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### Christian Legal Society v. Martinez: Rock, Paper, Scissors

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**CHRISTIAN LEGAL SOCIETY v. MARTINEZ:  
ROCK, PAPER, SCISSORS**

EDWARD J. SCHOEN\*  
JOSEPH S. FALCHEK\*\*

**I. INTRODUCTION**

In *Christian Legal Society v. Martinez*,<sup>1</sup> the U.S. Supreme Court upheld the “all-comers” policy of the Hastings College of Law, a professional school within the University of California higher education system, under which all registered student organizations must allow any student to join, participate and seek leadership position regardless of the student’s religious beliefs and sexual orientation.<sup>2</sup> Hastings’ nondiscrimination policy was challenged under the First Amendment by the Christian Legal Society, a student organization whose bylaws required all members to affirm their beliefs in enumerated principles, including the precept that sexual activity should not occur outside of marriage between a man and a woman, and refused membership to those students whose religious beliefs differed from the Christian Legal Society’s Statement of Faith or who engaged in “unrepentant homosexual conduct.”<sup>3</sup> Hastings denied official recognition of the Christian Legal Society as a student organization, because its restrictive membership policy violated Hastings’ all-comers membership requirements.<sup>4</sup>

In reaching its decision, the Court addressed several fundamental First Amendment issues that collided forcefully in the parties’ dispute, namely whether Hastings’ all-comers policy improperly imposed speech limitations in a limited public forum, restricted the students’ freedom of association, and denied organizational recognition because of the religious beliefs espoused by the organization. Because of the importance of these issues and the deep division of the Court in resolving them, careful analysis of the decision

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<sup>1</sup> 130 S. Ct. 2971 (2010).

<sup>2</sup> *Id.* at 2995.

<sup>3</sup> *Id.* at 2980.

<sup>4</sup> *Id.* at 2979.

illuminates the direction the law may take in resolving future First Amendment litigation.

## II. PROCEDURAL AND FACTUAL SCENARIO

Like many higher education institutions, Hastings encourages students to form extracurricular associations to enhance their academic and social interests outside the classroom and develop leadership skills.<sup>5</sup> Hastings' official recognition of student organizations confers significant benefits on those organizations, including financial assistance funded by mandatory student activity fees, access to the weekly newsletter, bulletin boards, and e-mail systems to publicize club activities and recruit new members, as well as the use of Hastings' name, logo, meeting facilities, and office space.<sup>6</sup> Hastings denies official recognition of student organizations, however, if they fail to comply with its nondiscrimination policy, which requires that all students must have the opportunity to join and seek leadership positions in recognized student organizations regardless of the students' status or beliefs,<sup>7</sup> but permits recognized student organizations to enforce neutral membership requirements such as payment of dues, attendance at meetings, and, in the case of its law journals, strong writing skills.<sup>8</sup>

The Christian Legal Society adopted bylaws requiring all members and officers to affirm a "Statement of Faith" confirming their belief in Jesus Christ as savior, the Trinity, and the Bible as the inspired word of God, and to conform their conduct to certain prescribed principles, such as the belief that sexual activity should only be undertaken by a man and a woman joined in marriage.<sup>9</sup> Because the adopted bylaws conflicted with the all-comers policy, the Christian Legal Society sought an exemption from Hastings' nondiscrimination policy.<sup>10</sup> Hastings denied the Christian Legal Society's exemption application, because its bylaws barred student membership on the basis of their religious beliefs and sexual orientation.<sup>11</sup> The Christian Legal Society filed suit against Hastings, claiming Hastings' refusal to grant official recognition violated its First Amendment rights to free speech, expressive association, and free exercise of religion.<sup>12</sup>

The Federal District Court granted Hastings' Motion for Summary Judgment, ruling that Hastings' denial of access to a limited public forum

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<sup>5</sup> *Id.* at 2978-79.

<sup>6</sup> *Id.* at 2979.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 2980.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 2980-81.

<sup>12</sup> *Id.* at 2981.

was viewpoint neutral, that the denial of official recognition did not impair the Christian Legal Society's ability to meet and conduct group activities, and that Hastings' all-comers policy did not deny the right to expressive association.<sup>13</sup> The Ninth Circuit affirmed, ruling that the all-comers policy was viewpoint neutral and reasonable.<sup>14</sup> The U.S. Supreme Court granted certiorari and affirmed the decision of the Ninth Circuit.

### III. IMPORTANCE OF PARTIES' STIPULATION OF FACTS

Hastings and the Christian Legal Society entered into a stipulation of facts submitted jointly with their motions for summary judgment which provided: "Hastings requires that registered student organizations allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs."<sup>15</sup>

The Christian Legal Society attempted to argue before the U.S. Supreme Court that Hastings enforced the all-comers policy inconsistently, requiring only student associations organized on the basis of religious beliefs or sexual orientation to comply with the policy and leaving other student associations free to admit members on the basis of their ideology.<sup>16</sup> The majority opinion rejected this argument, noting that the parties agreed unqualifiedly that the all-comers policy presently governs student associations and that, having entered into the stipulation, the parties are not permitted to deny the truth of the stipulated fact or suggest on appeal that the facts are other than those stipulated or that material facts are omitted.<sup>17</sup> Rather, "a judicial admission . . . is conclusive in the case."<sup>18</sup> That being so, the majority opinion "consider[ed] only whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution."<sup>19</sup>

The majority opinion's insistence on adhering strictly to the parties' stipulation was critical to the resolution of the case, because it permitted the

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 2982.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 2983.

<sup>18</sup> *Id.* The majority opinion castigates the dissenters for attempting to "undermine the stipulation" and trying to cast doubt on "Hastings' fidelity to its all-comers policy" by taking a sentence in Hastings' answer to the Christian Legal Society's first amended complaint out of context. In context, the majority opinion insists, the sentence confirms that Hastings applies the all-comers policy to all groups. In any event, the majority opinion concludes, the parties' stipulation supersedes the answer and extinguishes any conflict between them. *Id.*

<sup>19</sup> *Id.* at 2984. The majority opinion criticizes the dissenters for suggesting the majority opinion makes findings of fact about the all-comers policy and for devoting "considerable attention to CLS's arguments about the Nondiscrimination Policy as written." *Id.*

majority to focus on the limited public forum implications of Hastings' all-comers policy and to avoid consideration of whether the all-comers policy was selectively applied to religious groups, in which case the court would have to consider violations of freedom of association. As noted below in part IV, the former issue requires the court to investigate the reasonableness of the policy and the latter issue requires the court apply strict scrutiny. As discussed more fully in part VII below, if the latter test were applied, *Christian Legal Society* would likely have been decided very differently.<sup>20</sup>

#### IV. FUNDAMENTAL FIRST AMENDMENT PRINCIPLES IN PLAY

Fundamental First Amendment principles collide in the appeal of the *Christian Legal Society*: the constitutionality of restrictions on access to government property; the constitutionality of imposing restrictions on freedom of association; and the constitutionality of restrictions on student organizations based on the members' religious beliefs.

