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RELIGIOUS LIBERTY IN AMERICA:
A COMPREHENSIVE ANALYSIS OF CURRENT
CASE LAW AND LEGISLATION

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EXECUTIVE SUMMARY

This memo seeks to provide a comprehensive analysis of the current legal landscape concerning religious liberty in America. **Section I** provides a general description of the First Amendment and specifically discusses the Framers' reasoning behind the Free Exercise Clause and the Establishment Clause. The former ensures that citizens may freely make decisions based on their consciences, and the latter assures a kind of mutual non-interference by church and state in each other's affairs.

Section II discusses landmark Supreme Court cases and key legislation in order to provide a clearer understanding of the Court's evolving jurisprudence in regards to the Free Exercise and Establishment Clauses as well as Congress's response to its decisions. This section summarizes ten Supreme Court cases and two pieces of legislation which have significantly affected the condition of religious freedom over the last half century. Of particular importance is the *Everson* decision which interpreted the Establishment Clause to mandate strict government neutrality not just among religions, but between religion in general and irreligion. Also of significance is the *Smith* decision in which the Court interpreted the Free Exercise Clause to not require exemptions to neutral laws which incidentally create religious burdens.

Section III discusses eight issues currently significant to the exercise of religious liberty in various areas of society. **Subsection A** focuses on religious expression in schools and discusses subjects such as prayer, the Pledge of Allegiance, religious attire, and equal access. In regard to this area of the law, the Supreme Court has generally established that while school officials may not encourage religion, students do not abandon their First Amendment rights on campus, and are allowed to express their personal religious beliefs. Furthermore, schools must treat religious individuals and groups in the same manner as they treat other individuals and groups, and may not engage in discriminatory behavior against an individual or group solely due to religious beliefs.

Subsection B concentrates on issues related to religious expression in the workplace and specifically discusses religious speech / displays, religious attire, and the use of work facilities for religious reasons. Title VII protects against employment discrimination based on religious belief and mandates that employers must try and reasonably accommodate religious beliefs. Additionally, the Equal Employment Opportunity Commission mandates that employees with religious beliefs must be given the same benefits as those who do not hold such beliefs.

Subsection C focuses on matters of conscience and the rights of employees to refuse to comply with religiously objectionable tasks and policies. It discusses the rights of healthcare workers to decline to perform or assist in performing sterilizations and abortions, as well as the ability of pharmacists to refuse to dispense Emergency Contraception. Furthermore, it discusses the rights of religious organizations to hire in a manner that maintains their identity. Finally, it explores the rights of religious individuals and groups when their beliefs come in conflict with non-discrimination policies, especially those which list sexual orientation as a protected class. Courts have been divided in their rulings on this issue, but generally have not interpreted the Free Exercise Clause to contain a right to be exempted from generally-applicable non-discrimination laws.

Subsection D examines the constitutionality of policies authorizing government funding to religious schools. The Supreme Court has held that such policies are valid so long as they do not specifically fund religious activities and do not create excessive entanglement between the government and religion. Furthermore, the government may not condition the conferring of such funds based on a parochial school's level of religiousness.

Subsection E focuses on the constitutionality of religious monuments and displays. The Court has ruled that religious displays are not automatically unconstitutional because of their religious content; rather, they are only ruled to violate of the Establishment Clause if their surroundings suggest a message of government endorsement of religion. Recently, the Court has defended the constitutionality of religious monuments on public property and has stated that the government may freely choose to accept or reject certain types of religious monuments without having to accept other monuments expressing different religious beliefs. Finally, Ten Commandment displays in courthouses and public schools have consistently been struck down as unconstitutional.

Subsection F discusses the expansive protection that the Religious Land Use and Institutionalized Persons Act provides for religious organizations wishing to build new or expand previously existing structures. Such organizations may not be subjected to discriminatory zoning ordinances because of their religious beliefs and even neutral policies may not burden their religious practice unless the government has a compelling interest that it is achieving using the least restrictive means possible. Finally, the Church Arson Prevention Act and the Freedom of Access to Clinic Entrances Act authorizes the government to penalize anyone who defaces religious property or attempts to interfere with any person lawfully exercising the First Amendment right of religious freedom at a place of religious worship.

Subsection G focuses on the National Day of Prayer and a federal court's ruling that the general public may not challenge its constitutionality. Thus, although the Supreme Court has not ruled specifically on the constitutional issue, the National Day of Prayer is currently safe from public challenges.

Subsection H examines the rights of religious broadcasters to freely express their beliefs using radio, television, and other forms of media. Furthermore it discusses two FCC policies, the Fairness Doctrine and "localism," which have the potential to substantially limit religious broadcasters' First Amendment Freedoms.

Section IV provides a conclusion to the memo and reiterates that religious liberty must be vigilantly monitored to ensure that religion does not disappear from the public arena and that our nation continues to acknowledge its religious heritage.

The following list details which religious liberties are currently well-established, and those that are uncertain or overtly threatened.

Well-Established Religious Liberties:

- Right to personal and voluntary prayer in public schools
- Religious expression and religious attire in public schools
- Equal access for religious groups to school facilities and other benefits
- Religious expression, displays, and attire in the workplace
- Freedom to observe the Sabbath and other religious holidays and holy days
- Right of healthcare professionals to refuse to perform abortions and sterilization procedures
- Government funding for religious schools
- Freedom from discriminatory zoning ordinances
- Protection of religious property

Uncertain or Threatened Religious Liberties:

- Right of free speech on university and college campuses
- Right of student groups to freely associate
- Exemption from religiously objectionable classes
- Religious expression in graduation speeches
- Right of pharmacists to refuse to dispense emergency contraception
- The extent of the “ministerial exception” for religious organizations
- The rights of the Free Exercise Clause versus non-discrimination policies
- Ten Commandment displays

I. Introduction

The first alteration made to the United States Constitution concerned religious liberty. The framers viewed this right as so fundamental that they included it with other such cherished rights as the Freedom of Speech, Freedom of the Press, Freedom of Assembly, and Freedom to Petition the Government. These freedoms became the First Amendment to the Constitution, and to this day represent the most revered and staunchly defended liberties belonging to the American people. The First Amendment states in relevant part that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,”¹ and with these words, the framers ensured that every American would be free to practice the religion or his or her choice without fear of governmental interference. Currently every state constitution in America provides for the freedom to exercise one's religion,² which serves as compelling evidence that the framers’ intent to ensure the freedom of religion has become an enduring and well-established right embraced by the American people.

The First Amendment contains an Establishment Clause and a Free Exercise Clause which function equally in protecting religious liberty. James Madison, author of the Bill of Rights, viewed the free exercise of religion as an “unalienable right” and therefore believed that “the Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”³ The Free Exercise Clause is essential for the institution of democracy as it ensures that citizens are allowed to freely make decisions based on their consciences without fear of reproach. In regards to the Establishment Clause, the framers wanted to ensure a kind of mutual non-interference by church and state in each other’s affairs. In an 1802 letter to the Danbury Baptist Association, Thomas Jefferson stated that the purpose of the Establishment Clause was to build “a wall of separation between Church & State” in order to allow both institutions to operate freely from one another.⁴ In this way, the Establishment Clause was intended to protect the right of the Free Exercise Clause; however, over the years the application of these clauses has proven to be complex. There arguably exists a degree of tension between the two, as courts are often forced to decide whether to enforce neutral, generally-applicable laws which have the incidental effect of burdening

¹ U.S. CONST. amend. I.

² ALA. CONST. art. I, § 3; ALASKA CONST. art. I, § 4; ARIZ. CONST. art. XX, P 1; ARK. CONST. art. II, § 24; CAL. CONST. art. I, § 4; COLO. CONST. art. II, § 4; CONN. CONST. art. I, § 3; DEL. CONST. art. I, § 1; FLA. CONST. art. I, § 3; GA. CONST. art. I, § 1, P 3; HAW. CONST. art. I, § 4; IDAHO CONST. art. I, § 4; ILL. CONST. art. I, § 3; IND. CONST. art. I, § 3; IOWA CONST. art. I, § 3; KAN. CONST. Bill of Rights, § 7; KY. CONST. § 5; LA. CONST. art. I, § 8; ME. CONST. art. I, § 3; MD. CONST. Decl. of Rights, art. XXXVI; MASS. CONST. amend. art. XVIII, § 1, *amended by* MASS. CONST. art. XXXVI, § 1; MASS. CONST. pt. 1, art. II; MICH. CONST. art. I, § 4; MINN. CONST. art. I, § 16; MISS. CONST. art. III, § 18; MO. CONST. art. I, § 5; MONT. CONST. art. II, § 5; NEB. CONST. art. I, § 4; NEV. CONST. art. I, § 4; N.H. CONST. pt. 1, art. V; N.J. CONST. art. I, P 3; N.M. CONST. art. II, § 11; N.Y. CONST. art. I, § 3; N.C. CONST. art. I, § 13; N.D. CONST. art. I, § 3; OHIO CONST. art. I, § 7; OKLA. CONST. art. I, § 2; OR. CONST. art. I, § 3; PA. CONST. art. I, § 3; R.I. CONST. art. I, § 3; S.C. CONST. art. I, § 2; S.D. CONST. art. VI, § 3; S.D. CONST. art. XXVI, § 18; TENN. CONST. art. I, § 3; TEX. CONST. art. I, § 6; UTAH CONST. art. I, § 4; VT. CONST. ch. 1, art. III; VA. CONST. art. I, § 16; WASH. CONST. art. I, § 11; W. VA. CONST. art. III, § 15; WIS. CONST. art. I, § 18; WYO. CONST. art. I, § 18.

³ James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 1 (1785), available at http://www.constitution.org/jm/17850620_remon.htm.

⁴ Letter from Thomas Jefferson, President of the United States, to Danbury Baptist Association (Jan. 1, 1802), available at <http://www.loc.gov/loc/lcib/9806/danpre.html>.

particular religious practitioners. To grant an exemption to such practitioners in the view of some observers promotes a certain degree of establishment, whereas, to allow the law serves to restrict the right of free exercise. The evolution of the Supreme Court's Religion Clause jurisprudence reflects this tension, and there exist a multitude of landmark cases which help to provide a clearer understanding of the Court's interpretation of both clauses and how such judgments have affected religious liberty in the United States.

II. Supreme Court Religious Clause Jurisprudence and Relevant Legislation

A. *Reynolds v. United States* (1878)

Reynolds v. United States marked the first significant case the Supreme Court heard concerning the Free Exercise Clause. During these proceedings, Reynolds, a Mormon, claimed his right to free exercise should allow him to be able to practice polygamy as part of his religious beliefs, despite its prohibition by federal anti-bigamy laws. The Court held that Reynolds's beliefs did not exempt him from his obligation under federal law and stated that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."⁵ To accommodate the beliefs of every practitioner notwithstanding the rule of law would make "professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."⁶ Therefore, the Court ruled that while the freedom of religious belief and opinion was limitless, the federal government had the ability to regulate actions that manifest those beliefs.

B. *Cantwell v. Connecticut* (1940)

Reynolds interpreted the Free Exercise Clause on a strictly federal level, and it was not until the case of *Cantwell v. Connecticut* that the Court ruled that the rights of free exercise could be applied to the states via the Fourteenth Amendment. The Court ruled that Cantwell, a Jehovah's Witness, should not have been prohibited from disseminating his religious views and soliciting funds from the general public. The Court declared the Connecticut statute in question to be unconstitutional as it required individuals to apply for a solicitation license, the approval of which was determined based upon the applicant's religious beliefs. The Court ruled that it was unconstitutional for state officials to judge anyone's set of beliefs because such actions "lay a forbidden burden upon the exercise of liberty protected by the Constitution."⁷ Therefore, the Free Exercise Clause was ruled to apply to states in the way it applied to the federal government.

C. *Everson v. Board of Education* (1947)

Following shortly after the application of the Free Exercise Clause to the states, the Establishment Clause was held to restrict state governments as well. In *Everson v. Board of Education*, the Supreme Court announced that via the Fourteenth Amendment, the Establishment Clause would henceforth be applied to the states. The Court stated that the Establishment Clause prevented federal and state governments from setting up a church; aiding or favoring one religion

⁵ *Reynolds v. United States*, 98 U.S. 145, 166 (1879).

⁶ *Id.* at 167.

⁷ *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

over another or over non-religion in general; forcing an individual to profess or recant from a certain belief; taxing individuals in support of various religious institutions; and finally, participating in the affairs of religious groups.⁸ The Court's interpretation of the clause was unprecedented as it stated that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers."⁹ Professor Donald Beschle aptly sums up the significant consequence of the Court's ruling as making, "the confident assertion that government must maintain a strict neutrality, not merely among religions, but between religion in general and irreligion."¹⁰ This previously unheard-of "neutrality doctrine" has been instrumental in influencing the decisions of countless courts and remains *Everson's* biggest legacy.

D. *Sherbert v. Verner* (1963)

In 1963, the Supreme Court adopted an extremely expansive view of the Free Exercise Clause with its ruling in *Sherbert v. Verner*. Sherbert was a Seventh-day Adventist who believed that her religion prevented her from working on Saturday as she considered it to be the Sabbath. She was subsequently fired from her position for her refusing to work on Saturdays and was unable to find another job for the same reason. Despite her inability to find work, the South Carolina Employment Security Commission denied her unemployment benefits because state law mandated that an applicant was ineligible for such benefits if he or she "ha[d] failed, without good cause . . . to accept available suitable work when offered him [or her] by the employment office or the employer."¹¹ The Court ruled South Carolina's policy imposed a burden on Sherbert's free exercise, and therefore, the only way it could be justified was if it advanced a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate."¹² The policy was found not to advance such an interest, and with this case the "compelling interest" doctrine, known later as the "*Sherbert* Test," was created. This doctrine was significant because it required states to provide a compelling interest such as public safety, health, order, etc. in order to justifiably burden an individual's religious practice.

E. *Wisconsin v. Yoder* (1972)

In *Wisconsin v. Yoder*, the Court ruled that the requirement to show a compelling interest applied to all laws, even those which were generally applicable, which had the effect of burdening free exercise. Justice Burger, delivering the Court's stated, "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."¹³ In *Yoder*, the Court held that Wisconsin's compulsory school attendance law infringed the First Amendment rights of Amish parents who for religious reasons wished to educate their children at home. Thus, the Court ruled that governments could not justify burdening religious practitioners simply by

⁸ *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947).

⁹ *Id.* at 18.

¹⁰ Donald L. Beschle, *Does the Establishment Clause Matter? Non-Establishment Principles in the United States and Canada*, 4 U. PA. J. CONST. L. 451, 456 (2002).

¹¹ *Sherbert v. Verner*, 374 U.S. 398, 399 (1963).

¹² *Id.* at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

¹³ *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

claiming a law is neutral of a law; rather, the government had to be able to prove the compelling interest that the law served.

F. *Lemon v. Kurtzman* (1971)

One of the Supreme Court's most significant rulings in regards to the Establishment Clause was *Lemon v. Kurtzman* (1971). In *Lemon*, the Court ruled that a Pennsylvania statute which provided financial support to parochial schools by reimbursing the cost of teacher's salaries, textbooks, and instructional materials, was unconstitutional as it created excessive entanglement between the government and religion. In this case, Chief Justice Burger formulated a three-part test to determine if a statute or policy violates the Establishment Clause. Under this so-called *Lemon* test, for a law to be constitutional under the Establishment Clause, the law must, "first...have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"¹⁴ In regards to the first prong, the law must have a clear, secular purpose. Second, the law's primary effect cannot be targeted at helping or hindering religious groups; however, if a law's secondary effect is a burden to religious practice, it still passes this prong so long as a secular primary effect can be proven. Third, the law cannot create a significantly involved relationship with a religious institution. The Court stated that, "The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other;" however, the Court also realized that "total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable."¹⁵ The Court ruled the Pennsylvania statute failed this third prong, as it created "excessive entanglement" with parochial schools by requiring the government to continually analyze those school's curriculums to make sure that state funds were only being used for secular and not religious purposes.

G. *Lynch v. Donnelly* (1984)

The Court slightly modified the *Lemon* test in *Lynch v. Donnelly*. In *Lynch*, residents of Pawtucket, Rhode Island alleged that the city's inclusion of a crèche or nativity scene in the city's Christmas display was a government establishment of religion. The Court rejected this claim, acknowledging that while the crèche is identified with one particular religious faith, it would be curious "if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged...by the Executive Branch, by the Congress, and the courts for 2 centuries, would so 'taint' the city's exhibit as to render it violative of the Establishment Clause."¹⁶ The Court specified that the Constitution does not "require complete separation of church and state;"¹⁷ therefore, the government can make a certain degree of acknowledgement towards religion without violating any of the three prongs of the *Lemon* test, which the Court ruled was the case with the actions of the Pawtucket government.

¹⁴ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

¹⁵ *Id.* at 614.

¹⁶ *Lynch v. Donnelly*, 465 U.S. 668, 686 (1984).

¹⁷ *Id.* at 673.

