Jerold Waltman[1]
Baylor University
USA

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THE LANDSCAPE OF CONTEMPORARY JURISPRUDENCE REGARDING FREE EXERCISE OF RELIGION[2]

Abstract

Since 1990 the debate over the limits of free exercise of religion has touched the courts, the Congress, and the executive branch. A wide range of issues has emerged: property use, prisoner rights, religious speech and association in schools, church's autonomy in hiring employees, and the Obama administration's policies toward health insurance requirements for religious institutions and businesses. The purpose of this paper is to assess the current state of free exercise jurisprudence through a survey of the major developments in these fields. It seems that when free exercise issues affect individuals or religious institutions alone, a wide scope is allowed for religious liberty. However, when other political interests come into play—such as gay and lesbian groups or groups representing women—the record is far more mixed.

Keywords: Free exercise of religion, Religious Freedom Restoration Act, prisoner rights, freedom of speech, church autonomy, reproductive freedom.

Introduction

Religious free exercise is a fundamental constitutional right, but its application has been sharply contested in contemporary American politics. To be sure, there have long been skirmishes over the meaning of the Constitution's Free Exercise Clause, but since 1990 the volume and intensity of the conflict has increased noticeably. This date is important because in that year the Supreme Court handed down its decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.[3] When the Court used this case to jettison a long-standing interpretive rule, fashioned in 1963, it triggered outrage among almost

1 Jerold Waltman is the R.W. Morrison Professor of Political Science at Baylor University. His most recent book is *Congress, the Supreme Court, and Religious Liberty: The Case of* City of Boerne v. Flores (Palgrave, 2013). He also serves as editor of the *Journal of Church and State*. E-Mail: Jerold_Waltman@baylor.edu

2 Note: I would like to thank Deborah O'Malley for her help with this article.

3 494 U.S. 872 (1990).

the entire spectrum of American religious and civil liberties groups. This culminated in a decade-long struggle with Congress, the results of which have not yet abated.

The first section of this paper will sketch in the background to current free exercise jurisprudence. Then, we will address the major contemporary issues: property use, prisoner rights, religious speech and association in schools, church autonomy in hiring employees, and the conflicts concerning reproductive freedom and government policy. Lastly, I offer a brief analysis of judicial trends and what the future may hold for free exercise jurisprudence.

Background

The First Amendment stipulates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Though it is widely acknowledged that both these clauses aim to achieve a protection of religious liberty generally, disputes over church and state usually fall under one clause or the other. The first free exercise case arose in 1879, when the federal government outlawed the Mormon practice of polygamy.[4] The Supreme Court issued a unanimous opinion[5] stating that while the right to believe was absolute, religious practice can be limited if it is "in violation of social duties or subversive or good order." Polygamy was viewed to be the latter. A scattering of free exercise cases came to the court over the ensuing years, and more often than not the justices made it more difficult for the state to regulate religiously motivated behavior. Then in 1963, the Supreme Court adopted an explicit test for measuring whether or not government could interfere with someone's free exercise, the "compelling interest" test. In essence, a state or the federal government had to demonstrate that it had a compelling interest in uniformly enforcing the policy in question.

The test proved reasonably workable. In some areas, such as prisons, the military, and internal government operations, the Court refused to apply the test at all.[6] In other fields, the test was applied but the government usually won the day.[7] Overall, only in the unemployment compensation field were successful

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

5 In the United States Supreme Court, only a bare majority—5 out of 9 justices—is required for a ruling. An Opinion of the Court may represent either a majority or a plurality. The latter situation can occur when one or more justices whose vote is necessary to achieve a majority agrees with the ruling but does not endorse the reasoning of the justice who writes the Opinion of the Court. Such a justice may write a concurring opinion. Justices who disagree with the ruling and the rationale often write dissenting opinions to explain their position.

6 See *Goldman v. Weinberger,* 475 U.S. 503 (1986) (Military); *O'Lone v. Estate of Shabazz,* 482 U.S. 342 (1987) (Prisons); *Bowen v. Roy,* 476 U.S. 693 (1986) and *Lyng v. Northwest Indian Cemetery Protective Association,* 485 U.S. 439 (1988) (Internal government operations).

7 See, for example, *United States v. Lee*, 455 U.S. 252 (1982) (Payment of taxes for a specific program in which one did not

free exercise challenges mounted.[8]

Contemporary free exercise jurisprudence and politics begins with the 1990 case of *Employment Division of Oregon v. Smith*.[9] Writing for the majority in a 6-3 decision, Justice Antonin Scalia used the case to discard the compelling interest test. He insisted that judges were ill-equipped to assess the theological legitimacy of various religious beliefs, determine how central certain beliefs were to individual claimants for exemptions to generally applicable laws, and weigh the resulting needs of governmental uniformity in enforcing public policies against the religious beliefs of individuals. To be sure, exemptions from generally applicable laws could be granted, he said; however, it would henceforth be necessary for legislative bodies, state or federal, to confer them. Other justices dissented fiercely. Sandra Day O'Connor argued that the majority engaged in "a strained reading of the First Amendment" to reach its conclusion, while Justice Harry Blackmun felt that his colleagues took "a distorted view of our precedents."[10]

The decision likewise triggered a firestorm of criticism among both the religious and secular civil rights communities.[11] An extremely broad coalition of groups—many often hostile to each other in most areas of public policy—came together to lobby Congress to overturn this decision. Although there were some political obstacles to be overcome, in 1993 the Religious Freedom Restoration Act (RFRA) passed unanimously in the House of Representatives and by a lopsided 97-3 margin in the Senate. The act instructed the courts to use "strict scrutiny" when addressing a free exercise claim. Strict scrutiny is the highest standard of judicial review, and it requires that the government not only have a compelling interest, but that it must use the least restrictive means to reach its compelling interest. Thus, it is even more stringent than the compelling interest test standing alone.

Meanwhile, the Supreme Court had occasion to consider an unusual case, and used it as an opportunity to reiterate its holding in *Smith*. The case involved a challenge to a Hialeah, Florida ordinance that banned ritualistic animal sacrifice.[12] The measure was clearly targeted at the local Santeria congregation, and

participate); *Bob Jones University v. Internal Revenue Service*, 461 U.S. 574 (1983 (Racial discrimination); and *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989) (Tax deductions). Only in *Wisconsin v. Yoder,* 406 U.S. 208 (1972) (School attendance) did the government not prevail.

