RELIGION IN THE PUBLIC SQUARE

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REPRESENTATIVE PUBLISHED DECISIONS

FW/PBS, Inc., v. City of Dallas, 493 U.S. 215 (1990) (upheld constitutionality of majority of municipal ordinance regulating sexually oriented businesses).

Morgan v. Swanson, 659 F.3d 359 (5th Cir. 2011) (en banc) (granted qualified immunity to elementary school principals on First Amendment challenge involving claims of viewpoint discrimination against student religious speech).

Furley v. Aledo Indep. Sch. Dist., 218 F.3d 743 (5th Cir. 2000) (upheld decision dismissing student's First Amendment claims relating to the student's proposed commencement prayer).

Doe v. Rains County Indep. Sch. Dist., 66 F.3d 1402 (5th Cir. 1995) (held that teacher did not violate student's constitutional rights by failing to report alleged sexual abuse despite state law requiring report).

Johnson v. Johnson County, 251 S.W.3d 107 (Tex. App. – Waco 2008, pet. denied) (upheld decision of the trial court granting governmental immunity in jail inmate suicide case).

Midland Indep. Sch. Dist. v. Watley, 216 S.W.3d 374 (Tex. App. – Eastland 2006, no pet.) (reversed and rendered judgment for school district and public official in retaliation/Whistleblower case).

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RELIGION IN THE PUBLIC SQUARE

I. INTRODUCTION

The purpose of this paper is to provide an overview of various laws and court decisions relating to the presence of religion in the public square, with special attention to issues that arise in public schools.

II. The Laws Concerning Religion in the Public Square.

A. The First Amendment to the U.S. Constitution

The First Amendment reads as follows: "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."
The two "religion clauses", the Establishment Clause and the Free Exercise Clause, and also the Free Speech Clause, provide the initial legal framework for understanding the debates surrounding religion and public life.

Very generally speaking, the Establishment Clause prohibits local governments and public officials, in their official capacities, from advancing, coercing, or endorsing one particular religion and also prohibits the endorsement of religion as opposed to non-religion. Courts have found that in order to not violate the Establishment Clause, a local government's or public official's actions must have a secular purpose, not have a primary effect of advancing or inhibiting religion, not foster an excessive government entanglement with religion, and not persuade or compel a student to participate in religious exercise. It is the courts' interpretation of the Establishment Clause that has restricted the abilities of school officials to lead prayers with their students, teach religious material, and formally include support for religion in public schools.

The current interpretation given by the courts to the Free Exercise Clause is somewhat less confusing, though its interpretation has been no less controversial. Generally speaking, the Free Exercise Clause prohibits school districts from making rules or establishing practices specifically targeting adherents of particular faiths. Neutral laws and practices of general applicability are constitutional. As discussed at greater length below, there is considerable debate about whether the Supreme Court is correctly interpreting the Free Exercise Clause. Many people believe that the Free Exercise Clause provides greater protection to religious believers than is the case under current court decisions.

The application of the Free Speech Clause, like that of the Establishment Clause, has been a continual source of confusion. For instance, in the public school context, students have certain free speech rights in public schools. However, those rights are not coextensive with the rights of adults in public places and must be considered in light of the special circumstances of the school environment. What this general principle means in terms of student rights, student discipline, and what school personnel can and cannot do is a moving target and is highly dependent on the specific circumstances, including the age of the students, their grade level, when and where the actions in question take place, who are the actors, and any reactions or disturbance caused by an incident.

In the context of the Free Speech Clause, public officials should be familiar with the type of "forum" that exists for various types of activities. Depending on the type of forum that is created, local governments and public officials can impose different levels of reasonable restrictions on the time, place, and manner of speech, while not discriminating based on the viewpoint desired to be expressed.

B. The Equal Access Act.

The federal Equal Access Act was passed by Congress in 1984 to give extra-curricular student groups equal access to school premises for meetings during non-instructional (usually after school hours) time.[1]

The Act does not apply, however, to all schools. It applies exclusively to public secondary schools that receive federal financial assistance and also only applies if the school has a "limited open forum." which is created if the school allows at least one student led non-curriculum club (e.g., a chess club). Furthermore, the meetings must be student-initiated and non-students (e.g., a church's youth pastor) may not lead or be regular attendees at the meetings. School teachers, administrators, and officials may not promote, lead or participate in the meetings, although they may be assigned to the group "for custodial purposes."

If a school fits within the Act, "school premises" includes not only classroom space, but also access to the school newspaper, bulletin boards, the public address system, and annual club fairs.

As a practical matter, The Equal Access Act reiterates and reinforces current First Amendment jurisprudence, which requires school district policies, including facility use policies, to be viewpoint neutral in limited public forums.[2] Furthermore, in Texas, the same principles are set forth in the Religious Viewpoint Anti-Discrimination Act, discussed below. Thus, even elementary schools must provide religious groups with the same access to their facilities that are

[1] 20 U.S.C. §§ 4071-4074.

[2] See Good News Club v. Milford Cent. Schs., 533 U.S. 98 (2001).

provided to other community groups.

C. The Twenty Year Kerfuffle in Religious Rights Legislation.

1. Introduction

The past twenty years have seen something of a growth industry in legislation relating to religious rights. At the federal level, Congress enacted the Religious Freedom Restoration Act of 1994 (RFRA),[3] and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[4] At the state level, at least sixteen states[5] have enacted their own versions of the Religious Freedom Restoration Act, whether through adoption of religious rights legislation (e.g., in Texas, through Texas Religious Freedom Restoration Act [TRFRA][6]) or through constitutional amendment to the state constitution (e.g., in Alabama). Other, more specialized forms of religious rights legislation have been passed at the federal and state levels to address more specific concerns, such as the Texas Religious Viewpoints Anti-Discrimination Act of 2007.[7]

2. Background

Texas did not enact TRFRA on a clean slate. The act is a response to a twenty-year federal kerfuffle over the level of scrutiny to apply to free exercise claims under the First Amendment of the United States Constitution.[8]

The First Amendment to the United States Constitution states, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[9] The Free Exercise Clause of the First Amendment was made applicable to the states by the Supreme Court in 1940,[10] but there was little case law interpreting the Free Exercise Clause until the Supreme Court decided *Sherbert v. Verner* in 1963.[11] The current controversy surrounding the Free Exercise Clause and its protection of religious exercise stems from the Supreme Court's 1990 decision in *Employment Division v. Smith*.[12] Many academics and legislators believe that *Smith* gutted the Free Exercise Clause by holding that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.[13] The critics of *Smith* generally argue that the compelling interest standard should apply whenever a law substantially burdens the free exercise of religion, regardless of whether the law is neutral and generally applicable.[14] The adoption of RFRA and RLUIPA by Congress and TRFRA by the Texas Legislature were direct responses to *Smith*.

3. Development of Religious Exercise Legislation

a. Pre-*Smith* Supreme Court Precedent on the Free Exercise Clause.

The debate surrounding *Smith* centers on the question of whether the Free Exercise Clause is designed to grant religious individuals and institutions exemptions from generally applicable laws that incidentally burden religious exercise, absent a compelling state interest in the law's enforcement, or whether the Free Exercise Clause is designed to prevent intentional discrimination against religious exercise and religious believers.[15]

(1) Before the Compelling Interest Test.

The earliest United States Supreme Court cases to discuss the Free Exercise Clause consistently held that the Free Exercise Clause does not exempt individuals from neutral laws of general applicability. In *Reynolds v. United States*, the criminal defendant sought to have his criminal conviction for bigamy vacated because, based on his religious beliefs, he believed that polygamy was right.[16] The Supreme Court rejected Reynolds' request for relief, holding that, through the First Amendment, "Congress was deprived of all legislative power over mere opinion, but was left free

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[3] 42 U.S.C. § 2000bb *et seq.*

[4] 42 U.S.C. § 2000cc *et seq.*

[5] Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. Rev. 466, 477 (2010) (Connecticut, Florida, Illinois, Rhode Island, Alabama, Arizona, South Carolina, Texas, Idaho, New Mexico, Oklahoma, Pennsylvania, Missouri, Virginia, Utah, and Tennessee).

