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# Another Nail in the Coffin of Religious Freedom?: *Christian Legal Society v Martinez*

CHARLES J RUSSO AND WILLIAM E THRO\*

## Introduction

Amid on-going battles over the place of religious groups and even religion itself in the marketplace of ideas known as American public education, the United States Supreme Court added fuel to the fire in *Christian Legal Society v Martinez*.<sup>1</sup> In *Christian Legal Society*, the Court affirmed an order of the Ninth Circuit,<sup>2</sup> agreeing that officials at a public law school in California had the authority to implement a policy effectively marginalising religious freedom by requiring 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 recognised student organisation.

On remand for consideration of whether law school officials applied the all-comers policy selectively to the Christian Legal Society (CLS), the Ninth Circuit joined the Supreme Court in placing another nail in the coffin of religious freedom.<sup>3</sup> In so doing, the Ninth Circuit rejected the claim of the CLS on the ground that organisational leaders failed to preserve their argument that law school officials selectively applied the policy for appeal, making it apparently the only public institution of higher learning in the United States with such a policy in place.

Whether *Christian Legal Society* is a victory for those who think that students should not be subject to discrimination due to their religious beliefs or a setback for religious freedom depends, of course, on one's point of view.<sup>4</sup> Regardless of how one interprets *Christian Legal Society*, it has the potential to change the landscape of religious freedom in the United States dramatically insofar as officials can potentially block faith-based groups from public facilities. In light of the ramifications for religious freedom that *Christian Legal Society* raises for the United States and the United Kingdom, the remainder of this article is divided into two major parts. The first section reviews the facts, judicial history, and the opinions in the Supreme Court's ruling in *Christian Legal Society*. The second part reflects on what *Christian Legal Society* means for religious freedom in educational settings. The article rounds out with a brief conclusion.

## *Christian Legal Society v Martinez*

### Facts

Over a period of 10 years beginning with the 1994–1995 academic year and through the 2003–2004 school year, the CLS was a Registered Student Organization (RSO) at Hastings College of Law, a branch of the University of California's public system of higher education. In order to become RSOs, organisations had to comply with the law school's non-discrimination policy, modeled after state law, forbidding groups from

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<sup>1</sup> 130 S. Ct. 2971 (2010).

<sup>2</sup> 319 Fed. Appx. 645 (9th Cir.), cert. granted, 130 S. Ct. 795 (2009).

<sup>3</sup> 626 F.3d 483 (9th Cir. 2010).

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<sup>4</sup> As Chief Justice Roberts commented during oral argument, but the majority failed to acknowledge, there is a fundamental difference between discrimination based on status (race, sex, age, and sexual orientation) and discrimination based on belief (religion or political views). Oral Argument Transcript, *Christian Legal Soc'y v Martinez*, 130 S. Ct. 2971 (2010), at 44.

discriminating on an array of criteria including religion and sexual orientation. RSOs benefit by being able to use the law school's name, logo, and bulletin boards to post materials, email system for mailings, office space, voice mail, and travel funds.<sup>5</sup>

In September of 2004, CLS's officers unsuccessfully requested travel funds to attend the organization's annual national conference. Later in the same month, university officials met with the officers of CLS and, due to changes in the Society's national by laws, informed the group's leadership that it appeared to be non-compliant with the Law School's non-discrimination policy.<sup>6</sup> 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 or attend meetings.<sup>7</sup> Officials thus directed the CLS's officers to open the group's membership to all-comers, regardless of their beliefs or sexual orientation. When the leadership of the CLS refused to change the membership requirements, university officials denied their request for RSO status. Still, the CLS remained active at the law school during that academic year, sponsoring activities including Bible-study meetings, a lecture on Christian faith, and social activities.

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<sup>5</sup> Pursuant to its policy, 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 non-discrimination. The College's policy on non-discrimination is to comply fully with applicable law.

... 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.

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

<sup>6</sup> 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

## Judicial history

### *Trial Court*

The CLS unsuccessfully filed suit in a federal trial court in California, charging university officials with violating the First Amendment rights of its members to expressive association, free speech, and free exercise of religion along with denying its rights to due process and equal protection. The trial court initially granted the Law School's motion to dismiss the Establishment, Due Process, and Equal Protection Clause claims but permitted the CLS leave to amend its equal protection claim.<sup>8</sup> In

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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.