8 *Thomas v. Review Board of Indiana Employment Security Division,* 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Commission of Florida,* 480 U.S. 136 (1987); and *Frazee v. Illinois Department of Employment Security,* 489 U.S. 829 (1989).

9 494 U.S. 872 (1990).

10 494 U.S. 892 and 494 U.S. 908.

11 I have covered this reaction and the resulting legislation and litigation elsewhere. Waltman Jerold, *Congress, the Supreme Court, and Religious Liberty: The Case of* City of Boerne v. Flores, Palgrave, New York, 2013, chap. 1.

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

because it was so targeted the Supreme Court struck it down by a unanimous vote. In the opinion, Justice Anthony Kennedy explicitly restated the court's recently enunciated position on generally applicable laws (which this was not), that any exemptions had to be granted by the legislature.

Four years after its passage, the constitutionality of RFRA was taken up in the case of *City of Boerne v. Flores.*[13] Although the case had enormous implications for free exercise, the actual issue at bar centered on Congress's power to enact RFRA. Congress had relied on Section 5 of the Fourteenth Amendment, which empowers Congress to enforce the first four sections. Section 1 contains the "due process clause" that incorporates the First Amendment against the states. Thus, Congress claimed that it was merely enforcing the First Amendment when it ordered the courts to reinstate the compelling interest/strict scrutiny test. The Supreme Court, however, held that the act both infringed on the power of the courts to interpret the Constitution and went beyond the "remedial" power over state action given to Congress by Section 5. The *Boerne* opinion did not, however, address the question of whether RFRA was constitutional as applied to the federal government. In a later case, though, its validity for federal legislation was unanimously upheld,[14] a holding that was to become important when the health care mandate controversy erupted, as discussed below.

After the *Boerne* decision, RFRA's backers sought to repass the measure (this time to be called the Religious Liberty Protection Act [RLPA]) but base it on other parts of the Constitution.[15] In the end only a scaled back version covering land use and prisoner rights (the Religious Land Use and Institutionalized Persons Act of 2000, or RLUIPA) was able to secure the support necessary to pass.[16] Henceforward, the strict scrutiny test would be applied in all cases involving policies that dealt with these two areas, if the policy in question imposed a "substantial burden" on free exercise. The portion of the act addressing prisoner rights was upheld by the Supreme Court in 2005 in *Cutter v. Wilkinson.*[17] Although the Supreme Court has not ruled explicitly on the constitutionality of the land use portion, a number of Courts of Appeals have upheld it, and the high court has not chosen to review any of these cases.[18] Thus, in both these areas

13 521 U.S. 507 (1997).

14 *Gonzales v. O Centro Espirta Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006).

15 The commerce power and the spending power (Article I, Section 8). Also, Congress again utilized Section 5 of the Fourteenth Amendment, but this time went to some lengths to compile an evidentiary record, something the Supreme Court said RFRA lacked.

16 This was chiefly because of the opposition of gay rights groups, who feared that a broad act would be used to challenge their recently won legislative victories in the housing and employment areas. See Waltman Jerold, *Religious Free Exercise and Contemporary American Politics: The Saga of the Religious Land Use and Institutionalized Persons Act of 2000,* Continuum, New York, 2011, chap. 6.

17 544 U.S. 709 (2005).

18 *Midrash Sephardic, Inc. v. Town of Surfside,* 366 F. 3d 1214 (11th Cir. 2004); *Saints Constantine and Helen Greek Orthodox Church v.*

strict scrutiny has been the guiding framework in free exercise jurisprudence regarding state and local legislation.

RLUIPA and Land Use

At one time conflicts between religious institutions and local land use boards were rare, as communities generally welcomed churches and other religious bodies into their midst. However, as the U.S. has simultaneously become more religiously diverse and minority religions have expanded beyond their past geographical bases, many requests for building permits are from non-mainline faiths. Furthermore, with the growth of the suburbs, churches no longer cater chiefly to residents of one neighborhood, making them seem less part of the local social landscape. Then, too, institutions such as "mega-churches" construct facilities for a wide range of uses—sports facilities, large assembly halls, music venues, even a hotel—that put strains on traffic flow and parking.

While adherents of even mainline denominations have sometimes found themselves hampered by zoning decisions, it has more often been minority religious groups that have faced the most difficulties. One systematic study by Brigham Young University, cited by Congress when it was developing RLUIPA, found that although small religious denominations make up only 9 per cent of the American population, they account for 49 per cent of the court cases involving zoning issues.[19] And, of course, this study only counted those instances that make it to court; the slim resources of many small churches undoubtedly preclude legal action.

Along with the enhanced legal protection provided to religious bodies by RLUIPA, three other factors have strengthened their hand. First, the Department of Justice is empowered to investigate complaints and enter suits on behalf of aggrieved churches. Second, churches are allowed to collect attorney's fees from the local government if they are successful. Third, the Becket Fund for Religious Liberty offers expert legal help to any religious group when it challenges discriminatory land use decisions.

The evidence points to a major shift in land use decisions. As RLUIPA began to be litigated in the courts, a major question was how judges would interpret the "substantial burden" threshold. A rigid definition would lessen the impact of the statute while a broad one would provide a major victory for churches. Although there was initially some variation among the circuits (no case, recall,

City of New Berlin, 396 F. 3d 895 (7th Cir. 2005); and *Guru Nanak Sikh Society of Yuba City v. County of Sutter,* 456 F. 3d 978 (9th Cir. 2006).

19 The study is reprinted in *Hearings before the House Subcommittee on the Constitution on the Religious Liberty Protection Act of 1998*, 105th Cong., 2d sess., June 16, 1998, pp. 234-260.

was successfully appealed to the Supreme Court), in the end the court's opted for a somewhat low threshold.[20]

This approach proved most helpful to religious bodies across the country. The Department of Justice published a study in 2010 detailing the results of its efforts regarding RLUIPA. It concluded that "RLUIPA has had a dramatic impact in its first ten years on protecting the religious freedom of and preventing religious discrimination against individuals and institutions seeking to exercise their religions through construction, expansion, and use of property."[21] A careful study of land use decisions in New Jersey affirmed that conclusion,[22] as did a survey of federal court cases by the *Harvard Law Review*.[23]

Recent cases confirm these findings. For example, in *Rocky Mountain Christian Church v. County Commissioners of Boulder County,*[24] a mega-church with an accompanying school was denied a special use permit to construct a large-scale expansion project. The Board's decision said the expansion would be "incompatible with the surrounding area, an over-intensive use of the land, likely to cause undue traffic congestion, and likely detrimental to the welfare of the residents of Boulder County." The court found, however, that the county had not asserted a compelling interest and sided with the church. The Court of Appeals for the Fifth Circuit likewise found for a church in *Elijah Group v. City of Leon, Texas.*[25] The city had created a commercial zone from which churches were banned, but permits for assembly facilities could be granted to secular groups such as private clubs. The court held that to preclude a church from even applying for a building permit while allowing a similar privilege to a non-religious group clearly violated RLUIPA.