##### A. Government Restrictions on Public Forums

The first principle at issue in *Christian Legal Society* concerns the right of a governmental unit to restrict the use of its own property. In resolving this issue, courts employ four classifications of government property: traditional public forums, government designated public forums, limited public forums, and nonpublic forums. Traditional public forums, such as streets and parks, "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."<sup>21</sup> The government may impose reasonable time, place and manner restrictions in traditional public forums, but any restriction based on

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<sup>20</sup> Brett G. Scharffs, *May a Public Law School Deny Recognition to a Religious Student Group Based on the School's Nondiscrimination Policy?* 37 A.B.A. PREVIEW 296, 304 (2010) ("The key to the case probably lies in the facts the Court embraces as the basis for its analysis. If the Court follows the lead of CLS and focuses on Hastings' application of its nondiscrimination policy in a way that seems targeted exclusively at a religious group, it seems likely that the policy will be found to violate the First Amendment's protections of free speech or association. If, on the other hand, the Court accepts at face value the stipulated facts, that Hastings applies the all-comers policy equally to all student groups, then it seems likely that the Court will give the University sufficient latitude to adopt such a policy, even in the face of the possibility of groups being sabotaged or hijacked by unsympathetic student participants.")

<sup>21</sup> *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 103 S. Ct. 948, 955 (1983); *Hague v. CIO*, 59 S. Ct. 954, 964 (1939).

the content of the speech must satisfy strict scrutiny; that is, the restriction must be narrowly tailored to serve a compelling government interest.<sup>22</sup>

Governments create designated public forums when “government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose.”<sup>23</sup> Thus, for example, a state university creates a designated public forum when it adopts a policy of permitting registered student groups to use its facilities for meetings,<sup>24</sup> a state creates a designated public forum by passing a statute requiring open school board meetings,<sup>25</sup> and a city creates a designated public forum when it designs and dedicates a municipal auditorium for expressive activities.<sup>26</sup> Speakers cannot be excluded from designated public forums without a compelling interest, and restrictions are subject to the same strict scrutiny applicable to traditional public forums.<sup>27</sup>

Governments create limited public forums when they permit their property, which is neither a traditional nor a designated public forum, to be used for communication purposes but restrict use of the property to designated groups or certain topics.<sup>28</sup> The public does not have access to government property simply because it is owned or controlled by the government, and the government may, as the owner of the property, impose time, place and manner regulations, and reserve the property for a limited and dedicated use.<sup>29</sup> Thus, for example, a school district creates a limited public forum when it allows the union representing the teachers access to the interschool mail system.<sup>30</sup> The school district may also permit identified groups, such as the YMCA, Cub Scouts, and civic and church organizations

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<sup>22</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 105 S. Ct. 3439, 3448 (1985); *Carey v. Brown*, 100 S. Ct. 2286, 2291 (1980). The U.S. Supreme Court most recently considered a restriction on speech in a traditional public forum in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009), in which the Court was asked to decide whether the refusal of the city to permit a religious organization to display a monument containing a statement of its religious principles in Pioneer Park violated the First Amendment. The Court acknowledged that Pioneer Park was a traditional public forum and any restriction on the use of that forum must be narrowly tailored to serve a compelling governmental interest. *Id.* at 1132. The Court decided, however, that the right of Pleasant Grove City to engage in government speech by deciding what monuments to place in Pioneer Park trumped public forum analysis, because requiring the City to display all donated monuments would lead inexorably to the destruction or closing of the forum. *Id.* at 1138.

<sup>23</sup> *Cornelius*, 105 S. Ct. at 3449.

<sup>24</sup> *Widmar v. Vincent*, 102 S. Ct. 269 (1981).

<sup>25</sup> *Madison Joint Sch. Dist. v. Wisconsin Emp’t Relations Comm’n*, 97 S. Ct. 421, 426, n. 5 (1976).

<sup>26</sup> *Se. Promotions, Ltd. v. Conrad*, 95 S. Ct. 1239 (1975).

<sup>27</sup> *Cornelius*, 105 S. Ct. at 3448; *Perry Educ. Ass’n*, 103 S. Ct. at 955.

<sup>28</sup> *Perry Educ. Ass’n*, 103 S. Ct. at 955.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 956.

to use the mail system, but deny access to a rival union, without danger of converting the mail system into a designated public forum.<sup>31</sup> Because the school mail system is not a public forum, the school district is not required to permit any organization to use the school mail boxes.<sup>32</sup> As long as the decision of the school district to limit access is reasonable, the restriction does not violate the First Amendment.<sup>33</sup>

Governments create nonpublic forums when they restrict the use of their property to a limited purpose which would be disrupted if broader access were permitted or when the excluded use of the forum is inconsistent with the purpose for which the property is normally utilized. For example, the decision of a city to permit “purveyors of goods and services” to place advertisements on its city transit vehicles, but to refuse access to politicians seeking advertising space does not violate the First Amendment, because no public forum was created.<sup>34</sup> Rather, the city sought to “minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience,” and these objectives were reasonable.<sup>35</sup> Similarly, governments can provide restricted access to military reservations and jailhouse grounds without being forced to permit wider public access, because the use of the property would be disrupted by broader public use.<sup>36</sup> Likewise, the federal government may restrict the charitable organizations listed on the Combined Federal Campaign Contributor’s Leaflet used as part of the annual charity drive aimed at federal employees to “nonprofit charitable agencies that provide direct health and welfare services to individuals or their families.”<sup>37</sup> Without such a limitation, the federal government would potentially have been forced to permit 850,000 charitable organizations to participate by printing their thirty-word descriptions on the leaflet.<sup>38</sup> Because unlimited participation would disrupt the workplace and destroy the effectiveness of the charitable campaign, the federal government can exercise control over access.<sup>39</sup> Hence the Combined Federal Campaign was deemed to be a nonpublic forum,<sup>40</sup> and the federal government is permitted to control access on the basis of “subject matter and speaker identity so long as the distinctions

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Lehman v. City of Shaker Heights*, 94 S. Ct. 2714, 2717 (1974).