[6] TEX. CIV. PRAC. & REM. CODE §§ 110.001-.012.

[7] TEX. EDUC. CODE §§ 25.151-.157 (addressing viewpoint discrimination in public schools).

[8] *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 258 (2010)

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

[10] *See Cantwell v. Connecticut*, 310 U.S. 296 (1940),

[11] 374 U.S. 398 (1963).

[12] 494 U.S. 872 (1990).

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

[14] *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); *City of Boerne v. Flores*, 521 U.S. 507, 544-65 (1997) (O'Connor, J., dissenting) (adopting McConnell's account of the original understanding of the Free Exercise Clause).

[15] Vincent Phillip Munoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083 (2008).

[16] 98 U.S. 145, 162 (1878).

to reach actions which were in violation of social duties or subversive of good order."[17]

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose 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? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? The permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[18]

Throughout the following decades following the 1878 decision in *Reynolds*, the Supreme Court continued to reject claims that the Free Exercise Clause exempted religious believers from neutral laws of general applicability.[19] Up through at least 1940, when the Supreme Court first applied the Free Exercise Clause to state actions, the Supreme Court noted that neutral laws of general applicability will be upheld so long as they do not wholly deny the right to preach or to disseminate religious views:

> The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.[20]

(2) Sherbert v. Verner (1963)

In *Sherbert*, the plaintiff, a member of the Seventh-day Adventist Church, was fired from her job because she was unwilling to work on Saturdays. She claimed that working on Saturday was a violation of her religious beliefs.[21] The plaintiff sought other employment but was likewise unable to find other employment because she would not work on Saturdays.[22] As a result, the plaintiff filed an unemployment compensation benefits claim with the State.[23] The State agency responsible for administering the program concluded that the plaintiff had not accepted available employment and was thus barred from receiving benefits under the unemployment compensation program.[24] The plaintiff brought suit alleging that the State agency had violated her right to free exercise of her religion.[25] The Supreme Court held that the State policy preventing the plaintiff from receiving unemployment benefits because she would not work on Saturday for religious reasons must either (1) represent "no infringement by the State of her constitutional rights of free exercise"; or (2) be justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate.[26] The Court concluded that the State's policy imposed a substantial burden on the religious exercise of the plaintiff and that it was not justified by a compelling State interest.[27]

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[17] *Id.* at 164.

[18] *Id.* at 166-67.

[19] *Miles v. United States*, 103 U.S. 304, 310-11 (1881) (permitting exclusion of jurors in bigamy trial when jurors practiced or supported polygamy); *Davis v. Beason*, 133 U.S. 333, 342-43 (1890) ("It was never intended or supposed that the [Free Exercise Clause] could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. … However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by the general consent as properly the subjects of punitive legislation."); *Jacobson v. Mass.*, 197 U.S. 11, 29 (1905) (no constitutional exemption from military service based on religious convictions).

[20] *Cantwell*, 310 U.S. at 304.

[21] *Sherbert*, 374 U.S. at 399.

[22] *Id.*

[23] *Id.* at 399-400.

[24] *Id.* at 400-401.

[25] *Id.* at 401.

[26] *Id.* at 403.

[27] *Id.* at 406-408.

(3) Wisconsin v. Yoder (1972)

In *Yoder*, the plaintiffs, members of Amish communities, were tried and convicted for failing to place their high-school age children in school, in violation of the State's compulsory education statute.[28] The plaintiffs contended that the State's compulsory education statute violated their rights under the First and Fourteenth Amendments because the plaintiffs believed, in accordance with the tenets of their faith generally, "that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life."[29] The Court concluded that "the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[30] The Court further held that

> the conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practices of the Amish faith, both as to the parent and the child.[31]

Finally, the Court held that the State had failed to offer interests sufficiently compelling such "that even the established religious practices of the Amish must give way."[32]

(4) The Court Analyzes Its Pre-1990 Decisions

In *Smith* and in the Court's 1997 decision *Boerne v. Flores*,[33] the Supreme Court made note of certain limitations that the Court considered important in analyzing its pre-1990 jurisprudence. To begin with, the Supreme Court noted that there have only been two types of situations in which the Court has invalidated neutral, generally applicable laws. First, the Court noted that it used heightened scrutiny in the context of cases involving more than one constitutionally protected right.[34] In *Boerne*, the Court specifically noted that the case of *Wisconsin v. Yoder* was such a situation because it "implicated not only the right to the free exercise of religion but also the right of parents to control their children's education."[35] Second, the Court noted that it had previously used the *Sherbert* analysis, a balancing test, in cases involving state unemployment compensation rules.[36] However, the Court indicated that, even if it did extend *Sherbert* beyond unemployment compensation cases, it was certainly not inclined to extend *Sherbert* beyond cases involving individualized assessments.[37]

Also, in the Court's consideration of the Religious Freedom Restoration Act, the Court noted in *Boerne* that pre-*Smith* jurisprudence did not require that a government's compelling interest be narrowly tailored such that it was the least restrictive means of furthering the government's compelling interest.[38]

b. Employment Division v. Smith (1990)

In 1990, the United States Supreme Court issued its ruling in *Employment Division v. Smith*.[39] The case concerned whether the Free Exercise Clause of the First Amendment would permit the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permit the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use. The Court held that the law did not violate the Free Exercise Clause.

The Supreme Court held that the Free Exercise Clause does not exempt individuals from complying with laws that are neutral and generally applicable. The Court noted, however, that if the law requires some sort of individualized assessment, then there would be grounds for requiring greater scrutiny of the law in question. The Court further noted that courts should not be in the business of determining the centrality of an individual's beliefs, nor whether a particular burden is a substantial burden. Finally, the Court noted that the only times a neutral, generally applicable law had failed to pass constitutional scrutiny were cases in which the free exercise rights were coupled with some other constitutional protection (hybrid rights cases) or in certain unemployment compensation benefit cases.

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[28] 406 U.S. at 207-08.

[29] *Id.* at 208-09.

[30] *Id.* at 216.

[31] *Id.* at 218.

[32] *Id.* at 221.

[33] 521 U.S. 507 (1997).

[34] *Smith*, 494 U.S. at 881-82; *Boerne*, 521 U.S. at 513-14.

[35] *Boerne*, 521 U.S. at 514.

[36] *Smith*, 494 U.S. at 883-84; *Boerne*, 521 U.S. at 514.

[37] *Smith*, 494 U.S. at 884.

[38] *Boerne*, 521 U.S. at 535.

[39] 494 U.S. 872 (1990).

c. Lukumi v. Hialeah (1993)

In 1993, the United States Supreme Court issued its ruling in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[40] The case concerned a series of ordinances enacted by the City of Hialeah to prevent the Church of Lukumi Babalu Aye from practicing animal sacrifice. The applicable state law prohibited "cruelty to animals." The City concluded that all animal sacrifice is cruel because animal sacrifice does not serve a "useful" purpose. The Court concluded that the law was unconstitutional under the Free Exercise Clause.