The most prominent RLUIPA land use case in recent years provides a prime example of how a local community's acts of discrimination against a minority religious group can pressure government officials to weaken protection of the group's free exercise rights. This occurred in Murfreesboro, Tennessee when a group of Muslims faced stiff opposition to their attempt to build a new mosque. The Islamic Center of Murfreesboro (ICM) had been there for over thirty years, and many of its members reported that they had always felt welcome in the

20 The various definitions of "substantial burden" that the courts have used are laid out in the appendix to Salkin Patricia and Lavine Amy, The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government, *The Urban Lawyer,* Vol. 40, No. 2, Kansas City, Missouri, 2008, pp. 259-267.

21 U.S. Department of Justice, *Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act*, September 22, 2010, 5.

22 Englander Andrew, God and Land in the Garden State: The Impact of the Religious Land Use and Institutionalized Persons Act in New Jersey, *Rutgers Law Review,* Vol. 61, No. 2, Newark, New Jersey, 2009, pp. 753-790.

23 Note: Religious Land Use in the Federal Courts Under RLUIPA, *Harvard Law Review,* Vol. 120, No. 3, Cambridge, Massachusetts, 2007, pp. 2178-2199.

24 613 F. 3d 1229 (10th Cir. 2010)

25 643 F. 3d 419 (5th Cir. 2011)

town. Recent growth had led to the need for a new mosque. After receiving the local government's permission to construct the facility, they encountered public protests, harassing phone calls, vandalism, arson of a construction vehicle, and even a bomb threat.[26]

In June 2012, a small group of local citizens sued the city to stop construction of the mosque. Their attorneys argued that Islam is not a real religion and is therefore without First Amendment protection, and that the ICM was trying to overthrow the Constitution and replace it with Sharia law.[27] The local Chancery Court judge dismissed these arguments, but nonetheless ruled that, due to the "tremendous public interest" surrounding the mosque, its approval would be subject to a heightened legal standard when compared with other houses of worship.[28] The federal court, however, found that this violated RLUIPA since "the State Court's Order imposes a heightened notice requirement regarding the mosque which substantially burdens the Islamic Center's free exercise of religion without a compelling governmental interest."[29] As a result, the new mosque has since been constructed.

RLUIPA and Prisons

The problem of religious rights for prisoners has always been vexing. Most observers and prison administrators agree that religion can have a salutary effect on prisoner behavior and rehabilitation; at the same time, many prisoners use religious demands as a way to harass prison officials, or worse as a cover for gang activity. Before RFRA, while regularly acknowledging that prisoners do not lose their free exercise rights when incarcerated, the courts generally stuck to a policy of deferring to the judgment of prison administrators when it came to religious rights for inmates.[30]

During the hearings and floor debates over both RFRA and RLUIPA prison officials repeatedly urged that they be exempted from the statutes. In the latter case, they offered evidence from the period when RFRA was in effect that purported to show how outrageous and even dangerous some situations had become.[31] On the Senate floor, however, an amendment to exempt prisons from

26 Becket Fund District Court complaint, *http://www.becketfund.org/wp-content/uploads/2012/07/Verified-Complaint-2-07.18.12.pdf* (accessed 1.5.2013).

27 After long fight, opening day, *http://www.huffingtonpost.com/2012/08/11/* (accessed 1.5.2013).

28 Becket Fund press release *http://www.becketfund.org/tennessee-mosque-opens-in-time-for-ramadan/* (accessed 1.5.2013).

29 *United States v. Rutherford*, Federal District Court for the Middle District of Tennessee, No. 3: 12-0737 (2012).

30 The major case was *O'Lone v. Estate of Shabazz,* 482 U.S. 342 (1987), which refused to overturn prison rules requiring Muslim inmates to work on Friday.

31 See, for example, the testimony of Jeffrey Sutton, Commissioner of Ohio Prisons, in *Hearings before the House Subcommittee on the Constitution,* "Protecting Religious Freedom after *Boerne v. Flores,*" 105th Cong., 1st sess., July 14, 1997, 122-127.

RLUIPA failed. Nevertheless, statements from the bill's backers announced that they expected the courts to tread carefully in this area.[32]

As noted above, the Supreme Court upheld the prisoner portion of RLUIPA in *Cutter v. Wilkinson*. It used the spending clause as the basis for validating Congress's power to enact the statute, saying that states voluntarily agree to abide by federal conditions when they accept federal funds. Justice Ruth Bader Ginsburg's opinion for a unanimous court, though, also dealt with whether RLUIPA might run afoul of the Establishment Clause. The ground for such a worry was that RLUIPA in effect made the state prefer religion over non-religion, as when two prisoners made identical claims for special treatment (say, in diet or clothing) but one based his on religion and the other did not. However, she turned this objection aside, citing the oft-quoted principle that there must be some "room for play in the joints" between the two religion clauses.[33] Sensitive, though, to the problems upholding RLUIPA might create for prison governors, she gave a clear signal to the lower courts: "Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the functioning of an institution, the facility would be free to resist the imposition. In that event, adjudication in as-applied challenges would be in order."[34]

This admonition seems to have had some impact. Two studies determined that in the early years of RLUIPA's life, while prisoners still lost most cases, they were winning more than they had before.[35] Furthermore, the researchers found evidence that prisons were changing their practices in light of RLUIPA, granting prisoners more freedoms in a variety of areas. However, after *Cutter* the courts retreated a bit. On one front, they have been requiring more evidence for establishing a "substantial burden" on a prisoner's religion, especially when it comes to non-mainstream faiths. A recent case, *McFaul v. Valenzuela,*[36] is illustrative of this trend. Anson McFaul, an inmate in the Texas prison system, claimed that he was a Celtic Druid and needed certain medallions to keep near his person. The prison had a policy of denying inmates items that cost over 25 dollars. McFaul said that the reasons he needed the items were secret. After consulting experts, the court held that he had not demonstrated that possessing these medallions

32 "[Courts should] continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline, consistent with consideration of costs and limited resources." *Congressional Record,* Senate, July 27, 2000. This quotation is from a joint statement by Senators Orrin Hatch and Edward Kennedy, the bill's co-sponsors.