<sup>35</sup> *Id.* at 2718.

<sup>36</sup> *Greer v. Spock*, 96 S. Ct. 1211, 1217 (1976) (“[T]he business of a military installation [is] to train soldiers, not provide a public forum.”); *Adderley v. Florida*, 87 S. Ct. 242, 247 (1996) (noting that protestors have no right of expression “on that part of jail grounds reserved for jail uses”).

<sup>37</sup> *Cornelius*, 105 S. Ct. at 3342-43.

<sup>38</sup> *Id.* at 3451.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

drawn are reasonable in light of the purpose served and are viewpoint neutral.”<sup>41</sup>

### B. *Restrictions on Freedom of Association*

Governmental restraints on freedom of association and freedom not to associate are subject to close scrutiny and may not be upheld unless “they serve ‘compelling state interests’ that are ‘unrelated to the suppression of ideas’ – interests that cannot be advanced ‘through . . . significantly less restrictive means.’”<sup>42</sup> In *Roberts v. United States Jaycees*,<sup>43</sup> the U.S. Supreme Court confronted conflicting admission standards to the Jaycees, an organization founded in 1920 as the Junior Chamber of Commerce.<sup>44</sup> Local Jaycee chapters in Minneapolis and St. Paul admitted women as regular members, contrary to the national Jaycee bylaws which restricted membership to men between the ages of eighteen and thirty-five.<sup>45</sup> The national organization advised both chapters that their charters would be revoked, and the two chapters, alleging the exclusion of women from full membership was a violation of the Minnesota Human Rights Act, which prohibited discrimination on the basis of sex, filed charges with the Minnesota Department of Human Rights.<sup>46</sup> The Minnesota Department of Human Rights determined that the revocation of Jaycee charters of the Minneapolis and St. Paul chapters violated the Minnesota Human Rights Act, and the national organization brought suit against state officials in the federal district court, contending that requiring the organization to admit women violated the male members’ rights of free speech and association.<sup>47</sup> The federal district court certified to the Minnesota Supreme Court the question whether the Jaycees was a “place of public accommodation within the meaning of the Minnesota Human Rights Act.”<sup>48</sup> The Minnesota Supreme Court decided the Jaycees organization was a place of public accommodation, because it sells goods and extends privileges in exchange for membership dues, and the Jaycees amended its complaint to ask the federal district court to consider the constitutionality of that determination.<sup>49</sup>

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<sup>41</sup> *Id.* at 3451-52.

<sup>42</sup> *Roberts v. U.S. Jaycees*, 104 S. Ct. 3244, 3252 (1984); *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2784 (2010) (holding that freedom of association includes the right not to associate); *Aboud v. Detroit Bd. of Educ.*, 97 S. Ct. 1782, 1799 (1977).

<sup>43</sup> *Roberts v. U.S. Jaycees*, 104 S. Ct. 3244 (1984).

<sup>44</sup> *Id.* at 3247.

<sup>45</sup> *Id.* at 3248.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*



The federal district court ruled in favor of the state officials, and the Eighth Circuit Court of Appeals reversed, concluding that the Jaycees engaged in advocacy of political causes and mandating the membership of women “would produce a ‘direct and substantial’ interference with that freedom,” because the change in membership would “necessarily result in ‘some change in the Jaycees’ philosophical cast.”<sup>50</sup> Minnesota’s interest in eliminating discrimination, the court concluded, was insufficiently compelling to outweigh the Jaycees’ constitutional right of association.<sup>51</sup>

The U.S. Supreme Court closely considered the admission requirements utilized by the Jaycees, and determined the membership in local Minnesota chapters was neither small (the Minnesota chapter had about 430 members and St. Paul about 400 members) nor selective. New members were admitted with no inquiry into their backgrounds and the national organization imposed no requirements other than age and sex.<sup>52</sup> This caused the Court to conclude the Jaycees was essentially an organization of strangers, rather than an organization selecting members on the basis of personal or intimate affinity or affiliation, to which constitutionally protected freedom of association applied.<sup>53</sup> While the members of Jaycees do have associative rights to pursue political, economic and ideological interests, that right does not, the Court concluded, overcome “Minnesota’s compelling interest in eradicating discrimination against its female citizens.”<sup>54</sup> Further, Minnesota advanced this interest “through the least restrictive means of achieving its ends,”<sup>55</sup> and the Jaycees failed to demonstrate how Minnesota’s anti-discrimination policy imposed “any serious burdens on the male members’ freedom of expressive association,” or how the admission of women as full voting members impedes participation in such activities.<sup>56</sup> Consequently, the Court reversed the judgment of the Court of Appeals and upheld the right of the Minnesota Jaycee chapters to admit women as full voting members.<sup>57</sup>

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<sup>50</sup> *Id.* at 3249.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 3251.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 3253.

<sup>55</sup> *Id.* at 3254.

<sup>56</sup> *Id.* at 3255.

<sup>57</sup> The same result was reached in *Board of Directors of Rotary International. v. Rotary Club of Duarte*, 107 S. Ct. 1940 (1987), in which the U.S. Supreme Court ruled that the admission of women to membership in the Rotary Club pursuant to California’s equal accommodations law did not violate the First Amendment guarantee of freedom of association, in the absence of evidence the admission of women would restrict the accomplishment of organizational objectives or interfere with the organization’s classification and admission systems, because “the relationship among Rotary Club members is not the kind of intimate or private relation that warrants constitutional protection.” *Id.* at 1946.