<sup>6</sup> *Ibid*, at 8.

<sup>7</sup> As to sexual conduct, the CLS's policy stipulated: 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.

<sup>7</sup> *Ibid*, at 8.

<sup>8</sup> *Christian Legal Soc'y Chapter of the Univ. of Cal. v Kane*, 2005 WL 850864 (N.D. Cal. 2005).

response to the CLS's amended equal protection claim, both parties filed cross-motions for summary judgment on the free speech, expressive association, free exercise, and equal protection claims. In a lengthy, unreported order, the trial court granted the university's cross-motion for summary judgment on all counts.<sup>9</sup> In positing that university officials uniformly enforced the policy, the court rejected the CLS's claims that officials infringed on its constitutional rights.

On appeal, the Ninth Circuit summarily affirmed in favor of the university in a two-sentence memorandum.<sup>10</sup> The court observed that the parties stipulated that the law school imposed an open membership rule on all student groups, requiring them to accept all individuals as members, including those who disagreed with a group's mission. Relying on its own precedent in a K-12 case (that is, a case involving a public high school), *Truth v Kent School District*,<sup>11</sup> wherein it ruled that school board officials did not violate the Equal Access Act<sup>12</sup> or a Bible Study Club's First Amendment rights by requiring it to admit non-believers, the court was convinced that the policy was viewpoint neutral and reasonable.

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<sup>9</sup> *Christian Legal Soc'y Chapter of Univ. of Calif. v Kane*, 2006 WL 997217 (N.D. Cal. 2006).

<sup>10</sup> *Christian Legal Soc'y v Kane*, 319 Fed. Appx. 645 (9th Cir. 2009) (unpublished).

<sup>11</sup> 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).

<sup>12</sup> 20 U.S.C. §§ 4071 et seq. Essentially codifying *Widmar v Vincent*, 454 U.S. 263 (1981), which protected the access rights of a religious group on a university campus, the Act requires officials in public secondary schools receiving federal financial assistance and that permit non-curriculum related student groups to meet during non-instructional time to 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 (1990). For a commentary in this case, see C J Russo and D L Gregory 'Board of Education of the Westside Community Schools v Mergens: A Case Analysis' (1990) 17(1) *Religion and Public Education* 18–20.

## Supreme Court

### *Opinion of the Court*

On appeal, a divided Supreme Court, in a 5:4 decision written by Justice Ginsburg, affirmed that the CLS had to admit all-comers, even those who disagree with its missions and goals.<sup>13</sup> At the outset, the Court voiced its reluctance to deny RSOs access to university facilities based on their viewpoints.<sup>14</sup> However, conceding that *Christian Legal Society* presented a novel question, the Court delineated the issue at bar as whether 'a public law school [may] condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organisation's agreement to open eligibility for membership and leadership to all students?'<sup>15</sup>

After recounting the facts, the Supreme Court thought it necessary to resolve CLS's preliminary question of whether the policy was designed to prohibit discrimination or require RSOs to accept all-comers. Due to joint stipulations by the parties to the effect that they focused on the latter issue, the Court refused to review the policy as written.<sup>16</sup>

Having disposed of the threshold question of what policy was at issue, the Supreme Court considered its constitutionality.<sup>17</sup> The CLS advanced two separate arguments in disputing the policy. First, because the recognition of RSOs constitutes a limited public forum,<sup>18</sup> a topic discussed below,<sup>19</sup> the CLS maintained that law school officials could not deny access to RSOs that disagree with the law school. Second, since the law school policy required the CLS to accept members who disagreed with its core beliefs, it contended that the law

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<sup>13</sup> Justice Ginsburg's opinion was joined by Justices Stevens, Kennedy, Breyer, and Sotomayor.

<sup>14</sup> *Christian Legal Soc'y*, 130 S. Ct. at 2978.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, at 2984.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, at 2984 n 12. ('Our decisions make clear, and the parties agree, that Hastings, through its [recognised student organisation] program, established a limited public forum.')