33 The quotation is from *Walz v. Tax Commission*, 397 U.S. 669 (1970).

34 544 U.S. 726.

35 Gabuatz Derek, RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions, *Harvard Journal of Law and Public Policy,* Vol. 28, No. 2, Cambridge, Massachusetts, 2005, pp. 504-607 and Larson Jennifer, RLUIPA: Distress and Damages, *University of Chicago Law Review,* Vol. 74, No. 4, Chicago, Illinois, 2007, pp. 1413-1473.

36 684 F.3d 564 (5th Cir. 2012).

was central to his faith, and therefore that any burden on him was incidental rather than substantial.

On another front, even when a substantial burden is established, when it comes to applying the strict scrutiny standard the courts have begun to weigh costs. Taylor Stout has pointed out that prior to *Cutter* the Courts of Appeals had uniformly ignored costs. However, between 2005 and 2010, "circuit courts have decided forty-seven RLUIPA cases on the merits. Of those, the courts ruled in favor of the prisoners fourteen times and in favor of prisons thirty-three times. Of the thirty-three wins for prisons, seven decisions turned on the excessive financial and administrative burdens that RLUIPA imposes on prisons."[37] In essence, then, if controlling costs is a compelling governmental interest, in effect strict scrutiny is weakened.[38]

Thus, it appears that, while not gutting RLUIPA's protections, the courts are leaning at least somewhat more toward the side of prison administrators.

Speech and Association in Schools

The impact of RLPA's failure to pass can be seen in any number of areas, a major one of which concerns the plight of religious organizations in schools and universities. The central case here is *Christian Legal Society v. Martinez*.[39] Rather than take this case up on free exercise grounds, the court based its decision on freedom of speech. There, the doctrine of "limited public forums," which allows the justices to use a lower level of scrutiny, was deemed most pertinent. Had RLPA been in force, it would have obliged the Court to face the free exercise issue directly and utilize strict scrutiny.

The case involved the University of California Hastings College of Law's unique "accept-all-comers" policy, a non-discrimination policy wherein all student groups must "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs."[40] An organization that chooses to limit membership even to those who share beliefs related to the group's mission, rather than admitting all comers, cannot become a Registered Student Organization (RSO). As a result, they will not have access to

37 Stout Taylor, The Costs of Religious Accommodations in Prisons, *Virginia Law Review,* Vol. 96, No. 3, Charlottesville, Virginia, 2010, p. 1234.

38 In 2009 Aaron Black made a case that Congress should amend the statute to explicitly include costs as a compelling interest. Black Aaron, When Money is Tight, Is Strict Scrutiny Loose? Cost Sensitivity as a Compelling Governmental Interest Under the Religious Land Use and Institutionalized Persons Act of 2000, *Texas Journal on Civil Liberties and Civil Rights,* Vol. 14, No. 2, Austin, Texas, 2009, pp. 237-259.

39 561 U.S. ____; 130 S. Ct. 2971; 177 L. Ed. 2d 838 (2010).

40 177 L. Ed. 2d 850

university funding and some forums of communication with the student body.[41]

The Christian Legal Society (CLS), a national legal organization with chapters across the country, believes that sexual activity should only occur within marriage between a man and a woman. By the requirements of CLS-National, CLS chapters must enact bylaws requiring members and officers to sign a statement of faith and to live by these moral principles. Thus, students with different religious opinions and students who engage in "unrepentant homosexual conduct" may not become members. Because of these restrictions, Hastings denied the group RSO status, informing them that they must open up their membership to all students regardless of religious belief or sexual orientation.[42] CLS was the first student group ever to have been denied RSO status by Hastings.

The Christian Legal Society contended that this accept-all-comers policy impaired their First Amendment rights of free speech, expressive association, and free exercise of religion by forcing the group to admit members who do not share their beliefs about religion and sexual morality.[43] Such a requirement, they argued, undermined their ability to form an identity and thus advocate their viewpoints about these matters. Under the school's policy, for example, Jewish groups would ostensibly be required to admit anti-Semites or Holocaust deniers in order to obtain RSO status.[44]

41 The funding is provided by a mandatory student activity fee imposed on all students. RSOs may place announcements in a weekly student newsletter to advertise events on designated bulletin boards, send mass emails to the student body using a Hastings email address, and participate in an annual student group recruitment fair. They may also use Hastings' facilities for office space and meetings. See Justice Ginsburg's opinion at 177 L. Ed. 2d 849 and Justice Samuel Alito's dissenting opinion at 874. Groups that do not receive RSO status are not excluded from campus, but their ability to promote is limited. After CLS was denied RSO status, Hastings offered the group the use of their facilities for meetings and activities as well as generally available campus bulletin boards to announce their events. 177 L. Ed. 2d 851

42 It is important to note that Hastings' policy changed throughout the course of the litigation, a fact which the dissent uses to contend that Hastings'"all-comers policy" was mere subterfuge used to cover up their discrimination against CLS. In his dissent, Justice Samuel Alito pointed out that, at the time CLS was denied RSO status, the university had a mere "Nondiscrimination Policy," which was less constraining than the accept-all-comers policy. The university admitted that the original Nondiscrimination Policy "permit[ted] political, social, and cultural organizations to select officers and members who are dedicated to a particular set of ideals or beliefs" (Alito dissent, 177 L. Ed. 2d 883, internal quotations omitted). This policy would not survive First Amendment scrutiny, the dissent argued, because religious groups were singled out: "[o]nly religious groups were required to admit students who did not share their views" (Alito dissent, 883). Supreme Court precedent makes clear that a policy which treats secular speech more favorably than religious speech discriminates on the basis of viewpoint (Alito cites *Rosenberger,* 515 U.S. at 831 and *Good News Club* 533 U..S. at 112). It was only when CLS brought suit that Hastings changed their policy to an "accept-all-comers" policy, attempting to avoid any semblance of viewpoint discrimination. Alito states, "CLS was denied recognition under the Nondiscrimination Policy because of the viewpoint that CLS sought to express through its membership requirements. . . And there is strong evidence that Hastings abruptly shifted from the Nondiscrimination Policy to the accept-all-comers policy as a pretext for viewpoint discrimination." 177 L. Ed. 2d 881. The Court did not address the constitutionality of such a Non-discrimination policy, but only ruled on the broader all-comers policy. In his dissent, Alito argued that even the accept-all-comers policy is unconstitutional because a group's First Amendment right of expressive association is burdened when the group is forced to admit members whose presence would "affect[t] in a significant way the group's ability to advocate public or private viewpoints" (177 L. Ed. 2d 887, citing *Dale,* 530 U.S. at 648). No legitimate state interest, he thought, can override this powerful effect.

