# A SERIOUS SETBACK FOR FREEDOM: THE IMPLICATIONS OF *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*

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**&**
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## INTRODUCTION

> 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.
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> Justice Samuel Alito.[1]

In *Christian Legal Society v. Martinez*,[2] a sharply divided Supreme Court upheld an order of the Ninth Circuit[3] that officials at a public institution in California may require an on campus religious group to admit all-comers from the student body, including those who disagree with its beliefs as a condition of becoming a Registered Student Organization.[4] Put another way, the Court declared that the government, through university officials, might force religious groups to choose between compromising their values and receiving benefits that other student

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[1] *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 3020 (2010) (Alito, J., joined by Roberts, C.J., Scalia, & Thomas, JJ., dissenting).

[2] 130 S. Ct. 2971 (2010).

[3] 319 Fed. Appx. 645 (9th Cir.), *cert. granted*, 130 S. Ct. 795 (2009).

[4] *Christian Legal Soc'y,* 130 S. Ct. at 2978.

groups receive as a matter of constitutional right.[5] While the Court clearly held that all-comers policy is facially constitutional, it remanded the case for consideration of whether Law School officials applied the all-comers policy selectively to the student organization.

*Christian Legal Society* is a victory for those who believe that no student should experience discrimination in any form.[6] Yet, *Christian Legal Society* is a serious setback for freedom. As a *Wall Street Journal* editorial noted, "under the guise of nondiscrimination, the school would actively suppress the convictions of

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[5] Prior to *Christian Legal Soc'y*, the issue of whether a student religious group may exclude non-believers had been the subject of extensive litigation. *See*, *e.g.*, *Christian Legal Soc'y v. Walker*, 453 F.3d 853 [210 Ed. Law Rep. 916] (7th Cir. 2006); *Christian Legal Soc'y v. Eck*, 625 F. Supp.2d 1026 (D. Mont. 2009); *Every Nation Campus Ministries at San Diego State Univ. v. Achtenberg*, 597 F. Supp. 2d 1075 [242 Ed. Law Rep. 181] (S.D. Cal. 2009), *docketed on appeal sub nom. Alpha Delta Chi-Delta Chapter v. Reed*, No. 09-55299 (9th Cir. Feb. 27, 2009); *Beta Upsilon Chi, Upsilon Chapter at the Univ. of Fla. v. Machen*, 559 F. Supp. 2d 1274 [235 Ed. Law Rep. 214] (N.D. Fla. 2008), *vacated*, 586 F.3d 908, [250 Ed. Law Rep. 555] (11th Cir. 2009); *Univ. of Wis.-Madison Roman Catholic Found. v. Walsh*, 2007 WL 1056772 (W.D. Wis. 2007); *Alpha Iota Omega Christian Fraternity v. Moeser*, No. 04-765, 2005 WL 1720903 (M.D. N.C. Mar. 2, 2005), *dismissed as moot*, 2006 WL 1286186, at *3 (M.D. N.C. 2006); *Christian Legal Soc'y Chapter of the Univ. of Toledo v. Johnson*, No. 05-7126 (N.D. Ohio Jun. 16, 2005); *Christian Legal Soc'y Chapter of Washburn Univ. Sch. of Law v. Farley*, No. 04-4120 (D. Kan. Sept. 16, 2004); *Maranatha Christian Fellowship v. Regents of the Bd. of the Univ. of Minn. Sys.*, No. 03-5618 (D. Minn. Oct. 24, 2003).

[6] As the Chief Justice observed during oral argument, there is a fundamental difference between discrimination based on status (race, sex, age, sexual orientation) and discrimination based on belief (religion, political views). Oral Argument Transcript, *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010), at 44. However, the Court ignored this distinction. The policy treats discrimination based on race and discrimination based on affection for a particular sports team in the same way.

certain groups and their ability to express their views."[7] Moreover, as the *Los Angeles Times* editorial declared, *Christian Legal Society* represented a departure from the Court's "theme" of protecting the First Amendment rights of "unpopular" groups.[8]

This Article explores the Supreme Court's decision in *Christian Legal Society* and its implications.[9] Part I reviews the facts in *Christian Legal Society* as well as the Opinion of the Court, the two concurrences, and the four Justice dissent. Part II of this Commentary addresses the fundamental change in the Court's limited public forum jurisprudence, its evaluation of equality over freedom, and the significant impact that *Christian Legal Society* has on student organization jurisprudence.

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[7] Editorial, *The Supreme Court's "Subsidies,"* WALL STREET JOURNAL, July 1, 2010 at A18.

[8] Editorial, *A Mixed Record*, LOS ANGELES TIMES, July 5, 2010.

[9] Prior to *Christian Legal Soc'y*, there was significant scholarly commentary on the constitutionality of forcing groups to accept those who disagree with the group. See Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994); Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations*, 118 Harv. L. Rev. 2882 (2005); Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653 (1996); Charles J. Russo & William E. Thro, *The Constitutional Rights of Politically Incorrect Groups: Christian Legal Society v. Walker as an Illustration,* 33 J.C. & U.L. 361 (2007); William E. Thro & Charles J. Russo, *Preserving Orthodoxy on Secular Campuses: The Right of Student Religious Organizations to Exclude Non-Believers*, 250 Ed. Law Rep. 497 (2010) Ryan C. Visser, Note, *Collision Course?: Christian Legal Society v. Kane Could Create a Split over the Right of Religious Student Groups to Associate in the Face of Law School Antidiscrimination Policies*, 30 Hamline L. Rev. 449 (2007).

## I. OVERVIEW OF *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*

### A. Background

From the 1994-1995 academic year through the 2003-2004 academic year, a local chapter of the Christian Legal Society was a Registered Student Organization at Hastings College of Law, a public institution that is part of the University of California system. In order to become Registered Student Organizations, student groups had to comply with a school nondiscrimination policy that was consistent with state law; the policy forbids discrimination on an array of criteria including religion and sexual orientation. Registered Student Organizations received benefits such as the use of the Law School's name, logo, and bulletin boards to post materials, email system for mailings, office space, voice mail, and travel funds.[10] In September of 2004, the student organization's officers unsuccessfully sought travel

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[10] The nondiscrimination policy of the University of California, Hastings College of Law provides:

> The College is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, College-owned student residence facilities and programs sponsored by the College, are governed by this policy of nondiscrimination. The College's policy on nondiscrimination is to comply fully with applicable law.
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> The University of California, Hastings College of the Law shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.

Petition for Certiorari, at 4, *Christian Legal Soc'y v. Martinez*, No. 08-1371 (U.S. May 5, 2009).

funds to attend the organization's annual national conference. Later in the same month, university officials met with the student organization's officers and, due to changes in the student organization's national by-laws, they informed the group's leadership that it appeared to be non-compliant with the Hastings Law School's Nondiscrimination Policy.[11] University officials were particularly concerned with the Policy's provisions on religion and sexual orientation even though no non-Christian, gay, lesbian, or bisexual students sought to join the organization or attend its meetings. Officials thus directed the student organization to open its

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[11] The Christian Legal Society requires all members to:

> affirm a commitment to the group's foundational principles by signing the national Christian Legal Society Statement of Faith. A shared devotion to Jesus Christ is reflected in the Statement of Faith, the affirmation of which indicates a member's commitment to beliefs commonly regarded as orthodox in the Protestant evangelical and Catholic traditions. An individual raised in a faith other than Christianity is eligible for voting membership if he or she affirms the Statement's orthodox Christian tenets. Conversely, a person raised as a Christian is not eligible if he or she no longer can affirm the Statement of Faith.

*Petition for Certiorari*, at 7, *Christian Legal Soc'y v. Martinez*, No. 08-1371 (U.S. May 5, 2009). With respect to sexual conduct, the Christian Legal Society's requirements are clear:

> A person who advocates or unrepentantly engages in sexual conduct outside of marriage between a man and a woman is not considered to be living consistently with the Statement of Faith and, therefore, is not eligible for leadership or voting membership. A person's mere experience of same-sex or opposite-sex sexual attraction does not determine his or her eligibility for leadership or voting membership. Christian Legal Society individually addresses each situation that arises in a sensitive Biblical fashion.

