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PROPERTY AND THE PUBLIC FORUM: AN ESSAY ON *CHRISTIAN LEGAL SOCIETY v. MARTINEZ*

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Was the outcome in *Christian Legal Society (CLS) v. Martinez*¹ surprising? The case is situated at the intersection of various, and arguably conflicting, lines of doctrine.² Thus, the result might have seemed surprising if one were inclined to place the case alongside the series of Supreme Court decisions requiring public schools to grant religious groups equal access to public facilities—cases such as *Widmar v. Vincent*,³ *Rosenberger v. University of Virginia*,⁴ and *Good News Club v. Milford Central School*.⁵ It might have seemed to be a straightforward application of well-settled law, however, if one considered *CLS* to be yet another in the line of cases holding that, when extending benefits, the government may limit the recipients in any manner it wishes, so long as it does not improperly discriminate—cases such as *Rust v. Sullivan*,⁶ *Rumsfeld v. Forum for Academic and*

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1. *Christian Legal Soc’y (CLS) v. Martinez*, 130 S. Ct. 2971 (2010).

2. *Id.* at 2984–85 (noting that *CLS*’s claims call on two different lines of doctrine—that involving free speech in public fora and that involving the freedom of expressive association).

3. *Widmar v. Vincent*, 454 U.S. 263 (1981).

4. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

5. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). Mirroring these cases that hold in favor of religious plaintiffs on free-speech grounds, of course, are those cases applying limited public forum analysis to reject the claims of non-religious plaintiffs to such fora. *E.g.*, *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 808 (1984); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 50 (1983).

6. *Rust v. Sullivan*, 500 U.S. 173 (1991).

Institutional Rights (FAIR),⁷ and *United States v. American Library Association*.⁸

Ultimately, the *CLS* Court held that all of the relevant doctrines supported the position advocated by the Hastings College of Law (Hastings). The Court held a school could decline to recognize the student chapter of CLS due to the group's refusal to accept members who did not conform their beliefs and conduct to the principles of CLS (particularly regarding homosexuality).⁹ Because Hastings's refusal to recognize the CLS chapter as a registered student organization did not directly coerce the group to accept members it did not wish to take, the case turned on the question of whether a public university could decline to extend its financial support and other benefits to particular student groups.¹⁰ And because Hastings applied a reasonable, viewpoint-neutral "accept-all-comers" policy to registered student organizations, the condition passed muster under cases such as *Rosenberger*, which permitted the government to exclude speakers from a "limited public forum" so long as it did not behave unreasonably or exercise viewpoint discrimination.¹¹

Perhaps less obviously, however, *CLS* may also be viewed in relation to two other recent Roberts Court cases: *Pleasant Grove City v. Sumnum*¹² and *Salazar v. Buono*.¹³ In *CLS*, as in *Sumnum* and *Buono*, the Supreme Court turned to property—both as a metaphor and as a doctrinal tool—to resolve difficult and multifaceted constitutional questions. Although the relationship between First Amendment rights and property rights is a long-standing one,¹⁴ the

7. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006).

8. *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003). *See also* Brief on the Merits for Respondent-Intervenor Hastings Outlaw at 44•49, *CLS v. Martinez*, 130 S. Ct. 2971 (2010) (No. 08-1371). In addition, one might have seen trouble in store for CLS simply based on its ultimately catastrophic decision to stipulate that Hastings College of Law had indeed adopted an "accept-all-comers" policy.

9. *CLS*, 130 S. Ct. at 2994.

10. *Id.* at 2986.

11. *Id.* at 2988•95.

12. *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125 (2009).

13. *Salazar v. Buono*, 130 S. Ct. 1803 (2010).

14. *See, e.g.*, Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 *GEO. WASH. L. REV.* 439, 444•48 (2006) (describing the relationship between free speech and property in the Supreme Court's First Amendment jurisprudence); Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 *HASTINGS L.J.* 309, 310 (1999) (discussing the Court's "fundamental error" of "misconceiving the speech issues involved in the public forum problem as property issues"); Joseph Blocher, *Government Property and Government Speech*, 52 *WM. & MARY L. REV.* (forthcoming 2011), available at <http://papers.ssrn.com/sol3/>

Court seems to have turned to property with a renewed enthusiasm in these three recent cases.¹⁵ And although the property framework may appear to hold the promise of simplicity, neutrality, and avoidance of difficult policy questions, this essay argues that it fails to deliver on those promises. Instead, property analysis obscures the complex First Amendment issues behind seemingly easy categorical judgments and grants the government virtually unlimited power to exclude undesired speakers and groups.