What makes *Lynch* significant is the new interpretation of the first two prongs of *Lemon* test that Justice O'Connor formulated in her concurring opinion; her reading later came to be known as the "Endorsement Test". In regards to the first part of the test she stated, "The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion."¹⁸ Likewise, she offered a distinct reading of the second prong:

The effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion...What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.¹⁹

In Justice O'Connor's opinion, the most vital inquiry when deciding whether a government action violates the Establishment Clause is whether that action had the purpose or effect of producing an impression of endorsement. If the government appeared to be endorsing a particular set of religious beliefs, it could have the damaging effect of causing citizens to believe their political status could be affected for either sharing in or abstaining from those beliefs. O'Connor classified such endorsement as an "evil"²⁰ that needed to be avoided, and thus at the forefront of inquiries into alleged Establishment Clause violations. In *Lynch*, she believed that the crèche did not constitute such a message of endorsement as it was surrounded by other secular symbols which created a general holiday setting which "negate[d] any message of endorsement of [the crèche's] content."²¹

H. *Employment Division v. Smith* (1990)

Arguably, the Supreme Court's most controversial decision in regards to religious liberty was *Employment Division v. Smith* (1990). Smith and his co-worker Black ingested peyote as a part of a religious ritual of the Native American church. Both men were fired from their jobs at a private drug rehabilitation clinic when their employer discovered that they were ingesting peyote, as drug use violated the company's policy. The Oregon Employment Division denied them unemployment compensation because peyote use was criminal under Oregon law: thus, their discharge was for work-related "misconduct" and automatically made them ineligible to receive benefits.²² The men argued that their rights under the Free Exercise Clause had been violated, but the Court held that Oregon did not violate the First Amendment by withholding unemployment benefits, as both men had violated state law. The Court stated, "Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now."²³ The Court made it clear that *Shebert*'s "compelling interest" standard had historically applied only to state

¹⁸ *Id.* at 691.

¹⁹ *Id.* at 691-92.

²⁰ *Id.* at 691.

²¹ *Id.* at 692.

²² *Employment Division v. Smith*, 494 U.S. 872, 873 (1990).

²³ *Id.* at 882.

unemployment compensation rules and cases in which multiple constitutional rights were at stake; furthermore, the Court had recently abstained from using the compelling interest test at all. The Court stated, “Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.”²⁴ In short, the Court in *Smith* ruled that as long as a law is neutral and generally applicable, it is constitutional despite any incidental burden it may place on religious exercise. This decision was significant in that it largely overturned the “*Sherbert Test*” by narrowly tailoring it to apply only to unemployment compensation cases and not to criminal prohibitions of particular forms of conduct.

I. The Religious Freedom and Restoration Act of 1993 (RFRA)

Many religious groups were upset by *Smith* because they believed that First Amendment rights could now be curtailed as long as the government’s law or policy burdening religious exercise was neutral and generally applicable. In response to these concerns, Congress passed RFRA to re-establish the “compelling interest” standard established in *Sherbert*. RFRA stated, “[The] Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” unless such a burden “is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.”²⁵ RFRA was passed to apply “to all Federal and State law.”²⁶ Under RFRA, every law that had the effect of burdening religious exercise had to pass a strict scrutiny test to ensure that the law furthered a compelling interest and was the least restrictive means of furthering that interest. Any law that burdened religious practice without meeting both of these requirements was invalid under RFRA.

J. *City of Boerne v. Flores* (1997)

RFRA’s reach was greatly limited by the Supreme Court’s decision in *City of Boerne v. Flores* (1997).²⁷ In *City of Boerne*, the Catholic Archbishop of San Antonio applied for a building permit to enlarge a church in the City of Boerne, but the city denied the request, citing an ordinance governing historic preservation.²⁸ The Archbishop challenged the city’s ruling under RFRA, claiming that the ordinance burdened the church’s free exercise of religion. In response, the Court held that RFRA was unconstitutional as applied to states because it exceeded Congress’s power to enforce the Fourteenth Amendment.²⁹ By passing RFRA, Congress had sought to directly contradict *Smith* and had overstepped its bounds by intruding on the state’s general authority to regulate its citizens’ behavior. The Court stated:

Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by

²⁴ *Id.* at 884.

²⁵ 42 USCS § 2000bb-1.

²⁶ 42 USCS § 2000bb-3(a) (1993) (amended 2003).

²⁷ *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

²⁸ *Id.* at 512.

²⁹ *Id.* at 536 (referencing U.S. CONSTIT. amend. XIV, § 5).

changing what the right is. It has been given the power “to enforce,” not the power to determine what constitutes a constitutional violation.³⁰

The Court reasoned that RFRA infringed upon the power of the Judicial Branch to engage in constitutional interpretation and thus failed to honor the separation of powers. Furthermore, the Court found that RFRA placed a “heavy litigation burden on the States,” which far exceeded “any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*.”³¹ Thus, even though RFRA was designed to regulate policies such as the one contested in *City of Boerne*, the Court declared that because “the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.”³² In short, the Court invalidated RFRA as to state and local governments; thus, RFRA could not be used to challenge the constitutionality of a state's laws or policies.³³

K. *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal* (2006)

Although the Supreme Court held in *City of Boerne* that RFRA cannot be used to challenge state and local laws and policies, the Court subsequently held that RFRA can be constitutionally applied to federal laws. In *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal* (UDV), the UDV Church, claimed that federal law violated RFRA by placing an unjustified burden on its exercise of religion.³⁴ As part of its communion ceremony, members of the church drank a sacramental tea which contained hallucinogenic substances prohibited under the Federal Government's Controlled Substances Act.³⁵ The Court held that the burden on the church's religious practice violated RFRA because the Federal Government could not prove it had a compelling interest in applying the Controlled Substances Act to prohibit the church from using hallucinogenic substances as part of its religious rituals.³⁶

L. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)

In 2000, Congress passed RLUIPA to correct the problems the Court in *City of Boerne* found in RFRA. RLUIPA states, “No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution”³⁷ and that “no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution.”³⁸ As in RFRA, the only exception to this mandate is if the law or policy “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.”³⁹ However unlike RFRA, which sought to

³⁰ *Id.* at 519.

³¹ *Id.* at 534.

³² *Id.* at 536.

³³ The wording of RFRA was subsequently amended to only apply to the federal government, and any mention of state governments was removed.

³⁴ *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418, 423 (2006).

³⁵ *Id.* at 423.

³⁶ *Id.* at 439.

³⁷ 42 USCS § 2000cc.

³⁸ *Id.* § 2000cc-1.

³⁹ *Id.*

regulate all laws that burdened religious practice, RLUIPA focused only on those laws and policies related to land use and institutionalized persons. In 2005, the Supreme Court ruled in *Cutter v Wilkinson* that RLUIPA protected the religious practices of prisoners and that the act provided a permissible accommodation of religion that does not violate the Establishment Clause. The Court's decision only applied to the institutionalized persons portion of the act, as it declined to rule on the section involving land-use.

M. Conclusion

In regards to the Religion Clauses, it is difficult to completely summarize the Supreme Court's current jurisprudence. Recently, the Court appears to be increasingly basing its decisions on the notion of government neutrality.⁴⁰ The Court has reaffirmed that Government policies that are neutral towards religion do not violate the Establishment Clause, even if various religions might be incidentally benefitted.⁴¹ Therefore, Jefferson's "Wall of Separation" analogy is not how the Court currently views the Establishment Clause; rather the Court sees the clause as a mandate to treat all religions with equal and neutral criteria. Concerning the Free Exercise Clause, *Smith* continues to control the Court's decisions. As long as laws and policies are neutral and generally applicable, the Free Exercise Clause is not deemed to be violated, regardless of whether those laws and policies place a burden on religious practice. Hence, if policies and laws have a secular intent and are not aimed at hindering religious practice, it is difficult to successfully bring suit under the Free Exercise Clause. In conclusion, recent Supreme Court decisions first and foremost seek to ensure that laws and policies remain neutral and generally-applicable, so all individuals receive equal treatment, with no individuals or religious groups receiving benefits not available to all others. Consequently, the Court is no longer principally concerned with the incidental effects of neutral and generally applicable laws and policies.

III. Issues

A. Religious Expression in Public Schools

1. Prayer

Over the last half century, the Supreme Court consistently has invalidated any policies or practices which have served to explicitly or implicitly promote or encourage prayer during school hours or at school-sponsored events. In 1962, the Court ruled in *Engel v. Vitale* that a New York State policy that authorized the daily recitation of a short prayer by school officials violated the Establishment Clause. The Court stated, "Each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."⁴²

⁴⁰ L. Scott Smith, "Religion-Neutral" Jurisprudence: An Examination of Its Meaning and End, 13 Wm. & Mary Bill Rts. J. 841 (2005).

⁴¹ *Id.* at 842.

⁴² *Engel v. Vitale*, 370 U.S. 421, 435 (1962).

The Court's ruling in *Wallace v. Jaffree* (1985) furthered this separatist sentiment when it declared unconstitutional an Alabama statute authorizing a one-minute period of silence in all public schools "for meditation or voluntary prayer."⁴³ The statute originally mentioned only "meditation" but was amended to include "voluntary prayer" as an attempt by the Alabama State Legislature, in the majority's view, "to return voluntary prayer to the public schools."⁴⁴ The Court held that the statute violated the first prong of the *Lemon* test because it had no secular purpose. However, the Court made it clear that the statute as it was originally written did not violate the Establishment Clause because "nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the schoolday."⁴⁵ Therefore, the Court stated that policies authorizing moments of silence were constitutional as long as they did not encourage prayer.

Lastly, the Court held in *Santa Fe Independent School District v. Doe* (2000) that it was unconstitutional for the Santa Fe School District to have a policy permitting student elections to determine whether "invocations" should be delivered at football games. The school district permitted student-led invocations before football games, subsequent to approval by a majority of the student body. The Court held that these invocations contained a religious message, and thus the policy permitting them endorsed religion in violation of the Establishment Clause. Furthermore, by allowing issues of religion to be decided by majority vote, the school district was discriminating against the views of minority religions. The Court's opinion stated, "In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration."⁴⁶ Therefore, the Court held that any policy that even implicitly promoted prayer served to give the impression of school sponsorship and created an impermissible establishment of religion by the state. *Santa Fe* was significant because the Court interpreted the Establishment Clause to not only prohibit government preference of one religion over another but also to prohibit showing preference to religious expression at all, as any encouragement of prayer was deemed unconstitutional.

In 2002, President Bush signed into law the No Child Left Behind Act. That act mandated that the Department of Education provide guidelines for constitutionally protected types of prayer in public schools. Furthermore, the Act declared that to receive federal funding, "a local educational agency shall certify in writing to the State educational agency involved that no policy of the local educational agency prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary schools and secondary schools."⁴⁷ The Department of Education's guidelines cite *Santa Fe* in declaring that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses

⁴³ *Wallace v. Jaffree*, 472 U.S. 38, 39 (1985).

⁴⁴ *Id.* at 57.

⁴⁵ *Id.* at 67.

⁴⁶ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000).

⁴⁷ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, § 9524 (2002) (codified as amended at 20 U.S.C. § 7904(b)).

protect.”⁴⁸ Therefore, as long as students are voluntarily engaging in prayer and are free from any type of governmental endorsement, their religious expression is constitutionally protected. Additionally, the guidelines state that students “may pray with fellow students during the school day on the same terms and conditions that they may engage in other conversation or speech.”⁴⁹ While school authorities certainly have a right to maintain order with regard to student activities, “they may not discriminate against student prayer or religious speech in applying such rules and restrictions.”⁵⁰ In short, as long as students’ voluntary prayer is free from school officials’ influence and do not infringe upon the rights of others, their prayer is protected under the Free Exercise Clause and Free Speech Clause and cannot be restricted by the government.

The Civil Rights Division of the Department of Justice (DOJ) has consistently held the stance that schools should not discriminate against constitutionally protected types of prayer. Most recently in 2007, the DOJ reached a settlement with a Texas public high school in which the school drafted a new policy to explicitly allow Muslim students to engage in mid-day prayers during the lunch hour. Previously, the school had barred students from kneeling in a corner of the cafeteria to recite their prayers, and had prohibited them from praying in unused space during the lunch hour, despite the fact that other students were allowed to meet in such spaces during that time. Former Assistant Attorney General Wan J. Kim applauded the decision and stated, “Students should not be required to choose between practicing their faith and receiving a public education.”⁵¹

2. Religious Speech

The right of public school students to express their religious beliefs should be governed no differently than any other types of speech that may occur on school grounds. In *Tinker v. Des Moines* (1969), the Court held that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate;” however, the Court also acknowledged “the special characteristics of the school environment,” that must dictate the ways in which speech is regulated.⁵² Therefore, while the school can impose rules of order and pedagogical restrictions to govern student expression, the school may not implement such rules to target religious expression or discriminate against expression based solely on its religious content. In *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) the Court declared, “Viewpoint discrimination is...an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”⁵³ In this regard, religious expression is not distinguishable from other types of speech and therefore must be protected and regulated by the same neutral standards which govern all acts of expression.

⁴⁸ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)); accord *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 841 (1995).

⁴⁹ Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003).

⁵⁰ *Id.*

⁵¹ *Religious Freedom in Focus* (U.S. Dep’t of Justice), May 2007, available at http://www.justice.gov/crt/spec_topics/religiousdiscrimination/newsletter/focus_25.htm#1.

⁵² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

⁵³ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

The same standards used to protect individuals' religious expression also extend to religious groups as well. Whatever rights that a school affords to secular groups must also be given to religious groups. If a school allows secular groups to advertise in the school newspaper, make public announcements, or distribute leaflets, then the same privileges must be extended to religious groups.⁵⁴ School authorities are not allowed to discriminate against groups because they meet to pray or gather for other religious reasons. As with individuals, the school must treat all groups neutrally and may not engage in viewpoint discrimination.

The DOJ has consistently held that religious speech should be afforded the same protections given to all other types of speech. Most recently in 2006, the DOJ filed a brief as *amicus curiae* in two federal cases involving the religious expression of two students. In *Curry v. Saginaw School District* (ED. Mich. 2006), the DOJ's brief argued that the school district violated the Free Speech rights of a fifth grade student when the district prohibited him from distributing candy canes during a class exercise due to a religious message the candy canes contained.⁵⁵ In *O.T. v. Frenchtown Elementary School District Board of Education* (D. NJ. 2006), the DOJ's brief argued that the school district had engaged in viewpoint discrimination by not allowing a second grade student to perform a Christian song at a talent show.⁵⁶ In both of these cases, the District Courts decided in the students' favor, declaring that each respective school district had unconstitutionally restricted both students' Free Speech rights. However, the decision reached in *Curry v. Saginaw School District* was appealed, and the Sixth Circuit reversed the District Court's decision. The Sixth Circuit held that the decision to prevent the student from distributing the candy canes "was driven by legitimate pedagogical concerns," and therefore his "constitutional rights were not abridged."⁵⁷ Both of these cases are significant in that they show the DOJ's commitment to safeguarding students' rights to express their religious beliefs and that judicial interpretations vary as to which types of religious expression are free from school interference, and which ones are subject to regulation.

3. University Speech Codes

The majority of universities and colleges across the country maintain "speech codes" that prohibit expression that would be constitutionally protected in society at large.⁵⁸ These codes are meant to create an environment in which all students can partake in the educational experience free from discrimination and harassment; however, in practice they have resulted in unintended negative consequences for First Amendment rights. As government institutions, public universities are prohibited from interfering with freedom of expression and must generally respect rights guaranteed under the Constitution. The majority of speech is to be protected, but the Supreme Court has ruled that "speech that incites reasonable people to immediate

⁵⁴ U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003).

⁵⁵ *Religious Freedom in Focus* (U.S. Dep't of Justice), Oct. 2006, available at http://www.justice.gov/crt/spec_topics/religiousdiscrimination/newsletter/focus_20.htm#2.

⁵⁶ *Religious Freedom in Focus* (U.S. Dep't of Justice), Nov./Dec. 2006, available at http://www.justice.gov/crt/spec_topics/religiousdiscrimination/newsletter/focus_21.htm#1.

⁵⁷ *Curry v. Hensinger*, 513 F.3d 570, 580 (6th Cir. 2008).

⁵⁸ Foundation for Individual Rights in Education (FIRE), *Spotlight on Speech Codes 2011: The State of Free Speech on Our Nation's Campuses* 10, available at <http://thefire.org/public/pdfs/312bde37d07b913b47b63e275a5713f4.pdf?direct>.

violence...harassment; true threats and intimidation; obscenity; and libel,” fall outside of the First Amendment’s safeguards.⁵⁹ Speech codes often misconstrue these categories and interpret them more broadly than is constitutionally justified. For instance, in 2003, the misuse of harassment regulations became so widespread that the Department of Education’s Office for Civil Rights (OCR) issued a letter of clarification to all colleges and universities concerning the true definition of harassment. The letter read:

Some colleges and universities have interpreted OCR’s prohibition of “harassment” as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR’s jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.⁶⁰

The over-application of harassment regulations poses a threat to religious expression in particular as students and groups can be prevented from sharing beliefs with other students out of fear of being charged with engaging in harassing behavior. For example, the University of Alabama prohibits any expression that “insults another student because of his or her race, color, religion, ethnicity, national origin, sex, sexual orientation, age, disability, or veteran status.”⁶¹ The University of Florida’s speech code states, “Organizations or individuals that adversely upset the delicate balance of communal living will be subject to disciplinary action by the University.”⁶² With such vague policies as these, students and religious groups could be refrained from espousing beliefs on the definition of marriage, gender roles, and absolute religious truth, as their speech could be judged to be insulting to other students or disruptive of communal living, and therefore be categorized as harassment. In sum, speech codes have the capacity to significantly burden religious expression by reaching beyond constitutionally permissible restrictions of speech and therefore should be avoided.

4. Equal Access

The Supreme Court has held consistently that if a public school allows its facilities to be used by secular student groups during noninstructional time, the school must extend the same benefit to religious student groups. The Equal Access Act of 1984 states:

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.⁶³

⁵⁹ *Id.* at 12.

