CLS v. Martinez:
The Dissent

> *The Court provides a misleading portrayal of this case. . . .I begin by correcting the picture.*
>
> Supreme Court Justice Samuel Alito

On June 28, 2010, the U.S. Supreme Court rendered its decision in Christian Legal Society v. Martinez affirming the 9th Circuit's decision that Hastings College of Law could de-recognize a CLS law student chapter because it required its members and leaders to sign a statement of faith and adhere to that statement in their conduct. Links to the Court's opinions are at www.clsnet.org, and we encourage you to read them. The following excerpts are from Justice Alito's dissenting opinion in which Chief Justice Roberts, Justice Scalia, and Justice Thomas joined (some citations have been omitted):

The proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate." United States v. Schwimmer, 279 U.S. 644, 654-655 (1929) (Holmes, J., dissenting). Today's decision rests on a very different principle: no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning.

* * * *

The Court's treatment of this case is deeply disappointing. The Court does not address the constitutionality of the very different policy that Hastings invoked when it denied CLS's application for registration. Nor does the Court address the constitutionality of the policy that Hastings now purports to follow. And the Court ignores strong evidence that the accept-all-comers policy is not viewpoint neutral because it was announced as a pretext to justify viewpoint discrimination. Brushing aside inconvenient precedent, the Court arms public educational institutions with a handy weapon for suppressing the speech of unpopular groups-groups to which, as Hastings candidly puts it, these institutions "do not wish to … lend their name[s]." Brief for Respondent Hastings College of Law 11.

* * * *

In May 2005, Hastings filed an answer to CLS's first amended complaint and made an admission that is significant for present purposes. . . . Hastings admitted that its Nondiscrimination Policy "permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs." Id., at 93. The Court states that "Hastings interprets the Nondiscrimination Policy, as it relates to the [registered student organization] program, to mandate acceptance of all comers." But this admission in Hastings' answer shows that Hastings had not adopted this interpretation when its answer was filed.

Within a few months, however, Hastings' position changed.

* * * *

Hastings' effort to portray the accept-all-comers policy as merely an interpretation of the Nondiscrimination Policy runs into obvious difficulties. First, the two policies are simply not the same: The Nondiscrimination Policy proscribes discrimination on a limited number of specified grounds, while the accept-all-comers policy outlaws all selectivity. Second, the Nondiscrimination Policy applies to everything that Hastings does, and the law school does not follow an accept-all-comers policy in activities such as admitting students and hiring faculty.

* * * *

This Court does not customarily brush aside a claim of unlawful discrimination with the observation that the effects of the discrimination were really not so bad. We have never before taken the view that a little viewpoint discrimination is acceptable. Nor have we taken this approach in other discrimination cases.

* * * *

To appreciate how far the Court has strayed, it is instructive to compare this case with Healy v. James*, 408 U.S. 169 (1972), our only First Amendment precedent involving a public college's refusal to recognize a student group.*

* * * *

Unlike the Court today, the Healy *Court emphatically rejected the proposition that "First Amendment protections should apply with less force on college campuses than in the community at large."*

In the end, I see only two possible distinctions between Healy *and the present case. The first is that* Healy *did not involve any funding, but as I have noted, funding plays only a small part in this case. And if* Healy *would otherwise prevent Hastings from refusing to register CLS, I see no good reason why the potential availability of funding should enable Hastings to deny all of the other rights that go with registration.*

This leaves just one way of distinguishing Healy *: the identity of the student group. In* Healy*, the Court warned that the college president's views regarding the philosophy of the SDS could not "justify the denial of First Amendment rights." 408 U.S., at 187. Here, too, disapproval of CLS cannot justify Hastings' actions.*[2]

* * * *

In the end, the Court refuses to acknowledge the consequences of its holding. A true accept-all-comers policy permits small unpopular groups to be taken over by students who wish to change the views that the group expresses. Rules requiring that members attend meetings, pay dues, and behave politely would not eliminate this threat.

The possibility of such takeovers, however, is by no means the most important effect of the Court's holding. There are religious groups that cannot in good conscience agree in their bylaws that they will admit persons who do not share their faith, and for these groups, the consequence of an accept-all-comers policy is marginalization. . . . This is where the Court's decision leads.

* * *

I do not think it is an exaggeration to say that today's decision is a serious setback for freedom of expression in this country. . . . Even those who find CLS's views objectionable should be concerned about the way the group has been treated-by Hastings, the Court of Appeals, and now this Court. I can only hope that this decision will turn out to be an aberration.