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Education Law Consortium
850 College Station Road
University of Georgia
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John Dayton, J.D., Ed. D., Editor-in-Chief

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Foreword: Special Issue of the *Education Law & Policy Review* Church-State Law in Public Educational Institutions

Barry W. Lynn[*]

My view on religion in public schools is informed by the many roles I've played in life. As a Christian minister, I obviously have a perspective about faith and its meaning in our lives. Yet I also believe that no one comes to a fuller understanding of any religion through coercion, and I advocate for absolute freedom of conscience, a concept colonial-era religious freedom advocate Roger Williams called "soul liberty."

As a lawyer, I view the issue through a somewhat different lens, one of precedent, legal tests, and a body of law that has developed over more than 150 years. Though the law can seem a sterile and formulaic instrument to some, I tend to see it differently because I know that a courtroom is often our last resort when defending religious liberty rights in public schools and other places.

As a father who put two children through the public school system, I have yet another view. I see this issue fundamentally as one of parental rights, believing that no arm of the government has the right to make decisions about faith for my children or anyone else's.

Ninety percent of American children attend public schools. Most people pay taxes to support this system. Thus, the public schools touch all of our lives in some way, directly or indirectly. In a multi-faith society marked by expanding religious pluralism and growing numbers of people who have no religious beliefs, these taxpayer-funded schools must take pains to ensure that all students are welcome. This means that any content about religion must be educational, not devotional, in approach.

This special issue of the *Education Law & Policy Review* (ELPR) on church-state law is important because it was initiated by ELPR Co-Editors-in-Chief John Dayton & Hillel Levin, professors at the University of Georgia, in response to increases in reported incidents of church-state law violations in public educational institutions. Authors for this special

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[*] Barry W. Lynn is a United Church of Christ minister and an attorney. Since 1992, he has served as executive director of Americans United for Separation of Church and State. Prior to that, he worked for the American Civil Liberties Union and the legislative office of the UCC. His most recent book is GOD & GOVERNMENT: TWENTY-FIVE YEARS OF FIGHTING FOR EQUALITY, SECULARISM, AND FREEDOM OF CONSCIENCE (2015).

issue on church-state law include John Dayton, professor of education law at the University of Georgia; Andrew Seidel, constitutional attorney for the Freedom From Religion Foundation (FFRF); Robert Boston, Director of Communications for Americans United for Separation of Church and State (AU); William Thro, General Counsel for the University of Kentucky and former Solicitor General of Virginia; Susanne Eckes, professor of education law at Indiana University, and Steve Permuth, professor of education law and former dean of education at the University of South Florida.

John Dayton's article, *A Legal Primer on Church-State Law in Public Educational Institutions*, provides an overview of relevant church-state law as a guide to understanding church-state law in the context of public educational institutions. This article provides professional tips on putting church-state law principles into practice as well as useful practice tools and flow-charts for a systematic analysis and resolution of church-state challenges.

Andrew Siedel's article, *These Common Misconceptions Do Not Justify Religion in Public Schools*, written with a team of FFRF attorneys handling more than 5,000 church-state complaints each year, examines common misconceptions public school districts, and attorneys representing those districts, put forth to justify religious encroachment in the public schools, explaining and correcting these misconceptions.

My colleague Robert Boston's article, *Religion in Public Schools: A View from the Trenches*, provides a compelling perspective on the realities of church-state disputes, rooted in real world experience and legal history, and tracing and connecting these events through to current church-state disputes, concluding: "The people who want to use the public school system as a vehicle to spread their personal faith (and no others) or turn it into a device for the propagation of a civil religion marked by 'God and country' rhetoric won't get what they want. This has been a surprisingly hard lesson for some people to learn."

William Thro's article, *Solving the John 14:6 Problem: Promoting Confident Pluralism Through Religious Freedom on Campus*, notes that while many Christian's may view the John 14:6 text identifying Jesus as the way to salvation as a core principle in their faith, non-Christians may find these words deeply disturbing. This article explores religious accommodation in higher education. In addressing the constitutional mandates and challenges of religious accommodation in public higher education Thro argues that higher education institutions should recognize and fund student religious groups; allow religious expression in open

spaces on campus, and allow religious groups to exclude those who do not share their faith in order to promote a "Confident Pluralism" on campuses.

Suzanne Eckes' article, *LGBT Rights in U.S. Public Schools: When Civil Rights and Religious Beliefs Collide*, examines four specific areas of competing rights as they relate to sexual orientation and gender identity in K-12 public schools, including: bullying/harassment; student speech; curriculum; and transgender access issues, concluding that the doctrine of equal dignity prohibits public officials from demeaning LGBT individuals in public educational institutions.

Steve Permuth provides an *Epilogue* for the ELPR special issue on church-state law, drawing on his many years as a writer and editor in church-state scholarship, including his latest work as editor of a compilation of scholarly essays titled *Religion and Law in Public Schools: How the Religion Clauses of the First Amendment have shaped U.S. public education – and how the Trump administration is likely to affect future church-state relations*.

This issue of *Education Law & Policy Review* will likely circulate among attorneys and educators who have a special interest in this field. That's great, but I hope it goes beyond those audiences. The esteemed contributors have provided us with a wealth of valuable information that gives us much to think about. Their writings should be of interest to all Americans who interact with our public school system.

Barry W. Lynn

Rev. Barry W. Lynn
Executive Director, Americans United
June 20, 2017

A Legal Primer on Church-State Law in Public Educational Institutions

John Dayton, J.D., Ed. D.*

Few issues generate more impassioned debate in public educational institutions than church-state disputes. These disputes are generally not, however, the result of ambiguity in the law.[1] For over a half-century the U.S. Supreme Court has clearly and consistently held that the U.S. Constitution's Establishment Clause mandates religious neutrality by public school personnel when they are acting in their official capacities.[2] At least since *Engel v. Vitale* in 1962 this has been well-established law.[3] Further, in the U.S. it is common knowledge that public school-sponsored prayer is unlawful.[4]

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* John Dayton is a professor of education law and an adjunct professor of higher education at the University of Georgia. He serves as the Editor-in-Chief for the *Education Law & Policy Review* and as the Director of the Education Law Consortium.

[1] Some legal ambiguity is inevitable in the complex realm of constitutional law. In ruling on constitutional challenges federal judges generally use some form of elemental test, balancing test, or totality test. While these tests provide useful guidance to judges and potential litigants, ambiguity is often an unavoidable part of structuring a legal test that is not overly rigid. *See,* e.g., John Dayton, HIGHER EDUCATION LAW: PRINCIPLES, POLICIES, AND PRACTICE (2015) ("Judicially developed legal tests are an essential part of the Common Law tradition" and also reviewing the *Lemon* test from Lemon v. Kurtzman, 403 U.S. 602 (1971)).

[2] *See* Engel v. Vitale, 370 U.S. 421 (1962); Abington v. Schempp, 374 U.S. 203 (1963); Lee v. Weisman, 505 U.S. 577 (1992); Santa Fe v. Doe, 530 U.S. 290 (2000).

[3] The constitutional prohibition against public school agents leading students in prayer was clearly and directly articulated in Engel v. Vitale, 370 U.S. 421 (1962). This prohibition was articulated more broadly, however, in West Virginia v. Barnette, 319 U.S. 624, 642 (1943), nearly two decades prior to *Engel* ("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 opinion or force citizens to confess by word or act their faith therein").

[4] Given the duration and prominence of the culture war over public school-sponsored prayer in the U.S., it is difficult to believe that anyone, and especially anyone educated enough to hold a teaching license, doesn't know that public school-sponsored prayer is unlawful. Disputes over school prayer are regularly in the news, commonly discussed in churches and schools, and advocates for public school-sponsored prayer have bitterly complained about the Court's decision in Engel v. Vitale, 370 U.S. 421 (1962) for well

Nonetheless, for decades, in public school classrooms, in locker rooms, and on athletic fields throughout the U.S. Bible Belt and other scattered mostly rural areas in the U.S.,[5] there have been public school teachers and coaches regularly acting in clear violation of well-established law.[6] They are using their public positions to proselytize their personal religious beliefs to students under their state authority and coercing student participation in prayer and other religious rituals including on-field baptisms of players by coaches.[7] Further, public school officials are often fully aware of these unlawful activities by employees under their supervision, but nonetheless tolerate these legal violations despite commonly having their own school district personnel policies expressly prohibiting religious coercion of students by any school employee.[8]

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over a half century. One cannot bitterly complain about the Court's decision, and then when caught acting in clear contempt of that very decision, credibly claim ignorance of the Court's decision. It is common knowledge in the U.S. that public school-sponsored prayer is unlawful. Further, it is also well-established law that ignorance of the law is not an excuse for non-compliance. *See* Wood v. Strickland, 420 U.S. 308 (1975).

[5] Although non-compliance can happen in any public school, non-compliance with the Establishment Clause is generally not tolerated in urban areas with more religiously diverse populations and citizens well prepared to challenge school officials over legal violations and file complaints with the American Civil Liberties Union (ACLU) and other civil liberties organizations, *see*, e.g., https://www.aclu.org.

[6] *See,* e.g., Andrew Cohen, *The Public School Where Prayer is Everywhere*, THE ATLANTIC (Jan. 28, 2014) ("there are a small number of public schools—especially in the rural South—that continue to defy more than 50 years of Supreme Court decisions prohibiting school officials from promoting or inculcating religion." Citing statement of Charles Haynes, Freedom Forum's First Amendment Center), http://www.theatlantic.com/education/archive/2014/01/the-public-school-where-prayer-is-everywhere/283384.

[7] CBS News, *Mass Baptism at Georgia High School Spurs Controversy* (Sept. 3, 2015), http://www.cbsnews.com/news/mass-baptism-georgia-public-high-school-football-field-brews-controversy. Apparently, these mass baptisms at Georgia public high schools continue to occur. *See*, Vocativ, *Mass Baptism at a Georgia Public High School Goes Viral*, (Oct. 3, 2016), http://www.vocativ.com/363940/high-school-baptism.

[8] *See,* e.g., Oconee County Schools (OCS), Ga. (last visited Nov. 22, 2016), http://www.oconeeschools.org (OCS policy states: "Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the Establishment Clause from soliciting or encouraging religious activity and from participating in such activity with students"; "Teachers and school administrators should ensure that no student is, in any way, coerced to participate in religious activity"). *But see*, https://ffrf.org/news/news-releases/item/27886-georgia-school-district-scraps-bible-class-after-ffrf-complaint (complaint detailing a pattern of Establishment Clause violations by OCS officials in direct violation of the Establishment Clause and their own personnel policies). *See also, supra* note 6 ("Such open and extensive defiance of the law would not happen—could not happen—without school administrators leading the way." Citing statement of Charles Haynes, Freedom Forum's First Amendment Center).

As the U.S. Supreme Court has recognized acts of religious coercion by school officials are not victimless events.[9] To the contrary, these legal violations create serious risks of harm to minority faith students and their families. When subjected to unlawful religious coercion by public school teachers and coaches these students are put in the position of either participating or being publicly exposed as disfavored religious outsiders in their own schools. They must choose between turning their backs on their own family faith or on their teacher/coach and school peers and risking their social standing and safety. Students that do not submit to the religious authority of the teacher/coach may be subjected to coercive social pressure, harassment, bullying, exclusion, retaliation, and hate crimes aimed at them and their families.[10] The predictable harms and dangers that result from allowing religious endorsement and coercion by

[9] *See,* e.g., West Virginia v. Barnette, 319 U.S. 624 (1943) (re: public school officials forcing Jehovah's Witness children to salute the flag in violation of their religious beliefs: "Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions." *Id.* at 630; "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." *Id.* at 641); Lee v. Weisman, 505 U.S. 577, 593 (1992) (discussing the harms of psychological coercion involved in school sponsored prayers); Santa Fe v. Doe, 530 U.S. 290, 294 n.1 (2000) (noting a court order protecting parties from intimidation and harassment: "ANYONE TAKING ANY ACTION ON SCHOOL PROPERTY, DURING SCHOOL HOURS, OR WITH SCHOOL RESOURCES OR APPROVAL FOR PURPOSES OF ATTEMPTING TO ELICIT THE NAMES OR IDENTITIES OF THE PLAINTIFFS IN THIS CAUSE OF ACTION, BY OR ON BEHALF OF ANY OF THESE INDIVIDUALS, WILL FACE THE HARSHEST POSSIBLE CONTEMPT SANCTIONS FROM THIS COURT, AND MAY ADDITIONALLY FACE CRIMINAL LIABILITY. The Court wants these proceedings addressed on their merits, and not on the basis of intimidation or harassment of the participants on either side" (emphasis in original)).

[10] *Id. See also,* e.g., Katherine Stewart, THE GOOD NEWS CLUB: THE CHRISTIAN RIGHT'S STEALTH ASSAULT ON AMERICA'S CHILDREN 188 (2012) (opposition to public school proselytizing resulted in "threatening letters and telephone calls" and daughter becoming a "target of anti-Semitic bullying at school"); *The Smalkowski Story*, DAILY KOS (Nov. 24, 2006) (a family's opposition to public school proselytizing resulted in father being assaulted by a principal and a conspiracy of false charges against the family), http://www.dailykos.com/stories/2006/11/24/274210/-; Mary Beth Tinker, *Foreword: Special Issue of the Education Law & Policy Review Free Speech in Public Educational Institutions*, 2 EDUC. L. & POL'Y REV. X (2015) (public school coach attempted to coerce participation in team prayer; family received anti-Semitic death threats; the family was terrorized for months; their home was vandalized; and a fire was set on their property).

public school personnel are precisely why the Court has been so resolute in condemning and prohibiting these practices in public schools.[11]

While the law is clear concerning the general prohibition against state agents coercing religious participation by students, exactly how this legal standard applies in varied contexts in public educational institutions can only be determined through an accurate application of the appropriate legal standards and tests articulated by the Court. This article provides an overview of relevant church-state law as a guide to understanding church-state law in the context of public educational institutions.

An Overview of Relevant Church-State Law

In relevant part the First Amendment to the U.S. Constitution declares: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[12] The Establishment Clause and the Free Exercise Clause have been interpreted as general prohibitions on government interference in matters of religious faith.[13] Genuine religious faith is rooted in individual belief and free will concerning that belief. Government coercion is anathema to free will. As James Madison, the author of the First Amendment recognized, efforts to use the force of government to coerce and compel religious beliefs have caused great pains to individuals throughout human history, and served as the basis of countless conflicts and wars.[14]

History confirms that when the common government is being used to advance one group's religious beliefs over those of other groups, there will be bitter and too often deadly conflicts over which group controls government and the power to establish religious privileges in government institutions, schools, etc.[15] People tend to tolerate many abuses from their common government.[16] But one abuse that is generally not tolerated in any free society is government officials interfering with religious freedom and using government schools to coerce religious minority children into religious conformity, submission, and conversion.[17]

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[11] *Supra* note 9.

[12] U.S. CONST. amend. I.

[13] *See generally* John Dayton, EDUCATION LAW: PRINCIPLES, POLICIES, AND PRACTICE 67 (2012). *See also, supra* note 2.

[14] Dayton, *Id.*, at 69.

[15] Stewart, *supra* note 10, at 71-73 (describing deadly riots in the U.S. in the late 1800s between Protestants and Catholics over religious control of public schools).

[16] THE DECLARATION OF INDEPENDENCE (U.S. 1776) ("experience hath shewn that mankind are more disposed to suffer, while evils are sufferable").

[17] *Supra* note 9.

In recognition of these concerns, the First Amendment's Establishment Clause prohibits government officials from establishing any favored or disfavored religion.[18] The First Amendment's religion clauses have been interpreted as requiring official neutrality concerning religion and establishing a reasonable "wall of separation" between church and state.[19] This wall of separation between church and state is not, however, an absolute wall of separation. Religion plays a central role in many people's lives, and it has been a driving force of societal change throughout much of human history.[20] Religion cannot be banned from the public square without also banning the free expression of people who hold religious beliefs.[21] History proves, however, that few issues are more divisive than whose religion will be officially recognized and favored in the public square and the public school.[22]

The purpose of the symbolic wall of separation between church and state is to set appropriate boundaries between private religion and public government power.[23] This protects religion from governmental interference, and protects the common government from the disruption and divisiveness of conflicts over whose religion should receive official endorsement and have the power to compel others to express belief or face governmental punishment. The Constitution protects the rights of all persons to proselytize their faith to others if the wish, but prohibits anyone from using the power of the state to coerce religious belief or practice.[24]

The height and strength of the wall of separation increases or diminishes in each case depending on the degree of danger presented by the co-mingling of church and state.[25] For example, the Court has rejected challenges to the use of the phrase "In God We Trust" on government issued currency and "so help me God" in the Presidential oath of office.[26] The passive use of these phrases by government seems to present little real danger that anyone's religious freedom is jeopardized. Therefore the wall

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[18] *Supra* note 2.
[19] Dayton, *supra* note 13, at 70 ("The First Amendment's religion clauses have been interpreted as requiring official neutrality concerning religion and establishing a reasonable 'wall of separation' between church and state. This symbolic 'wall of separation' between church and state has been attributed to Thomas Jefferson based on a letter he sent to the Danbury Baptist Association in 1802"). *See also* Martha M. McCarthy, *Is the Wall of Separation Still Standing?,* 77 EDUC. L. REP. 1 (1992).
[20] Dayton, *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at 71.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 71.

of separation is low enough and flexible enough to allow for the continued lawful use of these phrases by the common government in this context.[27]

At the other end of the continuum, however, public school-sponsored prayer has been repeatedly rejected by the Court as a genuine danger to religious freedom and the essential maintenance of religious neutrality by the common government.[28] The wall of separation between church and state is at its highest in K-12 public schools where highly impressionable children are subject to compulsory attendance laws enforced by criminal sanctions.[29] The Court has recognized that captive audiences of highly impressionable children are vulnerable to state-sponsored religious indoctrination.[30] Further, few issues are more potentially divisive and disruptive than allowing the local majority to have the power to compel their religious beliefs and practices on other people's children through compulsory school attendance laws. In a free nation, it is an abuse of power to use compulsory attendance laws to remove other peoples' children from the guidance and protection of their parents and then exploit that unique access to vulnerable and impressionable children to attempt to religiously coerce and convert them. Even worse, the carrot of conversion is commonly presented with the stick of retaliation against anyone objecting to this unlawful scheme of public school-sponsored religious proselytizing.[31]

As a nation of immigrants, many of whom fled from religious oppression and coercion in Europe and other places, the U.S. is highly religiously diverse with countless variations of world faiths.[32] Most Americans share common democratic values and a desire that students learn good character and citizenship. And most Americans also hold

[27] *See* Newdow v. LeFevre, 598 F.3d 638 (9th Cir. 2010) (use of phrase "In God We Trust" as national motto did not constitute an unlawful government endorsement of religion), *cert. denied*, 562 U.S. 1271 (2011).
[28] *Supra* note 2.
[29] *Id.*
[30] *Id.*
[31] *See,* e.g., Stewart, *supra* note 10 (discussing aggressive public school proselytizers and the "authoritarian impulses and undercurrents of hostility and aggression that drive them to seek 'spiritual' authority over others." *Id.* at 147; and an ACLU case in which the Newman family's opposition to public school proselytizing resulted in "threatening letters and telephone calls" and their daughter becoming a "target of anti-Semitic bullying at school." *Id.* at 188).
[32] *See,* e.g., Religious Tolerance, *Membership of U.S. Religious & Spiritual Groups* (Aug. 26, 2003) ("The total number of faith groups in the U.S. cannot be calculated. The value depends upon exactly how one defines 'faith group' or 'religion.' Perhaps we can say that every person's religion is, to somewhat, degree unique"), http://www.religioustolerance.org/us_rel1.htm.

strong personal religious beliefs and family traditions.[33] Despite well-established law and clear evidence to the contrary, however, some continue to insist that common participation in public school-sponsored prayer is essential to teaching good character and citizenship.[34]

But if students were to pray together in the common public school, whose prayer would they pray? What common public school prayer could possibly be as religiously diverse as the people that would be asked to pray this prayer? What prayer could capture the faiths of the many denominations of Protestants, Catholics, Jews, Muslims, Buddhists, Hindus, Native Americans, etc., and yet not be religiously offensive to any of these faiths? And if you attempted to water-down the common prayer so that it was offensive to no one, wouldn't it become potentially offensive to all religious believers as a compromised, insincere governmental desecration of their genuine religious faith? Who should have the power to decide what the students would pray? Should government officials be involved in composing prayers for other people's children? These were among the issues brought to the U.S. Supreme Court in a series of cases concerning state-sponsored prayers and other religious exercises in public schools.

In 1943 in *West Virginia State Board of Education v. Barnette*, the U.S. Supreme Court addressed whether public school officials may lawfully compel students with a sincerely held religious objection to flag salutes to participate in public school-sponsored flag salutes.[35] In holding that they may not, the Court declared:

> 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. If there are any circumstances which permit an exception, they do not now occur to us. We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and

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[33] Pew Research Center, *U.S. Religious Landscape Survey: Religious Beliefs and* Practices (June 1, 2008) ("more than half of Americans say religion is very important in their lives"), http://www.pewforum.org/2008/06/01/u-s-religious-landscape-survey-religious-beliefs-and-practices.

[34] *Supra* note 2. *See also*, Wilhelm Hofmann, et al., *Morality in Everyday Life*, 345 SCIENCE 1340 (Sept. 12, 2014) (finding no difference in religious and non-religious participants in the likelihood or quality of committed moral and immoral acts).

[35] 319 U.S. 624 (1943).

> spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[36]

Based on the Court's reasoning concerning public school flag salutes in 1943, *a fortiori*, state officials may not compel public school students to participate in state-sponsored prayers in increasingly religiously diverse public educational institutions. Accordingly, in 1962 in *Engel v. Vitale*, the Court held that state agents may not compose prayers and require students to recite these prayers.[37] In *Engel* the Court declared:

> 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 . . . The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.[38]

In 1963 in *School District of Abington Township v. Schempp*, the Court declared mandated Bible readings in public schools unconstitutional.[39] The Court noted:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.[40]

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[36] *Id*., at 642.
[37] 370 U.S. 421 (1962).
[38] *Id*., at 431-432.
[39] 374 U.S. 203 (1963).
[40] *Id*., at 226.

In 1992 the Court declared state-sponsored graduation prayers unconstitutional in *Lee v. Weisman.*[41] And similarly in 2000 the Court found state-endorsed prayers at public school athletic events unconstitutional in *Santa Fe Independent School District v. Doe* declaring that: "One of the purposes served by the Establishment Clause is to remove debate over this kind of issue from governmental supervision or control. We explained in *Lee* that the 'preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere.'"[42]

For well over a half century the Court has sent a clear message concerning religion in public educational institutions: School agents may not use their official powers to endorse or coerce religion.[43] This is well-established law.[44] The Court has consistently rejected arguments for public school-sponsored prayer, whether the sponsorship was direct or indirect, "voluntary" or involuntary, noting that the First Amendment "tried to put an end to governmental control of religion and prayer."[45] The Court continues to firmly hold that private religious choices belong to parents, students, and members of the clergy, and not to public school officials.[46] Being elected to the public school board, or given a contract to work in a public school, does not authorize anyone to assume religious control over other peoples' children: A license to teach in a public school is not a license to preach in a public school.

State Law Provisions Governing Church-State Issues

State constitutions may guarantee positive rights (e.g., a state right to a publicly funded education) in addition to protecting the negative rights also secured under the U.S. Constitution (e.g., rights not to have intrusions by government agents on religious freedoms, free speech, etc.).[47] State constitutions may protect negative rights at higher levels than they are protected under the federal constitution. State actions cannot, however, fall below the level of protected rights under the U.S. Constitution.[48]

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[41] 505 U.S. 577 (1992).
[42] 530 U.S. 290, 310 (2000).
[43] *Supra* note 2.
[44] *Id.*
[45] Engel v. Vitale, 370 U.S. 421, 435 (1962).
[46] *Supra* note 2.
[47] *See generally* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).
[48] U.S. CONST. art. VI ("This Constitution . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of

Among state constitutional provisions that may provide greater protections against establishment of religion at the state level are the "Blaine Amendments" found in many state constitutions.[49] Blaine Amendments are named after James Blaine, a member of the U.S. Congress who introduced an amendment to the U.S. Constitution in 1875 that stated:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.[50]

Blaine's proposed amendment passed overwhelmingly in the U.S. House of Representatives.[51] In the U.S. Senate, however, the amendment fell four votes short of the two-thirds majority required by Article V of the U.S. Constitution for a successful constitutional amendment.[52]

Notwithstanding the failure of passage at the federal level, supporters of these amendments were far more successful at the state level. Over two-thirds of the states adopted Blaine Amendments into their state constitutions.[53] Nearly a century and a half later Blaine Amendments remain controversial, with some condemning them as remnants of anti-Catholic religious bigotry, and others praising them as protectors of church-state separation and religious liberty.

The exact text of states' Blaine Amendments varies. But what state level Blaine Amendments have in common is a prohibition against using public tax dollars for private religious purposes. Exactly what is prohibited, however, depends on judicial interpretations of these amendments by state courts. State courts are free to interpret their state constitution's religion clauses in any otherwise lawful manner they elect.

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any State to the contrary notwithstanding"); amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States").

[49] *See generally* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551 (2003).

[50] *Id*. at 556.

[51] *Id*. at 568.

[52] *Id*. at 573.

[53] *Id*. at 576.

Nonetheless, many state courts continue to closely follow the federal models for interpreting establishment and free exercise related provisions in their constitutions.

Church-State Law in Practice

The height and strength of the symbolic wall of separation between church and state increases or diminishes in each case depending on the degree of danger presented by the co-mingling of church and state power. This wall protects the free exercise of religion from governmental interference, and protects the state against dangerous conflicts over religious control.

In Establishment Clause cases the Court uses the *Lemon*[54] test or related alternative tests. Under the *Lemon* test, a government action challenged as violating the Establishment Clause will be constitutionally valid only if it satisfies each of the following conditions:

> 1) *Purpose*: There must a legitimate secular purpose for the challenged government action. The primary purpose underlying the government action cannot be religious in nature.
> 2) *Effect*: The primary effect of the government action must be religiously neutral. It must neither advance nor inhibit religion.
> 3) *Entanglement*: The government action must not foster excessive entanglement between church and state.

If a government action is found to have violated any of the three-prongs of the *Lemon* test, the challenged action is declared unconstitutional. Government officials have no lawful authority to continue any unconstitutional act and they may be held liable for monetary damages for violations of constitutional rights.[55] Alternatives to the *Lemon* test include:

> *The Endorsement Test*: The endorsement test asks whether based on the totality of the circumstances a reasonable observer would conclude that government officials had taken sides in a religious controversy. Government officials are either lending official endorsement or disapproval to a religious debate in a way that sends a message to reasonable observers that those who disagree with government officials are now institutional outsiders because

[54] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[55] 42 U.S.C. § 1983.

of their religious opinions. Consistent with the *Lemon* test, the endorsement test requires governmental neutrality towards religion.[56]

The Coercion Test: The coercion test asks whether government officials are using the power or prestige of the state to coerce belief or practice concerning religion. Government officials may not use the force of law or the threat of penalty to coerce belief or practice concerning religion. But more subtle forms of coercion are also prohibited. Concerning children, for example, the use of psychological coercion or social pressure concerning religion are prohibited. Consistent with the *Lemon* test, governmental neutrality toward religion is required.[57]

The key to navigating the murky and precarious waters of the Establishment Clause is for government officials to maintain neutrality concerning religion while acting in their official capacities as agents of the state, neither advancing nor inhibiting private expression of religion.

In Free Exercise Clauses cases the Court uses this legal test:

The plaintiff must establish:

1) *The belief is religious*: Only religious beliefs are entitled to free exercise protection. Political or philosophical beliefs may be advanced through free speech, but they are not protected under the Free Exercise Clause;
2) *The belief is sincerely held by the plaintiff*: The plaintiff must prove by a preponderance of the evidence that the religious belief is sincerely held and not a sham belief only for purposes of obtaining the exemption or reasonable accommodation;
3) *The belief is central to the plaintiff's faith*: The belief impacted by the government action must be a core element of the plaintiff's faith, and not merely tangential.

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[56] Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community").
[57] Lee v. Weisman, 505 U.S. 577 (1992).

> 4) *The government action is a direct burden on free exercise*: The government action must impose a direct burden on the free exercise of religion, and not merely an incidental burden.

If the plaintiff meets this burden of proof, the plaintiff has established a prima facie case for a protected free exercise right, and is entitled to an exemption from the policy or other reasonable accommodations unless the government can establish:

> 5) *There is a compelling governmental interest*: Government officials can prove a compelling governmental interest (e.g., protecting public security, health, safety, or respecting the Establishment Clause) for denying the exemption or other reasonable accommodation; and
> 6) *Government actions are narrowly tailored to achieving that interest*: The government's means of achieving the compelling interest must not be over-broad in limiting individual rights beyond what is necessary.

If the plaintiff prevails, the plaintiff is entitled to a free exercise exemption or other reasonable accommodation, but the government action remains valid for everyone else.[58]

Conclusion

As noted above, the key to church-state law compliance is for government officials to maintain neutrality concerning religion while acting in their official capacities as agents of the state, neither advancing nor inhibiting private expression of religion. The Appendix below provides professional tips on putting the above described legal principles into practice; U.S. Department of Education *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*; and useful flow-charts for a systematic analysis of church-state challenges.

[58] Employment Division of Oregon v. Smith, 494 U.S. 872 (1990).

APPENDIX

A Legal Primer on Church-State Law in Public Educational Institutions

John Dayton, J.D., Ed. D.

U.S. Constitution First Amendment (1791)

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

***Principles to Practice Tips*:**

Religious Neutrality: Practice religious neutrality in your official duties, neither advancing nor inhibiting religion. In your private capacity religious faith and practice are your choice and right. But as a government official always be certain that no reasonable person could perceive you as using your official power to reward or punish on the basis of religious belief. This is especially important when there is a power relationship between you and the other person. For example, peers may ask other peers if they would like to visit their church, etc. But if there is a positional power relationship (e.g., administrator/faculty; faculty/student) this may reasonably be perceived as misusing positional authority to coerce religious compliance.

Separation of Church and State: Respect the rights of individuals to make their own decisions concerning matters of faith free from state interference. And remember that the state, the state public school, and all state sponsored activities, belong equally to all persons, and not just to those in the religious majority. Do not allow anyone to attempt to seize religious control of any state function. All private citizens, whether they are in the majority, or a minority of one, have rights to pray or not pray as they may choose consistent with their own conscience, and without answering to any state agent. State officials must respect the appropriate bounds of church and state within the respective private and public spheres of life.

Free Exercise: State officials should avoid placing persons in circumstance where they have to choose between what their religious faith requires and what the state requires. Whenever possible, seek to provide a reasonable accommodation for the free exercise of religion. A requested accommodation is not reasonable if it would result in health or safety dangers to others; unreasonable costs; unreasonable administrative burdens; or require a fundamental alteration of a legitimate state program. But in most instances religious believers are merely asking to be exempted or allowed a reasonable alternative, costing the state little or nothing. Even if you do not understand the religious belief, respect the believer and treat that person as you would like to be treated under the circumstances. This is both the right thing to do, and the legally safe thing to do. If a reasonable accommodation has been provided there is no legitimate basis for a complaint or law suit.

Respect for Religious Diversity: Practice genuine respect for the sincerely held beliefs of all persons. Learn about the religious beliefs and practices of others, and teach others about the World's many faiths, their cultural differences, their common purposes, and how all persons of good faith can live together in peace in our schools and in our shared communities. In a just democracy under the equal rule of law no one is a religious outsider.

Stay Safely in the Legal Safe Harbor under Federal Regulations: Church-state law and its application in public educational institutions can often be complex and confusing. To help educators and others in better understanding the application of these principles the U.S. Department of Education's *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools* provides useful guidance on applying the First Amendment's religion clauses in public schools. Although these guidelines are intended for public K-12 schools, they provide useful guidance for all public educational institutions, keeping in mind the important distinctions that higher education attendance is voluntary and university students are not impressionable children, resulting in some additional flexibility concerning the wall of separation between church and state in higher education. Because the rules of church-state separation may be less stringent in some instances in public higher educational institutions, general adherence to the U.S. Department of Education's guidelines for public K-12 schools will likely keep higher education officials within the legal safe harbor under the First Amendment as applied by the Department of Education:

Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools[59]

Prayer During Noninstructional Time

Students may pray when not engaged in school activities or instruction, subject to the same rules designed to prevent material disruption of the educational program that are applied to other privately initiated expressive activities. Among other things, students may read their Bibles or other scriptures, say grace before meals, and pray or study religious materials with fellow students during recess, the lunch hour, or other noninstructional time to the same extent that they may engage in nonreligious activities. While school authorities may impose rules of order and pedagogical restrictions on student activities, they may not discriminate against student prayer or religious speech in applying such rules and restrictions.

