THE FIRST AMENDMENT AND LOCAL GOVERNMENT REGULATIONS

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FIRST AMENDMENT REGULATION

I. INTRODUCTION[1]

The First Amendment to the United States Constitution is one of the most significant and wide-reaching limitation on the activities, practices and regulations of local governments. It effects areas as wide ranging as the way public meetings are conducted, the types of zoning regulations that are permissible, the rights of prisoners, and the rights of employees and students.

The First Amendment to the United States Constitution provides that

> 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.

U.S. Const. Amend. I. The Supreme Court has made this amendment applicable to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

This paper focuses on the aspects of the First Amendment that relate to local government regulations. The paper is divided into three basic sections: (1) free speech rights; (2) assembly and petition rights; and (3) free exercise rights and the establishment clause limitations. Because of its relationship to free exercise/religious rights, the paper also discusses recent legislation, such as the Religious Land Use and Institutionalized Persons Act (RLUIPA), that is changing the way religious freedom issues are litigated.

II. FREE SPEECH RIGHTS

The First Amendment right of free speech (sometimes referred to as the right of free expression) is intended to remove governmental restraints from the arena of public discussion. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969).

As a general matter, the Free Speech clause means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content; however, this principle, like other First Amendment principles, is not absolute. *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002). The principles of this amendment are not to be treated as a promise that every one with opinions or beliefs to express may gather around him at any public place, and at any time, a group for discussion or instruction. *Poulos v. State of N.H.*, 345 U.S. 395, 405 (1953). The right of free speech is not an unlimited, unqualified right; the societal value of the speech must on occasion be subordinated to other values and considerations. *Dennis v. United States*, 341 U.S. 494, 503 (1951).

A. Forum Analysis and Content Discrimination

The first level of analysis in the Free Speech context is determining whether there is any Free Speech right in the particular location or forum. This analysis, however, only applies to public spaces such as parks, streets, government buildings, and schools. These are not actual limitations on Free Speech rights, but merely a recognition that individuals have limited (or no) free speech rights in certain forums.

Constitutional jurisprudence identifies four types of forums for speech that exist in the public sphere: (1) traditional public forums; (2) designated public forums; (3) limited public forums; and (4) non-public forums. *Chiu v. Plano Independent School District*, 260 F.3d 330 at 344-46 (5th Cir. 2001) (discussing the original three part formula for analyzing public forums, and concluding that a fourth forum, the "limited use" public forum, is recognized). "Traditional public forums" are places which "'by long tradition or by government fiat have been devoted to assembly or debate'", such as streets and parks. *Id.*, at 344 (*quoting Estiverne v. Louisiana State Bar Association*, 863 F.2d 371 at 376 (5th Cir. 1989)). "Designated public forums" include two distinct types; those that are open generally to the public at large for any assembly and speech, and those that are open to particular persons or for particular kinds of speech (known as "limited public forums"). *Id.*, at 345-46; *Good News Club v. Milford Central School*, 533 U.S. 98 at 106-07 (2001). "Nonpublic forum" refers to public property that is not by tradition open for public communication, nor has been designated as such by the government. *Chiu*, 260 F.3d at 347; *See also Perry Educ. Assoc. v. Perry Local Educators'Assoc.*, 460 U.S. 37, 48-49 (1983).

[1] It is important to give credit where credit is due. In that regard, I would like to thank my associate Joshua Skinner, Esq. for doing the lion share of the research and writing for this paper. I would also like to thank my partner, Steve Henninger for agreeing to present the paper, and thereby, freeing me to fulfill my commitment to a bunch of Boy Scouts to go backpacking in the mountains of New Mexico.

In making the determination whether a forum has been designated in a general sense or in a limited sense, the Court should look at two factors: (1) the intent of the government with respect to the forum; and (2) the nature of the forum and its compatibility with the speech at issue. *Chiu*, 260 F.3d at 346 (*quoting Estiverne*, 863 F.2d at 378). The intent of the government is the primary factor. *Id*.

Restrictions on speech in limited forums are permissible provided the restriction (1) does not discriminate on the basis of viewpoint and (2) is reasonable in light of the purpose served by the forum. *Milford Central School*, 533 U.S. at 106-07; *Chiu*, 260 F.3d at 346.

In the limited public forum sphere, it is recognized that content discrimination is permissible, as opposed to viewpoint discrimination directed against speech that otherwise falls within the subjects to which the forum has been opened. *Rosenberger v. Rector and Visitors of the University of Virginia*, 519 U.S. 819 at 829-30 (1995); *Milford Central School*, 533 U.S. at 104 (noting the Second Circuit's finding that the school's actions were "constitutional subject discrimination, not unconstitutional viewpoint discrimination."); *Chiu*, 260 F.3d at 354 (noting the Constitutional viability of policies of exclusion that "present a legitimate content based (but not viewpoint-based) distinction capable of surviving First Amendment scrutiny."); *See also Perry Educ. Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 48-49 (1983) (discussing limitations based on the subject matter and speaker identity).

Thus, if the public forum the individual wishes to speak in is not a public forum and has not been opened for discussion on the subject the individual wishes to discuss, there is no Free Speech right and the courts should not need to do further analysis. This is not always the case, however. In *Chiu*, the Fifth Circuit summarized the principles of forum analysis, but then jumped to the accusation that the school district had practiced viewpoint discrimination. *Chiu*, 260 F.3d at 349 ("Our inability to resolve the forum question on this summary judgment record does not affect our resolution of this appeal, however, because Plaintiffs have alleged viewpoint discrimination"). While technically, viewpoint discrimination is impossible unless the individual has a right to speak in the particular forum, the mere fact that the plaintiffs made that allegation would not seem to have been sufficient proof that they actually did have a right to speak in the particular forum. *See Perry*, 460 U.S. at 48-49.

B. The Tests for Limiting Free Speech Rights

The Supreme Court has established two general tests for considering the circumstances under which Free Speech rights may be limited: (1) the "time, place, manner" test and (2) the *O'Brien* test. *See Clark v. Comm. For Creative Non-Violence*, 468 U.S. 288, 294-299 (1984) and *United States v. O'Brien*, 391 U.S. 367 (1968). The "time, place, manner" test was developed for evaluating restrictions on expression taking place on public property which had been dedicated as a "public forum." *Barnes v. Glen Theatre*, 501 U.S. 560, 566 (1991) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Also, this test has been used to apply to conduct occurring on private property. *Barnes*, 501 U.S. at 566 (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)). The *O'Brien* test appears to have been developed primarily to address regulations that regulate forms of symbolic expression. *See O'Brien*, 391 U.S. at 367; *Clark*, 468 U.S. at 294.

As the Supreme Court has noted, despite the somewhat differing origins of the two tests, they are basically designed to determine the same issues. *Clark*, 468 U.S. at 298-299 (the *O'Brien* test "is little, if any, different from the standard applied to time, place, or manner restrictions"); *Barnes*, 501 U.S. at 566. As a result, the use of the two tests seems to be somewhat arbitrary. *See Clark*, 468 U.S. at 298, n. 8 ("We note that only recently, in a case dealing with the regulation of signs, the Court framed the issue under *O'Brien* and then based a crucial part of its analysis on the time, place, or manner cases. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804-805, 808-810 (1984)"); and *Barnes*, 501 U.S. at 566-567 (noting that the two tests are "much the same standard" and then using the *O'Brien* test without further explanation).

The "time, place, manner" test provides a four-part method for determining whether a regulation runs afoul of the First Amendment: (1) if it is a time, place and manner regulation; (2) if the regulation is content neutral (related to the speech's secondary effects rather than the content of the speech itself); (3) if the regulation is designed to serve a substantial governmental interest; and (4) leaves open reasonable alternative avenues of communication. *Clark*, 468 U.S. at 294-299; *See also N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162, 173 (5th Cir. 2003); *City of Los Angeles v. Alameda Books*, 535 U.S. 425 at 433-34 (2002); *City of Renton v. Playtime Theaters, Inc*., 475 U.S. 41 at 47 (1986). If the speech is not content-neutral, it is subject to strict scrutiny. *Id*.

O'Brien states that a regulation does not run afoul of the First Amendment (1) if it is within the Constitutional authority of the government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377.

The following discussion illustrates the manner in which the Supreme Court and the Fifth Circuit have applied the Free Speech clause in differing contexts.

C. Demonstrators, Public Events, and Other Public Forums

1. Perry Educ. Assoc. v. Perry Local Educators' Assoc.

In *Perry Educ. Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37 (1983), the Supreme Court considered the constitutionality of a collective-bargaining agreement between the school district and the Perry Education Assoc. (PEA) that the PEA would be permitted to use the interschool mail system, but that no other union, including the Perry Local Educators' Assoc. (PLEA), would be permitted to use it. *Perry*, 460 U.S. at 38-39. The PEA was the duly elected exclusive bargaining representative for the teachers in the district. *Id.* The PLEA contended that the school district cannot allow PEA to use the mail system, but not PLEA, because that would constitute viewpoint discrimination. *Id.* at 46-51. The Supreme Court held that, even assuming that the district had created a limited public forum, it was not a forum open to the PLEA. The Supreme Court argued that the collective-bargaining agreement discriminated based on the status of the two unions, not because they had differing viewpoints. *Id.* at 49

> Implicit in the concept of a nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property.

Id.

In addition, the forum was not designated as open to the public purely because the district allowed occasional use of the mail system by non-school related organizations. *Id.* at 46-47 (citing *Greer v. Spock*, 424 U.S. 828, 838 n. 10 (1976), "the fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not convert the military base into a public forum").

2. Clark v. Comm. For Creative Non-Violence

In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the U.S. Supreme Court considered the constitutionality of a National Park Service regulation prohibiting camping in certain parks. The Community for Creative Non-Violence received a permit to hold a protest rally in Lafayette Park to "demonstrate the plight of the homeless." *Clark*, 468 U.S. at 291-292. The Park Service specifically noted that they could not sleep at the rally site, pursuant to a Park Service regulation. *Id.* at 292.

The Supreme Court concluded that the regulation is a valid time, place, and manner restriction, while at the same time stating that the *O'Brien* test applied. *Id.* at 293-294. The Court noted that the regulation does not ban sleeping in all parks, *Id.* at 295, nor is it unrelated to the substantial interest in maintaining the parks "in the heart of our Capital in an attractive and intact condition." *Id.* at 296. The Court also noted that mere disagreement with the Park Service concerning the best way to regulate such demonstrations is an insufficient basis for finding the regulation unconstitutional. *Id.* at 299.

3. Ward v. Rock Against Racism

In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) , the Supreme Court upheld a New York City ordinance regulating the sound volume of music at an amphitheater in Central Park in order to prevent the noise from intruding on those in nearby areas of the park or in nearby residences.

The Court held that the regulation was a valid "time, place, and manner" restriction because the "principal justification for the sound-amplification guidelines is the city's desire to control noise levels." *Ward*, 491 U.S. at 792. In addition, the Court held that the city has a substantial interest in protecting its citizens from unwelcome noise, whether that noise is affecting residences or public parks. *Id.* at 796. In regards to the narrow tailoring requirement, the Court held,

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate interest, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. … So long as the means chosen are not substantially broader than necessary to achieve the government's interest … the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

Id. at 798-800 (citations omitted).