*Id*. at 8.

membership to all-comers, regardless of their beliefs or sexual orientation. When the student organization refused to make the changes, officials denied its request for status as a Registered Student Organization. Even so, the student organization remained active at the Law School throughout that academic year, sponsoring a variety of activities including Bible-study meetings, a lecture on Christian faith, and social activities.

### B. Lower Courts

Arguing that the Hastings Law School's action violated its First Amendment rights to expressive association, free speech, and free exercise of religion along with denying its rights to due process and equal protection, the student organization filed suit in a federal trial court in California seeking status as a Registered Student Organization. The trial court initially granted the Law School's motion to dismiss the establishment, due process, and equal protection claims in April of 2005, but granted the student organization leave to amend its equal protection claim.[12] The student organization then filed an amended complaint raising an equal protection claim. Both the student organization and the Law School filed cross-motions for summary judgment on the free speech, expressive association, free exercise, and equal protection claims. In a lengthy, unreported opinion, the trial court rejected all of the student organization's claims, instead granting the Law

[12] *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Kane*, 2005 WL 850864 (N.D. Cal. 2005).

School's cross-motion for summary judgment.[13] In essentially deciding that university officials uniformly enforced their Nondiscrimination Policy, the court rejected the student organization's claims that officials infringed on its constitutional rights.

On appeal, the Ninth Circuit summarily affirmed the order of the trial court in a two-sentence memorandum.[14] The appellate court noted that the parties stipulated that the Law School imposed an open membership rule on all student groups that required them to accept all individuals as members, including those who disagreed with a group's mission. Relying on its judgment in a K-12 case, *Truth v. Kent School District*,[15] the court concluded the conditions were viewpoint neutral and reasonable. In *Truth*, the Ninth Circuit ruled that school board officials did not

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[13] *Christian Legal Soc'y Chapter of Univ. of Calif. v. Kane*, 2006 WL 997217 (N.D. Cal. 2006).

[14] *Christian Legal Soc'y v. Kane*, 319 Fed. Appx. 645 (9th Cir. 2009) (unpublished).

[15] 542 F.3d 634 (9th Cir. 2008*), reh'g en banc denied*, 551 F.3d 850 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2889 (2009). For a commentary on *Truth*, *see* Jonathan F. Duncan & Karen Randolph Rogers, *The Equal Access Act: From Clear to Complicated in One Case*, 231 Ed. Law Rep. 7 (2008).

violate the Equal Access Act[16] or a Bible Study Club's First Amendment rights by requiring it to admit non-believers.

## C. Supreme Court

### 1. Opinion of the Court

The Supreme Court, in a five-to-four decision, affirmed that student clubs in the institution had to admit all-comers, even those who disagree with their missions and goals. [17]

In the opening sentence, the Supreme Court reiterated its reluctance to forbid student organizations access to university facilities based on their viewpoints.[18] However, in recognizing that the case presented a novel question, the Court described the issue before it as whether "a public law school [may] condition its official recognition of a student group—and the attendant use of school funds

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[16] 20 U.S.C. §§ 4071 *et seq*. Essentially codifying *Widmar v. Vincent*, 454 U.S. 263, 272-73 (1981), the Act mandates that public secondary schools that receive federal financial assistance and that permit non-curriculum related student groups to meet during non-instructional time must grant access to religious groups. The Act does allow officials to exclude groups if their meetings materially and substantially interfere with the orderly conduct of school activities.

The Court upheld the Act in *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226, [60 Ed. Law Rep. 320] (1990). For commentary on *Mergens* and its progeny, see Arval A. Morris, *The Equal Access Act after Mergens*, 61 Ed. Law Rep. 1139 (1990); Lawrence F. Rossow, *The Constitutionality of the Equal Access Act: Board of Education of Westside Community School District v. Mergens*, 64 Ed. Law Rep. 609 (1991).

[17] Justice Ginsburg, joined by Justices Stevens, Kennedy, Breyer, and Sotomayor, delivered the Opinion of the Court.

[18] *Christian Legal Soc'y*, 130 S. Ct. at 2978.

and facilities—on the organization's agreement to open eligibility for membership and leadership to all students?"[19]

After recounting the facts, the Supreme Court found it necessary to resolve the preliminary question that the student organization raised—whether to review the policy as written or whether to review the policy as a requirement to accept anyone who wished to join the organization. In light of joint stipulations by both parties, the Court focused on the constitutionality of the all-comers requirement and refused to review the policy as written.[20]

### a. Limited Public Forum Analysis Applies To Both the Free Speech Claim and the Freedom of Association Claim

Having declined to review the constitutionality of the policy as written, the Court turned to consider its constitutionality of the all-comers requirement.[21] The student organization advanced two separate arguments in disputing the policy. First, because the recognition of student groups constitutes a limited public forum,[22] the institution could not deny access to organizations that disagree with the Law

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[19] *Id.*

[20] *Id*. at 2982-84.

[21] *Id*.

[22] *Id*. at 2984 n.12 ("Our decisions make clear, and the parties agree, that Hastings, through its [recognized student organization] program, established a limited public forum.").

School.[23] Second, since the institution's policy required the student organization to accept members who disagreed with its core beliefs, it contended that the Law School was violating its right to freedom of expressive association.[24] If anything, the student organization charged that the government might intrude on the freedom of association only "by regulations adopted to serve compelling state interests,

[23] *Id.* at 2984. For a more thorough explanation the types of fora and the relevant constitutional rules, see *infra* notes 65-77 and accompanying text.

[24] *Christian Legal Soc'y*, 130 S. Ct. at 2985.

unrelated to the suppression of ideas that cannot be achieved through means significantly less restrictive of associational freedoms."[25]

The student organization had requested that the Supreme Court consider each of its arguments separately. However, the Court was of the view that since the two arguments effectively merged, "it makes little sense to treat [the student organization's] speech and association claims as discrete."[26] The Court gave three reasons for resolving both constitutional arguments under a limited public forum

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[25] *Roberts v. U.S. Jaycees Roberts,* 468 U.S. 609, 623 (1984). Moreover, the Court emphatically rejected the notion that something less than strict scrutiny should apply to freedom of association claims. *Boy Scouts of America v. Dale,* 530 U.S. 640, 659 (2000). Courts are required to "examine whether or not the application of the state law would impose any 'serious burden' on the organization's rights of expressive association." *Dale*, 530 U.S. at 658. Judges "give deference to an association's assertions regarding the nature of its expression" and "to an association's view of what would impair its expression." *Id.* at 653. It is not necessary for the organization's core purpose to be expressive or for all members to agree with all aspects of the message. *Id.* at 655. Under this framework, the Court has upheld statutes requiring civic organizations to admit women, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 539-542 (1987); *Roberts*, 468 U.S. at 623-27, but has allowed both parade organizers and the Boy Scouts to exclude those who disagree with a particular message. *Dale*, 530 U.S. at 655-60; *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 572-73 (1995). The cases have turned on whether "the enforcement of these [policies]" would "materially interfere with the ideas that the organization sought to express." *Dale*, 530 U.S. at 657.

Moreover, the Court emphatically rejected the notion that something less than strict scrutiny should apply to freedom of association claims. *Dale*, 530 U.S. at 659. Courts are required to "examine whether or not the application of the state law would impose any 'serious burden' on the organization's rights of expressive association." *Dale*, 530 U.S. at 658. Judges "give deference to an association's assertions regarding the nature of its expression" and "to an association's view of what would impair its expression." *Dale*, 530 U.S. at 653. It is not necessary for the organization's core purpose to be expressive or for all members to agree with all aspects of the message. *Dale*, 530 U.S. at 655.

[26] *Christian Legal Soc'y*, 130 S. Ct. at 2985.

framework.[27] First, the Court feared that utilizing limited public forum analysis for the free speech claim and strict scrutiny analysis for the freedom of association claim might lead to anomalous results.[28] The institution's actions might be constitutional under limited public forum analysis, but unconstitutional under the freedom of expressive association analysis.[29] Second, the Court thought that applying the freedom of expressive association standard to the recognition of student organizations would have invalidated a defining characteristic of a limited public forum—that the government may reserve the limited public forum for certain types of groups or purposes.[30] Third, the Court found that access to the limited public forum is "effectively a state subsidy."[31] Since the student organization had a choice, namely to accept those who disagreed with its values or forgo the subsidy that comes with recognition, the Court maintained that it was not being compelled to accept those who disagree.[32] As far as the Court was concerned, this choice

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[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] *Id*. at 2985-86.