Organized Prayer Groups and Activities

Students may organize prayer groups, religious clubs, and "see you at the pole" gatherings before school to the same extent that students are permitted to organize other non-curricular student activities groups. Such groups must be given the same access to school facilities for assembling as is given to other non-curricular groups, without discrimination because of the religious content of their expression. School authorities possess substantial discretion concerning whether to permit the use of school media for student advertising or announcements regarding non-curricular activities. However, where student groups that meet for nonreligious activities are permitted to advertise or announce their meetings—for example, by advertising in a student newspaper, making announcements on a student activities bulletin board or public address system, or handing out leaflets—school authorities may not discriminate against groups who meet to pray. School authorities may disclaim sponsorship of non-curricular groups and events, provided they administer such disclaimers in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.

[59] Excerpted from: U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (last visited Mar. 22, 2017).

Teachers, Administrators, and other School Employees

When acting in their official capacities as representatives of the state, teachers, school administrators, and other school employees are prohibited by the Establishment Clause from encouraging or discouraging prayer, and from actively participating in such activity with students. Teachers may, however, take part in religious activities where the overall context makes clear that they are not participating in their official capacities. Before school or during lunch, for example, teachers may meet with other teachers for prayer or Bible study to the same extent that they may engage in other conversation or nonreligious activities. Similarly, teachers may participate in their personal capacities in privately sponsored baccalaureate ceremonies.

Moments of Silence

If a school has a "minute of silence" or other quiet periods during the school day, students are free to pray silently, or not to pray, during these periods of time. Teachers and other school employees may neither encourage nor discourage students from praying during such time periods.

Accommodation of Prayer During Instructional Time

It has long been established that schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation in such instruction or penalize students for attending or not attending. Similarly, schools may excuse students from class to remove a significant burden on their religious exercise, where doing so would not impose material burdens on other students. For example, it would be lawful for schools to excuse Muslim students briefly from class to enable them to fulfill their religious obligations to pray during Ramadan. 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. In addition, in some circumstances, based on federal or state constitutional law or pursuant to state statutes, schools may be required to make accommodations that relieve substantial burdens on students' religious exercise. Schools officials are therefore encouraged to consult with their attorneys regarding such obligations.

Religious Expression and Prayer in Class Assignments

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content.

Student Assemblies and Extracurricular Events

Student speakers at student assemblies and extracurricular activities such as sporting events may not be selected on a basis that either favors or disfavors religious speech. Where student 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. By contrast, where school officials determine or substantially control the content of what is expressed, such speech is attributable to the school and may not include prayer or other specifically religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.

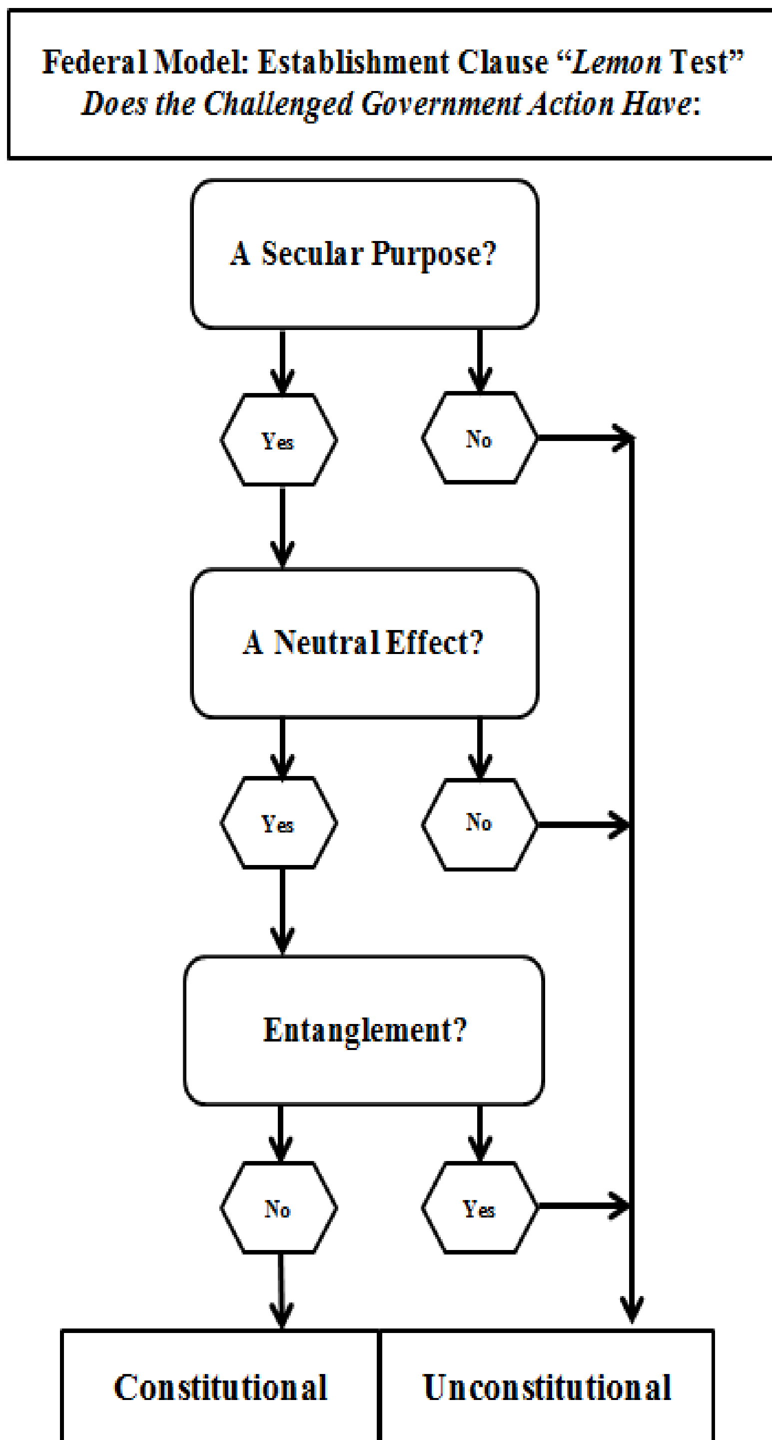
Prayer at Graduation

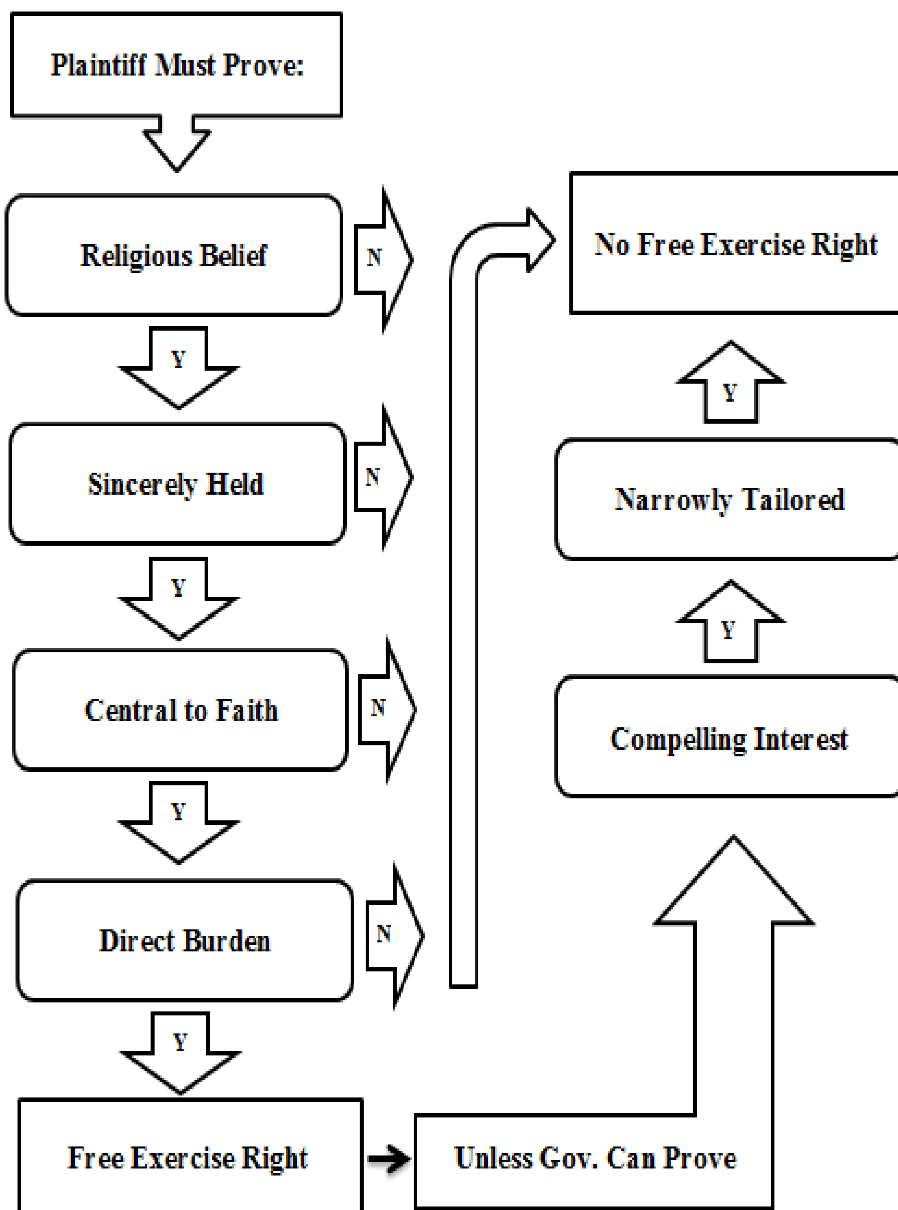
School officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make

appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.

Baccalaureate Ceremonies

School officials may not mandate or organize religious ceremonies. However, if a school makes its facilities and related services available to other private groups, it must make its facilities and services available on the same terms to organizers of privately sponsored religious baccalaureate ceremonies. In addition, a school may disclaim official endorsement of events sponsored by private groups, provided it does so in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.


Federal Model: Establishment Clause "*Lemon* Test"
Does the Challenged Government Action Have:
A Secular Purpose?
Yes
No
A Neutral Effect?
Yes
No
Entanglement?
No
Yes
Constitutional
Unconstitutional
© Dayton


Federal Model: Free Exercise Test and the *Plaintiff's Right to Religious Exemption/Reasonable Accommodation*
© Dayton
Plaintiff Must Prove:
Religious Belief
N
Y
Sincerely Held
N
Y
Central to Faith
N
Y
Direct Burden
N
Y
Free Exercise Right
Unless Gov. Can Prove
Compelling Interest
Y
Narrowly Tailored
Y
No Free Exercise Right

Inexcusable: These Common Misconceptions Do Not Justify Religious Violations in Public Schools

Andrew Seidel, J.D., L.L.M., et al[*]

Imagine that you're a mother of three children in a small rural community in the American South. Your oldest child, in middle school, comes home and says: "Mom, I got in trouble in school today." After some discussion, it turns out that your child wrote a very short story about Christmas, the assignment for the day, and used the word "Xmas" instead of "Christmas." The teacher, who could have explained the issues with this abbreviation in a legitimate, pedagogical way, instead chose to pull your child up in front of the class and publicly chastise him for "X-ing your Lord and savior out of his own birthday." You call the school and complain about the assignment and about this treatment, so the school agrees on a half measure: allowing your child to use the word "yule" instead of "Christmas." Nothing happens to the teacher.

A few weeks later, your second son gets in trouble for refusing to copy lines. The teacher assigned lines from the Bible, the book of John. Again, you call and complain. This time the assignment is changed. The teacher forces your child to copy lines from Dante's *Inferno*, "so that he knows where people like him will go when he dies."

A few weeks after that, your daughter comes home, injured. She was cornered in the bathroom, called a witch, and told she needed to be burned alive. The assailant then slammed her head into the concrete wall. Afraid for your child's safety, you don't send your daughter back to school.

A week later, your son, the "Xmas" son, is surrounded by four other boys on the playground. While roughing him up, they threaten to cut off his toes, gouge out his eyes, and string him up over a fire, until he confesses that Jesus Christ is his lord and savior.

This is an actual complaint that the Freedom From Religion Foundation (FFRF) received. At every stage, this mother reported the problems to the

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[*] Lead author Andrew Seidel is a constitutional lawyer and staff attorney for the Freedom From Religion Foundation (FFRF). This article is the product of a collaborative effort among FFRF's five full-time attorneys and two legal fellows: Senior Staff Attorney Rebecca Markert; Staff Attorneys Andrew L. Seidel, Patrick Elliott, Sam Grover, and Elizabeth Cavell; and Legal Fellows Ryan Jayne and Madeline Ziegler.

school. The school district didn't do anything to address the legal violations. The sheriff didn't do anything, instead sending her to the school resource officer. The school resource officer did nothing. And so this mom reached out to the FFRF. Though we wanted to file a suit immediately, we wrote the school district a warning letter first. The school district made some changes, and made them quickly. Here's what the mom had to say:

> A few weeks ago, kids at my son's school had threatened to gouge out his eyes, cut off his toes and HANG him over a fire until he confessed Christ was Lord, and the school wasn't doing ANYTHING and the sheriff wouldn't touch it. Well, the awesome attorneys over at FFRF sent the school a letter pointing out how many violations of policy, church and state, and told them to get a handle on the religious bullying. I was hopeful but not holding my breath after going round and round with these people for years . . . [W]hen [my son] got to his classroom the principal, the guidance counselor and the teacher were all talking to the kids about bullying, including bullying people for having different gods or NO gods at all !!! and why it wasn't OK . . . So progress . . . this is a good thing and I just wanted to say THANK YOU FFRF !!!

This article examines common misconceptions public school districts and attorneys representing those districts put forth to justify religious encroachment in the public schools. Each section explains and corrects one of these misconceptions. The authors are constitutional attorneys at FFRF, a national state-church watchdog group, and handle more than 5,000 state-church complaints each year, about half of which concern public schools. After an introduction to FFRF's work, strategies, and goals, some of the principal issues we address will be examined.

The FFRF and its Mission

Since 1976, the Freedom From Religion Foundation has been working to uphold the constitutional separation between state and church. We are the watchers on Jefferson's "wall of separation." The five staff attorneys and two legal fellows get nearly 5,000 state-church complaints every year, about half of which are in public schools. The complaints come from all over the country and, almost all of the time, are from local individuals in that community or school. The variety of violations is stunning. A complete list would be too cumbersome, but here is a sample:

- Religious assemblies
- School-sponsored baccalaureate services
- Bible distributions
- Creationism being taught in public schools
- Field trips to religious sites or events, such as graduations, being held in church
- Refusing to allow atheist or freethought student clubs to form
- Prayers at graduation
- Forcing students to stand for or recite the Pledge of Allegiance
- Religious displays, such as the Ten Commandments or posters with Bible quotes
- Staff and outside adults participating in See You At the Pole prayer events
- School boards conducting prayer during meetings
- Churches "renting" schools but not paying for the rental or storage, and sometimes displaying their church banners outside of rental hours, even during the school day.
- Proselytizing teachers or teachers imposing prayer on students
- Preachers given access to schools and students
- Prayer at school events, including coaches organizing or participating in prayers with student athletes.

At FFRF, we prefer to resolve these constitutional violations with education, especially violations in the public schools—we don't want money and time taken from public education. But if our amicable overtures are ignored or rejected, we will go to court.

If a school district you represent happens to get a letter from us, we want to work with you. Our goal is to ensure permanent constitutional compliance, nothing more. We have excellent working relationships with opposing counsel at hundreds of school districts. If you get that letter with the blue FFRF letterhead, know that you can work with us.

The case mentioned above, of the southern mom with three children and a school district that ignored her pleas, is not an extreme example. The escalation to bullying and physical violence is what we would expect to see when violations of the Establishment Clause—the separation of state and church—go unanswered. When teachers inject religion into the classroom, students take their cues from them. When students bully those

who are different, who are not Christian, and get away with it, the bullying intensifies and occurs more frequently. This is why FFRF heeds the words of the Supreme Court in *McCollum*,[1] taking it as our motivating code:

> Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart.

That strict separation is what FFRF seeks to protect. This mission is becoming ever more important in the public schools as the nation turns away from religion. Overall, 23% Americans identify as nonreligious.[2] That eight-point increase since 2007[3] and fifteen-point jump since 1990 makes the "nones" the fastest growing religious identification in America.[4] Nationally, about 35% of millennials—born after 1981, i.e., public school students—are nonreligious.[5]

If we focus on those who don't just check the "none" box, but also consider themselves atheist or agnostic, the numbers are still striking. Atheists and agnostics now make up 7% of the total U.S. population, which is more than Mormons, Jews, Hindus, Muslims, Jehovah's Witnesses and Buddhists combined.[6] About 12% of millennials are atheist or agnostic.[7]

Religion and the protections required by the Establishment Clause are going to clash more frequently as these demographics continue to shift, especially in public schools where the younger, less religious demographic spends so much time. Public school staff, board members, and counsel need to be ready to address these issues appropriately and avoid the common mistakes below.

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[1] Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 232 (1948).
[2] PEW RESEARCH CENTER, AMERICA'S CHANGING RELIGIOUS LANDSCAPE (May 12, 2015), www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.
[3] *Nones on the Rise: One-in-Five Adults Have No Religious Affiliation*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (October 9, 2012), http://www.pewforum.org/Unaffiliated/nones-on-the-rise.aspx.
[4] BARRY KOSMIN, NATIONAL RELIGIOUS IDENTIFICATION SURVEY 1989-1990 (1990).
[5] PEW RESEARCH CENTER, *supra* note 1.
[6] *Id*.
[7] *Id.*

Why do people come to FFRF instead of talking to their school directly?

FFRF often receives replies from school administrators upset to be hearing from us instead of directly from our complainant. For instance, one superintendent wrote that the school district had “an official complaint form that is available on our website as well as an open-door policy with our principals and central office. In the future, your concerned person may wish to address any concerns through the proper channels.”

Religion is a divisive matter in American life. Often, as the opening scene of this article indicates, simply being open about one’s lack of religion is enough to create backlash. This reaction can be far worse in public schools for students and parents who speak up about constitutional violations concerning the majority religion.

Despite young Americans rapidly losing religion, most of the country remains religious, and in recent surveys, the public still demonstrates an alarming hostility to atheism. As an article by two of the leading researchers on the rise of secularism noted, atheists “are one of the most despised people in the US today.”[8] Forty-two percent of Americans state that they would not vote for an atheist for president, making atheists the least-accepted religion-based group politically.[9] The 2008 American Religious Identification Survey reported that 42.9% of atheists and agnostics had experienced discrimination because of their lack of religious identification or affiliation in the five preceding years, including 26.1% in a social context and 13% in school.[10]

This has been borne out in many separation of church and state controversies over the years. Jessica Ahlquist, who challenged a prayer banner hanging in her Rhode Island school, needed a police escort to school because of all the threats she received, and her state representative even called her “an evil little thing” on a talk radio show.[11] Rachel Bauchman, a Jewish student who challenged choir performances of

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[8] Ryan T. Cragun, et al., *On the Receiving End: Discrimination toward the Nonreligious in the United States*, 27 J. CONTEMP. RELIGION 105, 105 (2012), http://bit.ly/2czdyQv.

[9] *Support for Nontraditional Candidates Varies by Religion*, GALLUP (June 24, 2015), http://bit.ly/2d46Z5V.

[10] Cragun, *supra* note 8, at 111, 114.

[11] Abby Goodnough, *Student Faces Town’s Wrath in Protest Against a Prayer*, N. Y. TIMES (Jan. 26, 2012), http://nyti.ms/1Ff3c0o. The state representative, Peter Palumbo, was later arrested for embezzlement, withdrawing nearly $60,000 from campaign funds for his personal use. Walt Buteau, *Former State Rep. Palumbo Arrested on Campaign Fund Charges*, WPRI (Jan. 19, 2017), http://wpri.com/2017/01/19/former-state-rep-palumbo-arrested-on-campaign-fund-charges/.

Christian music at her high school, faced daily harassment at school and in her community. She received a constant stream of threats, accusations, and anti-Semitic slurs, including having swastikas scrawled on posters she put up when she ran for student council.[12] Nicole Smalkowski, who decided not to participate in Christian prayers given by her basketball teammates in a public high school in Oklahoma, was harassed by both students and teachers who eventually forced her off the team.[13] And in a nightmare scenario, Joann Bell, a mother in Little Axe, Oklahoma, who protested religious activity in her children's public schools in 1981, was physically assaulted by a school cafeteria worker and had her home firebombed.[14]

Even complainants who remain anonymous, who suffer the added stress of trying to remain anonymous, can endure abuse. One high school science teacher who was directed to remove Bible verse posters and crosses on her classroom wall after FFRF lodged a complaint started her next class by defining the words "integrity" and "character." She explained to the children that whoever had reported her constitutional violation to FFRF lacked both, and that whoever complained was on the same level as the student who had cheated on the class's final exam. Our complainant reported shaking and struggling to keep control while listening to this tirade, fearful that other students would know who made the report.[15]

Again and again, people angry about challenges to state-sponsored religion pack school board meeting chambers and online comments sections. They speculate amongst themselves about who contacted FFRF, or call our office and demand to know. Occasionally, they send requests under public records laws, which don't apply to FFRF. More often, they send death threats that are reported to the police. It is little wonder that a parent or student who wants to try to stop a violation of the Establishment Clause would want to protect their anonymity.

Courts have recognized the need for special protection in Establishment Clause matters and therefore often grant protective orders allowing

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[12] Rachel Bauchman, *Rachel Bauchman Versus Utah*, FREETHOUGHT TODAY (Oct. 1996), http://bit.ly/1Edko5F.

[13] John Stossel, Sylvia Johnson, and Lynn Redmond, *The Black Sheep of Handesty* (May 11, 2007), http://abcn.ws/2dDWvhg.

[14] Penni Crabtree, *Prayer Issue Rips Apart Congress . . . Religious Oklahoma Township*, 20 NAT'L CATHOLIC REPORTER No. 21 (March 16, 1984), http://bit.ly/2d6Mk4M.

[15] This teacher subsequently sued the school district, alleging a violation of her freedom of speech and religious expression. The district's order to remove the religious items prompted by FFRF's letter was upheld in Silver v. Cheektowaga Cent. Sch. Dist., No. 16-102 (2d Cir. Nov. 7, 2016).

complainants to proceed anonymously during litigation.[16] FFRF's plaintiffs have been granted anonymity every time they have sought it.[17] It is also to a school's benefit to remain unaware of our complainant's identity and religious beliefs, as anonymity precludes any alleged abuse of that information. For instance, instead of defining "character" and "integrity," what might the teacher have done to the student had she known who had reported her? Could that student expect fair grades? Would the school want to deal with the fallout from subsequent accusations relating to the identity of the student being made public?

But most importantly, school procedures and a complainant's identity are irrelevant to the constitutionality of the school's actions. Either the Constitution is being violated or it is not. That is the only question the school need concern itself with. It is in a school's best interest to resolve a violation as quickly as possible if it exists, no matter how it was brought to their attention, to avoid liability.

Who is Some Group from Wisconsin to Tell a Local School What to Do?

A related complaint FFRF encounters frequently is that we are a meddling "out of state" or "outside" group that has no right to dictate how a given school conducts itself. After we warned several Oklahoma superintendents against allowing members of the Gideons Society to distribute Bibles to students at their schools, then-Attorney General Scott Pruitt (now the head of the EPA) told the schools: "As the attorney general of Oklahoma, I will not stand idly by while out-of-state organizations bully you or any other official in this state into restricting the religious freedom the Founders of this country held dear."[18]

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[16] E.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Doe v. Elmbrook Sch. Dist., 687 F.3d 840 (7th Cir. 2012); Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995); Doe v. Jackson City Sch. Dist., No. 2:13-cv-112 (S.D. Ohio 2013); Does v. Enfield Public Sch., 716 F. Supp. 2d 172 (D. Conn. 2010).

[17] E.g., Freedom From Religion Found., Inc. and Does v. Mercer County Bd. of Educ., No. 1:17-cv-00642 (S.D. W. Va. 2017); Doe v. Jackson City School District, No. 2:13-cv-112 (S.D. Ohio 2013); Freedom From Religion Found., Inc., and Does v. Connellsville Area Sch. Dist., No. 2:12-CV-1406 (W.D. Pa. 2013); Freedom From Religion Found., Inc., and Does v. New Kensington-Arnold Sch. Dist., 919 F. Supp. 2d 648 (W.D. Pa. 2013); Doe 1 v. Sch. Bd. of Giles Cnty., No. 7:11-cv-00435-MFU (W.D. Va. 2012).

[18] Pruitt letter of April 14, 2015, *available at* https://www.ok.gov/oag/documents/Letter%20to%20OK%20superintendents%20re%20religious%20freedom.pdf.

FFRF is a national membership organization with members in all 50 states, the District of Columbia, and Puerto Rico. In the Oklahoma Bible distribution matter, as with very nearly all of our other complaints, a local resident contacted us to request we take action. FFRF is often accused of "roaming" the country looking for state-church violations,[19] but with five full-time attorneys and nearly 5,000 complaints coming in annually, we simply don't have the time. The truth is, without a student to snap a picture of a cross on their classroom's wall, a parent reporting their child came home reciting a prayer their teacher taught them, or a high school football fan forwarding us a video showing a prayer or an article about their team employing a chaplain, we would have no way of knowing there was a problem in the first place.

We care about every attempt to erode the wall of separation of church and state, no matter where, no matter how big or small, because, as the story that opened this article shows, little violations lead to big violations. Religion is a divisive issue that lends itself more readily to escalation than to attenuation. Every vocal objection to a church-state violation chips away at the false assumption that everyone belongs to the majority religion, and makes communities more aware of the minorities in their midst, which benefits all minority religious groups.

Alleged "Voluntariness" of Religious Activities in Public Schools

A school district has set aside time at the start of its graduation ceremony for prayer. Or a school district has hired an evangelical group of entertainers to come to its elementary schools for a performance that will include life lessons and Bible stories (yes, such groups exist—many of them). Or a teacher has decided to show a religious movie during class as a reward for students. All of these scenarios, which involve religious promotion during school-sponsored activities, are complaints FFRF has received, and too frequently.

When FFRF explains that religious promotion during school-sponsored activities is unconstitutional, we often receive responses that are variations on the same theme: That participation in the religious aspect of this school

[19] *See,* e.g., "It appears that the small town of Spur is targeted now by the Freedom from Religion Foundation, which is roaming around the country claiming that any expression of religion in the form of a cross is forbidden on publicly owned land." Beth Pratt, *Considering Penguins, Christmas Sweaters and Religious Expressions*, LUBBOCK AVALANCHE J. (Dec. 9, 2016), http://lubbockonline.com/faith/2016-12-09/pratt-considering-penguins-christmas-sweaters-and-religious-expressions.

event is "voluntary." Sometimes the optional nature of the event is even communicated to parents and students. Sometimes parents are given a form to sign if they want their student to participate in an alternative activity. Other times an announcement is made that students can choose to attend an activity or not.

If students are not required to be present, the argument goes, then there is no constitutional violation. There are two fatal problems with this argument: It ignores the social reality of public schools; and it ignores the simple fact that the government is still violating the Constitution, whether all, some, or no students attend.

When the event in question is a graduation ceremony, sporting event, or any other activity that the majority of students will want to attend, students should not have to forfeit their participation in a fun activity or major life event in order to avoid violating their right of conscience.[20] For many students, opting out of such an event--especially when the event is public and participation is expected—is a punishment in itself.

In fact, given its high level of significance in the lives of graduates and their families, the Supreme Court went so far as to rule that a graduation ceremony isn't even a "voluntary" event: "Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term 'voluntary,' for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years."[21]

Eight years later, the Supreme Court expanded its commonsense objection to prayer at graduation ceremonies to other school events in *Santa Fe Independent School District v. Doe*, a 2000 decision holding that scheduling student-led prayer before football games is unconstitutional.[22] The school district argued that a football game, unlike a graduation ceremony, is truly voluntary for students to attend.[23] The Court responded by reminding the school district that the law "reaches past formalism" and that "[t]o assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is 'formalistic in the extreme.'"[24]

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[20] Lee v. Weisman, 505 U.S. 577, 583 (1992).

[21] *Id.* Remarkably, the Court ruled this way despite parties stipulating that attendance at graduation *is* voluntary.

[22] 530 U.S. 290 (2000).

[23] *Id.* at 310.

[24] *Id.* at 311.

In other words, Supreme Court Justices remember being in high school and appreciate the social realities that entails. When it comes to fun activities or major life events, providing an "opt out" doesn't mitigate the social pressure or desire of a student to be included. Not participating is a form of punishment and a school cannot punish students for wanting to avoid religious indoctrination.

The solution, fortunately, is simple: Remove religious ritual from school-sponsored events so that all students can participate in the latter. But what about situations where participation is presumably not desirable? If nonreligious students aren't pressured to participate, either through peer pressure or personal desire, then the above line of reasoning doesn't seem to apply.

The Supreme Court addressed this when it struck down Bible readings and prayer at the start of the school day. In no uncertain terms, it rejected the argument that voluntariness alleviated the problem. The court concluded that the religious endorsement was not "mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause."[25] Or, as Justice Brennan put it in his concurring opinion, "the availability of excusal or exemption simply has no relevance to the establishment question."[26]

Voluntariness simply does not matter in the Establishment Clause context because the school district is still endorsing a religious message, even if no students participate. If the school allows an outside group access to students during the school day, even on an opt-in basis, that private group is benefitting from the implicit stamp of school district approval. The same reasoning applies to a scheduled viewing of a religious movie or any other activity that takes place during the school day. The implicit message to students is "this message is important for you to hear."

One final consideration: Even if a student opts out and saves him or herself from direct proselytization, that doesn't help the student from becoming a target for peer-to-peer proselytization after the event. Introducing religion into public schools divides students along religious lines, creating religious "insiders" and minority religious or nonreligious "outsiders."[27] If the message at a school assembly is that religion is good

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[25] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 224–25 (1963).
[26] *Id.* at 288.
[27] *See* Santa Fe Indep. Sch. Dist., 530 U.S. 290, 309 (2000) ("School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the

and those who do not accept that message need to be converted, the inevitable result will be bullying through peer-to-peer ministry.

Public School "Open Forums" – A Purported Cure That is as Bad as the Disease

Some school officials have adopted a tactic the Religious Right has worked hard to promote: Turning government-sanctioned activities into "open forums" for private speech. In public schools, this often manifests itself when schools permit private groups to hand out Bibles or other religious literature in school. Creating such forums in an attempt to cure Establishment Clause defects often violates the Free Speech Clause. Added to the constitutional issues is the significant community discord that arises when controversial religious and political matters are thrust upon public school students.

Every year dozens of parents report to FFRF that their child received a Bible at school. Many times those complaints are resolved by informing school officials that public schools may not allow outsiders into classrooms to distribute Bibles to students, as courts have repeatedly held.[28] Often the Bibles are distributed by Gideons International, which targets teachers and principals rather than superintendents and school boards because school officials at lower levels are less likely to understand that Bible distributions are unconstitutional.

Despite the inherent problems in schools facilitating Bible distributions, some school districts have defended the practice by asserting that they have a "forum" for literature distributions. While the legality of such forums has rarely been tested, two circuit courts of appeals have addressed the issue.

In *Peck v. Upshur County Board of Education*, the Fourth Circuit Court of Appeals upheld a school policy that allowed religious and secular materials on a table one day a year in secondary schools, with a disclaimer.[29] This is often referred to as a "passive distribution." However, the court found that even a passive distribution was prohibited to elementary school students because of

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political community, and an accompanying message to adherents that they are insiders, favored members of the political community'") (q*uoting* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

[28] *See* Berger v. Rensselaer Central Sch. Corp., 982 F.2d 1160 (7th Cir. 1993) (holding that school distribution of Bibles to fifth-graders violated the Establishment Clause); *see also* Tudor v. Bd. of Educ. of Rutherford, 14 N.J. 31 (1953), *cert. denied*, 348 U.S. 816 (1954) (finding unconstitutional a school board resolution permitting the distribution of Bibles).

[29] 155 F.3d 274 (4th Cir. 1998).

the impressionability of these students.[30]

In *Roark v. S. Iron R-1 School District*, the Eighth Circuit Court of Appeals upheld a permanent injunction against the "passive" distribution of Bibles.[31] In doing so, the court remarked that the injunction was "based on a judicial determination that the District has for decades impermissibly endorsed a particular religion by allowing the distribution of Bibles in fifth grade classrooms."[32] The court found that, under the circumstances, the new passive distribution policy did not provide a valid defense to the entry of a permanent injunction.[33]

These cases caution strongly against the constitutionality of such forums in public schools. Regardless of the legality of such forums under the Establishment Clause, history has proven them to be unwise and constitutionally problematic under the Free Speech Clause.