D. Sexually Oriented Businesses

The Fifth Circuit's latest opinion on evaluating sexually oriented business (SOB) regulations indicates that an ordinance is examined using a "time, place, manner" test, which considers:

(a) whether the sexually oriented business zoning ordinance is a time, place and manner regulation;
(b) whether the ordinance is aimed at the content of sexually-oriented speech (content-based) and thus subject to strict scrutiny, or at the speech's secondary effects on the community (content-neutral) and thus subject to intermediate scrutiny; and, if content-neutral,
(c) whether the ordinance is designed to serve a substantial governmental interest; and
(d) leaves open reasonable alternative avenues of communication.

N.W. Enterprises, Inc. v. City of Houston, 352 F.3d 162, 173 (5th Cir. 2003); *City of Los Angeles v. Alameda Books*, 535 U.S. 425 at 433-34 (2002); *City of Renton v. Playtime Theaters, Inc*., 475 U.S. 41 at 47 (1986).

1. Time, Place, and Manner Regulations

A regulation is a time, place, and manner regulation if it does not ban the sexually oriented businesses altogether, "but merely require[s] that they be distanced from certain sensitive locations." *Alameda Books*, 535 U.S. at 434; *City of Renton*, 475 U.S. at 46. "Sensitive locations" can include residential areas, churches, parks, schools, and other sexually oriented businesses. *Id.*

2. Content-Neutrality

A time place, and manner regulation is content neutral if it is "narrowly tailored to serve a significant government interest, and leaves open ample alternative avenues of communication." *Frisby v. Schultz*, 487 U.S. 474 at 481 (1988). Under *Renton*, "zoning ordinances designed to combat the undesirable secondary effects of sexually oriented businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." *Renton*, 475 U.S. at 49. The Supreme Court has held that regulations predominantly aimed at only the secondary effects of particular expression are content-neutral and subject to intermediate scrutiny. *Alameda Books*, 535 U.S. at 434. Furthermore, Justice Kennedy, even while taking issue with the term "content-neutral," nevertheless concluded that intermediate scrutiny should be applied "so long as a municipal regulation does not ban the protected speech." *Id.* at 448 (Kennedy, J.); *N.W. Enterprises, Inc.*, 352 F.3d at 174.

Thus, in determining content-neutrality, the Fifth Circuit has held that the inquiry is whether the "predominate concerns" of a contested regulation were with the secondary effects of speech, rather than content. *N.W. Enterprises, Inc.*, 352 F.3d at 173-174 (quoting *Alameda Books*, 535 U.S. at 440-41). The legislative body is not required, however, to prove that the particular city is suffering secondary effects, nor is it required to prove that the regulation will be effective:

> The standard of constitutional scrutiny, after *Alameda Books* and taking into account Justice Kennedy's concurrence, is simply whether [the ordinance] addressed secondary effects of adult speech, as demonstrated by the legislative records submitted by the City. Even before *Alameda Books*, however, neither the Supreme Court nor this court required proof of the efficacy of an ordinance in order to determine the constitutional review standard.

Id. at 174.

> To require the legislature to show evidence of negative secondary effects and of the new regulations' efficacy requires too much of the City at this stage in the inquiry. Disputes over the effectiveness of the proposed regulations are properly reserved for the final prong of the *Renton* analysis.

Id. at 175; see also *Alameda Books*, 535 U.S. at 441 ("Only at [the third stage inquiry into whether a regulation serves a substantial governmental interest] did *Renton* contemplate that courts would examine evidence concerning regulated speech and secondary effects."). The Court is only to look at the expressed purposes of the ordinance to determine content-neutrality, not conduct any evidentiary analysis. *NW Enterprises*, 352 F.3d 174-175; *Alameda Books*, 535 U.S. at 440-41.

But even if the local government did not have evidence when the ordinance was enacted, that does not necessarily put the local government at a disadvantage. "[T]he City need not demonstrate that the City Council actually relied upon evidence of negative secondary effects when it enacted [its ordinance]. A local government can justify a challenged ordinance based both on evidence developed prior to the ordinance's enactment and that adduced at trial." *NW Enterprises*, 352 F.3d at 175 (citing *J&B Entm't, Inc. v. City of Jackson, Miss.*, 152 F.3d 362 at 371-72 (5th Cir. 1998)).

3. Substantial Governmental Interest

In evaluating whether a city ordinance is designed to serve a substantial governmental interest, Justice Kennedy describes the analysis as involving two basic questions. First, the court should ask, "What proposition does a city need to advance in order to sustain a secondary-effects ordinance?" *City of Los Angeles v. Alameda Books*, 535 U.S. 444 at 449 (2002) (Kennedy, J., concurring). Second, the court should ask, "How much evidence is required to support the proposition?" *Id.*

a. Substantial Government Interest Unrelated to the Suppression of Free Expression

In this regard, an admonition from the Supreme Court is instructive. "Our appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the statute may be constitutional." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring); see also *N.W. Enterprises*, 352 F.3d at 175.

An incidental burden on speech is permissible, so long as the neutral regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985). "[S]uch regulations [are not] invalid simply because there is some imaginable alternative that might be less burdensome on speech." *Id.* ; see also *LLEH, Inc. v. Wichita County, Texas*, 289 F.3d 358, 367-68 (5th Cir. 2002). It is not within a court's jurisdiction to base its ruling on its determination of "the most appropriate method for promoting [the] government interest." *Id.*

b. Evidence Reasonably Believed to be Relevant

In regards to the evidentiary analysis, the local government bears the burden of "providing evidence that supports a link" between the conduct regulated and asserted secondary effects. *Alameda Books*, 535 U.S. at 437 (plurality). Local governments are entitled to rely on a variety of sources, including prior precedent, studies conducted for other cities, studies conducted for the particular city, and the experience of those living in the city, including the council members themselves. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 297 (2000) (plurality) (prior precedent and experience of citizens, including council members); *City of Renton*, 475 U.S. at 51 (studies conducted for the particular city and for other cities).

More generally, the municipality "may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Alameda Books*, 535 U.S. at 438 (plurality). Furthermore, while cities *may* rely on empirical data, they are *not required to*, both because they are allowed to experiment in order to solve the serious problems associated with adult businesses, and because they are already familiar with their own local problems. *Id.* at 439-440 (plurality). Finally, as Justice Kennedy commented in *Alameda*, there is a high level of deference to legislative findings and "very little evidence is required" in order to uphold the ordinance at this initial stage. *Id.*, at 451 (Kennedy, J. concurring). This deference derives from a balance of the interests of First Amendment rights and the authority of local governments to assess, analyze, and address local problems and issues. *Alameda Books*, 535 U.S. at 440; *NW Enterprises, Inc.*, 352 F.3d at 180. Thus, "legislators cannot act, and cannot be required to act, only on judicial standards of proof." *NW Enterprises, Inc.*, 352 F.3d at 180.

In a case our office is currently litigating, the plaintiffs (a topless bar) have made a novel argument in regards to *Alameda* and the Fifth Circuit decision *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003). The plaintiffs contend that these cases represent agreement with Justice Souter's dissent in *Alameda*, stating that the courts should require a heightened level of investigation as to the evidentiary bases for these laws. In *Alameda*, however, the plurality commented on Justice Souter's attempt to raise the evidentiary standard: "Justice Souter asks the city to demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime. *Our cases have never required that municipalities make such a showing*.... Such a requirement would go too far in undermining our settled position that municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech." *Alameda Books*, 535 U.S. at 439 (citations ommitted) (emphasis added). As noted above, Justice Kennedy, in his concurrence, commented that "very little evidence is required" and that in *Alameda Books* "a single study and [the] common experience" of the city council was sufficient. *Id*., at 451-452.

As for *Encore*, the topless bar's contention that it indicates some new trend or modification of the proper evidentiary burden in the Fifth Circuit is misguided. All *Encore* says is that a city is "entitled to rely on the experiences ... of other cities ... so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Encore*, 330 F.3d at 294 (citing *Renton*). *Encore Videos* does not call into question the well established law that

> the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the

> city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Renton, 465 U.S. at 51-52. The *Renton* Court indicated that the Court of Appeals "imposed on the city an unnecessarily rigid burden of proof" when it required that the City conduct studies specifically relating to the specific problems facing that city. *Id.* at 50. The *Encore Videos* opinion does not change this, but merely indicated that the studies relied upon by City of San Antonio were not "relevant to the problem that the city addresses," as the Supreme Court has repeatedly indicated is necessary.[2]

Recent litigation involving the City of Kennedale may result in effectively overturning *Encore Videos*. Like in *Encore Videos*, the City of Kennedale had an ordinance regulating sexually oriented video stores that had no on-site viewing. The Fifth Circuit, in *Encore Videos*, noted that the studies relied upon by the City of San Antonio were insufficient to establish that there were likely to be negative secondary effects from off-site video stores (in contrast to on-site video stores). *Encore Videos*, 330 F.3d at 294-295. In a recent case in the Northern District of Texas, the City of Kennedale successfully provided studies demonstrating the negative secondary effects of off-site viewing adult video stores (*Reliable Consultants, Inc. v. City of Kennedale*, 4:05-CV-166-A). It does not appear that this case will be appealed to the Fifth Circuit, but other cities should consider referencing those or similar studies if they are wanting to regulate take-home only sexually oriented business video and book stores.

c. Irrelevant and Erroneous Factual Findings

If the local government meets their initial burden of proof, the burden shifts to the sexually oriented businesses, which must demonstrate that the challenged provisions, nevertheless, violate the First Amendment. *Alameda Books*, 535 U.S. at 438 (plurality). In order to make this showing, the SOBs must show that either: (1) the factual findings upon which the ordinance is based do not support the actual restrictions (*i.e.*, the rationale for the ordinance is not supported by the factual findings); or (2) the factual findings are themselves erroneous. *Id.* at 438-39 (plurality); *NW Enterprises, Inc.* 352 F.3d at 180-181.

If the SOBs attempt to dispute the factual findings, however, it is not enough for them to provide conflicting studies or alternate theories or conclusions. Rather, their evidence must "cast direct doubt" on the actual factual findings and studies relied upon by the City. *Pap's A.M.*, 529 U.S. at 300 (plurality) (citing *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 394 (2000) ("the closest respondents come to challenging these conclusions is their invocation of [conflicting] academic studies"); *Alameda Books*, 535 U.S. at 438 (plurality).

d. The Opportunity to Provide Additional Proof

If the SOBs can cast sufficient doubt on the local government's theory or findings, the burden of proof shift back to the municipality to provide "evidence renewing support for a theory that justifies its ordinance." *Alameda Books*, 535 U.S. at 439 (plurality).

4. Adequate Alternative Avenues of Communication

Determining whether there are adequate alternative avenues of communication differs somewhat depending on the nature of the regulation. In general, burden on an expressive activity is permissible as a minimal intrusion, if it serves a substantial interest which would be promoted less effectively in the absence of the regulations. *Albertini*, 472 U.S. at 689; *LLEH, Inc.*, 289 F.3d at 367-68; see also *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1061 (9th Cir. 1986) ("While the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired.").