[31] *Id*. at 2986. As explained *infra* notes 104-23 and accompanying text, characterizing access to a limited public forum as a subsidy has profound implications.

[32] *Id*. at 2986.

distinguished the situation from those cases where statutes or policies compelled admission of those who disagree.[33]

**b. Application of the Limited Public Forum Analysis**

At the outset of its limited public forum analysis, the Supreme Court reviewed three earlier cases involving disputes between universities and student groups that sought the benefits of becoming Registered Student Organizations. In the first case, *Healy v. James,*[34] in remanding the dispute for further consideration, the Court held that campus officials had the right to forbid a group from organizing a chapter of Students for a Democratic Society on campus unless the group was willing to abide by the university's reasonable campus laws. Nine years later, in *Widmar v. Vincent,*[35] the Court ruled in favor of a student group, granting it access to university facilities after officials singled out its religious purpose in attempting to exclude the organization from meeting on campus. Finally, in *Rosenberger v. Rector and Visitors of University of Virginia*,[36] the Court found university officials could not withhold benefits from a student newspaper simply because of its Christian perspective. The Court reiterated that in each of these cases it refused to

[33] *Id*. at 2986 n. 14.

[34] 408 U.S. 169, 187-88 (1972).

[35] 454 U.S. at 272-73.

[36] 515 U.S. 819, 829 [101 Ed. Law. Rep. 552] (1995).

let student groups be subject to discrimination in a limited public forum because of their viewpoints.[37]

The Court then turned to the two relevant questions in limited public forum analysis. First, the Court asked whether the regulation was reasonable. Second, the Court considered whether the regulation was viewpoint neutral.

**i. Reasonableness**

The Supreme Court wrote that although it owed no deference to university officials, it observed that its analysis of First Amendment rights "must be analyzed in light of the special characteristics of the school environment."[38] Even so, since the Court recognized that jurists lack the skills and perspectives of educational leaders, it purported to act cautiously.[39]

The Supreme Court next recounted, and agreed with, the four "justifications" that Hastings advanced in support of its policy. First, the Court was satisfied that the institution designed the policy to ensure leadership, educational, and social opportunities for all students. The Court analogized that just as faculty members cannot conduct classes for only students with whom they agree, so, too, organizations had to be available to all who wish to join. At the same time, the Court contended that under its approach, students would not have to provide funds

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[37] *Christian Legal Soc'y,* 130 S. Ct. at 2988.

[38] *Id.*

[39] *Id.*

to support organizations that excluded them as members.[40] Second, the Court agreed with Hastings that its all-comers policy allowed campus officials to police compliance with the university's non-discrimination policy without having to consider a Registered Student Organization's reasons for imposing conditions on membership. In so doing, the Court rejected the student organization's contention that it excluded members for their sexual conduct rather than their beliefs about sexual orientation.[41] Third, the Court agreed with the Law School that the policy's goal of bringing different groups together "encourages tolerance, cooperation, and learning among students."[42] Fourth, the Court found that the policy was advancing state law goals—prohibiting sexual orientation discrimination.[43]

The Supreme Court next found that the policy was all the more reasonable based on the availability of off-campus alternative channels available to the student organization in light of its loss of status as a Registered Student Organization.[44] The Court indicated that even though the student organization could not rely on mandatory student activities fees, it was still able to maintain a presence on campus through conducting meetings and that attendance at these events had doubled.

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[40] Id. at 2989.

[41] *Id.* at 2990.

[42] *Id.*

[43] *Id.* at 2990-91.

[44] *Id.* at 2991-92.

The Supreme Court went on to reject the student organization's assertions that the all-comers policy was "frankly absurd" [45] and that [t]here can be no diversity of viewpoints in a forum, … if groups are not permitted to form around viewpoints."[46] The Court also rebuffed the student organization's hypothetical concern that individuals hostile to its mission could infiltrate its membership if it had to admit all-comers, responding that there was no history of this and that the membership would not elect an individual bent on such a "hostile take-over."[47] The Court also suggested that the student organization was still free to condition membership and eligibility for leadership positions on neutral criteria such as payment of dues, attendance at meetings designed to help it continue to thrive. Moreover, should such a situation ever arise, university officials would "presumably" have to revisit the policy.[48]

**ii. Viewpoint Neutrality**

Turning to whether the policy was viewpoint neutral, the Court declared that "[i]t is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all*-comers"[49] because it contained no distinction

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[45] *Id.* at 2992.

[46] *Id.*

[47] *Id*. at 2993.

[48] *Id*.

[49] *Id* (emphasis original).

between and among groups in light of their message or point of view. In rebutting the student organization's claim that the "nominally neutral" policy had a differential impact on it, the Court found that it was acceptable because as long as campus officials did "not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." [50]

Finally, the Supreme Court concluded that although the all-comers policy was facially constitutional, it remanded the dispute for further consideration of the as-applied challenge.[51] Specifically, because the lower courts had never addressed whether institutional officials selectively enforced the all-comers policy, further proceedings on this issue, including whether the issue was preserved, were necessary.[52]

### 2. Concurring Opinions

Justices Stevens and Kennedy penned separate concurrences. Stevens, in the final opinion of his almost thirty-five year career on the Supreme Court, offered a rebuttal to Justice Alito's dissent.[53]

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[50] *Id*. at 2994.

[51] *Id*. at 2995.

[52] *Id*.

[53] *Id.* at 2995 (Stevens, J., concurring).

In an even briefer concurrence, Justice Kennedy pointed out that institutional officials and the student organization stipulated that there was no evidence of viewpoint discrimination in the policy.[54] However, he explained that the result may have been different "if it were shown that the all-comers policy was either designed or used to infiltrate the group or challenge its leadership in order to stifle its views,"[55] an issue that may arise on remand to the Ninth Circuit.

### 3. Dissenting Opinion

Justice Alito, joined by Chief Justice Roberts, Justices Scalia, and Thomas, dissented and made four points. First, the dissent disputed the Court's "misleading portrayal of this case."[56] In particular, the dissenting Justices argued that the institution historically had not required Registered Student Organizations to admit all students,[57] the denial of recognition had significant consequences,[58] and the funding that the student organization sought was insignificant.[59] Second, the dissent illustrated that the Court's decision was inconsistent with *Healy*.[60] Third, the dissenting Justices explained why the Court's previous limited public forum

[54] *Id.* at 2998 (Kennedy, J., concurring).

[55] *Id.* at 3000 (Kennedy, J., concurring).

[56] *Id.* at 3001 (Alito, J., joined by Roberts, C.J., Scalia, & Thomas, JJ., dissenting).

[57] *Id.* at 3001-06.

[58] *Id.* at 3006.

[59] *Id.* at 3006-07.

[60] *Id.* at 3007-09.

jurisprudence precluded the adoption of the Law School's policy as written.[61] Fourth, the dissent contended that institution's policy, as interpreted by the Court, was neither reasonable[62] nor viewpoint neutral.[63] Justice Alito ended his dissent with the comment that "Even those who find Christian Legal Society'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."[64]

## II. IMPLICATIONS

Although *Christian Legal Society* arose in the context of higher education, nothing in the Opinion of the Court suggests that the result is limited to higher education. Rather, the decision has broad implications for constitutional law. First, *Christian Legal Society* fundamentally alters the Court's limited public forum jurisprudence. Second, the decision favors equality over freedom. Third, the decision significantly alters the Court's student organization jurisprudence.

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[61] *Id.* at 3009-12.

[62] *Id.* at 3012-16.

[63] *Id.* at 3016-20.

[64] *Id*. at 3020.

### A. The Decision Fundamentally Alters Limited Public Forum Jurisprudence

The First Amendment limits governmental restrictions of expression utilizing government property or government channels of communication.[65] First, public streets and parks, "which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions'" are traditional public fora.[66] In a traditional public forum, the government may impose reasonable time, place, and manner restrictions.[67] However, in a traditional public forum, the government may not practice viewpoint discrimination[68] and any restrictions on speech must be narrowly tailored to achieve compelling government interests.[69] Thus, the American Nazi Party or the Ku Klux Klan may use a public

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[65] The Court's jurisprudence in this area is particularly important for public higher education. For a thorough examination of the relevant issues for public higher education, *see* Derek P. Langhauser, *Free And Regulated Speech On Campus: Using Forum Analysis For Assessing Facility Use, Speech Zones, And Related Expressive Activity,* 31 J. Coll. & U. L. 481 (2005). *See also* Derek P. Langhauser, *Drawing The Line Between Free And Regulated Speech On Public College Campuses: Key Steps And The Forum Analy*sis, 181 Ed. Law. Rep. 339 (2003).