⁶⁰ Letter from Assistant Secretary, U.S. Dep’t of Educ. Office of Civil Rights, to Dear Colleague (July 28, 2003) <http://www.ed.gov/about/offices/list/ocr/firstamend.html>.

⁶¹ Univ. of Ala., Student Handbook, Definition of Harassment, <http://www.studenthandbook.ua.edu/policyforstudents.html> (last visited Aug. 16, 2011).

⁶² Univ. of Fla., Student Handbook, Relations between People and Groups (Mar. 24, 2011), <http://thefire.org/public/pdfs/c6184e6fe4beebe669af2c1cb2ed6f1b.pdf?direct>.

⁶³ 20 USCS § 4071(a).

The Act declares, “A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.”⁶⁴ This legislation stipulates that schools must treat all student groups the same and may not condition use of its facilities based on a groups religious or non-religious viewpoints. The Court confirmed the Equal Access Act’s constitutionality in *Board of Education of the Westside Community Schools v. Mergens* (1990). The Court held that the legislation did not violate the Establishment Clause and justified this decision by declaring, “We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.”⁶⁵ Furthermore, the Court stated, “The proposition that schools do not endorse everything they fail to censor is not complicated.”⁶⁶ By confirming the Act’s constitutionality, the Court ensured that schools would not engage in viewpoint discrimination in determining which student groups could use their facilities, thus guaranteeing that equal standards would be applied to all.

The Court has held under the Free Speech Clause that the equal access principle extends to non-student groups and has ruled that if schools open their facilities for use by secular groups, they must open their facilities to religious groups. In *Lamb’s Chapel v. Center Moriches Union Free School District* (1993), a local church applied twice to use a school’s facilities to show a six-part film series on family values, but was repeatedly denied because the school board had issued rules and regulations which, while allowing the facilities to be used for “social, civic, and recreational uses,” prohibited their use for religious purposes.⁶⁷ The Court unanimously held that this policy constituted viewpoint discrimination as the church’s application was denied solely because the film series the church wished to show “dealt with the subject [of family values] from a religious standpoint.”⁶⁸ The Court stated, “The principle that has emerged from our cases ‘is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.’”⁶⁹ Furthermore, the Court held that allowing school facilities to be used for religious purposes on an equal basis with other purposes did not violate the Establishment Clause as “there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.”⁷⁰ In sum, the Court found that the government cannot make access to government property to speak conditional on the speech’s viewpoint and that the government may extend benefits to a religious group in the same manner it does to a secular group and not violate the Establishment Clause.⁷¹

5. Right to Associate

⁶⁴ *Id.* § 4071(b).

⁶⁵ *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

⁶⁶ *Id.*

⁶⁷ *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 385 (1993).

⁶⁸ *Id.* at 394.

⁶⁹ *Id.* (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, (1984)).

⁷⁰ *Id.* at 395.

⁷¹ In 2001, the Court reached an identical conclusion in *Good News Club v. Milford Central School*. In *Good News Club*, the court held that schools could not discriminate against a religious groups use of the school’s facilities if they are generally available to be used by secular community groups. Both *Lamb’s Chapel* and *Good News Club* ensure that religious groups may not be subjected to viewpoint discrimination.

The right to freely associate is currently the most problematic issue facing religiously-affiliated student groups at both high schools and universities. While the U.S. Constitution does not specifically mention the right to freedom of association, the Supreme Court has held that the Free Speech Clause of the First Amendment includes the right to associate for expressive purposes. In *NAACP v. Alabama ex. rel. Patterson* (1958) the Court declared:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.... It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.... It is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.⁷²

In *Patterson*, the Court articulated that individuals have the constitutional right to gather together for expressive purposes, and that the government could only curtail this right if in doing so, it was using the least restrictive means to achieve a compelling state interest.⁷³ This right is essential for all religious individuals who wish to gather with other like-minded believers to engage in worship, instruction, rituals, and celebrations.

Recently, the right to expressive association has been significantly jeopardized by multiple decisions from federal courts. In *Truth v. Kent School District* (9th Cir. 2008), a group of students wished to form a Bible club (Truth) and applied for a charter pursuant to the school's policy that "[u]nchartered clubs are not permitted to exist."⁷⁴ The Associated Student Body (ASB) Council denied Truth's charter request, citing concerns with its name; that its members had to sign a declaration of faith; and that its mission statement was overtly religious.⁷⁵ In other words, the ASB believed that granting a charter for Truth would lead to discrimination, as non-Christian students would not be able to become members of Truth. The student group challenged the ASB's action and claimed that rejecting their petition violated their rights under the Equal Access Act and the First Amendment. The Ninth Circuit disagreed and held that the school's decision to deny Truth official recognition was consistent with the Equal Access Act. The court declared, "The District denied Truth ASB status...based on its discriminatory membership criteria, not the religious content of the speech."⁷⁶ Therefore, the court held that Truth could not claim protection under the Equal Access Act. Furthermore, the court held that the government could exclude speech in a "limited public forum" "so long as its reasons for

⁷² *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 460-61 (1958).

⁷³ *Id.*; see also *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)) ("We have held that the freedom [of expressive association] could be overridden '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.'")

⁷⁴ *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 637 (9th Cir. 2008).

⁷⁵ *Id.* at 639.

⁷⁶ *Id.* at 645 (internal quotations omitted).

doing so [were] viewpoint neutral and ‘reasonable in light of the purpose served by the forum.’”⁷⁷ It determined that the ASB constituted such a forum, with its purpose being “to develop attitudes of and practice in good citizenship within the school; to promote harmonious relations between students, clubs, and activities; and to act as a forum for student and faculty expression.”⁷⁸ Therefore, the court held that to further the forum’s purpose, the school could exclude Truth because its presence on campus had the potential to disrupt harmonious student relations, as Truth sought to limit its membership to solely Christians. In sum, the court held that to preserve a limited public forum, schools can use non-discrimination policies to deny benefits to religious groups so long as such policies are neutral and do not specifically target such groups because of the religious content.

Similar to the Ninth Circuit’s decision in *Truth*, the Supreme Court held in *Christian Legal Society v. Martinez* (2010), that a school could deny recognition to a religious group based on a neutral policy.⁷⁹ In *Martinez*, a chapter of the Christian Legal Society (CLS) at Hastings College of Law was denied official “Registered Student Organization” (RSO) status by the school, because it required its members to sign a “Statement of Faith” by which they pledged to conduct their lives in accord with Christian principles, including but not limited to the promise to not engage in sexual activity outside of traditionally-defined marriage. The school believed this requirement violated its “accept all-comers” policy as it inherently barred non-Christian and homosexual students from becoming CLS members. The Court held that Hastings’ RSO policy constituted a limited public forum; therefore, for the school to justifiably restrict the CLS, it had to prove it did so using viewpoint neutral criteria and that its actions were reasonable in light of the forum’s purpose. The Court found that Hastings met both criteria and did not violate the First Amendment rights of the CLS members. With regard to neutrality, the Court declared, “It is...hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers.”⁸⁰ Furthermore, the Court contrasted between the case before it and the situation that occurred in cases such as *Rosenberger*. In cases like *Rosenberger*, “universities singled out organizations for disfavored treatment because of their points of view. But Hastings’ all-comers requirement draws no distinction between groups based on their message or perspective.”⁸¹ In other words, unlike the situation in *Rosenberger*, Hastings’ policy was not specifically targeted at the religious beliefs of a single group; rather, it expected every one of its student groups, secular or religious, to adhere to the same policy. The Court held, “An all-comers condition on access to RSO status, in short, is textbook viewpoint neutral.”⁸² The court also believed that Hastings could legitimately apply this policy as it sought to further the purpose of the limited public forum to bring “together individuals with diverse backgrounds and beliefs,” to encourage “tolerance, cooperation, and learning among students.”⁸³ In sum, the Court held that a university could constitutionally enforce an “accept all-comers” policy against any type of group, religious or secular, because such a policy is inherently viewpoint neutral and constructive in furthering an all-inclusive educational environment.

⁷⁷ *Id.* at 649 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (internal quotations and citation omitted)).

⁷⁸ *Id.* at 649 (the above purposes were stated in the ASB Constitution).

⁷⁹ *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2978 (2010).

⁸⁰ *Id.* at 2293.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 2290

In conclusion, it is difficult to ascertain to what degree *Martinez* will affect the liberties of religious groups at public high schools and universities. The Court only ruled on the constitutionality of all-comers policies and did not address larger non-discrimination policies. Therefore, in theory, *Martinez* should only be applicable to cases in which a university or high school has a specific “accepts all-comers” policy and not a more general policy which bars discrimination against certain classes. Despite this, the Ninth Circuit seems to have already applied *Martinez* to a general non-discrimination clause. In *Alpha Delta v. Reed* (9th Cir. 2011), a Christian fraternity and sorority at San Diego State University (SDSU) were denied official recognition because they required their members to live in a manner that was consistent with Christian beliefs, therefore violating the university’s requirements for recognition. To receive on-campus status, SDSU mandated that an organization not condition its membership or eligibility for officer positions on religious criteria; thus, these two Christian organizations could not be officially recognized while simultaneously dictating their own terms of association. Quoting *Martinez*, the court stated, “the fact that a regulation has a differential impact on groups wishing to enforce exclusionary membership policies does not render it unconstitutional.”⁸⁴ Therefore, even though in *Martinez* the Court only specifically ruled on an all-comers policy, the Ninth Circuit used *Martinez*’s logic to validate SDSU’s application of its non-discrimination policy to deny recognition to Christian organizations. If courts continue to extend *Martinez* to apply to universities’ general non-discrimination policies, as opposed to only “accept all-comers” policies, the capacity for student religious groups to freely associate while maintaining official recognition will be severely hindered.

6. Use of Religious Texts

The Supreme Court has held that while public schools cannot mandate that students read religious texts as devotional exercises, schools may include such texts as part of a curriculum consistent with the First Amendment. In *Abington School District v. Schempp* (1966), the Court held that a Pennsylvania statute that required reading of the Bible at the start of each school day violated the Establishment Clause. The school district believed its practice was within First Amendment bounds because it allowed for students to opt-out of listening to the Scripture reading, but the Court disagreed. The Court stated, “When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”⁸⁵ The Court made it clear that any policy authorizing actions favoring a particular religion was unconstitutional, regardless of whether students had to participate in such actions. However, the Court clarified that the Bible may reasonably be judged to be “worthy of study for its literary and historic qualities” and that “nothing...said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.”⁸⁶ Therefore, while schools may not use the Bible and other religious texts to further a set of religious beliefs, such texts may be used as instruments of learning in appropriate classes of history, literature, etc.

⁸⁴ *Alpha Delta Chi-Delta v. Reed*, No. 09-55299, slip op. 9979, ____ (9th Cir. Aug. 2, 2011) (quoting *Christian Legal Soc’y*, 130 S. Ct. 2971, 2294 (2010) (internal quotations omitted)).

⁸⁵ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 221 (1966).

⁸⁶ *Id.* at 225.

Currently, there is controversy in Idaho over a policy of the Idaho Public Charter School Commission (IPCSC) disallowing the use of religious texts in Idaho Public Charter Schools. The IPCSC adopted this policy on recommendation from Idaho's Attorney General, who believed that using religious documents or texts in public school curricula would violate Article IX, § 6⁸⁷ of the Idaho Constitution.⁸⁸ The Nampa Classical Charter Academy challenged this policy as violating First Amendment rights, and the case is currently being litigated before the United States Court of Appeals for the Ninth Circuit.

7. Religious Attire

A student's right to wear religious attire is governed by very similar standards to those relating to religious expression. In *Tinker*, students expressed themselves by wearing black to protest the involvement of the United States in the Vietnam War. The Court noted that wearing armbands, "was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."⁸⁹ Therefore, the First Amendment protects wearing clothing which symbolizes a particular belief or opinion in the same manner as other forms of expression such as speech. *Tinker* established students' right to freely wear clothing symbolic of views, secular or religious, so long as wearing such clothing does not "substantially interfere with the work of the school or impinge upon the rights of other students."⁹⁰ Specifically, this decision ensures that students wishing to wear clothing or accessories representative of religious beliefs are entitled to express these beliefs freely as long as they do not do so in a disruptive manner. Accordingly, school officials cannot prohibit attire solely because it conveys a religious message; doing so would amount to unconstitutional viewpoint discrimination.

In 2010, a New York School District suspended a seventh grade student for repeatedly wearing his rosary to school, claiming that such attire resembled a gang symbol and was thus prohibited by the school's dress code. The student and his family claimed that such action violated his rights under the Free Exercise Clause and filed a federal lawsuit, which resulted in the court issuing an injunction allowing the student to wear his rosary.⁹¹ Eventually, a settlement was reached in which the school district agreed to amend its dress code policy to allow rosaries to be worn.

8. Evolution, Creationism, and Intelligent Design

Federal courts have ruled consistently against school district policies that ban the teaching of evolution or try and subvert it with religiously-based theories. In 1968, the Supreme Court ruled in *Epperson v. Arkansas* that state law prohibiting the teaching of evolution in public school class was unconstitutional. The Court stated that Arkansas had enacted this prohibition

⁸⁷ This Article states, "No sectarian or religious tenets or doctrines shall ever be taught in the public schools," and "no books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article."

⁸⁸ *Nampa Classical Acad. v. Goesling*, 2009 U.S. Dist. LEXIS 82456 (D. Idaho 2009).

⁸⁹ *Tinker v. Des Moines*, 393 U.S. 503, 505-06 (1969).

⁹⁰ *Id.* at 509.

⁹¹ Stipulated Order Extending Show Cause Order/Temporary Restraining Order, *R.H. v. Schenectady City Sch. Dist.*, No. 1:10-CV-640 (N.D.N.Y. 2010).

solely because it deemed evolution “to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.”⁹² The law had no secular purpose but was merely an attempt to advance Judeo-Christian beliefs within the government’s educational facilities. The Court rejected this attempt and stated, “There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.”⁹³

The Court extended its ruling in *Epperson* when it declared any teaching of creationism to be unconstitutional regardless of whether evolution was taught concurrently. In *Edwards v. Aguillard* (1987), the Court struck down a Louisiana statute that although not requiring evolution or “creation science” to be taught, mandated that whenever one was taught, the other must be taught as well. Applying the first prong of the *Lemon* test, the Court found that the statute did not have a clear, secular purpose and therefore violated the Establishment Clause. The Court maintained that while it is “normally deferential to a State’s articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.”⁹⁴ The Court believed that the statute’s true purpose was not, as the state legislature claimed, to “protect academic freedom,”⁹⁵ but rather to “narrow the science curriculum,”⁹⁶ and “advance the religious viewpoint that a supernatural being created humankind.”⁹⁷ Therefore, the Court interpreted Louisiana’s statute to violate the Establishment Clause as its teaching of “creation science” was simply an attempt to mask religious teaching using the guise of advancing secular aims.

Finally, one lower court has held that any teaching which may resemble or draw from creationist theory is unconstitutional and not a valid alternative to teaching evolution. In *Kitzmiller v. Dover Area School District* (M.D. Pa. 2005), the district court held that the school district’s policy mandating that “intelligent design” be offered as a differing view to evolution science was unconstitutional as it advanced a form of religious belief. The school district’s board of directors passed a resolution which stated, “Students will be made aware of gaps/problems in Darwin’s theory and of other theories of evolution including, but not limited to, intelligent design.”⁹⁸ The resolution mandated that teachers read a statement at the beginning of biology class to alert students that Darwin’s theory contained gaps and that a book teaching intelligent design was available for those who were interested in exploring different theories about the origin of life. The court ruled that, “ID is nothing less than the progeny of creationism,”⁹⁹ and like the “creation science” described in *Edwards*, intelligent design sought to “utilize scientific-sounding language to describe religious beliefs.”¹⁰⁰ In sum, the court in *Dover* ruled that any attempt to undermine a scientific theory with one which presupposed a supernatural being constituted endorsement of religion and thus could not be taught in public schools.

⁹² *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968).

⁹³ *Id.* at 106.

⁹⁴ *Edwards v. Aguillard*, 482 U.S. 578, 586-587 (1987).

⁹⁵ *Id.* at 586.

⁹⁶ *Id.* at 587.

⁹⁷ *Id.* at 591.

⁹⁸ *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708 (M.D. Pa. 2005).

⁹⁹ *Id.* at 721.

¹⁰⁰ *Id.* at 711.

9. Pledge of Allegiance

Supreme Court opinions contain numerous references to the Pledge of Allegiance, and while the Court has stated definitively that students cannot be compelled to recite the Pledge, the Court has not expressly held whether school-sponsored Pledge recitation violates the Establishment Clause because the Pledge contains the words “under God.” In *West Virginia State Board of Education v. Barnette* (1943), the Court overruled its previous decision in *Minersville School District v. Gobitis* (1940) in which it had held that requiring students to recite the Pledge did not violate the free speech rights of students who objected. In *Barnette*, the Court held that students could not be forced to salute the flag nor recite the Pledge of Allegiance because such mandates represented a form of governmental interference with individual beliefs. The Court stated, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹⁰¹

Recently, a challenge was brought against a Florida statute that required public school students to stand and recite the Pledge, with exemptions only being granted if a student provided a written statement from a parent excusing him from participating. An eleventh grade student in a Florida public school challenged the constitutionality of these requirements, and in *Frazier v. Winn* (11th Cir. 2008), the court held that the portion of the statute requiring students to stand during recitation of the Pledge should be removed as “students have a constitutional right to remain seated during the Pledge.”¹⁰² In regards, to the portion requiring parental consent to be exempted, the court cited *Yoder* in declaring that parents had a constitutional right to “guide... the education of their children”¹⁰³ and therefore concluded “that the State's interest in recognizing and protecting the rights of parents on some educational issues is sufficient to justify the restriction of some students' freedom of speech.”¹⁰⁴ Therefore, while students do have a constitutional right to object to reciting the Pledge of Allegiance, the Eleventh Circuit held that requiring parental consent to enact this right does not violate the Constitution. While, it is well established that students do not have to participate in the Pledge of Allegiance, this right does not supersede their status as minors who are legally subject to parental control.

