS from doing likewise. CLS, for example, cannot withhold voting membership or eligibility for leadership from someone who denies the existence of God or rejects traditional sexual morality. Along the same lines, CLS must allow a person who rejects the inspiration and authority of the Bible to lead a Bible study. In short, under the written Policy on Nondiscrimination, RSOs are permitted to organize around secular ideas but not religious ideas. CLS argues that such differential treatment constitutes the viewpoint discrimination deemed presumptively unconstitutional by the Supreme Court in cases like *Good News Club v. Milford Central School*,[15] *Rosenberger v. Rector of the University of Virginia*,[16] and *Lamb's Chapel v. Center Moriches Union Free School District*.[17]

In response to this argument, Hastings asserted in the middle of discovery (and contrary to its answer and interrogatory responses) that it did not merely forbid discrimination on the basis of the things listed in its written Policy on Nondiscrimination, but actually forbid student groups from excluding *any* student from *any* position for *any* reason. Based upon this representation, the Ninth Circuit held that Hastings' treatment of the CLS chapter was not viewpoint discriminatory.

As CLS argues, Hastings' supposed "all comers" policy violates the First Amendment rights of *every* student group. Under this policy, a Federalist Society chapter could not deny a leadership position or voting membership to an individual who is not a conservative or libertarian, who denies that "the state exists to preserve freedom," who denies that "the separation of governmental powers is central to our Constitution," or who denies that "it is emphatically the province and duty of the judiciary to say what the law is, not what it should be."[18]

B. Hastings' Asserted Justifications

Assuming the Supreme Court concludes that Hastings abridged CLS's constitutional rights, it will then consider whether these abridgements were adequately justified, such that Hastings' refusal to recognize CLS did not violate the Constitution. In the courts below, Hastings argued that it wanted to make "the educational and social opportunities" that student groups provide available to all students. However, Hastings did *not* argue that non-Christians had been lining up to serve as officers and voting members of the CLS chapter. Nor did it argue that leadership or voting membership of the CLS chapter is an important "gateway" to tangible secondary benefits, such as opportunities to enhance one's career. Hastings also asserted that its policy encourages "tolerance, cooperation, and learning among students." Outlaw, which intervened as a defendant in the case, argued below that Hastings needed to punish the CLS chapter so that its members could "attend law school in an environment free from discrimination." It also observed that its members pay tuition and student activity fees and objected to the extension of benefits to an allegedly "discriminatory" group. Outlaw did *not* contend that its members wanted to serve as leaders of CLS, vote in CLS officer elections, or lead CLS Bible studies.

If the Court concludes that Hastings' application of its written Policy on Nondiscrimination to CLS was viewpoint discriminatory, it will ask whether that application was the least restrictive means of pursuing a compelling governmental interest.[19] More specifically, it presumably will ask questions such as whether the government officials at Hastings have a compelling interest in having an atheist lead a CLS Bible study. The Court might ask whether Hastings has a compelling interest in having a person who engages unrepentantly in sexual conduct outside marriage serve as a messenger for and representative of a group that deems such conduct sinful.

The Court has held that eliminating discrimination can in some contexts be a compelling governmental interest.[20]

However, it is difficult to imagine the Court concluding that the government has a compelling interest in forcing a religious group to accept as leaders and voting members individuals who reject the group's core religious commitments. To illustrate, the federal government and every state-exempt religious societies from laws that would otherwise prevent them from hiring or otherwise choosing leaders on the basis of religion.[21] In addition, the Court held in *Boy Scouts of America v. Dale* and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*[22] that a compelling state interest does not underlie every application of rules barring discrimination on the basis of sexual orientation.

It is also difficult to imagine that the Court will find compelling Hastings' alleged interest in encouraging "tolerance, cooperation, and learning among students." In *Hurley*, a unanimous Court observed as follows:

> It might . . . have been argued . . . that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is *a decidedly fatal objective*.[23]

To the extent Hastings hopes to produce "more tolerant" students by punishing CLS for its alleged intolerance, it appears as though such a goal would not justify the school's impairment of CLS's First Amendment rights. It also bears noting that CLS permits *all* students to attend its meetings and participate in its events. Accordingly, Hastings essentially must prove that this is insufficient—that the school's objectives are unsatisfied unless all students have the absolute right not just to attend meetings, but to be officers and voting members.

III. Conclusion

The dispute between CLS and Hastings is not an isolated incident. It is but one of numerous conflicts between student religious groups that desire to choose their leaders on religious grounds and college administrators who claim that such a practice is "discriminatory." The Supreme Court's resolution of *Christian Legal Society v. Martinez* is likely to provide significant guidance regarding the constitutional limits on the power of public colleges and universities to regulate the leadership requirements of student groups. The Court's decision is thus critically important to the future of student religious groups at America's public universities.

Endnotes

1 U.S. No. 08-1371 (cert. granted Dec. 7, 2009).

2 Christian Legal Soc'y Chapter at So. Ill. Univ. v. Walker, 453 F.3d 853 (7th Cir. 2006).

3 2006 WL 997217 (N.D. Cal. May 19, 2006).

4 542 F.3d 634 (9th Cir. 2008).

5 Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 68 (2006) (hereinafter *FAIR*); Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

6 408 U.S. 169 (1972).

7 515 U.S. 557 (1995).

8 530 U.S. 640 (2000).

9 468 U.S. at 623; *see also FAIR*, 547 U.S. at 69 (holding that laws that permit outsiders to become "members" of the "expressive association" touch the core of the First Amendment). Such intrusions "impair the ability of the original members to express only those views that brought them together." *Roberts* at 623; *see also* New York Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988). "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." Laurence Tribe, American Constitutional Law 791 (1978).

10 *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring).

11 *Dale,* 530 U.S. at 654.

12 Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) (emphasis added).

13 530 U.S. at 653.

14 *FAIR*, 547 U.S. at 59; *see also* Perry v. Sindermann, 408 U.S. 593, 597 (1972); Speiser v. Randall, 357 U.S. 513, 526 (1958); Christian Legal Soc'y v. Walker, 453 F.3d at 864 (citing *Healy*, which also involved denial of access to a speech forum rather than the application of a police power rule).

15 533 U.S. 98 (2001).

16 515 U.S. 819 (1995).

17 508 U.S. 384 (1993).

18 The Federalist Society for Law and Public Policy Studies, About Us, https://www.fed-soc.org/aboutus/ (last visited Feb. 9, 2009).

19 *See*, *e.g.*, *Rosenberger*, 515 U.S. at 829; Widmar v. Vincent, 454 U.S. 263, 270 (1981) (application of strict scrutiny).

20 *See*, *e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

21 42 U.S.C. §§ 2000e-1 & 2000e-2(e)(1) (exempting religious organizations from the religious nondiscrimination provisions of Title VII); Executive Order No. 13279 (exempting religious organizations from the religious nondiscrimination requirement applicable to federal contractors); Cal. Gov. Code § 12926(d) (exempting religious organizations from law prohibiting religious discrimination in employment); 22 Cal. Admin. Code tit. 22, §§ 98100, 98222 (exempting religious organizations from prohibition on religious discrimination by state contractors and recipients of state funds).

22 515 U.S. 557 (1995).

23 515 U.S. at 579-80 (1995) (emphasis added).