[66] *Perry Educ. Ass'n v. Perry Local Educators' Assn*., 460 U.S. 37, 45, (1983) (quoting *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.).

[67] *Perry Educ. Ass'n,* 460 U.S. at 45.

[68] *Carey v. Brown,* 447 U.S. 455, 463 (1980).

[69] *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 800 (1985).

park to spread its message.[70] Second, "if government property that has not traditionally been regarded as a public forum is intentionally opened up" for expressive purposes,[71] it creates a designated public forum.[72] Restrictions on speech in designated public fora are subject to the same limitation as those in traditional public fora.[73] Third, "a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects."[74] It is this third category, a limited public forum, which describes a public university's

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[70] In *Smith v. Collin*, 578 F.2d 1197 (7th Cir. 1978), the Seventh Circuit upheld the right of the American Nazi Party to march in Skokie, Illinois. When the Supreme Court denied the petition for certiorari, Justice Blackmun, joined by Justice White, dissented in stating that "this is litigation that rests upon critical, disturbing, and emotional facts, and the issues cut down to the very heart of the First Amendment." 439 U.S. 916, 916 (1978) (Blackmun, J., joined by White, J, dissenting from the denial of certiorari).

Later, in *Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995), the Klan was involved in another dispute involving a public forum as it challenged the rejection of its application for participation in an Adopt-A-Highway program based on its policy of excluding individuals and political groups. *Id.* at 1077. The Fifth Circuit affirmed that Texas had not created a public forum because the program's purpose was to allow citizens to support efforts to control and reduce litter, not to provide a forum for expressive activity. *Id.* at 1078. The court ruled that the state rejected the Klan's application because the section of highway was located near a desegregated housing project whose residents had been subject to harassment and intimidation by the Klan. *Id.* at 1080. The court concluded that the denial of the application was a reasonable and viewpoint-neutral restriction on speech. *Id.*

[71] *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009).

[72] *Cornelius,* 473 U.S., at 802.

[73] *Cornelius,* 473 U.S., at 800.

[74] *Pleasant Grove City,* 129 S. Ct. at 1132. *See also Perry Educ. Ass'n,* 460 U.S. at 46, n. 7.

recognition and/or funding of recognized student groups. [75] In a limited public forum, restrictions on expression must be "reasonable in light of the purpose served by the forum,"[76] and "must not discriminate against speech on the basis of viewpoint."[77]

*Christian Legal Society* fundamentally alters the Supreme Court's limited public forum jurisprudence in two ways. First, the Court expanded government's ability to restrict access to a limited public forum. Second, the Court now regards access to a limited public forum as a subsidy.

### 1. The Court Expanded Government's Ability to Restrict Access to A Limited Public Forum

While government may reserve a limited public forum "for certain groups or for the discussion of certain topics,"[78] government has never been able to require an organization to compromise its membership requirements as a condition of

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[75] *Rosenberger,* 515 U.S. at 829-30; *Widmar*, 454 U.S. at 272-73.

[76] *Cornelius,* 473 U.S. at 806.

[77] *Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 106, (2001). For a commentary on this case, *see* Charles J. Russo & Ralph D. Mawdsley, "*And the Wall Keeps Tumbling Down: The Supreme Court Upholds Religious Liberty in Good News Club v. Milford Central School,*" 157 Ed. Law Rep. 1 (2001). *See also Rosenberger,* 515 U.S. at 829.

[78] *Rosenberger,* 515 U.S. at 829. See also *Lamb's Chapel v. Center Moriches Union Free Sch. District,* 508 U.S. 384, 392-93, [83 Ed. Law. Rep. 30] (1993).

accessing a limited public forum.[79] There are sound reasons for this rule. "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."[80] "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."[81] "If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect."[82] This freedom of association "is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private."[83] Similarly, freedom of association, "plainly presupposes a freedom not to associate."[84] "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who

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[79] To the contrary, the Court explicitly held that groups that apparently restrict membership as a means of preserving their message must have access to limited public fora. *See Good News Club,* 533 U.S. at 102-03 (religious club for elementary school children); *Lamb's Chapel*, 508 U.S. at 387 (evangelical church). *Widmar*, 454 U.S. at 272 n.2 (Evangelical Group consisting of twenty core supporters).

[80] *Roberts*, 468 U.S. at 622.

[81] *Dale*, 530 U.S. at 647-48.

[82] *Rumsfeld v. Forum for Academic & Inst'l Rights*, 547 U.S. 47, 68 (2006).

[83] *Dale*, 530 U.S. at 630.

[84] *Roberts*, 468 U.S. at 623.

share the interests and persuasions that underlie the association's being."[85] "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[86]

Restricting the freedom of association as a condition of accessing a limited public forum violates the doctrine of unconstitutional conditions.[87] Under this doctrine, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected … freedom of speech even if he has no entitlement to that benefit."[88] "The government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government…."[89] If the government "may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may be thus manipulated out of existence."[90] Thus, government may not force

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[85] *Democratic Party of U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 n. 22 (1981). *See also California Democratic Party v. Jones*, 530 U.S. 567, 574-75 (2000).

[86] *Dale*, 530 U.S. at 648.

[87] *See generally* Kathleen Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev, 1413 (1989); William Van Alstyne, *The Demise of the Right-Privilege Doctrine in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

[88] *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003).

[89] *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

[90] *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 594 (1926).

private religious organizations to surrender their rights to freedom of association and freedom of religion as a condition of accessing limited public fora.[91]

In *Christian Legal Society*, the Supreme Court discounted the student organization's Freedom of Association argument[92] while ignoring the unconstitutional conditions doctrine.[93] Instead, the Court held that the government has the ability to restrict freedom of association as a condition of accessing limited public fora.[94] Put another way, the Court decreed that if groups want to use governmental property or channels of communication, they must be willing to compromise their missions by including those who disagree with their messages. In order to be a Registered Student Organization or use an auditorium in the wake of *Christian Legal Society*, Christians must accept non-believers, the NAACP must accept white supremacists, the Democrats must accept Republicans, and the Red Sox Nation must accept Yankee fans. Instead of having relatively easy access to limited public fora, groups must now make the difficult choice between

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[91] To the extent that groups have constitutional rights to access limited public fora, they must surrender one constitutional right in order to access another. If it is unconstitutional to ask the group to surrender a constitutional right in exchange for a discretionary benefit, then it is certainly unconstitutional to ask it to forgo one a constitutional right in exchange for another. *See* Brief of the Petitioner, *Christian Legal Soc'y v. Martinez*, 130 S. Ct 2971 (2010), at 55.

[92] *Christian Legal Soc'y*, 130 S. Ct. at 2985-88.

[93] The unconstitutional conditions argument clearly was before the Court. *See* Brief of the Petitioner, *Christian Legal Soc'y v. Martinez*, 130 S. Ct 2971 (2010), at 54-55.

[94] *Id*. at 2985-88.

compromising their membership standards and forgoing access to a limited public forum.[95]

That the coercive choice affects all groups dedicated to a particular message notwithstanding, it is particularly burdensome for religious groups. "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."[96] Moreover, the Roman Catholic Church,[97] the Church of Jesus Christ of Latter Day Saints,[98] the Orthodox Church,[99] the Presbyterian Church of America,[100] as well as numerous other denominations refuse to permit women to hold certain clerical and leadership

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[95] As one aspect of the impact that *Christian Legal Society* may have on religious groups, it is worth keeping in mind a case from the Second Circuit that this judgment essentially repudiates. In *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 [109 Ed. Law. Rep. 1145] (2d Cir. 1996), the court ruled that a religious club, albeit in a K-12 setting, was free to select its own members so that its members could retain control over the organization's mission and identity. The court went so far as to suggest that students who disagreed with the club's goals were free to start their own organization. For a commentary on *Hsu*, *see* Charles J. Russo & Ralph D. Mawdsley, *Hsu v. Roslyn Union Free School District No. 3: An Update on the Rights of High School Students Under the Equal Access Act,* 114 Ed. Law Rep. 359 (1997).

