Did the Supreme Court Properly Decide *Christian Legal Society v. Martinez*?

Rutgers School of Law-Newark, October 5, 2010

Gregory Baylor*: Thank you to the Federalist Society and to the LGBT Caucus for inviting me and for sponsoring this debate. Thanks also to Dean Chen for agreeing to participate in our conversation. I look forward to hearing his insights on the case. We were chatting beforehand and I learned that we are both graduates of Dartmouth College. So, whatever differences we may have about this case, we both bleed green.

Let me start with a story. In September of 1969, most Americans still supported military involvement in Vietnam. Richard Nixon had won the White House in part based on a promise to restore "law and order." He was referring to some of the violent protests against the Vietnam War, many of which had occurred on college campuses.

Groups like Students for a Democratic Society, back then in 1969, were seen as radical, dangerous, un-American, something not to be tolerated. It was in the face of this cultural reality that a group of students at Central Connecticut State College came together and sought to form a chapter of Students for a Democratic Society, or SDS. They sought official recognition from Central Connecticut State College, and the college president rejected their request. The president's primary objection to this SDS group was the fact that they were associated with the national SDS. The president said that they would be "a disruptive influence on campus" and would be "contrary to the orderly process of change on campus." He also said that the group's "philosophies" were "counter" to the official policy of the college.

Faced with a public university's hostility to its counter-cultural message, the SDS sought assistance, help, vindication of its rights from the federal courts. SDS argued that Central Connecticut State College had violated its First Amendment rights by withholding recognition from it. They took their case all the way up to the Supreme Court, which even at that time had had a long history of vindicating the rights of racial, religious, and ideological minorities, protecting them from powerful majorities and from the government. The Supreme Court ruled in favor of SDS in this case, this countercultural group that was not recognized by its college.

The Court, at least in my view, upheld the Constitution. It ordered the college to recognize the group, and some of the fears that the college had about SDS did not come to pass. The college did not erupt into flames, and life went on as it had before. Except, over time, millions of Americans came to share the SDS's skepticism of and disagreement with American military involvement in the war in Vietnam.

Let me tell another story; fast-forward the time machine a little bit to 1973. At that time, most Americans believed that homosexuality was a psychological disorder. They believed that same-sex sexual intimacy was morally wrong. Rules banning discrimination on the basis of sexual orientation in housing, education, financial transactions, public accommodations, and business establishments had not yet been enacted. The idea that the federal government would recognize same-sex relationships as the equivalent of traditional marriages was pure fantasy at this time.

It was in the face of this cultural reality in 1973 that a student at the University of New Hampshire sought to form a GSO, a Gay Student Organization, and the president of that university rejected his request. He refused to recognize the group. He refused to allow them to do what they wanted to do, which was to specifically sponsor a dance and to sponsor a play.

The Governor of New Hampshire at that time, a man named Meldrim Thompson, wrote an open letter to the university's board of trustees. He warned that if they did not "take firm, fair, and positive actions to rid your campuses of socially abhorrent activities," he would "stand solidly against the expenditure of one more cent of taxpayers' money for your institution." And in response to this pressure from the government, the president of the university refused to recognize the GSO and condemned the distribution of what he called "homosexual literature." The university said that it had "an obligation to prevent action which affronts the citizens of the university and the town."

So the GSO, faced with the hostility of a public university, went to the federal courts to seek a vindication of its constitutional rights. The U.S. Court of Appeals for the First Circuit held that the University of New Hampshire violated the rights of the GSO by not allowing it to conduct its activities and by not recognizing it. The court acknowledged that the GSO "stood for sexual values in direct conflict with the deeply imbued moral standards of much of the community," but it held that this conflict did not justify the university's unwillingness to recognize the GSO and allow it to conduct its activities.

As was true of Central Connecticut State College and the SDS, the court's order that UNH recognize the GSO did not cause the skies to fall. The campus did not erupt in flames. Life went on pretty much as it had before. But over time, many Americans became more accepting of homosexuality.

One more stop on the time machine—let us go forward to 2004 in San Francisco in the month of September. By this time, San Francisco had become one of the most liberal places in America. No other Republican candidate for President, just to illustrate the point, has received more than twenty percent of the vote in that city since 1988. The city's Castro neighborhood had become a center of gay life in the United States. Harvey Milk had become the first openly-gay man to be elected to public office in California. More recently, the mayor of San Francisco at the time, Gavin Newsom, had begun issuing marriage licenses to same-sex couples well in advance of the California Supreme Court's discovery or recognition of a right to same-sex marriage in the California Constitution.