In *Boy Scouts of America v. Dale*,<sup>58</sup> the U.S. Supreme Court considered the constitutionality of the expulsion of James Dale from the Boy Scouts because he was homosexual. Active in scouting from ages eight to eighteen, Dale applied for adult membership as an Assistant Scout Master of Troup 73. His membership was approved around the time he left home to attend Rutgers University. At Rutgers, he became active in the Lesbian/Gay Alliance, advocated increasing gay role models for homosexual teenagers, and was identified in a newspaper article as the co-president of the Lesbian/Gay Alliance.<sup>59</sup> The Monmouth Boy Scout Council revoked his adult membership, because Boy Scouts policy denied membership to homosexuals.<sup>60</sup> Dale filed a complaint against the Boy Scouts in the New Jersey Superior Court, alleging his expulsion violated New Jersey's public accommodations law, which prohibited discrimination on the basis of sexual orientation.<sup>61</sup> The New Jersey Superior Court ruled that the Boy Scouts was not a place of public accommodation, but rather was a "distinctly private group exempted from coverage under New Jersey's law, and that the Boy Scouts' policy of not admitting homosexuals was protected by the First Amendment freedom of expressive association."<sup>62</sup> The New Jersey Superior Court's Appellate Division reversed, holding that the public accommodations law applied to the Boy Scouts and was violated by the expulsion of Dale.<sup>63</sup> The New Jersey Supreme Court affirmed, deciding that the Boy Scouts was a public accommodation and that, because the membership of the Boy Scouts was large and nonselective and inclusive rather than exclusive, and because the organization's practice was to invite or allow nonmembers to attend meetings, the membership of the Boy Scouts was not sufficiently personal or private to warrant First Amendment protection under the freedom of intimate association.<sup>64</sup>

The U.S. Supreme Court preliminarily laid the foundation of its freedom of association analysis by focusing on the Boy Scouts' mission statement,<sup>65</sup> the Scout Oath,<sup>66</sup> and the Scout Law,<sup>67</sup> all of which, the Court emphasized,

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<sup>58</sup> *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

<sup>59</sup> *Id.* at 2449.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 2449-50.

<sup>62</sup> *Id.* at 2450.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2451.

<sup>65</sup> "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential." *Id.*

<sup>66</sup> "On my honor I will do my best to do my duty to God and country and obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight." *Id.* at 2451-52.

underscored the core purpose of the Boy Scouts to instill a system of values and moral beliefs through engagement in expressive activity.<sup>68</sup> Further, the Boy Scouts claimed, “it does not want to promote homosexual conduct as a legitimate form of behavior” and teaches homosexual behavior is not “morally straight,”<sup>69</sup> and its position statement maintained: “The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate.”<sup>70</sup> Admitting Dole to adult membership in the Boy Scouts as an assistant scoutmaster, the Court noted, “would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”<sup>71</sup>

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,<sup>72</sup> the U.S. Supreme Court ruled that the South Boston Allied War Veterans Council (“the Veterans Council”), an unincorporated association of individuals elected from various South Boston veterans groups which annually organizes and conducts Boston’s St. Patrick’s-Evacuation Day Parade (“the Parade”), could not be compelled by the government to allow the Gay, Lesbian and Bisexual Group of Boston (“GLIB”), a social organization of persons who are homosexual or bisexual and their supporters, to march in the parade.<sup>73</sup> The Court initially determined that the Parade was expression for purposes of the First Amendment. It was a festive event in which people in costumes and uniforms, marching bands and floats, and colorful flags and banners entertained the spectators lining the streets and the television viewers in their homes.<sup>74</sup> While conceding the Veterans Council was rather lenient in admitting diverse groups with a wide range of messages to its parade, relaxed admissions requirements did not forfeit the parade organizers’ constitutional protections.<sup>75</sup> Rather, the Court noted, the First Amendment protects the parade organizers’ rights to assemble a multifaceted message of their own choosing, much the same way as the First Amendment protects cable operators’ selection of programs to be rebroadcast and newspaper editors’ assembly of diverse voices on the editorial page.<sup>76</sup>

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<sup>67</sup> “A Scout is: Trustworthy, Obedient, Helpful, Thrifty, Friendly, Brave, Clean, Kind, Reverent.” *Id.* at 2452.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 2453.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 115 S. Ct. 2338 (1995).

<sup>73</sup> *Id.* at 2341, 2350.

<sup>74</sup> *Id.* at 2345.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 2345-46.

Because GLIB was formed for the very purpose of marching in and communicating its ideas as part of the Parade,<sup>77</sup> the "state court's application of [the public accommodations act] produced an order essentially requiring petitioners to alter the expressive content of their parade."<sup>78</sup> Such compelled speech violates the fundamental autonomy given to the speakers under the First Amendment to choose the content of their own message.<sup>79</sup> The Court continued:

Indeed, this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, subject, perhaps, to the permissive law of defamation. Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful (citations omitted).<sup>80</sup>

*Roberts*, *Dale* and *Hurley* provide significant First Amendment protection of the freedom to associate and not to associate, namely that government restrictions on associational relationships must serve compelling interests that cannot be attained through less restrictive means. That protection, however, is not provided unless the associational value of membership in the organization is clear and strong. In *Roberts*, the associational value of membership in the Jaycees was deemed to be weak, because the Jaycees were not selective in their membership and did not demonstrate how admitting women would burden the members' participation in expressive activities. Hence, the need to eliminate discrimination against women prevailed over the Jaycees' freedom of association. In *Dale*, the Boy Scouts created a clear system of values and beliefs, promulgated those values and beliefs unambiguously in its organizational mission statement, scout oath, and scout law, and instilled those values and beliefs in its members. The Boy Scouts' values and beliefs held that homosexual activity was morally wrong, and the admission of homosexual scout leaders directly contradicted what the organizations stood for. Hence, because the associational value of the Boy Scouts was strong, it prevailed over the private organization's discrimination against homosexuals. In *Hurley*, the

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<sup>77</sup> *Id.* at 2347.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 2347-48.

expressive activity was the annual parade, and the parade organizers had a long history of deciding what organizations could and could not participate in the parade. While the expression emanating from the parade was diverse and the admission standards were lenient, the associational value in terms of the participants' expression was sufficiently strong to overcome the need to eliminate discrimination based on sexual orientation.