<sup>19</sup> See, below, n 26–34 and accompanying text.

school violated its right to freedom of expressive association.<sup>20</sup> If anything, the CLS charged that the government *qua* officials at the public law school, may intrude on the freedom of association only 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas that cannot be achieved through means significantly less restrictive of associational freedoms.'<sup>21</sup> The Court rejected the notion that something less than strict scrutiny, a standard of constitutional review described below, should apply to freedom of association claims.

In matters dealing with equal protection, the Supreme Court had devised three tests, the first two of which are the more significant. The general constitutional test for acceptability of classification criteria is whether they are rationally related to legitimate governmental concerns. The Court has declared that '. . . if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.'<sup>22</sup> Under this 'rational relations' standard, courts apply a strong, but rebuttable, presumption that criteria established through the legislative process are constitutional.

On the other hand, courts apply 'strict scrutiny' if legislation or the actions of governmental officials impact on fundamental constitutional rights such as those identified in the Constitution (such as freedom of religion or speech) or that are implicitly there as declared by the Court or disadvantage members by categorising individuals based on constitutionally 'suspect' factors such as race. When courts apply 'strict scrutiny' they are unlikely to uphold classifications unless they are sufficiently narrowly tailored to achieve compelling governmental interests.<sup>23</sup>

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<sup>20</sup> *Christian Legal Soc'y*, 130 S. Ct. at 2985.

<sup>21</sup> *Roberts*, 468 U.S. at 623.

<sup>22</sup> *Romer v Evans*, 517 U.S. 620, 632 (1996).

<sup>23</sup> For perhaps the most notorious example of the Supreme Court's allowing a race-based classification to survive strict scrutiny, albeit not in a school setting, see *Korematsu v United States*, 323 U.S. 214 (1944)

In the infrequently applied middle ground, the Supreme Court has adopted an intermediate standard of review that is not as difficult for the government to meet as the compelling interest test but which involves less deference to legislation than the rational relations test. Under this test, the Court refuses to uphold classifications unless they bear 'substantial relationships' to 'important' governmental interests.<sup>24</sup>

The CLS had asked the Supreme Court to consider each of its arguments separately. Yet, since it believed that the two arguments effectively merged, the Court responded that 'it makes little sense to treat [the CLS's] speech and association claims as discrete.'<sup>25</sup> Before reviewing the Supreme Court's analysis, it is worth noting that the Court recognises three kinds of fora, two of which were not at issue in CLS.

In traditional public fora, which are subject to strict scrutiny, government officials may only impose reasonable time, place, and manner restrictions<sup>26</sup> that are narrowly tailored to achieve compelling government interests.<sup>27</sup> Regardless, government officials cannot practice viewpoint discrimination.<sup>28</sup> At the other end of the spectrum, public property such as a classroom,<sup>29</sup> 'is not by tradition or designation a forum for public communication.'<sup>30</sup> Since non-public fora are subject

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(upholding the placing of Japanese-Americans in protective custody camps during World War II based on their ancestry).

<sup>24</sup> The case most closely associated with this standard is *Plyler v Doe*, 457 U.S. 202 (1982), reh'g denied, 458 U.S. 1131 (1982), even though the majority did not clearly indicate that it was applying this test (allowing children whose parents were not documented to attend public school).

<sup>25</sup> *Christian Legal Soc'y*, 130 S. Ct. at 2985.

<sup>26</sup> *Perry Educ. Ass'n v Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

<sup>27</sup> *Cornelius v NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985).

<sup>28</sup> *Carey v Brown*, 447 U.S. 455, 463 (1980).

<sup>29</sup> *Walz ex rel. Walz v Egg Harbor Township Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003), cert. denied, 541 U.S. 936 (2004).

<sup>30</sup> *Perry Educ. Ass'n v Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

to less rigorous scrutiny than traditional open or designated public fora,<sup>31</sup> the government can enforce regulations reserving fora for their intended purposes, communicative or otherwise, but these 'must be "reasonable in light of the purpose served by the forum."'<sup>32</sup> Additionally, state officials cannot impose limitations in non-public fora designed to suppress expression with which they disagree.<sup>33</sup> While schools are generally non-public fora during school hours, once classes end, the type of fora that buildings become depends on local policies and practices with the result that the Supreme Court has twice found that since school officials in K-12 settings created limited open fora, they could not exclude religious groups.<sup>34</sup>