A few months after Mayor Newsom began issuing the same-sex marriage licenses, a student at Hastings College of Law in San Francisco had a conversation with Judy Chapman, who was at the time the director of student services there. The student told Dean Chapman that she and some associates of

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hers wanted to form a chapter of the Christian Legal Society at Hastings Law School. Chapman's first response foreshadowed what was going to happen next. She observed that the National Christian Legal Society had policies governing leadership and voting membership that were probably inconsistent with Hastings's policy on nondiscrimination, and she gave him a copy of that policy.

The students who spoke with Dean Chapman made the true observation that no one denies that CLS allows everyone and encourages everyone to participate in its meetings and in its events. But when it comes to the leaders of its organization, those who lead the Bible studies and those who select the leaders and set the agenda, may draw those folks from among those who share their views and beliefs.

So Dean Chapman's giving of the nondiscrimination policy to these two students foreshadowed the ultimate denial of recognition by Hastings College of Law of CLS, and just like SDS at Central Connecticut State College in the late 1960s, and just like the gay students' organization at the University of New Hampshire in the early 1970s, the CLS students went to the federal courts to vindicate what they believed were their judicial rights. They believed that Hastings had violated their First Amendment rights.

Unlike those two other cases, the federal courts, as you know, did *not* vindicate what I thought and what many of us thought were constitutional rights. As you heard, all the courts, the district court, the circuit court, and the U.S. Supreme Court, ruled for Hastings and against CLS. So the question before us today is whether the Supreme Court got it right. And you will not be surprised to know that my position in the debate is that the Supreme Court decided the case incorrectly.

I think it is important to be clear about what the Supreme Court decided. What was it asked to decide, and what did it actually decide? The Court was asked to decide whether Hastings had violated CLS's First Amendment rights by withholding from it registered student organization status because it draws its leaders and voting members (those who select the leaders) from among those who share its religious commitments, both doctrinal—"I believe X, Y, and Z"—and ethical—"I do this and don't do this." That was the question, whether that withholding of recognition because of CLS's practices was a violation of the First Amendment.

What precisely did the Court hold? A five-Justice majority held that Hastings did not violate CLS's First Amendment rights; it did not violate the Constitution by withholding recognition because of CLS's practices and policies—assuming that Hastings was applying a consistently-enforced "all-comers" policy. (That is a caveat to the general holding.) The general holding: Hastings won, and CLS lost.

What was their analysis? How did they get to that ultimate conclusion? The opinion is long and says Hastings wins, unlike the Ninth Circuit's opinion which says just about that but it is about two sentences long. The Supreme Court made a series of intermediate conclusions, and all of those conclusions add up to the result of the case. What were these intermediate conclusions? The first one was about what it is that the Court should be doing in the case. And more specifically, what questions should it be asking and answering? And, more specifically, what was the legal analysis that the Court should undertake?

And unlike many cases, there was a fundamental debate between the parties about what line of cases were most relevant. What mode of analysis? What test with all of its prongs should be applied by the Supreme Court? CLS had a number of claims, and it said that the Court should apply the tests that go with those claims separately and individually, acknowledging the possibility that it might win on claim A but not on claim B. But as long as it won on one claim, it could win the case. As you know, this is the way lawyers argue cases. You have alternative theories as to how to win the case.

One of CLS's claims was that under a body of case law under the First Amendment called expressive association doctrine—and there is a particular test for adjudicating expressive association claims—CLS said that the Court should apply that test. CLS also made a claim about—I apologize for getting into the weeds of Free Speech Clause doctrine but I think it's unavoidable in this case—a whole body of case law that deals with government regulating speech that happens on public property. This is called forum doctrine. There are different kinds of forums; the type of forum that you had at issue here was a student group recognition forum. We are going to have student groups; we are going to allow them to use meeting space; we are going to give them benefits; and they can do the things that they want to do.

What CLS argued was, we have a right to be in that forum, and if you exclude us from that, you have to justify it. More specifically, the argument was that the exclusion of CLS from the forum by Hastings was not reasonable, and it was not viewpoint-neutral. So you have an expressive association test with some prongs to it, and you have this access to forum speech test with some questions that the Court is supposed to ask. We argued that the Court needed to do all of that.