The Supreme Court held that a law that burdens the free exercise of religion of an individual and is not a law that is neutral and of general applicability must be justified by a compelling interest and must be narrowly tailored to further that interest. The Court noted that the case required the use of an individualized governmental assessment. Thus, the Court concluded that when individualized exemptions are available, the government must have a compelling reason to exclude those claiming a "religious hardship."

d. The Federal Religious Freedom Restoration Act of 1993

The Religious Freedom Restoration Act of 1993 (RFRA),[41] was enacted as a result of the Supreme Court's 1990 ruling in *Employment Division v. Smith*. As part of its findings of fact, Congress concluded that "governments should not substantially burden religious exercise without compelling justification" and that the pre-*Smith* structure set forth by the federal courts struck a sensible balance "between religious liberty and competing prior governmental interests."[42] In light of the legislative findings, Congress enacted RFRA (1) "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened;" and (2) "to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[43]

In order to fulfill its goals, RFRA stated that "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government demonstrates that application of the burden (1) "is in furtherance of a compelling governmental interest;" and (2) "is the least restrictive means of furthering that compelling governmental interest."[44] RFRA also created a private right of action for enforcement of the rights created by the Act.

e. Boerne v. Flores (1997)

In 1997, the United States Supreme Court issued its ruling in *Boerne v. Flores*.[45] The case concerned whether Congress had exceeded its authority under § 5 of the Fourteenth Amendment in enacting the Religious Freedom Restoration Act of 1993. In particular, the Court considered whether Congress was legitimately implementing the Free Exercise Clause through § 5 of the Fourteenth Amendment by the enactment of RFRA. The Court concluded that because RFRA extended beyond the principles enunciated in *Smith* and *Lukumi*, it was not a constitutional implementation of the Free Exercise Clause through § 5 of the Fourteenth Amendment.

The Supreme Court noted that § 5 of the Fourteenth Amendment grants Congress the authority to enact legislation in order to enforce the provisions of the Fourteenth Amendment, including the Free Exercise Clause in that it has been deemed to be incorporated into the Fourteenth Amendment protections. However, the Court noted that Congress does not have the authority to decree the substance of the Fourteenth Amendment restrictions on the states. Thus, legislation that alters the meaning of the Free Exercise Clause does not enforce the rights protected by that clause. The Court noted that Congress may go beyond the "enforcement" of the Fourteenth Amendment only in utilizing remedial legislation aimed at the "widespread and persisting deprivation of constitutional rights." In that context, the Court noted Congress' invalidation of literacy tests for voters because of the practice's history as a tool of racial discrimination.

The Court noted that while it is possible for Congress to enact legislation as a preventative to discrimination, it must be based on legislative findings that laws were enacted based on (in this case) religious animus. However, the Court noted that RFRA was primarily aimed at removing incidental burdens on religious freedom based on laws of general applicability (like zoning laws) that were not motivated by any animus towards religion. More importantly, however, the Court noted that RFRA has "sweeping coverage [that] ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[46]

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[40] 508 U.S. 520 (1993).

[41] 42 U.S.C. § 2000bb *et seq*.

[42] 42 U.S.C. § 2000bb(a).

[43] 42 U.S.C. § 2000bb(b).

[44] 42 U.S.C. § 2000bb-1(a)-(b).

[45] 521 U.S. 507 (1997).

[46] *Id.* at 532.

The Court also objected to the stringent test required by RFRA and noted that it's "demands of state laws reflect a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved."[47] The Court noted that claims that a law "substantially burdens" the exercise of religion are almost impossible to contest.[48] The Court further noted that the requirement that the law be justified by a compelling interest and narrowly tailored would be a nearly impossible hurdle for many laws. *Id.*

Finally, the Court noted that Congress' attempt to rewrite *Smith* and the Court's analysis of free exercise jurisprudence is in violation of the separation of powers.[49]

After *Boerne*, RFRA no longer applies to state and local governments. However, it does still apply to the federal government and federal laws. Most recently, various religious organizations have brought suit challenging the Affordable Care Act and its implementation by the Department of Health and Human Services because the Act and its implementing regulations require employers, including most religious employers, to provide funding for medical services that violate the beliefs of many religious believers.

4. The Religious Land Use and Institutionalized Persons Act of 2000

In response to the *Boerne* decision, after years of debate regarding the scope of a successor statute to RFRA, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[50] RLUIPA substantially narrows the scope of RFRA and focuses exclusively on land use and institutionalized persons.[51]

5. The Texas Religious Freedom Restoration Act of 1999.

Also in response to *Boerne*, various state legislatures enacted state religious liberty legislation.[52] In Texas, the legislature enacted the Texas Religious Freedom Restoration Act of 1999 (TRFRA).[53]

TRFRA provides broad protection for religious freedom in Texas, even broader than the freedom allowed by the Free Exercise Clause of the First Amendment. The law was enacted in 1999 after a decade of wrangling at the federal level over the extent to which the Constitution and the U.S. Congress can protect religious expression at the state level.

Under TRFRA, a governmental entity (including a public school) may not "substantially burden" a person's free exercise of religion unless it demonstrates that the application of the burden to the person is in furtherance of a "compelling governmental interest" and is the "least restrictive means" of furthering that interest.[54] "Free exercise of religion" is defined as "an act or refusal to act that is substantially motivated by a sincere religious belief."[55] Furthermore, it is not necessary to show that the adherent's "act or refusal to act" is motivated by a central part or central requirement of the person's sincere religious belief.[56] Generally, the law comes into play when a policy or practice that is neutral on its face and applicable to all – such as a dress code or school attendance policy – is challenged by a religious adherent as imposing a "substantial burden" on the practice of his faith. There is still relatively little case law interpreting TRFRA. In one published case, the Fifth Circuit Court of Appeals applied TRFRA in the school setting regarding an elementary school dress code.[57] In that case, the Court showed great deference to the Plaintiff's religious claims. The Court held that a claimant's religious beliefs should be not be discounted even if those beliefs are not held by all adherents of the same faith, nor should they be discounted if there are facts that show that the believer has "struggled with", or been inconsistent in adhering to, the particular religious tenet.[58]

From a practical standpoint, a school should tread carefully and lightly when a general policy, seemingly unrelated to any type of religious practice, is challenged as imposing a "substantial burden" on the exercise of a student, teacher, or employee's religion. The tolerance of religious practice demanded by TRFRA is high. To the extent that the individual's religious belief is deemed sincere, even if unconventional, a court will frequently require a school to accommodate the practice.

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[47] *Id.* at 533.

[48] *Id.* at 534 (citing *Smith*, 494 U.S. at 887).

[49] *Id.* at 535-536.

[50] 42 U.S.C. § 2000cc *et seq.*

[51] *See* 42 U.S.C. §§ 2000cc and 2000cc-1.

[52] Lund, *supra* note 5, at 477.

[53] TEX. CIV. PRAC. & REM. CODE § 110.001 et seq.

[54] TEX. CIV. PRAC. & REM. CODE § 110.001 et seq.

[55] *Id.* at § 110.001(a)(1).

[56] *Id.*

[57] *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010).

[58] *Id.* at 261-262.

D. The Texas Religious Viewpoints Anti-Discrimination Act.

The Texas Religious Viewpoints Anti-discrimination Act ("TRVAA")[59] protects students' expression of religious viewpoints in their schoolwork, mandates that schools permit students to organize religiously oriented clubs and activities to the same extent that students are able to organize other clubs and activities, and requires school districts to implement local policies creating limited public forums for student speech at school events and graduation ceremonies. The TRVAA was enacted in 2007 and purports to codify in Texas federal constitutional law regarding student religious expression.

With regard to student expression of religious viewpoints in schoolwork, the TRVAA provides that students may not be either penalized or rewarded for expressing a religious viewpoint in their homework, artwork, or other classroom assignment.[60] The student work must be judged only by ordinary academic standards concerning the substance and relevance of the work, and not according to the content of the religious expression or lack thereof.[61]

Further, the TRVAA requires that schools grant the same access to school facilities and advertising opportunities to student organized, religiously oriented clubs and activities as it grants to non-religious ones. The school district may disclaim school sponsorship of such activities and groups only in a manner that neither favors nor disfavors religiously oriented student clubs and activities.[62]

The TRVAA also mandates that school districts adopt a local policy providing for the use of neutral criteria for selecting student speakers at school events including graduation ceremonies. The school district is prohibited from discriminating against a student's voluntary expression of a religious viewpoint in such a student speech, but the school district must prevent students from engaging in obscene, vulgar, lewd or indecent speech. Further, whenever a student speaker is given access to such a forum, the school district must disclaim, orally or in written form, the content of the student's message.[63]

In order to comply with the TRVAA policy mandate, a school district may choose to implement a model policy provided within the statute itself[64], or it may adopt an alternative policy such as policy FNAA, provided by TASB. The model policy found within the TRVAA is a "safe harbor" provision that will enable a school district to be certain that it has complied with the TRVAA mandate.[65] However, the model policy may go too far and run afoul of federal constitutional limitations, leaving even a TRVAA compliant school district susceptible to a First Amendment challenge to their policy.

