

CHRISTIAN LEGAL SOCIETY V. MARTINEZ

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ABSTRACT: Particularly on the American university campus, First Amendment rights to speech, religious expression, and association are integral to students' educational experiences. In 2010, these freedoms faced a significant setback when the Supreme Court ruled in favor of Hastings College of Law in Christian Legal Society v. Martinez. The Court dismissed students' appeal to their rights by treating the public university as a limited forum in which Hastings needed only to show that its policy was "reasonable" to pass constitutional muster. The Court claimed that Hastings' all-comers policy was "viewpoint neutral," yet it required the Christian Legal Society to accept leaders whose actions violated the group's statement of faith. Hastings did not enforce this policy equally but permitted other campus groups to choose their members selectively. While Hastings claimed to prevent discrimination on the basis of religion and sexual orientation, they unconstitutionally discriminated against not only Christian students but any students with minority viewpoints that administrators could consider unwelcome. The powerful all-comers policy, now sanctioned by the Supreme Court, has empowered universities to suppress speech, religion and expressive association rights and is deeply detrimental to the First Amendment freedoms of not only students, but members of any organization motivated by beliefs.

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INTRODUCTION

One of the most unique features of the American experiment is the First Amendment, which guarantees freedoms that few other nations throughout history have enjoyed. Freedoms of speech, religion and association feature prominently as protections that not only guard individual expression rights but seek to create an open forum where the free exchange of ideas can prosper. In 2010, college students' First Amendment rights received a serious blow with the Supreme Court's decision in *Christian Legal Society v. Martinez*. The decision failed to uphold students' constitutional rights because the Court gave insufficient weight to First Amendment freedoms and overlooked the university's discriminatory application of their all-comers policy, granting universities increasing power to define student rights at whim.

FACTS

The case began with Hastings College of Law, part of the University of California public-school system, and their policy regarding Registered Student Organizations (RSOs). When a student group on campus is officially recognized as an RSO, the group is allowed to use school funds and facilities as well as Hastings' communication networks and official logo. Without this status, groups cannot meet on the law school premises, even with the school's special permission, which Hastings may revoke at any time. To become an RSO, each group must comply with Hastings' Nondiscrimination Policy, a clause echoing state law

that bars discrimination on the basis of several categories, including religion and sexual orientation. While this clause had been in place for two decades, it was not until the Christian Legal Society requested RSO status that Hastings mentioned the concept of an “all-comers” policy in June 2005. Hastings claimed their Nondiscrimination Policy should be interpreted as requiring that student organizations “allow any Hastings student to become a member and seek a leadership position in the organization.”¹ Not only would groups need to accept members who fundamentally disagreed with their goals, but they would have to allow potentially hostile group members to become leaders who could change the group’s mission entirely.

In 2004, a small group of Hastings students sought to establish a chapter of the Christian Legal Society (CLS) by becoming an RSO. This national organization, comprised of thousands of Christian law students and attorneys, contains in its bylaws a Statement of Faith that members must sign. The statement includes an affirmation of Scripture as the “inspired Word of God.”² In 2004, the national organization incorporated another clause into its policy which stated that “unrepentant participation in or advocacy of a sexually immoral lifestyle” is inconsistent with the Statement of Faith’s understanding of Scripture and would thus disqualify membership. CLS carefully defined “sexually immoral lifestyle” as “acts of sexual conduct outside of God’s design for marriage between one man and one woman.”³ This definition is important

1 CLS v. Martinez, 561 U.S. 661, 711 (2010) (Alito, J., dissenting).

2 *Id.* at 708.

3 *Id.* at 708.

because it is not solely targeted at potential members with homosexual orientation; it clearly refers to conduct and practices which also include any forms of heterosexual activity outside the bounds of traditional marriage. Thus the policy's goal is not to exclude sexual minorities, but to uphold a Biblical view of sexual activity consistent with the organizations' Statement of Faith.

Hastings, however, responded by denying CLS's request for registration, making CLS "the only student group whose application for registration has ever been rejected."⁴ CLS filed a complaint under 42 U.S.C. § 1983, claiming that Hastings' all-comers policy violated CLS students' First Amendment rights to free speech, expressive association, and free exercise of religion. The District Court ruled for Hastings, arguing that the all-comers policy was viewpoint neutral and permissible due to the nature of public universities as a "limited forum" for speech and expression. The Ninth Circuit upheld this decision, and in a splintered 5-4 decision the Supreme Court also ruled for Hastings, with majority opinion by Justice Ruth Bader Ginsburg, concurrence by Justice John Paul Stevens, and dissent by Justice Samuel Alito.

