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But how is this legal plunder to be identified? Quite simply. See if the law takes from some persons what belongs to them and gives it to other persons to whom it does not belong. See if the law benefits one citizen at the expense of another by doing what the citizen himself cannot do without committing a crime.

— Frédéric Bastiat

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[7](#) [8](#) [9](#) [10](#) [11](#) [12](#) [13](#)

[14](#) [15](#) [16](#) [17](#) [18](#) [19](#) [20](#)

[21](#) [22](#) [23](#) [24](#) [25](#) [26](#) [27](#)

[28](#) [29](#) [30](#)

[« May](#)

## Free Association Requires State Sanction?

Posted on 28th June 2010 by **S.M. Oliva**

The final day of the Supreme Court's term produced some flashy but ultimately marginal decisions. I'll address most of today's cases later in the week, but I wanted to take note here of [Christian Legal Society v. Martinez](#), a decision that has some establishment libertarians crying foul, including Cato Institute scholar [Roger Pilon](#):

Dissenting today in *Christian Legal Society v. Martinez*, Justice Samuel Alito put his finger on the majority's underlying principle: there shall be "no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning." That pretty much says it all.

This case arose after the Hastings College of Law, a large public law school in San Francisco, denied the school's tiny Christian Legal Society the same recognition and support it granted to some 60 other student organizations on the ground that CLS, contrary to the Hastings nondiscrimination policy, discriminates by requiring that its members and officers abide by certain key tenets of the Christian faith. In a word, in the name of anti-discrimination, Hastings, a government institution, discriminated against CLS, which was simply exercising its speech, religious, and associational rights. Cato filed an amicus brief in the case, written by the University of Chicago's Richard A. Epstein, supporting the CLS students' right to freedom of association.

But it was not to be. Justice Ruth Bader Ginsburg, writing for the Court's three other liberals plus Justice Anthony Kennedy, held that the school's "all comers" policy, which requires that student organizations accept anyone as members and even as officers, is "constitutionally reasonable," taking into account all of the surrounding circumstances. That is a new standard for constitutionality when it comes to fundamental rights. And if students, whatever their interests or values, cannot form organizations limited to people who share those interests and values, what's the point of having student organizations at all? In a word, like the mugger who says "Your money or your life," today's opinion enables Hastings to say, "If you want benefits otherwise available to all, you've got to give up your right to freedom of association." No public institution should be able to put people to such a choice.

The mugger analogy is comically off-base. A mugger seizes property through the threat of aggression. Hastings simply declined to grant special benefits to an organization that held views contrary to the school's. There was no aggression and no violation of individual rights.

Pilon erroneously refers to "the CLS students' right to freedom of association." Yet this case had nothing to do with rights — at least from a *libertarian* perspective. There is no "right" to receive recognition, funding, or other benefits from a state institution.

Nothing prohibits the members of the Christian Legal Society from freely assembling, speaking, or acting. Nothing entitles them to state recognition or support for their activities either. And honestly, libertarian groups should not be in the business of *encouraging* people to seek such state recognition or support; this only undermines the libertarian argument.

Unfortunately, there's a cottage industry within establishment libertarianism that encourages college students to think of themselves as victims. There's an entire organization — the misleadingly named [Foundation for Individual Rights in Education](#) (FIRE) — devoted to just this purpose. Rather than promoting voluntary action outside the structures of the state (and its wretched university system), FIRE, Cato, and the like preach an entitlement mentality: the state must facilitate the exercise of your rights!

Cases like CLS also over-emphasize the importance of universities and their “official” sanction. In an age when anyone can publish, speak, and associate through informal, web-based channels, why bother “registering” with a university bureaucracy to obtain limited, heavily restricted “benefits”? Perhaps this sort of thing still resonates with formal institutions like Cato and FIRE, but I fail to see the value.

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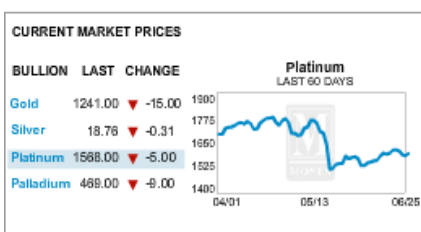
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