In *LLEH, Inc.* the Fifth Circuit specifically addressed claims by sexually oriented businesses that there were not adequate alternative avenues of communication because they would be driven out of business. The Fifth Circuit held that the district court's finding that the "six-foot buffer would effectively close [the plaintiff's establishment] is not controlling." *LLEH, Inc.*, 289 F.3d at 368. The Court realized that the six-foot buffer zone might have a significant effect on the plaintiff's business, but noted that "regulations that burden speech incidentally or control the time, place, and manner of expression must be evaluated in terms of their *general* effect." *Id.* (quoting *Albertini*, 472 U.S. at 688-89) (emphasis in original); see also *DLS, Inc. v. Chattanooga*, 107 F.3d 403, 413 (6th Cir. 1997) (noting that the economic effects of a time, place, and manner restriction are to be considered "in the aggregate, not at the individual level..."); *Jakes Ltd., Inc. v. Coates*, 284 F.3d 884, 891-92 (8th Cir. 2002).

In *N.W. Enterprises*, the plaintiffs argued that local government's could not repeatedly alter the regulations of sexually oriented businesses. *N.W. Enterprises*, 353 U.S. at 177 ("Appellees argue that it is unconstitutional for a city to change the rules

[2] The error of the plaintiffs' assertion that *Encore Videos* heralded some "new" approach to the requisite evidentiary analysis is confirmed by the Fifth Circuit's most recent opinion on the subject, wherein the Court discussed and applied the deferential *Alameda Books* analysis set out above. See *NW Enterprises, Inc.*, 352 F.3d at 174-175 and 180-181.

repeatedly, with retroactive impact, and to affect drastically the overwhelming majority of existing adult businesses each time."). The Fifth Circuit rejected this argument noting that such a requirement would conflict with the authority reserved to cities in *City of Renton* and *Alameda Books* "to experiment with different possible solutions to municipal problems." *Id.*

Because most sexually oriented business ordinances prohibit SOBs from locating within a certain distance of residences, churches, and schools, there is a risk that the expansion of such protected uses will further reduce the available locations for SOBs.

In evaluating whether there are sufficient alternative means for communication, the courts will not consider land for which the physical of legal characteristics of the property would not allow the presence of a sexually oriented business. *Woodall v. City of El Paso*, 49 F.3d 1120, 1124 (5th Cir. 1995). The courts need not exclude, however, land that is economically unfeasible. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) ("[W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices.").

In *Renton*, the Supreme Court upheld an ordinance under which five percent of the city's acreage as available for use by sexually oriented businesses. *Id.* Under *Woodall*, however, the Fifth Circuit noted that "[w]hat is important is the number of adult business locations that the acreage will support given the spacing requirements." *Woodall*, 49 F.3d at 1125. The Fifth Circuit noted that there were at least forty locations available and only 39 businesses in 1998 and 22 in 1992. *Id.* at 1127 ("We see that, as a matter of arithmetic, there were at all relevant times more 'reasonable' sites available than businesses with demands for them.").

Thus, there appear to be two methods for determining whether there are adequate alternative avenues for communication: (1) Compare the percentage of available locations or available acreage to the total area of the City; or (2) Determine whether all available locations are being used.

E. Sign Ordinances

Cities and counties often have a significant interest in controlling and regulating outdoor signs. The conrol and regulation is typically accomplished by means of a sign ordinance. The passage of a sign ordinance, though, carries with it First Amendment implications. The Supreme Court has noted the importance of signs in the First Amendment landscape:

> The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or 'broadside' to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes.

Metromedia v. City of San Diego, 453 U.S. 490, 501 (1981) (internal citations omitted).

In the case law, sign ordinance litigation distinguishes between noncommercial signs and commercial signs. In general, commercial signs are entitled to less protection that noncommercial signs.

1. Noncommercial Signs

In the area of noncommercial signs, there does not appear to be a consistent practice in regards to the proper standard of review. On the one hand, cases such as *Metromedia* indicate that the court should use a "time, place, manner" test, with a heightened level of scrutiny in cases where the ordinance is facially discriminatory. *Id.* at 515-521. On the other hand, cases such as *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), make use of the *O'Brien* test. *Id.* at 804-805.

a. Metromedia v. City of San Diego

In *Metromedia*, the Supreme Court considered the validity of any ordinance imposing substantial prohibitions on the erection of outdoor advertising displays within the city. *Metromedia*, 453 U.S.at 493. The ordinance regulated both commercial and noncommercial signs. *Id.* at 495-496 ("Under this scheme, onsite commercial advertising is permitted, but other commercial advertising and noncommercial communications are everywhere forbidden unless permitted by one of the specified exceptions."). The Court noted that "time, place, manner" analysis is appropriate in the noncommercial context, but noted that the City of San Diego ordinance was not entitled to this intermediate level of scrutiny because it was not a "time, place, and manner" restriction. *Id.* at 515-516 ("The ordinance does not generally ban billboard advertising as an unacceptable "manner" of communicating information or ideas; rather, it permits various kinds of signs. Signs that are banned are banned everywhere and at all times.").

b. Members of the City Council v. Taxpayers for Vincent

In *Vincent*, the Supreme Court considered an ordinance prohibiting the posting of signs on public property. *Vincent*, 466 U.S. at 791-792. There was no debate in *Vincent* that the City had the authority to make such regulations and that there was no intention to suppress free expression. *Id.* at 802-804. Thus, the only remaining considerations were (1) if the ordinance furthered an important or substantial governmental

interest; and (2) if the restriction was no greater than was essential to the furtherance of that interest. *Id.* at 805 and 808. The plaintiffs in *Vincent* argued that their signs would not affect traffic and that the only interest involved was aesthetics. *Id.* at 805. The Court ultimately held,

> The problem addressed by this ordinance – the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property – constitutes a significant substantive evil within the City's power to prohibit.

Id. at 807.

The Court also concluded that the ordinance was narrowly tailored because (1) it addressed the specific problem – unsightly signs – and no more; and (2) there was no reason to believe that the limitation prevented individuals from sufficiently exercising their Free Speech in other ways. *Id.* at 808 and 812.

c. Tex. Dept. of Transp. v. Barber

In *Tex. Dept. of Transp. v. Barber*, 111 S.W.3d 86 (2003), cert. denied, 540 U.S. 1177 (2004), the Texas Supreme Court addressed a challenge to the constitutionality of the Texas Highway Beautification Act. Barber, an attorney, had a noncommercial sign on his property informing drivers of a phone number they could call to receive free information regarding their right to be free from unreasonable searches and seizures. *Barber*, 111 S.W.3d at 91. The Act generally prohibits signs, but does provide exceptions for, among other things, (1) political signs relating to an election; and (2) outdoor advertising solely for activities conducted on the property on which it is located. *Id.* at 90. The Texas Supreme Court concluded that the Act does not violate the First Amendment and is distinguishable from *Metromedia* because "[t]he Texas Act permits commercial and noncommercial speech everywhere that relates to an activity on the property." *Id.* at 99.

The Texas Supreme Court's decision in *Barber* is not reconcilable with the U.S. Supreme Court precedents, as then-Justice Priscilla Owens noted in her dissent. It seems likely that the federal courts will ultimately declare the Texas Highway Beautification Act unconstitutional. *Metromedia* clearly states that the San Diego ordinance in question basically only allowed "signs advertising goods manufactured or produced or *services rendered* on the premises upon which such signs are placed." *Metromedia*, 453 U.S. at 493, n. 1 (emphasis added). The Texas Act provides for an exception for "outdoor advertising solely for activities conducted on the property on which it is located." *Barber*, 111 S.W.3d at 90. While there is a difference between "services rendered" and "activities," both terms exclude the vast majority of noncommercial speech and it seems unlikely that the difference between the terms is sufficient to uphold the Texas Act.

The Texas Act also allows an exception for certain political signs. *Id.* at 90-91. This would seem to bring the Act into direct conflict with *Vincent*. The plaintiffs in *Vincent* argued that the ordinance should provide an exception for political speech such as theirs. The U.S. Supreme Court noted that the City was not required to make such an exception and pointed out that some such exceptions could be unconstitutional:

> For example, even though political speech is entitled to the fullest possible measure of constitutional protection, there are a host of other communications that command the same respect. An assertion that "Jesus Saves," that "Abortion is Murder," that every woman has the "Right to Choose," or that "Alcohol Kills," may have a claim to a constitutional exemption from the ordinance that is just as strong as "Roland Vincent – City Council."

Vincent, 466 U.S. at 816.[3]

Finally, the Texas Supreme Court noted that while the Texas Constitution may provide greater protection than that provided by the First Amendment, "Barber had not articulated any reasons based on the text, history, and purpose of Article I, section 8 to show that its protection of noncommercial speech is broader than that provided by the First Amendment." *Barber*, 111 S.W.3d at 106.

2. Commercial Signs

Until 1975, purely commercial advertisements of services or goods for sale were considered to be outside the protection of the First Amendment. *Metromedia*, 453 U.S. at 505 (citing *Valentine v. Chrestensen*, 316 U.S. 52 (1942)). In 1976, however, the Supreme Court clearly reversed that trend and noted that commercial signs, while not necessarily entitled to the same protections as non-commercial signs, are entitled to First Amendment protection. *Id.*

Commercial speech is defined as speech that either proposes a transaction or constitutes an "expression related solely to the economic interests of the speaker and its audience." *Board of Trs. v. Fox*,

[3] The Texas Supreme Court did attempt to address this argument in regards to the "activities" provision, but did not address the political campaign provision. *See Barber*, 111 S.W. 3d at 100-101.

492 U.S. 469, 473-74 (1989); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). Essentially, commercial speech is advertising. Therefore, most road-signs and billboards constitute commercial speech. Courts have historically granted commercial speech little to no protection. In 1976, however, the Supreme Court held that commercial speech should receive First Amendment protection but to a lesser degree than noncommercial speech. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

The Supreme Court has established a four-part test for determining the constitutionality of regulations on commercial speech. *Central Hudson*, 447 U.S. at 557; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001). This test is "substantially similar" to the test for time, place, and manner restrictions. *Lorillard*, 533 U.S. at 555 (citing *Bd. of Trustees v. Fox*, 492 U.S. 469, 477 (1989)).

First, (1) the court must determine whether the expression is protected by the First Amendment. Next, (2) the court must determine if the asserted governmental interest is substantial. *Id.* If both inquiries yield positive answers, the court must determine (3) whether the regulation directly advances the governmental interest asserted; and (4) whether it is not more extensive than is necessary. *Lorillard*, 533 U.S. at 555 (citing *Central Hudson*, 447 U.S. at 566).

a. First Prong: First Amendment Protection

Certain categories of expression have no First Amendment protection. In general, these categories include obscenity and child pornography. *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992); *also see Roth v. U.S.*, 354 U.S. 476 (1957) (holding that obscenity has no protection); *New York v. Ferber*, 458 U.S. 747 (1982) (stating that child pornography is not protected). In the context of commercial signs, however, there are further restrictions. Commercial speech is not protected by the First Amendment if it is untruthful or misleading. *Central Hudson*, 447 U.S. at 563; *Lorrilard*, 533 U.S. at 555 ("For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.").

b. Second Prong: Substantial Governmental Interest

Local governments generally enact sign ordinances pursuant to their substantial governmental interest in traffic safety and aesthetics. *Metromedia*, 453 U.S. at 508 (traffic safety); *Vincent*, 466 U.S. at 805-807 (aesthetics). Local governments have also justified ordinances based the governmental interest in reducing alcohol consumption. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (invalidating ordinance under third prong of analysis). It should be noted, however, that the strength of the governmental interest will affect the balancing of that interest with the narrow tailoring. *See City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977).

c. Third Prong: Directly Advances the Governmental Interest

The third prong of the *Central Hudson* test concerns the relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest. It requires that

> the speech restriction directly and materially advance the asserted governmental interest. This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.