43 177 L. Ed. 2d 848.

44 177 L. Ed. 2d 887 (dissenting opinion).

The Court rejected CLS' claim, concluding that Hastings' all-comers policy did not violate the First Amendment Free Speech Clause. Under the Court's First Amendment jurisprudence, the majority reasoned, the law school's student group forum constitutes a "limited public forum," wherein the government can impose more restrictions than would be permissible in a more public setting.[45] Any access restrictions in a limited public forum must simply be "reasonable and viewpoint neutral."[46] Supreme Court precedent makes it clear that a university cannot target an organization because of its viewpoints,[47] but, in this case, the university set standards that apply to all campus organizations, regardless of their message or perspective. The university's position that the "educational experience is best promoted when all participants in the forum must provide equal access to all students"[48] is reasonable and beyond the Court's purview to question.[49] The Court also rejected CLS' free exercise claim because, under the precedent set by *Employment Division v. Smith*, the Free Exercise Clause is not violated unless the policy in question targets a religious group.[50]

As a result of the Court's decision in *CLS v. Martinez*, a number of public and private schools reconsidered their nondiscrimination policies, causing some strife across college campuses.[51] For example, two years after the decision was handed down, InterVarsity Christian Fellowship stated that 41 of its chapters faced challenges as a result. Legislative action has also taken place; lawmakers in Ohio and Arizona have passed bills ensuring that their state universities do not

45 Supreme Court precedent, according to the majority, has sorted government property into three categories: 1. Traditional public forums, such as streets and parks, 2. Government property that is not traditionally used as a public forum but is intentionally opened up for that purpose, and 3. Government property that is "limited to use by certain groups or dedicated solely to the discussion of certain subjects" This classification is from *Pleasant Grove City v. Summum,* 555 U.S. 460 (2009). Strict scrutiny is used to review speech restrictions that take place in the first two types of forum. In the third, however, the government must simply show that any restrictions are "reasonable and viewpoint neutral."

46 177 L. Ed. 2d 855, citing *Rosenberger,* 515 U.S. at 829.

47 In the case of *Healy v. James,* for example, a university clearly discriminated against a chapter of Students for a Democratic Society on the basis of viewpoint. Finding the organization's mission to be "violent and disruptive" and its philosophy "repugnant," the public college banned the group from campus. In that case, the Supreme Court concluded that, while a college can require organizations to affirm in advance their willingness to obey campus law, including reasonable conduct standards, it cannot restrict speech or associations simply because "it finds the viewpoints expressed by [a] group to be abhorrent." 408 U.S. at 187-188.

48 177 L. Ed. 2d 861, internal quotations, Brief for Hastings, 32

49 Hastings states that their policy does allow for the RSOs to have certain "neutral and generally applicable membership requirements unrelated to 'status or beliefs.'" Such requirements include academic standing, writing ability, dues attendance, "and even *conduct requirements*" 177 L. Ed. 2d 885, emphasis in original (dissenting opinion). Given that the school allows for conduct requirements, Alito argues, it is difficult to see why CLS' requirement for what they view as a sexually moral lifestyle does not count as a permissible "conduct requirement" under this policy: "If it does not, then what Hastings' new policy must mean is that registered groups may impose some, but not all, conduct requirements" (Alito at 885). Hastings must then explain why some are allowed and some are not, and this they have failed to do.

50 A variety of perspectives on the case can be found in a special symposium issue of the *Hastings Constitutional Law Quarterly*, Vol. 38, No. 2, Spring 2011.

51 Huffington Post, Christian Legal Society v. Martinez Decision Upends Campus Religious Groups, 5/11/2012

follow Hastings' lead. At the same time, very few universities have actually implemented an accept-all-comers policy, according to David French, senior counsel with the American Center for Law and Justice.[52]

The Scope of the "Ministerial Exception"

An important case, *Hosanna-Tabor Lutheran Church and School v. Equal Employment Opportunity Commission,* involving what is known as the "ministerial exception" came to the Supreme Court in 2012.[53] It was important not only for the substance of the decision, but because it gave the Court an opportunity to put up a weathervane on how it felt about free exercise in general.

The issue here was the conflict between the right of a church to select, control, and terminate its ministers and the enforcement of antidiscrimination laws covering employment relations. Almost everyone agrees that churches and other religious bodies should be able to impose whatever qualifications they wish upon people who play central ministerial roles, free from the strictures of equal opportunity laws. For example, no one would seriously contend that a Catholic Church selecting a priest has to comply with laws against gender discrimination. However, there is sharp debate over how far the ministerial exception should extend, both in terms of the positions covered and the types of institutions that it wraps in its protection. Some argue that all positions at churches, even those with no religious responsibilities (for example custodians and finance officers), should fall under the exemption; further, they contend that religiously affiliated institutions (such as schools, hospitals, publishing houses, etc.) should also be included within the exception.[54] Others believe that the exception should be severely limited, applying only to those who devote their full time to explicitly religious activities, such as conducting worship and teaching doctrine.[55]

Historically, the ministerial exception developed out of the "church autonomy" doctrine. This doctrine was promulgated in the nineteenth century in a number of church property disputes. The Supreme Court repeatedly held that such matters lay entirely in the hands of the designated religious authorities and were no business of the state. This doctrine was first applied to personnel in 1976 in *Serbian Eastern Orthodox Diocese v. Milivojevich*.[56] Milivojevich claimed

52 Interview on OneNewsNow, May 15, 2012, found *at http://www.onenewsnow.com/legal-courts/2012/05/15/all-comers-policy-bringing-campus-together* (accessed 1.5.2013).

53 132 S. Ct. 694; 565 U.S. _____ (2012).

54 See Lund Christopher, In Defense of the Ministerial Exception, *North Carolina Law Review,* Vol. 90, No. 1, Chapel Hill, North Carolina, 2011, pp. 1-72.

55 Corbin Caroline, Above the Law? The Constitutionality of the Ministerial Exception from Antidiscrimination Law, *Fordham Law Review,* Vol. 75, No. 2, New York, New York, 2007, pp. 1965-2038.