School Forums Enable Unconstitutional Viewpoint Discrimination

When schools have sought to defend their practices under a "private forum" argument, they inevitably bring about divisive and avoidable legal disputes. Orange County Public Schools (OCPS) in Orlando, Fla., stands as a prime example. On January 16, 2013, OCPS allowed World Changers of Florida to distribute *New International Version* Bibles to students in eleven schools. Local members of the community and FFRF objected to these distributions, both before and after they took place. In response to FFRF's requests to end the practice, the school system claimed that the distribution was part of a forum for private speech. However, OCPS did not have a written policy in place and the only group using the purported forum was this religious organization.

In response, FFRF and its local members decided to test the forum by requesting to distribute materials of their own. OCPS required that anything submitted by FFRF be reviewed beforehand (although the Bibles were not reviewed). A total of 9 out of 20 materials that FFRF submitted were rejected by the school system. One book, Sam Harris' *Letter to a Christian Nation,* which is a New York Times bestseller, was rejected because one page described the religious rituals of ancient societies, including the sacrifice of virgins, cannibalism, and the burning of widows so they could follow their husbands into the next world. The district deemed this to be inappropriate "for

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[30] *Id.* at 287 n.1 ("In elementary schools, the concerns animating the coercion principle are at their strongest because of the impressionability of young elementary-age children").
[31] 73 F.3d 556 (8th Cir. 2009).
[32] *Id.* at 561.
[33] *Id.*

the age and maturity of high school students." Another book, *Jesus is Dead* by Robert Price, was rejected because the district said that the "claim that Jesus was not crucified or resurrected is age inappropriate." Other pamphlets that contradicted the biblical account of Jesus were rejected because the district said they would "cause a substantial disruption."

The school district outlined these reasons, and others, for censoring the pamphlets and the books in a letter to FFRF. It may not come as a surprise that this letter ultimately was cited as "Exhibit A" when FFRF filed a lawsuit against the district on June 11, 2013. The complaint asserted that OCPS engaged in unconstitutional viewpoint discrimination. All the objections to FFRF's literature could be made about the Bible. For instance, the Bible claims that Jesus was crucified and resurrected, but that was distributed to students. As we noted at the time, the government cannot prohibit minority speech because the majority might become disruptive: "The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent."[34] As the Supreme Court has said, "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[35] In January of 2014, the district changed course and agreed to allow the materials that had previously been censored. FFRF's case was dismissed as moot.[36]

While the issue of past censorship was being litigated, proposed literature distributions within Orange County became increasingly contentious. Although atheist materials were eventually deemed tolerable to the school board, materials from the Satanic Temple were not. After the school system received a request to distribute materials from the Satanic Temple, the Board voted in February of 2015 to restrict the passive distribution of certain materials, including those that are religious.[37] This was the policy that FFRF had advocated from the beginning and repeatedly throughout litigation.

The same scenario has continued to come up in other school districts, although litigation has not been needed to resolve those disputes. In the Delta County School District in Colorado, FFRF requested that Bible distributions cease, only to be told that a forum existed for private groups to distribute

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[34] Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 235, 120 (2000).

[35] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 828 (1995).

[36] *FFRF v. Orange Cty. Sch. Bd.,* 30 F. Supp. 3d 1358, 1360 (M.D. Fla. 2014), *aff'd*, 610 F. App'x 844 (11th Cir. 2015).

[37] Lauren Roth, *Orange School Board Bans Outside Bibles, Satanic Materials in Schools*, ORLANDO SENTINEL, (Feb. 10, 2015), http://www.orlandosentinel.com/features/education/os-Bibles-satanic-pamphlets-banned-20150210-story.html.

materials. The school district allowed local residents to place FFRF materials and a coloring book from the Satanic Temple to be distributed to students via a passive distribution table.[38] Many parents and community members requested that the distributions cease altogether. The controversy could well have been avoided had school administrators said no to proselytizers seeking to reach a captive audience of public school students.

Claims of a "Forum" Do Not Absolve Schools of Their Constitutional Duties

Some school administrators have claimed that a "forum" for private speech exists even when it would not fundamentally change the analysis under the Establishment Clause. Even if a school can open a forum for distributing printed materials in schools--and that is not clear from the case law--it cannot really do so with other channels of speech. School assemblies and other school events are attributable to the school and are not easily characterized as forums for private speakers.

FFRF has all too often heard from school administrators that youth pastors who visit lunchrooms to recruit students are perfectly acceptable since the school allows other visitors to meet with students. This predatory behavior is worrisome on several levels, but the complicity by schools in such religious recruitment is astounding. Many Christian parents would not appreciate atheists, Muslims, or Scientologists roaming public schools to befriend their children, often with the ultimate goal of bringing them to a particular religious event.

Earlier this year FFRF submitted a complaint to a South Carolina school district that hosted a scheduled religious book reading in one of its elementary schools. The school district's attorney defended the practice by noting that the school had hosted other presentations within the school. Such arguments are not only unconvincing on their face, but lack any legal support. If an Establishment Clause violation could be cured by including secular subjects, the outcome of nearly every Supreme Court case relating to religion in schools would be wrongly decided. The decisions in *McCollum*[39] and *Schempp*[40] would have been incorrect since the schools provided secular curricular programming in addition to religious. Thankfully, this is not how our courts have interpreted the First Amendment and FFRF would strongly challenge any such assertions in court.

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[38] Erin McIntyre, *Schools Give the Devil His Due*, THE DAILY SENTINEL (Apr. 1, 2016), http://www.gjsentinel.com/news/articles/schools-give-the-devil-his-due.
[39] Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948).
[40] Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

The Event was Not Explicitly Christian or was Simply a Majority Vote by Students

Another typical and misguided strain of replies centers on religious specificity or attribution to the religious majority. For instance, after writing a letter of complaint to a school district about a religious assembly we might hear something in response like "well, it was not explicitly Christian" or, "it did not favor a particular sect of Christianity—Catholic, evangelical—so it was not a violation." Or, about a prayer before a school event, we might hear: "Majority rules, the students voted to have a prayer."

These two rejoinders display a basic misunderstanding of the Establishment Clause and the U.S. Bill of Rights. First, it is erroneous to claim that the Establishment Clause only applies when the government elevates one sect over another, but not one religion over another or religion over non-religion. Second, it is similarly incorrect to argue that the majority can vote to infringe the fundamental rights of the minority:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[41]

Typically, people making the "majority rules" argument are those comfortably in the religious majority, which makes the misconception disturbingly far-reaching. And while we could cite examples of public school districts' counsel making this argument, we can point to a more public authority: The late Justice Antonin Scalia. Scalia was fond of spreading this idea, going so far as to call the Supreme Court's settled interpretation of the Establishment Clause "a lie." At Colorado Christian University in October 2014, Scalia said:

> I think the main fight is to dissuade Americans from what the secularists are trying to persuade them to be true: that the separation of church and state means that the government cannot favor religion over nonreligion . . . [the Court's] latest take on the subject, which is quite different from previous takes, is that the

[41] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

> state must be neutral, not only between religions, but between religion and nonreligion. That's just a lie. Where do you get the notion that this is all unconstitutional? You can only believe that if you believe in a morphing Constitution.[42]

Decades before Scalia took the bench the Supreme Court explicitly rejected the idea that the Establishment Clause only prohibits sectarian preference, declaring "this Court has rejected unequivocally the contention that the Establishment Clause forbids *only* governmental preference of one religion over another."[43] The best expression of this came over 30 years ago. In 1985, the court wrote: "At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism."[44] This is the erroneous view Scalia espoused and which the Court repudiated:

> But when the underlying principle has been examined in the crucible of litigation, *the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all*. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in *forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among 'religions'—to encompass intolerance of the disbeliever and the uncertain.*" [45]

The high court refuted Scalia in the first real Establishment Clause case in 1947, declaring the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers."[46] Even the four dissenting justices in that case agreed that the Establishment Clause had a broader scope:

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[42] *See* Valerie Richardson, *Scalia Defends Keeping God, Religion in Public Square*, WASH. TIMES (Oct. 1, 2014), http://www.washingtontimes.com/news/2014/oct/1/justice-antonin-scalia-defends-keeping-god-religio/?page=1#ixzz3F5iX6U7z.
[43] Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 216 (1963).
[44] Wallace v. Jaffree, 472 U.S. 38, 52 (1985).
[45] *Id*. at 52-54 (emphasis added).
[46] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

> The First Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.[47]

In *Texas Monthly, Inc. v. Bullock,* the Court overturned a sales tax exemption that applied only to religious literature. Justices Blackmun and O'Connor explicitly stated that the "government may not favor religious belief over disbelief."[48] They, too, were refuting Justice Scalia. And in *Schempp,* the wonderful victory friend-of-FFRF Ellery Schempp achieved more than 50 years ago, Justice Goldberg wrote: "The fullest realization of true religious liberty requires that government . . . *effect no favoritism* among sects or *between religion and nonreligion*."[49] The Court put it bluntly 55 years ago:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally . . . pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[50]

Not only do Scalia's views on this critically important issue contradict virtually every major Establishment Clause case, they also fail to account for the Equal Protection Clause of the Fourteenth Amendment, which declared that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[51] In other words, our governments and our laws must treat all people equally regardless of their belief.

Justice Scalia often tried to claim that his view was that of the framers—the original view. But again, he's wrong. The framers agreed on Article VI, Section 3 of the Constitution, which prohibits any religious

[47] Id. at 31–32.
[48] 489 U.S. 1, 27–28 (1997) (separate opinion concurring in judgment).
[49] 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).
[50] Torcaso v. Watkins, 367 U.S. 488, 495 (1961).
[51] U.S. CONST. amend XIV.

test for public office.[52] During the North Carolina ratification debate, future Supreme Court Justice James Iredell said: "[I]t is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?"[53] Iredell's point, and the point made by his judicial successors, is that genuine freedom of religion requires the right to dissent, the right to be free from religion. And if the government can favor those who hold religious beliefs over those who do not, the people are not truly free because they are not truly equal. This vision of the First Amendment, which favors the majority religion, is simply untenable.

The Christian Majority Cannot Vote to Infringe the Rights of a Minority

School District Five of Lexington & Richland Counties in South Carolina had a policy that allowed students to vote on whether to have a prayer at their graduation ceremony: "The use of an invocation and/or benediction at a high school graduation exercise will be determined by a majority vote of the graduating senior class with the advice and counsel of the principal."[54]

Irmo High School, a school in the district, prepared written ballots using school time, staff, facilities, and funds. Teachers distributed the ballots, explained them to students in class, and collected the completed ballots. Teachers and school staff tallied, recorded, and reported the results. The students voted "yes" on the prayer and selected the prayer giver.

But the district had been ignoring the concerns of Max Nielson, an Eagle Scout, atheist, and senior who voted against the prayer. FFRF wrote a letter to the district explaining the constitutional problems with graduation prayer, an issue well settled by the Supreme Court in *Lee*,[55] but the district refused to change course:

> Please be advised that the District does not intend to overrule the decision of a majority of the 2012 graduating class of Irmo High

[52] U.S. CONST. art. VI ("no religious test shall ever be required as a qualification to any office or public trust under the United States").
[53] 4 ELLIOTT'S DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 194, https://memory.loc.gov/ammem/amlaw/lwed.html.
[54] Nielson v. Dist. 5, Dist. of S. Carolina, Second Amended Complaint, 3:12-cv-01427-CMC Date Filed 11/19/12 Entry Number 22 Page 5 of 14.
[55] Lee v. Weisman, 505 U.S. 577 (1992).

> School to have a student volunteer deliver an invocation at the Irmo High School graduation ceremony scheduled to take place next week.[56]

The superintendent reiterated this refusal after personally meeting with Nielson:

> I have reflected on everything you said during our meeting and, while I empathize with your position, I do not believe that I can in good conscience grant your request for me to step in and interfere with the decision of a majority of students who voted earlier this school year to include a prayer at their graduation ceremony.[57]

Max found FFRF and we sued the school district in November of 2012. That next August, the majority-vote prayer policy was changed and the school district had paid FFRF's attorneys' fees (the case continued over school board prayers).[58]

You can see the appeal of this argument. It passes the buck from the school to the students and lends a democratic gloss to the whole proceeding. But the idea that fundamental rights can be voted away runs counter to the Bill of Rights.[59] The Bill of Rights exists to protect the minority from the tyranny of the majority.[60] In fact, the Supreme Court has addressed this issue in a nearly identical context. In *Santa Fe*, quoting *Barnette*, it wrote that, "fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[61]

In *Santa Fe*, the Supreme Court struck down 6-3 a school policy that authorized students to vote on whether to hold a prayer at high school football games.[62] The school district adopted a policy entitled: "Prayer at

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[56] Nielson v. District 5, *supra* note 54, at 7-8.
[57] *Id.* at 8.
[58] *See* FREEDOM FROM RELIGION FOUNDATION, FFRF, STUDENTS, END GRADUATION PRAYERS, https://ffrf.org/legal/challenges/highlighted-court-successes/item/16264-ffrf-student-bring-suit-over-graduation-prayer.
[59] West Virginia v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts").
[60] Interview by Bill O'Reilly with Andrew L. Seidel on *The O'Reilly Factor*, FOX NEWS, January 18, 2013, clip *available at* http://www.mediaite.com/tv/bill-oreilly-clashes-with-atheist-over-obama-swearing-in-on-Bible-at-inauguration/.
[61] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 304–05 (2000) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).
[62] *Id*.

Football Games," and later amended their policy to omit the word "prayer" from the title, but which was substantially the same and envisioned student "messages," "statements," and "invocations." The students voted to have the prayer and then, in a separate vote, selected the student speakers. The particular message was not chosen by the vote, but the "statement or invocation" had "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."[63]

The Supreme Court accepted the case, "limited to the following question: 'Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.'"[64] The policy was indeed a violation.[65] The policy was facially invalid because:

> [I]t impermissibly imposes upon the student body a majoritarian election on the issue of prayer. Through its election scheme, the District has established a governmental electoral mechanism that turns the school into a forum for religious debate. It further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. **The award of that power alone, regardless of the students' ultimate use of it, is not acceptable**.[66]

Put another way, "the election mechanism . . . undermines the essential protection of minority viewpoints. Such a system encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise. Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred."[67] Perhaps put even more simply, the majority cannot vote to violate the Constitution.[68]

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[63] *Id*. at 306.
[64] *Id*. at 301.
[65] *Id*.
[66] *Id*. at 316 (emphasis added).
[67] *Id*. at 317.
[68] Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015) ("The Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights").

Free Speech Rights

Free speech is an important First Amendment right, one FFRF has raised, defended, and litigated. However, in the public school context it is often misunderstood as a license to violate the Establishment Clause.

Students' Free Speech Rights

School districts will often cite a student's free speech rights as a reason to allow some imposition of religion in the public schools. Particularly in the case of prayer at public school graduations—a practice that was struck down by the U.S. Supreme Court in 1992[69]—offending school districts will often remove prayer from the official graduation program, but then allow student remarks. The student selected for those remarks almost always chooses to give a prayer as part of those remarks. Schools often claim these prayers are legal because a student delivered them and thus they are private speech. This was nearly the same issue as in *Santa Fe*.[70]

In order to comply with constitutional mandates of religious neutrality, public schools should only hold events that are secular in nature. It is unconstitutional for public school officials to invite a teacher, faculty member, member of the clergy, or a student to deliver a prayer at school-sponsored events.[71] This extends necessarily to public school graduations.

In the *Lee v. Weisman* case, a Jewish family challenged the practice of inviting clergy members to deliver prayers at public middle school graduations in Rhode Island. During her graduation in 1986, Merith Weisman, a Jewish student, was subjected to a prayer delivered by a Baptist minister. Her father complained to the principal about the prayer, but received no reply. Once his next daughter, Deborah, was approaching her graduation in 1989, he alerted the school officials to the Establishment Clause problem once again. This time, the district assumed that inviting a rabbi to deliver the prayer would appease the Jewish complainants and scheduled prayer again. It did not satisfy the Weismans and they filed suit.

In 1992, the U.S. Supreme Court ruled in favor of the Weisman family. In affirming nearly four decades of precedent against school prayers, the high court ruled that prayers at public school graduations are an

[69] Lee v. Weisman, 505 U.S. 577 (1992).
[70] Santa Fe v. Doe, 530 U.S. 290 (2000).
[71] *See* Lee v. Weisman, 505 U.S. 577 (1992); *see also* Santa Fe v. Doe, 530 U.S. 290 (2000).

impermissible establishment of religion. Justice Kennedy wrote for the majority "if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people."[72] In response to the claim that the prayers were not state speech, Kennedy replied:

> [The State's] involvement is as troubling as it is undenied. A school official . . . decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant . . . and that choice is also attributable to the State . . . The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school age children who objected in an untenable position.[73]

The Supreme Court reaffirmed the necessity of secularism at public school events. In *Santa Fe v. Doe*, discussed above, Justice John Paul Stevens, writing for the majority, declared that student-led, student-initiated prayer at school events violates the Establishment Clause.[74] Stevens addressed the District's rationalizations for the policy, which claimed the prayers were a student choice, and that unlike at a graduation ceremony, attendance at an extracurricular event is "voluntary." However, the Court concluded that a prayer taking place at a "regularly scheduled school-sponsored function conducted on school property" would lead an objective observer to perceive it as state endorsement of religion.[75] The Court stated that in this context: "Regardless of the listener's support for, or objection to, the message, an objective . . . student will unquestionably perceive the inevitable . . . prayer as stamped with her school's seal of approval."[76]

Since the *Santa Fe* decision, schools have either ignored the decision and continued scheduling prayer at graduations until organizations like FFRF step in; or they contrive situations in which students are giving remarks that just happen to take place in the same slot where the prayer had been, and when a prayer is delivered, they claim the student has free

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[72] Lee, 505 U.S. at 592.
[73] *Id.* at 590.
[74] Santa Fe v. Doe, 530 U.S. 290 (2000).
[75] *Id.* at 308.
[76] *Id.*

speech rights they cannot restrict.[77] The problem, however, is that the school district already has a history and tradition of prayer at graduations. Especially for those districts that have chosen to flout constitutional requirements for decades despite clear case law, they have bred a culture of prayer. It is not surprising that once they're called out on the illegal prayer, the student chosen to deliver remarks would choose to deliver a prayer. The districts have cultivated this as a norm.

FFRF was involved in a prime example of this situation in Bastrop, Louisiana in 2011. There an atheist student complained about prayers scheduled at graduation in Morehouse Parish Schools. The district removed the prayer from the scheduled program and replaced it with a moment of silence, which was to be introduced by a student.

This was not done without extreme backlash from the community. In fact, the English teacher, Mitzi Quinn, made statements to the local press chiding this student for bringing this illegal practice to the school district's attention and stated no other non-believing student "had a problem" with prayer. She was quoted in the Bastrop Daily Enterprise saying, "And what's even more sad is this is a student who really hasn't contributed anything to graduation or their classmates."[78]

During graduation rehearsal, the student chosen to introduce the moment of silence, predictably gave a prayer and stated the following:

> Will you please stand for a moment of silence and remain standing for the presentation of colors and the Pledge of Allegiance. Before I get started though, let me say this. I was initially chosen to deliver the invocation but I was recently informed that I would be leading a moment of silence. However, before I fulfill my obligation, I would like to say that I am of the Christian faith. I respect those who do not share the same views as I do. But at this time, I would like to give thanks to the God that has made the class of 2011 a great success. For those of you who share the same beliefs as I do, I ask that you please bow your head as I pray. Our Heavenly Father, we come to you in thankfulness and a grateful heart for the friendships and memories that you have given us as the class of 2011. Even though for many of us this will be the last time that we gather as a class, we pray that you will lead us, guide

[77] *See,* e.g., http://religion.blogs.cnn.com/2013/06/06/hear-what-valedictorian-said-for-cheers/.

[78] Mark Rainwater, *Student Challenges Prayer at Bastrop Graduation*, BASTROP DAILY ENTERPRISE, May 18, 2011.

> us, and watch over us through all of our endeavors throughout the rest of our lives. In Jesus' name I pray. Amen. [Crowd yells "Amen" and cheers]. And now for a moment of silence.

Rumors spread throughout the district that the school officials would make the atheist student take the stage to receive his diploma and that the students planned to "boo" him. In the end, at the graduation ceremony a student led the entire audience in the Lord's Prayer.

Some states have also passed legislation, which creates a "limited public forum" in the graduation ceremony. The constitutionality of such laws remains unsettled. However, a public school graduation cannot logically be conceived as a forum, no matter the creative redefinition offered by some of these state laws. The Fifth Circuit addressed this in *Doe v. Santa Fe*: "Neither its character nor its history makes the subject graduation ceremony in general or the invocation and benediction portions in particular appropriate fora for such public discourse."[79] The Third Circuit also addressed the issue in *Brody v. Spang*: "Graduation ceremonies have never served as forums for public debate or discussions, or as a forum through which to allow varying groups to voice their views."[80]

Certainly, not every reference to a student's religious beliefs within the context of a school graduation necessarily violates the Establishment Clause. Truly spontaneous references to an individual's personal beliefs may be permissible under certain circumstances. However, FFRF has rarely seen the case whereby a student's religious remarks or prayers are truly spontaneous and self-initiated. They are most often the product of a school district's longstanding tradition of prayer at graduation ceremonies and decades long defiance of clear constitutional dictates.

In these situations, school districts must take steps to comply with constitutional requirements. Here are some actions districts can take to ensure their compliance:

- Issue a statement to the community explaining the District's legal duty to enforce and abide by the Constitution, which prohibits school sponsorship of prayer at graduation and other school-sponsored events.
- Apologize to any student who is harassed and treated as a pariah for bringing the illegal practice to light and correcting the situation.

[79] 168 F.3d 806, 820 (5th Cir. 1999).
[80] 957 F.2d 1108, 1117 (3d Cir. 1992).

- Discipline the student who defies the District's directives to refrain from delivering a prayer. If a student abuses her position as speaker to proselytize, the District cannot passively sit by.
- Take other action to ensure graduation exercises are not exploited to present religious messages.

Another area in which school districts claim students' free speech rights are religious displays in schools, i.e. pictures of Jesus, crosses on posters, or biblical verses on cheerleader signs at athletic events. In 2012, FFRF contacted several schools about religious banners players were to run through during the opening ceremonies of a football game. These banners displayed biblical verses such as "We can do all things through Christ who strengthens us. Phil. 4:13"[81] or "But thanks be to God, which gives us victory through our Lord Jesus Christ."[82]

Again, religious displays that appear at school-sponsored activities or become part of the school's décor are constitutionally suspect even when created or displayed by students. Courts have continually held that school districts may not display religious messages or iconography in public schools.[83] It is immaterial whether the display was funded by the district or by private donors, such as students. "[T]he mere posting of the [religious display] under the auspices of the [District] provides the 'official support of the State . . . Government' that the Establishment Clause prohibits."[84]

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[81] Banner displayed by Marbury High School cheerleaders in Autauga County Schools in Prattville, Alabama in October 2012, *see FFRF Warns Another School on Bible Banners*, FREEDOM FROM RELIGION FOUNDATION (Oct. 26, 2012) https://ffrf.org/news/news-releases/item/16028-ffrf-warns-another-school-on-bible-banners.

[82] Banner displayed by Kountze High School cheerleaders in Kountze Independent School District in Kountze, Texas in September 2012, *see, After Getting Freedom From Religion Complaint Texas School Halts Football Bible Banners*, Freedom From Religion Foundation (September 19, 2012), https://ffrf.org/news/news-releases/item/15272-texas-school-halts-football-bible-banners (emphasis in original sign).

[83] *See,* e.g., Stone v. Graham, 449 U.S. 39 (1980) (holding that the Ten Commandments may not be displayed on classroom walls); Lee v. York County, 484 F.3d 689 (4th Cir. 2007) (holding that a teacher may be barred from displaying religious messages on classroom bulletin boards); Washegesic v. Bloomingdale Pub. Schs., 33 F. 3d 679 (6th Cir. 1994) (holding that a picture of Jesus may not be displayed in a public school).

[84] *Stone*, 449 U.S. at 42 (holding that "[i]t does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions") (quoting *Schempp*, 374 U.S. at 222).

Teachers' Free Speech Rights

While it is true that public school employees do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[85] federal courts have upheld restrictions and limitations on the free speech rights of teachers and other public school employees because of their role as a government employee.[86] This interest in restricting speech is stronger in the context of a public school where employees interact with minor school children.[87]

School districts often use free speech rights of teachers as a defense to an Establishment Clause violation in the following circumstances: Religious displays in the classroom; praying with students; leading religious clubs; and wearing t-shirts with a religious message.

It is not a violation of the free speech rights of teachers when a school district regulates teachers acting in their official capacities. Teachers have access to a captive audience of students due to their position as public educators. Schools have a duty to regulate religious proselytizing by employees during school-sponsored activities. This is well within their power: "Because the speech at issue owes its existence to [his] position as a teacher, [the School District] acted well within constitutional limits in ordering [the teacher] not to speak in a manner it did not desire."[88]

To that end, "a school can direct a teacher to 'refrain from expressions of religious viewpoints in the classroom and like settings.'"[89] A school district has an obligation under the law to make certain that "subsidized

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[85] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[86] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) ("[T]he State has interests as an employer in regulating the speech of its employees that differs significantly from those it possesses in connection with regulation of the speech of the citizenry in general").

[87] *See,* Lee v. York Cty. Sch. Div., 484 F.3d. 687, 695 (4th Cir. 2007) ("Courts have generally recognized that the public schools possess the right to regulate speech that occurs within a compulsory classroom setting, and that a school board's ability in this regard exceeds the permissible regulation of speech in other governmental workplaces or forums").

[88] Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 970 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1807 (2012) (upholding decision of school board to require a math teacher to remove two banners with historical quotes referencing "God"); *see also* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline").

[89] Helland v. South Bend Comm. Sch. Corp., 93 F.3d 327 (7th Cir. 1993) (*quoting* Bishop v. Arnov, 926 F.2d 1066, 1077 (11th Cir. 1991).

teachers do not inculcate religion."[90] Federal courts have prohibited religious messages or conduct by teachers.[91]

In 2013, FFRF was informed that faculty members at Buchtel Community Learning Center, part of Akron Public Schools in Ohio, were wearing t-shirts with religious messages while at work. There were several different kinds of t-shirts, including t-shirts that promoted the girls' volleyball team and contained the phrase "God's Got Our Back"; t-shirts which promoted the school's athletic program and read "Jesus Is My Hero"; and t-shirts which promoted the men's sports program with "Pick Up the Cross and Follow Me: Jesus" written on the back. These designs also included the name of the school and were worn during the school day.

FFRF sent a letter of complaint and informed the school district that public school employees should not be wearing religious t-shirts with proselytizing messages while acting in their official capacities during the school day, during coaching, or any school-sponsored activities. Furthermore, the inclusion of the school's name on the shirts gives the appearance that the school, and thus Akron Public Schools, endorsed Christianity. The district promptly agreed and instructed its staff to refrain from wearing these shirts and addressed the issue at a district-wide meeting of all coaches and athletic directors.

The best statement on this misguided defense came from the Supreme Court: "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[92] When teachers are acting in their official capacity, they are the government and, like the government, their speech must comport with the Establishment Clause.[93]

Religious Clubs in Public Schools

A frequent complaint FFRF receives, and one of the more confusing areas of state/church law in public schools, is when a public school houses a religious club. A school might announce a Christian Club during the morning announcements; a teacher might lead an after-school Bible study

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[90] Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

[91] *See,* e.g., Johnson v. Poway Unified Sch. Dist., 658 F.3d 954 (9th Cir. 2011) (restricting teacher's display of religious posters in the classroom), *cert. denied*, 132 S. Ct. 1807 (2012); Lee v. York, 484 F.3d 687 (4th Cir. 2007) (upholding school district's removal of religious postings on classroom bulletin boards).

[92] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

[93] Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009).

in her classroom; or parents might run an Islam Club during lunch. These issues, often conflated, actually fall into two distinct categories: Student religious clubs; and school facility rentals. The legal guidelines for each of these are relatively clear, but keeping the two separate can be challenging.

Student Religious Clubs

The first type of religious clubs are bona fide student clubs. An example of this is a group of high school students who decide to start a Christian Club, to discuss their faith with like-minded students and to evangelize to non-Christian students. So long as the students follow the school's requirements for student groups, this is permissible. In fact, the federal Equal Access Act ("EAA")[94] guarantees that students will be able to form religious clubs on the same terms as they are able to form secular noncurricular clubs.[95]

However, there are strict guidelines that noncurricular student religious clubs must follow. First, the clubs must be "voluntary and student-initiated."[96] Second, the club and its meetings must be student-led.[97] If adults are directing the club, either in its formation or in its operation, it is not a legitimate student religious club under the EAA and the school should disband it. Third, the EAA requires that "employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity."[98] Schools often require that student clubs obtain a faculty sponsor, and teachers who serve as a religious club's sponsor must understand that they may not participate in the club. They attend club meetings to ensure student safety and enforce school rules. Schools must ensure that faculty sponsors understand and abide by the limits of their role.

It's also important to understand that the EAA's scope is limited to "secondary school[s],"[99] a term that is defined differently in each state. In some states, only high schools are "secondary schools,"[100] and in others

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[94] 20 U.S.C. § 4071 (2016).
[95] *See* Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 235 (1990) (upholding the EAA as constitutional).
[96] 20 U.S.C. § 4071(c) (2016).
[97] *Id.* ("nonschool persons may not direct, conduct, control or regularly attend activities of student groups").
[98] *Id.* (emphasis added).
[99] 20 U.S.C. § 4071(a) (2016).
[100] E.g. Ind. Code § 20-18-2-18; 20-18-2-7 (2016) ("secondary school" means "a high school").

the term includes middle schools.[101] Non-secondary schools are not bound by the EAA in limiting the activities of religious student clubs. Religious student clubs in elementary schools are inherently suspect because K-5 students are likely not mature enough to form, organize, and run a religious club without adult guidance.

Elementary schools might reasonably require that all student clubs include an adult organizer, such as a teacher. This policy would not allow for student religious clubs because a teacher-led student religious club would violate the Establishment Clause. The EAA prohibits adults from leading high school religious clubs, and elementary school students are certainly no better than high school students at discerning the subtle difference between private and government speech when their teachers run a student religious club. If anything, elementary school students are far more likely to think their teacher speaks for the school, and are also more susceptible to coercion by the authority figures in their lives.

If an adult desires to create, direct, or participate in a religious group for public school students at a public school, they simply may not do so through a bona fide student club. Instead, they must pursue the second type of religious club, which is a rental of school facilities.

School Rentals to Outside Religious Clubs

Many schools rent out their facilities during non-school hours. For example, a religious group that does not own a building might rent a high school auditorium for weekly worship services. A 2001 Supreme Court case involved a ministry renting a school classroom in the same manner, except that the rental was just after school ended, so that young students would likely not understand that the adult-led religious event was not part of the school day. In *Good News Club, et al. v. Milford Central School*, Milford Central Schools tried to ban this predatory conduct, but the Supreme Court held that excluding the club violated the Free Speech Clause of the First Amendment.[102] As a result, "Good News Clubs" (GNC) and similar rentals, which are often teacher-led, are now common across the country.

It must be emphasized that this rental arrangement is legally distinct from student religious clubs; GNCs are *not student clubs*, despite having the word "club" in their name. Rather, they are akin to a church renting a school facility for Sunday worship, which might be attended by students and teachers but has nothing to do with the school district other than a

[101] E.g. Okl. Stat. tit. 70 § 24-131.1 (2016) ("any grades seven through twelve").
[102] 533 U.S. 98, 119 (2001).

rental contract. The school district does not, indeed it cannot, sponsor, organize, or manage the event in any way. By comparison, extracurricular student clubs--those related to the curriculum, such as math club or Spanish club--operate under the administration and authority of the school.

GNC-style religious clubs, which rent space at the school and are not bona fide student clubs, are not entitled to the benefits afforded to student clubs—displaying posters in the school, inclusion in morning announcements and the annual yearbook, etc. The host school has a responsibility to avoid any appearance that the school sponsors or endorses such a club. Additionally, the school district must charge its standard rental fee to religious organizations renting school facilities. This creates serious issues for teachers or other school staff that wish participate in GNC-style clubs, they must do so as private citizens and must not be compensated by the school district for the time spent at the club. Moreover, to avoid the appearance of endorsement and to avoid confusing young, impressionable children about the teacher's role, it is often necessary to impose a buffer, typically of at least two hours, between the end of the teacher's official role and the beginning of the GNC rental.