Lorrilard, 533 U.S. at 555 (citations omitted); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996); *See also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993) ("Because the distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted, we have no difficulty concluding … that the city has not established the "fit" between its goals and its chosen means").

The Supreme Court clarified, however, that this burden does not require empirical data. *Id.*

> We have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense.'"

Lorrilard, 533 U.S. at 555 (citations omitted).

d. Fourth Prong: Scope of the Regulation

The Supreme Court has consistently refused to require time, place and manner restrictions on sign ordinances to be so narrowly tailored that they are the "least-restrictive means" *See Fox*, 492 U.S. at 477-478; *Lorrilard*, 533 U.S. at 556. Most recently, the Supreme Court held that there must be a reasonable fit between the legislature's ends and the means chosen to accomplish those ends; a means narrowly tailored to achieve the desired objective. *Lorrilard*, 533 U.S. at 556. In defining "narrowly tailored" for sign ordinances in another case, the Court explained that the regulation should not burden substantially more speech than is necessary to further the government's legitimate

interest. *Fox*, 492 U.S. at 478. Moreover, the courts should be careful about second-guessing the government's judgment on such matters. *Id.*

F. Free Speech Balancing Tests: Public Employees and Public School Students

1. The Connick/Pickering Test

The two key cases for determining Free Speech issues as they relate to restraints on the actions of public employees are *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). Because employment law is discussed in another lecture, the discussion of *Pickering* and *Connick* will be brief in order to allow time to discuss they applicability to a couple of more recent cases.

In *Pickering*, the Supreme Court addressed the appropriate level of scrutiny applicable to public employees who exercise their Free Speech rights. The School Board fired Pickering after he made public a letter falsely criticizing the Board. The Board argued that it should be permitted to terminate his employment because it was unreasonable for him to publish the false statement based on his education and experience. *Pickering*, 391 U.S. at 568-569. Pickering argued that the normal First Amendment standard for defamatory statements should apply: in order for statements to be legally actionable, they must be made "with knowledge that [they were] … false or with reckless disregard of whether [they were] … false or not." *Id.* at 569 (citing *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964)). The Supreme Court declined to set forth a general standard, but tried to "indicate some of the general lines along which an analysis of the controlling interests should run." *Id.*

The Court explained that the case involved a teacher who made erroneous public statements on issues of public concern, but made them in a manner critical of his employer. *Id.* at 572. His activities, however, did not impede the teacher's proper performance of his daily duties in the classroom and did not interfere with the regular operation of the schools generally. *Id.* at 572-573. Thus, the Court concluded that the Board's interest in limiting the teacher's Free Speech rights was not significantly greater than its interest in limiting a similar contribution by any member of the general public. *Id.* at 573.

> [I]n a case … in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.

Id. at 574.

In *Connick*, the Supreme Court re-analyzed the issues raised in *Pickering*. The case involved an assistant district attorney, Myers, who was being transferred. She opposed her transfer and, presumably to generate support for her contention that the transfer process and other aspect of the office environment were disliked, provided a questionnaire to the other assistant district attorneys. *Connick*, 461 U.S. 140-142. First, the Court concluded that most of the questionnaire did not constitute matters of public concern and therefore does not create a Constitutional cause of action. *Id.* at 147 ("We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.").

The Supreme Court noted, however, that one of the items on the questionnaire did concern a matter of public concern. Before the District Court, the judge ruled that the government had to "clearly demonstrate" that the speech involved "substantially interfered" with official responsibilities. *Id.* at 150. The Supreme Court held that this application of the *Pickering* standard was erroneous because it did not take into consideration "the government's interest in the effect and efficient fulfillment of its responsibilities to the public." *Id.* In analyzing the issue, the Supreme Court concluded that while Myers' abilities to perform her responsibilities were directly impeded, it is important to the efficient and successful operation of the District Attorney's office for Assistants to maintain close working relationships with their superiors. *Id.* at 151. As a result, the Court concluded that it should defer to Connick's and his assistant's judgment that Myers' actions would interfere with working relationships. *Id.*

> When close workings relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.

Id. at 151-152.

2. Tinker v. Des Moines

In *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969), the school district sought to restrict students from wearing armbands in protest of

the Vietnam War. The Supreme Court explained the case in the following manner:

> The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Id. at 508. The Court further explained that in order for the State to justify the prohibition of a particular expression of opinion,

> it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

Id. at 509.

3. Recent Examples: *Barrow* and *Chiu*

In *Barrow v. Greenville ISD*, 332 F.3d 844 (5th Cir. 2003), the Fifth Circuit addressed whether it was clearly established that a Superintendent could not refuse to hire an individual as an administrator in a school district solely on the basis that the applicant's children attended a private religious school. The Fifth Circuit reversed the grant of summary judgment based on qualified immunity and apparently[4] held that it was clearly established that

> [t]he state cannot take an adverse employment action against a public-school employee for exercising this right unless it can prove that the employee's selection of private school materially and substantially affects the state's educational mission.

Id. at 848.

The Fifth Circuit based its decision on two earlier cases, *Brantley v. Surles*, 718 F.2d 1354 (5th Cir. 1983), and *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990). This line of cases uses the *Tinker* test in the context of public school employment, rather than the *Pickering/Connick* test. *See Hastings v. Bonner*, 578 F.2d 136, 143 (1978). The Fifth Circuit has even acknowledged that this standard is a higher standard than the standard applied in *Pickering*, but has not offered any explanation as to why public school employees are entitled to greater First Amendment protections than other public employees. *Id.* The Fifth Circuit has also not been consistent in following this line of cases. *See Nieto v. San Perlita Indep. Sch. Dist*, 894 F.2d 174, 179 (5th Cir. 1990) (applying *Pickering* test) and, more recently, *Salge v. Edna Indep. Sch. Dist.*, 2005 U.S. App. LEXIS 9752 (5th Cir. 2005) (applying *Pickering* test). It would appear that, in general, the Fifth Circuit no longer uses the *Tinker* test for public school employees, at least in regards to cases involving Free Speech rights. *Barrow* contained an allegation of what are sometimes called "hybrid rights," and, as is discussed in another portion of this paper, hybrid rights may be entitled to heightened scrutiny. The two rights at issue in *Barrow* were the parental right to direct the education of their children and free exercise right to direct the religious education of their children. It may be that the proper interpretation of *Barrow* is heightened scrutiny for hybrid rights cases.

In *Chiu v. Plano ISD*, 260 F.3d 330 (5th Cir. 2001) ("*Chiu I*") and 339 F.3d 273 (5th Cir. 2003) ("*Chiu II*"), the Fifth Circuit addressed a school district policy prohibiting parents from distributing information on a particular Math program to other parents before, after and during a meeting organized by the district to discuss that particular Math program. The Fifth Circuit ultimately held that there was a question of fact as to whether two of the defendants had practiced viewpoint discrimination. *Chiu II*, 339 F.3d at 282. The Fifth Circuit further seems to have indicated (though this point is not clearly held by the decision), that viewpoint discrimination can only be practiced either (1) pursuant to a time, place, and manner restriction; or (2) when the Free Speech would "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others." *Id.* at 281. In commenting that the "material and substantial" disruption standard might be applicable to the case, the Fifth Circuit cited *Tinker*. This case has raised the question of the extent to which *Tinker* provides the standard for Free Speech activities in schools.

[4] This case is still on-going and the interpretation of the Fifth Circuit's decision is one of the key issues in the remaining debate.

G. Prior Restraint Laws

One method of attempting to regulate unprotected expression has been to create prior restraint systems. A prior restraint system provides some method by which the government prohibits a particular expression from occurring before it has occurred on the grounds that it is unprotected. Examples of prior restrain systems are film censors and licensing schemes.

While prior restraint systems are not unconstitutional *per se*, any system of prior restraint bears a heavy presumption against its constitutional validity. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990). The problems with prior restrain systems generally fall into one of two categories: (1) the scheme places "unbridled discretion in the hands of a government official or agency," *Id.*, and (2) the prior restraint fails to place limits on the time within which the decisionmaker must issue his decision. *Id.* at 226.

1. The General Standard

In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Court established three procedural safeguards that were necessary to ensure expeditious decisionmaking by the motion picture censor board:

(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained;
(2) expeditious judicial review of that decision must be available; and
(3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *Freedman*, 380 U.S. at 58-60; *FW/PBS*, 493 U.S. at 227. The third prong laid out in *Freedman* is not necessary in all contexts, however. In *FW/PBS*, the Supreme Court noted that the City was not involved in evaluation of the content of the expression, but was merely monitoring a licensing scheme. *FW/PBS*, 493 U.S. at 229. Moreover, the applicant is more likely to seek judicial review of the determination because rejection of the license completely denies the possibility of the business operating, rather than merely limiting the distribution of a particular movie. *Id.* at 229-230.

In *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 124 S.Ct. 2219 (2004), the Supreme Court considered whether the requirement of prompt judicial review required a guaranty of a prompt judicial decision. The Supreme Court held that a licensing scheme, by allowing for judicial review of the denial of a license, offers adequate assurance that a decision will be promptly issued sufficient to satisfy First Amendment requirements. The case creates a presumption that the regular judicial process of state courts is sufficient to satisfy First Amendment concerns. This is an important ruling because local governments have no real control over whether the trial court makes a prompt decision and a contrary ruling would have effectively prevented local governments from enacting such legislation until some new appeal process was created by the State.

2. Recent Trends: Prior Restraint and Content-Neutral Regulations

In *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002), the Supreme Court considered whether a permit system that required individuals to receive permits before having large gatherings in parks is subject to the procedural safeguards of *Freedman*. The Court concluded that *Freedman* is not applicable because the permit scheme in *Thomas* is a content-neutral evaluation. *Id.* at 322. The Court further noted that it has never applied the *Freedman* standard to content-neutral laws that applied to public fora. *Id.*

In *Zen Music Festivals v. Stewart*, Civil Action No. 3:02-CV-1998 (Northern District of Texas), Judge Fitzwater held that content-neutral laws and regulations are not subject to the prompt deadline rules found in *Freedman* and *FW/PBS*. Judge Fitzwater principally relied upon *Thomas* and recent cases from the Eleventh and Ninth Circuits. *See Granite State Outdoor Advertising, Inc. v. St. Petersburg, Florida*, 348 F.3d 1278 (11th Cir. 2003); *Southern Oregon Barter Fair v. Jackson County*, 372 F.3d 1128 (9th Cir. 2004). As a result, Judge Fitzwater concluded that the Texas Mass Gatherings Act, which created a prior restraint system on large gatherings in rural areas, is constitutionally permissible because (1) it is a content-neutral law; and (2) therefore, it is not required to provide a specific deadline for the public official to finish his review of an application.

The cases following *Thomas* create some degree of tension with cases such as *FW/PBS* and *Alameda Books*. While the Supreme Court has held that intermediate scrutiny is applicable to sexually oriented businesses, Justice Kennedy was the only member of the majority in *Alameda Books* to note that it is illogical to call SOB ordinances content-neutral. *See Alameda Books*, 535 U.S. at 448 (Kennedy, J.); *N.W. Enterprises, Inc.*, 352 F.3d at 174. In light of *Thomas*, *Alameda Books*, and the interpretation of *Thomas* by the Eleventh and Ninth Circuits and the Northern District of Texas, it may be that "content-neutrality" will cease to be a required element in analyzing sexually oriented business regulations. This view is also supported by what appears to be an admission in *Thomas* that sexually oriented business regulations are not content-neutral. *See Thomas*, 534 U.S. at 322 n.2.