[96] *Christian Legal Soc'y*, 130 S. Ct. at 3019 (Alito, J., joined by Roberts, C.J., Scalia, & Thomas, JJ., dissenting).

[97] Pope John Paul II confirmed the Church's refusal to ordain women, which is firmly rooted in the Church's tradition. *See Ordinatio Sacerdotalis* 4 (1994).

[98] LATTER DAY SAINTS DOCTRINES & COVENANTS 13, 20, 84, 107.

[99] Orthodox Church In America Website—Frequently Asked Questions (www.oca.org/qa)

[100] BOOK OF CHURCH ORDER, PRESBYTERIAN CHURCH OF AMERICA, Chapter 8.

positions.[101] The Roman Catholic Church insists upon celibacy for its priests.[102] The Presbyterian Church (U.S.A.) insists that its clergy and lay elders remain faithful to their spouses if married or celibate if unmarried.[103] Under the logic of *Christian Legal Society*, government may force these churches to either compromise their theological beliefs or forgo access to the limited public forum.

As a practical matter, allowing government to require groups to compromise their freedom of association or forgo access to a limited public forum likely will reduce the amount of expression in the limited public forum. Simply put, since some groups will decide that the "costs" of compromising their message are greater than the "benefits" of accessing limited public fora, they will forgo participation. In other words, they will retreat from the public square.

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[101] Indeed, it was not until the late nineteenth century when women were first ordained as clergy members by some Christian denominations. Religious Tolerance Website (religioustolerance.org).

[102] According to the Roman Catholic Church's Code of Canon Law:

> Clerics are obliged to observe perfect and perpetual continence for the sake of the kingdom of heaven and therefore are bound to celibacy which is a special gift of God by which sacred ministers can adhere more easily to Christ with an undivided heart and are able to dedicate themselves more freely to the service of God and humanity.

Can. 277 § 1.

[103] PRESBYTERIAN CHURCH (U.S.A.) BOOK OF ORDER § G.6.106(b). As a practical matter, the Presbyterian Church U.S.A.'s ordination standard is identical to the student organization's standard for membership. Presumably, those who find the student organization's membership requirements to be offensive or discriminatory toward homosexuals would also find the Presbyterian Church's ordination standards to be offensive or discriminatory.

### 2. The Court Views Access To A Limited Public Forum As A Subsidy

There are constitutionally significant differences between a government subsidy of speech and the establishment of a limited public forum.[104] If the government provides a subsidy to a private group as part of its efforts to implement one of its policies, then the government has substantial control over the private entity and may even engage in viewpoint discrimination.[105] In contrast, when the government creates a limited public forum so that others may speak, it has no real control over the private group and viewpoint discrimination is inappropriate.[106] Although the distinction between what is a government subsidy and what is a limited public forum was sometimes unclear,[107] the distinction remains.[108] Since a subsidy and a limited public forum are constitutionally distinct, there is no

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[104] *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541-44 (2001); *Rosenberger*, 515 U.S. at 833-34.

[105] *Velazquez*, 531 U.S. at 541-42; *Rosenberger*, 515 U.S. at 833-34; *Rust v. Sullivan*, 500 U.S. 173, 196-97 (1991).

[106] *Velazquez*, 531 U.S. at 542; *Rosenberger*, 515 U.S. at 834.

[107] *See, e.g. Velazquez*, 531 U.S. at 543-44 ("As this suit involves a subsidy, [the Court's] limited forum cases ... may not be controlling in a strict sense, yet they do provide some instruction."). *See also Legal Aid Services of Oregon v. Legal Services Corp.,* 608 F.3d 1084 1094-95 (9th Cir. 2010) (interpreting the Supreme Court's use of limited public forum principles in *Velazquez*).

[108] *See United States v. Am. Library Ass'n*, 539 U.S. 194, 211-13 (2003).

Establishment Clause issue with religious expression in a limited public forum.[109] In fact, if government excludes groups with a religious philosophy from the limited public forum, it engages in viewpoint discrimination.[110]

*Christian Legal Society* blurred the distinction between a limited public forum and a subsidy.[111] While the Supreme Court explicitly relied on limited public forum analysis,[112] the Majority also made clear that it regarded access to a limited public forum as a form of government subsidy.[113] For example, the Court noted that the Constitution protects the student organization's right to exclude, but that the student organization "enjoys no constitutional right to state subvention of its

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[109] *Rosenberger,* 515 U.S. at 842-43; *Widmar*, 454 U.S. at 273-74. Moreover, university officials may treat religious organizations *more favorably* than non-religious organizations without violating the Establishment Clause. *See Cutter v. Wilkinson*, 544 U.S. 709, 719-24 (2005) (Religious Land Use and Institutionalized Persons Act, which requires preferential treatment for religion, does not violate the Establishment Clause). *See also Texas Monthly v. Bullock,* 489 U.S. 1, 18 n. 8 (1989) ("we in no way suggest that all benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause."); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 335 (1987) (recognizing that the government may accommodate religious practices without violating the Establishment Clause).

[110] *Good News Club*, 533 U.S. at 107: *Rosenberger*, 515 U.S. at 830, 831; *Lamb's Chapel,* 508 U.S. at 393-94 (1993).

[111] Interestingly, Justice Kagan has suggested that government's efforts to subsidize a particular viewpoint are presumptively unconstitutional. *See* Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 Sup. Ct. Rev. 29, 67 (1992).

[112] *Christian Legal Soc'y*, 130 S. Ct. at 2985.

[113] *Id.* at 2985-86.

selectivity."[114] In explaining why the freedom of association claims must be analyzed using the more deferential limited public forum analysis, the Court commented, "[a]pplication of the less-restrictive limited public-forum analysis better accounts for the fact that Hastings, through its [Registered Student Organization] program, is dangling the carrot of subsidy, not wielding the stick of prohibition."[115] The Court emphasized that a student organization "in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; [the student organization] may exclude any person for any reason if it forgoes the benefits of official recognition."[116] Finally, in his concurrence, Justice Stevens observed that while government must tolerate all viewpoints, "[i]t need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities."[117]

By equating access to a limited public forum as a form of subsidy, the Supreme Court accepted the premise that recognition and/or funding of student groups is a subsidy.[118] However, since "the government generally need not subsidize

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[114] *Id*. at 2978.

[115] *Id*. at 2986.

[116] *Id*.

[117] *Id*. at 2998 (Stevens, J., concurring).

[118] Eugene Volokh, *Freedom of Expressive Association and Government Subsidies,* 58 Stan. L. Rev. 1919, 1922 (2006). Indeed, both the Court and Justice Stevens cited Volokh with approval. *Christian Legal Soc'y*, 130 S. Ct. at 2985-86; *Id*. at 2997 n.2. (Stevens, J. concurring).

the exercise of constitutional rights,"[119] universities may require student organizations to admit those who disagree as a condition of receiving benefits.[120] If anything, characterizing recognition as a subsidy "undervalues the expressive interests at stake."[121] Moreover, although there are significant distinctions between recognition of a student organization and financial payments to support that organization's activities,[122] the Opinion of the Court does not distinguish between recognition and funding. Indeed, the Court's student organization jurisprudence has never distinguished between recognition and funding.[123]

### B. The Decision Favors Equality over Freedom

Any discussion of *Christian Legal Society* must address the elephant in the room that the Supreme Court never examined explicitly—whether officials at public universities may deny recognition to student religious groups that practice sexual orientation discrimination. Although the student organization admits homosexuals

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[119] *See* Volokh, *supra* note 118, at 1922.

[120] *Id*. at 1926-27.

[121] Joan W. Howarth, T*eaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 920 (2009).

[122] *Christian Legal Soc'y*, 130 S. Ct. at 3006-07 (Alito, J., joined by Roberts, C.J., Scalia & Thomas, JJ., dissenting).