The Supreme Court offered three reasons for resolving the constitutional issues under limited

public forum analysis. First, the Court feared that utilising limited public forum analysis for the free speech claim and strict scrutiny analysis for the freedom of association charge might have led to inconsistent results. Put another way, the Court feared that the actions of law school officials might have been constitutional under limited public forum analysis but unconstitutional under the freedom of expressive association review. Second, the Court thought that applying the freedom of expressive association standard to the recognition of RSOs would have invalidated a defining characteristic of limited public fora, that the government may reserve fora for certain types of groups or purposes. Third, and perhaps most significantly, the Court interpreted access to the limited public forum as 'effectively a state subsidy.'<sup>35</sup> Insofar as the CLS had the choice of accepting individuals who disagreed with its values or forgo the subsidy that comes with RSO status, the Court maintained that it was not compelled to accept those who disagree. As far as the Court was concerned, this choice distinguished the case at bar from suits where the law compelled admission of those who disagree.<sup>36</sup>

At the heart of its limited public forum analysis, the Supreme Court asserted that since it was not beginning with a *tabula rasa* it was necessary to review the three earlier cases in which it resolved disputes between universities and student groups seeking RSO status. In remanding *Healy v James*<sup>37</sup> for further consideration the Court pointed out that campus officials had the right to forbid a group from organising a chapter of Students for a Democratic Society, a student political action group that often displayed violent propensities, on campus unless they were willing to abide by the university's reasonable campus laws. In *Widmar v Vincent*,<sup>38</sup> the Court noted that it entered a judgment in favor of a student group, granting it access to university facilities after officials singled out their religious purpose in attempting to exclude the organisation

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<sup>31</sup> For an interesting case, admittedly not involving education, illustrating the variety of issues over which Americans fight for religious freedom, see *Byrne v Rutledge*, 623 F.3d 46 (2d Cir. 2010). The court reasoned that since Vermont created a nonpublic forum by allowing drivers to purchase 'vanity' license plates and creating their own messages, officials violated the motorist's rights by denying him the opportunity to display the Christian reference to the Gospel of John 3.16, 'Yes, God so loved the world that he gave his only Son, that whoever believes in him may not die but have eternal life' (New American Bible), 'JN36TN,' on his plates. The court explained that the refusal violated the driver's First Amendment rights insofar as it excluded motorists who wished to comment on otherwise permissible subjects such as personal philosophy, beliefs, and values due to the fact that they sought to do so from a religious viewpoint.

<sup>32</sup> *Good News Club v Milford Cent. Sch.*, 533 U.S. 98, 106–107 (2001) (quoting *Cornelius v NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 806 (1985)).

<sup>33</sup> *Cornelius v NAACP Legal Defense and Educ. Fund*, 473 U.S. 788 (1985).

<sup>34</sup> See *Lamb's Chapel v Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), *on remand*, 17 F.3d 1425 (2d Cir. 1994); for a commentary on this case, see R D Mawdsley and C J Russo, 'Lamb's Chapel Revisited' (1998) 64(11) *School Business Affairs* 44–45. See also, *Good News Club v Milford Cent. Sch.*, *op cit* n 32; for a commentary on this case, see C J Russo and R D Mawdsley, 'And the Wall Keeps Tumbling Down: The Supreme Court Upholds Religious Liberty in *Good News Club v Milford Central School*' (2001) 157 *Education Law Reports* 1.

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<sup>35</sup> *Ibid*, at 2986.

<sup>36</sup> *Ibid*, at 2986 n 14.

<sup>37</sup> 408 U.S. 169 (1972).

<sup>38</sup> *Op cit* n 14.

from meeting on camps. Finally, in *Rosenberger v Rector and Visitors of University of Virginia*,<sup>39</sup> the Court reiterated how it forbade university officials from withholding benefits from a student newspaper simply due to its Christian perspective. The Court highlighted that in these cases it refused to let student groups be subject to discrimination in a limited public forum because of their viewpoints.

The Supreme Court next identifies two questions with regard to limited forum analysis. First, the Court inquired whether the regulation was reasonable. Second, the Court asked if the regulation was viewpoint neutral. The Court observed that while it owed no deference to university officials, its review of First Amendment rights 'must be analysed in light of the special characteristics of the school environment.'<sup>40</sup> Even so, since the Court recognised that jurists lack the skills and perspectives of educational leaders, it purported to act cautiously.