III. ASSEMBLY AND PETITION RIGHTS

The First Amendment provides protection to the "right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I. The Constitutional rights to assemble peaceably and to petition for the redress of grievances are intimately connected both in origin and purpose with other rights of free speech and free press. *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967).

From these protections comes what is called the "freedom of association" and it takes two forms: First, the Supreme Court has identified "a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). Second, there is a right of "intimate association," based on the reasoning that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* at 617.

As a result, the First Amendment protects a public employee's right to associate with a union. *Boddie v. City of Columbus*, 989 F.2d 745, 749 (5th Cir. 1993). Motel owners, however, do not have the right to rent rooms for less than 10 hours. *FW/PBS*, 493 U.S. at 237 ("Any "personal bonds" that are formed from the use of a motel room for fewer than 10 hours are not those that have "played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs."").

Claims under this portion of the First Amendment are rarely brought separate from other portions of the First Amendment and thus the standard of review is generally subsumed under the more specific allegation made.

IV. RELIGIOUS RIGHTS

A. Free Exercise Rights Under the First Amendment

The First Amendment prevents the government from making laws prohibiting the free exercise of religion. U.S. Const. Amend. I. The current state of the law regarding the free exercise protections provided by the First Amendment was principally enunciated in three Supreme Court cases. *Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); and *Boerne v. Flores*, 521 U.S. 507 (1997). These cases are part of an on-going controversy between the Supreme Court and Congress regarding the proper interpretation of the First Amendment. More of the details of this controversy are explained below in the discussion of the Religious Land Use and Institutionalized Persons Act of 2000.

For the time, however, *Smith* and *Church of the Lukumi Babalu Aye*, represent the current state of the law regarding the free exercise clause of the First Amendment.

> [T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)

Employment Division, Department of Human Resources v. Smith, 494 U.S. 872, 879 (1990). Or, as the Supreme Court later described the standard,

> In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition 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.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). Where rational-basis scrutiny applies,

> the State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negative "any reasonably conceivable state of facts that could provide a rational basis for the [regulation].

Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

B. Hybrid-Rights

Smith left open the possibility of heightened scrutiny for cases involving more than one Constitutional right. *Smith*, 494 U.S. at 881-882. The theory of "hybrid rights" draws upon a line of cases imposing a heightened level of scrutiny because more than one constitutional right was implicated. *Id.* The possibility of such "hybrid rights" claims has not been addressed by the Supreme Court since *Smith*.

The Fifth Circuit also has not addressed the question of what constitutes a hybrid rights claim and what level of scrutiny is appropriate. At least one judge in the Northern District of Texas, however, has held that *Smith* does not establish the required level of scrutiny for "hybrid rights" claims. *Littlefield v. Forney*

Indep. Sch. Dist., 108 F. Supp. 2d 681, 704 (N.D.Tex. 2000); *See also Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 700 (10th Cir. 1998) (rejecting a hybrid rights claim in the context of a parent homeschooling for religious reasons and noting that the reason for heightened scrutiny in *Yoder* was the extensive evidentiary record). The District Court judge in *Littlefield* noted that the First, Sixth, Ninth and Tenth Courts of Appeal all require some higher burden of evidentiary support, such as was found in the *Yoder*-Amish case, before applying a heightened level of scrutiny. *Littlefield*, 108 F. Supp. 2d at 706.

How this requirement of an "extensive evidentiary record" will be developed remains to be seen. It seems likely, however, that the general trend will be towards greater and greater limitations on this area of the law. *Smith*, 494 U.S. at 884 (indicating a desire by the Supreme Court to minimize the applicability of the "hybrid rights" cases).

C. Establishment Clause Limitations Under the First Amendment

The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the purpose or effect of advancing or inhibiting religion. *Agostini v. Felton*, 521 U.S. 203, 222-223 (1997) ("We continue to ask whether the government acted with the purpose of advancing or inhibiting religion [and] whether the aid has the 'effect' of advancing or inhibiting religion"). Thus, the Supreme Court has established a two-part test for determining whether a State or local government law or regulation violates the Establishment Clause: (1) Is the purpose of the law to advance or inhibit religion; and (2) does the law have the effect or advancing or inhibiting religion. *Id.*

Despite the deceptively simple two-part test for Establishment Clause cases, the courts have been anything but clear in practice. On June 27th, the Supreme Court made its most recent foray into this area of the law. The text of the opinions from the two Ten Commandments cases totals approximately 150 pages. While the standard that is to be derived from those cases is rather oblique, they do provide fairly extensive surveys of the Court's previous Establishment Clause jurisprudence.

1. Public Displays of a Religious Nature

One June 27, 2005, the Supreme Court issued its rulings in two cases involving displays of the Ten Commandments on public property. *McCreary County, Ky. V. ACLU of Ky.*, Cause No. 03-1693 (2005); *Van Orden v. Perry*, Cause No. 03-1500 (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. *McCreary*, Slip Opinon at 12-16 (majority). The Court held that "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *Id.* at 16. The Court also held that the history of the community and the development of the display helps in determining the purpose. *Id.* at 18. The Court even when so far as to admit that identical displays could have differing results depending on the surrounding historical circumstances they led to the display. *Id.* at 18 n.14.

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. *Van Orden*, Slip Opinion at 4 (Breyer, J., concurring in judgment).

2. Indirect Public Funding to Religious Organizations

The Supreme Court jurisprudence distinguishes between government programs that provide aid directly to religious schools, and programs of "true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). Thus, the Supreme Court has upheld programs such as

(1) a Minnesota program authorizing tax deductions for various educational expenses, including private school tuition costs, even though the great majority of the program's beneficiaries (96%) were parents of children in religious schools, *Mueller* v. *Allen*, 463 U.S. 388 (1983);
(2) a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor, *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1986);
(3) a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools, *Zobrest* v.

Catalina Foothills School Dist., 509 U.S. 1 (1993); and

(4) an Ohio voucher program in which parents of disadvantaged children may choose private education, including private religious education, for their children and the State will cover the tuition costs. *Zelman*, 536 U.S. 639.

The *Zelman* Court held that

> where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.

Zelman, 536 U.S. at 652.

While Justice Rehnquist, writing on behalf of the Court, states that there has been no alteration in the Supreme Court's jurisprudence on the question of indirect aid to religious institutions, *Id.* at 649, the vigorous dissents provided by Justices Ginsburg, Souter, Breyer and Stevens, indicate that this line of cases probably constitutes a substantial change in the type of regulation that will be upheld under the Establishment Clause. *Id.* at 688-689 ("Now, the three stages are succeeded by a fourth, in which the substantial character of government aid is held to have no constitutional significance, and the espoused criteria of neutrality in offering aid, and private choice in directing it, are shown to be nothing but examples of verbal formalism.").

3. Exemptions and Accommodations of Religion

In *Cutter v. Wilkinson*, __ U.S. __, 125 S.Ct. 2113, 161 L.Ed. 2d 1020 (2005), the Supreme Court held that the institutionalized persons portion of Religious Land Use and Institutionalized Persons Act (RLUIPA) is facially constitutional under the Establishment Clause. The Supreme Court specifically noted that the government may accommodate religious practices without violating the Establishment Clause. *Id.* at 1029 ("Foremost, we find RLUIPA's institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise."). This ruling will be important for states such as Texas that have enacted legislation to mandate that local governments provide exemptions for individuals whose religious exercise is substantially burdened.

V. THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000 (RLUIPA)

A. Introduction

The Religious Land Use and Institutionalized Persons Act is the latest battle in an on-going war between Congress and the Supreme Court regarding the proper interpretation of the Free Exercise Clause. The first portion of this section will discuss the various battles that have already been fought in order to provide a context for this current debate. In summary, Congress has stated that the Supreme Court's 1990 decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), was misguided in that it substantially reduced the level of protection provided to religious exercise by the Free Exercise Clause of the United States Constitution. As a result of what Congress considered an inappropriate Supreme Court decision, Congress enacted the Religious Freedom Restoration Act ("RFRA"). However, on appeal, the Supreme Court concluded that the Religious Freedom Restoration Act was unconstitutional because it purported to be enforcing the Free Exercise Clause but it was actually an attempt to substantially change the Court's interpretation of the Free Exercise Clause. Congress responded in 2000 with the enactment of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). RLUIPA is an attempt to offer some of the protections Congress believes should be provided by the Free Exercise Clause. However, Congress has attempted to provide alternate bases for the exercise of legislative power and has reduced the scope of the Act in hopes of surviving judicial review.

B. Development of Religious Exercise Legislation

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

There is considerable debate currently about what Free Exercise jurisprudence consisted of prior to the Supreme Court's ruling in *Employment Division v. Smith*, 494 U.S. 872 (1990). Congress claimed in the enactment of the Religious Freedom Restoration Act that the Free Exercise Clause should be interpreted in accordance with *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See* 42 U.S.C. § 2000bb(b)(1). In particular, Congress

noted the importance of the "compelling interest" test contained within those decisions. *Id.*

a. 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. *Sherbert*, 374 U.S. at 399. The plaintiff sought other employment but was likewise unable to find other employment because she would not work on Saturdays. *Id.* As a result, the plaintiff filed an unemployment compensation benefits claim with the State. *Id.* at 399-400. 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. *Id.* at 400-401. The plaintiff brought suit alleging that the State agency had violated her right to free exercise of her religion. *Id.* at 401. 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. *Id.* at 403. 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. *Id.* at 406-408.

b. 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. *Yoder*, 406 U.S. at 207-08. The plaintiffs contended that the State's compulsory education statute violated their rights under the First and Fourteenth Amendments because the plaintiffs believe, 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." *Id.* at 208-09. 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." *Id.* at 216. 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.

Id. at 218. 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." *Id.* at 221.

c. The Court Analyzes Its Pre-1990 Decisions

In *Smith* and in *Boerne v. Flores*, 521 U.S. 507 (1997), 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. *Smith*, 494 U.S. at 881-82; *Boerne*, 521 U.S. at 513-14. 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." *Boerne*, 521 U.S. at 514. Second, the Court noted that it had previously used the *Sherbert* analysis, a balancing test, in cases involving state unemployment compensation rules. *Smith*, 494 U.S. at 883-84; *Boerne*, 521 U.S. at 514. 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. *Smith*, 494 U.S. at 884.

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. *Boerne*, 521 U.S. at 535. This is significant because it was one of the reasons for the invalidation of the Religious Freedom Restoration Act and yet is nevertheless an element of RLUIPA.

2. Employment Division v. Smith (1990)

In 1990, the United States Supreme Court issued its ruling in *Employment Division v. Smith*, 494 U.S. 872 (1990). 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.

3. 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*, 508 U.S. 520 (1993). 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."

4. The Federal Religious Freedom Restoration Act (1994)

The Religious Freedom Restoration Act of 1994 (RFRA), 42 U.S.C. § 2000bb *et seq.*, was enacted as a result of the Supreme Court's ruling in *Employment Division v. Smith*, 494 U.S. 872 (1990). 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 U.S.C. § 2000bb(a). 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." 42 U.S.C. § 2000bb(b).

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." 42 U.S.C. § 2000bb-1(a)-(b). RFRA also created a private right of action for enforcement of the rights created by the Act.