Applying the Student Club/Rental Dichotomy

Without a clear understanding of the differences between student clubs and rental situations, it can be confusing for school attorneys to draw definitive lines for religious clubs that aim to recruit and evangelize students. Some religious organizations seek to take advantage of this confusion by equivocating their club's status to suit their needs.

Chapters of the Fellowship of Christian Athletes (FCA), for instance, have demanded that they receive all the benefits of noncurricular student clubs organized under the EAA, but when a coach's participation is challenged under the EAA the clubs often insist that they are an outside ministry, like the GNC, rather than a student club.

In one instance, FFRF received a complaint that an FCA informational meeting was announced during a high school's morning announcement, along with genuine student clubs, and it was reported that the FCA meeting was run by several school coaches, in the school's auditorium just before school. FFRF objected to the coaches' participation in this student club, citing the EAA, only to receive a response from the school district that the school did not view the FCA as a student club. This attempt to create a moving target only brought the school from the frying pan into the fire; instead of coaches violating the EAA, the school was violating the Establishment Clause by promoting an adult-led religious club during the

morning announcements, failing to charge the club rent, and paying employees for promoting their personal religion.

School districts expose themselves to serious liability when they allow religious groups to float in a limbo state between student clubs and GNC-style rentals. Schools should clearly define student clubs and must ensure that they are entirely student-initiated and student-led, and that staff do not participate in the club in any way. If the school rents space to an outside ministry, the school must ensure that its staff does not promote or endorse the club in any way. FFRF has seen problems with both types of clubs all over the country. School attorneys should regularly monitor the school's handling of any religious clubs to ensure they fit squarely into one of these two categories and are complying with the appropriate restrictions.

Conclusion

Religion is divisive. The Supreme Court has repeatedly stated that this is one of the major reasons the founders chose to keep our government separate from religion: "The Framers and the citizens of their time intended to guard . . . against the civic divisiveness that follows when the government weighs in on one side of religious debate; nothing does a better job of roiling society," and "the divisiveness of religion in current public life is inescapable."[103] In fact, the "purposes of the First Amendment's Religion Clauses [are] to assure the fullest possible scope of religious liberty and tolerance for all, to avoid the religious divisiveness that promotes social conflict, and to maintain the separation of church and state."[104]

Nowhere is this divisiveness more strongly felt than in our public schools, a place where our children spend thousands of hours learning and growing. The best policy for our pluralist society is to keep religion out of those schools. Hopefully, schools can do so by avoiding the common pitfalls discussed above.

[103] McCreary County, Ky. v. American Civil Liberties Union of Ky., 876, 881 (2005).
[104] Van Orden v. Perry, 545 U.S. 677, 678 (2005).

Religion in Public Schools: A View from the Trenches

Robert Boston*

In December of 1993, I drove to a small town in central Pennsylvania with a lawyer on a mission that, depending on your perspective, may or may not have been from God. We were there to tell a school board that its practice of beginning every school day with a Bible verse broadcast over the school's public-address system was clearly unconstitutional.

A few weeks prior to our road trip, the organization that employed us, Americans United for Separation of Church and State, had received an anonymous note outlining what the school system was doing and pleading for help: "I am a Christian, but I think what they are doing at the schools is wrong," our nameless correspondent wrote. "What my kids learn about religion we will do at home and in church. I do not think it is the school's business."

During the school board meeting, the attorney patiently outlined the law. He pointed out that the U.S. Supreme Court had, 30 years prior, struck down mandatory Bible reading in public schools in a landmark case, also from Pennsylvania, titled *School District of Abington Township v. Schempp*.[1] Members of the board admitted that they were in violation of the law. They wanted to retain the prayer practice, but in the face of the threat of a lawsuit, they voted 7-2 to discontinue it. They made it clear they weren't happy about that. An air of hostility hung in the room, and the attorney and I were treated with open disrespect. In the parking lot after the meeting, we were approached by an angry man who told us to get out of Pennsylvania and added, "Go back south where you belong." I calmly explained to the man that I was a native of the state, born and raised about two hours away from where we were standing.

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* Robert Boston holds a degree in journalism and has appeared on CNN, NBC, Fox News, MSNBC, and other news media as an expert on church-state issues. He is the author of church-state books including TAKING LIBERTIES: WHY RELIGIOUS FREEDOM DOESN'T GIVE YOU THE RIGHT TO TELL OTHER PEOPLE WHAT TO DO (2014). Mr. Boston is the Director of Communications at Americans United for Separation of Church and State (AU). He would like to thank Alex Luchenitser, Americans United Associate Legal Director, for reviewing drafts of this article and for offering helpful suggestions.

[1] School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963).

Although that incident occurred nearly a quarter of a century ago, the details are still vivid in my mind. I remember the school board president saying he would pray for us and urging people to start a national movement to bring back official school prayer. I recall the look of rage on the face of the man in the parking lot.

The attorney I traveled with that day moved on many years ago. I've stayed with Americans United. I'm not an attorney – I hold a bachelor's degree in Journalism – and I've dedicated most of my professional life to writing and speaking about church-state topics. The issue of religion's role in public education is constant. In 1993, the same year we fought that recalcitrant Pennsylvania school board, I wrote a book that was intended to be a layperson's guide to church-state relations. I titled the chapter on religion in public schools "The Issue That Won't Go Away."[2]

As a non-lawyer, my perspective is less about what the Constitution compels and courts require and more about what's the best way to protect everyone's rights in increasingly diverse communities in a country of many viewpoints. I have a personal perspective as well. My wife and I put two children through the public school system. As someone who was raised in an area where there was very little religious diversity but moved to a place where there is a lot, I've been informed by seeing what's possible and contrasting it to the somewhat parochial, majority-rules vision of my childhood.

I greatly respect the academics who study this issue, and I have used their research many times in my own writings. The problem is, precious little of that research is trickling down to the street level. From where I'm sitting – all too often in the trenches – we're just not making the kind of progress we ought to be by now.

I used to think the natural evolution of religion in America would solve the problem of the proper role of religion in public schools. Thomas Jefferson once observed: "Difference of opinion is advantageous in religion. The several sects perform the office of a Censor morum over each other."[3] The idea is that if many different religious organizations were in play, they would perform a natural check over one another. No one would amass too much power and compel others to follow its dictates.

In public education, this principle, I assumed, would create a kind of equilibrium that would lead to peace and harmony. For various reasons, that hasn't happened. Why not? I'll get to that in a moment. But first a

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[2] ROBERT BOSTON, WHY THE RELIGIOUS RIGHT IS WRONG ABOUT SEPARATION OF CHURCH & STATE (1993).

[3] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1998).

detour: It is often the case that a little history helps us understand where we are. So it is with religion in public schools.

I used to do a lot of talk radio. From that, I learned that lots of people cling to a story about religion in public schools that, while it confirms their pro-faith bias, has little connection to reality. In a nutshell, the story goes something like this: We had prayer and Bible reading in our schools for hundreds of years. No one complained. Then a loud-mouthed atheist named Madalyn Murray O'Hair came along in the early 1960s. Possibly backed by Soviet Russia, she filed a lawsuit to end prayer in schools. The super-liberal Supreme Court agreed, and since then our public schools have been God-free zones. A kid can't even say, "God bless you" if his friend sneezes. This explains why we have so many school shootings.

Where to begin? For starters, public education came along a lot later than many people think. Some founders, like Jefferson, supported the idea of education for everyone, but in most parts of the growing nation, there were no public schools and certainly no laws requiring young people to attend them.

All of that came later. Some states began establishing public schools and passing laws compelling children to be educated in the antebellum period, and there was more growth after the Civil War. But the concept was slow to catch on. Many states had no compulsory attendance laws even into the 20th century.

Many of the public schools that did exist reflected the religious perspective of the country's Protestant majority. Anyone who thinks there was no conflict over this simply hasn't read the history. That's not surprising. Few people know about the history of religion in public schools, and even fewer have read anything about it. The truth is, there was a lot of conflict, primarily between Protestants and Roman Catholics.

The United States of the pre- and post-Civil War eras, in some respects, was not so different from our country. The nation was prone to being periodically seized by waves of anti-immigrant hysteria. In the middle of the 19th century, Catholics became the bogeyman *du jour*. Immigrants from Ireland, Italy, and Eastern Europe had strange religion and strange customs. They read different versions of the Bible and deferred to bishops. Their loyalty was suspect. Did they owe allegiance to the United States – or the pope in Rome?

The country's ruling WASP elite did all it could to keep the newcomers in their place. Many public schools incorporated daily religious exercises that were Protestant in nature. Catholic pupils were not excused; they had to participate.

In 1844, a three-day riot erupted in Philadelphia after Catholic parents asked that their children be excused from mandatory prayer and Bible reading. The school board was inclined to grant the request, and even that was enough to set off the mobs. During what came to be known as the "Philadelphia Bible Riots," several people died and a few buildings were burned down, among them a Catholic church.[4]

Cincinnati in the late 1860s underwent a "Bible war" that eventually ended up in state court. The Ohio Supreme Court in 1872 ruled that education officials in the city were not required to sponsor Bible reading in school.[5]

The Ohio high court did not rule that Bible reading in public schools was unconstitutional, only that the schools were not required to do it and could exclude the practice if they chose. Still, the ruling resulted in some eloquent language: "United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated, the better it is for both," declared the court.[6]

The tide was turning. In 1890, the Wisconsin Supreme Court struck down required school devotionals. Nebraska's high court followed suited in 1903. In 1910, the Illinois Supreme Court took a major step forward when it ruled that mandatory religious practices such as prayer, Bible reading and hymn singing were unconstitutional even though, in theory at least, students could be excused from the worship activities.

That wasn't good enough, declared the court – in fact, it was harmful. Observed the court: "The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which was never contemplated. All this is because of his religious belief."[7]

Some state courts upheld public school prayer and Bible reading, and in other states the issue never came up. Other schools simply eliminated religious exercises on their own without being ordered to do so by a court because education officials could see the problems mandatory prayer and Bible reading were causing.

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[4] MICHAEL FELDBERG, THE PHILADELPHIA RIOTS OF 1844: A STUDY OF ETHNIC CONFLICT (1975).
[5] Board of Education of Cincinnati v. Minor, 23 Ohio St. 211 (1872).
[6] *Id.*
[7] Ring v. Board of Education, 245 Ill. 334 (1910).

As all this courtroom action and other activity shows, the issue of religion in public schools was a live controversy in many parts of the country. My point is that the issue of prayer, Bible reading, and other devotional activities in public schools did not suddenly become controversial in the swinging 1960s. The question of the proper role of religion in public schools has been with us as long as there have been public schools.

The U.S. Supreme Court was something of a Johnny-come-lately to the issue. This occurred in part because of lingering questions over the application of the Bill of Rights to the states. This issue, most legal scholars agree, was settled by the adoption of the 14th Amendment in 1868, but, remarkably, the Supreme Court didn't make this clear until the 20th century. In fact, the Supreme Court did not make it clear that the Establishment Clause – that part of the First Amendment that declares that government can "make no law respecting an establishment of religion" – applied to the states until 1947's *Everson v. Board of Education*.[8] In the post-*Everson* era, federal courts began examining issues that, until then, had been left to state courts.

Early skirmishes at the Supreme Court dealt with the issue of "released time," that is, the ability of public schools to allow students to leave class during the day to receive religious instruction. In *McCollum v. Board of Education* (1948), the high court ruled that supposedly "voluntary" religious courses could not take place on site at public schools.[9] A few years later, however, the court ruled in *Zorach v. Clauson* (1952) that it was permissible for public schools to release children during the school day for religious instruction that took place off site.[10]

These cases were warm ups for the big show. In 1962, the Supreme Court handed down the first school prayer ruling, declaring that a scheme cooked up by education officials in New York to encourage local districts to sponsor daily recitation of an allegedly non-sectarian prayer drafted by the state Board of Regents was unconstitutional.

The case, *Engel v. Vitale*, was not close. By a 6-1 vote, the Supreme Court struck down the prayer plan.[11] *Engel* is an important case but tends to get overlooked today because the plaintiffs faded away after the litigation ended. The parents who brought the case on behalf of their children are all dead. In 2012, the 50th anniversary of the ruling, I tracked down some of their children for an article I was writing. I also spoke with

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[8] Everson v. Board of Education, 330 U.S. 1 (1947).
[9] McCollum v. Board of Ed. of School Dist. No. 71, 333 U.S. 203 (1948).
[10] Zorach v. Clauson, 343 U.S. 306 (1952).
[11] Engel v. Vitale, 370 U.S. 421 (1962).

Bruce J. Dierenfield, a professor of history at Canisius College in Buffalo, N.Y., who wrote a book about the *Engel* case. He told me: "The *Engel* plaintiffs were interested in the constitutional principle at stake and religious liberty, but they shunned the spotlight. They wanted the focus to be on the First Amendment to the Constitution."[12]

The following year, the Supreme Court handed down its ruling in the *Schempp* case. In a legal spat originating in Pennsylvania, the court, again with only one dissenter, struck down coercive recitation of the Lord's Prayer and daily Bible reading in public schools.

It's at this point that people often say something like: "Wait a minute. I thought Madalyn Murray O'Hair brought this case." O'Hair did bring a case challenging school prayer in Baltimore's public schools. Her challenge worked its way through the courts at the same time as one brought by the Schempp family of suburban Philadelphia. Since the two cases presented virtually the same legal question, the Supreme Court considered them together.

Like the *Engel* plaintiffs, the Schempp family had little interest in becoming media figures after winning the case. Ed Schempp and his son Ellery were happy to give speeches about the lawsuit and sit for interviews, but they never attempted to form a national organization. O'Hair, by contrast, used her case to launch American Atheists and make herself a colorful and combative figure. She often appeared in the media and was a guest on the first episode of Phil Donahue's popular talk show.

These decisions are more than 50 years old, but they remain widely misunderstood. Over the years, I've encountered many people who were certain that every public school in America had official prayer, and there was no problem until O'Hair complained.

As shown, this is not true. Many people complained about mandatory prayer and Bible reading in schools, with scomplaints stretching back to the 19th century. These practices were already illegal in some states before the Supreme Court ruled. O'Hair brought one case among many and some public schools voluntarily phased out the religious practice to avoid complaints.

School prayer and Bible reading have also been vested with near-supernatural powers over the years. In the 1950s, officials in New York were convinced that a brief, generic prayer could fend off communism and juvenile delinquency. More recently, I've heard school prayer touted as the answer to school shootings, teen suicide, drug and alcohol abuse and sexual activity.

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[12] Rob Boston, "*Awesome Anniversary: Engel at 50 -- N.Y. Families Ended Coercive Prayers In Schools*," CHURCH & STATE 12 (June 2012).

A Religious Right activist named David Barton has even self-published a book titled *America: To Pray or Not to Pray* that purports to show the negative effects of the school prayer decisions. Barton's tome contains a series of charts that will, say, show how the rate of sexually transmitted diseases has escalated since 1962. He blames this on the *Engel* decision, an absurd example of *post hoc ergo propter hoc* in action.[13]

The school prayer rulings led to a spate of attempts to overturn them via a constitutional amendment. All of these efforts failed, but occasionally the issue flares up again. In 1998, the U.S. House of Representatives voted on a so-called "religious freedom" constitutional amendment that would, among other things, have restored official prayer to public schools. The amendment secured a simple majority but fell far short of the two-thirds needed to pass an amendment.[14]

What has been frustrating, from the point of an activist in the trenches, has been watching people spend so much time, energy and money to secure a "right" that already exists. Nothing prevents young people from praying on their own in public schools right now. Their prayers must be voluntarily chosen and non-disruptive, but they are allowed. Many states even have laws mandating moments of silence at the beginning of the school day. During this period, students may pray or not as dictated by conscience.

The Supreme Court struck down much more formalized rituals of coercive prayer. In New York prior to the *Engel* ruling, state officials actually wrote a prayer for public schools to use. Allegedly ecumenical, the prayer was in reality watered down and generic. It was an example of a kind of "one-size-fits-all" religiosity that no one actually practices.

The rituals that were declared unconstitutional in the Pennsylvania and Maryland cases were more sectarian. Pennsylvania law required recitation of the "Lord's Prayer," a Protestant supplication. It also mandated daily readings of 10 verses from the "Holy Bible." While the term is vague, it was most often interpreted to mean the King James Version of the Bible. Thus, these practices were by default Protestant in character.

Defenders argued that the practices were "voluntary." This is debatable, in that students (especially very young ones) undoubtedly felt great pressure to take part. I've talked with people who attended public schools in the pre-*Engel* era who speak with great emotion about how difficult it was to get up and leave the room. To do that, you had to be willing to single yourself out, to mark yourself as "different" in a highly

[13] DAVID BARTON, AMERICA: TO PRAY OR NOT TO PRAY? (1988).
[14] The final tally was 224-203.

visible way. Few students were willing to do that, so they just went along to get along.

School prayer amendments to the U.S. Constitution are introduced as a matter of course just about every session. They don't move, and the issue of rewriting the Constitution to return coercive forms of prayer seems to have died down.

This does not mean the larger issue is dead. Indeed, every year attorneys at Americans United receive hundreds of complaints about inappropriate religious activity in public schools. These problems run the gamut. Some school officials have a bad habit of inviting proselytizing groups into schools to offer lectures about things like sex education, drug abuse or suicide prevention. The talks, often delivered by people who have little expertise in the area, inevitably lapse into a sermonette or, at the very least, an invitation to attend a "party" later that evening at a local church that just happens to be evangelistic in nature.

Coaches – especially those who run football programs – are another problem. Whether paid staff or volunteers, coaches are part of the public-school system. Like teachers and principals, they may not engage in religious activity with students. But many do.

In 2006, Americans United represented a public school in East Brunswick, N.J., where a football coach named Marcus Borden was leading his team in prayers before games. Not all students wanted to take part, and school officials ordered Borden to stop. He stopped organizing the prayers but continued to "take a knee" with players. Borden took the matter to court; he won at the trial level, but a federal appeals court in April of 2008 reversed the lower court and ruled that officials had the right to curb Borden's coercive prayer activities.

While writing this article, a nearly identical situation erupted in Bremerton, Washington, where Joe Kennedy, an assistant coach at Bremerton High School, was placed on administrative leave after he refused to stop praying on the 50-yard line at the end of the school's football games.

School officials told Kennedy to stop. He originally decided not to reapply for the coaching job, but then changed his mind. Backed by a conservative Christian legal group, he is in court demanding that he be rehired and permitted to pray with the players.

These are not isolated issues. In the space of just five weeks in April and May of 2016, Americans United attorneys sent six letters to public schools warning them about religious activity by coaches.

It is worth noting that the Supreme Court has struck down school prayer in the football-game context too. In *Santa Fe Independent School*

District v. Doe, the high court in 2000 invalidated a Texas school district's policy of allowing students to vote on whether to have "non-sectarian" prayers before football games.[15] The facts that the prayers were led by students, not coaches, did not cure the problem, the court ruled.[16]

Coaches are often paid employees of the public-school system, but even if they are volunteers, they are acting in an official capacity. Like teachers and administrators, they can't engage in religious activity with students. There's no special set of rules for them; they often just act as if there is.

Advocates of separation of church and state encounter similar problems with the teaching of creationism in public schools: victories in court, defiance on the ground.

Virtually every case has gone our way. Although we lost the *Scopes* trial in 1925, things have been going in the right direction since then. In *Epperson v. Arkansas* (1968), the Supreme Court struck down an Arkansas law that made it a crime to teach evolution in public schools.[17] *Edwards v. Aguillard*, a 1987 case, saw the high court invalidate a Louisiana law that mandated "balanced treatment" between evolution and creationism in public schools.[18]

In 2005, a federal court in Pennsylvania struck down an especially ill-conceived policy in the Dover schools that attempted to introduce "intelligent design" (ID), a kind of younger, hipper cousin of creationism, into the town's schools. U.S. District Judge John E. Jones III put a stop to it. His decision was not appealed because voters in town decided to eject the board members who had dragged them into this legal quagmire. The new board quickly dumped the ID policy.[19]

Ah, the sweet smell of success! Kind of. Courtroom victories can compel a public school district to stop teaching creationism, but they can't make them do a good job of teaching evolution. And some don't.

The National Center for Science Education, based in Oakland, Calif., works full time to ensure that evolution is taught properly in public schools (the group also combats climate change denial). Some of the stories on its website are horrifying.[20]

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[15] Santa Fe Independent School Dist. v. Doe, 530 U.S. 290 (2000).
[16] *Id.*
[17] Epperson v. Arkansas, 393 U.S. 97 (1968).
[18] Edwards v. Aguillard, 482 U.S. 578 (1987).
[19] Kitzmiller v. Dover Area School Dist., 400 F. Supp. 2d 707 (M.D. Pa. 2005).
[20] NATIONAL CENTER FOR SCIENCE EDUCATION, https://www.ncse.com (last visited June 5, 2017).

In Idaho, members of the state legislature proposed a law that would have permitted the use of the Bible in the state's public schools "for reference purposes to further the study of" topics including "astronomy, biology, [and] geology."[21] Kentucky lawmakers considered a bill that would have extended summer vacation in the hopes that more kids would visit the state's latest attraction – a replica of Noah's Ark replete with dinosaurs in cages. The park, Ark Encounter, was built by a creationist ministry run by Ken Ham, an Australian evangelist. Unlike Noah's simple gopher wood and pitch construction, Ham's ark features steel beams, air conditioning and electric lights.[22]

There must be some way to resolve all of this, right? We can't be fated to continue fighting over the role of religion in public schools over and over, squaring off in court and spending money on attorneys that would be better directed to the classroom, correct? Surely there is an answer. Perhaps, but so far it has eluded us.

Occasionally the cry is heard: "Let's do a better job teaching about religion!" The suggestion has a certain appeal. Religion is important to people all over the world, and we tend not to know much about the ones we don't practice. If nothing else, we know that people believe some odd things about Muslims, Hindus and Buddhists, not to mention the smaller Christian sects and the non-believers, who are, according to some researchers, the third largest belief – or non-belief – system in the world, just behind Christianity and Islam.[23]

So, as the plan goes, we simply do a better job teaching about religion from an objective perspective. Religion comes back into school, and kids learn valuable things. It's a win-win! Except that it is often not. Teaching about religion has many things to say for it, but it's not the panacea it is sometimes held out to be. The chief problem is that many people who complain about religion's absence in public schools are angry about the absence of *one* religion – their own. Bringing in a bunch of "wrong" religions and holding them up as just as good as Pastor Bob's does not really please Pastor Bob. In fact, it annoys him greatly. That is

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[21] Glenn Branch, *Bible-as-Science Reference Bill in Idaho*, NATIONAL CENTER FOR SCIENCE EDUCATION (Feb. 16, 2016), https://ncse.com/news/2016/02/bible-as-science-reference-bill-idaho-0016927.

[22] Glenn Branch, *Vacation Creationism Bill Introduced in Kentucky*, NATIONAL CENTER FOR SCIENCE EDUCATION (Jan. 8, 2016), https://ncse.com/news/2016/01/vacation-creationism-bill-introduced-kentucky-0016853 .

[23] *See, e.g.*, Tom Henegan, *"No Religion" is World's Third Largest Group After Christians, Muslims, According to Pew Study*, HUFFINGTON POST (Dec. 18, 2012), http://www.huffingtonpost.com/2012/12/18/unaffiliated-third-largest-religious-group-after-christians-muslims_n_2323664.html.

not to say it should not be done – it should because ignorance of the belief systems of others does no one any good and leads to lots of problems – but don't expect it to resolve this particular problem.

Another difficultly is reaching true objectivity. Consider, for example, the Gospels. No serious scholar of the Bible believes the Gospels were written by the men whose names they bear. Nor are they contemporary accounts of the life of Jesus Christ. They were written decades after his death.[24]

Yet to teach this in a public school is to court great controversy. Options include not teaching it or pretending that the view favored by fundamentalists – that the Gospels were written by the men whose names they bear right after Jesus died (and returned to life) – is equally valid. Neither is attractive.

OK, so what about student-run clubs? There's a federal law, the Equal Access Act of 1984,[25] that allows students in public secondary schools to form non-curriculum-related clubs. There are certain restrictions. These clubs meet during "non-instructional" time and are not officially school sponsored. Membership is voluntary.

Is this the answer? It could be – if adults would allow it. The Equal Access Act has a catch: all groups must be treated equally, hence the use of the term "Equal" in the legislation's name. So, if a student wants to form a Christian club at the local high school she can – as long as Jewish kids can form a club too and Hindu kids, Buddhists and so on.

This is usually not a problem. But when atheist students come forth, or Wiccan students, or when someone proposes a gay-straight alliance, problems often arise. Yet the law is clear: equal access truly means equal access. The only clubs that can be curbed are ones that might engage in violent, disruptive, or unlawful activities. That a club may espouse an unpopular viewpoint is not legal cause to ban it. After all, an unpopular viewpoint is not necessarily a disruptive one.

In Winchester, Tennessee, student-run Christian clubs operated happily in public schools for years. No one said a thing. Yet late in 2015 when students at the same school filed paperwork to form a gay-straight alliance, the community threw a fit. The terrified school board hemmed and hawed and dragged the discussion out for months before voting 7-1 to require students to have parental permission before participating in any

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[24] *See*, e.g., GOSPELS, JESUS, AND CHRISTIAN ORIGINS: COLLECTED ESSAYS (William O. Walker, Jr. ed.) (2015).
[25] 20 U.S.C.A. § 4071 (1984).

school club, a move of dubious legality but one that allowed the alliance to exist.[26]

But remember, Equal Access clubs are entirely voluntary. In many schools, most students choose not to join religious clubs. Of course, as an advocate of separation of church and state, this is completely fine with me, but many religious conservatives continue to argue for a more formal role for religion in public education.

This brings us to the final proposal: the installation of a generic, or "one-size-fits-all" faith in schools. The argument goes something like this: Yes, we can't impose sectarian practices onto students, but surely there is a generic expression of faith that most people would find inoffensive.

This suggestion has long roots. The "regent's prayer" struck down in New York in 1962 was generic and had been composed by an interfaith committee. It didn't reference Jesus, just God. We all believe in God, right?

Well, no. Much has been written about the rise of "nones" in America – those people who, when asked to name their religion, reply, "None."

Make no mistake: Most of these people are not atheists, agnostics or humanists (although some are). Many identify as "spiritual but not religious" or may blend religious traditions into their own personal brew. In doing so, they are much like Thomas Jefferson who once famously stated: "I am a sect by myself, so far as I know."[27] Their religious exploration takes places outside the confines of a denomination or house of worship.

Would every Christian be happy with a prayer to a generic god in public schools? Would every Jew? Every Hindu? Every Buddhist? Every "none"?

Certainly not. The quest for a generic faith we can all rally around, though long running in America, is a fool's errand. What usually happens is that the rote repetition of "God talk" ends up hurting religion. Federal courts have upheld the use of the phrase "In God We Trust" on U.S. currency, asserting that it is a form of "ceremonial deism," an odd term the courts have adopted to avoid making difficult decisions about long-standing governmental actions that endorse religion in a general way (the

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[26] Brian Justice, *Extra-curricular Clubs: School Board Affirms Parental Approval*, WINCHESTER HERALD CHRONICLE (Apr. 11, 2016), http://www.heraldchronicle.com/extracurricular-clubs-school-board-affirms-parental-approval/.

[27] *Letter from Thomas Jefferson to Ezra Stiles Ely* (June 25, 1819), https://www.loc.gov/item/mtjbib023541/.

inclusion of "under God" in the Pledge of Allegiance is another example).[28] They have never extended that curious legal reasoning to public schools and for good reason: Generic prayer infringes on the rights of non-believers and believers as well.

Seriously religious people do not pray to a generic god. To believers, prayer is a profound attempt to connect with the most awesome power in the universe. It's not a thing to be gotten through before moving on to algebra or a rote practice done without thought. It is serious business.

In short, devout people do not pray to a generic god at home – why would they accept their children doing it in a public school? And atheists do not pray to a god at all. A policy of official generic religiosity in public schools, therefore, could only please those people who value the symbolism of religion more than its substance.

Is there an answer to the perennial battles over the role of religion in public education? My non-lawyer's answer is that yes, there is – just not one likely to please religious conservatives. But here it goes: Teach your kids religion at home. Take them to a house of worship. Instruct them to pray. Let them know their rights to religious freedom in public schools, but do not expect these taxpayer-funded institutions that by law must serve youngsters from a variety of religious and non-religious traditions to buttress your faith in any way. They cannot do that – and you should not want them to.

Not every issue is open to a reasonable compromise. Sometimes people want things they cannot have. The people who want to use the public-school system as a vehicle to spread their personal faith (and no others) or turn it into a device for the propagation of a civil religion marked by "God and country" rhetoric won't get what they want.

This has been a surprisingly hard lesson for some people to learn. As I was writing this article, attorneys with Americans United sent a letter to a public school district in a Bible Belt state after receiving complaints that school officials at a high school were reciting Christian prayers over the loudspeaker every morning. Mind you, the Supreme Court struck down practices like this 55 years ago.

It may be time for another road trip.

[28] *See* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996).

Solving the John 14:6 Problem: Promoting Confident Pluralism Through Religious Freedom on Campus

William Thro, J.D.*

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

For Christians, those words state the essentials of the faith—those who believe in Christ shall have salvation and the only way to achieve eternal life is through Jesus. Christians may disagree over faith and works, scripture and tradition, or grace and merit, but they all agree that Jesus is the way to salvation. There may be disputes over the authority of the Pope, the role of women in leadership, the use of contraceptives, or the consumption of alcohol, but there is general acceptance that Christ alone brings eternal life.

Conversely, for non-Christians, those words are deeply disturbing. They suggest that not everyone will enjoy salvation and eternal life. More significantly, they suggest other religious traditions are false—they do not lead to salvation even though the adherents do everything required by their religious traditions. At best, such a statement is offensive; at worst, it is grounds for violence and everlasting conflict.

This is the John 14:6 Problem. Religious traditions often claim that their belief system is the only way or, at least, the best way to achieve salvation and eternal life. Those who embrace a different faith or no faith vigorously dispute and reject such claims of exclusivity. In a society that is generally homogenous in terms of religious faith, the John 14:6 Problem leads to discrimination against those who refuse to embrace the prevailing faith. In a society with a great deal of religious pluralism—the United States—the John 14:6 Problem causes major conflict and potential violence.

The John 14:6 Problem is particularly challenging for colleges and universities. Institutions constantly struggle to accomodate students of different races, ethnicities, genders, generations, sexual orientations, disability statuses, socio-economic classes, faiths, and values. Indeed,

* William Thro is a lawyer and legal scholar focusing on constitutional law in educational contexts. He is currently the General Counsel at the University of Kentucky and a former Solicitor General of Virginia.

public higher education arguably is the most diverse segment of American society. All students, regardless of background or worldview, justifiably demand both equality and respect for their constitutional freedoms. The young frequently express themselves with rhetoric that is rough rather than refined and in a manner that is dramatic instead of dignified. Escalation is all too common and too easy. In this environment potential for conflict and misunderstanding is exponentially greater than in the broader society. Although controversy arises in a variety of contexts, including institutional efforts to achieve a critical mass of racial minorities, demands for the respect of Second Amendment rights, and the omnipresent free speech controversies, the most significant issues involve various aspects of the John 14:6 Problem.

As Greg Lukianoff demonstrates in *Unlearning Liberty: Campus Censorship and the End of American Debate,*[1] academic institutions frequently respond to the John 14:6 Problem—and any other difficulty posed by non-conforming speech through repression of expression.[2] Such an approach is constitutionally problematic and, ultimately, leads to totalitarianism.[3] The better approach is John Inazu's call for a Confident Pluralism[4] that "conduces to civil peace and advances democratic consensus-building."[5]

This Article argues the John 14:6 Problem on campus is solved by promoting Confident Pluralism through Religious Freedom. This Article has two parts. Part I offers an overview of Inazu's vision of Confident Pluralism. Part II explains how Religious Freedom on campus promotes Confident Pluralism. Specifically, institutions should recognize and fund student religious groups, allow religious expression in open spaces on campus, and, perhaps most importantly, should allow religious groups to exclude those who do not share their faith. For public institutions, the

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[1] Greg Lukianoff, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE (2012). For a review of Lukianoff's work, *see* William E. Thro, *Betraying Freedom: A Review of Lukianoff's Unlearning Liberty and Powers' The Silencing*, 42 J. COL. & U. L. 523 (2016).

[2] *See generally* Kirsten Powers, THE SILENCING: HOW THE LEFT IS KILLING FREE SPEECH (2015).

[3] John D. Inazu, *Law, Religion, & The Purpose of the University*, WASH. U. L. REV. (forthcoming 2017).