E. Texas Education Code Mandates

The Texas Education Code requires that all school districts require students to recite the Pledge of Allegiance to both the U.S. and Texas flags daily, unless a student's guardian has provided a written request for the student to be exempted.[66] In addition, following the recitation of the pledges, schools must provide a one-minute period of silence for each student to reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student. Each teacher must ensure that the students remain silent during that period and do not interfere with or distract other students.

Reiterating federal law under the Free Exercise Clause, the Texas Education Code also specifically states that a public school student has an absolute right to individually, voluntarily, and silently pray or meditate in school in a manner that does not disrupt the instructional or other activities of the school. No one may require, encourage, or coerce a student to engage in or refrain from such prayer or meditation during any school activity.[67]

Finally, in 2007, the Texas legislature enacted a new section to the Texas Education Code, which provides that school districts may offer high school students an elective course on the impact of the Old and New Testaments of the Bible.[68] The course must maintain religious neutrality and accommodate diverse religious views. An enrichment course offered pursuant to this law should be considered a special topic in Social Studies or an independent study in English, for purposes of the Texas Essential Knowledge and Skills (TEKS).[69] Also the legislature added a requirement that all school districts offering a K-12 curriculum must include "religious literature, including the Hebrew Scriptures (Old Testament) and New Testament, and its impact on history and literature," in its enrichment curriculum.[70] This

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[59] TEX. EDUC. CODE § 25.151-.155.

[60] *Id.* at § 25.153.

[61] *Id.*

[62] *Id.* at § 25.154.

[63] *Id.* at § 25.152.

[64] *Id.* at § 25.156.

[65] *Id.* at § 25.155.

[66] TEX. EDUC. CODE § 25.082.

[67] TEX. EDUC. CODE § 25.901.

[68] TEX. EDUC. CODE § 28.011.

[69] 19 TEX. ADMIN. CODE § 74.36.

[70] TEX. EDUC. CODE § 28.002(a)(2)(H).

mandated "enrichment curriculum" does not need to be an independent course; the content can be integrated with the content of other courses instead.[71]

III. Religion in Schools.

A. Religious expression at school.

1. Religious expression by students.

a. Student Prayer

The Supreme Court has ruled that a school may not sponsor or direct a prayer at school or at a school related event, such as a football game or a graduation ceremony.[72] This restriction extends even to a team prayer led by a coach.[73] When a school or one of its faculty members sponsors or participates in a prayer at school, the activity generally will be deemed to be a violation of the Establishment Clause.

The United States Supreme Court has prohibited pre-game prayers given by students.[74] However, there is considerable confusion about the extent to which a school can permit students to vote upon the delivery by a student of a message, entirely of that student's choosing, as part of graduation ceremonies. The Eleventh Circuit has authorized such a policy.[75] However, at least one federal court in Texas has ruled that a similar policy was rendered unconstitutional by the Supreme Court's decision in *Santa Fe* in 2000.[76] The TRVAA addresses some of the concerns raised in previous public student prayer cases, particularly through the TRVAA's mandates of a limited public forum, a neutral process for selecting student speakers, and content disclaimers by the school. The impact of these provisions remains to be seen, but challenges to public student prayer continue.

In 2011, the public student prayer issue once again reared its head in regards to a graduation ceremony at Medina Valley ISD. Pursuant to the TRVAA and the district's historical practice, the school district planned to allow its valedictorian and other students in positions of honor to give, among other talks, an invocation and benediction. These speeches were prepared by the students and reviewed by district officials to ensure that the students' speeches stayed on topic for the event. The school district was sued, with the plaintiffs arguing that student religious speech at the graduation and reference to it in the graduation program violated the Establishment Clause. The school district argued that the TRVAA makes graduation a limited public forum and that the district could not prohibit the students' speeches, even if they contained religious speech. Although the district court initially granted a temporary restraining order against the school district prohibiting any student prayer at the graduation ceremony, the Fifth Circuit promptly reversed, stating that the plaintiffs had not shown a substantial likelihood that they would prevail.[77]

Subsequently, the parties settled the case, with the school district agreeing not to permit its employees to initiate, solicit or direct prayers, join students in prayers, proselytize, or invite a third-party to engage in any of those actions during the school day or at school sponsored events.[78] The school district further agreed not to permit its employees to display religious symbols on school property except for non-religious pedagogical purposes, not to pre-screen the content of any student remarks to be given at school sponsored events, and not to stand during any student remarks.[79] Due to this settlement agreement, the court did not ultimately address the effect of the TRVAA on the issue of public student prayer at a graduation ceremony or whether Medina Valley ISD complied with the provisions of the TRVAA.

b. Student religious speech in schools.

Prior to 1969, when the Supreme Court issued its decision in *Tinker v. Des Moines Independent Community School District*[80], public school students generally did not have the right to speak on topics of

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[71] Op. Tex. Att'y Gen. No. GA-0657 (2008).

[72] *Lee v. Weisman*, 505 U.S. 577 (1992).

[73] *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995).

[74] *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

[75] *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070 (11th Cir.) (en banc) ("Adler II"), *vacated by* 531 U.S. 801 (2000), *reinstated by* 250 F.3d 1330 (11th Cir. 2001) ("Adler III").

[76] *Does 1-7 v. Round Rock Indep. Sch. Dist.*, 540 F. Supp. 2d 735 (W.D. Tex. 2007).

[77] See *Schultz v. Medina Valley Indep. Sch. Dist.*, No. SA-11-CA-422-FB (W.D. Tex. June 1, 2011); *Schultz v. Medina Valley Indep. Sch. Dist.*, No. 11-50486 (5th Cir. June 3, 2011).

[78] *Schultz v. Medina Valley Indep. Sch. Dist*., No. SA-11-CA-422-FB, 2012 U.S. Dist. LEXIS 19397, at *7 (W.D. Tex. February 9, 2012).

[79] *Id.* at *7-*9. The school district also agreed that its personnel will not disparage the plaintiffs. Id. at *17. This gave rise to a subsequent proceeding after the school district's superintendent gave a televised interview in which he called the lawsuit "a witch hunt" and a high school band director commented on a student's Facebook page, claiming that one of the plaintiffs had lied and made false accusations during the suit. In a document entitled, "Non-Kumbaya Order", the judge required school district personnel to apologize and the plaintiffs to accept their apologies. *Schultz v. Medina Valley Indep. Sch. Dist*., No. SA-11-CA-422-FB, 2012 U.S. Dist. LEXIS 37130 (W.D. Tex. March 19, 2012). No further problems seem to have arisen.

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

their own choosing in school.[81] Justice Thomas explained the situation a few years ago in one of his concurring opinions: early public schools "were not places for freewheeling debates or exploration of competing ideas. Rather, teachers instilled 'a core of common values' in students and taught them self-control."[82]

In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.[83]

The Supreme Court's decision in *Tinker* effected a sea change in students' speech rights, expanding them beyond anything that had previously been considered. Arguably, due to the expansiveness of the rights created by *Tinker*, the Supreme Court and other courts have had to make a long series of (sometimes inconsistent) exceptions to *Tinker*'s general grant of free speech rights.

