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Private Free Speech or Official Discrimination?

Jacob Sullum | April 20, 2010

Yesterday the Supreme Court **heard** the Christian Legal Society's challenge to an anti-discrimination policy that prevents the socially conservative student group from being officially recognized by Hastings College of Law in San Francisco. The society says voting members must follow traditional Christian teachings, which include prohibition of homosexual behavior and premarital sex. The school, which is part of the state university system, says recognizing the society, which would give it access to campus facilities and a share of student activity fees, would make the administration complicit in illegal discrimination based on sexual preference.

Two Supreme Court precedents suggest otherwise: A 1993 **ruling** said that a New York school district would not run afoul of the Establishment Clause by making school space available after hours to a Christian group on the same terms as other groups and that such equal treatment was in fact required by the First Amendment's free speech guarantee. Likewise, a 1995 **decision** said the University of Virginia had to give a Christian student newspaper the same printing subsidies that were available to secular student publications. In both cases, the Supreme Court held that the messages communicated by the religious groups constituted private speech.

Last year the U.S. Court of Appeals for the 9th Circuit nevertheless **rejected** the Christian Legal Society's challenge to the Hastings policy. In 2006, by contrast, the U.S. Court of Appeals for the 7th Circuit **sided** with CLS in a similar dispute involving Southern Illinois University's law school. In yesterday's oral arguments, Stanford University law professor Michael McConnell, representing the CLS chapter at Hastings, argued that the law school's ban on discrimination by recognized student groups is "a frontal assault on freedom of association," saying, "If Hastings is correct, a student who does not even believe in the Bible is entitled to demand to lead a Christian Bible study." Furthermore, he said, an NAACP chapter would have to accept "a racist skinhead." McConnell was not so keen to defend the right of racist skinheads to exclude blacks, saying (in response to a question from Justice Sonia Sotomayor) that CLS is arguing only that student groups should be allowed to discriminate based on belief, not based on race.

Justice Antonin Scalia made his view pretty clear, saying, "To require this Christian society to allow atheists not just to join but to conduct Bible classes...that's crazy." Justice Samuel Alito raised a hypothetical favorable to CLS: "50 students who hate Muslims show up and they want to take over that [Muslim] group." In that case, said the law school's lawyer, the original members could "rejoin and form another group." So "if hostile members take over," said Alito, "former members of CLS can form CLS 2?"

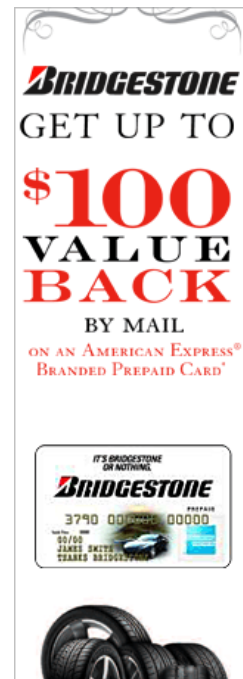
The law school says such concerns are purely theoretical. But the possibility of subversion by hostile nonbelievers is worrisome enough that CLS has attracted **support** from a variety of religious groups as well as defenders of civil liberties such as the Cato Institute and the Foundation for Individual Rights in Education. The ACLU is siding with Hastings.

The oral argument transcript is [here](#) (PDF). SCOTUS Wiki has briefs [here](#).

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The Libertarian Guy | 4.20.10 @ 8:55PM | #
The ACLU is siding with Hastings.

In other news... water is wet, a lion will kill your ass dead, and Paul Krugman is a clueless prick.

[reply to this](#)

Chony | 4.20.10 @ 8:56PM | #
Racist!

[reply to this](#)

Acronymist | 4.20.10 @ 9:59PM | #
That's why they're known as the Anti-Christian Litigation Union.

[reply to this](#)

Hobo Chang Ba | 4.20.10 @ 10:01PM | #
Have to say I'm actually with the ACLU on this one.

The first question is: where does the Constitutional right to start and join an officially recognized university club derive from? The members certainly have the freedom of association - the university could not prevent them from meeting, holding prayer services and speaking out on issues, but why are they entitled to official university recognition? If someone wanted to start the Neo-Nazi Skinhead Legal Society, where do they have a Constitutional right to get official recognition as a legitimate organization from a law school? What about the officially recognized Ku Klux Klan Legal Society for the Reinstatement of Slavery?