5. Boerne v. Flores (1997)

In 1997, the United States Supreme Court issued its ruling in *Boerne v. Flores*, 521 U.S. 507 (1997). 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 practices 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." *Id.* at 532.

The Court also objected to the stringent test required by RFRA and noted that its "demands of state laws reflect a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." *Id.* at 533. The Court noted that claims that a law "substantially burdens" the exercise of religion are almost impossible to contest. *Id.* at 534 (citing *Smith*, 494 U.S. at 887). 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. *Id.* at 535-536.

C. 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"). 42 U.S.C. § 2000cc *et seq.* RLUIPA substantially narrows the scope of RFRA and focuses exclusively on land use and institutionalized persons. *See* 42 U.S.C. §§ 2000cc and 2000cc-1.

1. RLUIPA and Land Use Regulation

In relation to the prohibitions related to land use, RLUIPA provides that governmental entities shall not impose or implement a land use regulation (1) "in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution;" (2) "that discriminates against any assembly or institution on the basis of religion or religious denomination;" or (3) "that (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc(b). According to the legislative history, (b)(1) and (2) are designed to apply to laws "that burden religion and are **not** neutral and generally applicable." 146 Cong. Rec. S7774-01, S7776 (July 27, 2000) (emphasis added).[5] Assuming these provisions are interpreted in light of the legislative history, these provisions are merely an expression of Constitutional law already expounded by the federal courts. *Id.* All of these regulations can be understood as prohibiting intentional (and facially evident) discrimination against religious assemblies and institutions.

RLUIPA also prohibits governmental entities from imposing or implementing land use regulations "in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution" unless the government demonstrates that the burden is imposed (1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000cc(a)(1). However, while the prohibitions of subsection (b), outlined above, apply in all cases, subsection (a) only applies in three specific situations:

> A. the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
> B. the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
> C. the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

42 U.S.C. § 2000cc(a)(2).

2. RLUIPA and Institutionalized Persons

In regards to institutionalized persons, RLUIPA provides,

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general

[5] At this time, the Courts have not had reason to interpret these provisions in any great detail. However, if the Court's were to apply them to laws that were neutral on their face, then there could be concerns about their constitutionality under § 5 of the Fourteenth Amendment. *See Smith*, 494 U.S. at 886 (noting that it would be an anomaly in the law to subject neutral, generally applicable laws to compelling-interest analysis.).

> applicability, unless the government demonstrates that imposition of the burden on that person –
>
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a). Like in the section dealing with land use regulations, RLUIPA only applies to institutionalized persons under specific circumstances:

> This section applies in any case in which –
>
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. § 2000cc-1(b).

3. Enforcement of RLUIPA

RLUIPA also provides two methods by which the Act can be enforced. First, RLUIPA creates a private right of action for individuals (and organizations) to assert a violation of the Act (or to assert the act as a defense to a claim). 42 U.S.C. § 2000cc-2(a). Standing for bringing a claim is determined by the general rules of standing under Article III of the United States Constitution. *Id*. The United States may also bring an action for injunctive or declaratory relief in order to enforce compliance with RLUIPA. 42 U.S.C. § 2000cc-2(f).

In reference to the burden of proof, if a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause of a violation or Section 2000cc of RLUIPA, the burden of proof shifts to the governmental entity. 42 U.S.C. § 2000cc-2(b). However, the burden of proof in regards to whether the law or regulation substantially burdens the plaintiff's exercise of religion remains with the plaintiff. *Id*.

However, a government may also avoid the preemptive force of any provision of RLUIPA (1) by changing the policy or practice that results in a substantial burden on religious exercise, (2) by retaining the policy or practice but providing an exemption, or (3) by any other means that eliminates the substantial burden. 42 U.S.C. § 2000cc-3(e).

4. Various Difficulties in Interpreting RLUIPA

a. What Constitutes a "Substantial Burden?"

RLUIPA defines religious exercise such that it "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). In regards to land use regulations, RLUIPA further specifies that "the use … of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc-5(7)(B). In order to qualify under Section 2000cc or Section 2000cc-1 of RLUIPA, however, a plaintiff must demonstrate that the governmental conduct imposes a "*substantial burden* on the religious exercise" of the plaintiff. 42 U.S.C. §§ 2000cc(a)(1) and 2000cc-1(a)(1) (emphasis added). According to a joint statement of Senators Hatch and Kennedy, the sponsors of RLUIPA, the term "substantial burden" is intentionally not defined in RLUIPA. 146 Cong. Rec. S7774-01, S7776. The Senators state that the term should be interpreted "by reference to Supreme Court jurisprudence." *Id.*

(1) Substantial Burden and Land Use Regulations

To date, four Courts of Appeal have addressed the question of what is required under RLUIPA to establish a "substantial burden" on religious exercise in the context of land-use regulations. *See Civil Liberties for Urban Believers v. City of Chicago* (*CLUB*), 342 F.3d 752 (7th Cir. 2003); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004); and *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004); *Lighthouse Institute for Evangelism v. City of Long Branch*, 100 Fed. Appx. 70 (3rd Cir. 2004) (unpublished decision).

In *CLUB*, the Seventh Circuit faced challenges by various groups to the zoning ordinance of the City of Chicago. *CLUB*, 342 F.3d at 755-58. The zoning ordinance restricted religious assemblies within certain specified zoning areas. *Id.* at 755-56. The Seventh Circuit held that,

> in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise-- including the use of real property for the purpose thereof *within the regulated jurisdiction generally*-- effectively impracticable.

Id. at 761 (emphasis added); *See also Lighthouse*, 100 Fed. Appx. at 77 (church could operate in other parts of the city). The Seventh Circuit then concluded that the scarcity of affordable land within properly zoned

areas in Chicago was not a substantial burden on religious exercise, but are merely "are incidental to any high-density urban land use." *CLUB*, 342 F.3d at 761. The Court of Appeals further noted that allowing the scarcity of affordable locations to be determinative would "require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations." *Id.* at 762.

In *San Jose Christian College*, the college requested that the City of Morgan Hill re-zone an area from hospital use to educational use. *San Jose Christian College*, 360 F.3d at 1027-29. However, the City of Morgan Hill turned down the college's request because its application was incomplete. *Id.* at 1029. The Court of Appeals held that Morgan Hill's decision to reject the college's application because it was incomplete was perfectly reasonable and totally failed to constitute a substantial burden on the college. *Id.* at 1035. The Ninth Circuit specifically noted that its holding was entirely consistent with that of the Seventh Circuit in *CLUB*. *Id.* Citing *CLUB*, the Ninth Circuit noted that the ordinary difficulties associated with location are not a substantial burden on religious exercise because they do not render religious exercise impracticable. *Id.*

In *Midrash Sephardi*, the Eleventh Circuit considered an argument by two synagogues of adherents to Orthodox Judaism that the Town of Surfside's zoning restrictions would substantially burden the congregants' religious exercise because it would make it difficult, especially for elderly and ill congregants, to walk to the synagogues on the Sabbath, as required by Orthodox Judaism. *Midrash Sephardi*, 366 F.3d at 1220-22. Even though the Eleventh Circuit concluded that the Seventh Circuit's "impracticable" requirement in *CLUB* was too strenuous, the Court of Appeals ultimately held that Surfside's zoning restrictions did not constitute a substantial burden on the congregants' religious exercise under RLUIPA. *Id.* at 1228. The Court of Appeals specifically noted,

> Were we to adopt the synagogues' reasoning, it would be virtually impossible for a municipality to ensure that no individual will be burdened by the walk to a temple of choice. Municipalities that allow religious exemptions to alleviate even the small burden of walking a few extra blocks would run the risk of impermissibly favoring religion over other secular institutions, or of favoring some religious faiths over others.

Id. Also, the Seventh Circuit briefly addressed the argument put forth by the synagogues that they would be unable to locate suitable land in the areas zoned for religious assemblies:

> That the congregations may be unable to find suitable alternative space does not create a substantial burden within the meaning of RLUIPA. As the Seventh Circuit noted, "whatever specific difficulties [the plaintiff church] claims to have encountered, they are the same ones that face all [land users], not merely churches. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them." *Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th Cir. 1990).

Id. at 1227, n. 11.

As a result, while there is currently a split among the Circuit as to how "substantial burden" should be interpreted, the Circuits are in agreement that the burden should be evaluated in relationship to the jurisdiction *as a whole*, not as to the particular piece of property that the plaintiffs want to use. This is in substantial contrast to many of the district courts. *Elsinore Christian Center v. City of Lake Elsinore*, 291 F.Supp.2d 1083, 1091 (C.D.Cal. 2003); *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792, 7 *et seq.* (W.D.Tex. 2004). The general trend in the district courts seems to be towards the assumption that a plaintiff demonstrates a substantial burden on religious exercise when prevented from using a particular piece of property. *Id.*

For local governments, however, the requirement used by the Courts of Appeal that plaintiffs demonstrate a substantial burden on their ability to exercise their religion in the jurisdiction as a whole is a significantly more difficult burden to achieve and makes it much more likely that local zoning ordinances and regulations will be upheld.

(2) Substantial Burden and Institutionalized Persons

To date, there appear to be no published opinions in the Fifth Circuit concerning the institutionalized persons portion of RLUIPA. *See Freeman v. Texas Dept. of Crim. Just.*, 369 F.3d 854, 858 (5th Cir. 2004) (noting prisoners had surprisingly not raised RLUIPA claims); *Thompson v. Scott*, 2004 WL 57718 (5th Cir. 2004) (unpublished); and *Neal v. Lucas*, 2003 WL 22207902 (5th Cir. 2003) (unpublished). While *Thompson* is unpublished, it is the only Fifth Circuit case to actually evaluate RLUIPA and, as part of that analysis, makes an important evaluation of prisoner claims under RLUIPA.

Thompson concerned a complaint filed by an inmate alleging, among other things, that his rights under RLUIPA were violated because the jail

mandated that he have shorter hair than was required by his religious faith. The Fifth Circuit, in a summary decision, concluded that the "short hair" requirement was constitutional for the same reasons the Fifth Circuit had previously upheld the regulation under RFRA. (citing *Diaz v. Collins*, 114 F.3d 69, 73 (5th Cir. 1997)).

In *Dunlap v. Losey*, 2002 WL 1001027 (6th Cir. 2002) (unreported), the Sixth Circuit held that a prisoner confined in temporary housing during a transfer who was prohibited from having a hardcover Bible had failed to demonstrate that his religious exercise was substantially burdened because he failed to show that a softcover Bible would be insufficient.

In *Lindell v. McCallum*, 352 F.3d 1107 (7th Cir. 2003), the Seventh Circuit held that a prisoner stated a cause of action under RLUIPA who alleged that the prison staff destroyed mail having religious content, ignored his dietary restrictions imposed by his religion, housed members of religion in different areas so they could not congregate, and excluded literature and videos containing his religious beliefs from the materials available to prisoners.

It appears that prisoner RLUIPA claims generally arise in the context of religiously dictated diets, religiously dictated holidays or services and access to religious materials. *Hoevenaar v. Lazaroff*, 276 F.Supp.2d 811 (S.D.Ohio 2003) (length of hair restriction held in violation of RLUIPA); *Madison v. Riter*, 240 F.Supp.2d 566 (W.D.Va. 2003) (kosher diet should be allowed); *Marria v. Broaddus*, 2003 WL 21782633 (S.D.N.Y. 2003) (unreported) (religious literature should be allowed); *Charles v. Verhagen*, 220 F.Supp.2d 937 (W.D.Wis. 2002) (restriction on number of religious feasts allowable).