In regards to the actual content of the Pledge of Allegiance, the Supreme Court has not ruled authoritatively on the constitutionality of the phrase “one Nation under God.” In *Engel*, the opinion of the Court contained a footnote which stated:

There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of

¹⁰¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁰² *Frazier v. Winn*, 535 F.3d 1279, 1282 (11th Cir. 2008) (quoting *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1274, 1278 (11th Cir. 2004)).

¹⁰³ *Id.* at 1285 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)).

¹⁰⁴ *Id.* at 1285.

belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.¹⁰⁵

In *Engel*, the Court sought to distinguish between the unconstitutionality of compelled prayer and the permissibility of reciting documents and songs mentioning reference to a Supreme Being. While this language does not explicitly refer to the Pledge of Allegiance, it is applicable because the Pledge is a “patriotic or ceremonial exercise” that expresses devotion for the country and “contains references to the Deity.”

The only challenge heard before the Supreme Court in relation to the Pledge’s content came in a 2004 case entitled *Elk Grove Unified School District v. Newdow*. In this case an atheist alleged that the words “under God” violated the Establishment Clause as well as violating his daughter’s right to non-belief under the Free Exercise Clause. The father shared joint-custody of the child with the child’s mother, who on the contrary endorsed the religious content of the Pledge. Due to this discrepancy, the Court ruled that the father did not have prudential standing to sue in federal court and therefore ruled against the father without reaching the merits of the constitutional claim.¹⁰⁶

Although the Supreme Court has not ruled on the constitutionality of the religious content contained in the Pledge of Allegiance, multiple lower courts have held that the words “under God” do not violate the Establishment Clause. For example, in *Newdow v. Rio Linda Union School District* (9th Cir. 2010) an atheist woman claimed that the words “under God” offended her non-religious beliefs and interfered with her right to direct her daughter’s upbringing. Even though the child had never participated or been forced to participate in the reciting of the Pledge, the mother believed that its recitation “indoctrinate[d] her child with the belief God exist[ed],”¹⁰⁷ and therefore should not be permitted at school. The court disagreed and stated:

We hold that the Pledge of Allegiance does not violate the Establishment Clause because Congress’ ostensible and predominant purpose was to inspire patriotism and that the context of the Pledge--its wording as a whole, the preamble to the statute, and this nation’s history--demonstrate that it is a predominantly patriotic exercise. For these reasons, the phrase “one Nation under God” does not turn this patriotic exercise into a religious activity.¹⁰⁸

The First Circuit issued a similar decision in *Freedom from Religion Foundation v. Hanover School District* (1st Cir. 2010). This suit involved two agnostic parents who challenged the constitutionality of a New Hampshire statute that required its schools to allocate time each day for students to voluntarily recite the Pledge. The parents believed that the mention of God in the

¹⁰⁵ *Engel v. Vitale*, 370 U.S. 421, 435 (1962).

¹⁰⁶ Although the Court’s opinion did not address the constitutional claim, in separate concurring opinions, Chief Justice Rehnquist and Justice O’Connor expressly stated that the religious content in the Pledge of Allegiance did not violate the Establishment Clause. Chief Justice Rehnquist stated, “Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.” *Elk Grove Unified Sch. Dist. v. Newdow*, 524 U.S. 1, 31 (2004).

¹⁰⁷ *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1012 (9th Cir. 2010).

¹⁰⁸ *Id.* at 1014.

Pledge constituted an establishment of religion and thus violated the rights of their children who were forced to listen to it every day. The court, however, found that the New Hampshire statute passed all three prongs of the *Lemon* test. The court specifically stated that the statute's purpose was secular, and that in reciting the Pledge, students promised "fidelity to our flag and our nation, not to any particular God, faith, or church."¹⁰⁹ Additionally, the court declared that the statute's "primary effect [was] not the advancement of religion, but the advancement of patriotism through a pledge to the flag as a symbol of the nation."¹¹⁰ Both the Ninth and First Circuits interpreted the Pledge of Allegiance in its entirety as a declaration of patriotism and not as religious expression, and therefore found the words "under God" to be constitutional and not to violate the Establishment Clause.¹¹¹

10. Observance of Religious Holidays and Celebrations

The Supreme Court has never expressly ruled on observing and celebrating religious holidays in schools, so therefore case law on this issue is scarce. However, applying the Court's ruling in *Tinker*, students may express their religious beliefs as they apply to particular holidays, as long as they do so in a non-disruptive manner. Therefore, they may wear holiday attire that expresses a religious message; "express their beliefs about religion in homework, artwork, and other written and oral assignments;"¹¹² and distribute pamphlets explaining the religious meaning of holidays during non-instructional time. In sum, students have the First Amendment right to express their beliefs about religious holidays in the same manner in which they may express their religious beliefs in general.

Similarly, the Court has never addressed whether school officials must grant excused absences for students wishing to miss class to observe religious holidays and celebrations. In *Zorach v. Clauson* (1952), however, the Court declared that a New York statute that allowed absences for religious observance and education was constitutional. The Court stated, "We would have to press the concept of separation of Church and State to...extremes to condemn the present law on constitutional grounds."¹¹³ Furthermore, the Court stated:

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.¹¹⁴

Accordingly, a school may have a policy in place to allow student to be absent for religious reasons and not violate the Establishment Clause.

¹⁰⁹ *Freedom from Religion Foundation v. Hanover Sch. Dist.*, 626 F.3d 1, 11 (1st Cir. 2010).

¹¹⁰ *Id.*

¹¹¹ See also *Croft v. Perry*, 624 F.3d 157 (5th Cir. 2010); *Myers v. Loudoun County Pub. Sch.*, 418 F.3d 395 (4th Cir. 2005); *Sherman v. Cmty Consol. Sch. Dist.* 21, 980 F.2d 437 (7th Cir. 1992).

¹¹² U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003).

¹¹³ *Zorach v. Clauson* 343 U.S. 306, 313 (2005).

¹¹⁴ *Id.* at 313-14.

Although the Court has established that schools may adopt policies allowing students to miss class to observe religious holidays and celebrations, it has not held such policies to be required. The Department of Education, however, has stated, “Where school officials have a practice of excusing students from class on the basis of parents’ requests for accommodation of nonreligious needs, religiously motivated requests for excusal may not be accorded less favorable treatment.”¹¹⁵ Thus, if schools allow absences for secular reasons such as sporting events, college visits, or court appearances, they may not discriminate against students who wish to miss class for religious reasons. Supreme Court precedent strongly suggests the Department of Education’s position is correct: “[I]n circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason.”¹¹⁶ In other words, if a student is entitled an absence for secular needs, he or she cannot be denied that benefit merely because the need is religious. The DOJ has committed itself to enforcing this right, and most recently in 2007 was instrumental in pushing a California school district to revise an attendance policy that had allowed for multiple excused absences for various secular reasons, but only one religious reason.¹¹⁷ In sum, although the Court has not required schools to grant excused absences for religious reasons, a school must allow them if it allows such absences for secular reasons.

11. Exemptions from Religiously Objectionable Classes and Assignments

One of the most contentious issues within public education is whether students have the right to “opt-out” of objectionable classes and assignments for religious reasons. Currently, many states have statutes that allow parents the right to remove their children from objectionable classes, but the Supreme Court has not decided whether the Free Exercise Clause requires such statutes. In *Yoder*, the Court established that parents had a right to “guide the religious future and education of their children,”¹¹⁸ and in *Pierce v. Society of Sisters* (1925), the Court affirmed that parents could elect to educate their children by means besides “instruction from public teachers only.”¹¹⁹ In other words, it is well-established that the government cannot force parents to send their children to public schools which conflict with their religious scruples; however, it becomes much more complicated for those parents who choose to send their children to public schools.

Currently, it is unclear to what extent parents may guide their children’s in public schools. In *Epperson*, the Court acknowledged that states have the “undoubted right to prescribe the curriculum for their public schools,”¹²⁰ and, unsurprisingly, such a right is a source of great controversy when parents believe that the curriculum is offensive to the religious beliefs they wish to impart to their children. And while parts of a curriculum may indeed offend various religious believers, the Court made it clear in *McCullum v. Board of Education* (1948) that to “eliminate everything that is objectionable to...[religious] sects or inconsistent with any of

¹¹⁵ U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645, 9647 (Feb. 28, 2003).

¹¹⁶ *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537 (1993).

¹¹⁷ *Scheidt v. Tri-Creek Sch. Corp.*, No. 2:05-CV-204 (N.D. Ind., complaint filed May 18, 2005), <http://www.justice.gov/crt/about/edu/documents/casesummary.php#tricreek>.

¹¹⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

¹¹⁹ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

¹²⁰ *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968).

their doctrines,...will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.”¹²¹

While parents do not have the authority to make a public school change its curriculum simply because it is deemed to be offensive to religious principles; the decisive issue is whether or not parents may remove their children from classes containing objectionable material. The Supreme Court has never ruled on “opt-out” rights, but multiple lower courts have issued decisions. The Tenth Circuit held in *Swanson v. Guthrie Independent School District* (10th Cir. 1998) that school boards are not required to allow students “dual-enrollment” in which they attend some classes at a public school and the remainder at a private institution or at home. In this case, parents wished to home school their daughter for religious purposes but wanted her to experience the benefit of certain public school classes in such subjects as foreign language and music. When the school board denied their request to allow their daughter to be a part-time student, the parents claimed the board’s policy violated their rights under the Free Exercise Clause. The court disagreed and held that the policy was neutral and did not place a religious burden on the parents as it did “not prohibit them from home-schooling [their daughter] in accordance with their religious beliefs, and [did] not force them to do anything that [was] contrary to those beliefs.”¹²² The court decision found that the Constitution did not require schools to accommodate religious beliefs by allowing parents to hand-pick which classes their children attended.

Extending the *Swanson* ruling, multiple circuits have held that the Constitution does not even require schools to provide “opt-outs” for specific lectures or lessons. In *Mozert v. Hawkins County Board of Education* (6th Cir. 1987), the court held that a Tennessee school did not have to provide an “opt-out” to religiously-objectionable readings in class because “governmental actions that merely offend or cast doubt on religious beliefs do not on that account violate free exercise. An actual burden on the profession or exercise of religion is required.”¹²³ The First Circuit held in *Brown v. Hot, Sexy, & Safer Productions* (1st Cir. 1995) that an assembly that featured an explicit sexual education presentation did not infringe “sincerely held religious values regarding chastity and morality.”¹²⁴ The court justified this decision by stating that there exists no fundamental privacy right to be free from “exposure to vulgar and offensive language and obnoxiously debasing portrayals of human sexuality,” and an “opt-out” remedy is not required for a right that does not exist. Finally, in *Parker v. Hurley* (D. Mass. 2008) the district court held that a Massachusetts school that taught kindergarten and first grade students about same-sex marriage did not violate parents’ right to free exercise or their right to freely raise their children. The school district had a policy that allowed students to “opt-out” of curriculum that “primarily involve[d] human sexual education or human sexuality issues;”¹²⁵ however, despite this policy, school officials decided to not inform parents before teaching such material. The court found this not to violate the Constitution and declared, “Students today must be prepared for citizenship in a diverse society. As increasingly recognized, one dimension of our nation’s diversity is differences in sexual orientation. In Massachusetts, at least, those differences may

¹²¹ *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203 (1948).

¹²² *Swanson v. Guthrie Indep. Sch. Dist.*, No. I-L, 135 F.3d 694, 698 (10th Cir. 1998).

¹²³ *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1068 (6th Cir. 1987).

¹²⁴ *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 527 (1st Cir. 1995).

¹²⁵ *Parker v. Hurley*, 474 F. Supp. 2d 261, 264 (D. Mass.), *aff’d*, 514 F.3d 87 (1st Cir. 2008).

result in same-sex marriages.”¹²⁶ In short, the school did not have to follow its own policy because its primary focus in teaching about homosexual marriage was not human sexuality, but rather on “fostering an educational environment in which gays, lesbians, and the children of same-sex parents will be able to learn well.”¹²⁷

Thus, while school districts may have “opt-out” policies, multiple lower courts have found that the Constitution does not require school districts to have them or in some circumstances even enforce them. Even classes involving sexual education and health are not automatic grounds for a constitutional exemption, and are subject to the same policies that govern other classes. But parents do have some limited statutory rights. If a class involves any type of “survey, analysis, or evaluation,” that involves their child’s participation, the Protection of Pupil Rights Amendment entitles parents to review any and all instructional materials related to such surveys, analyses, or evaluations.¹²⁸ In addition, absent parental consent, no student is required to submit to any kind of test designed to reveal information concerning political affiliations, psychological problems, sexual behavior and attitudes, illegal and anti-social behavior, critical appraisals of family relationships, legally privileged relationships, and income.¹²⁹ However, barring the inclusion of a survey, the final authority for parents who wish to remove their children from religiously-objectionable classes or assignment rests with individual school policy.

12. Graduation Ceremonies

The two most contentious issues surrounding graduation ceremonies involve school sponsored prayer and religious content in graduation and valedictory speeches. The Supreme Court’s decision in *Lee v. Weisman* (1992) currently serves as the controlling authority with regard to graduation prayer. In *Lee*, a school district invited a member of the local clergy to offer an invocation and benedictory prayers at the school’s commencement exercises. While the school did not tell the clergyman what to say, the school required that the prayer be non-denominational and gave the clergyman guidelines concerning non-denominational prayer. The school district defended its practice by saying that attendance and participation in religious exercises at a graduation were strictly voluntary. The Court disagreed and stated that because high school graduation is such a significant milestone in American society, attendance is “in a fair and real sense obligatory.”¹³⁰ The Court also reasoned that “public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction” made participation in the prayer not truly optional.¹³¹ The Court stated that actions such as standing could easily be interpreted as participating in and approving the religious activities and thereby pressure a dissenting student “to pray in a manner her conscience will not allow.”¹³² The government may not apply this type of religious coercion, and any policy which allows it violates the Establishment Clause. Accordingly, school districts

¹²⁶ *Id.* at 274.

¹²⁷ *Id.* at 275.

¹²⁸ 20 U.S.C. § 1232h(a).

¹²⁹ *Id.* § 1232h(b).

¹³⁰ *Lee v. Weisman*, 505 U.S. 577, 586 (1992).

¹³¹ *Id.* at 593.

¹³² *Id.*

may not sponsor prayer at graduation ceremonies; under *Lee*, such action is held to violate the Establishment Clause.

While *Lee* prohibits the government from sponsoring prayer at graduation ceremonies, *Lee* does not prohibit students from praying together at private baccalaureate ceremonies. Justice Souter noted in his concurring opinion in *Lee* that students may “organize a privately sponsored baccalaureate if they desire the company of like-minded students.”¹³³ Moreover, if a public school district rents its facilities to non-school groups during non-school hours, then the district must rent to religious groups such as the organizers of a religious baccalaureate service. The Court’s rulings in *Mergens*, *Good News Club*, and *Lamb’s Chapel* all support the notion that a policy of equal access for religious groups does not violate the Establishment Clause but rather exhibits a neutrality that does not treat religious groups more favorably or more hostilely than it treats secular groups. While schools may not sponsor or endorse baccalaureate ceremonies, their occurrence on school grounds is consistent with the Constitution.¹³⁴

Graduation and valedictory speeches that contain religious language remain a highly contentious legal issue, with their constitutionality in dispute in the lower courts. The Department of Education states:

Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression...that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content.¹³⁵

For instance, if a student is selected to speak based on his grade point average, and is allowed to independently compose his speech, the school may not discriminate against any religious language the student may decide to use. *Santa Fe* supports this reasoning, as it distinguished between government speech and private speech; while the government may not endorse religion, private parties can and are guaranteed constitutional protection.¹³⁶ Furthermore, the Court noted that because a speech is given on school property to a public audience does not automatically mean that such speech is the government’s speech.¹³⁷ In short, as long as a graduation speech can be reasonably understood as not endorsed or regulated by the school, it may freely refer to religion even if it is delivered on school property at school-sponsored events. Accordingly, the controversial question that must be answered regarding graduation speeches is whether their content can reasonably be attributed to the school or if it solely belongs to the speaker.

When a graduation speech is interpreted to bear the school’s approval or sponsorship, its content may be subject to editorial control. In *Hazelwood School District v Kuhlmeier* (1988), the Court stated, “Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as

¹³³ *Id.* at 629.

¹³⁴ U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645, 9648 (Feb. 28, 2003).

¹³⁵ *Id.*

¹³⁶ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 324 (2000).

¹³⁷ *Id.* at 302.

their actions are reasonably related to legitimate pedagogical concerns.”¹³⁸ Based on this reasoning, if a graduation speech is interpreted to “bear the imprimatur of the school”¹³⁹ and constitutes an academic experience, the school may restrict it using neutral and generally applicable criteria.¹⁴⁰ The Supreme Court has stated that if student expression is deemed to relate to pedagogical concerns, school officials are entitled to “assure that participants learn whatever lessons the activity is designed to teach...and that the views of the individual speaker are not erroneously attributed to the school.”¹⁴¹ Thus, it is possible that restrictions on speech at graduations do not have to necessarily be viewpoint neutral.

