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The Limits of Christian Legal Society

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THE LIMITS OF *CHRISTIAN LEGAL SOCIETY*

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INTRODUCTION

In *Christian Legal Society v. Martinez*,[1] a sharply divided Supreme Court held that officials at a public institution might require a student religious group to admit all-comers from the student body, including those who disagree with its beliefs, as a condition of being a recognized student organization.[2] Put another way, the Court declared that the government, through university officials, might force religious

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[1] 130 S. Ct. 2971 (2010).

[2] *Id.* at 2978.

groups to choose between compromising their values and receiving benefits that other student groups receive as a matter of constitutional right.[3]

While *Christian Legal Society* remains the controlling constitutional rule until explicitly overruled,[4] there are significant limits on the decision. First, in many instances, state law—whether in the form a state constitutional provision or a state statue—protects the rights student religious organizations to exclude non-believers. In other words, state law may require the opposite result of *Christian Legal Society*. Second, a 2012 decision, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[5] establishes that religious groups have a right of religious autonomy—absolute discretion to determine whom its leaders and, by extension, its members will be. This constitutional guarantee of religious autonomy is contrary to *Christian Legal Society*. Third, a 2013 decision, *Agency for International Development v. Alliance for Open Society International, Inc.*,[6] revives and redefines the unconstitutional conditions doctrine—government may impose conditions that define the program, but may not impose conditions that reach outside the program—so that a religious group may not be forced to surrender its religious autonomy rights as condition of receiving recognition and funding. Each of these limits is explained in more detail below.

I. STATE LAW LIMITS CHRISTIAN LEGAL SOCIETY

Because State Constitutions often are more protective of individual liberty,[7] a student group may have a state constitutional right to exclude

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[3] Although most public institutions allow student groups to exclude those who disagree with the group's objectives or do not share the group's interests, *Christian Legal Society* involved a policy forbidding any student organization from discriminating for any reason. Under this "all-comers policy," the Young Democrats had to allow Republicans to join; the Vegetarian Society had to include carnivores; and the Chess Club had to allow members who would prefer to play checkers.

Yet, most public universities allow student organizations to discriminate based on ideology or interest. The Young Republicans get to exclude Democrats, the Vegetarian Society gets to exclude carnivores, the Chess Club gets to exclude those who would prefer to play checkers, and Greek organizations get to exclude those who do not fit in. If a University allows non-religious organizations to exclude those who do not share the group's values, then it will have a difficult time forcing religious organizations to admit those who reject the faith. *But see* Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 800 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1743 (2012) (holding that state university may require religious groups to admit dissenters even those secular groups are allowed to exclude dissenters).

[4] Agostini v. Felton, 521 U.S. 203, 237-38 (1997); Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989).

[5] 132 S. Ct. 694 (2012).

[6] 133 S. Ct. 2321 (2013).

[7] A.E. Dick Howard, *The Renaissance of State Constitutional Law*, 1 EMERGING ISSUES IN

those who disagree with the group's views.[8] Indeed, since the Burger Court's decisions prompted a revival of state constitutional law in the early 1970's,[9] "it would be most unwise these days not also to raise the state constitutional questions."[10] Although the issue apparently is one of national first impression, it would not be surprising if a state court determined that its State Constitution prohibited the government from indirectly forcing an organization to admit members who disagreed with the organization's objectives.[11] Moreover, state Religious Freedom Restoration Acts[12] prohibit government from imposing a substantial burden on the free exercise of religion unless there is a compelling governmental interest pursued through the least restrictive means.[13] To the extent that a student group's membership policies are the result of religious belief, these state laws seem to prohibit government from indirectly forcing the inclusion of dissenters. Finally, a few States, acting in direct response to *Christian Legal Society*, have passed statutes guaranteeing the religious autonomy of student religious groups.[14] In sum, with respect to student religious organizations, state law may prohibit what *Christian Legal Society* permits.

STATE CONSTITUTIONAL LAW 1, 14 (1988).

[8] State Constitutions are fundamentally different from the National Constitution—the National Constitution is a grant of power and the state constitutions are limitations on power. Hornbeck v. Somerset County Board of Education, 458 A.2d 758, 785 (Md. 1983); Board of Educ. v. Nyquist, 439 N.E.2d 359, 366 n. 5 (N.Y. 1982). Thus, the presumptions concerning legislative authority are reversed. Congress may not act unless it can identify a specific enumerated power, but the State Legislature may act unless there is an explicit restriction. *See* United States v. Morrison, 529 U.S. 598, 607 (2000); Almond v. Rhode Island Lottery Comm'n, 756 A.2d 186, 196 (R.I. 2000).

[9] *See* A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

[10] William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

[11] Indeed, after the U.S. Supreme Court diminished religious freedom in *Smith*, several state courts held that the State Constitutions provided greater protection for religious freedom. *See* Douglas Laycock, *Theology Scholarships, The Pledge Of Allegiance, And Religious Liberty: Avoiding The Extremes*, 118 HARV. L. REV. 155, 211–12 (2004) (discussing cases).