56 426 U.S. 696 (1976).

that he had been unjustly removed from his post in the United States by the church's hierarchy in Yugoslavia. The Court declined, however, to consider the merits of his complaint, holding that the autonomy doctrine "applies with equal force to church disputes over church polity and administration."[57]

In 1972 a Court of Appeals applied the doctrine in an antidiscrimination employment dispute for the first time. A female Salvation Army minister presented evidence that she had been fired for complaining that she was paid less than comparably qualified men, which was a violation of Title VII of the Civil Rights Act of 1964. The judges held, though, that a "ministerial exception" was required by the Free Exercise Clause and denied her suit. Its rationale was that "The relationship between an organized church and its ministers is its lifeblood. . . Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."[58] In time, the doctrine was embraced by all the circuits, but it had only been upheld indirectly by the Supreme Court, as the justices had consistently rejected appeals from the circuits.[59]

Hosanna-Tabor Lutheran Church is a congregation of the Lutheran Church-Missouri Synod. The Synod has two types of ministers: ordained and commissioned. Ordained ministers serve churches on a full-time basis, administering the sacraments and leading other aspects of worship. Commissioned ministers act in a variety of other capacities, but most of them teach in the Synod's system of elementary and secondary schools. Cheryl Perich was a commissioned minister who had taught at Hosanna-Tabor's elementary school since 1999. Most of her teaching was in secular subjects, but she did occasionally teach religion classes and lead chapel services. In 2004 she became ill and it took a while for doctors to diagnose her condition. After about nine months her doctor certified that she was able to return to work. School officials, however, were wary. Her illness had caused her to fall into a deep sleep at unexpected intervals, and they felt this might pose a danger to, or at the least frighten, the children, and refused to take the doctor's statement as definitive. When they terminated her employment, she filed a complaint under the Americans with Disabilities Act with the Equal Employment Opportunity Commission. They ordered her reinstated, but the school instead brought a suit claiming the ministerial exception.

The Court's decision was unanimous, with Chief Justice Roberts writing the opinion. In it, he set forth a strong version of the ministerial exception. First, he said that it was demanded by both the Free Exercise Clause and the Establishment Clause. He spent a good bit of time reviewing the history of colonial governors appointing clergy and how distasteful that had proved to Americans. "We agree that there is such a ministerial exception. . . By imposing

57 426 U.S. 710.

58 *MClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972)

59 These cases are discussed in *Rweyemamu v. Cote,* 520 F.3d 198 (2nd Cir. 2008).

an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."[60]

Then, he took up the issue of whether Ms. Perich was a "minister." He developed several criteria, most of which were rather broad, to answer this question, and then held that she did indeed fit the definition. Although he held back from saying that his criteria should always serve as guidelines in future cases, by implication they will have a good bit of impact.

Thus, the Supreme Court has now said that the ministerial exception is a central component of free exercise doctrine and that its scope is expansive. And, it is noteworthy that this position carries the unanimous imprimatur of the sitting justices.

Marriage, Reproduction, and Conscience Rights

One of the most timely and controversial areas of free exercise claims is within the context of changing policy on cultural issues: namely, marriage and life issues. Religious people who have certain moral views on contraception, abortion, and marriage are facing risks in their professions when government policy on these issues diverges with the principles on which they run their organizations. For example, religious business owners who provide wedding services, such as photography or cake design, may have a conscientious objection to making this service available for same-sex weddings, and religious medical professionals often object to assisting with abortion or dispensing certain drugs.

Many religious practices are clearly protected by federal law from antidiscrimination claims in this area. As described above, the Court has made clear under its "ministerial exception" doctrine that religious employers cannot be penalized under antidiscrimination claims if their employee is a minister. In other areas, however, the law is less clear. One area of controversy involves religious ministries that serve the general public. Many religious organizations serve the public through education, health care services, adoption services, and marital counseling, and many states include gender, marital status, and sexual orientation as protected classes under their "public accommodation" laws.[61] When legal recognition is given to same-sex marriage, if religious organizations that are labeled "places of public accommodation" refuse, out of conscience, to condone,

60 132 S. Ct. 703.

61 Becket Fund SCOTUS brief, 16. Religious institutions and ministries are increasingly being labeled "places of public accommodation."

subsidize, or facilitate it through their services, they may face penalties. Such penalties could include denial of access to public facilities, withdrawal of government contracts and benefits, and loss of accreditation and licensing.[62]

An example of this can be seen in three recent cases wherein Catholic charitable organizations were forced to end their adoption services because they could not in good conscience place children with homosexual couples, which was required by law in their respective jurisdictions. Consequently, Catholic Charities, one of the most extensive charitable organizations in the United States, ended their adoption services in Washington D.C., Illinois, and Massachusetts.[63]

Supporters of religious exemptions cite this as an example of how refusing to accommodate religious objectors hurts not only religious people, but the general public good as well. Between adoption and other services, Catholic Charities serves more than ten million poor adults and children of many different faiths across the country. Catholic foster care workers argue that they cannot violate their deeply held beliefs, and that the problem could be solved with a simple exemption. Those opposed to the religious exemption argue that Catholic Charities is essentially using taxpayer money to discriminate against same-sex couples.[64]

The issue of conscience rights in the health care profession has also been a controversial subject over the past several years. After the 1973 case of *Roe v. Wade*, in which the Supreme Court declared that abortion is a constitutional right, several federal laws were passed providing protections for health care professionals who have religious or moral objections to being involved in sterilization or abortions.[65] Among other things, these laws protect health care workers with such objections against government pressure to participate in these procedures.[66] Generally, these laws assure that the receipt of federal funds cannot be used to pressure hospitals, doctors, nurses, and other healthcare professionals to participate in sterilization or abortion. In addition, federal research funds cannot be conditioned upon one's willingness to participate in or research such procedures, and individuals cannot be forced to make abortion referrals or participate in abortion training. [67] The Bush administration and the Obama administration

62 Becket Fund SCOTUS brief, 4

63 Catholic News Agency, Press Release, "Same-sex 'marriage' law forces D.C. Catholic Charities to close Adoption Program," April 19, 2013.

64 *New York Times,* December 28, 2011. Catholic Charities affiliates received a total of $2.9 billion a year from the government in 2010, around 62% of its annual revenue.

65 To be clear, the right to an abortion established in *Roe* simply means that the government cannot, through its laws, deny a woman her choice to attain an abortion. It does not mean that all doctors must perform abortions. In other words, the right applies against the state, not private actors.