[4] John D. Inazu, A CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE (2016).

[5] Christian Legal Soc. v. Martinez, 561 U.S. 661, 734 (2010) (Alito, J., joined by Roberts, C.J, Scalia, & Thomas, JJ., dissenting) (quoting Brief of Gays & Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner at 35, Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010) (No. 08-1371)).

federal Constitution commands many, but not all, of these freedoms. Nevertheless, if Confident Pluralism is to prevail, public institutions must offer more freedom than the bare federal constitutional minimums. Similarly, while private schools outside of California[6] are not subject to the Constitution,[7] private universities should offer the same measures of religious freedom except where the institution's own religious mission requires a different result.[8]

I. DEFINING CONFIDENT PLURALISM

In 2010, the U.S. Supreme Court held that a state university could force a student religious organization to admit non-believers as a means of uniting the student body.[9] Justice Alito, with three other Justices, sharply dissented and set forth an alternative vision of American life:

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[6] *See* Calif. Educ. Code § 94367 (extending First Amendment protections to private universities).

[7] Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295, 12 (2001).

[8] Forcing a religious institution to violate its own faith tenets raises significant federal and, in many States, state constitutional issues.

[9] Christian Legal Soc., 561 U.S. 661. For a critique of the decision, *see generally* Jacob Affolter, *Fighting Discrimination with Discrimination: Public Universities and the Rights of Dissenting Students*, 26 RATIO JURIS 235 (2013); David Brown, *Hey! Universities! Leave Them Kids Alone!: Christian Legal Society v. Martinez and Conditioning Equal Access to A University's Student-Organization Forum*, 116 PENN ST. L. REV. 163 (2011); Zachary R. Cormier, *Christian Legal Society v. Martinez: The Death Knell of Associational Freedom on the College Campus*, 17 TEX. WESLEYAN L. REV. 287 (2011); Michael R. Denton, *The Need for Religious Groups to Be Exempt from the Diversity Policies of Universities in Light of Christian Legal Society v. Martinez*, 72 LA. L. REV. 1055 (2012); Richard A. Epstein, *Church and State at the Crossroads: Christian Legal Society v. Martinez*, 2009-10 CATO SUP. CT. REV. 105 (2010); Mary Ann Glendon, *The Harold J. Berman Lecture: Religious Freedom-A Second-Class Right?*, 61 EMORY L.J. 971 (2012); Erica Goldberg, *Amending Christian Legal Society v. Martinez: Protecting Expressive Association as an Independent Right in A Limited Public Forum*, 16 TEX. J. C.L. & C.R. 129 (2011); Blake Lawrence, *The First Amendment in the Multicultural Climate of Colleges and Universities: A Story Ending with Christian Legal Society v. Martinez*, 39 HASTINGS CONST. L.Q. 629 (2012); Timothy P. Lendino, *From Rosenberger to Martinez: Why the Rise of Hyper-Modernism Is A Bad Thing for Religious Freedom*, 33 CAMPBELL L. REV. 699 (2011); Michael Stokes Paulsen, *Disaster: The Worst Religious Freedom Case in Fifty Years*, 24 REGENT U. L. REV. 283, 284 (2012); Charles J. Russo & William E. Thro, *Another Nail in the Coffin of Religious Freedom?: Christian Legal Society v. Martinez*, 12 EDUC. L.J. 20 (2011); Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847 (2011); William E. Thro, *The Rights Of Student Religious Organizations After Christian Legal Society v. Martinez*, 39 RELIGION & EDUC. 147 (2012); William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of Christian Legal Society v. Martinez*, 261

>]T]he Court argues that the accept-all-comers policy, by bringing together students with diverse views, encourages tolerance, cooperation, learning, and the development of conflict-resolution skills. These are obviously commendable goals, but they are not undermined by permitting a religious group to restrict membership to persons who share the group's faith. Many religious groups impose such restrictions. Such practices are not manifestations of "contempt" for members of other faiths. Nor do they thwart the objectives that [the state university] endorses. Our country as a whole, no less than the [state university] values tolerance, cooperation, learning, and the amicable resolution of conflicts. *But we seek to achieve those goals through "[a] confident pluralism that conduces to civil peace and advances democratic consensus-building," not by abridging First Amendment rights*.[10]

Expanding upon Justice Alito's point as well as the ideas of other scholars,[11] Inazu describes a "Confident Pluralism" as "rooted in the conviction that protecting the integrity of one's own beliefs and normative commitments does not depend on coercively silencing opposing views."[12] Emphasizing both an inherent distrust of state power[13] and a "commitment

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EDUC. L. REP. 473 (2010); Jack Willems, *The Loss of Freedom of Association in Christian Legal Society v. Martinez, 130 S. Ct. 2971 (2010)*, 34 HARV. J.L. & PUB. POL'Y 805 (2011).

[10] Christian Legal Soc., 561 U.S. at 733-34 (2010) (Alito, J., joined by Roberts, C.J, Scalia, & Thomas, JJ., dissenting) (citations omitted) (emphasis added).

[11] In the law review article that formed the foundation for his later book, Inazu explains: "The underpinnings of a confident pluralism are also advanced by a number of prominent scholars. Kenneth Karst insists that '[o]ne of the points of any freedom of association must be to let people make their own definitions of community.' William Eskridge reaches a similar conclusion: 'The state must allow individual nomic communities to flourish or wither as they may, and the state cannot as a normal matter become the means for the triumph of one community over all others.' And David Richards reflects, 'The best of American constitutional law rests . . . on the role it accords resisting voice, and the worst on the repression of such voice.'" John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587, 590-91 (2015) (footnotes omitted) (citations omitted).

[12] *Id.* at 592.

[13] Such a distrust is implicit in our constitutional system. *See* THE FEDERALIST NO. 51 (James Madison). Indeed, the Calvinist view of human nature—that everyone is totally depraved—informed and influenced the framing of our Constitution. *See generally* Mark David Hall, ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC 12-40 (2012); Marci Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention* in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 293, 295

to letting differences coexist, unless and until persuasion eliminates those differences,"[14] Inazu "seeks to maximize the spaces where dialogue and persuasion can coexist alongside deep and intractable differences about beliefs, commitments, and ways of life" and to "resist coercive efforts aimed at getting people to 'fall in line' with the majority."[15] Inazu's vision of Confident Pluralism requires both "Civic Practices" by individuals[16] and "Constitutional Commitments" by the larger political community.[17] This Part of the Article discusses both Civic Practices and Constitutional Commitments below.

A. Civic Practices

"Instead of shutting down or avoiding those with whom we disagree,"[18] Inazu's paradigm requires "us to embrace civic practices to make a difference in how we treat each other."[19] In particular, we must pursue tolerance, humility, and patience.[20] This Section of this Part discusses each of these three aspirational civic practices.

1. Tolerance

"Tolerance is the most important civic aspiration. It means a willingness to accept genuine difference, including profound moral disagreement."[21] It requires us to accept beliefs that our own worldviews deem "deeply unacceptable," "blasphemous" or "obscene."[22] "The basic difficulty of tolerance . . . is that we need it 'only for the intolerable.'"[23]

Yet, "tolerance does not require embracing all beliefs and viewpoints as good or right."[24] "We should aspire not to an 'anything goes,' happy-go-lucky tolerance, but to a practical enduring for the sake of

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(Michael W. McConnell, Robert F. Cochran, Jr., & Angela C. Carmella, eds. 2001); William E. Thro, *A Pelagian Vision for Our Augustinian Constitution: A Review of Justice Breyer's* Active Liberty, 32 J.C. & U.L. 491, 504 (2006).

[14] Inazu, *Confident Pluralism* (law review) *supra* note 11, at 592.

[15] *Id.* at 592.

[16] Inazu, CONFIDENT PLURALISM (book) *supra* note 4, at 1377-2062.

[17] *Id*. at 249-1376.

[18] *Id*. at 1407.

[19] *Id*. at 1411.

[20] *Id*. at 1411-16.

[21] *Id*. at 1444.

[22] *Id*. at 1448.

[23] *Id*. (quoting Bernard Williams, *Toleration: An Impossible Virtue?* in TOLERATION: AN ELUSIVE VIRTUE 19 (David Heyd, ed., 1996)).

[24] Inazu, CONFIDENT PLURALISM (book) *supra* note 4, at 1448.

coexistence."[25] People of different faith traditions or world views "are not going to agree with one another on every important issue—they hold views about the world that are fundamentally at odds with one another."[26] "The depth of their disagreement, and the fact of that disagreement, precludes anything like ultimate approval."[27]

2. Humility

"Humility requires even greater self-reflection and self-discipline than tolerance."[28] It requires individuals "to recognize that their own beliefs and intuitions rest upon tradition-dependent values that cannot be empirically proven or fully justified by forms of rationality external to those traditions."[29] An individual may have "confidence in his own convictions," but must recognize "the limits of translation, and the difficulty of proving our deeply held values to one another." "[O]ur human faculties are inherently limited—our ability to think, reason, and reflect is less than perfect, a limitation that leaves open the possibility that we are wrong."[30] "Humility is based on the limits of what we can prove, not on claims about what is true. For this reason, it should not be mistaken for relativism."[31] In sum, our beliefs often are, at least partially, a product of faith.[32]

3. Patience

"Patience involves restraint, persistence, and endurance."[33] People of Faith often "structure much of their lives around their ethical commitments, and they often want their normative views to prevail on the rest of society,"[34] but "dialogue and persuasion usually take time."[35] "That does not mean endorsement, or recognition, or acceptance. In fact, it may turn out that patience leads us to a deeper realization of the error or

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[25] *Id*. at 1453.
[26] *Id*. at 1456-57.
[27] *Id.* at 1457.
[28] *Id*. at 1472.
[29] *Id.* at 1474.
[30] *Id*. at 1476.
[31] *Id*. at 1480.
[32] *Id*. at 1478.
[33] *Id*. at 1499.
[34] *Id*. at 1503-04.
[35] *Id*. at 1504.

harm of an opposing viewpoint."[36] "Sometimes we will need patience to endure differences that will not be overcome."[37]

B. Constitutional Commitments

Although Americans disagree about "the purpose of our country, the nature of the common good, and the meaning of human flourishing,"[38] we agree on the necessity of "limiting state power, of encouraging persuasion over coercion, and of supporting a robust civil society."[39] This "modest unity" underlying Confident Pluralism includes both a premise of inclusion and a premise of dissent.[40] The Inclusion Premise "aims for basic membership in the political community to those within our boundaries."[41] The Dissent Premise recognizes individuals "must be able to reject the norms established by the broader political community with our own lives and voluntary groups." In order to recognize both inclusion and dissent, Inazu calls on the broader political community to respect associational freedom,[42] ensure meaningful access to public forums,[43] and provide funding to support pluralism.[44] Although our current constitutional framework requires a large degree of associational freedom, access to public forums, and public funding, Inazu argues that current doctrine "falls shorts and is headed in the wrong direction."[45] His vision of Confident Pluralism requires the courts to "redefine and reimagine" doctrines concerning voluntary groups, expression in public places, and public funding of private expression.[46]

II. RELIGIOUS FREEDOM PROMOTES CONFIDENT PLURALISM

If public and private universities are going to promote Confident Pluralism, then institutions must embrace a broad definition of religious freedom. Like Inazu's call for Constitutional Commitments, my definition

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[36] Inazu, *Law, Religion, & The Purpose of the University*, *supra* note 3.
[37] Inazu, CONFIDENT PLURALISM (book) *supra* note 4, at 1504.
[38] *Id*. at 252.
[39] *Id*. at 262.
[40] *Id*. at 262-66.
[41] *Id*. at 450.
[42] Inazu, *Confident Pluralism* (Law Review), *supra* note 11, at 604-06.
[43] *Id.* at 606-08.
[44] *Id.* at 608-12.
[45] Inazu, CONFIDENT PLURALISM (book), *supra* note 4, at 2071.
[46] *Id.* at 2075.

of Religious Freedom involves broad associational rights for private groups—including funding, the right to speak in public spaces, and the ability to discriminate against those who do not share their faith. While current constitutional doctrine provides many of these rights, my definition of Religious Freedom—like Inazu's Confident Pluralism—requires institutions to do more than the constitutional minimum. In some instances, State Constitutions or state statutes provide the additional protections. In other instances, particularly those involving private universities, the school should make policy choices to give more protection.

A. Religious Groups Should Be Recognized and Funded

There is "no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."[47] A public university may not favor student groups that support the institution's views, and it may not penalize students groups with which it disagrees.[48] Similarly, the Court has ruled that an administration's disagreement with a student organization's views does not justify denying the student organization access[49] or funding.[50] Indeed, the practice of requiring students to pay mandatory fees that are then distributed to student groups is permissible only if the institution does not favor particular viewpoints.[51] Quite simply, the "avowed purpose" for recognizing student groups is "to provide a forum in which students can exchange ideas."[52] Thus, a group

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[47] Widmar v. Vincent, 454 U.S. 263, 269 (1981).

[48] Over forty years ago, the Court declared: "The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of 'destruction' thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent. Healy v. James, 408 U.S. 169, 187-88 (1972). There is no obligation for a university to recognize or fund student groups, but if a university chooses to do so, then it must treat all student groups the same." *See* 2 WILLIAM A. KAPLIN & BARBARA H. LEE, THE LAW OF HIGHER EDUCATION 1244-46-20 (5th ed. 2013).

[49] Widmar, 454 U.S. at 267-70.

[50] Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 831 (1995).

[51] Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 233-34 (2000).

[52] Widmar, 454 U.S. at 272 n.10. *See also* Southworth, 529 U.S. at 229 (student activity

that holds racist, sexist, homophobic, anti-Semitic, or anti-Christian views is entitled to recognition, access to facilities, and funding.[53] Of course, "students and faculty are free" to "voice their disapproval of the [student organization's] message,"[54] but debate or deliberation may not be suppressed because "the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed."[55] If one finds a particular viewpoint disagreeable, the solution is to promote an alternative viewpoint, not to suppress the disagreeable viewpoint.[56]

B. Religious Groups Should Be Able to Speak in Public Spaces

The Constitution also requires public institutions to permit religious groups to speak in a wide variety of locations. Universities often confine expressive activities to a narrow "free speech" zone,[57] but recent Supreme Court decisions suggest such restrictions are unconstitutional. In *Pleasant Grove City v. Summum,*[58] the Court clarified "designated public fora" and "limited public fora" were not interchangeable terms for the same constitutional concept, but were in fact two separate constitutional

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fee was designed to facilitate "the free and open exchange of ideas by, and among, its students"); Rosenberger, 515 U.S. at 834 (university funded student organizations to "encourage a diversity of views from private speakers").

[53] However, while the institution may not refuse recognition because of the student organization's viewpoint, the institution may require the organization to (1) obey the campus rules; (2) refrain from disrupting classes; and (3) obey all applicable federal, state, and local laws. Kaplin & Lee, supra note 48, at 1245-46 (interpreting *Healy*). As a practical matter, this means that the institution can impose some neutral criteria for recognition, such as having a faculty advisor, having a constitution, and having a certain number of members. However, the institution cannot deny recognition simply because the institution or a significant part of the campus community dislikes the organization. Moreover, *Healy* also states that the institution may not deny recognition because members of the organization at other campuses or in the outside community have engaged in certain conduct. Healy, 408 U.S. at 185-86.

[54] Rumsfeld v. Forum for Academic & Inst'l Rights, 547 U.S. 47, 69-70 (2006).

[55] UNIVERSITY OF CHICAGO, REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION (2015).

[56] If college and university officials are going to express disapproval in the name of the university, they should make certain that they are authorized to speak for the institution. There likely will be situations—particularly at public institutions—where the governing board has a very different attitude toward the student organization.

[57] Lukianoff *supra* note 1, at 61-76 (Chapter 3) Powers, *supra* note 2, at 89-106 (Chapter 5).

[58] 555 U.S. 460 (2009).

concepts and required different levels of scrutiny.[59] By doing so, the Court resolved "the confusion over terminology and scrutiny levels [noticed by lower courts] after the Supreme Court first articulated the concept of a 'limited public forum.'"[60] After *Pleasant Grove*, an open space on a public university campus is properly viewed as a "designated public forum."[61] "Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum."[62] Thus, a public institution may impose speech restrictions "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."[63] However, the university "may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[64]

While these constitutional rights are substantial, it may be necessary for public institutions to go beyond the constitutional minimum, particularly with respect to religious expression. Inazu calls for a fundamental transformation of public forum doctrine so that governmental officials have less subjective discretion.[65]

Of course, outside of California, constitutional restrictions on the freedom of speech do not apply to private colleges and universities. Yet, except where an institution's own religious mission requires the exclusion

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[59] *Id.* at 469. The U.S. District Court for the Southern District of Ohio explained the significance of *Pleasant Grove*: "The *Gilles* court treated the terms 'limited public forum' and 'designated public forum' interchangeably. But the Supreme Court has subsequently clarified that *designated public fora and limited public fora are distinct types, subject to differing standards of scrutiny.* This *Pleasant Grove* decision 'resolves the confusion over terminology and scrutiny levels' created by the Sixth Circuit's earlier decisions, and diminishes the value of *Gilles'* holding that open campus spaces of public universities are limited public fora. Indeed, the Sixth Circuit's most recent decision on the matter holds that such spaces are more appropriately considered designated public fora." Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams, 2012 WL 2160969, at *4 (S.D. Ohio 2012) (emphasis in original) (citations omitted).

[60] Miller v. City of Cincinnati, 622 F.3d 524, 535 n. 1 (6th Cir. 2010).

[61] *See* McGlone v. Bell, 681 F.3d 718, 733 (6th Cir. 2012) (holding that the open areas of Tennessee Technical University's campus are designated public fora). *See also* Hays Cnty. Guardian v. Supple, 969 F.2d 111, 116 (5th Cir. 1992) (holding that the university campus is a designated public forum).

[62] Pleasant Grove, 555 U.S. at 469-70.

[63] Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

[64] Ward v. Rock Against Racism, 491 U.S. 781, 791(1989).

[65] Inazu, CONFIDENT PLURALISM, *supra* note 4, at 912-54.

of certain views and faith traditions from the academic communities, private institutions should allow religious groups to speak in public spaces on campus.

C. Religious Groups Should Have the Right to Exclude Non-Believers

1. As a Matter of Constitutional Law, Religious Groups Have Autonomy on Matters of Leadership and Membership

The right to express a particular viewpoint necessarily includes the right to associate with others who share that view. "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."[66] "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."[67] "If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect."[68] This freedom of association "is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private."[69]

"Freedom of association . . . plainly presupposes a freedom not to associate."[70] "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being."[71] "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[72]

Therefore, government may intrude on the freedom of association only "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas that cannot be achieved through means

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[66] Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).
[67] Boy Scouts of America v. Dale, 530 U.S. 640, 647-48 (2000).
[68] Rumsfeld, 547 U.S. at 68.
[69] Dale, 530 U.S. at 630.
[70] Roberts, 468 U.S. at 623.
[71] Democratic Party of U.S. v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 122 n. 22 (1981). *See also* California Democratic Party v. Jones, 530 U.S. 567, 574-75 (2000).
[72] Dale, 530 U.S. at 648.

significantly less restrictive of associational freedoms."[73] Courts are required to "examine whether or not the application of the state law would impose any 'serious burden' on the organization's rights of expressive association."[74] Judges "give deference to an association's assertions regarding the nature of its expression" and "to an association's view of what would impair its expression."[75] It is not necessary for the organization's core purpose to be expressive or for all members to agree with all aspects of the message.[76] Under this framework, the Court has upheld statutes requiring civic organizations to admit women,[77] but has allowed both parade organizers[78] and the Boy Scouts[79] to exclude homosexuals.[80] The cases have turned on whether the "the enforcement of these [policies]" would "materially interfere with the ideas that the organization sought to express."[81]

While all student groups enjoy these constitutional rights, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* recognized that the First Amendment "gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own [leaders]."[82] "By imposing an unwanted minister, the state

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[73] Roberts, 468 U.S. at 623. Moreover, the Court has emphatically rejected the notion that something less than strict scrutiny should apply to freedom of association claims. Dale, 530 U.S. at 659.

[74] Dale, 530 U.S. at 658.

[75] *Id.* at 653.

[76] *Id.* at 655.

[77] Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 539-542 (1987); Roberts, 468 U.S. at 623-27.

[78] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 572-73 (1995).

[79] Dale, 530 U.S. at 655-60.

[80] Hsu v. Roslyn Union Free School Dist. No. 3, 85 F.3d 839 (2nd Cir. 1996), reinforces this conclusion. The Second Circuit held that "when a sectarian religious club discriminates on the basis of religion for the purpose of assuring the sectarian religious character of its meetings, a school must allow it to do so unless that club's specific form of discrimination would be invidious (and would thereby violate the equal protection rights of other students), or would otherwise disrupt or impair the school's educational mission." Id. at 872-73. For a commentary on this case, see Charles J. Russo & Ralph D. Mawdsley, *Hsu v. Roslyn Union Free School District No. 3: An Update on the Rights of High School Students Under the Equal Access Act*, 114 EDUC. L. REP. 359 (1997).

[81] Dale, 530 U.S. at 657.

[82] 132 S. Ct. 694, 706 (2012). *Hosanna-Tabor* has received a significant amount of commentary. *See* Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 106 NW. U. L. REV. 951 (2012); John C. Eastman, *Hidden Gems in the Historical 2011-2012 Term, and Beyond*, 7 CHARLESTON L. REV. 1 (2012); Marsha B. Freeman, *What's Religion Got to Do with It? Virtually*

infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments."[83] "According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."[84]

In sum, *Hosanna-Tabor* establishes that religious groups have a right of absolute discretion to determine who its leaders will be. Logically, if an organization can restrict its leadership to those who adhere to the faith, basic principles, then the organization ought to be able to impose a similar requirement on membership. Consequently, the necessary inference of *Hosanna-Tabor* is that religious organizations, through the Religion Clauses, [85]have greater associational freedoms than their secular counterparts. [86] A student religious group has a constitutional right to exclude those who disagree with its basic faith tenets.

Nothing: Hosanna-Tabor and the Unbridled Power of the Ministerial Exemption, 16 U. PA. J.L. & SOC. CHANGE 133 (2013); Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 982 (2013); Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 MERCER L. REV. 405 (2013); Mark A. Hicks, *The Art of Ecclesiastical Ware: Using the Legal System To Resolve Church Disputes*, 6 LIBERTY U. L. REV. 531 (2012); Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. Rev. 973 (2012); Ralph D. Mawdsley, & Allan G. Osborne, Jr., *Shout Hosanna: The Supreme Court Affirms The Free Exercise Clause's Ministerial Exception*, 278 EDUC. L. REP. 693 (2012); Melissa Rogers, *Treating Religion Differently*, 10 FIRST AMEND. L. REV. 210 (2012).

[83] *Id.*

[84] *Id.*

[85] "Responding somewhat incredulously to the government's theory that whatever rights the church might have derive only from freedom of association, [Justice Scalia] said that 'there, black on white in the text of the Constitution are special protections for religion.'" Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 855 (2012).

[86] Such a result would not violate the Establishment Clause. The government may favor religion and religious entities over non-religion and non-religious entities. *See* Cutter v. Wilkinson, 544 U.S. 709, 719-24 (2005) (Religious Land Use and Institutionalized Persons Act, which requires preferential treatment for religion, does not violate the Establishment Clause). *See also* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 18 n. 8 (1989) ("[w]e in no way suggest that all benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause"); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987) (recognizing that the government may sometimes accommodate religious practices without violating the Establishment Clause).

2. Government Cannot Force Religious Groups to Surrender Their Religious Autonomy

Hosanna Tabor confirms that student religious organizations enjoy additional rights, but many institutions may be tempted to require a surrender of those rights as a condition of receiving recognition or funding.

Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., precludes such ultimatums.[87] Specifically, while the government may impose conditions that define the limits of the particular program, the government may not impose "conditions that seek to leverage funding to regulate speech outside the contours of the program itself."[88] A state university's program of recognizing and funding student organizations ensures that "students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall."[89] The limits of such a program may well require that organizations allow non-members to attend their events. However, requiring groups to compromise their beliefs and their message by admitting non-believers is to leverage speech outside the contours of the program itself.

After *Alliance for Open Society*, a public institution may not force religious groups to surrender the religious autonomy rights recognized in *Hosanna-Tabor*. This is so for three reasons.

First, the unconstitutional conditions doctrine protects religious autonomy rights. Although *Alliance for Open Society* concerned the freedom of speech, its holding is not limited to free speech claims. Indeed, a few days after the decision in *Alliance for Open Society* the Court recognized "an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."[90] Thus, the principles of *Alliance for Open Society* apply to all of the enumerated rights articulated in the Religion Clauses as well as other[91] constitutional provisions.[92]

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[87] 133 S. Ct. 2321 (2013).
[88] Alliance for Open Soc'y, 133 S. Ct. at 2328.
[89] Southworth, 529 U.S. at 233.
[90] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2584 (2013).
[91] Indeed, *Koontz* did not involve the First Amendment, but rather centered on the Fifth Amendment Takings Clause.
[92] Presumably, this includes Second Amendment rights related to the individual ownership of firearms. *See* McDonald v. City of Chicago, 561 U.S. 742 (2010).

Second, the unconstitutional conditions doctrine is not limited to money grants, but logically extends to *any* form of governmental subsidy.[93] The Supreme Court views both tax exemptions and tax deductions as a form of government subsidy.[94] Similarly, a grant to a college's students is the same as a subsidy to the college itself.[95] Since a state university's recognition of a student group is a form of a governmental subsidy,[96] it logically follows that the unconstitutional conditions doctrine applies to the recognition and funding of student religious groups.[97]

Third, a condition requiring a religious group to admit those who do not share its beliefs is unconstitutional. To explain, after *Alliance for Open Society*, conditioning the receipt of a subsidy is constitutional if the condition is more than a restatement of the program's definition.[98] As the Supreme Court observed, state university officials recognize and fund student organizations so that "students have the means to engage in

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[93] *See* Amicus Curiae Brief of Beckett Fund for Religious Liberty and Christian Legal Society at 6-9; Agency for International Development v. Alliance for Open Society, No. 12-10 (U.S. April 3, 2013).

[94] As the Court explained, a "tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions." Regan v. Taxation With Representation of Washington, 461 U.S. 540, 544 (1983).

[95] Grove City Coll. v. Bell, 465 U.S. 555, 564 (1984).

[96] Specifically, the Court found that access to the limited public forum is "effectively a state subsidy." Christian Legal Soc'y, 110 S. Ct. at 2986. Since the student organization had a choice, namely to accept those who disagreed with its values or forgo the subsidy that comes with recognition, the Court maintained that it was not being compelled to accept those who disagree. *Id.* As far as the Court was concerned, this choice distinguished the situation from those cases where statutes or policies compelled admission of those who disagree. *Id*. at 2986 n. 14. For a critique of the Court's conclusion that access to a limited public forum is effectively a state subsidy and the implications of that holding, *see* Thro & Russo, *Serious Setback*, *supra* note 9, at 485-87.

[97] Of course, in *Bob Jones University v. United States*, 461 U.S. 574, 593-96 (1983), the Court held that the federal government could deny a subsidy (a tax exemption) to a religious university that, as a matter of religious doctrine, espoused racist views. In other words, the institution was denied a tax exemption because the government disagreed with its views. Such a result appears to contradict the logic of *Alliance for Open Society*. As Professor Epstein observed, "if *Bob Jones* is correct, then the government could claim that it has a 'compelling state interest' to condition tax exemptions to religious institutions on their adherence to Title VII prohibitions against gender discrimination, as practiced by Roman Catholics and Orthodox Jews, in the selection of religious leaders." Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 95 (1988).

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

dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall."[99] While state university administrators may be tempted to adopt a different and broader rationale for recognizing and funding student organizations, public institutions "cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."[100]

Assuming the purpose of recognizing and funding student organizations on campuses is to foster dynamic discussions among students, then public university administrators may impose conditions that facilitate those purposes. For example, it likely is appropriate to require student organizations to follow university accounting procedures, have a faculty advisor, reserve meeting space in advance, and open some of its educational events to the entire campus.[101] Similarly, state university officials likely can require that most of the members and all of the officers in a student group actually be enrolled.[102] These conditions are fully consistent with the reasons why state universities recognize and fund student groups.[103]

3. State Law May Reinforce the Right to Exclude Non-Believers

In some states, state law may reinforce a religious group's right to exclude non-believers. Because state constitutions often are more protective of individual liberty than the United States Constitution,[104] a

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[99] Southworth, 529 U.S. at 233.

[100] Legal Services Corp. v. Velazquez, 531 U.S. 533, 547 (2001). *See also* Alliance for Open Soc'y, 133 S. Ct. at 2329 (quoting *Velazquez*).

[101] Of course, "students and faculty are free to associate to voice their disapproval of the [student organization's] message." Rumsfeld, 547 U.S. at 69-70. If one finds a particular viewpoint disagreeable, the solution is to promote an alternative viewpoint, not to suppress the disagreeable viewpoint.

[102] Of course, a requirement that most members and all officers be students represents an interference with religious autonomy rights; such an interference is consistent with the purpose of recognizing student organizations—to promote dialogue among *students*.

[103] A requirement that a student organization choose its officers through democratic elections likely would not be consistent with the purposes of recognizing student groups. Many religious organizations—notably the Roman Catholic Church and the Church of Jesus Christ of Latter Day Saints—choose leaders through mechanisms other than democratic elections. If a student religious organization's core beliefs require selection of leaders through a method other than democratic elections, then that belief must be respected.

[104] A. E. Dick Howard, *The Renaissance of State Constitutional Law*, 1 EMERGING ISSUES IN STATE CONSTITUTIONAL LAW 1, 14 (1988).

student group may have a state constitutional right to exclude those who disagree with the group's views. [105] Indeed, since the Burger Court's decisions prompted a revival of state constitutional law in the early 1970s,[106] "it would be most unwise these days not also to raise the state constitutional questions."[107] Although the issue apparently is one of national first impression, it would not be surprising if a state court determined that its State Constitution prohibited the government from indirectly forcing an organization to admit members who disagreed with the organization's objectives.[108] Moreover, state Religious Freedom Restoration Acts[109] prohibit government from imposing a substantial burden on the free exercise of religion unless there is a compelling governmental interest pursued through the least restrictive means.[110] To the extent that a student group's position is the result of religious belief, these state laws seem to prohibit government from indirectly forcing the inclusion of dissenters.

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

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

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

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

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

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

4. *Christian Legal Society* Should Not Deter Institutions from Allowing Student Religious Groups to Exclude Non-Believers

To be sure, in *Christian Legal Society v. Martinez*,[111] a sharply divided Supreme Court held that officials at a public institution in California might require a student religious group to admit all-comers from the student body, including those who disagree with its beliefs, as a condition of being a recognized student organization.[112] Put another way, the Court declared that the government, through university officials, might force religious groups to choose between compromising their values and receiving benefits that other student groups receive as a matter of constitutional right. While the government "surely could not demand that all Christian groups admit members who believe that Jesus was merely human,"[113] the government "may impose these very same requirements on students who wish to participate in a forum that is designed to foster the expression of diverse viewpoints."[114] As Professor Paulsen notes, the "holding is a fundamental negation of the right of Christian campus groups to freedom of speech, to freedom of association, and to the collective free exercise of religion—a First Amendment disaster trifecta."[115]

Yet, while *Christian Legal Society* allows public institutions to force student religious groups to admit non-believers, it does not require them to do so. There are three reasons why an institution—public or private—should not force religious organizations to admit those who do not share the faith. The remainder of this Section discusses these reasons.

a. *Christian Legal Society* Arose Under Unique Circumstances

Although nothing in the Court's opinion limits *Christian Legal Society* to a particular context, the reality is the case arose in an unusual factual situation. Although most public institutions allow student groups to exclude those who disagree with the group's objectives or do not share the group's interests, *Christian Legal Society* involved a policy forbidding any student organization from discriminating for any reason. Under this "all-comers policy," the Young Democrats had to allow Republicans to join; the Vegetarian Society had to include carnivores; and the Chess Club had

[111] 130 S. Ct. 2971 (2010).
[112] *Id.* at 2978.
[113] Christian Legal Soc'y, 130 S. Ct. at 3014 (Alito, J., joined by Roberts, C.J., Scalia, J. & Thomas, JJ., dissenting). *See also id*. at 2997 (Stevens, J., concurring)
[114] *Id.* at 3014 (Alito, J., joined by Roberts, C.J., Scalia, J. & Thomas, JJ., dissenting).
[115] Paulsen, *supra* note 9, at 284.

to allow members who would prefer to play checkers. If an institution allows some student political organizations or student special interest organizations to exclude those who do not share the group's ideology or interests, then it will be difficult to justify forcing student religious groups to admit non-believers.

b. Subsequent Supreme Court Decisions Cast Doubt on *Christian Legal Society*

Two subsequent Supreme Court decisions, *Hosanna-Tabor* and *Alliance for Open Society* collectively undermine the result in *Christian Legal Society*.[116] First, as explained above, *Hosanna-Tabor* establishes that religious groups have a right of religious autonomy—absolute discretion to determine whom its leaders will be. Logically, if an organization can restrict its leadership to those who adhere to the faith, then the organization ought to be able to impose a similar requirement on membership. That is the opposite result of *Christian Legal Society*. Second, as explained above, in *Alliance for Open Society,* the Court revived and redefined the unconstitutional conditions doctrine—government may impose conditions that define the program, but may not impose conditions that reach outside the program. As a result, government cannot force a religious group to surrender its religious autonomy rights as a condition of receiving some government subsidy or benefit—such as university recognition or access to student activity funds. That outcome also is the direct opposite of *Christian Legal Society*. In sum, *Hosanna-Tabor* and *Alliance for Open Society* collectively contradict the result in *Christian Legal Society*.