The Supreme Court’s distinction between private and government speech in *Santa Fe* has left open the possibility that speakers at graduation may include prayer or religious themes in their speeches. But this area of constitutional law remains highly unsettled, and the lower federal courts are split on whether schools may censor student graduation speeches based on content or viewpoint. Currently the Second,¹⁴² Third,¹⁴³ Ninth,¹⁴⁴ and Eleventh¹⁴⁵ Circuits have required viewpoint neutrality for school-sponsored speech while the First¹⁴⁶ and Tenth¹⁴⁷ Circuits have held that viewpoint neutrality is not necessary in all circumstances.¹⁴⁸ Any graduation speech that is deemed to “bear the imprimatur of the school” and relates to “legitimate pedagogical concerns” may, under *Hazelwood*, have its religious content stripped from it depending on the part of the country in which it is being delivered.

B. Religious Expression in the Workplace

1. Title VII of the Civil Rights Act of 1964

In regards to freedom of religion within the workplace, Title VII of the Civil Rights Act of 1964 is the piece of legislation most frequently called upon to protect the right of Americans to practice their religion while simultaneously pursuing a career. Title VII applies to all public sector employers, as well as all private businesses which have fifteen or more employees on their payroll for at least twenty weeks out of the year. Title VII declares that an individual may not be discriminated against because of his religion in all aspects of employment, including hiring,

¹³⁸ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

¹³⁹ *Id.*

¹⁴⁰ For example, the Tenth Circuit cited *Hazelwood* in *Corder v. Lewis Palmer School District* (10th Cir. 2009), to support its holding that the school district did not violate the Free Speech Clause by requiring valedictorians to submit their speech for approval beforehand, as well as requiring a student to apologize for making comments related to Christianity which were originally not a part of the approved speech. It further stated that the student’s free exercise claim failed because the student was disciplined not because of her religious beliefs, but rather because she did not follow the religion-neutral policy of submitting her speech for prior review.

¹⁴¹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

¹⁴² See, e.g., *Peck ex rel. Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 629-33 (2d Cir. 2005).

¹⁴³ See e.g., *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 173 (3d Cir. 1999), *aff’d in part by an equally divided court, en banc, vacated in part*, 226 F.3d 198 (3d Cir. 2000).

¹⁴⁴ See, e.g., *Planned Parenthood of S. Nev., Inc. v. Clark Cnty. Sch. Dist.*, 941 F.2d 817, 827-30 (9th Cir. 1991).

¹⁴⁵ See, e.g., *Bannon v. Sch. Dist. of Palm Beach Cnty.*, 387 F.3d 1208, 1215 (11th Cir. 2004).

¹⁴⁶ See, e.g., *Ward v. Hickey*, 996 F.2d 448, 452-54 (1st Cir. 1993).

¹⁴⁷ See, e.g., *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 926-27 (10th Cir. 2002).

¹⁴⁸ See, e.g., *Chiras v. Miller*, 432 F.3d 606, 615 n.27 (5th Cir. 2005) (“A split exists among the Circuits on the question of whether *Hazelwood* requires viewpoint neutrality.”).

firing, compensation, benefits, or promotion.¹⁴⁹ Title VII defines religion to include “all aspects of religious observance and practice, as well as belief.”¹⁵⁰ Therefore, employers may not in any way discriminate against religious practice in addition to belief.

Title VII also requires that employers must accommodate an employee’s religious practices to ensure the requirements of employment do not conflict with the expression of religious beliefs. Employers may be exempted from this directive only if they can demonstrate that they are “unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of [their] business.”¹⁵¹ The Equal Employment Opportunity Commission (EEOC) has interpreted a “reasonable accommodation” to include but not be limited to flexible scheduling, voluntary shift substitutions or swaps, job reassignments, and modifications to workplace policies or practices.¹⁵² This list contains several common methods that employers can use to remove any burdens that employment responsibilities have imposed on any employee’s religious practice; however, employers are not absolutely required to make any possible accommodations, but only those that will not place an “undue hardship” upon the operation of their business. In *Trans World Airlines v. Hardison* (1977), the Supreme Court held that an “undue hardship” resulted from any religious accommodation which created more than *de minimus* cost or burden upon an employer.¹⁵³ The EEOC has defined a *de minimus* cost to be any accommodation that is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires employees to do more than their share of potentially hazardous or burdensome work.¹⁵⁴ Therefore, an employer is not required to cater to an employee’s religious needs if such an accommodation will create a burden to the operation of his or her business. Title VII thus creates a balance that ensures employees that they cannot legally be discriminated against due to their beliefs, and that employers must reasonably accommodate their religious needs; conversely, it enables employers to have some discretion in determining accommodations by not forcing them to incur any undue hardships.

2. Religious Speech and Displays

Title VII mandates that employers must reasonably accommodate their employees’ religious practices; therefore, Title VII protects any religious speech employee’s religion requires. Employees are allowed to share their faith at work as long as they do not infringe on the rights of other employees and do not interrupt the workplace agenda, as both of these could

¹⁴⁹ 42 U.S.C. § 2000e-1.

¹⁵⁰ *Id.* § 2000e.

¹⁵¹ *Id.*

¹⁵² U.S. Equal Employment Opportunity Comm’n, Compliance Manual § 12 (2008), available at <http://www.eeoc.gov/policy/docs/religion.html>.

¹⁵³ In *Hardison*, a TWA employee, Hardison, could not work on Saturdays due to his religion. After making multiple attempts to accommodate his religious needs, TWA ultimately fired him because he had not accepted TWA’s offers and continued to refuse to work on Saturdays. The Supreme Court held that TWA’s action had not violated Title VII because “to require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship.” *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

¹⁵⁴ U.S. Equal Employment Opportunity Comm’n, Compliance Manual § 12- IV(B)(2) (2008), available at <http://www.eeoc.gov/policy/docs/religion.html>.

be considered undue hardships.¹⁵⁵ Additionally, employers and supervisors may also communicate their faith with subordinate employees as long as such actions are not institutionalized and employees are not shown preferential or negative treatment based upon accepting or denying such beliefs.¹⁵⁶ Generally, Title VII covers the majority of religious expression and is only limited when an employer can show that such expression hindered workplace efficiency either by disrupting the work of the employee expressing his or beliefs or by causing disturbances with co-workers being exposed to such beliefs.

Conversely, Title VII protects against harassing statements and conduct based upon an employee's religion. Harassing actions are defined as being unwelcome and "sufficiently severe or pervasive to alter the conditions of employment by creating an...offensive work environment."¹⁵⁷ An employee may never be "required or coerced to abandon, alter, or adopt a religious practice as a condition of employment,"¹⁵⁸ as such a condition threatens tangible economic and psychological harm. However, an altered working environment is not solely the result of tangible harms but can also occur if employees are at all discouraged "from remaining on the job, or...advancing in their careers," solely because of their religious beliefs.¹⁵⁹ Therefore, Title VII protects all employees from being subjected to antagonizing behavior due to their religious beliefs, and it assures them that they have the right to be free from a work environment which in any way limits them because of what they believe. In summary, Title VII creates a type of joint defense which protects employees from the unreasonable restriction of their religious speech, while simultaneously ensuring that no employee is forced to endure a hostile work environment created by harassing forms of religious speech.

Religious displays are generally governed by the same standards as religious speech. Employees may have religious displays at their workspace so long as such a display is necessary for the practice of their religion and does not disrupt the work environment or infringe upon other workers' rights. In *Powell v. Yellow Book USA* (8th Cir. 2006), an employee sued her employer for not forcing another employee to remove religious sayings attached to her cubicle. The court ruled in the employer's favor and stated, "An employer...has no legal obligation to suppress any and all religious expression merely because it annoys a single employee."¹⁶⁰

¹⁵⁵ See EEOC Dec. 6674 (1976). In this case, an orthodox Muslim who was fired for being "overzealous" in his conversations concerning his belief was found to have been the victim of discrimination. The employer's claim that the employee's actions created an undue hardship did not prevail as there was no evidence that the employees' actions impeded his ability to do his job, or disrupted the operation of the workplace. See *id.*

¹⁵⁶ See *Brown v. Polk Cnty.*, 61 F.3d 650, 657 (8th Cir. 1995) (court ruled that Brown, who was a supervisor of around fifty employees, did not impose an undue hardship upon his employer as the company had no evidence of "'imposition on co-workers or disruption of the work routine,' generated by occasional spontaneous prayers and isolated references to Christian belief" (quoting *Duane Terrell Burns v. S. Pacific Transp. Co.*, 589 F.2d 403, 407 (1978))); see also *EEOC v. Townley Eng'g & Mfg.*, 859 F.2d 610, 621 (9th Cir. 1988) ("Title VII does not, and could not, require individual employers to abandon their religion."). Requested accommodations must be based on religious doctrine and not merely personal preference. *Eatman v. U.S. Parcel Service*, 194 F. Supp. 2d 256 (S.D.N.Y. 2002) An employer's requirement that individuals with non-traditional hairstyles wear hats did not violate the Title VII rights of an employee who wore dreadlocks as an expression of religious beliefs because the employee's decision was a personal preference and not required by religious tenets. *Id.*

¹⁵⁷ U.S. Equal Employment Opportunity Comm'n, Compliance Manual § 12- III(A)(2) (2008), available at <http://www.eeoc.gov/policy/docs/religion.html>

¹⁵⁸ *Id.*

¹⁵⁹ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

¹⁶⁰ *Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074, 1078 (8th Cir. 2006).

Powell contrasts with *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) in which the court ruled that an employee's religious display condemning homosexuality was not protected under Title VII. The court ruled that the display could be interpreted as demeaning to homosexual employees and thus had the potential to create a hostile work environment. Furthermore by accommodating the display, Hewlett-Packard faced an undue hardship as the display "would have inhibited its efforts to attract and retain a qualified, diverse workforce, which the company reasonably view[ed] as vital to its commercial success."¹⁶¹ Together, these two cases serve to differentiate those religious displays Title VII protects and those that fall outside of its boundaries. In sum, religious displays are permissible in the workplace as long as they do not create a hostile or intimidating environment for other employees, and do not place an undue hardship on employers.

3. Religious Attire and Grooming

As with religious speech and displays, an employer must accommodate an employee's request to dress and groom himself in ways his religion requires unless the employee's request would place an undue hardship on business operations. This protection extends to government as well as private employees, so long as government employees' religious attire is clearly meant to represent personal beliefs and is not presented as a government viewpoint. The EEOC has declared that requests to wear religious head coverings and dress, (such as a Jewish *yarmulke* or a Muslim *hijab*) as well as requests to maintain certain types of hairstyles and facial hair (such as a Sikh's uncut hair and beard) represent religious practices protected under Title VII.¹⁶² An employer is only exempted from accommodating these requests if granting them would jeopardize the safety of the work environment or create another type of undue hardship on the business.¹⁶³

One controversial ground cited by employers not wishing to accommodate religious attire or grooming requests is that such requests would cause undue hardship by tainting the company's public image. In *Cloutier v. Costco Wholesale Corp* (1st Cir. 2004), a female Costco employee was denied her request to wear religiously-motivated facial piercings, due to a company policy prohibiting facial jewelry. The employee claimed that because her religious beliefs required her piercings, Title VII required Costco to accommodate her. The court disagreed and stated, "Granting such an exemption would be an undue hardship because it would adversely affect the employer's public image."¹⁶⁴ In contrast to *Cloutier*, the district court in *EEOC v. Red Robin Gourmet Burgers* (W.D. Wash 2005) held that an employer was required to accommodate a male employee's request to display religious tattoos, regardless of the employer's claim that such an accommodation would damage its reputation as a family-friendly establishment. The court justified its ruling by stating, "Hypothetical hardships based on unproven assumptions typically fail to constitute undue hardship . . . Red Robin must provide

¹⁶¹ *Peterson v. Hewlett-Packard Co.* 358 F.3d 599, 607 (9th Cir. 2004).

¹⁶² U.S. Equal Employment Opportunity Comm'n, *Religious Discrimination*, <http://www.eeoc.gov/laws/types/religion.cfm> (last visited Aug. 16, 2011).

¹⁶³ *Id.*; see also *Webb v. City of Philadelphia*, 562 F.3d 256, 260-61 (3d Cir. 2009) (Court granted summary judgment against police officer's request to wear a "religious" headscarf while in uniform and on duty since the accommodation would present an undue hardship.).

¹⁶⁴ *Cloutier v. Costco Wholesale Corp.* 390 F.3d 126, 136 (1st Cir. 2004).

evidence of ‘actual imposition on co-workers or disruption of the work routine’ to demonstrate undue hardship.”¹⁶⁵

Cloutier and *Red Robin* represent a current division among courts in interpreting the extent to which Title VII protects religious attire and grooming. If one reads *Cloutier* broadly, it may have grave implications for those wishing to wear religious attire as businesses could simply cite a desire to maintain their public image as legitimate grounds for denying exemptions to dress-code policy. In conclusion, the right to wear religious attire is fairly established and enforced, but there is the possibility that court rulings that have negatively affected minority religions could be applied more generally and hinder mainstream faiths as well.¹⁶⁶

4. Observance of Religious Holidays and Celebrations

In regard to an employee’s request to be excused from work for religious reasons, the EEOC has stated that voluntary substitutes and shift swaps are examples of reasonable accommodations that do not impose an undue hardship upon an employer’s operation.¹⁶⁷ However, an employer does not have to permit a substitute or swap if by doing so it could incur added costs or unfairly affect the amount of work that other employees have to perform. As with other areas of religious practice in the workplace, an employer must try and reasonably accommodate an employee’s request to miss work for religious reasons, but only if such a request does not pose more than *de minimus* cost or burden.

5. Use of Work Facilities for Religious Reasons

The EEOC states that an employer must meet an employee’s need to use work facilities for religious reasons if such a request can be reasonably accommodated without causing undue hardship.¹⁶⁸ If an employer allows office space to be used for non-work, non-religious purposes, the employer must allow the space to be used for religious needs; denying religious usage would constitute religious discrimination. However, if an employer’s policy only allows company property to be used for work-related reasons, an employee’s religious request is less likely to prevail. For example, in *Berry v. Department of Social Service* (9th Cir. 2006), the court held that an employer did not have to meet a Christian employee’s request to use a conference room to conduct prayer meetings because the employer did not allow other non-work related groups to use the space. Furthermore, the employer “did not prohibit its employees from holding prayer meetings in the common break room or outside, but declined to open the [conference room] to

¹⁶⁵ *EEOC v. Red Robin Gourmet Burgers, Inc.*, 2005 U.S. Dist. LEXIS 36219, *19 (W.D. Wash 2005) (quoting *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981)).

¹⁶⁶ In *Brown v. F.L. Roberts*, 419 F. Supp. 2d 7, 17 (D. Mass. 2006), a district court judge observed, “[i]f *Cloutier*’s language approving employer prerogatives regarding ‘public image’ is read broadly, the implications for persons asserting claims for religious discrimination in the workplace may be grave. One has to wonder how often an employer will be inclined to cite this expansive language to terminate or restrict from customer contact, on image grounds, an employee wearing a yarmulke, a veil, or the mark on the forehead that denotes Ash Wednesday for many Catholics. More likely, and more ominously, considerations of ‘public image’ might persuade an employer to tolerate the religious practices of predominant groups, while arguing ‘undue hardship’ and ‘image’ in forbidding practices that are less widespread or well known.” *Id.*

¹⁶⁷ U.S. Equal Employment Opportunity Comm’n, *Religious Discrimination*, <http://www.eeoc.gov/laws/types/religion.cfm> (last visited Aug. 16, 2011).

¹⁶⁸ *Id.*

employee social or religious meetings as such use might convert the conference room into a public forum.”¹⁶⁹ Therefore, employers retain primary control over their facilities, but they must still make reasonable efforts to accommodate their employees’ religious needs. Additionally, employers are not allowed to generally make their facilities available for non-work related purposes and subsequently deny their use for religious reasons. The Supreme Court has made it clear that a benefit “that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free...not to provide the benefit at all.”¹⁷⁰ Thus, employers may not be hostile towards religion in the workplace and must not provide benefits in a discriminatory fashion.

C. Right of Conscience

For the purposes of this memo, the term “Right of Conscience” refers to the ability of employees to be able to refuse a work-related task which they judge to be morally objectionable based on the tenets of their religion. This type of situation has gained the most media attention within the healthcare industry, but individuals across a wide range of professions are daily forced with the difficult decision of either performing tasks in violation of their religion, or objecting to such tasks with the fear of facing repercussions. The following sections detail some of the environments where vocational / legal duties and religious beliefs most often clash; at issue in each situation is whether the Free Exercise clause or various statutes allow employees and organizations to be exempted from neutral, generally-applicable policies.

1. Healthcare Professionals

Within the healthcare industry, doctors, nurses, and other medical personnel face the possibility of performing or assisting in procedures, such as abortions and sterilizations, that conflict with their religious beliefs. Passed in 1973, the Church Amendments sought to address this dilemma by prohibiting any entity which received federal funding from forcing “an individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions....”¹⁷¹ Furthermore, the Church Amendments proscribed any discriminatory action targeted towards an individual “because he refused to perform or assist in the performance of such a [sterilization] procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions....”¹⁷² Because of the Church Amendments, hospitals and health clinics that receive federal funding cannot compel any

¹⁶⁹ *Berry v. Dep’t of Social Servs.*, 447 F.3d 642, 657 (9th Cir. 2006).