Whether or not the traditional understanding of the role of schools is best, it was part of the general understanding of the First Amendment that existed throughout most of the history of the United States. In *Tinker*, however, the Court was faced with student anti-war demonstrators who, rather than engage in disruptive protests, merely wore black armbands to indicate their support for an end to the Vietnam War. There was no indication that the students' actions caused any sort of disruption at the school, nor was there any real indication that the presence of the students wearing black armbands was likely to cause any problems. With a factual scenario of a peaceful, non-disruptive protest and in the midst of the growing disapproval for the Vietnam War during late sixties, the Supreme Court concluded that the (mostly high school) students in *Tinker* should have a free speech right under the First Amendment to wear their armbands. The Court held that school officials could not prohibit students from wearing an armband in protest of the Vietnam War, where the conduct at issue did not "materially and substantially disrupt the work and discipline of the school."

Since *Tinker* in 1969, however, every time the Supreme Court has considered the issue of student speech rights, it has narrowed and limited those rights. Thus, in *Bethel School District v. Fraser*, the Court said that school officials could restrict a high school student's freedom to give a school assembly speech containing an elaborate sexual metaphor.[84] Similarly, in 1988, the Supreme Court concluded that a school district can restrict student contributions to a school-sponsored newspaper, even without threat of imminent disruption.[85] Most recently in *Morse v. Frederick*, the Court decided that schools may restrict a student's speech if it advocates drug use.[86] As Justice Thomas pointed out, the "exceptions" to *Tinker* have been ad hoc and lack almost any sense of consistency.[87]

Schools and school officials clearly may restrict student speech if it is:

- Materially and substantially disruptive;
- Lewd;
- School-sponsored; or
- Promotes drug use.[88]

The Supreme Court in *Morse* left open the possibility of additional bases for regulation of student speech, as did Justice Alito in his concurring opinion.[89] What those additional exceptions might be is unclear. Within our own circuit, the Fifth Circuit, the Court of Appeals has added exceptions for viewpoint- and content-neutral regulations[90] and for situations that pose a danger to students.[91]

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[81] There is some court of appeals precedent from earlier in the sixties for such rights, but, as a general matter, *Tinker* marked the beginning of any widespread belief or acceptance that public school students had affirmative speech rights. *Cf.* Kristi L. Bowman, *The Civil Rights Roots of* Tinker*'s Disruption Tests*, 58 AM. U.L. REV. 1129, 1130 (2009).

[82] *Morse v. Frederick*, 551 U.S. 393, 411-412 (2007) (Thomas, J., concurring).

[83] *Id.* at 412.

[84] *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685-686 (1986).

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

[86] *Morse v. Frederick*, 551 U.S. 393 (2007).

[87] *Morse*, 551 U.S. at 421.

[88] *Morgan v. Swanson*, 659 F.3d 359, 407 (5th Cir. 2011) (en banc) (Elrod, J., majority opinion as to this issue).

[89] *Morse*, 551 U.S. at 404-406 (opi.), 422-423 (Alito, J., concurring). The Fifth Circuit has concluded that Justice Alito's concurring opinion is the controlling opinion in *Morse*. *See Morgan*, 659 F.3d at 374 n.46 (Benavides, J.) (citing *Ponce v. Socorro Indep. Sch. Dist*., 508 F.3d 765, 768 (5th Cir. 2007)); *see also id.* at *98 n.1 and *120 (Elrod, J.). As the Seventh Circuit has noted, Justice Alito's concurring opinion should not have been classified as the controlling opinion since Justice Alito, as part of a majority of the Supreme Court, signed the primary/majority opinion. *Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668, 673 (7th Cir. 2008).

[90] *Morgan*, 659 F.3d at 407 (quoting *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 509 (5th Cir. 2009)).

[91] *Ponce*, 508 F.3d at 770-772. This exception is not mentioned in *Morgan*, but it does not appear that the court in *Morgan* intended to disapprove *Ponce* since it is otherwise cited with approval and is not specifically rejected or

The various Supreme Court student speech cases did not involve any elementary school-age students and, prior to the Fifth Circuit's en banc decision in *Morgan v. Swanson*, it was unclear whether the First Amendment Free Speech Clause provided affirmative speech rights to elementary school students at school.[92] In *Morgan*, however, the Fifth Circuit concluded that the Free Speech Clause does apply to the speech of elementary school students while they are at school and that restrictions on religious speech *solely* because it is religious violate the First Amendment.[93] Unfortunately, the Fifth Circuit was unable to garner a majority as to how the Free Speech Clause applies in elementary schools. The only other substantive holdings from *Morgan* relate to "school-sponsored" speech and to the application of the Establishment Clause in elementary schools.

Under *Morgan*, the "school-sponsored" speech exception should be construed narrowly.[94] It only applies to activities that may fairly be characterized as part of the curriculum, which are supervised by faculty members, and designed to impart particular knowledge or skills so that the views of the individual speaker may not be erroneously attributed to the school. The classic examples are the school newspaper and school plays.[95] Neither in its discussion of *Hazelwood* nor in its application to the facts alleged in *Morgan* did the majority consider whether elementary school students might be more likely to attribute individual speech to a school. The Court merely concluded that the factual allegations, as alleged, did not indicate that they would be likely to misperceive the speech as coming from the school.[96]

The Court went on to state that the Establishment Clause draws a sharp distinction between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.[97] This conclusion is relatively uncontroversial. The significant part is relegated to a footnote: "The principals contend that elementary school students are more impressionable and therefore this case involves heightened Establishment Clause concerns. This is without merit."[98] Leaving aside the fact that the principals in *Morgan* did not argue that there are heightened Establishment Clause concerns in elementary schools, numerous courts and judges *have* made that argument, repeatedly. Moreover, it is unclear whether there was a majority ruling from the Fifth Circuit on this footnote (or the proper interpretation of it), so the question of whether the Establishment Clause concerns permit greater restrictions in elementary schools likely remains open for the time being.

The following questions remain open within the Fifth Circuit:

1. Whether the "material and substantial disruption" standard applies differently in elementary schools than in high schools. Numerous courts have indicated that the "material and substantial disruption" standard would apply differently in elementary schools.[99]
2. Whether the ability of school districts to restrict lewd or inappropriate speech applies differently in elementary schools than in high schools.[100]
3. Whether the term "viewpoint discrimination"

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overruled by the *en banc* court. However, *Morgan* generally seems to indicate that only the exceptions listed in *Morgan* are permitted: "In short, what one child says to another child is within the protection of the First Amendment unless one of the narrow exceptions discussed above applies." *Morgan*, 659 F.3d at 412 (Elrod, J.).

[92] *Id.*, at 382 (Benavides, J.).

[93] *Id.* at 403-405 (Elrod, J.).

[94] *Id.* at 408.

[95] *Id.* at 408.

[96] This was precisely the issue raised by the Third Circuit Court of Appeals in *Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271, 277 (3d Cir. 2003) (in the elementary school classroom, the "line between school-sponsored speech and merely allowable speech is blurred."). *Walz*, like *Morgan*, dealt with restrictions on the distribution of candy canes with an attached religious message, "Legend of the Candy Cane."

[97] *Morgan*, 659 F.3d at 409 (citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

[98] *Id.* at *143 n.26 (relying on *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001)). The extent to which this footnote should be applied outside the specific facts of *Morgan* is unclear. This portion of Judge Elrod's opinion is only the majority opinion because of its adoption by Judge Owen. Judge Owen, however, also adopted the portion of Judge Benavides' opinion, in which he states, "in *Good News Club*, the Supreme Court *reiterated* previous precedents assigning 'significance ... in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults.'" *Id.* at 381. Judge Elrod's opinion leave ambiguous whether the sentence "This is without merit," refers to the argument about elementary school students being more impressionable or whether that argument applies to the *Morgan* case. In light of Judge Owen's joining of the opinion, the best interpretation would appear to be that Judge Elrod's footnote is limited to the specific facts of *Morgan*.