### *C. University Restrictions on Student Organizations Based on Content of Expression*

The U.S. Supreme Court has on at least three occasions dealt with university restrictions on student organizations based on the content of their expression. In *Healy v. James*,<sup>81</sup> students at Central Connecticut State University filed a request to establish a local chapter of the Students for a Democratic Society, and a Student Affairs Committee approved the application and recommended recognition of the chapter.<sup>82</sup> The president of the University, however, rejected the recommendation, and issued a statement denying the chapter the benefits of official campus recognition, because he found the organization's philosophy antithetical to the school's policies and to academic freedom.<sup>83</sup> The U.S. Supreme Court concluded the denial of campus recognition violated the First Amendment.<sup>84</sup> While the Court recognized that universities can require campus organizations to affirm their willingness to adhere to campus policies governing student conduct, universities cannot suppress the organization's speech or association simply because it finds the views expressed to be abhorrent.<sup>85</sup>

In *Widmar v. Vincent*,<sup>86</sup> a registered student religious group, Cornerstone, asked the University of Missouri at Kansas City to provide meeting space for its members.<sup>87</sup> The policy of the University was to encourage the activities of student organizations and to provide facilities for their meetings, and, pursuant to that policy, the University permitted Cornerstone to meet on campus. In 1977, however, the University Board of Curators changed the policy to prohibit the use of buildings and grounds for the purpose of religious worship or teaching.<sup>88</sup> Student members of Cornerstone brought suit to challenge the regulation on the grounds it

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<sup>81</sup> *Healy v. James*, 92 S. Ct. 2338 (1972).

<sup>82</sup> *Id.* at 2342.

<sup>83</sup> *Id.* at 2343.

<sup>84</sup> *Id.* at 2352.

<sup>85</sup> *Id.* at 2349, 2352-53.

<sup>86</sup> *Widmar v. Vincent*, 102 S. Ct. 269 (1981).

<sup>87</sup> *Id.* at 272.

<sup>88</sup> *Id.*

violated their right to free exercise of religion and freedom of speech.<sup>89</sup> The U.S. Supreme Court determined that, having established a limited public forum for student expression, the University was required to demonstrate its regulation was necessary to serve a compelling state interest and was narrowly constructed to achieve that end.<sup>90</sup> The Court rejected the University's argument that it was obligated by the Establishment Clause<sup>91</sup> not to provide its facilities to religious groups.<sup>92</sup> Rather, the Court concluded, providing meeting space for Cornerstone neither confers approval of its religious principles or practices nor empowers the religious organization to dominate the limited public forum.<sup>93</sup> Further, providing meeting space to religious groups does not interfere with the University's capacity to establish reasonable time, place and manner regulations.<sup>94</sup> Having created a limited public forum to student organizations, the University is not permitted to impose content-based exclusions on speech, religious or otherwise.<sup>95</sup>

In *Rosenberger v. Rector and Visitors of the University of Virginia*<sup>96</sup> the University of Virginia withheld payment to an outside contractor for printing a student newspaper produced by Wide Awake Productions, a recognized student organization which promoted Christian values and viewpoints.<sup>97</sup> The University normally paid outside contractors for expenses related to student news, information, and opinion, but excluded student religious organizations from its disbursement request program.<sup>98</sup> When Wide Awake Publications submitted a disbursement request for the cost of printing its newspaper,<sup>99</sup> the University denied the request because of the religious perspective of the newspaper.<sup>100</sup> The U.S. Supreme Court ruled that the University of Virginia's refusal to pay the publication costs of the Wide Awake Productions' newspaper constituted government-imposed viewpoint discrimination in violation of the First Amendment.<sup>101</sup> Having established a

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 274.

<sup>91</sup> "Congress shall make no law respecting an establishment of religion." U.S. Const. amend I. The Establishment Clause has been made applicable to the States through the Fourteenth Amendment. See *Cantwell v. Connecticut*, 60 S. Ct. 900, 903 (1940).

<sup>92</sup> *Widmar v. Vincent*, 102 S. Ct. 269, 276 (1981).

<sup>93</sup> *Id.* at 276-77.

<sup>94</sup> *Id.* at 277.

<sup>95</sup> *Id.* at 279.

<sup>96</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995).

<sup>97</sup> *Id.* at 2515, 2525.

<sup>98</sup> *Id.* at 2514. A "religious activity" was defined as any activity that "primarily promotes or manifests a particular belief about a deity." *Id.* at 2515.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 2516, 2520.

limited public forum for the expression of various student viewpoints,<sup>102</sup> the University was prohibited by the First Amendment from excluding Wide Awake Publications because it advocated a Christian perspective.<sup>103</sup> The Court further determined the use of student fees to pay publication costs for a student newspaper promoting a Christian perspective does not violate the Establishment Clause, because the university's student activities fee, unlike taxes levied for direct support of a church or group of churches, was "neutral toward religion."<sup>104</sup>

In *Healy*, *Widmar* and *Rosenberger*, the U.S. Supreme Court struck down the attempts by universities to restrict access of student organizations to limited public forums because of their viewpoints. Having created and sanctioned the limited public forum, the university was required to "respect the lawful boundaries it has itself set,"<sup>105</sup> and the First Amendment prohibits universities from excluding speech on the basis of the viewpoint expressed.

## V. MAJORITY OPINION IN *CHRISTIAN LEGAL SOCIETY*

After dealing with the parties' stipulation of facts and the Christian Legal Society's attempt sidestep it, as discussed in part III above, the immediate issue confronting the U.S. Supreme Court was deciding what test to apply to resolve the First Amendment issues presented. As noted above in part IV, government infringement on freedom of association is governed by the strict scrutiny test, while government restrictions on speech in limited public forums are governed by the reasonableness test. The Christian Legal Society argued that Hastings' imposition of the all-comers policy violated their rights of association and religious speech and that the two tests should be considered separately.<sup>106</sup> The majority opinion<sup>107</sup> deftly rejected this argument, and determined that Hastings' efforts to promote student organizations established a limited public forum,<sup>108</sup> and that limited public forum analysis adequately respects and fairly balances the Christian Legal Society's religious speech and expressive-association rights.<sup>109</sup> The Court

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<sup>102</sup> *Id.* at 2517.

<sup>103</sup> *Id.* "The Guideline invoked by the University to deny third-party contractor payments on behalf of [Wide Awake Publications] effects a sweeping restriction on student thought and student inquiry in the context of University sponsored publications." *Id.* at 2520.

<sup>104</sup> *Id.* at 2522.

<sup>105</sup> *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2988 (2010).

<sup>106</sup> *Id.* at 2985.

<sup>107</sup> The majority opinion was authored by Justice Ginsberg. Justices Stevens, Kennedy, Breyer and Sotomayor joined the majority opinion, and Justices Stevens and Kennedy filed concurring opinions.

<sup>108</sup> *Id.* at 2984.