¹⁷⁰ *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984)). Despite this statement, the Seventh Circuit ruled that General Motors did not violate Title VII by providing resources to recognized employee “affinity groups”, while simultaneously refusing to recognize one based on Christianity. The court justified its ruling by stating, “General Motors’s Affinity Group policy treats all religious positions alike—it excludes them all from serving as the basis of a company-recognized Affinity Group. The company’s decision to treat all religious positions alike in its Affinity Group program does not constitute impermissible ‘discrimination’ under Title VII.” *Moranski v. General Motor Corp.*, 433 F.3d 537, 541 (7th Cir. 2005). This case may be somewhat of an anomaly and may not represent a trend in the courts.

¹⁷¹ 42 USCS § 300a-7(a)(1).

¹⁷² *Id.* § 300a-7(c)(1).

individual to perform a sterilization or abortion procedure to which he or she objects on religious grounds, nor can an objector be subject to any kind of employment discrimination because of his or her refusal to perform one of these procedures.

Much in the same way that the Church Amendments protect individuals, the Weldon Amendment and the Public Health Service Act protect organizations who do not wish to perform or pay for abortions. Both of these pieces of legislation ensure that hospitals, health clinics, and insurance providers will not face governmental discrimination due to their decision not to provide or fund abortions. Specifically the Public Health Service Act states that no government that receives federal financial assistance may “subject any health care entity to discrimination on the basis that--the entity refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions.”¹⁷³ Accordingly, this act, along with the Weldon Amendment, ensures that healthcare entities, such as religiously-affiliated hospitals, will not be penalized for following conscience and refusing to support abortions. Furthermore, the Public Health Service Act states that post-graduate physician training programs that do not provide training for abortions must be judged by the same accreditation standards as other programs that do provide such training.¹⁷⁴ In this way, the Act ensures that medical schools that do not provide abortion training will not be forced to provide that training to be accredited.

In 2008, President Bush passed a series of regulations to ensure that government agencies complied with the non-discrimination policies of the Church Amendments, Weldon Amendment and the Public Health Services Act (collectively known as the Conscience Statutes), and were not compelling individuals or healthcare entities to perform or fund abortions. Citing concerns “about the development of an environment in sectors of the health care field that [was] intolerant of individual objections to abortion or other individual religious beliefs or moral convictions,”¹⁷⁵ the regulations sought to clarify the obligations placed on government agencies by federal law. The regulations also required that recipients of federal funding certify in writing their compliance with the Conscience Statutes’ requirements. Finally, the regulations clarified several definitions. Most notably, the regulations interpreted the Church Amendments’ provision which stated that an individual could not be forced to perform or assist in performing an abortion or sterilization procedure. The regulations defined “assist in the performance” to mean “any activity with a reasonable connection to a procedure, health service or health service program, or research activity;” such activities included “counseling, referral, training, and other arrangements for the procedure, health service, or research activity.”¹⁷⁶ The regulations did not alter existing law in any way but simply ensured compliance with existing laws and provided an overall better understanding of obligations those laws imposed and protections they provided.

Citing the Bush-era regulations alleged potential for confusion and harm, President Obama authorized new regulations that largely rescinded the Bush regulations. Obama’s regulation removed the section of the Bush regulations that required written certification of compliance with non-discriminatory laws and the section defining statutory provisions. The

¹⁷³ 42 USCS § 238n(a)(1).

¹⁷⁴ *Id* § 238n(b)(1).

¹⁷⁵ 73 Fed. Reg. 78071, 78073 (Dec. 18, 2008).

¹⁷⁶ *Id.* at 78097.

Obama Administration removed the certification section because that section imposed financial and administrative burdens upon healthcare entities and because the Administration simply believed that the certification requirements were “unnecessary to ensure compliance with the federal health care provider conscience protection statutes.”¹⁷⁷ The definitions section was removed because there was concern that if interpreted too broadly, healthcare providers could be led to mistakenly believe they had the right under the Conscience Statutes “to refuse to treat entire groups of people based on religious or moral beliefs.”¹⁷⁸ The new rule clarified the original purpose of the Conscience Statutes, stating:

The Federal provider conscience statutes were intended to protect health care providers from being forced to participate in medical procedures that violated their moral and religious beliefs. They were never intended to allow providers to refuse to provide medical care to an individual because the individual engaged in behavior the health care provider found objectionable.¹⁷⁹

The new rule made it clear that providers could not claim the Conscience Statutes to justify not treating someone whose lifestyle conflicted with the providers’ religious beliefs; therefore, the statutes’ protection only extended to those individuals who were being coerced to perform religiously objectionable procedures such as abortions and sterilizations. The changes made by the Obama administration did not alter previously-existing federal laws, but they did significantly limit the breadth given to them by the 2008 Bush Regulations.

One of the main impetuses for rescinding the Bush-era regulations was the fear that the broad language of the definitions section could be used to justify limiting access to contraception. The Obama administration was concerned that the word “abortion” could be interpreted to include “contraception” and thus lead providers to believe that the Conscience Statutes allowed them to refuse to provide birth control and emergency contraceptives based on religious objections. The new rule clarified that federal law, stating, “There is no indication that the federal health care provider conscience statutes intended that the term ‘abortion’ included contraception.”¹⁸⁰

Despite this clarification, there currently exists much debate surrounding the rights of those religiously-opposed to dispensing contraception, and pharmacies are at its forefront. Many pharmacists believe that types of emergency contraception such as Plan B are immoral and to dispense them amounts to participating in the taking of human life; therefore, they do not believe that their religious beliefs allow them to dispense emergency contraception to customers. The American Pharmacists Association (APhA) has stated that it “recognizes the individual pharmacist’s right to exercise conscientious refusal and supports the establishment of systems to ensure patients’ access to legally prescribed therapy without compromising the pharmacist’s right of conscientious refusal.”¹⁸¹ In this way, pharmacists are not forced to violate their

¹⁷⁷ 76 Fed. Reg. 9968, 9974 (March 25, 2011).

¹⁷⁸ *Id.* at 9973.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 9974.

¹⁸¹ *Federal Conscience Clause*, Gov’t Aff. Issue Brief (Am. Pharmacists Ass’n), Mar. 2009, at 3, *available at* <http://www.pharmacist.com/AM/Template.cfm?Section=Home2&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=15688>.

consciences so long as they ensure that patient's needs are met by another willing pharmacist or healthcare professional. Currently five states explicitly allow for pharmacists to refuse to distribute emergency contraception;¹⁸² five more states have broad refusal clauses that do not specifically mention pharmacists, but may apply to them.¹⁸³ Conversely, only California requires that pharmacists fill all valid prescriptions.¹⁸⁴

Two of the most noteworthy rulings to date on this issue have resulted in somewhat conflicting decisions regarding pharmacist's rights. In *Stormans, Inc. v. Selecky* (9th Cir. 2009), the court upheld a Washington state law which required pharmacies to deliver lawfully prescribed FDA-approved medications, among which was emergency contraception. The court justified its ruling by stating that the law was neutral and that its "neutrality...[was] not destroyed by the possibility that pharmacists with religious objections to emergency contraception will disproportionately require accommodation under the rules."¹⁸⁵ Conversely, in *Morr-Fitz, Inc. v. Blagojevich* (Ill. Cir. Ct. Apr. 5, 2011) an Illinois state court invalidated a state law compelling pharmacists to dispense emergency contraception as the court declared that the law violated the state's RFRA and the First Amendment Free Exercise Clause.¹⁸⁶ It seems that until one of these types of cases reaches the Supreme Court, decisions will continue to be made on a case-to-case basis depending on state law; therefore, the constitutional right of pharmacists to be able to refuse to dispense emergency contraception is currently unclear.

2. Churches, Religious Schools, and Other Religious Organizations

Under Title VII, religious organizations are allowed to show preferential treatment for members of the same religion in employment decisions and thus can legally discriminate using religious criteria. Title VII states that it does not apply to a "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."¹⁸⁷ In this way, a Roman Catholic school may choose to hire a Catholic teacher instead of a Protestant teacher solely for religious reasons and not be found liable for discrimination under Title VII. However, Title VII does not allow employers to discriminate based on other criteria such as race or sex.

Additionally, the Supreme Court has ruled that religious organizations may not discriminate against protected classes. In *Bob Jones University v. United States* (1983) the Court held that the IRS could remove a Christian university's tax-exempt status due to its racially discriminatory policies despite the fact that the school claimed the policies were based upon Biblical interpretations. The Court held that the IRS could justifiably burden the university's First Amendment rights because "the Government [had] a fundamental, overriding interest in eradicating racial discrimination in education" that "substantially outweigh[ed] whatever burden

¹⁸² Arkansas, Georgia, Idaho, Mississippi, and South Dakota, see Guttmacher Instit., *State Policies in Brief: Emergency Contraception*, 2 (2011), available at http://www.guttmacher.org/statecenter/spibs/spib_EC.pdf

¹⁸³ Colorado, Florida, Illinois, Maine, Tennessee. See *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1131 (9th Cir. 2009).

¹⁸⁶ *Morr-Fitz, Inc. v. Blagojevich*, No. 2005-CH-000495, (Ill. Cir. Ct. Apr. 5, 2011) (order granting declaratory and injunctive relief), available at http://media.aclj.org/pdf/judgerienziruling_20110405.pdf.

¹⁸⁷ 42 U.S.C. § 2000e-1.

denial of tax benefits place[d] on [the university's] exercise of [its] religious beliefs.”¹⁸⁸ *Bob Jones* held, in effect, that the government had such a compelling interest in assuring equal treatment for all of its citizens that it could legitimately burden the university's free exercise of religion to achieve that interest. Therefore, both Title VII and the Supreme Court place limits on the extent to which religious organizations may avoid adherence to government non-discrimination policies.

Recent events in Illinois illustrate the possible danger to free exercise imposed in the name of nondiscrimination. Illinois enacted a new law entitled the Religious Freedom Protection and Civil Union Act.¹⁸⁹ This Act has legalized same-sex unions and has forced Catholic adoption agencies either to assign children to same-sex couples in the same way as they would heterosexual couples or lose their foster care and adoption contracts with the state. The state has already chosen not to renew its contracts with those Catholic adoption agencies electing not to comply, and currently the matter is being heard in a state court.¹⁹⁰ Examples such as this one are evidence that religious organizations are not always free to fully determine and follow their mission statements as government anti-discrimination policies often place pressure on religious groups to significantly change their policies or in some circumstances completely disband.

One protection that religious organizations can employ against burdensome government policies is the “ministerial exception.” The ministerial exception can best be described as a sort of “blanket protection” that prevents the government from interfering with the internal affairs of religious bodies such as churches, synagogues, and mosques. Although this right is not specifically stated in the First Amendment, multiple courts have interpreted the First Amendment to contain this exception.¹⁹¹ Even in *Employment Division v. Smith*, the Supreme Court acknowledged that the government may not “lend its power to one or the other side in controversies over religious authority or dogma.”¹⁹² Federal courts have almost unanimously agreed that the government may not from enact policies or make judgments concerning a religious organization's internal affairs as doing so would violate the Establishment Clause as well as the organization's rights under the Free Exercise Clause. Therefore, the ministerial exception enables a religious organization to conduct its employment practices in some ways that may otherwise constitute discrimination under Title VII without fear of governmental reproach. The courts, however, are significantly divided in their opinions about the breadth of the ministerial exception's protection and whether it should apply to religious organizations other than churches, synagogues, etc. Currently these questions have been answered on a case-by-case basis, but later in 2011 the Supreme Court will hear a case entitled *Hosanna-Tabor v. EEOC* that likely will answer at least some questions about the ministerial exception's reach.¹⁹³ In *Hosanna-Tabor*, the Court will decide whether religiously-affiliated schools may operate their

¹⁸⁸ *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983).

¹⁸⁹ 750 ILL. COMP. STAT. ANN. 75/1-75/90 (LexisNexis 2011).

¹⁹⁰ See Manya Brachear, *State Severs Foster Care Ties with Chicago Charities*, Chicago Tribune, July 11, 2011, available at http://articles.chicagotribune.com/2011-07-11/news/chi-state-severs-fostercare-ties-with-catholic-charities-20110711_1_children-with-unmarried-cohabiting-catholic-charities-civil-unions.

¹⁹¹ See *McClure v. Salvation Army*, 460 F.2d 553, 558, 560 (5th Cir. 1972); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724–25 (1976) (all of these cases hold that religious bodies have an absolute right to elect their leaders free from government interference).

¹⁹² *Employment Division v. Smith*, 494 U.S. 872, 877 (1990).

¹⁹³ See *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769 (6th Cir. 2010).

employment practices under the protection of the ministerial exception or whether or not they must abide by Title VII regulations. Whatever the Court decides will be of great significance to religious organizations and could substantially affect their ability to conduct their employment practices in a manner consistent with their religious beliefs.

3. Religious Beliefs and Anti-Discrimination Policies

Over the last decade, there have been increased instances of religious beliefs coming into conflict with non-discrimination policies. Meant to be neutral, these policies often have the incidental effect of pressuring a religious individual or group to condone lifestyles and decisions they morally oppose. In 2000, the Supreme Court made one of its most controversial rulings when in *Boy Scouts of America v. Dale* the Court decided that the Boy Scouts could legally revoke the membership of an assistant scoutmaster because of his homosexuality despite a New Jersey law that prohibited discrimination based on sexual orientation. The Court determined that the Boy Scouts engaged in “expressive association” as they sought to recruit scoutmasters who would “instill values in young people;”¹⁹⁴ one of the values the Scouts held was its belief that homosexual activity is immoral.¹⁹⁵ Therefore, the Court ruled that forcing the Scouts to accept an openly homosexual leader would force them to send a “distinctly different message”¹⁹⁶ than they desired, and therefore such action would significantly hinder their right of expressive association. The Court’s ruling essentially gave the Boy Scouts the constitutional right to bar homosexuals from becoming leaders.

Although *Dale* affirmed a group’s right to associate, it did little to address the rights of religious believers whose beliefs about homosexual activity collide with state anti-discrimination laws. Currently under Title VII, “sexual orientation” and “gender identity” are not listed as protected classes, and therefore discrimination based on either of these characteristics is not grounds to file a complaint with the EEOC. But many state and local governments have adopted policies that makes such discrimination illegal and therefore allow aggrieved parties to sue individuals or corporations that they believe unfairly targeted them based on their sexual orientation or gender identity. A question of great significance for religious individuals is whether state and local policies prohibiting discrimination based on sexual orientation can legally burden their free exercise by forcing them to extend equal benefits to proponents of a lifestyle that they find to be morally objectionable or to suppress speech objecting to that lifestyle. A related issue is whether states may allow private businesses to apply their own policies against sexual orientation discrimination to restrict employees’ religiously-motivated speech disapproving of homosexuality.

Religious believers generally have not fared well in these types of cases. Courts have held that companies may apply their non-discrimination policies to legally fire¹⁹⁷ and restrict the speech¹⁹⁸ of religious employees expressing their disapproval of homosexuality. In such cases,

¹⁹⁴ *Boy Scouts of America v. Dale*, 530 U.S. 640, 650 (2000).

¹⁹⁵ *Id.* at 671-72.

¹⁹⁶ *Id.* at 652.

¹⁹⁷ *Bodett v. CoxCom*, 366 F.3d 736 (9th Cir. 2004) (The court held that a Christian employee who voiced her beliefs about homosexuality to an openly-gay employee had violated her employer’s non-discrimination policy and thus she had not been fired because of her religious beliefs, but because she violated a legitimate policy.)).

¹⁹⁸ *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (see explanation in section B2).

courts judged that under Title VII, employers do not have to accommodate religious beliefs that impose more than a *de minimus* cost upon business operations; therefore, employers can legally enforce non-discrimination policies against religious expression objecting to homosexuality because such expression has the potential to disrupt the harmonious office relations that the policy is trying to preserve. In other words, Title VII's protection for religious speech expressing disapproval of homosexuality is practically non-existent as such speech may be deemed offensive, and thus accommodating it would create a negative work environment that would impose an undue hardship on employers. In this manner, courts will likely continue to consider employer nondiscrimination policies to be a legitimate mechanism to suppress religious speech by employees objecting to homosexuality. Moreover, non-discrimination policies and laws are forcing people in professions such as psychology¹⁹⁹ and reproductive services,²⁰⁰ and people in the business of renting properties,²⁰¹ to either recant their religious beliefs about homosexuality, or express their views openly and suffer the repercussions. In summary, the increasing emergence of non-discrimination policies which list sexual orientation as a protected class will continue to significantly burden the religious practice of individuals objecting to such practices, as the government's interest to create a society of equality will be judged to be a higher priority than an individual's free exercise rights.

D. Government Funding for Religiously Affiliated Organizations

1. Government Subsidies for Religious Schools

In determining the constitutionality of policies that direct government funds towards religiously-affiliated schools, the Supreme Court has traditionally held that such policies do not violate the Establishment Clause as long as they do not favor certain types of schools over others, and ensure that funds are only used for secular purposes and materials. Despite the strict separationist doctrine advocated in *Everson*, the Court in *Everson* held that the government could provide benefits to families of religious and non-religious students alike. The Court held that a New Jersey statute which allowed students going to parochial schools to be reimbursed for bus fares in the same way as students who went to public schools was constitutional. The Court defended its decision by stating, "The [First] Amendment requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."²⁰² In this way, the Court made it clear that the Establishment Clause only required a neutral approach to religion, and not one which actively disfavored it. Similarly, the Court

¹⁹⁹ See *Ward v. Wilbanks*, 2010 U.S. Dist. LEXIS 127038 (E.D. Mich. 2010) and *Keeton v. Anderson-Wiley*, 733 F. Supp. 2d 1368 (S.D. Ga. 2010) (Both of these cases involve students in separate counseling masters degree programs, who were threatened with expulsion for professing their religious beliefs, especially in regard to their views on homosexuality. Both of their respective schools believed that their views made them unfit to counsel homosexual clients, therefore they required them to change their viewpoints as a condition of receiving their accreditation. These cases are currently being litigated in the Sixth and Eleventh Circuits respectively.).