To be sure, *Christian Legal Society* remains the controlling constitutional rule until explicitly overruled.[117] "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[118] At most, *Hosanna-Tabor* and *Alliance for Open Society* cast serious doubt on the reasoning of *Christian Legal Society* and provide the basis for asking the Court to overrule *Christian Legal Society*.

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[116] *See* William E. Thro, *The Limits of Christian Legal Society,* 2014 CARDOZO L. REV. DE NOVO 124 (2014); William E. Thro, *Undermining Christian Legal Society v. Martinez*, 295 EDUC. L. REP. 867 (2013).
[117] Agostini v. Felton, 521 U.S. 203, 237-38 (1997).
[118] Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989).

c. Allowing Student Religious Groups to Determine Membership Is Essential to Confident Pluralism

Allowing student religious groups to determine their own membership is essential to confident pluralism.[119] If the public institution wishes to promote understanding and dynamic discussion, a policy of forced inclusion "could be completely counterproductive, indeed nonsensical—e.g. forcing a Jewish club to allow Muslim or Christian Officers."[120] Like the statute invalidated in *Alliance for Open Society*, a requirement to admit non-believers "is an ongoing condition on recipients' speech and activities, a ground for terminating [participation in the program] after selection is complete."[121] The condition is nothing more than an attempt to compel an organization to conform to the state university's desires.[122] The requirement goes beyond defining the limits of the program; it affects the organization's constitutional rights outside of the program.[123]

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[119] As Inazu explained: "The example of the all-comers policies on a number of different college campuses illustrates the importance of what some have called 'institutional pluralism.' At Hastings and other public school campuses, these all-comers policies depart not only from the aspirations of a confident pluralism, but also from longstanding *constitutional* constraints. But what about private schools like Vanderbilt University and Bowdoin College? Should these private schools enforce all-comers policies as a normative matter? This is to me a far more complicated question than cases involving public institutions. On the one hand, Vanderbilt and Bowdoin are hindering pluralism in the same way that Hastings is in adopting an all-comers policy. Perhaps even more egregiously, their adoption of an all-comers policy cuts against the academic inquiry purportedly at the heart of institutions of higher learning. All of these failures suggest strong normative reasons to criticize Vanderbilt and Bowdoin for adopting the all-comers policy. On the other hand, Vanderbilt and Bowdoin are themselves private actors, and they contribute to the landscape of institutional pluralism. For this reason, those who are critical of the substantive policies might nevertheless defend the ability of these institutions to implement them. Private actors like universities reinforce the First Amendment insofar as they limit the power of the state, even when they internally neglect those values. That is another reason that the state action doctrine matters--it preserves the integrity of non-state power players because of, rather than in spite of, the power that they wield." Inazu, *Confident Pluralism* (law review), *supra* note 11, at 612-13.

[120] *American Center for Law & Justice Amicus Curiae Brief* at 9, *Agency for International Development v. Alliance for Open Society*, No. 12-10 (U.S. May 4, 2013). *See also Amicus Curiae Brief of Beckett Fund for Religious Liberty and Christian Legal Society* at 10-11, *Agency for International Development v. Alliance for Open Society*, No. 12-10 (U.S. April 3, 2013).

[121] Alliance for Open Society, 133 S. Ct. at 2330.

[122] *Id.*

[123] *Id.*

Additionally, as Robert George observed, "the right to religious freedom by its very nature includes the right to leave a religious community whose convictions one no longer shares and the right to join a different community of faith, if that is where one's conscience leads."[124] Forcing a religious organization to accept those who disagree with its core tenets is to begin the process of changing the nature of organization.[125] If a Catholic organization is forced to accept Protestants, then the organization will be less Catholic and, in time, may not be Catholic at all. As Inazu explains, "[o]ne reason that associational freedom is the fundamental building block of a confident pluralism is that it shields groups and spaces from the reaches of state power. Without this initial sorting . . . the aspirations of a confident pluralism become functionally unworkable."[126] Put another way, Confident Pluralism requires us to recognize that People of Faith should be able to study the Bible, Torah, Koran, or sacred text without including secularists who reject any notion of the divine.

Conclusion

In a sense, the John 14:6 Problem is the defining issue of our time. In "our own religiously and culturally fractured world," we must find a way "for religious believers to bring the full weight of their convictions into public life while fully respecting the rights of others in a pluralistic society under a constitutional government."[127] Although some may seek "to restrict and enclose the life of faith within the most strictly confined and private limits,"[128] the better course is to determine "how devotees of any faith—Islam and Hinduism as well as Christianity, but also any secular 'replacement religion'—can carry on a responsible public life in contention, and concert, with people of other convictions."[129]

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[124] Robert P. George, "*What is Religious Freedom?*," PUBLIC DISCOURSE, July 24, 2013, (available at http:// www.thepublicdiscourse.com/ 2013/ 07/ 10622).
[125] *See* California Democratic Party v. Jones, 530 U.S. 567, 577-78 (2000) (discussing the impact of allowing non-party members to participate in the a political party's primary).
[126] Inazu, *supra* note 11, at 604 (emphasis original).
[127] James D. Bratt, ABRAHAM KUYPER: MODERN CALVINIST, CHRISTIAN DEMOCRAT at *Introduction* (2013). For an essay on the significance of Kuyperian thought for religious liberty, *see* William E. Thro, *A Kuyperian Perspective on American Religious Freedom* in REL. & LAW IN PUBLIC SCHOOLS 125 (Steve Permuth, Susan Silver, Ralph Mawdsley & Charles J. Russo, eds., 2017).
[128] MARK J. LARSON, ABRAHAM KUYPER: CONSERVATISM, AND CHURCH AND STATE 1762 (2015) (Kindle Edition) (quoting an English Translation of Kuyper's political party manifesto).
[129] Bratt, *supra* note 127, at Introduction.

Recognizing "we can, and we must learn to live with each other in spite of our deep [religious] differences,"[130] Inazu's Confident Pluralism paradigm offers a way to solve the John 14:6 Problem. On a college campus, promoting Confident Pluralism—and, thus, solving the John 14:6 Problem—requires Religious Freedom. That vision of Religious Freedom must both embrace and extend constitutional norms.

[130] INAZU, CONFIDENT PLURALISM (book), *supra* note 4, at 2063.

LGBT Rights in U.S. Public Schools: When Civil Rights and Religious Beliefs Collide

Suzanne Eckes[*]

Society's views of sexual orientation and gender identity have certainly evolved in recent years.[1] As this has occurred, public schools have been forced to address several related issues, which have sometimes led to litigation. Many of the controversies involve competing rights between students' religious beliefs and other students' civil rights. In the past, students' and families' sincerely held religious beliefs sometimes conflicted with the rights of racial minorities.[2] Although religious objections related to race are no longer socially acceptable, the issue of competing rights has resurfaced again with a new focus on sexual orientation and gender identity. Specifically, students have relied on their sincerely held religious beliefs when wearing homophobic t-shirts to school, when challenging anti-bullying policies, or when questioning school-curriculum choices. Also, there are underlying religious arguments in recently proposed laws and policies that many argue impede the civil rights of transgender students.

While students' individual religious liberties should remain protected in public schools, these same individuals should not be able to regulate the civil liberties of others. As United States Supreme Court Justice Anthony Kennedy recently observed, "no person may be restricted or demeaned by

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[*] Suzanne Eckes is a professor of education law at Indiana University in the Educational Leadership and Policy Studies Department. She is the president-elect of the Education Law Association (ELA) and the author of school-law related articles and book chapters.

[1] Nancy J. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment of Religion*, 84 UMKC L. REV. 749 (2016).

[2] William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657 (2011) (explaining how religious beliefs were used to justify slavery and racial segregation); *see also*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (upholding decision to deny tax exempt status to K-12 private school and university that discriminated against black students in admissions based upon religious beliefs); Complaint at 3–11, Goldsboro Christian Schs. v. United States, 461 U.S. 574 (1983) (No. 81-1) (arguing in K-12 school case that God "separated mankind into various nations and races," and that this separation "should be preserved in the fear of the Lord."); *see* STEPHEN L. CARTER, GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS 92-93 (2000) (outlining Biblical arguments used to maintain racial inequality).

government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons . . . in protecting their own interests."[3] This article examines four specific areas of competing rights as they relate to sexual orientation and gender identity in K-12 public schools, including bullying/harassment, student speech, curriculum, and transgender access issues.

Student Bullying and Harassment

Researchers have documented that lesbian, gay, bisexual and transgender (LGBT) students are bullied and harassed at higher numbers than the rest of the student population in schools.[4] A 2015 National School Climate survey discovered that 85% of LGBT students reported harassment in school.[5] According to the study, 71.5% of LGBT students avoided school functions because they felt unsafe or uncomfortable.[6] The Centers for Disease Control and Prevention (CDC) found that there are 1.3 million high school students who identify as LGBT (8% of the high school population).[7] Within this group, more than 40% of the LGBT students said they have considered committing suicide in the last year and 30% have attempted suicide. At the same time, the CDC reported that 15% of straight students have considered suicide and 6% have attempted.[8] In order to address the mistreatment of LGBT students, many school districts across the country have included sexual orientation and/or gender identity within their anti-harassment or anti-discrimination policies. Some parents object to programs and policies that attempt to shield LGBT students from bullying and harassment because they believe such programs "conflict with their deeply held religious beliefs that homosexuality is sinful."[9] With the goal of safeguarding religious liberties, it is sometimes

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[3] Burwell v. Hobby Lobby Stores, 134 S. Ct. 2571, 2786–87 (2014) (J. Kennedy concurring).
[4] JOSEPH G. KOSCIW ET AL., GLSEN, THE 2015 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION'S SCHOOLS (2016), https://www.glsen.org/sites/default/files/2015%20National%20GLSEN%202015%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report.pdf.
[5] *Id.*
[6] *Id.*
[7] *Health Risks Among Sexual Minority Youth*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/healthyyouth/disparities/smy.htm (last updated Aug. 11, 2016).
[8] *Id.*
[9] *Teacher Tolerance or Attacking Religion?*, NAT'L EDUC. ASSOC. (May 20, 2006), http://www.nea.org/home/13990.htm.

recommended that LGBT rights and protections be limited.[10] Legal scholar Nancy Knauer contends that religious liberty requests can be "deceptively evenhanded" and that religious liberty arguments can present a "power flip" where the religious objectors become the victims.[11] William Eskridge, a professor at Yale Law School, maintains that sometimes Christian fundamentalists support forms of state discrimination against LGBT persons, "on the ground that full equality for gays would mean fewer liberties for themselves."[12]

In addition to parents objecting for religious reasons, some religious-based groups have attempted to derail anti-bullying policies by claiming they are unnecessary.[13] One commentator observed:

> Most bullying prevention programs consider a variety of reasons for bias and harassment in school: for example, discrimination due to a student's race, age, gender, religion, or physical and mental abilities. When Religious Right activists deride "special rights" or "special protections," they try to make gay students appear more powerful than others, including their bullies. Their real objective is to drive teachers, school officials, and policymakers to intentionally ignore the problem of bullying against gay and gay-perceived students and create or maintain a policy of inaction.[14]

Matt Barber, the Associate Dean of Liberty University School of Law, referred to anti-bullying programs as "Alinksy-style, homo-fascist tactics to stifle any dissent."[15] According to Barber, suicide rates among gays are high because they know "what they are doing is unnatural, is wrong, is immoral."[16] Family Research Council President Tony Perkins explained to *National Public Radio* that problems experienced by LGBT youth are

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[10] *See* Knauer, *supra* note 1 at 753.
[11] *Id.*
[12] Eskridge, *supra* note 2 at 658.
[13] AllenMcw, *The Religious Right's War on LGBT Youth and their Support for Bullying*, DAILYKOS (July 19, 2015), http://www.dailykos.com/story/2015/7/19/1403610/-The-Religious-Right-s-War-on-LGBT-Youth-and-their-Support-for-Bullying.
[14] *Id.*
[15] Brian Tashman, *Barber: Suicide Rate High Among Gay Youth Because They Know "What They Are Doing is Unnatuaral, Is Wrong, Is Immoral,"* RIGHT WING WATCH (Mar. 28, 2011, 1:48 PM), http://www.rightwingwatch.org/post/barber-suicide-rate-high-among-gay-youth-because-they-know-what-they-are-doing-is-unnatural-is-wrong-is-immoral/.
[16] *Id*.

their fault and not due to bullying, and that being gay is abnormal. He asserted that "these young people who identify as gay or lesbian, we know from the social science that they have a higher propensity to depression or suicide because of that internal conflict."[17] Such efforts to ban protections for LGBT students through school policy are misguided. In fact, it appears that LGBT students may need even more protection when compared to other groups that have been historically marginalized in public schools. A 2016 study revealed that while 57.6% of students feel unsafe at school due to the personal characteristic of sexual orientation, 13% of students felt unsafe due to their religion and 7.4% felt unsafe due to their race.[18]

Two court decisions discussed below illustrate not only the harassment LGBT students can experience in schools, but also the legal issues that arise when such harassment is not addressed. One of the cases discussed below includes a Title IX claim. Title IX is part of the Education Amendments of 1972, and it states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance."[19] Congress enacted this law in order to prohibit using federal money to support discriminatory practices with educational institutions that receive federal funds, and to give individual citizens effective protection against those practices.[20] In cases involving LGBT harassment, students sometimes argue that they have been discriminated against on the basis of sex.

In both cases, the students alleged violations under the Equal Protection Clause. The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws,"[21] requiring that similarly situated individuals be treated the same.[22] Given patterns of past discrimination, courts have interpreted the Equal Protection Clause as requiring the state to provide more justification for the use of some classifications of individuals than others. In so doing, the Court uses different levels of scrutiny for different

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[17] Barbara Bradley Hagerty, *Religious Undercurrent Ripples in Anti-Gay Bullying*, NPR (Oct. 26, 2010, 2:17 PM),
http://www.npr.org/templates/story/story.php?storyId=130837802.
[18] *See* KOSCIW ET AL., *supra* note 4 at 12.
[19] 20 U.S.C. § 1681(a) (1972).
[20] *See* Suzanne E. Eckes & John Minear, *Friday Night Lights*, PRINCIPAL LEADERSHIP, 10–12 (2015).
[21] U.S. Const. amend. XIV, §1.
[22] City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

classes of people.[23] There are three different levels of judicial scrutiny (i.e., strict, intermediate, and rational basis scrutiny). For example, race falls under strict scrutiny, which requires both a compelling governmental objective and a demonstration that the classification is necessary to serve that interest.[24] With strict scrutiny, an explicit racial classification will be permissible only when it is narrowly tailored to achieve a compelling governmental interest.

The next level is intermediate scrutiny, which is the standard used when the government makes sex-based classifications. Under this level of scrutiny, the government must demonstrate that the classification based on sex serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.[25] For example, if the problem being targeted is female participation in advanced science courses, school officials might decide to adopt a policy where female students can pursue single-sex science courses. If this were the case, the district would need to demonstrate that the policy is substantially related to addressing that particular problem (e.g., underrepresentation of females in advanced science courses).

The third level of judicial scrutiny is referred to as rational basis, which requires that the classification is rationally related to a legitimate state interest.[26] Disability and socio-economic status, for example, fall under this level of review. Some also argue that sexual orientation falls under this level of scrutiny. Under these levels of scrutiny, it is easier to create a government classification that negatively impacts gay students than it is to create a government policy that negatively impacts students of color.

Courts should not permit LGBT students to experience discrimination in public schools by applying this lower level of scrutiny. Legal scholar, Kenji Yoshino, has noted that there is a gap between the "perceived illegitimacy of race discrimination and that of sex discrimination" and that there is a "prioritization of race discrimination over sex discrimination, and of sex discrimination over orientation discrimination."[27] From a school policy perspective, all students who have been historically marginalized in schools should be protected. Despite the lower level of scrutiny involved, there are certainly rational or important governmental

[23] *See* Grutter v. Bollinger, 539 U.S. 306 (2003).
[24] Suzanne Eckes & Stephanie McCall, *The Potential Impact of Social Science Research on Legal Issues Surrounding Single-Sex Classrooms and Schools*, 50 EDUC. ADMINISTRATION QUARTERLY 195 (2014).
[25] *Id.*
[26] *Id.*
[27] Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 875 (2002).

reasons why sexual orientation should be included in school anti-discrimination policies alongside race, ethnicity, national origin, gender, religion and disability. The two decisions discussed below further explain why such policies are necessary.

In *Nabozny v. Podlesney*,[28] a student from Wisconsin claimed that he was harassed by other students based on his gender and sexual orientation and that school officials failed to protect him.[29] He sued under the Equal Protection Clause (pursuant to 42 U.S.C. § 1983). Nabozny claimed that his classmates called him a faggot, spit on him, and struck him on several occasions.[30] Although the principal was informed about the harassment, he allegedly took no action. After Nabozny reported these incidents, the harassment continued and, during class, a student pretended to mock rape him as twenty others watched and laughed. The other attacks reportedly continued and nothing was done by school officials to address the harassment.[31]

After Nabozny attempted suicide, he finished his eighth-grade year in a Catholic School. The Catholic School only offered classes through eighth grade and his family could not afford private school, so he therefore returned to the public school for ninth grade.[32] In ninth grade, Nabozny was assaulted in the bathroom and was urinated on after being pushed into a stall. The guidance counselor agreed to change Nabozny's schedule to minimize his exposure to the perpetrators. In so doing, the counselor placed him in a special education classroom with two of the perpetrators; Nabozny attempted suicide again.[33] In tenth grade, eight boys beat him in the hallway for 5-10 minutes and Nabozny suffered from internal bleeding. When Nabozny reported this incident to a school official in charge of discipline, he was told he deserved such a beating because he was gay. He eventually moved to Minneapolis where he was diagnosed with PTSD.[34]

The district court dismissed his equal-protection claim because there was no evidence that he was treated differently based on his gender.[35] The Seventh Circuit reversed, finding that school officials had aggressively disciplined male-on-female battery and harassment but failed to address

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[28] Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).
[29] Nabozny also included claims under the Fourteenth Amendment's due process clause, which will not be discussed.
[30] *Nabozny*, 92 F.3d at 451.
[31] *Id.*
[32] *Id.* at 452.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 457-58.

this harassment. According to the circuit court, the Equal Protection Clause requires "the state to treat each person with equal regard, as having equal worth, regardless of his or her status."[36] The court stressed that the question is not, as the school district argued, whether school officials "are required to treat every harassment complaint the same way."[37] Rather, the question is whether "they are required to give male and female students equivalent level of protection" which they are required to do absent an important governmental objective.[38] Thus, the court found that a reasonable person standing in the school district's position would have understood that school officials' non-action was unlawful. The court highlighted that when school officials laughed at Nabozny's pleas for help, it was "simply indefensible."[39] As for Nabozny's sexual orientation claim against the school district, the court was unable to find any rational basis for permitting one student to assault another student based on the victim's sexual orientation.[40] The court again found that a reasonable person in the school district's position would have concluded that the discrimination Nabozny experienced based on his sexual orientation was unconstitutional.

The second illustrative court case includes a student who experienced similar treatment in school. In *Henkle v. Gregory*, a gay student was allegedly harassed and intimidated by classmates at his high school in Nevada.[41] Students in the school referred to Henkle as "fag" "butt pirate" "fairy" and "homo," and they lassoed him around the neck and suggested dragging him behind a truck.[42] The administration allegedly took no action against the perpetrators. Another incident occurred during Henkle's English class where students called him a fag and drew sexually explicit pictures. Although the English teacher knew about the harassment, she told Henkle that his sexuality was of a private matter.[43] After other horrific events, he was transferred to the alternative school where the principal told him to quit acting like a fag. Upon Henkle's request, he was transferred to another high school where the harassment continued; he was punched in the face and called derogatory names. No action was taken at this high school either.[44] Henkle wanted to transfer back to the alternative

[36] *Id*. at 456.
[37] *Id*.
[38] *Id*.
[39] *Id*. at 455.
[40] *Id*. at 450.
[41] Henkle v. Gregory, 150 F. Supp. 2d 1067 (D. Nev. 2001).
[42] *Id*. at 1069.
[43] *Id*. at 1070.
[44] *Id*.

school, but the principal refused to take him despite there being space. Henkle therefore attended a community college but then was not eligible for a high school diploma.[45] He filed a lawsuit alleging violations of the First (free speech) and Fourteenth (equal protection) Amendments as well as Title IX violations. Although his Title IX and Equal Protection Clause claims were dismissed, the court refused to dismiss his First Amendment claim.[46] Lambda Legal reports that the parties reached a settlement agreement in 2002.[47]

If Jamie Nabozny or Derek Henkle would have been terrorized in this way because of their skin color, it would have been easier to argue for protections under the Fourteenth Amendment's Equal Protection Clause because race is subject to a higher level of scrutiny than sex or sexual orientation. Such distinctions, especially as they play out in the K-12 school context where all students should feel valued, do not translate into sound education policy. U.S. Supreme Court Chief Justice Roberts has asserted, in a K-12 public school case involving race and equal protection, that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[48] The Court should also find that the way to stop discriminating on the basis of sexual orientation is to stop discriminating on the basis of sexual orientation.

Additionally, students who were harassed in this way because of their race would likely have been protected under state and federal laws. It is indeed astonishing that only eighteen states have passed anti-bullying and/or anti-harassment laws that include sexual orientation and gender identity, and only thirteen states and the District of Columbia have anti-discrimination laws that provide protections for LGBT students.[49] Also, unlike for racial minorities, religious minorities, and individuals with disabilities, there is no *specific* federal protection that exists for LGBT students who experience discrimination in schools.

It is unfortunate that whether protections are needed for LGBT students is still under debate; the *Washington Post* reported in January 2017 that a school board in Virginia declined to consider policies that would ban

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[45] *Id.* at 1071.
[46] *Id.* at 1078.
[47] Press Release, Lambda Legal, Groundbreaking Legal Settlement is First to Recognize Constitutional Right of Gay and Lesbian Students to be Out at School & Protected From Harassment, (Aug. 28, 2002), http://www.lambdalegal.org/news/ca_20020828_groundbreaking-legal-settlement-first-to-recognize.
[48] Parents Involved in Cmty Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).
[49] *State Maps*, GLSEN, http://www.glsen.org/article/state-maps (last visited Apr. 30, 2017).

discrimination based on sexual orientation and gender identity because the law is "unsettled" and because of possible changes under the Trump administration.[50] This approach is misguided because school officials can, within the confines of the law, carefully craft religiously-neutral school policies that prohibit discrimination against the LGBT students. To allow harassment against other groups, such as racial or religious minorities based on religious objections, is equally unconscionable. Religious liberty arguments within this context of the public school require some limitations – similar to those applied to race. For example, in a case involving a K-12 private school that prohibited African Americans from enrolling based on religious beliefs, the Supreme Court found that the public interest in eradicating racial discrimination trumped school officials' sincerely held religious beliefs.[51] There are as equally strong public interest reasons to eradicate discrimination based on sexual orientation.

Student Speech

Difficult questions often arise in schools when student expression denigrates or attacks another student's core being in public school.[52] For example, imagine that a student wears a confederate flag belt buckle with the slogan "White Pride" during a school-sponsored Martin Luther King celebration. What if a student wears a button that says "Christianity is a Lie" during a religious tolerance day or a t-shirt that says "God Created Adam and Eve, Not Adam and Steve" on the National Day of Silence? Would school officials be able to prohibit this expression? Students who wear such attire might argue that they have the right under the First Amendment's Free Speech Clause to offer another viewpoint, or that they have the First Amendment right to express their sincerely held religious beliefs in public school--even when that expression might denigrate religious, racial, or sexual minorities.[53] Civil rights and religious rights are at the core of some of these examples.

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[50] Moriah Balingit, *Citing Trump and Unsettled Law, School Board Declines to Add LGBT Protections for Employees*, WASH. POST (Jan. 25, 2017), https://www.washingtonpost.com/local/education/citing-trump-and-unsettled-law-school-board-declines-to-add-lgbt-protections-for-employees/2017/01/25/c16dae7e-e332-11e6-a547-5fb9411d332c_story.html?utm_term=.53411affa4fa.
[51] *See* Bob Jones Univ. v. U.S., 461 U.S. 574 (1983).
[52] Suzanne E. Eckes, *Homophobic Expression in K-12 Public Schools: Legal and Policy Considerations Involving Speech that Denigrates Others,* BERKELEY J. EDUC., 1–47 (forthcoming).
[53] *Id*.

Under the First Amendment, public school students have rights to express themselves, but these rights are not absolute. For example, in *Tinker v. Des Moines Independent Community School District*, the U.S. Supreme Court ruled that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," unless the speech creates a material and substantial disruption in the school.[54] In *Tinker*, the Court also noted that student speech could be limited if it interfered with the rights of others to be let alone.[55] In sum, students' private, political speech is protected unless it creates a material and substantial disruption in the school (i.e., *Tinker's* first prong) and/or if it collides with the rights of others (i.e., *Tinker's* second prong).

Three other U.S. Supreme Court cases allow other limitations to student expression in schools as well. In *Bethel Sch Dist. No. 403 v. Fraser,* the Supreme Court analyzed whether school officials could curtail a student's speech at a school-sponsored assembly.[56] The student plaintiff in this case was speaking about a friend who was running for student council, and in his speech he used an explicit sexual metaphor. The Court ruled in favor of the school district, finding the student's speech not protected because it was offensive, and observed that "schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, offensive speech and conduct."[57] The Court also asserted that public schools "must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[58]

Likewise, in *Hazelwood Sch. Dist. v. Kuhlmeier*, students alleged that their principal violated their First Amendment rights when he censored two pages of the school newspaper.[59] Holding in favor of the school district, the U.S. Supreme Court held that student speech in school-sponsored expressive activities could be curtailed if their actions are reasonably related to legitimate pedagogical concerns.[60] The Court also observed that students' rights "must be applied in light of the special characteristics of the school environment."[61] Finally, in the *Morse v.*

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[54] 393 U.S. 503, 506 (1969).
[55] *Id*. at 508.
[56] 478 U.S. 675 (1986).
[57] *Id*. at 683.
[58] *Id*. at 681 (quoting C. Beard & M. Beard, New Basic History of the United States 228 (1968)).
[59] 484 U.S. 260 (1988).
[60] *Id.* at 273.
[61] *Id*. at 266.

Frederick decision, the Supreme Court ruled in favor the school district, finding that school officials may discipline students for speech at school-sponsored events that promote illegal drug use.[62]
Significantly, the Court reasoned that school personnel must sometimes take reasonable "steps to safeguard those entrusted to their care."[63]

School officials and courts have relied on these four student-expression cases when interpreting student-speech policies. These four decisions allow student speech in public schools to be limited when it is disruptive (*Tinker*), interferes with the rights of others (*Tinker*), is lewd and vulgar (*Bethel*), is school-sponsored (*Hazelwood*), and when it promotes illegal activities (*Morse*). Speech that denigrates another student's core being should also be limited. In addition to First Amendment free speech claims, students who wear shirts with racist or homophobic messages also contend that they have rights under the Free Exercise Clause of the First Amendment. Under the Free Exercise Clause, "Congress shall make no law . . . prohibiting the free exercise [of religion]."[64] Four illustrative federal lower court opinions are discussed below to explain how U.S. Supreme Court precedent has applied in cases involving competing rights and homophobic speech.

In *Chambers v. Babbitt*, a student in Minnesota wore a sweatshirt to school that said "Straight Pride."[65] School officials asked him to remove the sweatshirt based on safety concerns and prior incidents in the school that promoted intolerance; a group of students had approached the principal to explain that they were upset with this sweatshirt.[66] Chambers argued that it was an expression of his religious belief. The federal district court granted the student's motion for a preliminary injunction in order to protect his freedom of speech because school officials failed to demonstrate that there was a reasonable belief that a substantial disruption occurred.[67] However, the court rejected Chambers' claims that school personnel were promoting homosexuality when they made a "conscious and commendable effort" to create an environment that promoted tolerance and respect for diversity at the school.[68] At the same time, the court relied on the first prong of the *Tinker* decision to embrace the constitutional guarantee to freedom of expression. The court observed:

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[62] 551 U.S. 393 (2007).
[63] *Id.* at 397.
[64] U.S.CONST. amend. I.
[65] 145 F. Supp. 2d 1068 (D. Minn. 2001).
[66] *Id.* at 1069.
[67] RICHARD FOSSEY, TODD DEMITCHELL, & SUZANNE ECKES, SEXUAL ORIENTATION, PUBLIC SCHOOLS, AND THE LAW (Education Law Association ed. 2007).
[68] *Chambers,* 145 F. Supp. 2d at 1073.

> Maintaining a school community of tolerance includes the tolerance of such viewpoints as expressed by "Straight Pride." While the sentiment behind the "Straight Pride" message appears to be one of intolerance, the responsibility remains with the school and its community to maintain an environment open to diversity and to educate and support its students as they confront ideas different from their own. The Court does not disregard the laudable intention of Principal Babbitt to create a positive social and learning environment by his decision, however, the constitutional implications and the difficult but rewarding educational opportunity created by such diversity of view point are equally as important and must prevail under the circumstances.[69]

A federal district court in Ohio weighed in on this issue as well. In *Nixon v. Northern Local School District Board of Education*,[70] a middle school student wore a t-shirt to school that he purchased at a church camp.[71] The front of the shirt included the following text:

INTOLERANT
Jesus said . . . I am the way, the truth and the life.
John 14:6
[the back of the shirt displayed these statements]:
Homosexuality is a sin!
Islam is a lie!
Abortion is murder!
Some issues are just black and white![72]

When Nixon wore the t-shirt to school, a guidance counselor told him to turn it inside out. He refused, and was escorted to the principal's office where an assistant principal insisted that he remove it or turn it inside out before returning to class. School officials contacted his father, who refused to tell his son to remove it.[73]

When his father met with the school superintendent and the principal about a week later, they explained that the shirt violated school policy.[74]

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[69] *Id.*
[70] 383 F. Supp. 2d 965 (S.D. Ohio 2005).
[71] *Id*. at 967.
[72] *Id*.
[73] *Id*.
[74] *Id*.

The school district's student handbook stated that clothing "that disrupts the educational process,"[75] and clothing "with suggestive, obscene, or offensive or gang related words and/or pictures," could also be prohibited.[76] The handbook also said that "any actions or manner of dress that interfere with school activities or disrupt the educational process are unacceptable."[77] Nixon had worn other shirts to school in the past with religious messages but had never been disciplined. The previous religious shirts, however, did not denigrate other students; they included such messages as WWJD (i.e., What Would Jesus Do). Once this policy was reviewed with the father, he was told that if Nixon returned to the school wearing the t-shirt, he would be suspended.[78]

Although school officials agreed that the shirt did not cause disruption, they posited that the shirt had the potential to cause a disruption because the school community includes Muslims, gays and those who have had abortions.[79] Within a few months, the Nixon family filed a lawsuit in a federal court, complaining that Nixon's First Amendment rights had been violated. The court found that school officials' fear of disruption fell short of the *Tinker* standard.[80] Instead, the court reasoned that school officials were motivated by "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[81]

The court also disagreed with the defendants' allegation that Nixon's t-shirt "invaded on the rights of others."[82] "[T]here is no evidence," the court declared, "that James' silent, passive expression of opinion interfered with the work of Sheridan Middle School or collided with the rights of other students to be let alone."[83] Specifically, with regard to *Tinker's* second prong, the court found that "defendants point to no authority interpreting what 'invasion on the rights of others' really entails. In fact, the Court is not aware of a single decision that has focused on that language in *Tinker* as the sole basis for upholding a school's regulation of student speech."[84] School officials also defended their actions under

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[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] *See* FOSSEY ET AL., *supra* note 67.
[79] *Id.* at 967.
[80] *Id*. at 972.
[81] *Id*. at 974 (quoting Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 509 (1969)).
[82] *Id*.
[83] *Id*.
[84] *Id*. at 974.