[123] See *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229-30 (2000); *Rosenberger,* 515 U.S. at 831.

who agree with its beliefs and the resulting standard of conduct,[124] many perceive it as denying membership to all homosexuals. While Hastings' interpretation of its written policy is that Registered Student Organizations cannot deny membership based on belief,[125] its enforcement of that policy apparently is limited to groups that deny membership to some homosexuals.[126]

This underlying issue—whether university officials may deny recognition to student religious groups that practice sexual orientation discrimination—represents a conflict between two constitutional values—freedom and equality. On the one hand, the Constitution prohibits the government from engaging in sexual orientation discrimination.[127] On the other hand, the Constitution protects freedom—the freedom of expression, the freedom of religion, and the freedom of civil associations. Prior to *Christian Legal Society*, the Court's jurisprudence struck a careful balance between freedom and equality. However, in *Christian Legal Society*, the Court vindicated equality over the freedom of expression, the freedom of religion, and the freedom of civil associations.

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[124] *See* Brief of the Petitioner, *Christian Legal Soc'y v. Martinez*, 130 S. Ct 2971 (2010), at 35.

[125] *Christian Legal Soc'y*, 130 S. Ct. at 2973-74.

[126] *Id.* at 3017-18 (Alito, J., joined by Roberts, C.J., Scalia & Thomas, JJ., dissenting).

[127] *Romer v. Evans*, 517 U.S. 620, 634-36 (1996).

### 1. The Decision Favors Equality over Freedom of Expression

"The proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[128] "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits,"[129] but also "embraces such a heated exchange of views, even (perhaps especially) when they concern sensitive topics like race, where the risk of conflict and insult is high."[130] "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[131] "[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as

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[128] *Christian Legal Soc'y*, 130 S. Ct. at 3000 (Alito, J., joined by Roberts, C.J., Scalia, & Thomas JJ., dissenting) (quoting *United States v. Schwimmer,* 279 U.S. 644, 654-55, (1929) (Holmes, J., dissenting)).

[129] *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010).

[130] *Rodriguez v. Maricopa County Community College Dist.*, 605 F.3d 703, 708 (9th Cir. 2010). *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

[131] *Hurley,* 515 U.S. at 579.

unwise or irrational."[132] Indeed, "it is axiomatic that the government may not silence speech because the ideas it promotes are thought to be offensive."[133]

To be sure, *Christian Legal Society* does not change these principles. It does not allow government to ban speech that may be offensive to minorities or may be contrary to the government's efforts to ensure equality.[134] Yet, while the decision does not permit a *direct* ban, it does permit an *indirect* ban on the offensive speech. If an organization expresses a belief that is offensive to a segment of society, then the government may force the group to dilute its message or abandon use of government property and communication channels. Thus, the government accomplishes indirectly what the First Amendment prohibits it from doing directly.[135]

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[132] *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 124 (1982).

[133] *Rodriguez*, 605 F.3d at 708 *See also Brandenburg v. Ohio,* 395 U.S. 444, 448-49, (1969); *Saxe v. State Coll. Area Sch. Dist.,* 240 F.3d 200, 204 (3rd Cir.2001); *DeAngelis v. El Paso Mun. Police Officers Ass'n,* 51 F.3d 591, 596-97 (5th Cir. 1995).

[134] Indeed, the Court has consistently rejected attempts to ban speech that is offensive to the audience. See *United States v. Playboy Entertainment Group,* 529 U.S. 803, 814-816 (2000); *R.A.V. v. St. Paul,* 505 U.S. at 382,; *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico,* 457 U.S. 853, 871-872, (1982) (plurality opinion); *Tinker v. Des Moines Independent Community Sch. Dist.,* 393 U.S. 503, 508-509, (1969).

[135] *Cf. Perry v. Sindermann*, 408 U.S. 593, 597 (1972)("For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.'"). *See also O'Hare Truck Serv., Inc.* v. *City of Northlake,* 518 U.S. 712, 716-17 (1996).

The consequences of allowing government to impose such a coercive choice are chilling for those who disagree with the prevailing social mood or government's current position on an issue. Today, officials at public universities tell campus religious groups that their members must accept those who disagree with the fundamental tenets of their faith. Tomorrow, the government may tell a political party that its opponents get to participate in the selection of its candidates.[136] "Without the right to stand against society's most strongly-held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched."[137]

**2. The Decision Favors Equality over the Free Exercise of Religion**

"Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any

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[136] *Cf. California Democratic Party v. Jones,* 530 U.S. 567, 574 (2000); Jones, 530 U.S. at 586; *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 216 (1986); *Democratic Party of U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 111 (1981) (invalidating state laws interfering with party selection of candidates). *See also Eu v. San Francisco County Democratic Cent. Comm.,* 489 U.S. 214, 224 (1989) (noting that the First Amendment protects the right of citizens "to band together in promoting among the electorate candidates who espouse their political views."); *Jones,* 530 U.S. at, 574 ((reiterating that regulations imposing *severe burdens* on associational rights must be narrowly tailored to serve a compelling state interest); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (holding that if a State requires candidates to be elected by means of a State-run primary, it may not force a political party to include or exclude voters from that primary).

[137] *Rodriguez*, 605 F.3d at 708. *See also Gitlow v. New York,* 268 U.S. 652, 667, (1925); *id.* at 673, (Holmes, J., dissenting).

religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite."[138] " The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such." [139] The Constitution "requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people."[140] "Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities nor employ the taxing power to inhibit the dissemination of particular religious views."[141] Indeed, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[142] Thus, religious groups may profess

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[138] *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968). As the Supreme Court observed:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws, which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance.

*Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947).

[139] *Sherbert v. Verner*, 374 U.S. 398, 402-403 (1963).

[140] *Cutter*, 544 U.S. at 719.

[141] *Sherbert v. Verner*, 374 U.S. 398, 402-403 (1963).

[142] *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 714 (1981).

any beliefs they wish and may exclude those who disagree with their beliefs.[143] Since the State is not required "to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice,"[144] the government may treat religious organizations *more favorably* than non-religious groups without violating the Establishment Clause.[145]

While belief is absolutely protected, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[146] Thus, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even [if] the law has the incidental effect of burdening a particular religious practice."[147] In determining whether a law is neutral and generally applicable, judges must ask if "the object of the law is to infringe upon or restrict practices because of their religious motivation"[148] and if the statutes "in a selective manner impose burdens

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[143] *See generally*. *Amos*, 483 U.S. at 334-40.

[144] *Board of Educ. v. Grumet,* 512 U.S. 687, 705 (1994).

[145] *See Cutter*, 544 U.S. at 719-24 (Religious Land Use and Institutionalized Persons Act, which requires preferential treatment for religion, does not violate the Establishment Clause).

[146] *Smith,* 494 U.S. at 879. *See also United States v. Lee,* 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring). The Court first enunciated this principle in *Reynolds v. United States*, 98 U.S. 145 (1878) (rejecting a Free Exercise Clause challenge to a federal polygamy statute).

[147] *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993).

[148] *Lukumi*, 508 U.S. at 533.

only on conduct motivated by religious belief."[149] "Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied."[150]

Of course, *Christian Legal Society* does not alter these constitutional rules. The government "surely could not demand that all Christian groups admit members who believe that Jesus was merely human."[151] Yet, after *Christian Legal Society*, the government "may impose these very same requirements on students who wish to participate in a forum that is designed to foster the expression of diverse viewpoints."[152] What the Constitution forbids government from doing directly, it may accomplish indirectly by restricting access to the limited public forum.[153]

The implications of this result are stunning. For the first time since the incorporation of the Establishment Clause[154] and the Free Exercise Clause,[155] the

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[149] *Id.* at 543.

[150] *Id.* at 531.

[151] *Christian Legal Soc'y*, 130 S. Ct. at 3014 (Alito, J., joined by Roberts, C.J., Scalia, J. & Thomas, JJ., dissenting). *See also id.* at 2997 (Stevens, J., concurring).

[152] *Id.* at 3014 (Alito, J., joined by Roberts, C.J., Scalia, J. & Thomas, JJ., dissenting).

[153] *Cf. Perry*, 408 U.S. at 597.

[154] *Everson*, 330 U.S. at 17-18.

States—through public university officials—are regulating, albeit indirectly, both the beliefs and membership of religious organizations. Under the logic of Christian *Legal Society*, religious freedom has little remaining substance. When a minister has a theological objection to marrying same-sex couples, will the State allow the minister to marry opposite-sex couples? Will government withhold tax exemptions from churches that disagree with the government?[156] Will cities and counties withhold police and fire protection for congregations that demand members to acknowledge Jesus as the only way to salvation?[157] If the government can force a religious group to admit non-believers as a condition of participating in a limited

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[155] *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (striking down the convictions of Jehovah's Witnesses for violating a statute against the solicitation of funds for religious, charitable, or philanthropic purposes without prior approval of public officials). Prior to the adoption of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1 (Due Process Clause), the Establishment Clause and the Free Exercise Clause, like other provisions of the Bill of Rights, were limited to the National Government. *See Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833). Thus, the States were free to do whatever they wished with respect to religion, subject only to the commands of their own State Constitutions.