Its professed desire to act cautiously notwithstanding, the Supreme Court clearly agreed with the four 'justifications' that law school officials proffered in support of the disputed policy. First, the Court asserted that the goal of the policy was to ensure leadership, educational, and social opportunities for all students. In this analysis, the Court analogised that just as faculty members cannot conduct classes for only students with which they agree, so, too, organisations had to be available to all who wish to join. The Court thought that under this approach, students would not have to provide funds to support organisations from which excluded them as members. Second, the Court agreed with the law school administrators that the all-comers policy allowed campus officials to police compliance with their non-discrimination policy without having to consider a RSO's reasons for imposing conditions on membership. Accordingly, the Court rejected the claim of CLS that it excluded members for their conduct rather

than their beliefs, simply stating that it had declined to make this distinction in cases of this nature. Third, the Court agreed with the University that the policy's goal of bringing different groups together 'encourages tolerance, cooperation, and learning among students,'<sup>41</sup> a dubious sentiment at best in light of concerns addressed in the discussion below. Fourth, the Court ruled that the policy effectively prohibited university officials from providing public subsidies to groups such as the CLS that engaged in conduct with which the people of California disagreed.

Based on the preceding analysis, the Supreme Court decided that the policy was reasonable based on the availability of off-campus alternative channels to the CLS once it lost RSO status. The Court ascertained that although the CLS 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 doubled.

The Supreme Court rejected the CLS's contentions that the all-comer policy was 'frankly absurd'<sup>42</sup> and that '[t]here can be no diversity of viewpoints in a forum . . . if groups are not permitted to form around viewpoints.'<sup>43</sup> The Court also rebuffed the CLS's concern that individuals hostile to its mission could infiltrate its membership if it had to admit all-comers as hypothetical, responding that there was no history of this and that an individual bent in such a 'hostile take-over' would not be elected by membership.

In what can only be described as a disappointment to supporters of religious freedom, the Court refused to consider what would have happened if a 'hostile take-over' had been organised by a group rather than an individual. However, the Court suggested that the CLS 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. Of course, the Court

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<sup>39</sup> 515 U.S. 819 (1995). For a commentary on this case, see R D Mawdsley and C J Russo 'Religion in Public Education: *Rosenberger* Fuels an Ongoing Debate' (1995) 103 *Education Law Reports* 13.

<sup>40</sup> *Christian Legal Soc'y*, 130 S. Ct. at 2988.

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<sup>41</sup> *Ibid*, at 2990.

<sup>42</sup> *Ibid*, at 2992.

<sup>43</sup> *Ibid*.

added that, should such a situation have arisen, then university officials would ‘presumably’ have to revisit the policy.

As to whether the policy was viewpoint neutral, the Supreme Court posited that ‘[i]t is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all-comers*’<sup>44</sup> because it contained no distinction between and among groups in light of their message or point of view. In rejecting the CLS’s claim that the ‘nominally neutral’ policy had a differential impact on it, the Court was convinced 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.’<sup>45</sup>

The Supreme Court thus concluded that insofar as neither of the lower courts addressed whether law school officials selectively enforced the all-comers policy against the CLS, it had to remand the dispute for further consideration over the extent to which this question may still have been viable.

### *Concurring opinions*

In the first of two brief concurrences, Justice Stevens, in the final case on the Supreme Court, attempted to rebut the rationale in Justice Alito’s dissent which would have rejected the policy as unconstitutional. Stevens retorted that while the CLS had the right to limit its membership off campus, the First Amendment did not require the law school’s policy to grant it status as a RSO.<sup>46</sup>

In an even briefer concurrence, Justice Kennedy declared that law school officials and the CLS stipulated that there was no evidence of viewpoint discrimination in the policy.<sup>47</sup> Still, he indicated 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,’<sup>48</sup> an issue that did not arise as the Ninth Circuit rejected the CLS’ claims.