[99] *Id.* at 377 n.72 (Benavides, J.) (briefly discussing numerous cases questioning how to apply free speech guaranties in elementary schools); *see also id.* at 386-387.

[100] *Id.* at 387 ("[T]he threshold for what constitutes suggestive or lewd speech, as discussed in *Fraser*, might be lower in an elementary-school setting.").

means hostility toward a particular viewpoint or merely a restriction on a certain type of viewpoint based on some other concern. For instance, some courts have distinguished between (a) restrictions on religious speech in public schools *solely* because it is religious, and (b) restrictions on religious speech because it is likely to cause offense to other students.[101]

4. Whether school districts can practice "viewpoint discrimination" against student speech that is "school-sponsored." In cases where there is no hostility to the viewpoint, numerous courts have held that school districts may restrict student speech that is "school-sponsored," as they have variously interpreted the term "school-sponsored." *Morgan* indicates that some of the Fifth Circuit judges, perhaps a majority, might reject "viewpoint discrimination," even when applied to "school-sponsored" speech.[102]
5. Whether elementary-age students are more likely to (mis)perceive private speech as "school-sponsored" or "school-endorsed." While a majority of the Fifth Circuit concluded that the facts, as alleged in *Morgan*, did not indicate any likelihood that the private speech would be misperceived as "school-sponsored" or "school-endorsed," there is no clear majority ruling out the possibility that, under different factual allegations or based on evidence of what actually occurred or occurs in an elementary school, school officials might be able to impose greater restrictions under the "school-sponsored" exception or based on the Establishment Clause.
6. Whether there are additional circumstances that would justify schools districts in restricting or regulating student speech.

c. Religious speech in student work.

As noted above, the TRVAA provides that students may not be either penalized or rewarded for expressing a religious viewpoint in their homework, artwork, or other classroom assignment. However, the student must comply with the requirements of the assignment, and the student's expression of a religious viewpoint in an otherwise unacceptable piece of work will not support an unearned good grade. A student assigned to paint a portrait of someone they admire is certainly permitted to hand in a portrait of Jesus Christ, but if it is poorly rendered and not responsive to the requirements of the assignment, the teacher is justified in giving a low grade.

d. Religious expression and dress codes.

Religious dress code policies are increasingly subject to challenge under state laws such as the Texas Religious Freedom Restoration Act, but there are also Free Speech, Free Exercise, Establishment Clause and TRVAA implications in many of these challenges. Generally, in requiring religious exemptions from dress codes, the Courts are showing great deference to claims of a "sincerely held religious belief."[103]

2. Absence for religious worship or instruction

Attendance policies are also an issue to be considered in light of TRFRA. Catholic students, for example, may request time off to worship on holy days of obligation. Similarly, Muslims may request accommodation to participate in the obligatory Friday prayers, or Jumu'ah. Some schools have attempted to accommodate this practice by providing an empty classroom for students, and time off from class to conduct the prayers. These might seem to be reasonable responses under TRFRA, but they could also pose problems in other areas, such as the Equal Access Act or the Establishment Clause.

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[101] *Morgan* emphasizes that, "Accordingly, the principals were not permitted to discriminate on the basis of viewpoint; yet, in each incident the principals allegedly censored speech solely because it expressed a religious message." *Id.* at 409. *See also Hill v. Colorado*, 530 U.S. 703, 707-10 (2000) (finding no unconstitutional content-based discrimination where a statute restricting anti-abortion speech was not adopted "because of disagreement with the message [conveyed]"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that "the principal inquiry in determining content-neutrality … is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys").

[102] This discussion was, like some of Judge Elrod's other more controversial claims, relegated to a footnote. *See Morgan*, 659 F.3d at 407 n.23.

[103] Examples of such deference: A kindergartener boy was allowed to wear long hair in deference to his Native American heritage and even the school's attempt to require the hair to be in a bun or a braid tucked behind his shirt was deemed unacceptable (*A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010)); Wearing rosaries on the outside of a uniform deemed acceptable despite school's concern that the rosary was a gang symbol in that community (*Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997)); A Muslim middle school girl was allowed to wear a hijab, or headscarf (*Hearn v. Muskogee Sch. Dist.*, No. 6:03-cv-00598 (E.D. Okla. filed Oct. 28, 2003)); and, in perhaps the most striking example, a high school girl was permitted to wear a nose stud, claiming membership in the Church of Body Modification; the church has a website and claims 3,500 members nationwide (*Iacono v. Croom*, No. 5:10-CV-416-H, 2010 U.S. Dist. LEXIS 108153 (E.D.N.C. Oct. 8, 2010)).

3. Religious expression by teachers.

A teacher's right to engage in speech at school is reconciled with the employer's right to protect its own legitimate interests in performing its mission. On multiple occasions, courts have held that freedom of speech does not entitle teachers to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.[104] Recently, the Ninth Circuit held that a math teacher's freedom of speech rights were not violated when the school ordered him to take down banners in his classroom that displayed in large block type: "IN GOD WE TRUST"; ONE NATION UNDER GOD"; "GOD BLESS AMERICA"; and "GOD SHED HIS GRACE ON THEE."[105] Similarly, the Fourth Circuit has held that a school board did not infringe the rights of a teacher when it ordered him to remove religious material from a classroom bulletin board.[106]

4. Religious expression by third-parties.

Generally, if a school is asked to distribute any literature with religious content – by a student, parent or third party – the school must treat the request the same as any other request containing no religious content. The federal Equal Access Act applies here, and the school should treat a literature distribution request in the same manner it treats a request for use of its facilities: every request must be treated the same, regardless of the content. By permitting literature distribution on campus, the school is creating a "limited public forum," and it must be viewpoint neutral in its distribution of literature.[107] It can impose reasonable time, manner and place restrictions and it should prohibit school staff from being involved in the distribution.[108] For example, a school might require all materials to be set on a table in the front office, or that distribution can never take place during instructional time. However, as a word of caution, some courts have concluded that school districts may or, in some cases, must prohibit materials that contain "proselytizing" language. It does not appear that such restrictions will be permitted in the Fifth Circuit, though the issue is undecided.

B. Activities at school related to religion.

1. Instruction with religious content

In 2007, Texas adopted a law that authorizes schools to offer a high school course on the Bible;[109] however, the issue of what type of religious topics can and cannot be taught in the classroom remains controversial. In fact, the new Texas law itself requires that any course offered on the Bible comply with general constitutional law requirements. Thus, while such a course is optional, if offered, it must be for a secular purpose in an academic manner that neither fosters nor demeans any religious tenet, but instead fosters knowledge and appreciation of the role of religious heritage.[110] However, the law is relatively new, and there are very few specific guidelines as to what can and cannot be included in the Bible curriculum.[111]

The same general guidelines apply to any religious content in any course: the content must have a secular purpose and not promote one religion over another. For example, the courts have held that a school may include religious literature, music, drama, and arts in its curriculum and its school activities when the material has secular value independent of its religious content. For example, a school choir can

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[104] *Brammer-Hoelter v. Twin Peaks Charter Acad*., 492 F.3d 1192, 1204 (10th Cir. 2007); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007); *Mayer v. Monroe Cnty. Cmty. Sch. Corp*., 474 F.3d 477, 479-80 (7th Cir. 2007).

[105] *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011).

[106] *Lee v. York County Sch. Div*., 484 F.3d 687, 700 (4th Cir. 2007)

[107] Some examples: A school district's refusal to allow distribution of camp brochures expressing a religious viewpoint was unconstitutional (*Hills v. Scottsdale Unif. Sch. Dist. No. 48*, 329 F.3d 1044 (9th Cir. 2003) (per curiam)); A Christian youth group was permitted to access a school's distribution system for distributing and posting nonschool materials to students (*Child Evangelism Fellowship of N.J. v. Stafford Twp. Sch. Dist.* 233 F. Supp 2d 647 (D.N.J. 2002);

[108] For example, a Florida School District implemented guidelines for the distribution of books and literature that required them to be available to students only at a designated location, that all faiths be allowed to provide materials, and that school staff not be permitted to participate in any way in the distribution. *Meltzer v. Bd. of Public Instruction of Orange County, Florida*, 577 F.2d 311, 313-314 (5th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979).