[156] In the past, some pro-abortion advocacy groups have sought to invalidate tax exemptions for the Roman Catholic Church because of the Church's opposition to abortion. See *In re U.S. Catholic Conference*, 885 F.2d 1020 (2nd Cir. 1989) (dismissing the suit for lack of standing).

[157] *See John* 14:6 ("Jesus said to him, 'I am the way and the truth and the life. No one comes to Father except through me.'") (English Standard Version).

public forum, then government can impose similar conditions on other governmental "benefits."[158]

Undoubtedly, the defenders of *Christian Legal Society* will claim that the government could never tell ministers whom to marry, withhold tax benefits from sects that refuse to embrace the government's values, or deny basic services to those who advocate offensive messages. Those defenders need to articulate a principled basis for limiting the implications of *Christian Legal Society*. It is not enough to say that the case is limited to the narrow context of higher education. Although Justice Kennedy's concurrence emphasized the unique environment of a public university campus,[159] nothing in the Opinion of the Court suggests that the result is limited to higher education.

### 3. The Decision Favors Equality over the Freedom of Civil Associations

In describing America during the Age of Jackson, Alexis De Tocqueville believed "secular associations of public-spirited citizens and churches and synagogues of spiritually oriented citizens were the underlying reason for the self-regulating order of our society." [160] As McGinnis notes, "Tocqueville saw the

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[158] Indeed, under the Court's logic, the City of New York could prohibit the construction of a Mosque near Ground Zero simply by adopting a provision that any non-profit organization that wished to utilize city services near Ground Zero must refrain from belief discrimination in selecting its leaders. *See* Posting of Michael W. McConnell to Volokh Conspiracy, www.volokh.com (Aug. 18, 2010).

[159] *Christian Legal Soc'y*, 130 S. Ct. at 2999-3000 (Kennedy, J. concurring).

[160] John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence Of Social Discovery*, 90 Cal. L. Rev. 485, 491 (2002)

principle of civil association as one of the most central and beneficial principles of the New World because it allowed the accomplishment of beneficial public purposes without the supervision of the state."[161] "Tocqueville believed that while political factions try to use government coercion for their own ends, civil associations organize to meet the common goals of their members. Civil associations promote reciprocity among their members and create social norms from which other individuals can voluntarily choose."[162]

These insights are not limited to a nineteenth century Frenchman's observations. Cochran, utilizing the Calvinist doctrine of Sphere Sovereignty[163] as well as the Roman Catholic concept of Subsidiarity,[164] demonstrates that such private associations play vital roles in society and ought to receive special protections.[165] Similarly, Horowitz, applying Sphere Sovereignty, demonstrates that

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[161] *Id.* at 497.

[162] *Id.* at 491.

[163] *See* Abraham Kuyper, *Sphere Sovereignty* (1880) in *ABRAHAM KUYPER: A CENTENNIAL READER* 488 (James D. Bratt, ed., 1998). In Kuyper's theory, "God delegates authority to the state, but He also delegates authority to other entities, each of which is sovereign in its sphere." Robert F. Cochran, Jr., *Tort Law and Intermediate Communities: Calvinist and Catholic Insights* 486, 487 in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell, Robert F. Corchran, Jr., and Angela C. Carmella, eds., 2001). In Kuyper's view, "the church, the state, families, universities, guilds, and other associations" have spheres in which they are sovereign. *Id.*

[164] First expressed by Pope Leo XII in the papal encyclical *Rerum Novarum (Of New Things)* in 1891, in part a response to socialism in Europe, subsidiarity emphasizes "the importance of institutions [that act] between the individual and state remaining independent …. " Cochran, *supra* note 163, at 488.

[165] Cochran, *supra* note 163, at 486, 490-92, 493-94.

religious institutions, serve as a check on both the government and other non-state actors.[166]

Recognizing their importance in our constitutional system, the Rehnquist Court expanded "the autonomy of private associations at the expense of the state power."[167] As McGinnis demonstrates, the landmark decisions of the last twenty-five years concerning freedom of association,[168] religious expression,[169] and the rights of student organizations[170] all represent an enhancement of the freedoms of these mediating institutions.[171] By allowing private organizations to "exclude

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[166] Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 Harv. C.R.-C.L. L. Rev. 79 (2009).

[167] McGinnis, *supra* note 160, at 571.

[168] *Dale*, 530 U.S. at 655-60; *Hurley*, 515 U.S. at 572-73.

[169] *Lamb's Chapel*, 508 U.S. at 392-93

[170] *Southworth*, 529 U.S. at 229-30; *Rosenberger*, 515 U.S. at 828-32.

[171] McGinnis, *supra* note 160, at 526-59. As McGinnis explained:

> the Rehnquist Court has bolstered the autonomy of mediating institutions, particularly civil associations, against government power. In *Boy Scouts of America v. Dale*, the Court permitted private associations to exclude homosexuals from positions that those associations believe are incompatible with homosexual status, allowing those associations to be a contributing force in shaping social norms about homosexuality. In doing so, the Court reinforced the autonomy of civil associations: associations whose value comes from their contribution to civil society rather than direct input into politics. This solicitude for civil associations contrasts with the Warren and Burger Courts, which focused on protecting the autonomy of those associations more directly connected to politics. The Rehnquist Court has underscored the importance of providing expressive autonomy to civil associations, at least of the noncommercial kind, by suggesting in a case examining political associations, *California Democratic Party v.*

individuals whose identity, views, or behavior will undercut the process by which they formulate their norms,"[172] and allowing "religious ideas on character-building and other social norms to compete with secular ideas and norms,"[173] the Court ensures that civil associations contribute to our society and constrain the government.

*Christian Legal Society* discounts the importance of civil associations and undermines their power. If private organizations wish to participate in limited public fora, they must allow the State to determine their membership policies. To the extent that sacrificing ideological purity undermines the message of private associations, these groups becomes less powerful and less effective. Conversely, if organizations wish to exclude those with whom they disagree, they must forgo the right to use the government's property and channels of communication. By limiting the means of conveying its message, organizations are not as effective. Under either alternative, there is a diminishment of both the effectiveness of private associations and their ability to serve as a check on the government.

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> *Jones*, that political and civil associations have congruent rights of expressive association. Similarly, in *Board of Regents of the Univ. of Wisconsin Sys. v. Southworth*, the Court created the constitutional space for government to aid civil associations so long as they did so in a viewpoint neutral manner.

*Id*. at 492-93 (citations omitted).

[172] *Id.* at 539.

[173] *Id.* at 553.

The justification for this diminishment of private associations and corresponding enhancement of the State is the government's desire to promote equality by restricting access to its limited public forum.[174] The objective of equality for all trumps the vitally important role of the private associations.

## C. The Decision Significantly Changes Student Organization Jurisprudence

### 1. Public Universities May Practice Indirect Viewpoint Discrimination

As there is "no doubt that the First Amendment rights of speech and association extend to the campuses of state universities,"[175] "[t]he mere disagreement of the [institution] with the group's philosophy affords no reason to

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[174] In the past, the Court, at least implicitly, has drawn a distinction between commercial and non-commercial private entities. As McGinnis explained:

> although Tocqueville included both profit and nonprofit groups under the rubric of civil association, the Court, in the near term, will surely allow the state to apply antidiscrimination law against associations with an economic purpose. The Court has never suggested that it would invalidate laws related to economic matters on freedom of association grounds. The line drawn in freedom of association parallels the line drawn in the federalism area: the Court is more willing to allow decentralization in noneconomic than in economic matters. Thus, in both the federalism and expressive association area, the Court is adapting Tocquevillian principles to take account of the social democratic view that the government has a more compelling interest in regulating the economic sphere because that sphere is potentially the greater source of exploitation and inequality.

McGinnis, *supra* note 160, at 537-38 (footnotes omitted).