### *Dissenting opinion*

Justice Alito, joined by Chief Justice Roberts along with Justices Scalia and Thomas, offered a spirited, lengthy dissent making four points. First, the dissent disputed the Court’s ‘misleading portrayal of this case.’<sup>49</sup> In particular, the dissenters maintained that law school officials had not historically required RSOs to admit all students, the denial of recognition had significant consequences and that the funding that the CLS sought was insignificant. Second, the dissent contended that the Court’s opinion was inconsistent with its own precedent in *Healy*. Third, Justices maintained that the Court’s previous limited public forum jurisprudence precluded the adoption of the law school’s policy as written. Fourth, the dissent demonstrated that law school policy, as interpreted by the Court, was neither reasonable nor viewpoint neutral. Justice Alito added that ‘[e]ven 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.’<sup>50</sup>

### *Remand*

On remand, the CLS unsuccessfully motioned to have the case returned to the trial court for consideration of its claim that law school officials selectively applied its non-discrimination policy against it.<sup>51</sup> Rather, the Ninth Circuit ruled that since the CLS failed to preserve its argument that

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<sup>44</sup> *Ibid*, at 2993.

<sup>45</sup> *Ibid*, at 2994.

<sup>46</sup> *Ibid*, at 2995 (Stevens, J, concurring).

<sup>47</sup> *Ibid*, at 2998 (Kennedy, J, concurring)

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<sup>48</sup> *Ibid*, at 3000 (Kennedy, J, concurring).

<sup>49</sup> *Ibid*, at 3001 (Alito, J, joined by Roberts, CJ, Scalia, and Thomas, JJ dissenting).

<sup>50</sup> *Ibid*, at 3020 (Alito, J, joined by Roberts, CJ, Scalia, and Thomas, JJ, dissenting).

<sup>51</sup> *Christian Legal Soc. Chapter of Univ. of Cal. v Wu*, 626 F.3d 483 (9th Cir. 2010).



law school officials selectively applied the disputed policy for appeal, it had no choice but to deny its motion.

## Reflections

In *Christian Legal Society* the Supreme Court altered its limited-public forum jurisprudence both by expanding the government's ability to restrict access to such a forum and by treating access as a subsidy. In so deciding, the Court placed another nail in the coffin of religious freedom because its rationale grants educational officials greater rights to impose restrictions on religious, and other, groups. As a result of *Christian Legal Society*, a student group that requires its members to pledge conformity to orthodox Christian doctrines on sexual morality has effectively been marginalised. Moreover, as noted earlier, this was apparently the first time in the history of Hastings or any public American university that officials excluded an RSO from campus based on its 'sincerely held religious belief.'<sup>52</sup> As such, *CLS* raises four inter-related implications for educational leaders and lawyers on both sides of the Atlantic.

First and perhaps most obviously, policies at public institutions may now require RSOs to admit all who wish to join their ranks regardless of their beliefs. In other words, while the First Amendment and federal statutes such as the Equal Access Act<sup>53</sup> still require school boards in K-12 settings to recognise student religious groups, educators may

require clubs to admit members who disagree with the core tenets of their philosophies.

In *CLS* the Supreme Court essentially repudiated a case from New York in which the Second Circuit reasoned that leaders of a Bible Study club formed under the auspices of the Equal Access Act could set their own criteria for electing leaders.<sup>54</sup> In allowing club leaders to establish their own qualifications for officers, such as being a 'practicing Christian,' the court suggested that individuals who disagreed with the group's values were free to form their own organisations. Since the Supreme Court's rejection of such an approach in *Christian Legal Society* leaves the door open to litigation over the status of the Equal Access Act, it will be interesting to observe what occurs with regard to religious freedom in K-12 settings.

If the fears of the student leaders of CLS were to be realised, an upshot of the ruling in *Christian Legal Society*, extending the 'all-comers' requirement to leadership positions, may be that atheists may end up leading Fellowship of Christian Athletes chapters while homophobes may seek to become Presidents of Gay-Straight clubs. Certainly, open membership policies may remove some administrative headaches associated with student groups that wish to limit who can join, regardless of their bases for doing so. Yet, the all-comers policies may create other concerns such as the fear voiced by the CLS that outsiders may wish to join simply in order to infiltrate their membership or to undermine groups with which they disagree. It is puzzling why the Court was so cavalier in refusing to consider that such a 'hostile takeover' might occur other to acknowledge that, with the exception of Justice Kennedy, the remainder of the Justices in the majority have either voted against religious freedom in almost all cases or have a predisposition to do so based on their judicial philosophies.