[109] TEX. EDUC. CODE § 28.011 (the law is described above in the section entitled, "Texas Education Code Mandates").

[110] *See Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) (Pennsylvania law mandating daily reading of a Bible passage declared a violation of the Establishment Clause); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (Arkansas law prohibiting the teaching of evolution violated the Establishment Clause).

[111] California has developed a fairly comprehensive plan for instruction on religious topics, which might offer some guidance for Texans. *See* California Department of Education, *History-Social Science Framework for California Public Schools: Kindergarten through Grade Twelve* 207-11 (2005), *available at* http://www.cde.ca.gov/ci/cr/cf/documents/histsocsciframe.pdf.

include religious songs in its repertoire if those songs have musical merit.[112]

2. Inviting clergy to school or school events

The entire line of "prayer in public schools" cases have made it clear that schools cannot invite clergy to say prayers at public events, nor can it sponsor a Baccalaureate service for graduating Seniors.[113] However, privately organized Baccalaureate services are clearly constitutional. A few cases have arisen wherein schools have invited clergy to some program or activity. For example, the Beaumont Independent School District had a "clergy in schools" program, which placed clerical volunteers from the community in the school district's primary and secondary schools to counsel and mentor students on secular topics. The program was held to violate the Establishment Clause because it did not include non-religious counselors in its program, and thereby favored religion over non-religion.[114]

3. Pledges of Allegiance and moments of silence

As noted above, the Texas Education Code now mandates daily recitation of the Pledges of Allegiance to the U.S. and Texas flags, followed by a one-minute moment of silence.[115] However, in accordance with Supreme Court precedent, students are permitted to opt-out of reciting the pledges of allegiance.[116]

During the moment of silence, a student "may, as the student chooses, reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student."

In order for a moment of silence to be Constitutional it must meet a three part test: it must have at least some secular purpose, its primary effect cannot be to advance or inhibit religion, and the law must not foster an excessive government entanglement with religion.[117] If there is no secular purpose, then a court need not analyze the remaining two factors.[118] In 2010, the Fifth Circuit Court of Appeals upheld the pledge recitation requirement and also found that the recent addition of "under God" to the Texas pledge was constitutional.[119] The moment of silence is constitutional because it had secular purposes: fostering patriotism and providing a period for thoughtful contemplation.[120] The court found that the obvious purpose of the pledge was to foster patriotism.[121] Over the past twenty years, federal circuit courts have consistently upheld state pledge statutes.[122]

Additionally, the court also held that there was no evidence that the moment of silence's primary effect was to advance religion, as students could do other silent activities besides praying.[123] In another case from the Seventh Circuit in which a moment of silence statute was upheld, the court found that it was not required that the statute expressly allow for "other silent activity" in order for the statute to be considered Constitutional.[124] Finally, the Fifth Circuit, in its review of the issue, found that having teachers enforce silence did not entail an excessive government entanglement with religion.[125]

In short, moments of silence are permissible if their purpose is not solely to allow prayer in schools.[126]

4. Prayer at school board meetings.

Many public school board meetings open with a prayer. Courts that have considered the issue have had to decide whether these prayers should be treated under the line of cases dealing with "school sponsored

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[112] *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995); *Bauchman v. W. High Sch.*, 132 F.3d 542 (10th Cir. 1997).

[113] *See Lee v. Weisman*, 505 U.S. 577, and *Santa Fe Indep. Sch. Dist. v. Doe*, both discussed above.

[114] *Oxford v. Beaumont Indep. Sch. Dist.*, 224 F. Supp. 2d 1099 (E.D. Tex. 2002), following *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462 (5th Cir. 2001).

[115] TEX. EDUC. CODE § 25.082.

[116] *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (state law requiring students to say pledge of allegiance unconstitutional because it compelled the speech of students).

[117] *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971); *Wallace v. Jaffree*, 472 U.S. 38, 55-56 (1985).

[118] *Wallace*, 472 U.S. at 56.

[119] *Croft v. Perry*, 624 F.3d 157 (5th Cir. 2010); companion case at *Croft v. Governor of Tex.*, 562 F.3d 735 (5th Cir. 2009).

[120] *Croft v. Governor of Tex.*, 562 F.3d at 746.

[121] *Id*. at 747.

[122] *Freedom from Religion Found. v. Hanover Sch. Dist*., 626 F.3d 1, 15 (1st Cir. 2010), *cert. denied sub nom. Freedom From Religion Found. v. United States*, No. 10-1214, 131 S. Ct. 2992 (2011) (holding that a voluntary, teacher-led recitation of the Pledge by New Hampshire's public school students does not violate the Constitution). In *Wallace*, the Supreme Court struck down Alabama's moment of silence statute, but that was based on the unusual facts of that case – namely, that the State admitted that the *only* purpose of the statute was to reintroduce prayer into public schools. *Wallace*, 472 U.S. at 56-57, 61.

[123] *Croft v. Governor of Tex.*, 562 F.3d at 749-750.

[124] *Sherman v. Koch*, 623 F.3d 501, 516-517 (7th Cir. 2010).

[125] *I Croft v. Governor of Tex.*, 562 F.3d at 750.

[126] *Wallace*, 472 U.S. at 56-57, 61.

prayer," which is prohibited by the Establishment Clause (discussed above) or rather the prayer of a "legislative and deliberative body," which is generally permitted. Though there are cases that tend to treat these prayers the same as any other school sponsored prayer and to find them unconstitutional, it is still an open question in the Fifth Circuit whether these prayers are unconstitutional.[127]

5. Displays of the Ten Commandments

Many cases throughout the country have been brought against schools and other entities protesting the public display of the Ten Commandments or displays expressing founding principles of the law that make reference to God. There is no clear consensus among the courts, but the underlying principle is that the display must have been initiated and implemented with a secular purpose. Of note, a district court in Rhode Island recently ordered the immediate removal of a prayer mural from the auditorium of a public high school for violating the establishment clause.[128] The Supreme Court has noted (in a 10 Commandments Case originating in Texas) that courts should be "especially vigilant" in Establishment Clause cases in elementary and secondary schools.[129]

6. Holiday Ceremonies/Parties

The United States Supreme Court has determined that schools may celebrate the holidays and create displays as long as they do so within "the context of the Christmas season" and the religious component of their display does not dominate but simply represents one element of a holiday that has obtained secular status in our society.[130] Thus, Christmas programs that include Christmas carols such as "Silent Night" and "O Come All Ye Faithful" do not violate the Establishment Clause so long as the program is part of the educational efforts of the school.[131] Likewise, religious symbols "may be used only as a teaching aid or resources and only if they are displayed as part of the cultural and religious heritage of the holiday and are temporary in nature."[132]

IV. LEGISLATIVE PRAYER

In general, government-sponsored prayer in opening legislative sessions is constitutionally permissible. In *Marsh v. Chambers*, the Supreme Court noted an exception to traditional Establishment Clause analysis: the Supreme Court upheld the Nebraska state legislature's practice of beginning each session with a prayer from a chaplain paid by the state, because the opening of legislative sessions with the recitation of prayer is deeply embedded in the "unique history" and tradition of this country.[133] The Court went on to observe that "[t]he content of the prayer is not of concern to judges" when "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[134] In *County of Allegheny v. ACLU*, the Supreme Court noted that legislative prayers that have the effect of affiliating the government with a specific faith or belief do not pass constitutional muster under the *Marsh* analysis.[135]