66 Goodrich Luke, The Health Care and Conscience Debate, *Engage,* June 27, 2011, Washington, D.C. pp. 121-127.

67 None of these laws contain an enforcement mechanism or private right of action, meaning that no one can sue in court if they are violated. Rather, violations must be taken up with the federal Health and Human Services Department. Goodrich, Health Care and Conscience Debate, p.121.

issued differing regulations concerning these laws, and both provoked a storm of controversy.

Under the Obama administration's regulation, it is unclear whether pharmacists are exempt from providing abortifacient drugs. Such cases therefore ended up in the courts. In Washington State, a federal court struck down a 2007 state regulation requiring pharmacists to dispense Plan B (the morning-after pill) or "ella," the week-after pill, even if doing so would violate their religious beliefs. The plaintiffs in the case were a family-owned pharmacy and two individual pharmacists. Because they believe that life begins at conception, they could not in good conscience dispense the drugs; instead, they referred patients to dozens of nearby pharmacies who do dispense them. The new state regulation allowed such referrals for economic or convenience reasons, but not for reasons related to conscience. The federal judge who authored the opinion striking down the regulation noted that there was significant evidence that the "predominant purpose" of the rule was to "stamp out" the right of religious objection.[68] Only one other state in the nation, Illinois, has required pharmacies to dispense emergency contraceptives to which they religiously object, and that regulation was struck down as unconstitutional by a state court.[69]

Current Controversy: The Contraception Mandate

One of the most controversial questions regarding religious liberty in recent years revolves around what is known as the "HHS mandate," a federal regulation requiring all group health plans to provide contraception and sterilization at no cost to their employees.[70] Many religious organizations object to the requirement, arguing that it forces them to violate their deeply held beliefs about reproduction and the dignity of human life.

The HHS mandate was created during implementation of the Affordable Care Act (ACA), the health care reform bill that was passed by Congress in 2010. The language of the bill itself does not specifically address contraception, but requires that certain "preventive services" be covered by all group health plans. In the fall of 2010, the government asked the Institute of Medicine (IOM) to recommend a list of preventive services for women specifically.[71] With the advice of the IOM, in August 2011 the Department of Health and Human Services (HHS) issued

68 Becket Fund, Press Release, "Court Strikes Down Law Requiring Pharmacies to Dispense the Morning-After Pill," February 22, 2012.

69 *Morr-Fitz v. Quinn,* Appellate Court of Illinois, 4th Dist., No 4-11-0398 (2012).

70 The HHS mandate must not be confused with the health care bill's "individual mandate," a provision requiring citizens to purchase healthcare or pay a penalty to the IRS. The Supreme Court upheld the individual mandate as a tax in August 2010.

71 Frequently Asked Questions: Becket Fund's Lawsuits Against HHS, at *http://www.becketfund.org/faq* (accessed 5.5.3013).

a regulation mandating that all group health plans cover certain women's health services, including all Food and Drug Administration-approved "contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[72] The regulation was set to take effect on August 1, 2012. The regulation contained an exemption for religious organizations—churches, church bodies, temples, mosques, and synagogues—but not for religiously based or religiously affiliated organizations such as schools, hospitals, charitable organizations, publishing houses, and the like. A public outcry ensued, with more than 100,000 comments objecting to the mandate being submitted to HHS.[73] Meanwhile, dozens of religious organizations filed lawsuits.[74] These organizations argue that the mandate forces them to choose between violating their religious beliefs and facing severe penalties. Organizations that fail to comply will not only be confronting significant fines, but will also be forced to drop health insurance for their employees altogether.[75] Opponents argue that the latter will be unfair to their employees, while the former threatens their very existence as organizations.

Legally, opponents of the mandate contend that it violates the Religious Freedom Restoration Act (recall that RFRA still applies to the federal government).[76] The Becket Fund, a public interest law firm spearheading the effort, argues that the mandate places a substantial burden on religious organizations and does not employ the least restrictive means in order to fulfill the government's interest. They argue that the government can increase access to contraception in many ways that do not burden religious employers.[77] Thus it fails RFRA's required strict scrutiny.

Supporters of the mandate argue that it is necessary in order to attain the government's goal of providing women with "greater access" to contraception.

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72 Women's Preventive Services: Required Health Plan Coverage Guidelines, at: *http://www.hrsa.gov/womensguidelines/* (accessed 5.5.2013). The requirement also includes services such as annual well-woman visits, and screening for HPV, HIV, and domestic violence. The only controversial requirement is that which involves contraception, sterilization, abortion-inducing drugs, and education and counseling related to these issues.

73 Rassbach Eric, The Affordable Care Act Employer Mandate Case: Regulation versus Conscience on its Way to the Supreme Court, *Oxford Journal of Law and Religion,* Vol. 2, No. 1, Oxford, UK, 2013, p. 201.

74 For a full list of the organizations as well as updates on their lawsuits, visit the Becket Fund's HHS Mandate Information Central*: http://www.becketfund.org/hhsinformationcentral/* (accessed 5.5.2013).

75 Employers who offer health plans that are not compliant with the HHS mandate will be fined $100 per employee, per day. (26 USC § 4980D Pg. 1), at *http://www.gpo.gov/fdsys/pkg/USCODE-2011-title26/pdf/USCODE-2011-title26-subtitleD-chap43-sec4980D.pdf*. (accessed 5.5.2013). Employers who have over 50 employees and choose to drop insurance coverage altogether in order to avoid the HHS Mandate will be fined approximately $2,000 per employee per year (26 U.S.C. § 4980H Pg. 1), at *http://www.gpo.gov/fdsys/pkg/USCODE-2011-title26/pdf/USCODE-2011-title26-subtitleD-chap43-sec4980H.pdf.* (accessed 5.5.2013). Originally obtained from, "Obamacare and its Mandates Fact Sheet" by Alliance Defending Freedom, *http://www.alliancedefendingfreedom.org/content/docs/facts/ObamaCare-and-its-Mandates.pdf.* (accessed 5.5.2013).

76 They also maintain that it violates the Establishment Clause, the Free Speech Clause, and the Administrative Procedures Act.

77 Among proposed alternatives include: giving a tax credit to employers who purchase contraceptives with their own funds or using government resources to inform the public that these drugs are widely available in a variety of public venues. Hobby Lobby Appellant Brief, page 47.