Bethel,[85] claiming that the message on Nixon's t-shirt met the "plainly offensive" standard.[86] The district court rejected this argument as well. Specifically, the court asserted that "[n]one of the actual words on James' shirt compare in offensiveness to the sexually explicit, vulgar, and plainly offensive words expressed in the *Bethel* line of cases."[87] While the content might be politically offensive to some who would read it, the court reasoned, politically offensive speech is properly analyzed under *Tinker*.[88] Thus, the federal district court granted Nixon's motion for a preliminary and permanent injunction against the school district, and prohibited school officials from preventing Nixon from wearing his t-shirt unless there was evidence that it caused substantial disruption to school activities or that a substantial disruption was likely to occur.[89]

Two federal circuit courts of appeals have also addressed similar issues. In *Harper v. Poway*,[90] the Ninth Circuit analyzed a case involving a student who wore a shirt that said "I will not accept what God has condemned" and "Homosexuality is shameful" (citing a Bible passage) and another shirt stating "Be Ashamed . . . Our school has embraced what God has Condemned" and "Homosexuality is shameful."[91] He wore this shirt on the National Day of Silence, which is a day of action to protest the bullying LGBT students experience.[92] School personnel asserted that the shirt created a hostile environment for other students in the school and was inflammatory. In fact, there was disruption created by the shirt and students were suspended, but Harper was not disciplined for his shirt.[93] Harper ultimately filed a motion for a preliminary injunction to be permitted to wear the shirt to school, but the federal district court denied the student's motion.[94] Relying on *Tinker*, the district court highlighted evidence in the record to show that school personnel could reasonably forecast a substantial disruption or a material interference with school activities.

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[85] 478 U.S. 675 (1986).
[86] *Id.*
[87] Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 971 n.10 (S.D. Ohio 2005).
[88] *Id.* at 969.
[89] *Id.* at 975.
[90] 445 F.3d 1166 (9th Cir. 2006).
[91] 345 F. Supp. 2d 1096, 1100 (S.D. Cal. 2004).
[92] *Harper*, 445 F.3d at 1171 n3.
[93] *Id.* at 1172.
[94] *Harper*, 345 F. Supp.2d at 1096.

The Ninth Circuit affirmed the district court's decision to deny Harper's motion for a preliminary injunction. Instead of relying on *Tinker's* substantial disruption standard, it applied *Tinker's* second prong (i.e., the "rights of other students" and "to be secure and to be let alone").[95] The court held that under *Tinker*, Harper's shirt impinged upon the rights of the other students in the school. The Ninth Circuit observed that:

> [H]is T-shirt 'collides with the rights of other students' in the most fundamental way. Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses. As *Tinker* clearly states, students have the right to 'be secure and to be let alone.' Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.[96]

The court also cited social science research to support its decision. Specifically, much of the research addressed the harms LGBT students experience in schools due to harassment. Interestingly, the court compared the issue to racial harassment and observed that "[w]hile the Confederate flag may express a particular viewpoint, [i]t is not only constitutionally allowable for school officials to limit the expression of racially explosive views, it is their duty to do so."[97]

The Ninth Circuit declined the *en banc* request to rehear this case. One judge wrote a concurrence to this denial of the request and criticized the dissent in *Harper*. He wrote:

> The dissenters still don't get the message - or *Tinker*! Advising a young high school or grade school student while he is in class that he and other gays and lesbians are shameful, and that God disapproves of him, is not simply "unpleasant and offensive." It strikes at the very core of the young student's dignity and self-worth. Similarly, the example Judge Kozinski offers, a T-shirt bearing the message, "Hitler Had the Right Idea" on one side and "Let's Finish the Job!" on the other, serves to intimidate and injure

[95] *Harper*, 445 F.3d at 1177 (quoting Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 508 (1969)).
[96] *Id.* at 1178.
[97] *Id*. at 1184–85.

> young Jewish students in the same way, as would T-shirts worn by groups of white students bearing the message "Hide Your Sisters - The Blacks Are Coming."[98]

Subsequently, the U.S. Supreme Court agreed to hear this case. The Court vacated and remanded to the Ninth Circuit with direction to dismiss the appeal as moot; positing that the district court had already entered final judgment.[99] As a result, the decision has limited precedential value.

The Seventh Circuit took a different approach to a similar issue. In *Nuxoll v. Indian Prairie Sch. Dist. #204*[100] and *Zamecnik v. Indian Prairie Sch. Dist.*,[101] two high school students from Illinois claimed that their First Amendment rights had been violated when school officials opposed their expression related to homosexuality by disciplining one of the students for wearing a t-shirt that said "Be Happy, Not Gay" on the day after the National Day of Silence. School personnel thought the words "not gay" could create disruption in the school and therefore asked the student to cross out "not gay." The student filed a motion for a preliminary injunction against the school district, arguing that school officials violated their First Amendment rights when school policy prohibited them from making "derogatory comments" that referred to race, ethnicity, religion, gender, sexual orientation or disability. The students contended that the First Amendment allowed them to make negative comments about others as long as they did not use inflammatory or fighting words.[102] Denying the student's request for the injunction, the federal district court held that this expression was contrary to the school's legitimate educational mission under *Hazelwood v. Kuhlmeier*.[103] The court also reasoned that the policy's purpose was to maintain a civilized educational environment and it had enforced the policy in an even handed manner. The court stressed that the student had not demonstrated a reasonable probability that his free speech rights had been violated.

In 2008, the Seventh Circuit Court of Appeals reversed the district court's decision to deny the student's motion for a preliminary injunction because, even though there had been incidents of harassment involving gay students, there was not enough evidence indicating that this speech

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[98] Harper, 455 F.3d at 1053.
[99] Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2007).
[100] 523 F.3d 668 (7th Cir. 2008).
[101] 636 F.3d 874 (7th Cir. 2011).
[102] *Id*. at 875.
[103] *See* Zamecnik v. Indian Prairie Sch. Dist., 2007 U.S. Dist. LEXIS 28172 (N.D. Ill. 2007).

would cause a substantial disruption. The court also discussed viewpoint neutrality and recognized that on the National Day of Silence those with different viewpoints should be able to voice opinions. Additionally, Judge Posner asserted that the slogan “Be Happy Not Gay” was only “tepidly negative,”[104] and that there was no evidence that the derogatory comments were directed at a specific individual. The court remanded the case back to the district court to grant the student’s motion for a preliminary injunction. When the case reached the Seventh Circuit again it upheld the district court’s decision that granted summary judgment to the students.[105] The court did not find the speech to be considered fighting words and also cautioned that eighteen-year-old students should not be raised in intellectual bubbles or be able to rely on a hurt feelings defense.[106]

The *Chambers*, *Nixon,* and *Nuxoll/Zamecnik* decisions relied on *Tinker’s* “substantial disruption” standard. It is clear from these holdings that the courts required evidence of a substantial disruption in the school before they would curtail the students’ rights under the First Amendment. In these cases, there was only fear of substantial disruption, which did not meet the requirement set forth under *Tinker’s* first prong (i.e., substantial disruption). If courts insist on relying on *Tinker’s* first prong, it could certainly be arguable that a substantial disruption is created when students do not feel safe attending school as a result of denigrating speech that attacks their core being.[107] Indeed, student expression that denigrates other students, whether related to sexual orientation, religion, or race, has the potential to create psychological harm, which should be considered a form of disruption as it impacts personal well-being and academic growth.[108]

To the contrary, in *Harper*, the Ninth Circuit applied *Tinker’s* second prong. The *Harper* court got it right. Already vulnerable students, whether racial, religious, or sexual minorities, should not need to wait until a substantial disruption occurs to prohibit speech that denigrates others in public schools. First, speech that denigrates other students should not be considered political speech.[109] To be certain, when school

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[104] Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668, 676 (7th Cir. 2008).
[105] Zamecnik v. Indian Prairie Sch. Dist., 636 F.3d 874 (7th Cir. 2011).
[106] *Id.*
[107] *See* Eckes, *supra* note 52.
[108] *Id.*
[109] *See* Eckes, *supra* note 52; Cheshire Calhoun, *Sexuality Injustice*, 9 NOTRE DAME J. L., ETHICS & PUB. POL’Y 241 (1995): Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1696 (1993); Steven J. Macias, *Adolescent Identity Versus the First Amendment: Sexuality and Speech Rights in the Public Schools*, 49 SAN DIEGO L. REV. 791 (2012).

officials permit political debate about whether or not sexual orientation (or race or religion) is acceptable in schools, it is really a debate about a student's self-worth and identity.[110] Gilreath posits that these anti-gay t-shirts are a type of "anti-identity" speech that deny the victim existential status.[111] The concurring judge in *Harper* correctly observed that such speech "strikes at the very core of the young student's dignity and self-worth."[112] In sum, when Muslims, Christians, gays, African Americans, or Latinas are told that they are not welcome in school, this is simply not political expression.[113]

Further, in a school context, waiting for a disruption to occur with regard to speech that denigrates another student's core-being is highly problematic for other reasons.[114] For example, do we really believe that LGBT students, a population that oftentimes hides in the closet because they are ostracized in school, will create a substantial disruption in speaking out against homophobic speech? Would one black student at an all-white school need to create a substantial disruption about a confederate flag before school officials could address the problem? Should it fall on the shoulders of the one Muslim student at the school to create a substantial disruption when someone wears an "Islam is a lie" shirt to school? Moreover, the substantial disruption policy could play out unevenly in the same school district. To illustrate, if there are two Jewish students enrolled in a school, it would be less likely that there would be a material disruption created if someone wore a swastika t-shirt to school, however, across town (within the same school district with a larger Jewish population), that same anti-semitic shirt could be banned if there was a critical mass of Jewish students who created a disruption over the shirt. While the speech identified in the example with only two Jewish students might not cause the most conspicuous disruption, the speech could certainly cause a substantial disruption to the two students whose self-worth is being questioned by the anti-Semitic t-shirt. In other words, the substantial disruption standard does not work in a school when the minority is truly in the minority. Moreover, this is bad education policy.[115]

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[110] Macias, *supra* note 109.
[111] Shannon Gilreath, *Tell Your Faggot Friend He Owes Me $500 for my Broken Hand: Thoughts on a Substantive Equality Theory of Free Speech*, 44 WAKE FOREST L. REV. 557 (2009).
[112] Harper v. Poway Unified Sch. Dist., 455 F.3d 1052, 1053 (9th Cir. 2006).
[113] *See* Eckes, *supra* note 52.
[114] *Id.*
[115] *Id.*

Indeed, *Tinker's* second prong is the most applicable to cases involving homophobic speech.[116] The court in *Nixon* rejected the second prong of *Tinker* because the Supreme Court has never thoroughly explained it,[117] but other circuit courts have relied upon it.[118] Consistent with the Fourth, Ninth, and Tenth circuits, speech that denigrates seems to be protected under *Tinker's* second prong.[119] Further, the *Bethel*, *Hazelwood*, and *Morse* decisions also help in this area. As noted, the *Bethel* Court insisted that public school personnel "must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[120] Specifically, both *Hazelwood* and *Morse* give deference to school officials in maintaining a civil environment as well. These decisions permit speech that denigrates a student's core being to be limited.

Curricular Issues

The 2010 U.S. Census reported that there are 594,000 same-sex couple households in the U.S. and that 6 million children and adults have an LGBT parent.[121] At the same time, the U.S. Supreme Court in *Obergefell v. Hodges* found that the U.S. Constitution guarantees the rights of same-sex couples to marry.[122] Indeed, it is reasonable to assume that based on the number of same-sex households in the U.S., combined with the *Obergefell v. Hodges* decision, LGBT persons should not be excluded from the public school curriculum. Some states encourage the inclusion of LGBT persons in the curriculum, but these policies have not been without

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[116] *See* Eckes, *supra* note 52

[117] Nixon v. N. Local Sch. Bd. of Educ., 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005); Allison S. Fetter-Harrott, *Anti-Gay Student Speech and the First Amendment: A Data-Based Examination of Court Reliance on Social Science Research and the Doctrinal Definition of Tinker's Substantial Disruption Standard* (Doctoral dissertation, Indiana University, 2014), *available at* http://ezproxy.lib.indiana.edu/login?url=http://search.proquest.com/docview/1548319740?accountid=11620; Martha *McCarthy, Curtailing Degrading Student Expression: Is a Link to a Disruption Required?* 38 J. L. & EDUC., 607–621 (2009).

[118] *See* Kowalski v. Berkley Cty. Schs., 652 F.3d 565 (4th Cir. 2011); *West v. Derby Unified Sch. Dist. No.* 260, 206 F.3d 1358 (10th Cir. 2000) Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006).

[119] *See* Eckes, *supra* note 52.

[120] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 681 (1986).

[121] Daphne Lofquist, *Same-Sex Couple Households*, U.S. CENSUS BUREAU (Sept. 2011), http://www.census.gov/prod/2011pubs/acsbr10-03.pdf.

[122] 135 S. Ct. 2584 (2015).

controversy. For example, a school district in California is currently engaged in a debate about how much students should learn about the LGBT community in schools. California has a law (the FAIR Act) that encourages schools to discuss the contributions of individuals with disabilities and the LGBT community in the curriculum.[123]

Similar to the anti-bullying and free speech issues discussed, curricular choices have been legally contested.[124] When challenged, school personnel must balance parents' interests in directing their children's religious upbringing against school interests, like fostering an educated student body and making all students feel welcome.[125] In several instances parents have claimed that some parts of the curriculum offend their sincerely held religious beliefs.[126] To illustrate, parents have challenged the school curriculum including books used in class such as "*King & King*" and "*Heather Has Two Mommies*" because these books are teaching kids that "homosexuality" is acceptable, which contradicts the Bible.[127] Such challenges are not surprising, as similar issues arose in the 1950s when interracial marriage was not always included in the curriculum.[128] Of course, under the First Amendment's Free Exercise Clause, families have the right to teach their children about animus toward LGBT persons or racial minorities. But when these religious beliefs cross over and begin affecting state-sponsored policy in public schools, there are limitations.[129] The case below provides one illustrative example.

In *Parker v. Hurley,* the First Circuit Court of Appeals addressed the topic of same-sex couples being discussed at an elementary school.[130] In this case, parents alleged, amongst other claims, that books describing same-sex families violated their right to practice their religion under the Free Exercise Clause of the First Amendment. One family filed a lawsuit challenging the books sent home with kindergarten and first-grade students. The books depicted diverse families, including families comprised of parents of the same gender. The second family took issue with a story book read to a second grade class that detailed a marriage

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[123] *Email Over LGBT School Curriculum Sparks Debate in Conejo Valley*, CBS LOS ANGELES (Jan. 17, 2017, 6:27 PM), http://losangeles.cbslocal.com/2017/01/17/851482/.
[124] *See*, e.g., Brown v. Hot, Sexy and Safer Prods., 68 F.3d 525, 538-39 (1st Cir. 1995) (rejecting parents' claim that health curriculum violated sincerely held religious beliefs).
[125] *Id*.
[126] *Id*.
[127] *See* Hagerty, *supra* note 17.
[128] Jeffry Bybord & William Russel, *The New Social Studies: A Historical Examination of Curriculum Reform*, 2 SOC. STUDS. RES. & PRAC. 38 (2007).
[129] *See* Knauer, *supra* note at 1.
[130] 514 F.3d 87, 102 (1st Cir. 2008).

between two princes. The parents did not challenge that these books were used by the school district as part of a nondiscrimination curriculum, but instead challenged on the grounds that the families were not given any prior notice and were not allowed to opt-out from the instruction.[131]

The court recognized that these books offended the families' sincerely held religious beliefs, but at the same time did not find that their constitutional rights were burdened. The free exercise of religion, the court posited, did not require public schools to "shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them."[132] The court also explained that exposure to the books does not prevent the parents from raising their children under their religious beliefs. The *Parker* case illustrates some of the challenges related to accommodating the faith doctrine of all students in public schools.[133]

Not all school districts have decided to adopt a non-discrimination curriculum as was the case in *Parker*. There are currently eight states that have passed laws that prohibit teachers from discussing gay and transgender issues in schools and they are oftentimes linked to religious freedom arguments.[134] Some of these laws, for example, would prevent discussion about HIV or AIDS in schools.[135] These laws and related polices are also being legally challenged. For example, a motion for a preliminary injunction was recently filed against the Utah State Board of Education to prohibit the Board from enforcing school policies that target LGBT students and prohibit positive discussions about sexual orientation in schools.[136] The lawsuit contends that Utah's policies violate rights to free speech under the First Amendment, the Equal Protection Clause of Fourteenth Amendment, and Title IX.[137]

These laws – as they relate to the curriculum – are harmful because they stigmatize LGBT students and discriminate against them by treating

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[131] Suzanne Eckes & Allison Fetter-Harrott, *Religion and the Public School Curriculum*, *in* INTERNATIONAL PERSPECTIVES ON EDUCATION, RELIGION AND LAW 28 (Charles J. Russo ed., 2014).
[132] *Id*. at 106.
[133] *Id*.
[134] *See* GLSEN Maps, *supra* note 49.
[135] *Id*.
[136] McKenzie Romero, *Equality Utah Asks for Injunction on 'Anti-Gay' School Laws as Lawsuit Proceeds*, DESERET NEWS (Jan. 26, 2017, 9:58 PM), http://www.deseretnews.com/article/865671949/Equality-Utah-asks-for-injunction-on-anti-gay-school-laws-as-lawsuit-proceeds.html.
[137] *Id*.

them differently than other similarly-situated students in the school. For example, there are no similar laws that ban discussing heterosexual individuals in a positive manner.[138] Also, as suggested by Lambda Legal, these laws prevent students from obtaining important health information in school.[139] Fortunately, courts have analyzed several cases, which have helped define the roles of parental rights and religion in public schools.[140] These decisions suggest that public school personnel must balance free speech and free exercise rights while at the same time guarding against Establishment Clause violations. Although a parent may have a religious objection to some curricular decisions, courts have found that the curriculum does not burden the student's right to freely exercise religious beliefs because by discussing AIDS or evolution in the curriculum, for example, students are not required to accept what is taught if their religious views conflict.[141]

Legislation and Transgender Students

New controversies have materialized involving proposed state legislation that supporters assert protects religious beliefs while opponents argue are only tools to discriminate against LGBT persons.[142] Interestingly, similar religious liberty arguments were used to exclude racial minorities in the past.[143] However, those religious beliefs that were

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[138] *See #DontEraseUs: FAQ About Anti-LGBT Curriculum Laws*, LAMBDA LEGAL, http://www.lambdalegal.org/dont-erase-us/faq (last visited Apr. 30, 2017).
[139] *Id.*
[140] *See,* e.g., Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003) (rejecting parents claims that student should not be required to participate in health curriculum based on religious beliefs); Mozert v. Hawkins Cty. Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) (finding that requiring student to participate in reading program did not burden the student's right to freely exercise his religious beliefs because he was not required to profess a creed).
[141] *See id.*
[142] Ashley Fantz, *North Carolina, Mississippi Measures have Companions Elsewhere in U.S.,* CNN (Apr. 7, 2016, 12:47 AM), http://www.cnn.com/2016/04/06/us/nationwide-bill-religious-freedom-sexual-orientation/.
[143] When U.S. Senator Robert Byrd led a filibuster against the Civil Rights Act of 1964, he quoted the Bible to support segregation in public accommodations and asserted that "In Leviticus, chapter 19, verse 19, we find the words: 'Ye shall keep my statutes. Thou shalt not let thy cattle gender with a diverse kind: thou shalt not sow thy field with mingled seed.' God's statutes, therefore, recognize the natural order of the separateness of things." 88 CONG. REC. 13,207 (1964) (statement of Sen. Robert Byrd); *see also* Eskridge, *supra* note 2 (arguing that the same conflict between religious beliefs and civil rights played out in the context of race); Joseph Crespino, *Civil Rights and the Religious Right*, IN RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S, at 90-97

used to maintain racial segregation and oppose interracial marriage[144] are no longer socially acceptable. Today, however, religious beliefs are being used to justify discrimination against the LGBT population in a similar manner.[145] The ACLU reports that, in 2016, about two-hundred bills have been proposed in state legislatures that could lead to discrimination against LGBT individuals; half of those bills invoke religion or religious beliefs as justification to refuse services to gay people.[146] Sometimes the "religious freedom" legislation is drafted to allow exceptions to nondiscrimination laws, which would permit businesses, individuals, and government employees to refuse service to someone by claiming a "sincerely held religious belief."[147] Some of these proposed laws have implications for schools. In fact, some of the legislation specifically targets transgender students in public schools. For example, South Dakota's Governor vetoed a bill that would have forced LGBT students to use restrooms that align with their sex assigned at birth.[148]

In North Carolina, HB2, or the Public Facilities Privacy and Security Act, bans people from using public restrooms that align with their gender identity.[149] Critics say this law discriminates against transgender individuals and puts them in danger. The law was a response to Charlotte's nondiscrimination ordinance, which permitted transgender individuals to use public restrooms that align with their gender identity.[150] HB2 was legally challenged and the court granted the transgender

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(Bruce J. Schulman & Julian E. Zelizer eds., 2008) (explaining that private religious academies opened to oppose *Brown v. Board of Education* and racial integration).

[144] *See,* e.g., President Truman in 1963 explained when opposing interracial marriage that "the Lord created it that way." Mike Tolson, *In Resistance To Same-Sex Marriage, Echoes of 1967*, HOUST. CHRON. (July 5, 2015), http://www.houstonchronicle.com/local/gray-matters/article/In-resistance-to-same-sex-marriage-echoes-of-1967-6365105.php; When the U.S. Supreme Court struck down Virginia' Act to Preserve Racial Integrity in *Loving v. Virginia*, 388 U.S. 1 (1967), only 20% of the U.S. population approved of interracial marriage. Many rejected interracial marriage based on their sincerely held religious beliefs.

[145] *See* Knauer, *supra* note 1 at 776.

[146] *Id.*; *see also*, *Past Anti-LGBT Religious Exemption Legislation Across the Country*, ACLU, https://www.aclu.org/other/past-anti-lgbt-religious-exemption-legislation-across-country?redirect=anti-lgbt-religious-exemption-legislation-across-country (last visited Apr. 30, 2017).

[147] *Id.*

[148] Greg Botelho & Wayne Drash, *South Dakota Governor Vetoes Transgender Bathroom Bill*, CNN (Mar. 2, 2016, 1:51 AM), http://www.cnn.com/2016/03/01/us/south-dakota-transgender-bathroom-bill/.

[149] 2016 N.C. Sess. Laws 3 § 1.3 (codified as amended at N.C. GEN. STAT. ANN. § 143-760 (West 2016)).

[150] *See* Fantz, *supra* note 142.

plaintiff's motion for a preliminary injunction based on the Title IX claim, but dismissed the plaintiff's motion for a preliminary injunction on the Equal Protection claim.[151]

Similarly, HB 1523 in Mississippi stated three "sincerely held religious beliefs or moral convictions" entitled to special legal protection. They included that marriage should be recognized as a union between one man and one woman; sexual relations are properly reserved to marriage; and that male or female refer to an individual's immutable biological sexes objectively determined by anatomy at the time of birth.[152] The bill further enumerated that the State of Mississippi would not "discriminate" against those people who act pursuant to sectarian belief. The law was challenged. In *Barber v. Bryant*, the federal district court found that "HB 1523 grants special rights to citizens who hold one of three 'sincerely held religious beliefs or moral convictions' reflecting disapproval of lesbian, gay, transgender, and unmarried persons," and that the Equal Protection Clause is violated by the HB 1523's permission of arbitrary discrimination against LGBT individuals.[153] The court noted that these bills were passed in direct response to the *Obergefell v. Hodges* decision.[154] The court reasoned that "[i]t is therefore difficult to accept the State's implausible assertion that HB 1523 was intended to protect certain religious liberties and simultaneously ignore that the bill was passed because same-sex marriage was legalized last summer."[155]

As noted above, the proposed legislation could certainly have implications for transgender students. According to various media reports, school districts across the country are addressing issues related to access and transgender students.[156] Although there has not been much litigation,

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[151] Carcaño v. McCrory, 315 F.R.D. 176 (M.D.N.C. 2016).
[152] 193 F. Supp. 3d 677, 688 (S.D. Miss. 2016).
[153] *Id*.
[154] *Id*. at 691.
[155] *Id*. at 700.
[156] *See* e.g., Katie Rogers, *Transgender Students and 'Bathroom Law's in South Dakota and Beyond*, N.Y. TIMES (Feb. 25, 2016), http://www.nytimes.com/2016/02/26/us/transgender-students-and-bathroom-laws-in-south-dakota-and-beyond.html?_r=0 (U.S. Dep't of Education threatened to withhold federal funds after school officials refused student's request to use restroom that aligned with her gender identity); Nathaniel Siddall, *Transgender Student's Use of School Restroom Sparks Debate in Manchester*, DAILY TRIBUNE (Feb. 19, 2015, 8:22 AM), http://www.dailytribune.com/social-affairs/20150219/transgender-students-use-of-school-restroom-sparks-debate-in-manchester (after school transgender policy adopted, parent argued that other students would feel uncomfortable or threatened" if a transgender student used the restroom that aligned with her gender identity); Dana Farrington, *Texas Lt. Gov. Targets Fort Worth Schools Chief Over Transgender*

federal courts in Wisconsin[157] and Ohio[158] as well as the Fourth Circuit Court of Appeals have all examined these issues in the K-12 context. Likewise, the U.S. Department of Education under the Obama Administration observed that discrimination based on gender identity was a violation of Title IX.[159] As a result, school officials are navigating these issues when the law is not entirely settled. Some have argued that accommodating transgender students conflicts with their sincerely held religious beliefs, while others argue that there are privacy and safety concerns.[160]

A decision from the Fourth Circuit Court of Appeals highlights many of these issues. The case was filed on behalf of a transgender boy who argued that school officials violated his rights under the Equal Protection Clause and Title IX when a school policy did not allow him to use the restroom that aligned with his gender identity.[161] In this case, Gavin Grimm, who was assigned the sex at birth of female, explained that before age six, he refused to wear female clothing and by age twelve recognized that he felt more like a boy.[162] Several of his friends in ninth grade knew he felt this way and acknowledged that he presented himself as a boy. He told his parents that he was transgender, and at that time, a psychologist diagnosed him with gender dysphoria, suggesting hormone therapy. Gender dysphoria has been described as the distress one experiences when the sex assigned at birth does not reflect the gender identity. The psychologist gave him a "Treatment Documentation Letter" highlighting

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Guidelines, NPR (May 10, 2016, 12:08 PM), http://www.npr.org/sections/thetwo-way/2016/05/10/477481119/texas-lt-gov-targets-fort-worth-schools-chief-over-transgender-guidelines (the Lieutenant Governor encouraged the superintendent in Fort Worth to resign after he created inclusive policies for transgender students).

[157] Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker, 841 F.3d 730 (7th Cir. 2016) (upholding lower court's decision denying the school district's motion to dismiss in a case involving a transgender student who was not permitted to use the restroom that aligned with his gender identity).

[158] Bd. of Educ. v. U.S. Dep't of Educ., 2016 U.S. Dist. LEXIS 131474 (S.D. Ohio Sept. 26, 2016) (student's motion for a preliminary injunction was granted when the federal district court ruled that she was likely to succeed on both her Title IX and equal protection claims related to restroom access).

[159] Catherine E. Lhamon & Vanita Gupta, *Dear Colleague Letter on Transgender Students*, U.S. DEP'T OF JUSTICE and U.S. DEP'T OF EDUC. (May 13, 2016), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

[160] Suzanne Eckes, *The Restroom and Locker Room Wars: Where to Pee or Not to Pee*, J. LGBT YOUTH, 1 (forthcoming).

[161] G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016).

[162] G.G. v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736 (E.D. Va. 2015).

that he was being treated for gender dysphoria and should be treated as a boy in every way, including access to the male restroom in school.[163]

He eventually changed his legal name to Gavin and modified his records at school to indicate his new name. At this time, his family began to refer to him using male pronouns.[164] While Gavin initially agreed to use a bathroom in the nurse's office and took gym class through a home school program, he eventually requested and the principal agreed to let him use the male restroom because his teachers and the vast majority of his peers accepted him as a boy. For seven weeks, Gavin used the male's restroom, however, during this time, the school board received complaints from some adult community members who were concerned with privacy. As a result, a Resolution was introduced that addressed restroom and locker room policies for all students. Before the resolution passed, the school district took steps to address some concerns, including the installation of three unisex single-stall restrooms, raising the doors and walls around the bathroom stalls, and adding partitions between the urinals.[165] After the school board passed the resolution, it required students to use restrooms and locker rooms that aligned with a student's biological gender or use an alternative private facility.[166] Gavin was informed that he would be disciplined if he used the boys' restrooms.

Gavin eventually began hormone treatment, which resulted in an overall more masculine appearance.[167] According to Gavin, due to his more masculine appearance, girls in the school were uncomfortable with him using the female restroom. Gavin subsequently filed a motion for a preliminary injunction, alleging violations under the Equal Protection Clause and Title IX.[168] The federal district court denied Gavin's motion for a preliminary injunction and granted the school district's motion to dismiss the Title IX claim.[169] With regard to the preliminary injunction, the court did not find that the balance of hardships weighed in his favor, noting that Gavin failed to show that his using the male restroom would not infringe upon the privacy rights of the other students.[170] It dismissed the Title IX claim because it found that the Department's Guidance was not consistent with Title IX's regulations. Specifically, the court

[163] *Id*.
[164] *Id*. at 739.
[165] *Id*. at 740.
[166] *Id*. at 740–42.
[167] *Id*. at 741.
[168] *Id*. at 742.
[169] *Id*. at 750–53.
[170] *Id*.

highlighted that under Title IX's regulations,[171] school officials may provide separate restroom and locker room facilities on the "basis of sex" and that such facilities provided for students of one sex shall be "comparable" to such facilities provided for students of the other sex.[172] Gavin's attorney interpreted the regulation to mean that sex is determined with reference to one's gender identity, but school officials interpreted sex as it relates to genitalia. The district court found that the regulations require that the facilities only be comparable.

On appeal, the Fourth Circuit Court of Appeals examined Title IX's implementing regulation, which it noted, clearly permits restrooms and locker rooms to be segregated by sex.[173] Reversing the district court's dismissal of the Title IX claim, the federal appellate court held that the district court did not give the Department's interpretation of the regulation appropriate deference. Specifically, as noted above, Title IX's implementing regulation (34 C.F.R. § 106.33) includes language about permitting segregated bathrooms based on sex. The Fourth Circuit found, however, that the regulation is "silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms."[174] The court relied upon a January 2015 letter from the Office for Civil Rights, which indicated that"[w]hen a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity."[175]

Also, while relying on earlier Supreme Court precedent, the Fourth Circuit reasoned that the Department's interpretation of the regulation should be given deference because the Department's interpretation of its own regulation should have controlling weight.[176] While the federal district court interpreted Title IX's regulations to permit school officials to segregate restrooms based on sex assigned at birth, the Fourth Circuit deferred to the U.S. Department of Education's interpretation of its own regulation of Title IX – that sex is determined based on gender identity. Although this regulation clearly refers to males and females, the Fourth Circuit observed that the statute does not address how school officials

[171] 34 C.F.R. § 106.33 (1972).
[172] Eckes, *supra* note 160.
[173] G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016).
[174] *Id*. at 720.
[175] *Id*. at 714.
[176] *See* Auer v. Robbins, 519 U.S. 452 (1997) (allowing deference to federal agency to interpret its own regulation).

should determine whether a transgender student is male or female for the purpose of creating restroom access policies.[177]

The Fourth Circuit declined to rehear this decision *en banc*.[178] On remand, the preliminary injunction was granted, but in July 2016 the preliminary injunction was stayed.[179] In October 2016, the U.S. Supreme Court granted certiorari.[180] With the new administration, it is quite possible that the U.S. Department of Education will take a different approach to Title IX's applicability to discrimination based on gender identity.

As states continue to consider religious liberty exceptions that impact LGBT persons, including transgender students in schools, they will certainly need to balance the competing rights of religious liberty arguments and civil rights. The U.S. Supreme Court has cautioned about the slippery slope involving religious liberties. In *Reynolds v. U.S.* the Court asked, "[s]uppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"[181] The Court in *Reynolds* also asserted that "professed doctrines of religious belief" are not "superior to the law of the land."[182] Further, in another decision involving religious liberty, Justice Scalia observed:

> The rule respondents favor would open the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind – ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination law, drug laws, and traffic laws, to social welfare legislation such as minimum wage law, child labor laws, animal cruelty laws, environmental protection laws, and laws providing the equality of opportunity for the races. The First Amendments' protection of religious liberty does not require this.[183]

[177] *See G.G.*, 822 F.3d at 737–40.
[178] G.G. v. Gloucester Cty. Sch. Bd., 824 F.3d 450 (4th Cir. 2016).
[179] Gloucester Cty. Sch. Bd. v. G.G., 136 S.Ct. 2442 (2016).
[180] Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 369 (2016).
[181] 98 U.S. 145, 166 (1878).
[182] *Id*. at 167.
[183] Emp't Div. v. Smith, 494 U.S. 872, 888–89 (1990).