<sup>109</sup> *Id.* at 2986.

explained that it “makes little sense” to consider Christian Legal Society’s religious speech and association arguments as two separate lines of argumentation, because “expressive-association and free speech arguments merge”<sup>110</sup> and the “limited-public-forum precedents supply the appropriate framework for assessing [Christian Legal Society’s] speech and association rights.”<sup>111</sup> Further, Hastings’ all-comers policy merely withheld benefits rather than required admission of all applicants for club membership - as the Court noted, it simply dangles “the carrot of subsidy” rather than wields “the stick of prohibition” - it is more fitting to apply the less-restrictive limited-public forum analysis.<sup>112</sup>

Having determined that the limited public forum analysis was applicable, the Court reiterated the appropriate test to be applied to the all-comers policy: the university may not prohibit speech if its decision discriminates on the basis of the viewpoint expressed.<sup>113</sup> Deferring to the significant discretion of colleges and universities to assemble its educational and extracurricular programs, the Court considered the justifications advanced by Hastings in support of its all-comers policy:<sup>114</sup> open access maximizes the opportunities of student attainment of leadership positions in

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<sup>110</sup> *Id.* at 2985.

<sup>111</sup> *Id.* The Court reasoned: (1) the speech and association interests of the Christian Legal Society were closely intertwined, and it would be “anomalous for a restriction on speech to survive constitutional review under our limited public forum test only to be invalidated by an impermissible infringement of expressive association”; (2) strict scrutiny analysis applicable to “expressive association would, in practical effect, invalidate a defining characteristic of limited public forums,” namely that the state is permitted to reserve them for certain groups; and (3) Hastings’ student organization program imposes only indirect pressure on the Christian Legal Society to change its membership requirements. In other words, the Christian Legal Society could (and in fact did) choose to forego the benefits of recognized organization status in order to limit its membership rather than being directly compelled to accept members it objected to.

<sup>112</sup> *Id.* at 2986. Two commentators strongly object to the Court’s characterization of denying access to campus facilities as “dangling the carrot of subsidy, not wielding the stick of prohibition.” William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of Christian Legal Society v. Martinez*, 261 WEST’S EDUC. L. REP. 473, 486 (2010) (“By equating access to a limited public forum as a form of subsidy, the Supreme Court accepted the premise that recognition and/or funding of student groups is a subsidy. However, since ‘the government generally need not subsidize the exercise of constitutional rights,’ universities may require student organizations to admit those who disagree as a condition of receiving benefits. If anything, characterizing recognition as a subsidy ‘undervalues the expressive interests at stake.’ Moreover, although there are significant distinctions between recognition of a student organization and financial payments to support that organization’s activities, the Opinion of the Court does not distinguish between recognition and funding. Indeed, the Court’s student organization jurisprudence has never distinguished between recognition and funding.”).

<sup>113</sup> *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2988 (2010).

<sup>114</sup> *Id.* at 2989.



student organizations,<sup>115</sup> reduces the policing requirements in enforcing its nondiscrimination policy,<sup>116</sup> and encourages cooperation and tolerance among students with diverse backgrounds.<sup>117</sup> Those justifications, the Court concluded, support its all-comers requirement, and “are surely reasonable in light of the recognized student organization forum’s purposes.”<sup>118</sup> Further, the Court noted, the Christian Legal Society, although denied access to the law school’s electronic means of communications, was able to host a variety of activities and significantly increase student participation.<sup>119</sup> Finally, the Court emphasized, “requiring *all* student groups to accept *all* comers”<sup>120</sup> does not distinguish groups based on their message or perspective, and is “textbook viewpoint neutral.”<sup>121</sup>

While it conceded Hastings’ all-comers policy was “nominally neutral,”<sup>122</sup> the Christian Legal Society argued that the all-comers policy “systematically and predictably [burdened] most heavily those groups whose viewpoints are out of favor with the campus mainstream.”<sup>123</sup> The majority opinion dismissed this argument, because “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”<sup>124</sup> The Court noted:

Even if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, “[w]here the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.”<sup>125</sup>

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 2990 (“If a hypothetical Male-Superiority Club barred a female student from running for its presidency, for example, how could the Law School tell whether the group rejected her bid because of her sex or because, by seeking to lead the club, she manifested a lack of belief in its fundamental philosophy?”).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 2991.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 2993.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 2994.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* citing *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989) (municipal noise regulation designed to ensure that music performances in band shell did not disturb surrounding residents, by requiring performers to use sound system and sound technician provided by city, did not violate free speech rights of performers); *Madsen v. Women’s Health Ctr., Inc.*, 114 S. Ct. 2516 (1994) (that injunction restricted speech of only antiabortion protestors did not make it content based).

<sup>125</sup> *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2994 (2010) (citing *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992) (ordinance prohibiting display of symbols likely to arouse anger or

Hence, in the majority opinion's view, Hastings' all-comers policy attempts to make sure members would not be rejected for membership in student organizations because of their religious beliefs or sexual orientation, and that objective constitutes an adequate explanation for its policy separate and apart from the Christian Legal Society's assertion the all-comers policy represented disagreement with student organizations' beliefs.<sup>126</sup> That being so, the Court concluded, "Hastings' open-access condition on [Recognized Student Organization] status [was] reasonable and viewpoint neutral," and the "[Christian Legal Society's] free-speech and expressive association claims" must be rejected.<sup>127</sup>

Finally, the Court rebuffed the Christian Legal Society's argument that Hastings' all-comers policy violated the Free Exercise Clause, determining that "the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct"<sup>128</sup> and that the Christian Legal Society, in requesting an exemption from the all-comers policy sought "preferential, not equal, treatment," precluding its free exercise argument.<sup>129</sup>

## VI. DISSENTING OPINION IN *CHRISTIAN LEGAL SOCIETY*

The dissenting opinion<sup>130</sup> rests on its contention that "strong evidence" exists showing Hastings applied its all-comers policy as a pretext to engage in viewpoint discrimination,<sup>131</sup> and cites the following evidence for this

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resentment in others on the basis of their race, color, creed, religion or gender, even though narrowly construed by the state supreme court to address "fighting words," violates the First Amendment on its face, because it prohibits speech on the basis of the subjects addressed in the speech)).

<sup>126</sup> *Christian Legal Society*, 130 S. Ct. at 2994.

<sup>127</sup> *Id.* at 2995.

