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Cato Institute: Avoid campus club conundrum

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ARTICLE

Can a public law school revoke official student-organization status from a Christian group that excludes from full membership students who either advocate or engage in "unrepentant" sexual conduct "outside of marriage between one man and one woman?" All are welcome at the group's meetings, mind you, but candidates for officer positions – and members who vote in officer elections – must subscribe to the organization's basic principles.

That's the conundrum the Supreme Court faces in Christian Legal Society v. Martinez. Oral arguments were set for Monday.

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It's quite a dilemma: Either force people to pay for ideas and actions they find morally repugnant, or let government determine which people will be less equal than everyone else.

It's also a no-win situation that could have easily been avoided.

The Christian Legal Society policy shouldn't be controversial. Just as Democrats shouldn't be forced to allow Republicans to dictate their messaging, the Sierra Club shouldn't have to let the Drill Baby Drillers control its governance, and Outlaw, the gay and lesbian law students group, shouldn't have to take a neutral stance on same-sex marriage, CLS should be able to exclude non-Christians and others who don't abide by its mission statement. After all, a group that can't define itself, and exclude people who disagree with its goals, ceases to be a group.

Yet the University of California Hastings law school refuses to provide CLS the resources available to other student organizations – use of bulletin boards, meeting spaces, access to funding – on the grounds that its membership rules violate the school's anti-discrimination policy.

It's a dismal situation: Provide the funding, and the university – a government entity – subsidizes speech and viewpoints many taxpayers find intolerable. Withhold it, and government discriminates against students based on their religion and speech.

Is there any solution?

Legally, CLS wins the case: While "freedom of association" is not specifically mentioned in the Constitution, the Supreme Court has ruled it an inescapable part of speech and assembly rights protected by the First Amendment. For example, when Alabama wanted the NAACP to disclose its membership lists, the court found that full speech rights can be realized only if people can come together to coordinate and amplify their speech.

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NAACP v. Alabama (1958) has direct implications for Christian Legal Society v. Martinez, making clear that government cannot give preference to some associations over others, which is what Hastings has done by only recognizing groups that adhere to its nondiscrimination policies.

Even if the court finds for CLS, a lot of people are going to have their rights violated. Essentially, such a ruling would force taxpayers who object to religious speech and association to nonetheless subsidize it – just as they subsidize the Democrats, Republicans, Sierra Club and other student clubs.

Of course, Hastings is far from alone in funding such groups, nor is it alone in seeing similar battles go to the Supreme Court. In 1995 the Court ruled that a public university cannot deny funding to a Christian newspaper when all other student newspapers were funded. In 2000 the court invalidated a University of Wisconsin system in which students voted on which groups to fund.

These and other rights-infringing situations could have been avoided if public schools simply did not support student activities; no subsidies mean no discrimination. But students want their subsidized clubs, and schools are happy to fund them as long as it helps bring in students and their tuition dollars.

Which brings us to the root freedom problem, not just when it comes to funding student groups, but all of higher education: It is impossible to reconcile free speech with governmentally compelled support of speech. Just as public colleges cannot choose both which student groups to fund and avoid discrimination, they cannot pay a professor without privileging his speech over that of the taxpayers who pay his bills. It also cannot fire him for saying something that taxpayers dislike without the government being guilty of censoring speech.

There is only one complete solution: Government must stop funding higher education – which, after all, is a form of regressive taxation, with lower-income households subsidizing the children of higher-income households (who attend college at a much higher rate). Ultimately, it's the only way to preserve real freedom and equality for each and every American.

Shapiro is a senior fellow in constitutional studies at the Cato Institute, where McCluskey is the associate director of the center for educational freedom. Cato filed an amicus brief supporting the petitioners in Christian Legal Society v. Martinez on freedom-of-association grounds.

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