Perhaps in striking that balance, courts should ensure that one's individual religious liberty is protected, but in doing so, should not regulate the liberty rights of others.[184] This thought was captured in an exchange within the *Obergefell* decision. To illustrate, in Justice Alito's dissent in *Obergefell*, he cautioned that we should not "vilify Americans who are unwilling to assent to the new orthodoxy" and that "those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools." [185] Justice Kennedy, however, wrote that "no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons . . . in protecting their own interests."[186] The *Obergefell* majority clearly states that "the First Amendment must protect the rights of [religious] individuals, even when they are agents of government, to voice their personal objections – this, too, is an essential part of the conversation – but the doctrine of equal dignity prohibits them from acting on those objections, particularly in their official capacities, in a way that demeans or subordinates LGBT individuals."[187] Further, while there is a deep commitment to religious freedom in the U.S., as Knauer notes, this has generally been applied to religious clergy and religious organizations.[188] She argues that these exemptions "do not extend the same degree of protection to individual objectors who are not exempt from generally applicable laws."[189] Also, some of this proposed legislation to expand free exercise protections are constrained by the Establishment Clause.[190] Moreover, what some state legislatures are proposing with religious exemptions, according to Knauer, represents a radical expansion of how religious liberty has generally been treated in the past by the U.S. Supreme Court in other contexts.[191]

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[184] *See* Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 840, 878 (2014).
[185] 135 S. Ct. 2584, 2642–43 (2015).
[186] Burwell v. Hobby Lobby Stores, 134 S. Ct. 2571, 2786–87 (2014) (Kennedy, J., concurring).
[187] Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 30 (2015).
[188] Knauer, *supra* note 1 at 759–60.
[189] *Id.*
[190] *Id.* at 787.
[191] *See* Emp't Div. v. Smith, 494 U.S. 872 (1990) (rejecting that the government needed to show a compelling government interest in a Free Exercise Clause claim but later overturned through federal legislation); Reynolds v. United States, 98 U.S. 145 (1878) (rejecting religious liberty argument of plaintiff who argued it was his religious duty to

Conclusion

Thorough examination of these issues is essential as LGBT rights continue to be debated in public schools. In trying to create welcoming learning environments for *all*, it is sometimes difficult for school officials to balance the competing rights of students' religious liberties and students' civil rights. While students' *individual* religious liberties should remain protected, individuals should not try to regulate the liberty of *others* in a public school. There are strong public interest arguments that call for the eradication of discrimination based on sexual orientation and gender identity in all aspects of public schooling. Similar religious liberty arguments that were used within the context of race should also be rejected within this context.

As discussed above, with regard to anti-discrimination policies, LGBT students should receive the same protections as other historically marginalized groups in schools. There is a need to help this population feel safe and there is no rational reason to exclude them from school anti-discrimination policies. Also, it is possible to craft school policy within the confines of the law -- in the same way that already protects racial and religious minorities and students with disabilities. With regard to student expression, homophobic, racist, and anti-religious speech that interferes with the rights of other students should not be considered political speech. While political speech should remain protected, speech that denigrates another student's core being, whether based on animus toward LGBT students or religious minorities, is unacceptable in the public-school context. Also, *Tinker's* second prong provides that students have the right to be let alone in school. Finally, religious liberty arguments should be limited in both the context of the curriculum and legislation that constrains LGBT rights. As several federal courts have noted, when LGBT persons are included in the curriculum, schools are not requiring students who have religious objections to agree with or affirm the content. Likewise, as the U.S. Supreme Court has observed, the doctrine of equal dignity prohibits public officials from demeaning LGBT individuals.

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practice bigamy); *see also*, U. S. v. Lee, 455 U.S. 252 (1982) (finding no free exercise violation by refusing to allow a social security exemption for an Amish employer); Estate of Thorton v. Caldor, 472 U.S. 703 (1985) (finding a state law that gave employees an absolute right not to work on the Sabbath violated the Establishment Clause); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934) (rejecting student's claim that taking a required course in military science offended the student's sincerely held religious beliefs).

Epilogue: Special Issue of the *ELPR*
Church-State Law in Public Educational Institutions

Steve Permuth, Dustin Robinson, Meaghan McKenna, and Susan Silver*

> *It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us.*
>
> Charles Dickens, A TALE OF TWO CITIES

When co-editors John Dayton and Hillel Levin provided parameters for writing this special issue of the *Education Law and Policy Review*, it was to be focused on church-state law in public education institutions responding to increases of reported incidents of legal violations. The law seemed well-settled.[1] The challenge was seeing that the law was understood and respected. Unanticipated political events now call into question the future of legal issues once thought well-settled. The compelling text in this volume, provided by distinguished authors (please see the Foreword by Rev. Barry Lynn), is a singularly excellent work for all interested in understanding the legal framework of church-state law. The following Epilogue is empowered by the rich fabric of these authors' personal, professional, legal, and historical insights, and attempts to frame these issues in light of evolving legal and political realities starting with the unexpected election of President Trump and the potential impact of his new administration on church-state relations.

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* Lead author Steve Permuth is a Professor teaching education law in the College of Education at the University of South Florida (USF). He served as the Editor-in-Chief for RELIGION AND LAW IN PUBLIC SCHOOLS (2017). This article is the product of a collaborative effort among Professor Permuth and USF colleagues Dustin Robinson, Meaghan McKenna, and Susan Silver. Opinions expressed are the views of the authors and not those of USF.

[1] *See* Engel v. Vitale, 370 U.S. 421 (1962); Abington v. Schempp, 374 U.S. 203 (1963); Lee v. Weisman, 505 U.S. 577 (1992); Santa Fe v. Doe, 530 U.S. 290 (2000).

On November 4, 2016, authors Steve Permuth and Dustin Robinson gave a presentation entitled "*Religious Intolerance in Public Schools: A Clash of First Amendment Rights*" at the 62nd Annual Conference of the Education Law Association (ELA). The presentation was focused on the conflict of First Amendment freedoms of religion and speech between *Minersville School District v. Gobitis*[2] and *West Virginia v. Barnette*[3] regarding flag salutes and the pledge of allegiance, and the importance of those cases regarding key issues of governmental authority and religious freedom. After some discussion among presenters and an informed audience, we closed with an informal review of the cases and implications they may have given the immediacy of the presidential election the next week on November 9, 2016.

It appeared from national "experts," pundits and most of the session participants that there was a certainty that Hillary Clinton would become the next U.S. President. Education law would likely be moving forward with a general sense of settled stability on issues of church-state relations. In addition, a centrist-liberal leaning Supreme Court would be appointed with a possible shift to the left, social programs would continue as priorities, and movement to advance international collaborations and issues including LGBTQ rights, work with teacher unions, and commitment to public education would continue.

The Experts and Pundits Were Wrong!

Americans woke up the day after the election to the reality that Hillary Clinton had lost the electoral vote and that Donald J. Trump would become the 45th President of the United States on January 20, 2017. The comfortable certainty of where education law at the federal level would move was gone and replaced with the likelihood of a dramatic shift to the right by the new administration.

The President-Elect, at his inauguration, strongly suggested the need to "trust" him because of his wealth and business experience to make "deals" for all Americans and bring us together to "Make America Great Again." We would work together to develop and enforce policies for the good of all Americans. Later speeches would indicate priorities based on campaign promises and expediency to "deal" with a number of issues, elements of which had direct and/or indirect bearing on education.

With primacy on time, the push to succeed, and establishing a clear legacy, and not excessive concern about differences but the need to go

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[2] 310 U.S. 586 (1940).
[3] 319 U.S. 624 (1943).

around or through them if needed, the major issues appeared to include: 1) "Repeal and Replace" the Affordable Care Act (i.e., Obama Care) as the first agenda item of the new administration;[4] 2) establishing major tax reform; 3) building a wall on the border of the United States and Mexico; 4) immigration reform (including deportation); 5) primacy of military spending; 6) rolling back of regulations in a large number of business and non-business corridors including education; 7) quick movement to solidify the federal courts within a more conservative mission and vision; and 8) a decision to "drain the swamp" of old politicians and Wall Street.

Many of Mr. Trump's supporters were people who were not satisfied with the direction of the nation and their status in it. Others, including some of those at the very top of the economic scale, viewed his leadership as benefitting them through changes in regulations in areas of tax reform and elimination of regulations. Given control of the Presidency, Senate, and House, the Republican leadership was organizationally poised to move forward. But the task would not prove easy, in large part, due to internal philosophical and political posturing within the Republican Party.

But considerable public concern and pressure on issues (e.g., healthcare) communicated to members of Congress and to others (e.g., Governors) slowed the efforts. The political winds continue to swirl including the albatross of Russian intervention in the presidential election and possible Trump administration involvement. To add to other issues, questions about the role of his personal family members (i.e., son, daughter, son-in-law) as major advisors has raised reservations. These concerns are increasingly shared even by some of Mr. Trump's election supporters.

To those that did not support Mr. Trump, America had made a mistake. They awoke the morning after the election with discontent, a pall of anguish, disbelief, and fear. Some suggested they would move out of the country, expressing a deep feeling of resignation of defeat and mourning, and a sense of loss of national ideals and innocence. Everyone understood the reality: A major shift to the political/legal right. But how far, how deep, and how fast might this happen?

There were concerns on issues including support for public education; regulations on schools (from food requirements to integration); the rights of children with specials needs; LGBTQ community rights; minority rights; immigrants and immigration rights; marriage equality; and the possible impacts of a new Secretary of Education, Attorney General, and

[4] On July 27, 2017 efforts to repeal Obama Care only, failed in the Senate. No vote on repeal and reform was passed by both the House of Representatives and the Senate.

newly appointed federal judges on public schools and the enforcement of civil rights. Regarding church-state relations specifically, how far would the new administration go in pushing the agenda of the Religious Right on school prayer, "voluntary" bible-reading, flag salutes, tolerance of proselytizing and the accommodation of favored religious organizations in public schools?

The President made two appointments in this first year which will surely impact the future of church-state relations in America and which offer additional insights on where we may be moving nationally. They were the appointments of Elizabeth (Betsy) DeVos as Secretary of Education, and Neal Gorsuch as Associate Justice of the United States Supreme Court.

Secretary Elizabeth (Betsy) DeVos

As a candidate President Trump advocated an educational theme at the K-12 level focused on improving and increasing school choice (e.g., charters and vouchers), and greater local control. He also shared a vision that: "Largely, we can eliminate the Department of Education"[5] and "[t]here is no failed policy more in need of urgent change than our government run education monopoly."[6]

To lead his efforts in this direction he nominated Betsy DeVos as his Secretary of Education. Her nomination was met with historically contentious deliberation by the United States Senate and, for the first time in history, required the Vice President of the United States, Michael Pence, to break a 50-50 tie on February 7, 2017.

Supporters suggested an outstanding record of involvement with private schools, great philanthropy, a commitment to parental school choice, and financial support for school choice alternatives. She was described as having great leadership capability and as focused on the best interest of children and parents. She was also, notably, a supporter of Donald Trump (after initial support for Bush, Fiorina, and then Rubio).

Detractors found her lack of any experience in public schools alarming and her understanding of public schools naïve. She also raised red flags with her admission that her service and reform efforts were to "advance God's Kingdom" and that "changing the way we approach . . . the system of education in the country . . . may have greater Kingdom gain in the long

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[5] *Hannity: Interview with Donald Trump* (Fox News television broadcast Apr. 4, 2016).
[6] Speech given by Donald Trump in Cleveland, Ohio on Sept. 8, 2016, http://transcripts.cnn.com/TRANSCRIPTS/1609/08/cnr.06.html.

run."[7] She was considered by Randi Weingarten, President of the American Federation of Teachers as "the most ideological, anti-public education nominee . . . since the cabinet position was created."[8] On July 3rd, 2017 Lily Eskelsen-Garcia, President of the National Education Association (NEA) said;

> I will not allow the National Education Association (largest labor union in America) to be used by Donald Trump or Betsy DeVos. I do not trust their motives. I do not trust their alternative facts. I see no reason to assume they will do what is best for our students and their families."[9] "[T]hey are at the dangerous intersection of arrogance and ignorance" and she is "the queen of for–profit privatization of public schools."[10]

Advancing the President's agenda, Secretary DeVos supported efforts to trim some $9 billion from the Department of Education (a 13% decrease) and "immediately add an additional federal investment of $20 billion to school choice."[11] Secretary DeVos has also iterated that school choice options do not necessarily require "accountability" by going through the same standards under which public schools are reviewed. Concerns have also been raised over suggestions of removing certification requirements for teachers who could be chosen because they are good teachers with no criteria listed for making this determination.

In terms of higher education, President Trump and Secretary DeVos are looking to propose a number of changes that would have dramatic economic impact on college students and graduates, including policies that could result in larger student debt payments for a longer period of time. In addition, there would be an elimination of the Public Service Loan

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[7] Benjamin Wermund, *Trump's Education Pick Says Reform Can Advance God's Kingdom*, Politico.com, http://www.politico.com/story/2016/12/betsy-devos-education-trump-religion-232150 (last visited July 21st, 2017).

[8] Kate Zernike, *Betsy DeVos, Trump's Education Pick, has Steered Money From Public Schools.* THE NEW YORK TIMES (Nov. 23, 2016).

[9] Valerie Strauss, *Teacher Union Leader: We Won't Work with Trump and DeVos Because I Do Not Trust Their Motives.* WASHINGTON POST (July 3, 2017).

[10] *Id.*

[11] *See, supra* note 7, speech given by Donald Trump; Sean Sullivan & Emma Brown, *Trump Pitches $20 billion Education Plan at Ohio Charter School that Received Poor Marks From the State,* THE WASHINGTON POST (Sept. 8, 2016).

Forgiveness plan and the removal of $3.9 billion out of Pell Grant reserves.[12] Further, Secretary DeVos suggested that the Higher Education Act of 1965 may need to be totally scrapped given that "public policy that guides education has only inched ahead"[13] indicating we should start from the very beginning with a clean slate.

Of further concern was a report that most Republicans now believe that higher education is bad for the nation.[14] The data, by the Pew Research Center, showed that negative perceptions of higher education among Republicans moved from 38% in 2010 to 58% in 2017. In contrast, 72% of left-leaning independents or Democrats currently believe that colleges and universities have a positive impact on the nation. These changes in perceptions among Republicans, in quick summary, seem to be focused on reports of liberal bias in colleges and universities and changing views on the purpose and value of higher education. Whether one agrees with the data or its interpretation, the "value" of higher education is increasingly questioned by the political right, which now holds political power. And political power, to a great extent, determines the direction of funding and support.

Secretary DeVos will likely continue her focus on school choice and deregulation. But perhaps the most telling legacy of this new President may be in his federal judicial appointments, including the newest member of the U.S. Supreme Court, Associate Justice Neal Gorsuch.

Associate Justice Neal Gorsuch

To demonstrate his commitment to conservative values, President Trump campaigned on an appeal to voters that he would appoint another committed conservative judge to the Supreme Court to take the place of Justin Antonin Scalia, who passed away early in 2016. Neal Gorsuch was confirmed by the Senate on April 7, 2017, as the 113th justice of the United States Supreme Court. The vote for his Senate confirmation was 54-45, which was historically close for a U.S. Supreme Court nominee. For the first time in the history the dominant Republican Senate invoked the so-called "nuclear option" of changing the votes needed to be confirmed to the Supreme Court from the historic precedent of 60 votes to

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[12] Daniel Douglas-Gabriel, *Trump and DeVos Plan to Reshape Higher Education Finance. Here's what it Might Mean for You,* THE WASHINGTON POST (May 17, 2017).
[13] *Id.*
[14] Clara Turnage, *Most Republicans Think Colleges Are Bad for the Country. Why?,* CHRONICLE OF HIGHER EDUCATION (July 10, 2017).

a simple majority.[15] While applauded by some, the process was, to say the least, less than satisfying to others. The New York Times, perhaps tongue in cheek, shared:

> During 20 hours of questioning from Senators during his confirmation hearings last month, Judge Gorsuch said almost nothing of substance. He presented himself as a folksy servant of neutral legal principles, and senators had little success eliciting anything but canned answers . . . But neither side harbored any doubts, based on the judge's opinions, other writings and the president who nominated him, that Judge Gorsuch would be a reliable conservative committed to following the original understanding of those who drafted and ratified the Constitution.[16]

On the role of a judge, in a speech given at Case Western Reserve University's School of Law, Gorsuch stated that judges are asked to:

> [A]pply the law as it is, focusing backward, not forward, and looking to text, structure, and history to what a reasonable reader at the time of the events in question would have understood the law to be--not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best.[17]

Some insight into Justice Gorsuch's future impact on the Court may be reflected in his concurring opinion in *Hobby Lobby Stores v. Sebelius*,[18] while he was serving on the 10th Circuit Court of Appeals. Addressing the Religious Freedom Restoration Act, he wrote: "The Act doesn't just apply to protect popular religious beliefs: it does perhaps its most important work in protecting unpopular religious beliefs, vindicating this nation's long-held aspiration to serve as a refuge of religious tolerance."[19] In the context of the case, this was music to conservative ears. While Justice Gorsuch is filling the position on the Court once held by Antonin Scalia, it

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[15] Adam Liptak & Matt Flegenheimer, *Neal Gorsuch Confirmed by Senate as Supreme Court Justice*, THE NEW YORK TIMES (April 7, 2017).
[16] *Id.*
[17] Neil M. Gorsuch, *2016 Sumner Canary Memorial Lecture: Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia,* 6 CASE W. RES. L. REV. 905, 906 (2016).
[18] Hobby Lobby Stores v. Sebelius, 723 F.3d 1114 (2013).
[19] *Id.* at 1153.

is suggested that his interpretation of the law may be more similar to that of Samuel Alito.[20]

The U.S. Supreme Court's recent decision in *Trinity Lutheran Church of Columbia v. Comer*[21] gave Justice Gorsuch an early opportunity to reveal his views regarding church-state relations. The 7-2 opinion in favor of *Trinity Lutheran Church* was delivered by Chief Justice Roberts. The majority held that the state could not deny the church the right to participate in a program that funded protective ground surface materials for playgrounds as doing so violated the Free Exercise Clause of the First Amendment.

Although the result in *Trinity Lutheran* was clear, what it means for future cases is less clear. A footnote (note 3) to the case appears to severely limit the reach of this case. Footnote 3 stated: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."[22] Chief Justice Roberts and Justices Gorsuch and Thomas disagreed with the majority decision regarding Footnote 3, arguing for a more expansive interpretation of the holding in *Trinity Lutheran*, a holding reaching far beyond "playground surfacing" to other areas regarding church-state relationships.

Justice Gorsuch noted in concurrence with Justice Thomas, that in their opinion the distinction between religious use and religious status should make no difference, stating: "I don't see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way."[23]

Of additional importance, the day following the *Trinity* decision, the Court remanded two cases for reconsideration in light of the *Trinity* decision, *Doyle v. Taxpayers for Public Education*,[24] and *New Mexico Associations of Nonpublic Schools v. Moses*.[25] In *Doyle* the question was whether the state of Colorado violated the Equal Protection Clause by invalidating a generally available and religiously neutral student aid program because the program affords students the choice of attending religious schools. In *New Mexico* the issue was the constitutionality of a textbook lending program that provides curriculum materials for private

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[20] *See* Stephanie Mencimer, *Mr. Right,* 3 MOTHER JONES 48 (2016), http://www.motherjones.com/politics/2016/06/samuel-alito-profile-antonin-scalia-supreme-court-appointment/.
[21] Trinity Lutheran Church of Columbia v. Comer, 132 S. Ct. 2012 (2017).
[22] *Id.* at 2024 n.3.
[23] *Id.* at 2026.
[24] Doyle v. Taxpayers for Public Education, 356 P.3d 833 (2013).
[25] New Mexico Associations of Nonpublic Schools v. Moses, 367 P. 3d 838 (2015).

religious schools. The New Mexico Supreme Court held that the state constitution's "Blaine Amendment" prohibit such a program. Thirty-nine U.S. states have similar amendments prohibiting the use of state funding in support of any church or religion. The reach of *Trinity* becomes crucial to whether these state constitutional provisions remain constitutionally valid as a further state-level wall of separation between church and state. Justice Gorsuch favored the more expansive reading of *Trinity*, invalidating state "Blaine Amendments" and it is likely that other Trump appointees would as well.

We began this Epilogue with the conflict between *Gobitis* and *Barnette* and we will close this Epilogue here as well, as these cases are at the heart of ongoing First Amendment tensions and key to freedom of conscience in the U.S. At the core of these issues is this fundamental constitutional question: Does our Constitution protect individual freedom of conscience or must the individual's conscience bend to the will of government authority? Does the student have a right to follow his or her own religious and moral conscience or may public school officials lawfully coerce participation in flags salutes, pledges, and prayers?

To illustrate the current administration's position on the issues addressed in *Gobitis* and *Barnette*, here are excerpts from our chapter in RELIGION AND LAW IN PUBLIC SCHOOLS[26] titled, *Be Careful What You Wish For . . .*"[27]

> On September 1, 2016, at the American Legion National Convention in Cincinnati, then-candidate Donald Trump provided possible insights into a direction for the future in discussing issues of patriotism and schools. One excerpt of the speech [quoting Donald Trump] notes that . . .
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> - Together we're going to work on so many shared goals, but I want to begin by discussing one goal that I know is so important to you. Promoting American pride and patriotism in America's schools. Very important.
> - In a Trump administration, I plan to work directly with the American Legion to uphold our common values and to help ensure they are taught to America's children.

[26] STEVE PERMUTH, SUSAN SILVER, RALPH MAWDSLEY & CHARLES RUSSO, RELIGION AND LAW IN PUBLIC SCHOOLS (2017).

[27] Steve Permuth, Susan Silver &Dustin Robinson, *Be careful What You Wish For…*, *in* RELIGION AND LAW IN PUBLIC SCHOOLS*,* 498-500 (Steve Permuth ed., 2017).

- We want our kids to learn the incredible achievements of America's history, its institutions and its heroes, many of whom are with us today, I can tell you. Including, by the way, two special people, Mayor Rudolph Giuliani and Senator Jeff Sessions. They're right here.
- We will stop apologizing for America. And we will start celebrating America.
- We will be united by our common culture, values and principles, becoming one American nation, one country, under one Constitution, saluting one American flag, and always saluting it.
- The flag all of you helped to protect and preserve. That flag deserves respect, and I will work with the American Legion to strengthen respect for our flag. You see what's happening, it's very, very sad.
- And by the way, we want young Americans to recite the Pledge of Allegiance.

As noted in our article *Through the Eyes of the Witnesses,*[28] the Supreme Court ruled, on point, in *Gobitis*, that states could mandate the flag salute and the Pledge of Allegiance in pursuance of national cohesion and unity, and in order to "promote in the minds of children who attend the common schools an attachment to the institutions of their country."[29] This would be very consistent with Mr. Trump's language.

But history shows us what so often happens when government singles out individuals and groups as a threat to national cohesion and unity. Before and after the *Gobitis* decision, children at school were threatened, abused, and harassed for their sincerely held religious beliefs that the flag salute and pledge were akin to idolatry and a violation of their faith. The Court issued its opinion against the Jehovah's Witnesses in *Gobitis* on June 3, 1940. On June 9, 1940 an angry mob set fire to the Jehovah's Witnesses Kingdom Temple in Kennebunk, Maine. In the wake of the Court's decision in *Gobitis* persecutions of Jehovah's Witnesses intensified nation-wide. As documented by the ACLU, Jehovah's

[28] Steve Permuth, Susan Silver &Dustin Robinson, *Through the Eyes of Witnesses*, *in* RELIGION AND LAW IN PUBLIC SCHOOLS, 498-500 (Steve Permuth ed., 2017).
[29] Minersville v. Gobitis, 310 U.S. 586, 599 (1940).

Witnesses were arrested, imprisoned, fined, beaten, tortured, and terrorized.[30]

Three years later, the Court, in *West Virginia v. Barnette* overturned *Minersville* on freedom of speech grounds. The Court iterated that the standing of governmental authority to mandate a pledge of allegiance and saluting the flag as a function of governmental authority in public schools was unconstitutional. Concerning state coerced unity in political and religious belief, in *Barnette* the Court declared:

> Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.[31]

With the Trump Era "national unity and pride" agenda; the push for flag salutes and pledges; support for public school prayer;[32] and the appointment of Supreme Court Justices and federal judges favoring these practices; are we looking at a federal policy of return to national unity over individual conscience? To majority will over minority faith? To *Gobitis* over *Barnette*? Should the will of the majority prevail in public schools even when this will, as enforced by the common government, intrudes on the most sacred aspects of individual conscience? If so, then what is the purpose of the First Amendment?

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[30] ACLU, THE PERSECUTION OF JEHOVAH'S WITNESSES (1941).
[31] 319 U.S. 624, 641 (1943).
[32] *See*, e.g., *Trump: "Outrageous" That Washington Prep Coach Lost Job Over Prayers on Field*, USA TODAY (Oct. 3, 2016), http://usatodayhss.com/2016/donald–trump–bremerton–coach–joe–kennedy–prayers.

Justice Gorsuch appears to be what the political right and the Religious Right were seeking: A reliable conservative textualist voice on the Court. In the current administration through 2020, and perhaps beyond, any resignation or death of one or more centrist or liberal leaning Justices will likely lead to appointments of additional conservative textualist Justices which would move the court even farther to the right for the foreseeable future. In addition, appointment of conservative/textualist judges throughout the federal judicial system would solidify and expand the reach of this particular brand of conservatism well into the foreseeable future. At what point does this change in judicial personnel unsettle what has now long been thought settled law since *West Virginia v. Barnette*:

> 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. If there are any circumstances which permit an exception, they do not now occur to us. We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[33]

Conclusion

"It was the best of times, it was the worst of times . . ." are we moving toward or away from a greater America? At the end of this Epilogue there still remain major questions about the future direction of education; the future of church-state relations; and little clarification of how Establishment Clause and Free Exercise Clause jurisprudence will ultimately evolve under the influence of Trump Era federal judges. To quote a modern day poet and winner of a Nobel Prize in Literature, what is clear, in the words of Bob Dylan is that "The Times They Are A Changin"[34] and the answer my friend is "Blowin in the Wind."[35] Great poets and singers may one day write about the change and uncertainty of our time. For now, however, we live it, and when necessary endure it, with a common hope that we will find that greater America for ourselves, our children, and future generations through our commitment to education

[33] 319 U.S. 624, 642 (1943).
[34] BOB DYLAN, THE TIMES THEY ARE A CHANGIN (Columbia Records 1964).
[35] BOB DYLAN, BLOWIN IN THE WIND (Columbia Records 1963).

and the just rule of law. We hope that this Epilogue, and this special issue on church-state law, will contribute to a constructive national dialogue on these critically important issues and encourage further learning about our religious liberties and the great religious diversity of our nation.

> *"If a nation expects to be ignorant and free in a state of civilization, it expects what never was and never will be. If we are to guard against ignorance and remain free, it is the responsibility of every American to be informed."* Thomas Jefferson

Forthcoming Issue of the *Education Law & Policy Review*

Open Call for Papers on Alternative Models of Public Education: Law, Policy, and Public Education Reform

Hillel Levin, J.D. & Jennifer Rippner, J.D., Ph. D.

Co-Editors-in-Chief

Submission Dates: June 1, 2018 thru June 29, 2018 Only

Explanation of the Issue Theme

The traditional image of a public school involves a neighborhood school under the supervision of a local school board. Much of our education laws and policies are built around this model. This traditional model, however, is increasingly under pressure.

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The *Education Law Consortium* (ELC) is a non-profit, non-partisan, university-based group of leading scholars, policy analysts, and practitioners, dedicated to the advancement of education, and the promotion of the common good, through law and policy improvement. The ELC seeks to play a vital role in promoting education law and policy improvement thru non-partisan research and model policy development, and the free dissemination of information to all persons, including thru the *Education Law & Policy Review* (ELPR), which is provided free by the ELC and its partners to all readers.

We hope that you will consider supporting future educational improvement by supporting the *pro bono* work of the ELC. Helping support the work of the ELC is fast and easy thru the University of Georgia's 501(c)(3) qualified *Georgia Education Law Consortium Fund* account, and contributions are tax deductible as allowed by law. Contributions in any amount are most welcomed. Just cut and paste or copy the link below into your Internet browser:

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AMERICANS UNITED:

— Fights threats to church-state separation in the courts.

— Works with federal and state legislators to help them understand the importance of maintaining church-state separation.

— Organizes people locally to stand up for church-state separation in their own communities.

— Publishes *Church & State*, an award-winning monthly journal of news and analysis.

Founded in 1947, Americans United works hard to ensure that America's public schools welcome children of all faiths and philosophies and that taxpayer funds are not spent to support sectarian education.

A tax-exempt, non-profit organization, Americans United is non-sectarian and non-partisan. Our members come from various faith and non-faith traditions and political perspectives.

To join or to receive more information about Americans United, email us at americansunited@au.org, call (202) 466-3234, or write to:

Americans United
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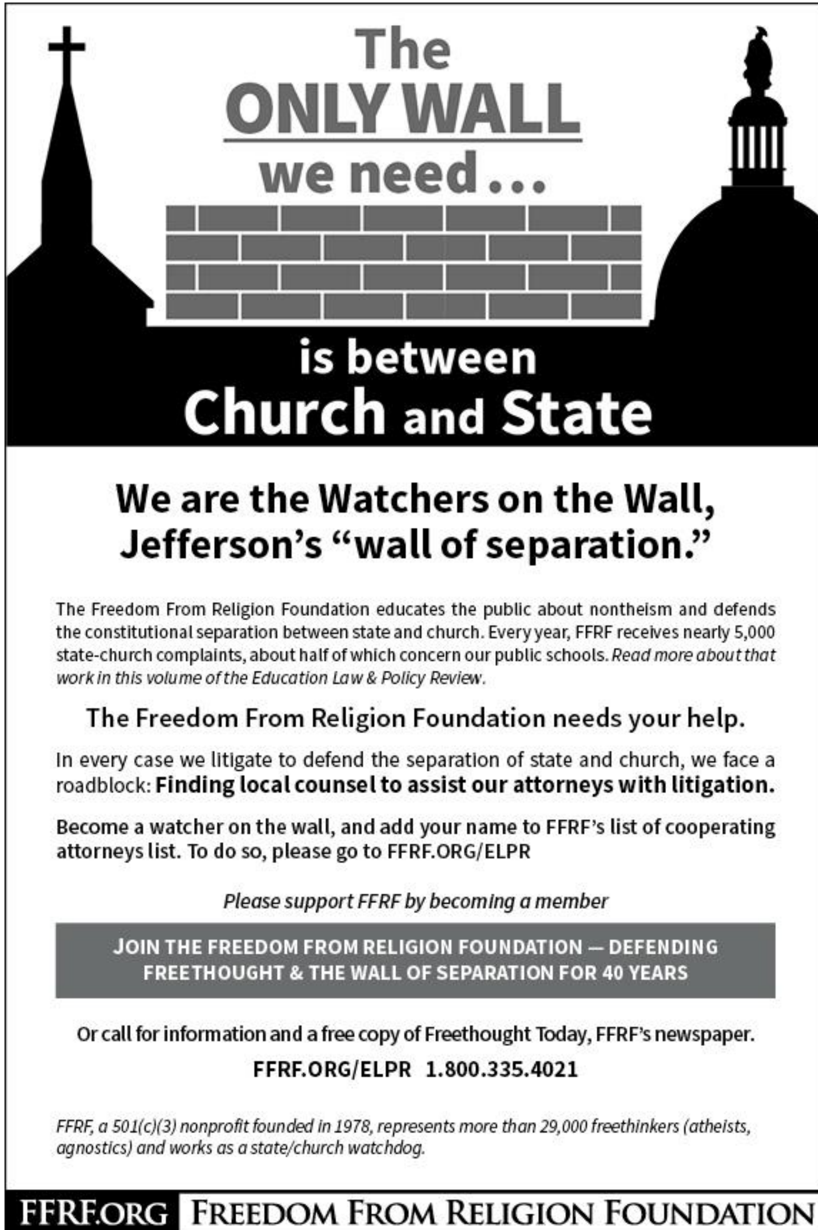
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