²⁰⁰ See *North Coast Women's Care Medical Group, Inc. v. Superior Court*, 44 Cal. 4th 1145 (Cal. 2008) (California Supreme Court ruled that a physicians' religious beliefs did not exempt from California's Unruh Civil Rights Act, and therefore they had to provide IVF to a lesbian couple.).

²⁰¹ *Smith v. Fair Employment and Housing Division*, 12 Cal. 4th 1143 (Cal. 1996) (California Supreme Court ruled that a landlord could not refuse to rent apartment to unmarried couples, as her religious principles did not exempt her from her obligations under California's Housing Discrimination Code.).

²⁰² *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

held in *Board of Education v. Allen* (1965), that a New York law requiring public schools to lend textbooks to private and parochial schools did not violate the Establishment Clause because it was neutral towards religion. The Court viewed the law as Constitutional because it did not favor one religion over another or religion in general, and “the financial benefit [was] to parents and children, not to schools.”²⁰³

The Court recently applied the holdings in *Everson* and *Allen* in *Zelman v. Simmons-Harris* (2002). In *Zelman*, the Court upheld an Ohio voucher program that provided financial aid for certain students so they could attend the public or private school of their choosing, including religious schools. The program was intended to allow students who lived in areas with poorly performing public schools to be able to attend other public and private schools; however, no other public schools participated, and 82% of the private schools participating were religious. It was later found that 96% of the participating students in the program were attending religious schools. Plaintiffs challenged the law as improperly funding religious activity, thus violating the Establishment Clause.²⁰⁴ The Court disagreed and stated:

In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice.²⁰⁵

Therefore, the Court ruled that the program’s effects did not matter as its purpose was not to favor religion. It was purely meant to advance educational goals, and families were free to use the funds to choose the educational option that they deemed best. In sum, the Supreme Court consistently has ruled that the government may pass policies that direct funds towards religious institutions so long as such policies have secular goals, do not favor one religion over another, or religion in general, and that any financial aid reaching religious institutions does so as the result of private individual choices.²⁰⁶

Although the government may constitutionally direct funds towards religious schools, it only may do so if it can avoid excessive entanglement with the religious mission of the institutions it is benefitting. In *Lemon*, the Court held that a Pennsylvania statute providing financial support to parochial schools by reimbursing the cost of teacher’s salaries, textbooks, and instructional materials was unconstitutional because it required the government to constantly ensure that its funds were only being used for secular purposes. This continual monitoring created an entangling relationship because it forced governments to interfere in religious organizations’ internal affairs, and is thus could infringe on religious liberty. Consequently, because of the prohibition of creating entangling relationships, governments may not judge the religiousness of an institution which receives its funds.

²⁰³ *Bd. of Educ. v. Allen*, 392 U.S. 236, 244 (1965).

²⁰⁴ *Zelman v. Simmons-Harris*, 536 U.S. 639, 647 (2002).

²⁰⁵ *Id.* at 662.

²⁰⁶ See *Mitchell v. Helms*, 530 U.S. 793, 835 (2000); *Agostini v. Felton*, 521 U.S. 203, 234-35 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 14 (1993).

Despite its prohibition of excessive entanglement, for a number of years, the Supreme Court routinely held that direct aid to “pervasively sectarian” schools violated the Establishment Clause because any funds those schools received, even those to be used for secular purposes, would necessarily become religiously tainted and be used to indoctrinate students. In *Mitchell v. Helms* (2000), the Court rejected this “pervasively sectarian” doctrine as inconsistent with the Establishment Clause because it required the government to condition its aid based on a recipient’s level of religious commitment, thereby causing government to discriminate against religion. The plurality stated:

[T]he inquiry into the [the school’s] religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person’s or institution’s religious beliefs.²⁰⁷

Therefore, the state may not condition its aid on the intensity of an institution’s religious beliefs as such a practice requires the government to routinely evaluate an institution’s religious nature before it can support it with aid. The Tenth Circuit recently applied *Mitchell* in *Colorado Christian University v. Weaver* (2009), when it ruled that it was unconstitutional for the state to gauge the religiosity of a student’s university in determining whether he was eligible for scholarship funding.²⁰⁸

2. Government Funding for Religiously Affiliated Social Programs

In 2002, President Bush issued Executive Order 13279. That order ensured that faith-based social programs would be entitled to the same legal protection and benefits guaranteed to secular programs. The Order stated, “The Nation’s social service capacity will benefit if all eligible organizations, including faith-based and other community organizations, are able to compete on an equal footing for Federal financial assistance used to support social service programs.”²⁰⁹ Accordingly, it explicitly stated that “No organization should be discriminated against on the basis of religion or religious belief in the administration or distribution of Federal financial assistance under social service programs.”²¹⁰ The Order clarified that faith-based organizations receiving federal funds could maintain their religious character and did not have to remove any religious references from their names or religious symbols or icons from their buildings.²¹¹ The only stipulation for receiving financial assistance was that activities such as religious instruction and worship had to take place separately from any social program receiving assistance.²¹² In sum, Executive Order 13279 ensured that faith-based social programs had the same access to federal funding as other social groups and that they could receive such funds without having to compromise their religious identity or hiring practices.

²⁰⁷ *Mitchell v. Helms*, 530 U.S. 793, 828.

²⁰⁸ See *Colorado Christian University v. Weaver*, 534 F.3d 1245 (2008).

²⁰⁹ Exec. Order No. 13,279, 67 Fed. Reg. 77141 (Dec. 12, 2002).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

In his presidential campaign, President Obama pledged to reform the Bush Faith-Based Initiative so that federal funds would not go to organizations that proselytized and that discriminated in their hiring practices using religious criteria.²¹³ Accordingly, he issued Executive Order 13559 which amended President Bush's former Order in an attempt to clarify prohibited uses of federal funding.²¹⁴ However, despite his campaign promises, this new Order did little to change Order 13279 and did not address the issue of religious hiring by federally-funded faith based organizations. It reaffirmed that religious social programs were equally eligible for federal funding and that such social programs did not have to abandon their religious identity to receive funds. One of the few significant changes made stated that the government "must monitor and enforce standards regarding the relationship between religion and government in ways that avoid excessive entanglement between religious bodies and governmental entities."²¹⁵ This provision was added to ensure that federal funding complies with the Establishment Clause by not being used to further overtly religious activity. There is a possibility that this change could be used by the government to excessively restrict funding to organizations it deems overly evangelistic, but currently this has not been an issue, and thus the protections ensured in the Bush initiative remain intact.

E. Religious Displays and Monuments

1. Public Religious Displays

Justice O'Connor's invention of the "endorsement test" in *Lynch* heavily influenced subsequent Supreme Court decisions concerning government religious displays. In *Lynch*, O'Connor stated in her opinion that government action violated the Establishment Clause if it conveyed to a so-called reasonable observer a message that the government endorsed or disapproved of religion.²¹⁶ Under this interpretation of the Establishment Clause, whether a government religious display violates the Establishment Clause depends on whether the display, in the context of all relevant surrounding facts, would lead the hypothetical reasonable observer to conclude that the display promotes or gives the appearance of favoring one religion over another or religion over non-religion (or vice versa).

The Court applied the "endorsement test" in *County of Allegheny v. ACLU* (1989) to justify different rulings concerning the constitutionality of two of Pittsburgh's holiday displays. One of the displays was featured on the Grand Staircase inside the county courthouse and consisted of a crèche, or nativity scene, which included the banner "Gloria in Excelsis Deo!" (Glory to God in the Highest!). The other display was featured on a publicly-owned piece of property outside an office building and contained a Christmas tree, a menorah, and a sign with a message proclaiming the city's support of liberty during the holiday season. The Court held that the crèche violated the Establishment Clause while holding that the second display was permissible as it did not advance religion. The Court stated that "the effect of a crèche display

²¹³ See Laura Meckler, *Faith-Based Program gets Wider Focus*, Wall Street Journal, February 5, 2009 available at <http://online.wsj.com/article/SB123379504018650159.html>.

²¹⁴ See Exec. Order No. 13,559, 75 Fed. Reg. 71319 (Nov. 22, 2010).

²¹⁵ *Id.* at 71320.

²¹⁶ *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring).

turns on its setting;”²¹⁷ thus to be permissible, a nativity scene must be situated in a context which contains an overall secular message. In contrast to the crèche in *Lynch*, which was surrounded by non-religious symbols such as Santa Claus and reindeer, the one in *Allegheny* was unaccompanied. Furthermore, the *Allegheny* crèche was situated in the main part of the county courthouse, a building which clearly represented governmental authority. The Court thus concluded that because the crèche stood alone and was featured in such a prominent location, an observer would reasonably believe that the county “support[ed] and promote[ed] the Christian praise to God that [was] the crèche’s religious message.”²¹⁸ In summary, the Court ruled that it was not merely the presence of religious content which violated the Establishment Clause, but rather that such content appeared in a context suggesting government endorsement of its message.

In contrast to its ruling about the crèche, the Court held that the city’s display containing a Christmas tree, menorah, and sign proclaiming its support of liberty did not endorse religion and accordingly did not violate the Establishment Clause. The Court held that the presence of a Christmas tree and menorah together did not serve as an endorsement of the Christian and Jewish faiths, but rather “simply recognize[d] that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in [American] society.”²¹⁹ Therefore, the display had a secular purpose, as it sought to celebrate the holiday season in general and not promote a specific religious viewpoint. Additionally, unlike the nativity scene in the courthouse, the menorah and Christmas tree were located in a much more neutral venue and did not immediately suggest governmental endorsement. In conclusion, both *Lynch* and *Allegheny* illustrate that when determining the constitutionality of a display containing religious symbols, the display’s context and setting are as important as its content in determining whether the display violates the Establishment Clause.

The crèche in *Lynch* was government owned; the crèche in *Allegheny*, although privately sponsored, appeared in a non-public forum on government property. In *Capitol Square Review & Advisory Board v. Pinette* (1995), the Supreme Court ruled on the constitutionality of a private religious display on government property that was a public forum. In *Pinette*, the Ohio Chapter of the Ku Klux Klan wished to place a cross on the Columbus Capitol Square. But the request was denied because the Advisory Board believed that granting the request would violate the Establishment Clause. The Board determined that because the square was in such close proximity to the seat of government, allowing a cross to be placed there would produce the perception of government endorsement. The Court rejected this argument. The square was “a traditional public forum open to all without any policy against free-standing displays;”²²⁰ therefore, to prohibit a display because of its religious connotations was to engage in content discrimination. The Court stated:

We find it peculiar to say that government ‘promotes’ or ‘favors’ a religious display by giving it the same access to a public forum that all other displays enjoy. And as a matter

²¹⁷ *Cnty. of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 599 (1989).

²¹⁸ *Id.* at 600.

²¹⁹ *Id.* at 616.

²²⁰ *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 759 (1995).

of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.²²¹

Therefore, regardless of the square's proximity to the seat of government, the Board's decision to prohibit a private display in a public forum because the display was religious constituted an unconstitutional restriction of free speech. Furthermore, it is unreasonable to say that an observer would misinterpret the presence of a cross as a sign of government endorsement when the square was routinely used to feature various displays and messages which clearly represented private, and not government speech. This distinguished *Pinette* from *Allegheny*. In *Allegheny*, the Grand Staircase in which the crèche was placed was not a public forum; therefore, because the staircase was not available to all, the government was found to be unconstitutionally favoring a religious message.²²² In short, if a government maintains a public forum, it may allow private, religious displays in the same way as it does secular displays without violating the Establishment Clause.

2. Religious Monuments and Memorials

Recently, there has been increased controversy over the constitutionality of religious monuments and memorials on public property. Normally, these monuments are established with private funds and placed in public parks or on the grounds of federal and state buildings with the government's permission. However, despite being built with private funding, multiple suits have been brought before federal courts challenging the validity of such monuments under the Establishment Clause.

Currently, there exists no clear consensus amongst the courts' various decisions. In *Salazar v. Buono* (2010), the plaintiffs sued to challenge the constitutionality of a memorial cross located in the Mojave National Preserve. The cross had been erected by a veterans association in honor of American soldiers who died during World War I. The Court held that the cross did not have to be dismantled. The Court reasoned that, "The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm."²²³ Furthermore, the Court declared, "The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society... Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework."²²⁴ The Court held that the cross's presence did not represent the government's endorsement of Christianity because the cross was raised not to promote a Christian message but rather to honor the lives of men who had died serving their country.²²⁵ The Court's decision in *Buono* reaffirmed that the mere presence of religious content on public property does not violate the Establishment Clause; government does not advance a religious message merely because a memorial on government property has religious symbolism.

²²¹ *Id.* at 763-64.

²²² *Id.* at 764.

²²³ *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010).

²²⁴ *Id.* at 1818-19.

²²⁵ *Id.* at 1816.

Whereas *Buono* the Supreme Court ruled solely on the constitutionality of religiously-themed monuments on public property, in *Pleasant Grove v. Summum* (2009), the Court considered whether a government could be selective in the types of privately donated monuments it allowed to be placed in its public parks. In *Summum*, the Summum church believed that the city of Pleasant Grove was compelled to allow a statute containing the organization's "Seven Aphorisms" to be placed in one of its public parks, because it had done so for a monument containing the Ten Commandments. Summum argued that to allow the Ten Commandments while simultaneously rejecting the Seven Aphorisms constituted an instance of viewpoint discrimination by the government; therefore, the city had to either accept or reject both, and did not have the option to choose one over the other. The Court disagreed and held that while governments may not freely discriminate against the content of private speech in a public forum, the government's own speech is not governed by the Free Speech Clause.²²⁶ The Court stated:

There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech.²²⁷

The Court reasoned that based on Summum's argument, when the United States accepted the Statue of Liberty from France, it would have also had to accept a Statue of Autocracy from Imperialist Russia.²²⁸ The Court concluded that the ramifications of such reasoning would either result in the government having to accept all statues, or more feasibly, having to reject everything. The government is not bound to such standards, and therefore it is appropriate that its own speech is not restricted by the First Amendment. Accordingly, the government is not forced to accept any monument it does not desire to, and may exercise discretion in selecting and rejecting privately- donated monuments.

3. Ten Commandment Displays

The most controversial and contested types of religious monuments are those containing depictions of the Ten Commandments. Displays containing the Ten Commandments (whether in monuments or otherwise) continue to result in highly-contested court decisions. Decisions regarding the constitutionality of Ten Commandments displays have been decided by narrow margins, and this area of the law remains highly unsettled.

The Supreme Court's first significant ruling regarding Ten Commandments displays occurred in *Stone v. Graham* (1980). In *Stone*, the Court held that a Kentucky law mandating that a copy of the Ten Commandments text be displayed in every public school classroom was unconstitutional. Applying the *Lemon* Test, the Court found that even though the law specified that copies of the Ten Commandments were to be donated using private funds, the law could not pass *Lemon*'s first prong as the law had an explicitly religious purpose. The Court stated:

²²⁶ *Pleasant Grove Cit. v. Summum*, 129 S. Ct. 1125, 1131-32 (2009).

²²⁷ *Id.* at 1132.

²²⁸ *Id.* at 1137-38.

Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.²²⁹

The Court held that despite whatever secular reasons Kentucky gave for requiring schools to post the Ten Commandments, the Commandments are inherently religious and thus cannot be endorsed by government.

The Court's decision in *Stone*, however, does not mean that all government Ten Commandments displays are unconstitutional. Rather, constitutionality depends upon context – the physical context in which the display appears and the historical context surrounding the government's decision to display the Ten Commandments. Because of the importance of context, cases involving the constitutionality of Ten Commandments displays are highly fact sensitive. Two cases decided by the Supreme Court on the same day in 2005 – *Van Orden v. Perry* and *McCreary County v. ACLU* – illustrates this.

In *Van Orden*, the Supreme Court held that a Ten Commandments monument on the Texas State Capitol grounds did not violate the Establishment Clause due to its broader meaning within the context of all the other monuments surrounding it.²³⁰ While the Court did not produce a majority opinion, the plurality defended the monument's constitutionality while simultaneously acknowledging two sides of Establishment Clause jurisprudence. Commenting on these two opposing influences, the plurality stated:

Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens. One face looks to the past in acknowledgment of our Nation's heritage, while the other looks to the present in demanding a separation between church and state. Reconciling these two faces requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage.²³¹

In *Van Orden*, the plurality believed that Texas's Ten Commandments monument represented a very "passive use" of the religious text, and, situated among the other monuments on the Texas Capitol grounds, it did not necessarily endorse a Judeo-Christian religious message but rather only represented one strand of the state's political and legal history.²³² Therefore, requiring that Texas remove the monument would represent unnecessary hostility towards religion and would prevent Texas from recognizing its own religious heritage.

On the other hand in *McCreary County*, the Court relied on *Stone* to invalidate the multiple efforts made by two counties in Kentucky to post the Ten Commandments in their

²²⁹ *Stone v. Graham*, 449 U.S. 39, 42 (1980).

²³⁰ *Van Orden v. Perry*, 545 U.S. 677, 691-92 (2005).

²³¹ *Id.* at 683-84.