<sup>128</sup> *Id.* See *Emp't Div., Dept. of Human Res. of Ore. v. Smith*, 110 S. Ct. 1595 (1990), in which the U.S. Supreme Court decided that the Free Exercise Clause permits the State to prohibit sacramental peyote use and to deny unemployment benefits to persons discharged for such use. Oregon law prohibited the possession of controlled substances, and two employees of a private drug rehabilitation organization were fired because they ingested peyote, a controlled substance. The fired workers claimed they did so as a sacramental practice of the Native American Church in which they were members. Their ensuing applications for unemployment benefits were denied, because they were fired for work-related misconduct. The U.S. Supreme Court decided the denial of unemployment benefits did not violate the Free Exercise clause, because individuals are obligated to comply with criminal laws that incidentally prohibit the performance of religious practices, as long as the law is not directed specifically to the religious practice.

<sup>129</sup> *Christian Legal Society*, 109 S. Ct. at 2995.

<sup>130</sup> The dissenting opinion was authored by Justice Alito. Chief Justice Roberts and Justices Scalia and Thomas joined in the dissenting opinion.

<sup>131</sup> *Id.* at 3001.

proposition: (1) Hastings recognizes more than sixty student organizations, but “in all its history” denied recognition to only one, the Christian Legal Society<sup>132</sup>; (2) Hastings admitted in its answer to Christian Legal Society’s first amended complaint that it “permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs”<sup>133</sup>; (3) inconsistencies existed in documents and depositions as to when the all-comers policy was implemented<sup>134</sup>; (4) Hastings “routinely registered student groups with bylaws limiting membership and leadership positions to those who agreed with the groups’ viewpoints,”<sup>135</sup> but required the Christian Legal Society to comply with the all-comers policy<sup>136</sup>; (5) Hastings inconsistently described its all-comers policies in various legal briefs<sup>137</sup>; (6) substantial differences existed in Hastings’ nondiscrimination and all-comers policies<sup>138</sup>; and (7) Hastings cited its nondiscrimination policy (rather than its all-comers policy) as grounds for denying the application of Christian Legal Society for an exemption.<sup>139</sup>

The dissenting opinion also disagrees with the conclusion of the majority opinion that the Christian Legal Society suffered no harm from its non-recognition. While Hastings offered to provide facilities for the Christian Legal Society meetings, its requests were given low priority and the administration routinely failed to respond to its requests for meeting space until after the date requested had passed, including the Christian Legal Society’s request to set up a table to recruit members on the campus patio at the beginning of the academic year.<sup>140</sup> Further, denied access to funding through student fees and to the electronic means of communication provided by Hastings, membership in the Christian Leadership Society declined to seven members.<sup>141</sup> The dissenting opinion also chides the majority opinion for emphasizing the Christian Legal Society’s ability to endure discrimination:

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

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<sup>132</sup> *Id.* at 3000.

<sup>133</sup> *Id.* at 3003.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 3004.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* 3004-05.

<sup>139</sup> *Id.* at 3005.

<sup>140</sup> *Id.* at 3006.

<sup>141</sup> *Id.*

the view that a little viewpoint discrimination is acceptable. Nor have we taken this approach in other discrimination cases.<sup>142</sup>

Because Hastings arguably used its all-comers policy to discriminate against the Christian Legal Society viewpoints, the dissenting opinion relies on *Healy* for the proposition that refusal to recognize a student organization because of its viewpoint and to deny it access to campus facilities and customary means of communication among members of the college community burdens the student members' right of association.<sup>143</sup> Further, the minority opinion insists, the court in *Healy* rightfully refused to grant deference to the college president, because it is the responsibility of the court to exercise its own judgment on the interpretation and application of free speech.<sup>144</sup> Moreover, granting the application of limited public forum cases to Hastings' all-comers policy, the minority opinion maintains that Hastings violated the requirement of viewpoint neutrality, because its refusal to recognize the Christian Legal Society impermissibly discriminated on the basis of religion and sexual orientation.<sup>145</sup>

If the dissenting opinion's insistence that Hastings' all-comers policy was used as a pretext for viewpoint discrimination had prevailed, Hastings' decision not to recognize the Christian Legal Society would likely have been governed by the strict scrutiny test applicable to association infringement cases. The Christian Legal Society employed stringent admission standards, required its members to affirm their belief in the group's religious principles, and conducted activities aimed at inculcating those beliefs in its members. Given the high associational value of membership in the Christian Legal Society, forcing the Christian Legal Society to accept members who did not share its beliefs compelled it to contradict the values it stood for. Were strict scrutiny applied to review Hastings' actions, it is doubtful the law school's purported interests for imposing the all-comers policy - exposing students to differing views, maximizing the availability of student leadership positions and encouraging cooperation and tolerance - would be deemed compelling in the eyes of the dissenting justices. Further, following *Healy*, the dissenters certainly would not likely have given deference to the judgment of academic organizations regarding student activities and organizations.<sup>146</sup> Hence, using strict scrutiny, Hastings' imposition of the all-comers policy would likely

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 3007.

<sup>144</sup> *Id.* at 3008.

<sup>145</sup> *Id.* at 3010.

<sup>146</sup> *Id.* at 3008 (“It is also telling that the *Healy* Court, unlike today's majority, refused to defer to the college president's judgment regarding the compatibility of “sound educational policy” and free speech rights. The same deference arguments that the majority now accepts were made in defense of the college president's decision to deny recognition in *Healy*.”).

have been deemed to infringe on the Christian Legal Society members' freedom of association, and Hastings would have been required to recognize the Christian Legal Society and grant an exemption to its admission criteria.<sup>147</sup>

## VII. SIGNIFICANCE OF *CHRISTIAN LEGAL SOCIETY*

The majority opinion in *Christian Legal Society* is significant in three ways. First, the decision to uphold the all-comers policy is confined to limited public forums of colleges and universities. More particularly, the decision permits academic institutions to require that student activities and organizations to admit all students regardless of their viewpoints or sexual orientation and to deny access to state university property if the recognized student organization refuses to compromise on its admission standards.<sup>148</sup> To pass First Amendment muster in this arena, the academic institutions' requirements need only be reasonable and viewpoint neutral. By avoiding the issue of freedom of association, the majority escaped a much wider and more difficult issue of whether or not "religious groups, as well as other types of expressive association, have the right to discriminate in the selection of their voting members and officers."<sup>149</sup> As noted by Professor Scharffs:

The principles articulated in this context could have significant implications on so-called charitable choice programs, where religiously affiliated groups that provide social services are able to receive federal funding and are also allowed . . . to discriminate on

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<sup>147</sup> "The choice of the 'reasonable' and viewpoint-neutral test - that is, the choice of the appropriate doctrinal box or category on the First Amendment case law flowchart - essentially dictated the result. If a different box had been chosen, a different (and more stringent) test would have applied, and a different result might very well have been obtained." Vikram Amar, *The First Amendment in the 2009 Term: It's All About How You Frame It*, 37 A.B.A. PREVIEW 347, 350 (2010).