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<sup>52</sup> See, eg *Employment Div., Dep't of Human Resources of Or. v Smith*, 494 U.S. 872, 907 (1990) (although noting that courts can examine the nature of religious beliefs, upholding the dismissal of drug counselors who ingested peyote as part of a sacramental ritual in the Native American Church, a legally organised religious movement that was recognised by the federal government since a generally applicable law that is neutral toward a religion but has the effect of burdening a religious practice need not be justified by a compelling government interest). The Court also uses the term 'deeply held religious belief.' See, eg *Johnson v Robinson*, 415 U.S. 361, 383 (1974) (upholding the denial of veteran's benefits to a conscientious objector who claimed that this violated his right to religious freedom in light of the government's substantial interest in raising a military).

<sup>53</sup> Op cit n 14.

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<sup>54</sup> *Hsu v Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2d Cir. 1996), cert. denied, 519 U.S. 1040 (1996). For a commentary on this case, see C J Russo and R 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' (1997) 114 *Education Law Reporter* 359.

Considering that the judiciary and educational leaders, whether in K-12 or higher education, appear to display attitudes ranging from indifference to hostility to religion,<sup>55</sup> particularly Christianity, an argument can be made that it was too facile of the Supreme Court to reject the infiltration concerns of CLS so readily. Moreover, the Ninth Circuit's judgment on remand requiring the CLS to include members who do not share a commonality of interest simply makes no sense from a wider perspective because this may well snuff out a diversity of perspectives that make educational institutions whether at the secondary or tertiary levels places of open and free inquiry. In fact, *Christian Legal Society* may foster environments that are antithetical to intellectual diversity because it sends a message to people of faith and those with unpopular views that their viewpoints are unwelcomed and should either remain unspoken or remain confined to the private dormitory rooms and Facebook.<sup>56</sup>

In the wake of *Christian Legal Society*, students of faith may choose to attend other institutions of higher learning that are more friendly to, or at least more tolerant of, their beliefs, even if they are in a minority. Should such an exodus occur, it would be the detriment of intellectual diversity on college and university campuses. Concomitantly, for secularists and those individuals who sway with the prevailing political wind, the message is equally clear that they may well be able to avoid engaging in debate with people of faith with whom they disagree. Even though American society is increasingly heterogeneous in terms of race, religion, language, and culture, the lack of intellectual diversity on campuses when students are unable to encounter those with whom they disagree or who do not share the majority's dogma creates a situation that is detrimental to intellectual development.

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<sup>55</sup> For a discussion of issues on point, see C J Russo 'Judicial "hostility to all things religious in public life" or Healthy Separation of Religion and Public Education?' (2008) 35(2) *Religion and Education* 78–94.

<sup>56</sup> *Christian Legal Soc'y*, 130 S. Ct. at 2991–92.

Third, in characterising access to a limited public forum as a 'subsidy' in *CLS*, the Supreme Court adopted a novel approach on the use of public educational facilities whether in K-12 or higher education. *Christian Legal Society* thus poses questions about the future of the Equal Access Act, a federal statute that grew out of a dispute from higher education, *Widmar v Vincent*,<sup>57</sup> wherein the Supreme Court reasoned that university officials could not exclude Christian students due to the content of their speech. Prior to the enactment of the Equal Access Act, educational officials, particularly in K-12 settings, had broad, almost absolute, authority to choose who could use their facilities or whether student groups would be recognised.

In the three decades since *Widmar* the Supreme Court consistently ruled that if educational officials allow some outside groups to use their facilities, then they must allow all outside groups to do so for similar purposes.<sup>58</sup> The precedent set by *Widmar* is now in some doubt due to *Christian Legal Society* even though the cases litigated over the past thirty years represent classic limited public forum jurisprudence. Yet, the subsidy question is a fundamentally different inquiry since the Court determined in *Christian Legal Society* that RSOs no longer have a right to a subsidy. Put another way, if courts categorise access to educational facilities as 'subsidies,' by allowing selected groups to use space at presumably discounted prices, then educators at all levels are likely to have broad authority to refuse access to religious groups and may have the unintended consequence of excluding groups based on their religious beliefs.