The Supreme Court said that only access to forum analysis will apply. That is one of the errors that they made, and I will explain why later. They decided that they were only going to ask the speech forum questions. And I think that there are only two questions that the Court is supposed to ask when it is adjudicating one of these claims from a speaker saying, "We're supposed to be in this speech forum and you wouldn't let us in there." The two questions are these. First, whether the exclusion was reasonable in light of the purposes of the forum. The Court made an important intermediate conclusion when applying this test. It said that the purpose of the forum was to promote tolerance among the students. It then held that excluding CLS because it did not allow everyone to be able to be a part of the organization was consistent with that policy and promoted that purpose of the speech forum. So that was the second piece of its analysis.

The third piece of its analysis was to say that this all-comers policy was the policy under which Hastings said a student group that wants recognition must allow everyone to be a leader or a voting member. The Court said that this was viewpoint-neutral on its face. Now it acknowledged that CLS had argued that this policy had been applied inconsistently, so it sent the case back down to the lower courts for adjudication of that claim. That

is what the Court was asked to decide, that is what the Court did decide, and that was a little taste of its analysis.

I could talk for hours about what I thought was wrong with the Supreme Court majority's opinion, but I will not do that. I will limit myself to three particularly significant things the Court did that I believe are mistakes and contributed to what I believe is an incorrect result. The first one is a refusal to follow precedent. The SDS case that I talked about, Students for a Democratic Society at Central Connecticut State College, is not just a nice story. It is a case that the Supreme Court decided and that I thought had precedential value for *CLS v. Martinez*. But obviously it was a different case: it did not involve CLS; it did not involve nondiscrimination policy. But the way that the Court ignored *Healy*, or sidestepped *Healy*, or misunderstood *Healy*, or misapplied *Healy*, was in its approach. What the *Healy* Court said was, if a public university is recognizing students groups, allowing them to meet, allowing them to use all these means of communicating with their campus community, it cannot not recognize them unless doing so would cause a substantial disruption of the educational process.

So not only did they say SDS wins, but they set forth an analysis under which courts should subsequently ask that question, would recognizing this group create a substantial disruption of the educational process? I believe that if the Court had faithfully followed *Healy*, it would have ruled for CLS because recognizing CLS would not have substantially disrupted the educational process at Hastings. The campus would not have burst into flames. It would have gone on much as it had before. So I think they failed to follow *Healy*.

They did not ignore *Healy*. What they said was that *Healy* is a case that is about hostility, and hostility was the dispositive fact of *Healy*. *Healy* stands for the proposition that when you know for a fact that the university administrator does not like the message of the group, refusal to recognize it is unconstitutional. I disagree. I think that is an overly narrow reading of the opinion. I suggest you read it for yourself and make your own judgment about it, but I do think that is an overly-narrow reading.

The second-most consequential thing the Court did, which I think was a mistake, was not to apply expressive association analysis. This is a claim that CLS was going to win. The right of expressive association acknowledges that people get together in groups to do expressive things, and the test acknowledges that governments can mess with that in a way that violates the right of expressive association.

Healy is an example in itself. The Court said that the unwillingness of a public university to recognize a student group can be a violation of the right of expressive association. Another example is the government telling a group, you must turn over your list of members (*NAACP v. Alabama*). A third way would be to force an organization to accept as leaders or members people who disagree with its message. That is the case of *Boy Scouts v. Dale* last decade. That is the right of expressive association.

I do believe that if the Court had faithfully analyzed that claim and applied that doctrine, it would have ruled for CLS. Requiring CLS's compliance with the all-comers policy, allowing atheists to lead its Bible studies, would undermine its ability to formulate and articulate its message, which is the essence of an expressive association right. And, in that case, the Court would have turned to Hastings and said that CLS has shown that this would undermine their ability to articulate their message; Hastings, what is your justification for that? And they would need a compelling justification. I believe if the Court had faithfully followed precedent and asked that question, they would have concluded that Hastings lacked a compelling justification for, for example, requiring an atheist to lead a CLS bible study.