Justice Ginsburg's majority opinion in *CLS* turns on the idea that Hastings created a "limited public forum" through its Registered Student Organization (RSO) program.¹⁶ Because the Court found that the RSO program carried the limited public forum designation, Hastings was permitted to draw lines to determine which student groups would have access to the forum, so long as those lines were reasonable and did not discriminate against particular groups based on their viewpoint.¹⁷ The use of forum analysis with respect to CLS's free-speech claim was not particularly unusual or controversial—though it is perhaps worth noting that the Court recently has shown little appetite for forum analysis and has declined to apply it in several important cases in the past few years.¹⁸ What may be more noteworthy is that the Court extended forum analysis to CLS's freedom-of-association claim as well.¹⁹ This doctrinal decision was a less obvious choice, since the Court could not point to any recent cases in which freedom of association claims were assimilated to free-speech forum analysis. Indeed, the Court was left to distinguish

papers.cfm?abstract_id=1653644, at 5 (exploring "the deep structure of the relationship between government property and government speech"); Harry Kalven, Jr., *The Concept of Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1 (1965) (surveying free speech in a variety of public-place cases).

15. It is worth noting, moreover, that there were three different groupings of Justices applying the property principles in each of the three cases. *CLS* was a 5-4 decision with the liberal Justices in the majority, and *Buono* was 5-4 with the conservatives in the majority, Justice Kennedy being the swing vote in each case. *Summum* was a 9-0 decision. This essay therefore does not argue that the property approach is unique to any particular wing of the Court or any particular Justice.

16. *CLS*, 130 S. Ct. at 2985 (concluding that "[the Court's] limited-public-forum precedents supply the appropriate framework for assessing both CLS's speech and association rights").

17. *Id.* at 2989•91.

18. The Court declined to apply forum analysis despite at least one party's urging in *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004), and *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003); cf. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 189•90 (2007) (mentioning but not clearly applying forum analysis with respect to public employees union's expenditure of agency-shop fees).

19. *CLS*, 130 S. Ct. at 2985•86.

precedents such as *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*,²⁰ and *Healy v. James*,²¹ in which forum doctrine was not applied or even mentioned.²²

By applying forum analysis in *CLS*, the Court reminded us that the government is not just a regulator—it is also a property owner that exercises dominion, control, and exclusionary rights over its domain. The majority opinion explains that forum analysis recognizes the government’s ability “to preserve the property under its control for the use to which it is lawfully dedicated.”²³ Hastings’s decision to exclude *CLS* from its RSO program is based on the law school’s role as both a “property owner and [an] educational institution.”²⁴

The Court’s use of forum doctrine places it in the company of *Sumnum* and *Buono*, two other recent cases dealing with the rights of religious minorities. In *Buono*, also decided last term, a National Park Service employee challenged the presence on federal land of a Latin cross, which had been erected as a memorial to the soldiers who died in World War I.²⁵ Shortly before the *Buono* litigation, the Park Service had denied permission to erect a Buddhist shrine in the same location.²⁶ The Court held against the cross’s challenger in *Buono*, with a plurality opining that federal legislation, passed after the district court found an Establishment Clause violation, had the potential to alleviate a previously-adjudicated constitutional violation, and, by logical extension, to permit the exclusion of other religious monuments by transferring ownership of the cross to a private party.²⁷

20. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995) (holding, without referencing public forum doctrine, that the application of a public accommodation law to force a veterans group to allow gay individuals to march in its parade violated the group’s First Amendment right of expressive association).

21. *Healy v. James*, 408 U.S. 169 (1972) (finding a violation of the First Amendment in a university’s exclusion of a student group from official recognition without applying forum analysis).

22. See *CLS*, 130 S. Ct. at 2986 n.14, 2987 (distinguishing *Hurley* and *Healy*); *id.* at 3007•09 (Alito, J., dissenting) (asserting that the case is controlled by *Healy*); cf. John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565 (2010) (bemoaning the assimilation of the constitutional freedom of assembly to the freedom of expressive association).

23. *CLS*, 130 S. Ct. at 2984 (quoting *Cornelius v. NAACP*, 473 U.S. 788, 800 (1985) (internal quotation marks omitted in original)).

24. *Id.* at 2986; cf. *Int’l Soc. for Krishna Consciousness, Inc. (ISKCON) v. Lee*, 505 U.S. 672, 678 (1992) (“Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject.”).

25. *Salazar v. Buono*, 130 S. Ct. 1803, 1811•12 (2010).

26. *Buono v. Norton*, 371 F.3d 543, 549 (9th Cir. 2004).

27. *Buono*, 130 S. Ct. at 1817•18 (plurality opinion).