LEGAL ISSUES & ANALYSIS

The first key legal issue which Justice Ginsburg's majority opinion fails to address constitutionally is CLS's appeal to their rights to speech and expressive association. Instead of giving weight to students' concerns over their rights, the Court rules that Hastings' restrictive policy is "reasonable" and therefore

4 *Id.* at 710.

constitutional. The Court addresses only the issue of “whether a public institution’s conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution.”⁵ The Court refuses to discuss whether this all-comers policy violates the rights of American citizens, or whether Hastings’ inconsistent interpretation and enforcement of their policy constitutes discrimination against the religious viewpoints of CLS members, who constitute a small minority on campus. Instead of directly addressing the all-comers policy’s effect on First Amendment rights, the Court argues that public universities are a “limited forum” in which speech and expressive association can be limited “in light of the purpose served by the forum.”⁶

However, the concept of a public university as a limited forum directly undermines the stated goals of academic institutions, such as fostering discourse and facilitating an atmosphere where diverse ideas and demographics can interact freely and prosper. As Justice Alito points out in his dissent, the Court had a dramatically different outlook in 1972 with *Healy v. James*, when it rejected the concept of a limited forum. Even though the Court allowed the university to reject Students for a Democratic Society because of their potentially violent measures, the powerful precedent of First Amendment rights on campus still played a much more significant role than the *Christian Legal Society v. Martinez* Court would acknowledge.⁷ The Healy Court strongly opposed

5 *Id.* at 177.

6 *CLS v. Martinez*, 561 U.S. 661, 711 (2010) (citing *Rosenberger v. Rector and Visitors of Univ. of VA*, 515 U.S. 819, 829 (1995)).

7 *Healy v. James*, 408 U.S. 169 (1972).

the proposition that “First Amendment protections should apply with less force on college campuses than in the community at large.”⁸ Instead, the free exchange of ideas that characterizes American society should thrive at public universities in order to enhance the educational experience due to constitutional protections. Particularly in law school, where most students come in their mid-twenties to learn the art of legal discourse and engage in a competitive professional career, students do not need to be protected from opposing viewpoints or unwelcome religious views as if the campus were a kindergarten classroom. Justice Anthony Kennedy acknowledges this in his concurrence, mentioning that “a vibrant dialogue is not possible if students wall themselves off from opposing points of view.”⁹ However, the Court argues that as long as the school does not prohibit certain beliefs or intend to discriminate against CLS through its policy, it is justified in limiting speech and association. In effect, the Court treats the campus as a limited forum where certain minority voices can be silenced.

The Court’s adoption of a limited-forum analysis in *Christian Legal Society v. Martinez* is significant because it allows the Court to use a weak standard of “reasonableness” to evaluate the College’s policy instead of the strict scrutiny standard traditionally applied when freedom of speech or Fourteenth Amendment rights are at stake. The Court borrows its “reasonableness” standard from *Rosenberger v. Rector and Visitors of Univ. of VA*, a 1994 case on campus speech in publishing. However, Justice

8 *Id.* at 180.

9 *CLS v. Martinez* 561 U.S. at 705 (Kennedy, J., concurring).

Ginsburg overlooks the precedent set by the rest of the Rosenberger case, in which the Court ruled that a university may not withhold funding from a student publication due to its religious outlook.

The second legal issue regards the Court's claim that the all-comers policy is "viewpoint neutral" and therefore not a violation of the free expression of religion guaranteed by the First Amendment. The Court dismisses the students' claim of religious freedom by arguing that Hastings did not single out CLS for inferior treatment purely due to its religious status, and thus the students' rights were not violated. The Court mentions the precedent set in *Widmar v. Vincent*, a 1981 case in which a university was prevented from discriminating against a religious group that wanted to meet on campus. However, this was an Establishment Clause case, while the issue at hand in *Christian Legal Society v. Martinez* is the free exercise of religion, a clause that the Court has made stronger efforts to protect.¹⁰ Furthermore, the Court should have followed the precedent set in *Widmar* and protected the religious students in CLS from being singled out for "disadvantageous treatment."¹¹

One of the Court's arguments to justify the dismissal of these free exercise claims is that CLS was discriminating against students with homosexual orientation therefore Hastings needed to protect a minority from being excluded. However, CLS makes

10 For example, the Court in *Wisconsin v. Yoder* made it clear that Amish parents' free exercise of religion would be inhibited by a compulsory public school attendance policy, and thus the Amish received protection by the Court.

11 *CLS v. Martinez*, 561 U.S. at 684.

clear that it is not excluding members or leaders on the basis of sexual orientation, but “on the basis of a conjunction of conduct and the belief that the conduct is not wrong.”¹² These distinctions between orientation, conduct, and belief are nuanced and lie at the heart of religious practice. For the Court, an intentionally non-religious entity, to dictate the interaction of these concepts in such a complex area is essentially judicial supremacy. This approach also demonstrates a fundamental misunderstanding of the nature of fervently-held religious beliefs; the Court even implies that CLS is “cloak[ing] prohibited status exclusion in belief-based garb.”¹³ Justice Ginsburg acknowledges that this religious question is too nuanced for Hastings to decide, yet the Court presumes to decide it definitively in a manner that significantly limits students’ rights of religious expression and threatens the ability for any group to have a Statement of Faith and hold their leaders to it. Furthermore, the fact that Gays and Lesbians for Individual Liberty submitted a brief supporting CLS’s arguments lends credence to the argument that this is a First Amendment issue, not a gay rights issue.