The third thing the Court did which I think was a mistake and led to results which I believe were incorrect is that it mischaracterized this. I talked before about the test they applied, which was whether the exclusion was reasonable in light of the purposes of the forum. And there are two pieces to that. There is reasonableness, and there are the purposes of the forum. As I said before, the Supreme Court agreed with Hastings's argument that the purpose of the forum was to promote tolerance, and therefore, excluding CLS was very consistent with that objective. I would concede that. But I do not think that this was the purpose of the forum. I think the purpose of the forum was robust debate on a variety of subject matters, a virtually limitless list of subject matters from a variety of perspectives. You had pro-life, pro-choice, Democrat, Republican, environmental law society, business law society, you had the ultimate Frisbee club, you had the wine-tasting group, you had the Muslim group, the Jewish group, and the Christian group. There were sixty groups. There was really nothing that unified them other than the fact that they were student groups, and CLS simply wanted to be group sixty-one.

Other cases—the *Healy* case, the case called *Widmar*, the case called *Southworth*, the case called *Rosenberger*—all stand for the proposition that these recognition systems are wide-open and robust, and that was the mistake that the Court made in coming to its results.

Ronald Chen*: Thank you very much, Mr. Baylor, for your comments, and thank you for taking the time to come here all the way from Washington. I just had to come down the elevator. We very much appreciate your presence here to add to this debate.

As with so many things, the answer in a debate depends on how you frame the question. And we have heard at the outset at least one way to formulate the question: whether a publicly-funded law school student organization has the First Amendment right to limit leadership and voting membership based on its religious beliefs, including its beliefs about extramarital sexual conduct.

There is actually a lot that Mr. Baylor and I would agree on. I could actually answer that question with one slight emendation—although Mr. Baylor may not think it is slight—in the positive. I absolutely believe that organizations do have a First Amendment associational right both to associate, which necessarily implies the right not to associate with those who do not hold their beliefs. The two words I would just have to take

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out of that sentence are "publicly funded." I think the majority essentially found that this is what this case was about.

I will tell a story, too, of a case I had this past spring in the Constitutional Litigation Clinic. It involved a high school student, CH (she is a minor, so we still use two initials), and in this case the ACLU—this is a relatively rare event but it does happen—was in fact acting in cooperation with the Alliance Defense Fund. She wanted to, on a designated day, distribute pro-life literature, and wear an armband, really some duct tape on her arm that said "Life" on it. The school turned it down for a variety of reasons. First, they said it was the school uniform policy, but it was pretty clear that what they were really doing was objecting to the subject matter of her speech. The Alliance Defense Fund represented her; the ACLU came in, and between them the message was the same, that it is a clear violation of the First Amendment to preclude her from using the school, which, as all schools are, is some type of forum for expressing their beliefs.

How is that different from this case? I think it is different in several ways. I will admit, my viewpoint does not really stray that far from the majority, so I will simply give you some type of synopsis. The majority felt that the policy at issue was Hastings's "all-comers policy," that student organizations that seek recognition—which carries with it the ability to call upon resources, including the same type of student activities fee that you all pay and that the SBA disperses—that such organizations must accept or at least give the opportunity for membership to all members of the law school community.

There was some debate between the majority and the dissent. What about things like the Law Review that are somewhat exclusive? And in a war of footnotes, they decided that really what was at issue was that a member of every organization has the opportunity to participate in and cannot be excluded based on status or goal. Mr. Baylor is certainly correct that there was a lot of debate, certainly between the majority and the dissent, on what the actual policy was. The dissent, led by our own favorite son, Justice Alito, felt that the policy was not an all-comers policy but a nondiscrimination policy that said that student organizations could not discriminate based on religion or affectional preferences, I assume.

So the way I phrase this debate is along the lines of the majority. Does a public university violate any constitutional proscription if it requires that any student organization that receives government money or resources—that such an organization gives an opportunity to all students to become members of the organization? I say no, there is no violation if a public university does that.

First, I do not believe that such a restriction is content- or viewpoint-based. It is, in fact, in some ways—to some extent, I draw upon my own practical experience as an on-again, off-again law school administrator—a device to get the law school administration (i.e., the government) out of the business, sometimes a very messy business, of what actually motivates a group of students to do anything, whether they are excluding based on status or belief. I think it would be very problematic if I tried to ask the Italian-American Association whether they were excluding someone based on the consistency or not of that person's beliefs with the mission of the organization, as opposed to status.