In *Sumnum*, decided in the 2008 term, the Supreme Court rejected the free-speech claim of a religious group seeking to have its permanent monument displayed alongside the Ten Commandments and various, more-obviously secular items in a publicly-owned park known as Pioneer Park.²⁸ The Court held that the monuments in the park, which were all donated by private parties, were nonetheless the government's own speech, rendering the city immune to claims of discriminatory treatment from a free-speech perspective.²⁹ Like *CLS*, both *Sumnum* and *Buono* rely on concepts of property and ownership to resolve complex constitutional questions. In all of these cases, the Court ultimately resolved the controversy against the plaintiffs by placing religious speech into a framework in which the speaker, as property owner, has the virtually unlimited right to exclude any kind of speech for almost any reason.

In these three cases, property law and property metaphors appear to simplify the task at hand. They seem to magically transform complicated constitutional questions into straightforward disputes over the property owner's right to exclude. Property promises a sort of glittering neutrality, a way of cutting through the tangled complexities of the First Amendment with ancient, tried-and-true common law principles. Yet, this appearance is deceptive. Indeed, this essay argues that the use of property is problematic when First Amendment values are at stake; moreover, property is not as neutral a doctrinal tool as the Court appears to believe. Rather, the use of property metaphors—and particularly that of the government as property owner—empowers the government to exclude unwanted speakers, mostly under conditions that the government itself is free to define.

The Court's use of property in *CLS* is troubling for several reasons. First, the use of property metaphors tends toward categorical rules.³⁰ Whereas many issues of religious freedom, religious establishment, and free speech depend on delicate balancing and context-specific judgments,³¹ the existence of a property right suggests

28. *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1129•30 (2009).

29. *Id.* at 1134.

30. See Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1226•35 (1984) (describing and critiquing the categorical nature of public forum analysis).

31. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring) (“[judgment] must take account of context and consequences”).

that no such balancing is required. Once the property right is allocated, the property owner is assumed to have an absolute or near-absolute right to exclude others, for almost any reason at all.³² And indeed, in *CLS*, the only limits on Hastings's ability to exclude student groups from the RSO forum were that the exclusion must be reasonable and not a result of viewpoint discrimination—requirements that the “accept-all-comers” policy easily met.

Moreover, property rights tend to be self-reinforcing and self-defining, particularly when the government is the property owner: the more the government excludes individuals from its property, the more it is entitled to exclude them.³³ The nature and boundaries of the forum being created by the government are defined in part by how much access the government grants to the forum, and to whom. Indeed, “the Court has begun to define designated fora in a disturbingly circular way, treating the very restrictions under attack as conclusively establishing that the forum has not been designated for speech in the first place.”³⁴

The use of the property metaphor therefore allows the government to set its own speech boundaries—to define what kind of speech is and is not permissible by defining the boundaries of its forum.³⁵ This self-defined and categorical property concept may be contrasted with the “incompatibility” approach that appeared to be gaining ascendancy at one time.³⁶ The incompatibility approach assumes that individuals should have free access to government

32. See Massey, *supra* note 14, at 326•30 (contrasting the categorical, property-based approach to free-speech problems with the more nuanced and speech-protective balancing approach).

33. The doctrine of adverse possession is an analog of this phenomenon in the private property domain: so long as a property owner continues actively to exclude others, she can retain ownership of the property and thus her right to exclude, but if she fails for a period of time to exclude others, she may lose her property right, and thus her right to exclude.

34. Louis Michael Seidman, *The Dale Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1594 (2008). For example, in *ISKCON v. Lee*, 505 U.S. 672 (1992), the Court pointed to the fact that “public access to air terminals is . . . not infrequently restricted” as a factor demonstrating that airports are not public fora. *Id.* at 682.

35. See Seidman, *supra* note 34, at 1561•62 (arguing that the discretionary nature of property rules ultimately undermines the robustness of free-speech protections); cf. Jennifer Nedelsky, *American Constitutionalism and the Paradox of Private Property*, in CONSTITUTIONALISM AND DEMOCRACY 241, 264•65 (Jon Elster & Rune Slagstad eds., 1988) (“Property is thus the boundary to governmental power, but it is a boundary government itself draws. Through property and its definition by the judiciary, the state creates, and shifts, and recreates its own limits.”).