Third, in a closely related point, *CLS* allows educational officials to restrict access to limited public fora such as auditoria and stadia. While school boards and administrators in public institutions of higher education, like all governmental officials, always had the authority to bar activities from their limited public fora, *CLS* allows officials to deny access to groups if they condition membership based on their beliefs.

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<sup>57</sup> Op cit n 40.

<sup>58</sup> *Lamb's Chapel*, op cit n 34; *Milford*, op cit note 34.

Consequently, educational officials may require outside groups seeking to rent halls for speeches or films to have open membership policies. Since such a rule excludes churches and political organisations, educational officials may avoid some of the difficult issues surrounding church and state as well as questions involving the use of public facilities for partisan campaign activities by limiting access.

In seeking to avoid one type of controversy, others may emerge in K-12 school systems. For instance, if educational leaders adopt all-comers' policies, their actions may have the unintended consequence of galvanising taxpayers with strong religious beliefs into protesting that they, or their children, are being deprived of access to publicly funded facilities due to their faiths. Adopting an all-comers approach may be costly to school boards in terms of lost good will as citizens vote to deny operating funds via tax increases when levies are needed to maintain school activities. While not suggesting that parents should have a 'heckler's veto'<sup>59</sup> in all cases, educational leaders whether in K-12 or higher education, should think twice about placing restrictions on access especially since individuals who disagree with groups can form their own organisations. At the same time, conditioning access to facilities for religious groups based on their stances with regard to lifestyle choices of potential members is something of a slippery slope. Insofar as it is unclear where such litmus tests will end as opponents may seek to bar people of faith from being able to express their beliefs in public places over other issues with which they disagree, then officials should proceed with caution.<sup>60</sup>

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<sup>59</sup> See *Milford*, op cit n 34, at 119 (2001) (permitting a religious group to use public school facilities, noting that the Supreme Court is unwilling 'to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what . . . members of the audience might misperceive').

<sup>60</sup> See, eg *Abortion Rights Mobilization v United States Catholic Conference*, 495 U.S. 918 (1990) (refusing to disturb an order of the Second Circuit that, on remand from the Supreme Court, ruled that a pro-abortion group

Fourth, since the Supreme Court has granted broad deference to the judgment of higher education officials about institutional policies, one would expect a similar outcome in the K-12 context. While this development may make it easier for officials in K-12 schools to prevail in litigation challenging their educational policy-making, it ultimately may undermine efforts to foster communities of inclusiveness and tolerance. As reflected by the growth in home schooling and other alternative form of education such as charter schools in the United States, increasing numbers of parents of faith distrust public schools in light of their perceptions that their deeply held religious values are unwelcome. Requiring Christian groups to include non-Christians as a condition of using public facilities may reinforce this belief. In addition, revising facilities-use policies so that Churches and political groups may not use public school property arguably sends a message of isolation that public officials may not wish to endorse,<sup>61</sup> particularly if they are taxpayers who help to fund public education.

## Conclusion

The Ninth Circuit's rejection of the CLS's appeal that university officials selectively enforced the all-comer's policy does not mean that the fight over access to facilities and membership criteria in student organisations is over. In fact, *Christian Legal Society* may serve as the opening salvo in a new front in the battle for religious freedom. More specifically, if clubs can make selective enforcement claims or can demonstrate that individuals who disagree with their core values

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lacked standing to challenge the tax exempt status of the Roman Catholic Church based on its pro-life teachings).

<sup>61</sup> On three occasions, the first of which was in higher education while the latter two were in public schools, the Supreme Court ruled that once educational officials in public institutions allow various groups to meet in their facilities, they cannot exclude religious organisations based on the religious content of their speech. See *Widmar v Vincent*, op cit n 14. *Lamb's Chapel v Center Moriches Union Free School Dist.*, op cit n 36. *Good News Club v Milford Cent. Sch.*, op cit n 34. See also op cit n 14.

seek to engage in what can be described as 'hostile takeovers,' then the door is open to litigation as Justice Kennedy suggested. Thus, post *Christian Legal Society* disputes bear watching because they may have a significant impact on the way in which

officials at all levels can regulate the use of educational facilities and whether their actions will advance or inhibit the fundamental right of religious freedom.