Because there is so little case law on the substantial burden provision of the institutionalized persons' portion of RLUIPA, it is difficult to determine how the courts will evaluate these claims. Obviously, the Fifth Circuit's unreported decision in *Thompson* would seem to contradict the decision in *Hoevenaar*. The Seventh Circuit appears to be the only Court of Appeals that has addressed whether a particular set of facts constitutes a substantial burden, but considering that the facts in *Lindell* have the appearance of intentional discrimination against a particular religious group, it is not surprising that the Court of Appeals concluded that the plaintiff had stated a claim under RLUIPA.

The recent Supreme Court decision *Cutter v. Wilkinson*, __ U.S. __, 125 S.Ct. 2113, 161 L.Ed. 2d 1020 (2005), made certain comments that will likely have a strong impact on the interpretation of "substantial burden." Technically, the Court's comments concern whether the government's interest outweighs the free exercise rights of the prisoner. The Court thought it worth repeating that prison security is a compelling state interest and that RLUIPA was enacted under the assumption that deference would be given to the institutional officials' expertise. *Id.* at 1031, 1035, and 1036 n.13. Thus, even if a prisoner can establish a substantial burden on his free exercise rights, the judgment of the prison as to what will maintain order will be given substantial deference. In fact, the examples cited by the Supreme Court of violations by prisons would already have been prohibited by the Free Exercise Clause, the Establishment Clause and the Equal Protection Clause. *Id.* at 1031 n.5.

b. Does RLUIPA Require a Policy, Custom or Practice for Suits Against Governmental Entities?

In the context of federal civil rights litigation brought under 42 U.S.C. § 1983, the Supreme Court has held that a plaintiff must establish that a governmental entity had a policy, custom or practice that violated the plaintiff's rights. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that Congress did not intend to subject municipal bodies to respondeat superior liability under §1983. The rejection of respondeat superior means that "a municipality cannot be held liable solely because it employs a tortfeasor," but only for its own wrongs. *Monell*, 436 U.S. at 692. A municipality is liable for its own wrongs when enforcement of a municipal policy or practice results in a deprivation of federally protected rights. Accordingly, a governmental entity cannot be held liable under §1983 on the basis of a respondeat superior theory. *Oklahoma City v. Tuttle*, 471 U.S. 808, 828 (1985); *Williams v. Luna*, 909 F.2d 121 (5th Cir. 1990); *Board of the County Commissioners of Bryan County, Oklahoma v. Brown* 520 U.S. 397, 117 S.Ct. 1382 at 1388 (1997). "It is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." *Monell*, 436 U.S. at 694.

Locating a "policy" ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality. Similarly, an act performed pursuant to a "custom" that has not been formally approved by an appropriate decision maker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law. *Board v. Brown*, 117 S.Ct. at 1388.

The policy or custom causing the alleged injury must be a "deliberate or conscious choice" by individuals with policy-making authority. *Richardson v. Oldham*, 12 F.3d 1373, 1381-82 (5th Cir. 1994); *Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th

Cir. 1992). A policy "generally implies a course of action consciously chosen from among various alternatives." *Tuttle*, 471 U.S. at 823.

RLUIPA provides that "a person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). The term government is defined to include,

> (i) a State, county, municipality, or other governmental entity created under the authority of a State;
> (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
> (iii) any other person acting under color of State law.

42 U.S.C. § 2000cc-5(4)(A). Further, RLUIPA states, "no government shall impose or implement a land use regulation…." 42 U.S.C. § 2000cc(a)(1) and (b)(1)-(3). As a result, while RLUIPA explicitly makes governmental officials proper defendants under RLUIPA, it does not make absolutely clear the extent to which the actions of governmental officials can be held against the governmental entities. In fact, there appears to be no evidence that RLUIPA attempts to create *respondeat superior* liability for governmental entities.

RLUIPA defines "land use regulation" as meaning a "zoning or landmarking law, or the application of such law, that limits or restricts a claimant's use or development of land." 42 U.S.C. § 2000cc-5 (5). Thus, while there appears to be no case law on this issue to date, it would seem to make the most sense out of RLUIPA to say that (1) claims may be brought against individuals only for the application of zoning or landmarking laws; and (2) claims may only be brought against governmental entities only for the zoning or landmarking laws themselves, or perhaps for the application such laws when the actions of the governmental official would constitute the actions of a policymaker. In the context of prisoner litigation, it would likewise make the most sense out of RLUIPA to only allow suits against governmental entities when the alleged violation resulted from a policy, custom or practice.

c. Does RLUIPA Require Exhaustion of Administrative Remedies?

It is relatively common for governmental entities to allow property owners to receive variances from the zoning ordinances in certain circumstances. However, it is currently unclear whether a plaintiff must exhaust such administrative remedies prior to bringing a claim. In *Murphy v. Zoning Comm'n of the Town of New Milford*, 148 F.Supp.2d 173 (2001), homeowners sued the town's zoning commission and zoning enforcement officer, alleging that a cease and desist order prohibiting regularly scheduled prayer meetings of 25 or more attendees violated their rights under RLUIPA. The plaintiffs in *Murphy* were homeowners who were holding prayer group meetings in their home, in violation of the local ordinance. *Id.* at 176-77. The Town issued a cease and desist order, but had not actually engaged in an enforcement action. *Id.* at 178 and 183. The Town had an appeal process that plaintiffs could have taken advantage of, but did not. *Id.* at 184. Also, it appears that the plaintiffs could have applied for a special use permit, but did not. *Id.* The District Court held that the cease and desist order was a final order for purposes of ripeness under RLUIPA because it had the actual effect of substantially burdening the religious exercise of the plaintiffs. *Id.* In directly addressing the issue of whether the plaintiffs should be required to appeal the cease and desist order or apply for a special use permit, the Court held that *individuals*, as opposed to *institutions*, are not required to exhaust their administrative remedies under RLUIPA. *Id.* at 184-85. The Court noted that the Congressional Record specifically states that the statute "does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations." *Id.* at 184 (citing Senators Hatch and Kennedy, 146 Cong. Rec. S7774-01, S7776 (daily ed. July 27, 2000)). The Court concluded that the Congressional Records reference to institutions as opposed to individuals was an indication that Congress had not intended to require individuals to exhaust their administrative remedies prior to bringing a suit to prevent conduct that substantially burdens the plaintiff's religious exercise. *Id.* at 184-85.

Since there seem to be no other cases directly on this issue, it is unclear how the court's will decide the issue. The conclusion of the *Murphy* court is ultimately unpersuasive and it should be noted that the Court specifically limited its holding to the specific facts before it. *Id.* at 184. In almost all cases involving institutions that have been substantially burdened, they will also involve individuals who have been substantially burdened. Thus, the conclusion of the *Murphy* court would have the effective result of completely contradicting the legislative history of the two sponsors for RLUIPA, Senators Hatch and Kennedy.

5. Constitutionality, Or Lack Thereof, Of RLUIPA

In reviewing the case law involving RLUIPA, it appears that various parties have primarily challenged the constitutionality of RLUIPA on five bases: (1) the Spending Clause; (2) the Commerce Clause; (3) § 5 of

the Fourteenth Amendment; (4) the Establishment Clause; and (5) the Tenth Amendment.

a. RLUIPA and the Spending Clause

As already mentioned, RLUIPA only applies in certain specified circumstances. The first situation in which RLUIPA applies is when a "substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability." 42 U.S.C. § 2000cc(a)(2)(A). To date, there appear to have been no cases that have concluded RLUIPA is unconstitutional on the grounds that it is beyond the scope of Congress' authority under the Spending Clause. In the context of the institutionalized persons portion of RLUIPA, however, various court shave concluded that RLUIPA is a valid exercise of Congress' authority under the Spending Clause. *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003); *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004); *see also San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (2004) (assuming without discussion that the *Mayweathers* decision is binding precedent as to the constitutionality of the land use regulation provisions) and *Elsinore Christian Center v. City of Lake Elsinore*, 291 F.Supp.2d 1083, 1103 (C.D.Cal. 2003) (likewise assuming without discussion that the land use regulation provisions are constitutional under the Spending Clause).

Congress has the authority to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. Art. I, § 8, cl. 1. The Supreme Court has held that incident to this power, "Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). However, the Supreme Court has enunciated three limitations on the ability of Congress to condition the receipt of federal funding: (1) "the exercise of the spending power must be in pursuit of the general welfare;" (2) "if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously;" and (3) the limitation must be related to the federal interest in the particular national project or program. *Id.* (internal quotes removed).

In order to determine whether an exercise of the spending power is in pursuit of the general welfare, the Supreme Court has noted that "courts should defer substantially to the judgment of Congress." *Id.* In fact, The Supreme Court went so far as to question whether a Court could ever invalidate a law on this basis. *Id.* at 207, n. 2; *Mayweathers*, 314 F.3d at 1066. Thus, the Ninth and Seventh Circuits both concluded that, considering the protection provided to religious exercise by the First Amendment, it is clear that the protection of religious exercise is within the scope of the "general welfare." *Mayweathers*, 314 F.3d at 1066-67; *Charles*, 348 F.3d at 607. Likewise, neither Court had any real doubt that RLUIPA unambiguously conditions the receipt of federal funding on compliance to the Act. *Mayweathers*, 314 F.3d at 1067; *Charles*, 348 F.3d at 607-08 (noting that the use of a "least restrictive test" did not make the condition ambiguous).

Finally, in reference to the requirement that the conditions must bear some relationship to the purpose of the federal funding, the Ninth Circuit noted,

> Congress has a strong interest in making certain that federal funds do not subsidize conduct that infringes individual liberties, such as the free practice of one's religion. The federal government also has a strong interest in monitoring the treatment of federal inmates housed in state prisons and in contributing to their rehabilitation. Congress may allocate federal funds freely, then, to protect the free exercise of religion and to promote rehabilitation.

Mayweathers, 314 F.3d 1067. The Seventh Circuit, in *Charles*, noted,

> Congress has an interest in allocating federal funds to institutions that do not engage in discriminatory behavior or in conduct that infringes impermissibly upon individual liberties. In the context of protecting prisoners' religious rights, Congress also seeks to promote the rehabilitation of prisoners, a process in which religion can play an important role.

Charles, 348 F.3d at 608.

It would appear that the Ninth and Seventh Circuits have relied on two different arguments: (1) that the federal government has an interest in funding institutions that do not engage in discriminatory behavior; and (2) that religious exercise furthers the federal government's interest in the rehabilitation of prisoners (which is presumably what federal funding to prisons is designed to facilitate). The first argument has a significant logical flaw. The *Dole* test requires that the condition on federal funding bear a real relationship to the purpose of the funding. *Mayweathers*, 314 F.3d 1067. Unless the purpose of the federal funding is to prevent discriminatory behavior, there is no relationship between the purpose of the funding and the purpose of the condition on funding. The second argument, however, (the relationship between religious exercise and rehabilitation), is a logically coherent argument in line

with *Dole*. From the perspective of determining the constitutionality of RLUIPA, its application is limited because it only works within the context of institutionalized persons.[6]

As already discussed, one of the primary purposes of RLUIPA is to condition the receipt of federal funding on adherence to the provisions relating to land use regulation. *See* 42 U.S.C. § 2000cc. While a local government may well receive federal funding that impacts a wide variety of programs, that is not to say that there is any relationship between the federal funding received and whatever land use regulations a local government may enact. It does not appear that any Court has considered the possibility that even if the institutionalized persons' portion of RLUIPA is constitutional under the Spending Clause, that does not mean that the land use regulation portion of RLUIPA is constitutional.

b. RLUIPA and the Commerce Clause

The second situation in which RLUIPA applies is when "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability." 42 U.S.C. § 2000cc(a)(2)(B).