[175] *Widmar*, 454 U.S. at 269.

deny it recognition" [176] or funding. [177] In granting recognition and/or funding, the institution does not adopt the group's speech as its own[178] or "confer any imprimatur of state approval" on the student group.[179] If there were disagreement with the message of the student groups, then, "[other] students and faculty are free to associate to voice their disapproval of the [student organization's] message."[180] Indeed, the practice of requiring students to pay mandatory fees that are distributed to student groups is permissible only if institutions do not favor particular viewpoints.[181] Simply stated, the "avowed purpose" for granting official status to Registered Student Organizations is supposed to be "to provide a forum in which students can exchange ideas."[182] Thus, groups with racist, sexist,

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[176] *Healy,* 408 U.S. at 187-88.

[177] *Rosenberger,* 515 U.S. at 831.

[178] *Southworth*, 529 U.S. at 229.

[179] *Widmar*, 454 U.S. at 274.

[180] *Rumsfeld*, 547 U.S. at 69-70.

[181] *Southworth,* 529 U.S. at 233-34.

[182]*Widmar*, 454 U.S. at 272 n.10. *See also Southworth*, 529 U.S. at 229 (student activity fee was designed to facilitate the free and open exchange of ideas by, and among, its students); *Rosenberger*, 515 U.S. at 834 (university funded student organizations to "encourage a diversity of views from private speakers").

homophobic, anti-Semitic, and/ or anti-Christian views are entitled to recognition, access to facilities, and funding.[183]

*Christian Legal Society* does not allow university officials to engage in viewpoint discrimination *directly* but does permit institutions to engage in *indirect* viewpoint discrimination. Instead of refusing to recognize or fund politically incorrect groups, institutional leaders simply require these organizations to dilute their views by admitting people with whom they disagree. Groups such as "Students for Obama" are likely to be less effective if they include supporters of Sarah Palin, but must now do so if they want recognition and funding.

The practical effect of forcing student organizations to include those who disagree with organizational core values is to transform the nature of the limited public forum. Instead of having competition *among* student organizations, there will be competition *within* student organizations.[184] For example, rather than having a Federalist Society and an American Constitution Society put forth competing visions of constitutional interpretation and the role of the judiciary, students will

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[183] While institutions may not refuse to recognize student organizations due to their viewpoints, they may require organization to (1) obey the campus rules; (2) refrain from disrupting classes; and (3) obey all applicable federal, state, and local laws. *See* 2 William A. Kaplin & Barbara H. Lee, THE LAW OF HIGHER EDUCATION 1051 (4th ed. 2007) (interpreting *Healy*). As a practical matter, this means that institutions can impose some neutral criteria for recognition such as having a faculty advisor, a constitution, and a certain number of members. Even so, institutions cannot deny recognition simply because officials or a significant part of the campus community dislikes the organization. Moreover, according to *Healy*, institutions may not deny recognition because members of organizations at other campuses or in the outside community engaged in certain conduct. *Healy,* 408 U.S. at 185-86.

[184] *Christian Legal Soc'y*, 130 S. Ct. at 3016 (Alito, J., joined by Roberts, C.J., Scalia & Thomas, JJ., dissenting).

debate in a constitutional theory club. The homogenized amorphous views of the collective will replace the sharply defined perspectives of competing advocacy groups. While one can debate whether polarized discussion is superior, the reality is that ideological competition between and among groups is the norm in the world beyond campus. If institutions wish to prepare students to be leaders in that world, experiencing the ideological competition would seem prudent.

### 2. The Decision Makes It More Difficult to Obtain the Educational Benefits of a Diverse Student Body

In holding that institutions of higher education could consider race in the admissions process,[185] the Court emphasized, "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[186] "Our country as a whole, no less than the Hastings College of Law, values tolerance, cooperation, learning, and the amicable resolution of conflicts."[187] Indeed, the promotion of the educational

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[185] *Grutter v. Bollinger,* 539 U.S. 306, 328 (2003). Commentaries on the impact of these decisions have appeared in these pages. *See* William E. Thro, *No Direct Consideration of Race: The Lessons of the University of Michigan Decisions*, 196 Ed. Law Rep. 755 (2005). J. Kevin Jenkins, *Grutter, Diversity, & K-12 Public Schools*, 182 Ed. Law Rep. 353 (2004); Ralph D Mawdsley & Charles J. Russo, *Supreme Court Dissenting Opinions in Grutter: Has the Majority Created a Nation Divided Against Itself*?, 180 Ed. Law Rep. 417 (2003).

[186] *Grutter*, 539 U.S. at 330.

[187] *Christian Legal Soc'y*, 130 S. Ct. at 3015-16. (Alito, J., joined by Roberts, C.J., Scalia, J. & Thomas, JJ., dissenting).

benefits of a diverse student body is an overriding objective at most public institutions.

Yet, *Christian Legal Society* undermines that goal. If anything, *Christian Legal Society* does not promote exposure to widely diverse people, cultures, ideas, or viewpoints. To the contrary, *Christian Legal Society* does the exact opposite. For people of faith and those with unpopular views, the message is clear—your viewpoints are unwelcomed and should remain unspoken or remain confined to the private dormitory rooms and Facebook.[188] As a result, these students may well decide to attend other institutions of higher learning to the detriment of intellectual diversity on the campuses they choose not to attend. For secularists and those whose views align with the prevailing political wind, the message is equally clear—you need not deal with people with whom you disagree. Although American society is increasingly heterogeneous in terms of race, religion, language, and culture, students do not encounter those who do not share the majority's dogma.

## CONCLUSION

In the second decade of the twenty-first century, the prevailing view at some public institutions is liberal, secularist, and sexually promiscuous. Although society may be debating the wisdom of state recognition for same-sex unions, there is a clear consensus in favor of gay marriage at many public institutions. In such a political and social climate, ideas that are conservative, religious, advocate a

[188] *Christian Legal Soc'y*, 130 S. Ct. at 2991-92.

traditional view of sexual morality, or question the wisdom of transforming a key social institution are the distinct minority. In fact, many in the majority find such ideas to be offensive.[189] Yet, despite their unpopularity, suppression of these ideas is not an option. As the Ninth Circuit observed a few weeks before *Christian Legal Society*:

> Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular. Colleges and universities-sheltered from the currents of popular opinion by tradition, geography, tenure and monetary endowments—have historically fostered that exchange. But that role in our society will not survive if certain points of view may be declared beyond the pale. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[190]

The marketplace of ideas must remain free and all viewpoints must have space to flourish.

Unfortunately, in *Christian Legal Society* a bare majority of the Supreme Court ignored this principle. By holding that officials at a public institution could deny recognition to a student organization that refused to admit those who

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[189] *See generally* Charles J. Russo, *The Child is Not the Mere Creature of The State: Controversy over Teaching About Same-Sex Marriage in Public Schools*, 232 Ed. Law Rep. 1 (2008).

[190] *Rodriguez*, 605 F.3d at 708. *See also Keyishian v. Bd. of Regents.,* 385 U.S. 589, 603 (1967).

disagreed with its views, the Court dealt a serious setback to freedom.[191] In so ruling, the Court transformed its limited public forum jurisprudence by empowering the government to restrict access based on membership policies and equating access to the forum with a subsidy. The Court favored equality over the freedom of expression, freedom of religion, and the vital role of civil associations. At the same time, the Court significantly changed its student organization jurisprudence by allowing indirect viewpoint discrimination and undermining the educational benefits of a diverse student body. In sum, instead of following the American tradition of free speech, the Supreme Court embraced the internationalist fad of political correctness.[192]

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[191] It is a setback not only for conservative people of faith, but also for secular advocates of equality for homosexuals. As the student organization explained in its brief:

> Under a proper understanding of the First Amendment, this case is most emphatically *not* a clash between religious freedom and rights pertaining to sexual orientation. Religious groups and gay rights groups share common ground in the need for freedom of association. Both are vulnerable (in different parts of the country) to the hostile reactions of university administrators and fellow students. Both can pursue their objectives best if free to decide for themselves who will lead and speak for them.

Brief of the Petitioner, *Christian Legal Soc'y v. Martinez*, 130 S. Ct 2971 (2010), at 58.

[192] *Christian Legal Soc'y*, 130 S. Ct. at 3000, 3020 (Alito, J., joined by Roberts, C.J., Scalia & Thomas, JJ., dissenting).