[12] *See* Ariz. Rev. Stat. §§41-1493 to -1493.02; Conn. Gen. Stat. §52-571b; Fla. Stat. §§761.01-.05; Idaho Code §§73-401 to -404; 775 Ill. Comp. Stat. 35/1-99; Ky. Rev. Stat. § 446. Mo. Stat. §§1.302-.307; N.M. Stat. §§28-22-1 to 28-22-5; Okla. Stat. Tit. 51, §§251-258; 71 Pa. Cons. Stat. §§2401-2407; R.I. Gen. Laws §§42-80.1-1 to -4; S.C. Code §§1-32-10 to -60; Tenn. Code § 4-1-407; Tex. Civ. Prac. & Rem Code §§110.001-.012; Utah Code §§ 63l-5-101 to -403; Va. Code §§ 57-1 to -2.02.

[13] *See* Christopher C. Lund, *Religious Freedom After Gonzales*, 55 S.D. L. REV. 467, 476 (2011); James W. Wright, Jr., Note, *Making State Religious Freedom Restoration Amendments Effective*, 61 ALA. L. REV. 425, 426 (2010).

[14] *See* Idaho Code 33-107D; Ohio Rev. Code § 3345.023; Virginia Code § 23-9.2:12.

II. THE RELIGION CLAUSES LIMIT *CHRISTIAN LEGAL SOCIETY*

Two years after *Christian Legal Society*, in *Hosanna-Tabor*, the Court rendered a decision that seems to expand the associational rights of student religious groups. First, the Court recognized the First Amendment gives "special solicitude" to religion and religious organizations: "We cannot accept the remarkable view [espoused by the Obama Adminstration] that the Religion Clauses have nothing to say about a religious organization's freedom to select its own [leaders]."[15] Second, the Court declared that the Free Exercise Clause secures a religious organization's right to choose its own leaders: "By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments."[16] Third, the Court found that the Establishment Clause prohibited government interference with a religious organization's ecclesiastical decisions. [17]

In sum, *Hosanna-Tabor* establishes that religious groups have a right of religious autonomy—absolute discretion to determine whom its leaders will be. Logically, if an organization can restrict its leadership to those who adhere to the faith's basic principles, then the organization ought to be able to impose a similar requirement on membership. Consequently, the necessary inference of *Hosanna-Tabor* is that religious organizations, through the Religion Clauses, have greater associational freedoms than their secular counterparts. A student religious group has a constitutional right to exclude those who disagree with its basic faith tenets.

III. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE LIMITS *CHRISTIAN LEGAL SOCIETY*

Hosanna-Tabor confirms that student religious organizations enjoy additional rights, but many institutions may be tempted to require that student religious organizations surrender those rights as a condition of receiving recognition or funding. This is essentially what happened in *Christian Legal Society*—the student religious group was forced to choose between recognition and preserving its theological integrity.

Alliance for Open Society precludes such ultimatums. Specifically, while government may impose conditions that define the limits of the

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[15] *Hosanna-Tabor*, 132 S. Ct. at 706.
[16] *Id.*
[17] *Id*.

particular program, the government may not impose "conditions that seek to leverage funding to regulate speech outside the contours of the program itself."[18] A state university's program of recognizing and funding student organizations ensures that "students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall."[19] The limits of such a program may well require that organizations allow non-members to attend their events. However, requiring groups to compromise their beliefs and their message by admitting non-believers is to leverage speech outside the contours of the program itself.

After *Alliance for Open Society*, a public institution may not force religious groups to surrender the religious autonomy rights recognized in *Hosanna-Tabor*. This is so for three reasons. First, the unconstitutional conditions doctrine applies to religious autonomy rights. Second, the doctrine encompasses any form of government subsidy, including recognition and funding of a student organization. Third, requiring a student religious group to compromise its religious autonomy rights as a condition of receiving funding or recognition is unconstitutional. Quite simply, the condition of surrendering religious autonomy does not define the purpose of recognizing or funding student groups; it regulates the exercise of constitutional rights outside those purposes.

CONCLUSION

Christian Legal Society was a "serious setback to freedom,"[20] but it does not destroy the religious liberty of student religious organizations. In many instances, state law protects the ability of student religious organizations to exclude non-believers. Moreover, the Supreme Court's subsequent decision in *Hosanna-Tabor* confirms that all religious organizations, including student religious organizations, have the right to choose their leaders and, by extension, their members. Finally, *Alliance for Open Society* precludes public university from requiring a student religious organization to surrender its religious autonomy rights.

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[18] *Alliance for Open Soc'y,* 133 S. Ct. at 2328.

[19] Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 233 (2000).

[20] *Christian Legal Soc'y,* 110 S. Ct. at 3020 (Alito, J., joined by Roberts, C.J., Scalia & Thomas, JJ., dissenting).