36. See Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 445•46 (2006) (describing the “compatibility” approach, and its demise).

property and asks simply whether their use of the property is incompatible with the key intended uses of the property.³⁷ While largely asking the same questions as the incompatibility approach, the reasonableness inquiry at the center of the limited public forum approach almost by definition assumes a much more deferential disposition toward the government and its reasons for excluding a particular speaker. Thus, the default position of government exclusion (exemplified by the *CLS* Court's reasonableness and viewpoint-neutrality standard), rather than of government inclusion (exemplified by the incompatibility standard), is not only troubling from the perspective of enabling and protecting free speech—it also flies directly in the face of free-speech and free-exercise values. The claim of groups like *CLS* is a claim, after all, for inclusion in the polity, regardless of their refusal to assimilate to the majority's political views. To start the analysis of *CLS*'s claim from a default position of exclusion is hardly to take those claims seriously.³⁸

Additionally, the Court's apparent assumption that property provides utter clarity is not entirely accurate. Property has never, in reality, been the simple and straightforward doctrinal tool that the Court wishes it would be. The pages of many a property casebook stand as evidence that the right to exclude others is only a provisional starting point for the "bundle of rights" that comprise the notion of property. Despite the apparent absolutism with which the right to exclude others is sometimes touted as the essential quality of any property right, numerous circumstances impose limits on that right to exclude. Antidiscrimination laws are one example; the right to free speech in parks, streets, and other government-owned property is another.³⁹ Indeed, thirty years ago, in *Pruneyard Shopping Center v. Robins*, the Supreme Court upheld the California Supreme Court's decision requiring a private property owner's right to exclude others to yield to the free-speech rights of individuals who would engage in peaceful expressive activity on that property.⁴⁰ In his *Pruneyard* concurrence, Justice Marshall rejected an "overly formalistic view of the relationship between the institution of private ownership of

37. See *Cornelius v. NAACP*, 473 U.S. 788, 826•27 (1985) (Blackmun, J., dissenting) (describing the incompatibility approach); Massey, *supra* note 14, at 328•29 (same).

38. Cf. Inazu, *supra* note 22, at 570 (describing freedom of assembly in similar terms).

39. See, e.g., Kalven, *supra* note 14, at 13 (influentially describing a "First-Amendment easement" to use the public streets for public expression).

40. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980).

property and the First Amendment guarantee of freedom of speech,”⁴¹ arguing that “common-law rights” were not “immune from revision by” the government.⁴² Thus, the crux of the issue is, and has always been, what substantive principles should govern the limitations on the property owner’s right to exclude. That is a question the Court seems loath to touch, using the forum metaphor and its concomitant reasonableness standard as reasons to defer largely to the judgment of the law school.

Finally, it is easy to lose sight of the fact that property is simply a remarkably poor fit for the concepts that the Court is required to grapple with in this case. In one of its earlier cases dealing with the access of religious groups to university-sponsored fora, the Court openly acknowledged that the student organizations funding program “is a forum more in a metaphysical than in a spatial or geographic sense.”⁴³ The school’s right to control its actual physical property is at issue only to a very slight degree; CLS sought not just the use of school property—which it might have had in any case⁴⁴—but also official recognition, funding, and the use of the school’s logo and various communications channels. But the “limited public forum” metaphor allowed the Court to avoid directly analyzing the actual burden on CLS’s freedom of speech and, perhaps more importantly, its freedom of association. It also allowed the Court to avoid determining whether that burden could be justified: the highly deferential standard that the Court was required to apply as a result of the limited public forum framework did not require any in-depth balancing of constitutional values.

One might agree with Justice Stevens that Hastings’s policy is content- and viewpoint-neutral—even if one considers the specific policy prohibiting discrimination based on sexual orientation, rather than the broader accept-all-comers policy that the Court considered.⁴⁵ And one might persuasively argue that Hastings is permitted to apply such a condition to student groups, regardless of its effect on certain religious entities or its permissibility outside the context of official

41. *Id.* at 91 (Marshall, J., concurring) (quoting *Hudgens v. NLRB*, 424 U.S. 507, 542 (1976)).

42. *Id.* at 93.

43. *Rosenberger v. Rector & Vistors of Univ. of Va.*, 515 U.S. 819, 830 (1995).

44. *CLS v. Martinez*, 130 S. Ct. 2971, 2991 (2010) (noting that Hastings offered CLS the use of its facilities for meetings and access to general bulletin boards).

45. *Id.* at 2995•96 (Stevens, J., concurring).

university funding and recognition.⁴⁶ But the majority did not make that argument; in fact, it avoided that issue altogether—turning *CLS* into a far-less-consequential case than many had expected. Indeed, this failure to say anything of real importance is perhaps the most surprising thing about the Court’s decision in *CLS v. Martinez*.

46. *Id.* at 2997•98. Of course, one might also take the position that antidiscrimination provisions may be applied constitutionally to government-funded programs outside the university setting.