Under the United States Constitution, Congress has the authority to regulate commerce with foreign nations, among the States and with Indian tribes. U.S. Const. Art. 1, § 8, cl. 3. Pursuant to that authority, Congress may (1) "regulate the use of the channels of interstate commerce;" (2) "regulate and protect that instrumentalities thereof;" and (3) regulate intrastate activities where the activity has a substantial effect on interstate commerce. *United States v. Lopez*, 514 U.S. 549, 559, 561 (1995). The primary case upholding RLUIPA under the commerce clause is *Westchester Day School v. Village of Mamaroneck*, 280 F.Supp.2d 230 (S.D.N.Y. 2003). The Court in *Westchester Day School* concluded that because Section 2000cc(a)(2)(B) has a "jurisdictional element" limiting its application to cases in which the activity is within the confines of interstate commerce, RLUIPA is a valid exercise of Congressional authority under the Commerce Clause. *Id.* at 237-38.

In *Elsinore Christian Center v. City of Lake Elsinore*, 291 F.Supp.2d 1083, 1102-1104 (C.D.Cal. 2003), however, the District Court held that RLUIPA is not a valid exercise of the Commerce Clause. The District Court noted that *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), specifically allow for the regulation of non-economic activities if the aggregate effect of the activity brings the activity within the reach of the third prong of regulation. *Id.* at 1102. The District Court further noted that it was most likely with this particular requirement in mind that Congress required claims brought under § 2000cc(a)(2)(B) demonstrate that there was a sufficient nexus with interstate commerce. *Id.* However, this provision does not save Section 2000cc(a)(2)(B) because, in contrast to other such federal laws, RLUIPA attempts to regulate the State's regulations rather than the conduct of individuals:

As the Supreme Court has observed:

> In providing for a stronger central government … the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States … We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. [Citations] The allocation of power contained in the Commerce Clause, for example, *authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce*.

New York v. United States, 505 U.S. 144, 166, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (emphasis added). *Id.* at 1103-03.

To date, it appears that no court has addressed the argument made by the district court in *Elsinore*. *See United States v. Maui*, 298 F.Supp.2d 1010, 1015 (D.Ha. 2003) and *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792, *19 (W.D.Tex. 2004) (both ignoring *Elsinore* in the context of the Commerce clause despite citing it in other sections of the orders). Currently, *Elsinore* is on appeal to the Ninth Circuit Court of Appeals and a decision on this issue is expected at any time. *Elsinore Christian Center v. City of Lake Elsinore*, Case No. 03-80125 (9th Cir.).

c. RLUIPA and § 5 of the Fourteenth Amendment (Free Exercise)

In *Boerne*, the Supreme Court held that the Religious Freedom Restoration Act was unconstitutional because Congress did not have the authority to create RFRA under § 5 of the Fourteenth Amendment. Section 5 of the Fourteenth Amendment,

[6] In *Benning*, the State conceded that RLUIPA served the general welfare so the Eleventh Circuit never addressed this issue. *Benning*, 391 F.3d at 1305. The Eleventh Circuit did, however, basically adopt the argument that RLUIPA serves the governmental interest in avoiding civil rights violations. *Id.* at 1307 *et seq.*

however, is simply the implementation clause and grants Congress the "power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. Amend. XIV, § 5. However, the Supreme Court has concluded that the Free Exercise Clause of the First Amendment was "incorporated" into the Fourteenth Amendment under the § 1 "due process" clause. As a result, Congress is permitted to enact legislation for the purpose of enforcing the Free Exercise Clause.

Currently, there is only one court that has concluded that RLUIPA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. *Elsinore Christian Center v. City of Lake Elsinore*, 291 F.Supp.2d 1083, 1096-1102 (C.D.Cal. 2003). Of the courts that have addressed the issue and concluded that RLUIPA is constitutional, there has been a fairly consistent argument. *Freedom Baptist Church v. Middletown*, 204 F.Supp.2d 857, 868-69 (E.D.Pa. 2002) (assuming RLUIPA codifies *Sherbert* in the context of individualized assessments); *Westchester Day School v. Village of Mamaroneck*, 280 F.Supp.2d 230, 234-237 (S.D.N.Y. 2003) (relying on *Freedom Baptist*); *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792, *19 (W.D.Tex. 2004) (basically making no substantive argument). However, after examining the argument put forth by the district court in *Elsinore*, the arguments of the courts in favor of RLUIPA are unpersuasive. None of the courts that have upheld RLUIPA under § 5 of the Fourteenth Amendment have addressed, in any detail, the extent to which RLUIPA is not a codification of *Sherbert*, nor have any of the courts addressed the statement in *Employment Division v. Smith* that *Sherbert* has never been applied outside the context of unemployment benefits.

In contrast, in *Elsinore Christian Center v. City of Lake Elsinore*, 291 F.Supp.2d 1083, 1096-1102 (C.D.Cal. 2003), the District Court held that RLUIPA is not a valid enforcement of the Free Exercise Clause under § 5 of the Fourteenth Amendment for the following reasons: (1) Free Exercise jurisprudence does not show any substantial evidence that the *Sherbert* analysis is applicable to zoning regulations (thus RLUIPA is not merely the codification of already existing law); (2) Free Exercise jurisprudence limits its protection to "central religious beliefs and practices" whereas RLUIPA applies to all religious practices, irrespective of whether they are central; (3) *Sherbert* and *Lukumi* applied only to "individualized exemptions" whereas RLUIPA applies to all "individualized assessments;" (4) *Sherbert* requires some evidence that the governmental entity does not treat "religious hardships" on the same level as other hardships; and (5) RLUIPA has an insufficient basis in the legislative findings and is out of proportion in comparison to the ills it seeks to prevent.

The discussion provided in *Elsinore* is more thorough than any of the arguments provided in the other district courts. It appears that, to date, no Court of Appeals has addressed this issue. As already mentioned, *Elsinore*, is on appeal to the Ninth Circuit Court of Appeals and this is one of the issue that the Ninth Circuit should address. *Elsinore Christian Center v. City of Lake Elsinore*, Case No. 03-80125 (9th Cir.).

d. RLUIPA and the Establishment Clause

To date, no Court of Appeals has addressed the question of whether the zoning regulations portion of RLUIPA is unconstitutional as a violation of the Establishment Clause. However, in the context of the institutionalized persons portion of RLUIPA, various Courts of Appeal and, just recently, the Supreme Court, have addressed the issue. *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002) (upholding RLUIPA), cert. denied, 157 L. Ed. 2d 30, 124 S. Ct. 66 (2003); *Charles v. Verhagen*, 348 F.3d 601, 610-11 (7th Cir. 2003) (upholding RLUIPA); *Cutter v. Wilkinson*, 349 F.3d 257, 262-68 (6th Cir. 2004) (declaring RLUIPA unconstitutional); *Madison v. Riter*, 355 F.3d 310 (2003) (upholding RLUIPA); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1240-42 (11th Cir. 2004) (upholding RLUIPA); *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004) (upholding RLUIPA); *Cutter v. Wilkinson*, __ U.S. __, 125 S.Ct. 2113, 161 L.Ed. 2d 1020 (2005) (overturning Sixth Circuit and upholding RLUIPA).

In *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003), the Seventh Circuit held that the provision of RLUIPA that applies to institutionalized persons does not violate the Establishment Clause because it merely lifts a burden from the free exercise of religion.

In *Williams v. Bitner*, 285 F.Supp.2d 593 (M.D.Pa. 2003), the District Court held that the provision of RLUIPA that applies to institutionalized persons does not violate the Establishment Clause because the Court concluded that RLUIPA "merely ensures that all inmates share an equal right to observe their beliefs." *Id.* at 600.

In *Westchester Day School v. Village of Mamaroneck*, 280 F.Supp.2d 230 (S.D.N.Y. 2003), the District Court held that RLUIPA is not violate of the Establishment Clause because it does not prefer one religion over another. *Id.* at 238.

In *Cutter v. Wilkinson*, 349 F.3d 257, 262-68 (6th Cir. 2004), the Sixth Circuit concluded that the institutionalized persons portion of RLUIPA was unconstitutional under the Establishment Clause for the following reasons: (1) RLUIPA favors religious rights over other fundamental rights without any showing that religious rights are at any greater risk of deprivation; (2) the exemption given to religious employers in Title VII is fundamentally different from RLUIPA because

Title VII would, at least arguably, otherwise violate the Establishment Clause because it would have required interference in the internal workings of religious organizations; and (3) RLUIPA encourages individuals to at least claim to have religious reasons for their actions (in order to get the benefit of strict scrutiny) and thus advances religion.

In *Cutter v. Wilkinson*, __ U.S. __, 125 S.Ct. 2113, 161 L.Ed. 2d 1020 (2005), the Supreme Court overturned the Sixth Circuit's decision and held that the institutionalized persons portion of RLUIPA is facially constitutional. The Supreme Court specifically noted that the government may accommodate religious practices without violating the Establishment Clause. *Id.* at 1029 ("Foremost, we find RLUIPA's institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise."). The Court did note, however, that the government's duty does not extend to paying for devotional accessories, *Id.* at 1033 n.8, nor does it require that the accommodation be particularly pleasant. *Id.* at 1034 n.10 ("one state corrections system served as its kosher diet 'a fruit, a vegetable, a granola bar, and a liquid nutritional supplement - - each and every meal'").

The Court repeatedly noted that the current case was a facial challenge to the statute, and not an as-applied challenge. Presumably to provide guidance in order to avoid future as-applied challenges, the Court held, "We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety." *Id.* at 1034-1035. In that context, the Court specifically referenced the case declaring unconstitutional a law that granted individuals the right to force their employers to allow them to have whatever day they wanted for their Sabbath observance. *Id.* The Court also thought it worth repeating that prison security is a compelling state interest and that RLUIPA was enacted under the assumption that deference would be given to the institutional officials' expertise. *Id.* at 1031, 1035, and 1036 n.13. Thus, while the Supreme Court ultimately concluded that the institutionalized-persons portion of RLUIPA is constitutional under the Establishment Clause, it appears to have reached that decision by limiting the supposed expansive scope of the Act.

e. RLUIPA and the Tenth Amendment

To date, no court has declared RLUIPA unconstitutional under the Tenth Amendment. This presumably because of the various cases that state that if Congress has acted pursuant to a specifically delegated power, the action does not fall within the Tenth Amendment. As to those courts that have concluded that RLUIPA violates some other constitutional provision, there has been no reason to address the Tenth Amendment.

In *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003), the Seventh Circuit held that the provision of RLUIPA that applies to institutionalized persons does not violate the Tenth Amendment because RLUIPA is a valid exercise of the Spending Clause and the power is therefore not reserved to the states. *Id.* at 609; *See also Benning v. Georgia*, 391 F.3d 1299, 1308-1309 (11th Cir. 2004).