Look, I'd be at the front of the line defending the rights of students to hold and express pretty much whatever views they believe, but freedom of association does not require official recognition (and funding) from a separate entity, be they government or not.

Also, out of curiosity, how much of Hasting's funding is derived from tax dollars?

[reply to this](#)

Jorgen | 4.20.10 @ 10:06PM | #
Agreed. I think it's reasonable to demand of organizations accepting university funding that they comply with university bans on discrimination. If this group was taken over by a bunch of hostile homosexuals, they could start a new group without university funding and discriminate to their heart's content. In most cases, though, I find university funding for student groups to be an obnoxious waste of money.

[reply to this](#)

robc | 4.20.10 @ 10:26PM | #
How about a christian college that accepts government backed loans?

[reply to this](#)

SIV | 4.20.10 @ 10:54PM | #
Also, out of curiosity, how much of Hasting's funding is derived from tax dollars?

Nearly all of it.

The school, which is part of the state university system

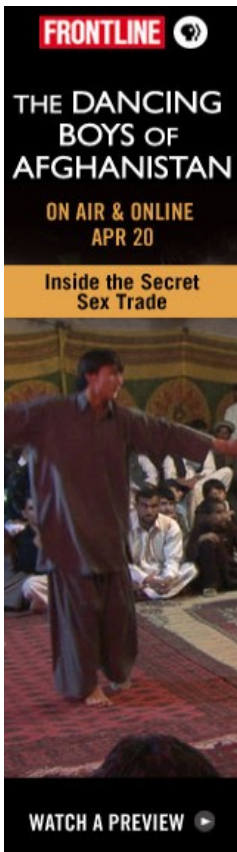
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Hobo Chang Ba | 4.20.10 @ 11:06PM | #
Well - tuition is still paid (and there is also an endowment and private scholarships), so while I'm sure there's a proportion that is taxpayer funded, but probably not "nearly all of it."

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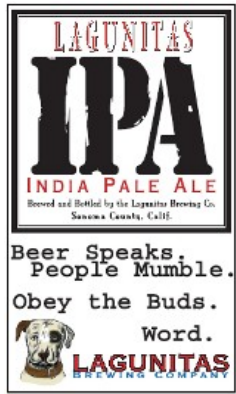
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MJ | 4.21.10 @ 7:09AM | #

If the school accepts groups also based on religious or quasi-religious beliefs and are allocating funds to those groups, then there's an issue. If the school is seen as an arm of the State then the State is picking and choosing which organizations are established and funded based on an approved set of beliefs.

[reply to this](#)

People Power Hour | 4.20.10 @ 10:22PM | #

Personally I'm against the idea because if someone believes in mythology as a way of life, they don't deserve squat from rational folk....

[reply to this](#)

robcc | 4.20.10 @ 10:23PM | #

I think this is a tricky one. Easiest way to decide it - separation of school and state.

Problem solved. I doubt the SCOTUS will choose that path though.

This is the same kind of issue that came up due to private schools accepting government funds and will come up with vouchers (you see it here sometimes where people say they don't want vouchers being used at christian and/or muslim schools).

[reply to this](#)

capitol I | 4.20.10 @ 10:29PM | #

Such a simple and logical solution, of course, it will *never* be considered.

[reply to this](#)

robcc | 4.20.10 @ 10:33PM | #

It solves about 99% of all school related issues that come up.

[reply to this](#)

Hobo Chang Ba | 4.20.10 @ 10:46PM | #

It's really not that tricky.

The question is simplified to "does anyone have a constitutional right to receive official organizational recognition and potentially taxpayer-provided funding from another entity?"

The question is clearly no, whether the entity is a state run/funded school (no one has the right to taxpayer funding and government recognition for their discriminatory organization) or a privately run school (where freedom of association explicitly permits discrimination against various viewpoints.)

Those who think otherwise would inherently believe that freedom of association includes the right to involuntary subsidization and governmental legitimization of every possible organization, from ACORN to the Ku Klux Klan.