²³² *Id.* at 691-92.

courtrooms.²³³ McCreary and Pulaski Counties decided to post copies of the Ten Commandments in their respective courthouses.²³⁴ The ACLU of Kentucky sued the counties and sought a preliminary injunction against maintaining the displays.²³⁵ After the ACLU sued, each county's legislative body proposed a new display that would place the Ten Commandments alongside eight other historical documents that all contained a religious theme.²³⁶ The district court eventually held that both displays were unconstitutional, prompting the counties to pass a new resolution to install a third type of display entitled "The Foundations of American Law and Government Display."²³⁷ That display featured the Ten Commandments alongside eight historical documents that were mostly different from those in the previous display.²³⁸ These documents were accompanied by an explanation meant to educate citizens about the significance of each document in regards to Western legal thought and the nation's history.²³⁹

The Supreme Court ultimately held that all three displays were unconstitutional because each had a predominantly religious purpose. Relying on *Stone*, the Court easily invalidated the first display, and likewise invalidated the second as the documents that surrounded the Ten Commandments were narrowly selected to specifically refer to God and Christianity; therefore, the display represented an improper endorsement of religion.²⁴⁰ In regards to the third display, the Court held that it was also unconstitutional because the "...Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality."²⁴¹ The Court held that from the beginning, the two counties' original purpose had always been to project religious values, and regardless of the nature of the third display, "[n]o reasonable observer could swallow the claim that the Counties had cast off the [original] objective so unmistakable in the earlier displays."²⁴² In sum, the Court in *McCreary* reaffirmed its decision in *Stone* that the Ten Commandments were inherently religious, and furthermore ruled that this fact was not automatically negated or lessened simply by surrounding them with other historical documents.

The importance of historical context in Ten Commandment display cases is further illustrated by the Tenth Circuit Court of Appeals' decision in *Haskell County v. Green* (10th Cir. 2009). In *Green*, the Court ordered that a Ten Commandments monument at the Haskell County Courthouse be removed because it violated the Establishment Clause. The circumstances in *Green* were remarkably similar to those in *Van Orden* as both Ten Commandment monuments were privately-donated and located on prominent government property surrounded by other monuments; however, the court believed there was enough of a difference to distinguish *Van Orden* from *Green*. In looking back on the monument's history, there was clear evidence that the monument had been donated for purely religious reasons. Moreover, the county officials who

²³³ *McCreary Cnty. v. ACLU*, 545 U.S. 844, 868-870 (2005).

²³⁴ *Id.* at 851.

²³⁵ *Id.* at 852.

²³⁶ *Id.* at 852-54.

²³⁷ *Id.* at 854-56.

²³⁸ *Id.* at 855-56.

²³⁹ *Id.* at 856.

²⁴⁰ *Id.* at 854-855.

²⁴¹ *Id.* at 873.

²⁴² *Id.* at 872.

voted on the monument had openly espoused their religious beliefs, blurring the line between their private and public obligations as state officials. The court wrote:

In a small community like Haskell County, where everyone knows everyone, and the commissioners were readily identifiable as such...we conclude that the reasonable observer would have been left with the clear impression--not counteracted by the individual commissioners or the Board collectively--that the commissioners were speaking on behalf of the government and the government was endorsing the religious message of the Monument.²⁴³

Therefore, although the display in *Green* had much in common with the display in *Van Orden*, the Tenth Circuit ultimately decided that the historical context surrounding the county's decision to display the Ten Commandments was more important than the monument's proximity to other monuments.

McCreary, as noted, likewise illustrates the importance of historical context. But while the Court's decision regarding the third display in *McCreary* was heavily affected by the preceding displays and the purpose behind them, the Court did not state that past actions displaying a religious purpose would forever taint government efforts to include the Ten Commandments in a larger display.²⁴⁴ Thus, a current case before the Supreme Court, *DeWeese v. ACLU*, has the potential to set a significant precedent. In *DeWeese*, a judge hung a display in his courtroom entitled "Philosophies of Law in Conflict." That display contained two posters entitled "Moral Absolutes: The Ten Commandments," and "Moral Relatives: Humanist Precepts."²⁴⁵ The first poster contained the Ten Commandments, and the second one contained quotations from various judges, humanists, and historical documents; furthermore, below the posters the judge included a small paragraph suggesting that the country is "paying a high cost in increased crime and other social ills for moving from moral absolutism to moral relativism since the mid 20th century."²⁴⁶ The Sixth Circuit held that the display was unconstitutional in large part because "the history of Defendant's actions [regarding an earlier display] demonstrates that any purported secular purpose [for the present display] is a sham."²⁴⁷ In other words, the Sixth Circuit arguably held that Judge DeWeese's actions concerning the previous display forever tainted—and thus would invalidate—any future attempts from dealing with the display's subject matter.

DeWeese is presently pending before the Supreme Court on a petition for writ of certiorari. That petition argues, among other things, that the Sixth Circuit's holding that Judge DeWeese's past actions demonstrate that any other attempt to create a display dealing with the same subjects must serve only a religious purpose and that holding conflicts with *McCreary* and with decisions from other circuits. If the Court grants certiorari in *DeWeese*, the Court will have

²⁴³ *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 803 (10th Cir. 2009).

²⁴⁴ See *McCreary Cnty.*, 545 U.S. at 843-44.

²⁴⁵ *ACLU v. DeWeese*, 633 F.3d 424, 426-427 (6th Cir. 2011).

²⁴⁶ *Id.* at 427.

²⁴⁷ *Id.* at 432.

the opportunity to clarify what role actions concerning previous displays play in analyzing a subsequent display's constitutionality.²⁴⁸

F. Zoning and Religious Land Use

1. RLUIPA

The Religious Land Use and Institutionalized Persons Act (RLUIPA) protects houses of worship and other religious organizations from zoning ordinances that target religious organizations for different treatment or place a substantial burden on their ability to freely exercise their religious beliefs. RLUIPA states, “No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution,” and that no government shall “impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.”²⁴⁹ Furthermore, no government may “totally exclude[] religious assemblies from a jurisdiction,” or “unreasonably limit[] religious assemblies, institutions, or structures within a jurisdiction.”²⁵⁰ Even if a land use regulation is neutral, RLUIPA provides that the regulation may not substantially burden the free exercise of a religious institution unless the government can demonstrate that the regulation is “in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.”²⁵¹

In determining what specifically constitutes a substantial burden, no exact definition exists; rather courts must use a “case-by-case, fact-specific inquiry to determine whether the government action or regulation in question imposes a substantial burden on an adherent’s religious exercise.”²⁵² Similarly, courts have found it difficult to define what specifically constitutes a compelling government interest; however, courts have found that “loss of tax revenue” does not represent such an interest. Governments may not punish organizations for a benefit they have bestowed upon them, and thus cannot cite a religious organization’s tax-exempt status as grounds for denying a request for a building permit.²⁵³ While religious organizations still must apply for zoning permits and follow the same requirements as other land

²⁴⁸ It is possible, however, that if the Court grants certiorari in *DeWeese*, it would not reach the merits; DeWeese has also argued that the plaintiffs’ purported injury from the display – offense at the display – is not sufficient to confer standing.

²⁴⁹ 42 USCS § 2000cc(b)(1)(2).

²⁵⁰ *Id.* § 2000cc (b)(3).

²⁵¹ *Id.* § 2000cc(a)(1).

²⁵² *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004); *see also Mintz v. Roman Catholic Bishop*, 424 F. Supp. 2d 309, 321 (D. Mass. 2006) (finding that government significantly burdened a church when it denied its request to build a parish center which would be utilized for office space and for church-related gatherings. The court made this ruling despite the finding that the church could have met its religious needs by using its existing structures); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007) (finding a substantial burden was imposed upon a Jewish School when it was not allowed to expand its facilities to accommodate a growing student body).

²⁵³ *See Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1228 (C.D. Cal. 2002) (“So universal is the belief that religious and educational institutions should be exempt from taxation that it would be odd indeed if we were to disapprove an action of the zoning authorities consistent with such belief and label it adverse to the general welfare.” (internal citation omitted)).

users, they are protected from religiously-biased policies, and even some neutral regulations, that would hinder their capacity to build and expand their structures. Although the Supreme Court has never ruled on the constitutionality of RLUIPA's land use section,²⁵⁴ the Department of Justice consistently investigates and prosecutes occurrences of religiously-motivated zoning discrimination. RLUIPA is widely enforced and has been used frequently to prevent zoning ordinances to be applied in ways that discriminate against or substantially burden religious organizations.²⁵⁵

2. Protection of Religious Property

Two laws offer significant protection for both religious property and for the practitioners who make use of that property to exercise First Amendment rights. The Church Arson Prevention Act and the Freedom of Access to Clinic Entrances Act (FACE) grant the government the authority to punish anyone who destroys religious property. The Church Arson Prevention Act penalizes anyone who “intentionally defaces, damages, or destroys any religious real property, because of the religious character of that property, or attempt[s] to do so...”²⁵⁶ Furthermore, both acts penalize anyone who attempts to obstruct an individual from practicing his religion at his place of worship. FACE specifically punishes anyone who “by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship.”²⁵⁷ These two acts provide that those who target property because of its religious nature will face punishment and that people's right to practice their religion in their chosen house of worship will occur without obstruction or fear of harm or injury.

G. National Day of Prayer

36 U.S.C. § 119 states, “The President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals.”²⁵⁸ Congress enacted this law in 1952, but its origins date back to the time of George Washington when he declared:

The Honorable the Congress having recommended it to the United States to set apart Thursday the 6th of May next to be observed as a day of fasting, humiliation and prayer, to acknowledge the gracious interpositions of Providence...The Commander in Chief enjoins a religious observance of said day and directs

²⁵⁴ In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Supreme Court addressed the constitutionality of the institutionalized persons portion of RLUIPA, but declined to make a ruling on the section concentrating on land use.

²⁵⁵ See *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 424 (5th Cir. 2011); *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'r*, 613 F.3d 1229, 1237 (10th Cir. 2010); *Midrashi Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1235 (11th Cir. 2004).

²⁵⁶ 18 USCS § 247(a)(1).

²⁵⁷ 18 USCS § 248(a)(2)

²⁵⁸ 36 U.S.C. § 119.

the Chaplains to prepare discourses proper for the occasion; strictly forbidding all recreations and unnecessary labor.²⁵⁹

Since 1952, every President of the United States has declared a day of prayer in which he calls upon all Americans to spend the day in reflection and prayer. In 2010, the United States District Court for the Western District of Wisconsin held in *Freedom from Religion Foundation, Inc. v. Obama* that the statute authorizing the National Day of Prayer violated the Establishment Clause. The court held that the statute had both the purpose and effect of advancing religion by encouraging prayer. The court stated:

Establishment clause values would be significantly eroded if the government could promote any longstanding religious practice of the majority under the guise of “acknowledgment”.... the government crosses the line between acknowledgment and endorsement when it “manifest[s] [the] objective of subjecting individual lives to religious influence,” “insistently call[s] for religious action on the part of citizens” or “expresse[s] a purpose to urge citizens to act in prescribed ways as a personal response to divine authority.” This is exactly what § 119 does by encouraging all citizens to pray every first Thursday in May. If the government were interested only in acknowledging the role of religion in America, it could have designated a “National Day of Religious Freedom” rather than promote a particular religious practice.²⁶⁰

The Seventh Circuit reversed the district court’s decision because the plaintiffs did not have standing to sue. The Court found that the plaintiffs had not suffered any legal injury from the statute authorizing the National Day of Prayer because the only injury they alleged was offense at the government calling for a day of prayer. The court stated, “Offense at the behavior of the government, and a desire to have public officials comply with (plaintiffs’ view of) the Constitution, differs from a legal injury.”²⁶¹ Although the Seventh Circuit did not reach the merits of the constitutional issue, it did preclude the general public (at least in the Seventh Circuit) from challenging the National Day of Prayer in the future. If the other federal courts follow the Seventh Circuit’s lead, the National Day of Prayer will only cease to exist should the President decide to discontinue its proclamation.²⁶²

H. Broadcasting

The Constitution’s Framers considered freedom of the press to be of the utmost importance. As James Madison wrote: “[T]o the press alone, checkered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error

²⁵⁹ *The Writings of George Washington, from the Original Manuscript Sources 1745-1799* (John C. Fitzpatrick, ed. 1931), available at <http://www.questia.com/PM.qst?a=o&d=34093650>.

²⁶⁰ *Freedom from Religion Found., Inc. v. Obama*, 705 F. Supp. 2d 1039, 1055-56 (D. Wis. 2010) (quoting *McCreary Cnty. v. American Civil Liberties Union*, 545 U.S. 844, 877 (2005)).

²⁶¹ *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011).

²⁶² See also *Freedom from Religion Found., Inc. v. Perry*, 2011 U.S. Dist. LEXIS 82870 (S.D. Tex. July 28, 2011) (holding plaintiffs lacked standing).

and oppression.”²⁶³ In modern times, this freedom has been expanded from print sources to include radio, television, satellite, and internet media, which collectively broadcast information on an extensive range of subject matters. Among these, religion occupies a significant role as many faith-based organizations have used various broadcasting mediums to communicate religious beliefs and opinions. Therefore, when these organizations take advantage of media opportunities, the protections guaranteed under the First Amendment’s Free Exercise and Freedom of the Press Clauses are in full effect. However, despite the rights enjoyed by religious broadcasting organizations, several Federal Communications Commission (FCC) initiatives pose a risk to these liberties.

1. Fairness Doctrine

In an effort to create a balanced and impartial broadcast forum, the FCC in the 1940’s created what came to be known as the Fairness Doctrine. In explaining its reasons for creating this policy, the FCC stated, “[T]he public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies to all discussion of importance to the public.”²⁶⁴ The Fairness Doctrine created a two-part obligation for broadcasters to “provide coverage of vitally important controversial issues of interest in the community served by the station” and to “afford a reasonable opportunity for the presentation of contrasting viewpoints.”²⁶⁵

In 1969, the Supreme Court upheld the doctrine’s constitutionality in *Red Lion Broadcasting Co. v. FCC* and justified its decision by stating, “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”²⁶⁶ Despite the Court’s decision in *Red Lion*, the FCC decided to abolish the Fairness Doctrine in the 1980s. The FCC found that the doctrine deterred free speech because the doctrine made broadcasters more hesitant to address controversial topics. The Fairness Doctrine was recently removed from the Code of Federal Regulations.

2. Localism

Although the Fairness Doctrine is no longer enforced, another policy suggested by the FCC known as “localism” has the potential to hinder religious freedom in a similar manner. The FCC has maintained consistently that one of broadcasting’s main purposes is to provide local communities with news and programs that are relevant to their needs and interests, thus ensuring that programming does not become overly syndicated and homogenized. In the words of former FCC Chairman Michael Powell, “Fostering localism is one of this Commission’s core missions and one of three policy goals, along with diversity and competition, which have driven much of our radio and television broadcast regulation during the past 70 years.”²⁶⁷

²⁶³ 1799: Report of the Virginia House of Delegates *reprinted in The American Republic: Primary Sources*, (Bruce Frohnen ed. 2002).

²⁶⁴ *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949).

²⁶⁵ Federal Comm’n Comm’n, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age* 277 (2011), available at www.fcc.gov/infoneedsreport.

²⁶⁶ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

²⁶⁷ *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425, 12445 (2004) (*Localism NOI*) (Powell, Michael K., Chairman, concurring).

In 2008, the FCC released several new policy proposals to promote localism across the broadcasting spectrum. Among these proposals was the requirement that all broadcast licensees create permanent Community Advisory Boards, comprised of various community leaders, to better identify and understand issues of concern to its local community.²⁶⁸ Such a requirement could pose a significant burden to religious broadcasters in particular as they will be forced to consult with an Advisory Board and alter their religious programs in a way that meets the Board's satisfaction. Religious broadcast organizations could potentially find their licensee's status or eligibility for renewal in jeopardy should they not fully comply with the Community Advisory Board's recommendations. This would place religious organizations in the adverse position deciding whether to risk losing their FCC license or following the Advisory Board's proposals and in so doing possibly contradicting their religious convictions and beliefs. These religious broadcasters could well lose their particular religious voice and identity if they must set aside those carefully calculated, thoughtfully, and prayerfully-developed programming choices to serve an agenda weighted by considerations different than the ones those broadcasters follow. In conclusion, recommendations by the FCC to promote "localism" by mandating Advisory Boards risk posing a significant burden to religious broadcasters' rights and therefore should not be implemented as they could stifle free speech and prevent these organizations from being able to freely exercise their religion.

IV. Conclusion

This memo's purpose has been to provide a comprehensive view of the current status of religious liberty in America. Based on the analysis of key court cases and legislation, it is clear that there are some freedoms that have been securely established, and others that remain in question or even in jeopardy. Religious freedom must be vigilantly monitored to ensure that mentions of God and faith do not completely disappear from public schools and government institutions. That freedom must be defended to assure free expression in the workplace, and equal treatment for religious individuals. And finally, religious freedom must be guarded to ensure that religious organizations can continue to associate based on their mission statements, remain autonomous, and not be forced by the government to condone morally objectionable activity. The Establishment Clause and Free Exercise Clause will continue to be interpreted in a variety of ways but one constant that must never be forgotten is that the United States is a religious nation, and "our institutions presuppose a Supreme Being."²⁶⁹ Any law or policy that treats religion hostilely or attempts to unduly limit its practice must be ruled unconstitutional and held to directly violate our historical values. If that happens, one of our most sacred and valued liberties will never be compromised and will remain vibrant for future generations.

²⁶⁸ See *Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, 1336-38; 1339 (2008).

²⁶⁹ *Van Orden v. Perry*, 545 U.S. 677, 683-84 (2005).