The Court continues to justify Hastings’ discrimination toward CLS by arguing that the law school enforces its all-comers policy equally to apply to all groups. However, as Justice Alito demonstrates, this is simply not the case. In fact, Hastings’ inconsistent enforcement of their policy reveals that the policy was not viewpoint neutral, but instead targeted CLS because of its members’ use of their Statement of Faith. Out of 60 campus

12 Brief for Petitioner at 35-36. *CLS v. Martinez*, 561 U.S. at 690.

13 *CLS v. Martinez*, 561 U.S. at 684.

groups and in all its history, Hastings has only denied RSO status to one group—the Christian Legal Society. Other groups, such as Silenced Right, limit their voting members to students committed to the pro-life message, and La Raza accepts only students “of Raza background.”¹⁴ These groups have never encountered an all-comers policy. While Hastings argues that its all-comers policy had been in place for twenty years and CLS just happened to violate it in 2004, Justice Alito demonstrates that no Hastings administrator ever mentioned an all-comers policy until they had denied CLS’s initial recognition request. Instead, Hastings’ initial claim was that CLS violated their Nondiscrimination Policy. Since Hastings had never before used this policy to coerce a group into accepting all comers as both members and leaders, Hastings’ inconsistent application of the policy constitutes discrimination against CLS. As Justice Alito explains, Hastings’ Nondiscrimination Policy is a standard clause that applies to every member of the law school, such as human resources staff, administration and faculty, yet their actions have not been subjected to the concept of an all-comers policy. Only those qualified for leadership and aligned with the mission of the school are considered for employment, as with any educational institution. Thus Hastings’ claim that their Nondiscrimination Policy mandates CLS’s acceptance of all comers as both voting members and leaders is inconsistent with previous applications and constitutes a new policy, one the school invented in order to exclude CLS’s unwelcome beliefs.

The Court’s final argument to justify Hastings’ rejection

14 *Id.* at 713 (Alito, J., dissenting).

of CLS is that the effects of being denied RSO status were not detrimental enough to merit complaint. Justice Ginsburg views the RSO status as a subsidy or benefit that some groups gain, not a necessary element to a group's survival and growth. However, the denial of recognized status is a penalty that affected CLS substantially; the group survived with only seven members, and the fact that they were able to plan a few off-campus events for students does not justify discrimination against this group. The inability to use campus meeting rooms, advertise through campus channels, and receive funding for special events significantly impacted CLS's ability to reach students. Even if the loss of RSO status had not affected CLS materially, Justice Alito argues, "this Court does not customarily brush aside a claim of unlawful discrimination with the observation that the effects of the discrimination were really not so bad. We have never before taken the view that a little viewpoint discrimination is acceptable."¹⁵

CONCLUSION

Since the Court's decision in 2010, dozens of similar cases have emerged at private and public universities nationwide. The powerful tool of an all-comers policy, now sanctioned by the Supreme Court, has given universities license to suppress the speech, religion and expressive association rights of groups such as Intervarsity, Cru, and Catholic fellowships. Vanderbilt University and the University of Buffalo have prohibited groups from requiring their leaders to identify as Christian. In September

15 *Id.* at 717-8.

2014, the California State University system officially unrecognized Intervarsity from its 23 campuses, costing each chapter up to \$20,000.¹⁶ To be consistent, schools would have to require a sorority to accept men and force the College Democrats to allow a Republican president to be elected. However, most all-comers policies exempt Greek groups and allow honor societies and athletic groups to discriminate based on intelligence and gender. Religious groups are asking for a similar exemption to protect their sincere beliefs, and some schools, including University of Michigan and Ohio State University, have granted these exemptions. However, nothing prevents a school administration from violating students' First Amendment rights by modifying or withdrawing the exemption at any time. The issue centers on the source of these rights themselves, whether they belong inherently to students in a free society, or are granted at whim by university administrators.

The Court's decision in *Christian Legal Society v. Martinez* is deeply detrimental to the First Amendment rights of not only students, but members of any organization motivated by beliefs. The Court also limited students' freedoms of speech and expressive association by treating the public university as a limited forum, despite the *Healy* precedent of campus rights. Furthermore, the Court incorrectly applied precedent in *Rosenberger* so that the law school only had to show that its policy was "reasonable," instead of the strict scrutiny standard traditionally used

16 Charles C. Haynes, *Religious voices under attack at colleges*, Livingston Daily, Oct. 2, 2014, <http://www.livingstondaily.com/story/opinion/columnists/2014/10/02/charles-c-haynes-religious-voices-attack-colleges/16620365/>.

for First Amendment violations. Hastings' inconsistent application of their Nondiscrimination Policy demonstrated that it was not viewpoint neutral, and CLS's loss of recognized status caused significant harm to the group's ability to thrive on campus. While Hastings claimed to be preventing discrimination on the basis of religion and sexual orientation, their unconstitutional tactics constituted discrimination against not only Christian student leaders, but any student with a minority viewpoint that could be considered "unwelcome" by administrators' evolving definitions. One of America's defining features, the free exchange of ideas has always challenged and encouraged students to learn enthusiastically, embrace complexity and appreciate diversity. For the Supreme Court to sanction the silencing of these voices and beliefs is an injustice that should not be ignored.