A rule like this actually, frankly, makes—not that I expect a lot of sympathy—law school administrators' lives a lot easier because it gets us out of the business of intrusively inquiring into consistency with "mission," i.e. why student organizations are doing something. Basing it on a very outwardly, externally objective, verifiable circumstance—do you accept all comers or not?—gets us out of that, and it is, in my view, a viewpoint-neutral, content-neutral rule of general application. That, I would contend, is the distinction between this situation or situations like this and *Healy v. James*, which Mr. Baylor mentioned, which was a case, as he described, in which the university administration basically singled out a particular organization, in that case the SDS, for special discriminatory treatment, excluding them from the benefits in an otherwise general program involving student organizations. I think this case is almost the exact opposite of that. Here we have a neutral university policy, and it is the student organization that is essentially asking for the exemption from that neutral rule by asking that it be relieved from the obligations of the all-comers policy. That, to me, is a critical difference.

In the proper context, I would be the first to argue in favor of free speech associational rights, and I absolutely agree that the right to associate includes the right not to associate. It must, necessarily. I just do not think in this case that CLS at Hastings really lost any right of association. I do not mean to belittle this in any way, but it seems all this really came down to is money. They did not get access to the student activities fee. As I understand from the record, and I certainly think this is an important point, they could have access, for instance, to a meeting room just like any other group of students.

Let's face it: if a group of students wants to get together, talk about sports, talk about anything, or engage in Bible study, they can get a room to do it within a reasonable time so long as it is free. And, apparently, the majority said they had that right. They had access to bulletin boards and other methods of communications—or at least I would be the first to say that they should—just as any student here at Rutgers, sometimes to the annoyance of everyone else, has complete access to the student-wide listserv, and we approve everything that goes on that listserv.

I first adopted this policy, and at the time I told the SBA that there are two ways to do this: either no student has access to the list or everyone does. I am not going to do the in-between thing of deciding which student organizations or which students have access, because that is going to involve me being the super-editor and censor, and I am not going to have any of that. So the SBA actually voted at the time and said, "We'll keep the access for all policy with all the occasional annoyances that may cause."

So with those assumptions—that a public university must allow access to an organization which, due to some confessional standard or mission or belief, excludes from its membership those who do not meet those standards, as, quite frankly, would any run-of-the-mill religious denominations. We have campus ministries at Rutgers even though it's a public university. I

just looked it up. If you go to catholiccenter.rutgers.edu, you will find the website of the Catholic campus ministry, and if you go to episcopal.rutgers.edu, you will find the website for the Episcopal ministry at Rutgers. So they all have access to essentially the same methods of communications, and if anyone wanted to send a message on the listserv, at least I could say we would allow it so long as we allow open access to the listserv.

Where I think that the Court said that a public university was allowed to draw the line, a line that I think is a defensible one, is when, in addition to having means of communication and a place for a meeting, you also are seeking money, state money collected from you all in support of their mission. Actually, I could make an argument, though I do not think that it is necessary, that if Rutgers or Hastings or any other public university decided to do that, there might be a serious Establishment Clause violation in doing so. At the very least, it seems to me, it is a defensible decision of the university not to do that. And Hastings chose a way that did not require, in order to apply that rule, a viewpoint-based or content-based distinction. There is a certain elegance in this way that the all-comers policy achieved that result without having inquired into the inner workings of a student organization.

There was an argument that was raised before the courts that this all-comers policy would allow essentially a hostile takeover, that groups of students who had conflicting beliefs with the Christian Legal Society could become members and take over the association and do whatever they wanted. And the Court, I think, rightfully said that this is speculative. I would say at this point that it is fanciful that that was going to happen. At the very least, if you were going to rely on that as the basis for an argument that you have lost the right to association, there should be some record to indicate that it is anything more than a fanciful possibility, as I think you have heard suggested before (without naming the source), you all got the message that you have other things to do with your time. If you do not agree with an association's mission or belief, you do not join it; you join some other association. And that is the way things should work.

So I do not think that CLS really lost in any meaningful sense its ability to freely associate. What it had was a choice. It could decide to take the all-comers pledge, and the additional thing it received essentially was access to funds. And if it did not decide to do that, that would be fine, and it could, and presumably since that time has continued to exist and, for all I know, flourish. I do not think that it denies someone the right to association simply to say that we are not going to fund it, or give you a subvention. Religious organizations and religiously-affiliated organizations have existed since the beginning of the nation without state support and have done just fine.