[reply to this](#)

capitol I | 4.20.10 @ 11:03PM | #

Exactly, there is no constitutional guarantee to government (taxpayers') money, contrary to what many in this country believe. Also, when you saddle up to that teat you gotta suck by the rules of the cow.

fra la la laaa...by the rules of the cow...shoop shoop

[reply to this](#)

robcc | 4.20.10 @ 11:08PM | #

Not only is there no guarantee, there is no clause that allows the federal government to fund schools at all.

And yet....



[reply to this](#)

Turnkey | 4.20.10 @ 10:34PM | #

I'm thinking the school deserves to win, its not like a local church won't backroll the club.

That said, if they lose you could always start a overtly racist club. You could even claim it was part of a religion / subsect.

[reply to this](#)

robc | 4.20.10 @ 10:35PM | #

I ask you the same question I asked Jorgen: Can a christian college be forced to enroll homosexual students if they also accept government backed loans?

[reply to this](#)

capitol I | 4.20.10 @ 10:47PM | #

Why wouldn't a christian college admit homosexual students?

[reply to this](#)

robc | 4.20.10 @ 11:05PM | #

Because its a violation of Christian tenets?

Many would accept them. Some wouldnt. Heck, the US military wont accept openly homosexual soldiers.

[reply to this](#)

capitol I | 4.20.10 @ 11:14PM | #

A lot of things violate christian tenets, I just wonder why homosexuality is so special?

[reply to this](#)

robc | 4.20.10 @ 11:19PM | #

I just picked it out because it was used in the story. I could have gone with premarital sex instead. Which, IIRC, BYU has a rule against.

[reply to this](#)

robc | 4.20.10 @ 11:24PM | #

Are mixed gender camping trips allowed?

Answer: No.

[reply to this](#)

robc | 4.20.10 @ 11:26PM | #

What is the process for obtaining a beard exception?

[reply to this](#)

Rhywun | 4.21.10 @ 1:58AM | #

Wow, that's... surreal. Especially given the prominent beard on the statue that appears on every page.

[reply to this](#)

robc | 4.21.10 @ 9:46AM | #

Especially given the prominent beard on the statue that appears on every page.

2 answers:

1. He filled out the proper paperwork.

2. Beards are for closers!

[reply to this](#)

[Hobo Chang Ba](#) | 4.20.10 @ 11:03PM | <#>

It's a good question - for instance, government-backed loans and grants go to single-sex private schools all the time. However, if a college came out tomorrow and decided they were not going to admit black people, I don't doubt the government would take action to cut off grants and loans to students at that school. It's the eternal conflict of merging the public and private and the many problems that creates.

I would argue any private organization that wishes to discriminate against people of any race, sexuality, religion, gender, physical handicap, etc. should be completely privately funded and pay the consequences (or, maybe in their eyes, reap the benefits) of that decision.

[reply to this](#)

[robc](#) | 4.20.10 @ 11:07PM | <#>

This was discussed back in the day. This was a fear of many of the private schools, that government restrictions would come with the money. In many ways, many of them regret the decision to ever accept government money.

Personally, it seems to me its easier to just not fund ANY SCHOOL WHATSOEVER.

[reply to this](#)

[Hobo Chang Ba](#) | 4.20.10 @ 11:34PM | <#>

I'm not going to take it that far, because, like Adam Smith and Thomas Paine, I do support the concept of public schools as a mechanism to make society more meritocratic and break cycles of poverty (in no way does this mean I endorse public schools in their current form). Since cycles of poverty tend to originate from bad government policies, I see public schools (in theory) as the only possible corrective. I beat this like a dead horse on this site, but rampant economic and social inequality is the enemy of liberty because it gives statist an easy argument and a large audience for massive interventionism and the welfare state.

The ROI for public schools *if they were radically reformed* could be very high from a utilitarian and even a libertarian perspective - it is better to have highly trained workers that could attain self-reliance than to have a permanent underclass of low-skilled laborers who would support and elect politicians promising them permanent government dependency.

I do believe any private entity granted government money should not be allowed to discriminate on any feature other than merit and qualification.

[reply to this](#)

[robc](#) | 4.20.10 @ 11:48PM | <#>

I am more willing to support public education than public schools. By which I mean vouchers. To anywhere. The schools need to be left alone for it to work.