In the one case where the Fifth Circuit was presented with the issue, *Doe v. Tangipahoa Parish School System*, the case was ultimately decided on standing grounds only.[136] In 2003, "John Doe" filed suit in federal court against the School System, alleging that their practice of opening School Board meetings with a prayer violated the Establishment Clause. The district court held that the School Board's practice was unconstitutional and enjoined them. On appeal, a three-judge panel was divided three ways, when it affirmed in part, holding that the School Board's practice of opening its meetings with a sectarian Christian prayer fell outside the *Marsh* legislative prayer exception. But on rehearing *en banc*, the Fifth Circuit reconsidered and held that the district court record contained insufficient evidence that the plaintiff Doe had ever attended any Board meetings; the Court of Appeals vacated and remanded the divided panel decision on the single ground that the plaintiff had not proved standing to bring suit.[137]

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[127] See *Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011); *Marsh Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999). The only time the issue has been presented to the Fifth Circuit Court of Appeals, the Court found that the Plaintiffs had no standing to sue because there was no evidence that they ever attended the school board meetings (*Doe v. Tangipahoa Parish Sch. Sys.*, 494 F. 3d 494 (5th Cir. 2007)).

[128] *Ahlquist v. City of Cranston*, C.A. No. 11-138L, 2012 U.S. Dist. LEXIS 3348 (D.R.I. Jan. 11, 2012).

[129] *Van Orden v. Perry*, 545 U.S. 677 (2005).

[130] *Lynch v. Donnelly*, 465. U.S. 668, 679, and 691 (1984).

[131] *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).

[132] *Id.* at 1317.

[133] *Marsh v. Chambers*, 463 U.S. 783, 790-93 (1983).

[134] *Id.* at 794-95.

[135] *County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989) ("not even the 'unique history' of legislative prayer…can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief.").

[136] *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 197, 205 (5th Cir. 2006), *vacated on reh'g en banc*, 494 F.3d 494 (5th Cir. 2007).

[137] *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 499

Other Circuit courts have varied in how they have applied the *Marsh* decision. Some courts have applied *Marsh*, deciding that prayers must be nonsectarian.[138] Other courts have stopped short of holding that *Marsh* commands that legislative prayer must be nonsectarian or prohibits invocations of "particular concepts of God," but rather courts should focus on whether the prayer opportunity has been exploited to proselytize and/or disparage other religious views.[139]

V. PUBLIC DISPLAYS

The Supreme Court's most recent foray into the realm of Ten Commandments monuments illustrates, it remains remarkably unclear as to how local governments should evaluate the chance that a specific display will violate the Establishment Clause.

One June 27, 2005, the Supreme Court issued its rulings in two cases involving displays of the Ten Commandments on public property, holding one constitutional and the other not. *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).

In *McCreary*, a majority of the Supreme Court held that the Ten Commandments displays at two courthouses in Kentucky were unconstitutional, pursuant to the Establishment Clause. In so holding, the Supreme Court reaffirmed that one of the essential elements of determining constitutionality under the Establishment Clause is the purpose of the act. The Court held that "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." The Court also held that the history of the community and the development of the display helps in determining the purpose. The Court even went so far as to admit that identical displays could have differing results depending on the surrounding historical circumstances they led to the display.

In *Van Orden*, there was no majority and Justice Breyer's opinion is controlling. Four justices, with Justice Breyer concurring in the judgment, held that the display of the Ten Commandments at the Texas State Capitol is constitutional under the Establishment Clause. In essence, Justice Breyer concluded that because the display had been on the Capitol grounds for approximately 40 years before any complaints were made, it is not perceived as an endorsement of religion and does not violate the Establishment Clause.

In light of these rulings, it is apparent that Justice Breyer is correct when he states that "no exact formula can dictate [the] resolution" of these sorts of cases. On this point, the Fifth Circuit has noted that, "[i]n determining the constitutionality of a religious display, the Supreme Court has made clear that 'under the Establishment Clause detail is key.'"[140]

In *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), the Supreme Court considered a Free Speech Clause challenge to a display that included the Ten Commandments, and concluded that monuments on government property are government speech, which is not subject to the First Amendment Free Speech Clause.[141] In that case, a little-known religious organization requested permission to erect a stone monument in a park that contained several other donated monuments, including a stone Ten Commandments monument. The organization brought suit against the City and local officials claiming that defendants violated the Free Speech Clause by accepting the Ten Commandments monument while rejecting the organization's "Seven Aphorisms" monument.

The Court concluded that the City's decision to accept certain privately donated monuments while rejecting the plaintiff's monument was a form of government speech, and thereby not subject to the Free Speech Clause. The permanent monument displays, as opposed to the transitory expressive acts and traditional

(5th Cir. 2007) (en banc).

[138] *See, e.g., Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006) (citing *Doe v. Village of Crestwood*, 917 F.2d 1476, 1479 (7th Cir. 1990)), later reversed and remanded with instructions to dismiss for lack of standing, *Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly*, 506 F.3d 584, 585 (7th Cir. 2007); *Bacus v. Palo Verde Unif. Sch. Dist. Bd. of Educ.*, 52 Fed. Appx. 355 (9th Cir. 2002) (unpublished)

[139] *See e.g., Turner v. City Council of the City of Fredericksburg, Va.*, 534 F.3d 352 (4th Cir. 2008); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1233-34, 1234 n.10 (10th Cir. 1998) (en banc) (city was "within its rights under *Marsh*" to deny permission to speaker to recite his proposed prayer, where prayer "aggressively proselytize[d] for his particular religious views and strongly disparage[d] other religious views"); *Pelphrey v. Cobb County, Georgia*, 547 F.3d 1263, 1271 (11th Cir. 2008) (to read *Marsh* as allowing only nonsectarian prayers "is at odds with the clear directive by the [Supreme Court] that the content of the legislative prayer "is not of concern to judges where. . .there is no indication that the prayer opportunity has been exploited to proselytize or advance any one. . .faith or belief'").

[140] *Staley v. Harris County*, 485 F.3d 305, 308 (5th Cir. 2007) (en banc) (*quoting McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 867-68 (2005) (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989)) (Fifth Circuit dismisses appeal of district court's order to remove a display of a Bible in a monument on the County's courthouse grounds as moot, because the County, without prior warning, put the display in storage for renovation of the courthouse just days before en banc oral argument).

[141] In his concurrence, Justice Scalia noted that the Ten Commandments display in this case would also pass muster under the establishment clause in light of *Van Orden*. *Id*, at 483 (Scalia, concurring).

public forum speeches that commonly took place in the park, were government speech and not a form of expression to which the analysis applied.

The Supreme Court recently denied certiorari in the *Mount Soledad Memorial* case.[142] This case out of the Ninth Circuit concerns a 43-foot high cross that has stood atop the now federally-owned Mt. Soledad Memorial in San Diego since 1954. The Memorial was originally private, then it belonged to the City of San Diego, and now it belongs to the federal government. A three-judge panel originally held that the cross conveys a government endorsement of religion in violation of the Establishment Clause. The Ninth Circuit refused en banc review, and the plaintiff's petitioned for certiorari.

While the Supreme Court refused to hear the case due to its interlocutory posture, Justice Alito hinted that the Court might grant certiorari in the future, emphasizing that "[t]his Court's Establishment Clause jurisprudence is undoubtedly in need of clarity,"[143] and that "[o]ur denial, of course, does not amount to a ruling on the merits, and the Federal Government is free to raise the same issue in a later petition following entry of a final judgment."

[142] *Mount Soledad Memorial Ass'n v. Trunk*, Cause No. 11-990, and *United States v. Trunk*, Cause No. 11-1115, 132 S. Ct. 1810 (2012).

[143] See also Justice Thomas's dissent to denial of certiorari in *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 22 (2011) ("It is difficult to imagine an area of the law more in need of clarity").