<sup>148</sup> Two commentators express a spirited counter argument: "In *Christian Legal Society*, the Supreme Court discounted the student organization's Freedom of Association argument while ignoring the unconstitutional conditions doctrine. Instead, the Court held that the government has the ability to restrict freedom of association as a condition of accessing limited public fora. Put another way, the Court decreed that if groups want to use governmental property or channels of communication, they must be willing to compromise their missions by including those who disagree with their messages. In order to be a Registered Student Organization or use an auditorium in the wake of *Christian Legal Society*, Christians must accept non-believers, the NAACP must accept white supremacists, the Democrats must accept Republicans, and the Red Sox Nation must accept Yankee fans. Instead of having relatively easy access to limited public fora, groups must now make the difficult choice between compromising their membership standards and forgoing access to a limited public forum." Thro & Russo, *supra* note 112, at 484.

<sup>149</sup> Scharffs, *supra* note 20, at 303.

the basis of religious preference in their hiring of personnel. It could even have implications for entities that receive tax exemptions and discriminate in the selection of their employees or leaders (something every church and most religious groups do).<sup>150</sup>

The majority opinion was able to limit the confines of the decision to college and university public forums by the deft manner in which it concluded that limited public forum analysis “adequately respects and fairly balances” the Christian Legal Society’s religious speech and expressive-association rights.”<sup>151</sup> No precedent was cited in direct support of this conclusion, which now stands as precedent, and the arguments asserted in support of it, summarized in part VI above,<sup>152</sup> are weak. Presumably limitations on rights of association in college and university public forums in the future need only be reasonable and viewpoint neutral to survive First Amendment challenges.

The majority opinion in *Christian Legal Society* is also significant, because it granted deference to the judgment of academic administrators: “determinations of what constitutes sound educational policy or what goals a student-organization forum ought to serve fall within the discretion of school administrators and educators.”<sup>153</sup> Granting deference to Hastings educational discretion likely pleased the Association of American Law Schools, which submitted a brief “emphasizing the importance of institutional autonomy and urging that law schools should have wide latitude in determining how to develop strong and effective programs,” and asking the court not to constitutionalize a policy issue involving “sensitive educational judgment.”<sup>154</sup> Granting deference likely did not please “religious groups and other expressive association [which] have submitted amicus briefs on behalf of CLS [The Christian Legal Society], arguing that a holding in favor of Hastings would have significant negative implications for their rights of association and free speech.”<sup>155</sup>

Finally, the case is significant because of the paucity of attention paid to the free exercise doctrine. The Christian Legal Society devoted “only about one page of [its] brief to arguing that Hastings’ policy violated [its] free

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<sup>150</sup> *Id.*

<sup>151</sup> *Christian Legal Soc’y v. Martinez*, 109 S. Ct. 2971, 2986 (2010).

<sup>152</sup> *Supra* notes 108-112.

<sup>153</sup> *Christian Legal Society*, 109 S. Ct. at 2989.

<sup>154</sup> Scharffs, *supra* note 2, at 303.

<sup>155</sup> *Id.*

exercise of rights,”<sup>156</sup> and the U.S. Supreme Court devoted one short footnote dismissing the argument.<sup>157</sup>

### VIII. CONCLUSION

In *Christian Legal Society*, the U.S. Supreme Court wrestles with three fundamentally important First Amendment issues: government restrictions on access to limited public forums, government restrictions on freedom of association, and government restrictions on student organization expression based on the content of that expression. The U.S. Supreme Court ultimately uses limited public forum analysis to uphold Hastings’ imposition of the all-comers policy on its student organizations. The implication of that decision is that limitations on rights of association in college and university public forums in the future need only be reasonable and viewpoint neutral to survive First Amendment challenges. In reaching its decision, the majority opinion sidesteps the more difficult issue of whether or not religious and expressive association groups have the right to discriminate in the selection of their voting members and officers by concluding that public forum analysis adequately protects religious speech and expressive-association rights.

By arguing vehemently that Hastings failed to apply its all-comers policy consistently and thereby improperly infringed on the Christian Legal Society’s religious expression and freedom of association, the dissenting opinion seeks to evaluate Hastings’ actions under the strict scrutiny test applied in association infringement cases. Had the dissenters been successful in doing so, the decision would likely have gone the other way, opening the door to permitting religious and expressive association groups to discriminate in selecting voting members and officers.

The manner in which these three competing interests are resolved in *Christian Legal Society* strikes the authors as being rather like the ancient game of “Rock – Paper – Scissors.” in which participants use hand gestures symbolizing the rock, paper, and scissors to defeat an opponent. Gestures are resolved by the following rules: rock breaks scissors; paper covers rock, scissors cuts paper. In *Christian Legal Society*, First Amendment principles are like the competing hand gestures. *Healy*, *Widmar* and *Rosenberger*,

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<sup>156</sup> *Id.* at 304.

<sup>157</sup> *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2995 n.27 (2010) (“CLS briefly argues that Hastings’ all-comers condition violates the Free Exercise Clause. . . . Our decision in *Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876, forecloses that argument. In *Smith*, the Court held that the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct. *Id.*, at 878-882, 110 S.Ct. 159. In seeking an exemption from Hastings’ across-the-board all-comers policy, CLS, we repeat, seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause.”).

which impose significant restrictions on the ability of academic organizations to restrict student organization speech and which mandate such limitations must be viewpoint neutral, are the rock. *Dale* and *Hurley*, which provide significant prohibitions against infringements on the freedom to associate and overturn the admission of members to clubs and organizations that have strong associational bonds unless there are compelling reasons and narrowly tailored means, signify the paper and therefore defeat the rock. Finally, in the majority view, limited public forum requirements, which accept restrictions on access to public forums if they are reasonable and viewpoint neutral, are the scissors, and scissors triumphs over paper.



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