[reply to this](#)

[Hobo Chang Ba](#) | 4.21.10 @ 12:25AM | <#>

But doesn't that just enable the conflict we've been discussing this whole time caused by merging the public and the private? I'd prefer a public school system where every public school operates like a secular private school and parents can send their kids to any school in the entire district. Of course there would have to be "qualifications" to get into the most desirable schools (which would end up overcrowded and likely see a drop in quality). Meanwhile, good teachers could get bonuses to move to the weakest schools in the system and improve those. As long as there is no federal interference, this would be the ideal public school system and would remove the perpetuation of poverty cycles caused by monopolies based upon property taxes.

Private Free Speech or Official Discrimi...

[reply to this](#)

robc | 4.21.10 @ 9:48AM | #

But doesn't that just enable the conflict we've been discussing this whole time

Hence:

The schools need to be left alone for it to work.

Funding the voucher DOES NOT MAKE THE SCHOOL QUASI-PUBLIC.

The state is funding the student, not the school. That is the distinction, in that case, that needs to be made.

[reply to this](#)

robc | 4.20.10 @ 11:10PM | #

It's a good question - for instance, government-backed loans and grants go to single-sex private schools all the time.

And VMI got sued into coedness. Never seems to happen the other way around.

[reply to this](#)

IceTrey | 4.20.10 @ 11:20PM | #

Easy solution. Don't let any student organization use college facilities and for sure don't give them any damn money. Just tell them all to shut up and go study, which is what they should be doing anyway.

[reply to this](#)

Jamie Kelly | 4.20.10 @ 11:22PM | #

Blah fuckin' blah. The state mix of religion/education/values leads to yet ANOTHER fucking court case that tries to find some solution in what is another impossible dilemma.

Fucking blah.

The onus, from my view, is on LIBERALS to give up their lofty notions of "publicly funded" education.

Until that happens, fuck you, liberals. Fuck you all right in the fat fucking ass.

[reply to this](#)

daleandersen | 4.21.10 @ 1:47AM | #

Why are there state universities anyway? Privatize the motherfuckers!

[reply to this](#)

MJ | 4.21.10 @ 7:30AM | #

If the School is funding other religious or quasi-religious organizations who are willing to comply with the policy, then the school arguably is running afoul of the establishment clause by refusing to recognize an organization whose beliefs compel them not to comply. The establishment clause is less about the state not funding religion, then the state not favoring one set of beliefs over others.

[reply to this](#)

John | 4.21.10 @ 8:47AM | #

Equal protection means just that. People are absolutely correct to say that the state of California does not owe people support of their private organizations. But, if the State starts giving support, it has to give out that support equally. You can't say group A gets our support but group B doesn't because we don't like its views.

There are some limits to that. If the group wanted to use the facility to break the law for example, the state wouldn't owe it support. Or if the group had nothing to do with the purpose of the institution. But in this case if Hastings is going to let law students form their own organizations and provide state sponsored support for those organization, every organization (the Wiccans, the gays, the communists, and (gasp) the Christians) have to all be treated the same. You cannot as a state say that only those who hold politically correct views have a right to state support.

[reply to this](#)**Hobo Chang Ba** | 4.21.10 @ 9:06AM | #

Nobody has a "right" to state support or organizational recognition. Equal protection under the law applies to individuals, not to groups. If this state run school as a policy chooses to support non-discriminatory organizations but not discriminatory ones, there is no violation of rights here. Nothing is preventing the students from forming their own organization - so I don't see exactly which constitutional freedom is being violated here.

[reply to this](#)**John** | 4.21.10 @ 9:42AM | #

You are just dead wrong. You say can say no to everyone. But you cannot say yes to some and no to others because you don't like their political views. The Constitutional freedom is the right to free speech and association. Everyone should have the same access to government support, whatever that may be, regardless of their political views.

This is no different than the government saying we are only going to recognize the College Republicans but not the College Democrats because the Republicans are in power. The Democratic students have just as much of a right to form an organization as the Republicans do. And you can't provide support and discriminate against the other.

Or to give another example, if equal protection doesn't apply to individuals in groups, then the college could say that they will not sanction any group that contains more than 10% minority membership or any group that is based on ethnic race or identity.

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