So what do I think the outcome of this decision is? If a group of students wanted to conduct a Bible study in one of our rooms, or if the local Catholic or Episcopal ministry wanted to hold a service in this building, say, on Ash Wednesday, or if a group of Muslims students wanted to reserve a room to conduct their five required daily prayers, all those things not only should happen, I can say the experience in this law school, at least in my experience, they have happened on occasion, and I think nothing in this decision prevents that at all. All those things are still allowed under this decision within the confines of a public law school, and I think that is fine. And I think it is actually probably constitutionally required.

What if the decision had gone the other way? If we are going to talk about hostile takeovers, predictions of extreme outcomes to influence the debate, I will throw in one. What about if the Westboro Baptist Church wants to create a student organization here? We would have to allow it. I assume you all know the unhappy provenance of that organization. I suppose I will criticize myself and say that now it is me engaging in speculation. It would never happen.

But any denomination, any of what I will call the mainstream denominations that has a confessional requirement, which is most of them, would we be required to fund the Rutgers Catholic Student Law Student Association or Jewish Association or Muslim Association that had as a requirement of membership some requirement adhering to some confessional standard? Since I have litigated Establishment Clause cases before and have developed some friendships with opposing counsel, and now one more, I always tell public interest lawyers who litigate on the other side, "Be careful what you wish for; you might get it." If this decision had gone the other way, we would have had, in my view, increased government interaction and entanglement with the religious organizations in a way that might seem at the moment to be beneficial because you get some money, but, I think, in the long run might actually work against the free exercise rights of the religious organization involved. The Establishment Clause is as much for the protection of religious sects as it is for the state.

Mr. Baylor Response: Thanks, Dean. Those were great comments.

How many of you have read the opinion? A fair number. I mean, it is a complicated case, and the outcome was not self-evident. The fact that you had a circuit split over this question and that you had five Justices who are intelligent, thoughtful people, four Justices who also are intelligent, thoughtful people coming to different conclusions, is unsurprising. So I think you heard some of the alternative perspectives on this case and why it was so closely divided in the Court.

On the Establishment Clause question, Hastings did not justify what it did by reference to the Establishment Clause. In other words, it did not say it was trying to either comply with the Establishment Clause or even that it was trying to respect Establishment Clause values even if its actions were not required. I think that they did not do that because they realized that this was a non-starter argument.

The big religious freedom and church-state battle in the 1970s, 1980s, and 1990s was whether religious groups should have the same access to public meeting space as non-religious organizations, and the Court resolved that controversy over and over again; a conflict between a free exercise/free speech argument on one side and an Establishment Clause argument on the other side. In favor of the free speech argument, there was a case in 1981 called *Widmar v. Vincent*. It said that there is no Establishment Clause power recognizing a religious student group. Then, in 1995, in a case called *Rosenberger v. University of Virginia*, the Court did something that I think is somewhat

significant to this case because Dean Chen talked about the existence of the money and these other benefits besides meeting space. The Court said that there was no Establishment Clause justification for denying a religious publication money to publish religious things, and the Court said that denying that was a Free Speech Clause violation. It was a slightly different argument we made in this case, and I do not want to suggest that they are the same. But, in other words, all this church-state stuff was off to the side.

Another important debate in the case that you heard Dean Chen talk about a little bit was, how bad was it for CLS not to have recognition, and how bad would it be for CLS to comply with the policy? Let me take the second one first. How bad would it be for CLS to comply with the policy? Our argument in that regard did not rest entirely on the specter of 100 people who disagree with CLS's message showing up on a particular day in September and saying, "We're here to take over." The way that CLS operates and the way Hastings operated really put this into sharp relief without the existence of a real person who did not agree with CLS showing up and being excluded.

CLS is like a lot of religious organizations, and, in a way, unlike a lot of other kinds of organizations. When you join the Federalist Society, for example, you do not sign a creed that says, "I believe in X, Y, and Z," or if you join the Environmental Law Society or the LGBT Caucus, you do not sign a statement of beliefs. You have a general sense of what they are about. You have a general sense of whether you agree or disagree with them. But a lot of religious organizations are different. They do have creeds, and it is just a way that they, over time, develop a way of defining their boundaries. This is what we do believe; this is what we do not believe. It is a very common phenomenon in Christianity. It may strike you as odd, but it is a very normal thing for a religious group to say, "Here's what we believe."

