

Homosexuals Unwelcome Here...The Law of Discrimination by Recognized Student Organizations*

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INTRODUCTION

Apparently, despite everything I have been taught, not all discrimination is bad. Or, at least, it's not illegal. In fact, discriminating against the discriminators may be illegal, in the context of a college's failure to recognize discriminating student organizations. At a personal level, I understand this. Suppose I started a chapter of the Zionist Student's Organization on your campus. We received recognition, took members and had activities all devoted to the cause of Israeli statehood and independence. If a Palestinian student wanted to join our organization to undermine our efforts, I would fight the administration for our right to exclude those whose beliefs were anathema to ours, as part of our freedom of association. I would accept the legal right of the Palestinian student to form his own anti-Israeli organization, but I would want the right to discriminate against his efforts to join the ZSO.

Across the country, Christian student groups are litigating to determine their rights to exclude students whose beliefs do not accord with the tenets of the organization. Largely, they are winning, with the notable exception of a recent federal district court decision in California that may not apply beyond California. Why are they winning, what are the issues, and what should we do with respect to similar organizations on our campuses?

Homosexuals Unwelcome Here

Many of these groups--such as the Alpha Iota Omega Christian fraternity at UNC, Chapel Hill--have litigated to protect their First Amendment rights to free association, free exercise of religion and free speech. According to their pleadings, they have asserted a right to discriminate on the basis of religion and sexual orientation. The federal district court in North Carolina stopped short of agreeing that Christian student organizations have that right, but accepted the idea that limiting membership within exclusive organizations is permissible. Broadly construed university anti-discrimination statements applied to student organizations have been struck down as well in Illinois, Ohio, Kansas and Arizona, though in fairness it should be noted that Chapel Hill clarified its policy prior to the recent decision, and therefore was successful in having the case dismissed as moot.

These cases are being litigated by national groups, such as the Alliance Defense Fund, in an effort to prove a point, sometimes going so far as encouraging non-discriminating student organizations to change their policies in order to create a case. So much for deeply held organizational beliefs. Most of the bylaws of these organizations also prohibit sex outside of marriage. I wonder if they will act to eject fornicators when and if such conduct comes to light? These national organizations--even when they win--rarely recover damages or costs, so I greatly hope the expenses of litigation are being borne by the puppeteers and not the student organizations who are often their pawns. After all, in order to have the right to exclude gays,

they have to be willing give up sex until they are married. I hope the Alliance Defense Fund is making this clear to them.

Status and Belief

The district court in North Carolina found common ground between the parties on their arguments about the distinction between status and belief, a distinction with which we should be familiar. The courts have recognized this distinction, holding that discrimination on the basis of status (often an immutable characteristic such as race or gender) is invidious and illegal. Discrimination on the basis of belief, however, is not only permissible and legal, it is often necessary to the protection of the First Amendment rights of exclusive organizations. Here is the revised (constitutional) UNC Chapel Hill policy, recognizing the distinction between status and belief:

To be eligible for official recognition from the University -- and the privileges that accompany official recognition -- a student co-curricular organization must abide by the following:

1. Membership and participation in the organization must be open to all students without regard to age, race, color, national origin, disability, religious status or historic religious affiliation, veteran status, or sexual orientation. Membership and participation in the organization must also be open without regard to gender, unless exempt under Title IX.
2. Student organizations that select their members on the basis of commitment to a set of beliefs (e.g., religious or political beliefs) may limit membership and participation in the organization to students who, upon individual inquiry, affirm that they support the organization's goals and agree with its beliefs, so long as no student is excluded from membership or participation on the basis of his or her age, race, color, national origin, disability, religious status or historic religious affiliation, veteran status, sexual orientation, or, unless exempt under Title IX, gender.

This policy was cited approvingly by the judge because it does not permit student organizations to discriminate generally. The court used the following example as illustrative of this point. If a student known to be Jewish wanted to join Alpha Iota Omega, that student could not be excluded simply on the basis of their status as a Jew. Instead, the organization would have to make an individual inquiry into whether the prospective member was able to share the stated beliefs of the organization. If not, they could be excluded not because of their status, but because their beliefs did not mirror the requirements of the organization. This means that if an openly gay student applied to Alpha Iota Omega, and in the individual interview he explained that he was gay but condemned homosexuality, believed it was sin, and did not practice his homosexuality, Alpha Iota Omega would have to accept him. His status is protected under the sexual orientation anti-discrimination rule of the college, and his beliefs qualify for membership. Similarly, if my Palestinian applicant to the ZSO was interviewed, and he professed a newfound support for Israel, renounced Islamist fundamentalism, and told us he believed in Zionism, I would have to accept him.

The Hastings Case

In case captioned *Christian Legal Society v. Mary Kay Kane*, the University of California Hastings College of Law was granted summary judgment, upholding its right to refuse to recognize the Christian Legal Society as a student organization. CLS openly discriminates on the basis of religion and sexual orientation, and sued to win its right to recognition. Hastings contended that CLS' practices violated its anti-discrimination policies. This case was decided differently because it was analyzed (and likely argued) from a different perspective. The California anti-discrimination statutes (and Hastings', which was based on the state statute) regulate on their face conduct, not speech. The act of discriminating is conduct, and is not subject to the stringent First Amendment requirements applied to the regulation of pure speech.

Therefore, free speech rights of the organization were not in play because the state is entitled to regulate conduct with much greater latitude. Specifically, the court upheld Hastings' right to regulate what an organization must do to be recognized as distinct from acting to somehow limit CLS's right to oppose and protest homosexuality as part of its organizational mission. It applied the test elaborated by the Supreme Court in *United States v. O'Brien* for regulation of conduct under the First Amendment. Under *O'Brien*, governmental regulation of conduct is valid, even if it incidentally restricts speech, so long as: (1) the regulation is within the constitutional power of the government; (2) it furthers an important or substantial government interest; (3) the government interest is unrelated to the suppression of free expression; and (4) the incidental restriction on the alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. On all of these tests, Hastings' refusal of recognition was upheld, and the judge also granted summary judgment on allegations of violation of CLS' rights to free exercise, free association and an equal protection claim.

The reason I argue that this case may not be applicable outside of California (it also may apply to any state that has codified sexual orientation as actionable discrimination) is because California finds discrimination on the basis of sexual orientation to be invidious. Not all states do. Because California does, it meets part (2) of the *O'Brien* test easily, as a compelling state interest.

Do These Cases Only Apply to Public Institutions?

Yes and no. These cases, if they are litigated at public institutions, really only set precedents for public institutions in those jurisdictions. However, though the constitution may not apply to private institutions, state constitutions and anti-discrimination status may apply to private universities in some states, and thus the unfettered ability of private institutions to determine their own rules may be fettered by state legislation. I really can't tell you how to weed between these two cases. They are factually similar, and yet have very different results. The geography alone tells a story about the strength of Christianity in the South and the vehemence of the anti-discrimination movement in California. What I can tell you is if you are in doubt about recognizing a discriminating student group--especially a Christian one--suspect a set-up, and consult legal counsel.

**The title of this article is intended to reflect the biases of the groups the article is about. It is in no way reflective of the beliefs of the author.*

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