Conservative College Club Should be Open to Gays

Alan E Garfield
Everyone likes liberty and equality. But what happens when the two collide?

That's what happened in a case currently before the Supreme Court. The University of California, Hastings, a state law school in California, refused to register the Christian Legal Society as an official school organization because the Society prohibits gays from being members. As a result, the Society could not get funding from the pool of student activity fee money. And, while the Society could still meet on campus, it could not use the school's official means of communication and could not place the school's name and logo on its literature.

The law school is defending its action under the banner of "equality." Surely, it says, the school can insist that official school organizations not discriminate against the school's own students. Nor should the school's gay students be forced to pay an activity fee to subsidize a group that excludes them as members.

The Christian Legal Society is meanwhile flying the "liberty" flag. It claims that the school is violating its members' free speech rights. The Society, it says, was formed to express conservative Christian values, including disapproval of homosexual behavior. If the school forces the Society to accept gay members, it will destroy the group's ability to convey its message.

So who's right? On the one hand, the argument that official school organizations should not exclude a school's own students certainly sounds legitimate. Yet how can a student organization ever stand for anything if it can't exclude those with opposing beliefs? Do the Student Democrats have to accept Republican members? Must the right-to-life group accept pro-choice members? The law school says they should.

On the other hand, if the law school has to register and subsidize groups regardless of their discriminatory practices, student fees could end up supporting the Student Nazi Party or the Student KKK Alliance. Certainly, the First Amendment should prevent a government-funded college from censoring a group merely because the school doesn't like the group's message. But does it also require the school to subsidize the group and allow the group to use the school's name and logo?

While both sides make credible arguments, I personally think the equality interest trumps the liberty interest in this instance (but I would love to read what you think in the comment section for this article on delawareonline.com).

One reason I favor the equality interest is that the curtailment of free speech rights is fairly minimal. The Christian Legal Society can still hold meetings on campus. It can still publicize events on a school bulletin board for unofficial programs. The loss of funding is negligible (typically a few hundred dollars).

And the Society can still communicate with its members using social networks like Facebook. Indeed, the Society's membership has nearly doubled in the year since it lost its official status.

At the same time, the equality interest seems compelling. The history of college organizations excluding blacks, Jews, and other minority groups is too recent to ignore new forms of discrimination. California law also prohibits state schools from discriminating based on sexual orientation. So it would seem odd if schools were permitted to subsidize student organizations that engage in this discrimination.

Of course, even Hastings acknowledges that organizations can exclude students based on characteristics other than status or beliefs. The Hastings Law Review, a student-edited publication, for example, can exclude students who are poor writers. But it would seem grossly inappropriate for the Law Review to be able to exclude students because they are Hispanic, female, gay, Mormon or Republican.

I realize that this means that the Black Law Students Association will have to accept white members, and the Jewish Legal Society will have to accept Buddhists. But maybe that's not so bad.

Indeed, perhaps the law school is trying to teach students that to thrive in this multicultural world they will have to relate to people who are different from them.

After all, justice is supposed to be blind. So why not have law students get used to wearing blindfolds while they're training to be lawyers.

Alan E. Garfield is a professor at Widener University School of Law. He can be reached at aegarfield@widener.edu.