Put that to one side. What Hastings was saying was, if you want to be recognized, you must promise in advance that you will allow someone who rejects your religious beliefs to be a leader or voting member. The policy did not work like, "here is this rule out there, and if you violate it—someone wants to be the president and is an atheist, so they cannot be president—we are going to come after you and de-recognize you." What Hastings said was, "CLS, you must promise in advance that you will never consider the statement of faith in making decisions about members." That is a promise that CLS could not make, out of conviction or out of conscience. They could not say truthfully that they were never going to consider somebody's religious beliefs. So, really, that is the downside of forced compliance. They really cannot in good conscience agree in advance that they are going to comply with the policy.

The other piece of this was, how bad is it to not be recognized? I will have to take issue with the factual recitation that Dean Chen put forth a little bit on this issue of meeting space. Hastings did say, "We give you access to meeting space as it is available." There were three instances between the time the lawsuit was filed and the time the record was closed in which CLS sought access to the meeting space. And, in each case, that request was denied. To be fair, they did not say, "No, we lied when we said you can have access to meeting space." What they did was they slowed up the request. They never responded to it until after the event had occurred.

And it sounds to me that you agreed that that is the wrong thing to have done, but that is what they did, and that was in the record.

So the assertion that CLS had access to the meeting space, yes, Hastings asserted that, but it did not comport with reality.

The second thing is that they did deny CLS access to all the means of communicating on campus. They did not have access to the listserv. They did not have access to the bulletin board. They did not have access to the list of registered student organizations on the website. I did a lot of debating on this case before the decision came down. And every time I would ask the leader of the group that was sponsoring the debate, whether it was the LGBTQ Group or the Federalist Society or the CLS chapter, whether these benefits are important. All of them said without exception, the benefits of recognition are important. The dissenting opinion correctly observes that recognition is the life blood of your activity on campus. I can see you can exist without recognition, but recognition is a helpful thing.

The last thing I will say is that I think it is worth considering what it was that Hastings was trying to accomplish. In other words, what was it that CLS was doing that was so terrible? I think, to put this in a broader context, American law acknowledges generally that discrimination is wrong. America acknowledges that religious discrimination is wrong. The debate is still going on about sexual orientation discrimination, but the law in those contexts always, in religion and sexual orientation, exempts religious organizations. Barney Frank's Employment Non-Discrimination Act, which essentially adds sexual orientation to Title VII, has an exemption for religious organizations. Essentially, what CLS wanted was for Hastings to behave in a way that most of Americans behave.

Dean Chen Response: Just a doctrinal clarification. I am sure you are right that Hastings did not raise any Establishment Clause defenses. I will speculate that they thought they did not have to because that argument is only something you bring out—i.e., we are not going to recognize this religious group because we do not want to violate the Establishment Clause—that is something you raise only if the state has to meet the compelling state interest test.

Widmar v. Vincent, which Mr. Baylor mentioned, did say at least hypothetically that avoidance of an Establishment Clause violation could constitute a compelling state interest that would justify a content-based restriction on speech. And that was essentially what happened in *Widmar*. Like *Healy v. James*, it was a school reaching out and saying to a particular type of speaker based on his content, because it was religious in nature, we are not going to give you the same access to the school, the facilities, or anything else. And I would be the first to agree that you cannot do that.

This again is, to me, the flip situation where there is a neutral rule under which the law school administration is not singling out a certain content or viewpoint or type of speech for special regulations applying a neutral rule. And again, it is

really the organization that is seeking the exemption from the rule, not the other way around.

And as for the factual matter—there, I am going to take the easy way out—I would not have done that. My discussion assumed that even if CLS does not have recognition, they have to have the same access to channels of communication as any other student. I suppose that means, if I were to wake up tomorrow or were to tell Dean Farmer to wake up tomorrow and cut off this all-comers access to our listserv, and we applied uniformly and it was not pretextual just to avoid this, that would be a different case. But so long as we have that policy, it has to be consistently applied, as is access to rooms. Sometimes, there is a problem getting a room in this law school, but I assure you now—you will just have to take my word, it is this new-fangled software that we are trying to use—it has nothing to do with, believe it or not, whatever it is that the student organization wants to do.