The HHS states that scientists have abundant evidence that contraception has significant health benefits for women and their families.[78] Birth control has also been found to reduce medical costs significantly, and it is the most common drug taken by young and middle-aged women in America.[79] Opponents answer that these services are widely available at public clinics, community health centers, and hospitals with income-based support.[80] Further, under Title X, the federal government already spends millions of dollars a year funding free or nearly free family planning services.[81] They believe that the issue is therefore not about access to contraception but solely about who pays for it.

One of the most far-reaching lawsuits opposing the mandate involves the for-profit business, Hobby Lobby, a national chain of craft stores owned by a Christian family. The company declares a religious mission and manifests its mission by remaining closed on Sundays, providing chaplains for employees, and evangelizing.[82] The Obama administration has argued that Hobby Lobby is a for-profit, *secular* corporation, not a religious organization; as a business, it is a legal entity distinct from its owners.[83] Further, the mandate is imposed on group health plans, which are legally distinct from the corporations that sponsor them.[84] Thus Hobby Lobby cannot invoke RFRA.[85] Hobby Lobby's attorneys argue that neither RFRA nor Supreme Court precedent bar businesses from making a religious claim, and that threatening to impose massive fines on a person's business unless he violates his beliefs places a substantial burden on that person's free exercise.[86] As of this writing, the case is still in the Court of Appeals.

Attempts to resolve the issues raised by the mandate have taken place outside the courtroom as well. On January 20, 2012, President Obama announced that religious organizations objecting to the mandate would be given a year long "safe harbor,"—an additional year, that is, to comply with the man-

78 January 20, 2012 statement by Sebelius *http://www.hhs.gov/news/press/2012pres/01/20120120a.html* (accessed 5.5.2013).

79 January 20, 2012 statement by Sebelius.

80 Hobby Lobby Appellants Brief, page 45.

81 HHS planned to spend over $300 million in 2012 to fund contraceptives through Title X.

82 Hobby Lobby Appellants Brief, 16.

83 Hobby Lobby DOJ brief, p. 3.

84 Hobby Lobby DOJ Brief, page 10. Opponents of the mandate argue that this distinction is inconsistent with our legal practices: "In many areas of American law, paying another to do something wrong is itself a wrong. It is a crime to pay another to commit a criminal act. It is a tort to pay another to engage in tortious activity harming another. The government has not yet explained why these principles of moral accountability may not be invoked by religious organizations when they assess their own culpability in paying for insurance that enables what they believe to be wrongful conduct." Rassbach, Affordable Care Act, 204.

85 DOJ argues that RFRA must be read in light of the statutory backdrop that existed when it was enacted, and this includes several statutes that granted "religious employees alone the prerogative to rely on religion as a reason to deny employees protection of federal law." DOJ brief, page 10. This refers to the exemption for religious organizations and educational institutions to discriminate on the basis of religion granted in Title VII of the Civil Rights Act of 1964.

86 Hobby Lobby Appellants Brief, page 16 and page 35.

date. The objecting organizations argued that this did nothing to answer their concerns. Cardinal Timothy Dolan, archbishop of New York and president of the U.S. Conference of Catholic Bishops, stated, "In effect, the president is saying we have a year to figure out how to violate our consciences."[87] A month later, the administration announced a compromise: it would consider a system under which the insurance companies would have to provide the services for free to the recipients, rather than having the religious organization pay for them directly. [88] Religious organizations argued that this too was in reality no compromise at all: no insurance company is going to provide "free" services to recipients, meaning the religious employers would inevitably pay for it through higher premiums. Further, the religious objection involves not just paying for the drugs, but the act of helping employees attain them. Religious organizations would still be forced to help their employees attain contraception and abortion-inducing drugs by providing these services on their health plans.[89]

There are currently 53 cases challenging the HHS mandate, representing over 150 plaintiffs.[90] Of the 21 for-profit organizations that have filed lawsuits, 18 have obtained rulings addressing the merits of their case. Of those 18, 13 have secured injunctive relief against the mandate, meaning that they do not have to comply with the mandate while the case proceeds in court. There have been 30 non-profit lawsuits, and none of them has been decided on the merits yet. Given the importance of the issue and the potential of a split between the circuits, this issue will more than likely become the next landmark Supreme Court religious liberty case.

Conclusions

Two major conclusions stand out from the foregoing survey. First, three of the five issues—land use, prisoner rights, and the ministerial exception—involve questions of the liberty of an individual or a religious institution to be exempt from a general governmental regulatory policy whereas the other two—speech and association in schools and colleges and the health care mandate—involve policies that attempt to enhance the liberty of another group. The balance of interests, therefore, is rather different.

In the area of land use, religious institutions seem to be in the ascendant.

87 "U.S. Bishops Vow to Fight HHS Edict," United States Conference of Catholic Bishops, Press release, January 20, 2012.

88 White House Fact Sheet: Women's Preventive Services and Religious Institutions, at http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions

89 Obama Administration Offers False "Compromise" on Abortion Drug Mandate, February 10, 2012, *http://www.becketfund.org/obama-administration-offers-false-"compromise"-on-abortion-drug-mandate/* (accessed 5.5.13).

90 For a database of information on these lawsuits, see *http://www.becketfund.org/hhsinformationcentral/* (accessed 5.5.2013).

The wording of RLUIPA and the construction that has been put on terms such as "substantial burden" by the lower federal courts has put local governments on the defensive. For the time being at least, there is no indication that the Supreme Court will set that trend aside. RLUIPA, therefore, has to be scored a success in this field.

When it comes to prisoner rights, the picture appears more mixed. The drafters of the law were careful to stress that there were limits to prisoners' claims and Justice Ginsburg's cautionary statements appear to have been taken to heart by the lower courts. Prison administrators still win the vast majority of cases. Nevertheless, the real question is how the situation compares to what would have been happening had RLUIPA not passed (or contained a carve-out for prisons). It seems clear that the discretion of prison officials would be even greater than it is now had that been the case. Thus, even though prisoners are only occasionally successful when they make free exercise claims, their status is certainly better than it was before.

The ministerial exception presents an unambiguous case: religious institutions enjoy strong protection from governmental employment policies when they hire, fire, or set the working conditions of their officials. The unanimous vote of the court and the fact that the case involved someone whose work was not directly religious in character both underscore this conclusion. As long as this precedent stands, churches, as well as the institutions connected to churches, will command the right to control their staffs unhindered by governmental regulations.

Overall, then, it seems that when the conflict is between an individual or a specifically religious institution and the state, contemporary American jurisprudence leans heavily toward the individual and the institution and limits what government can do.

When we turn to conflicts that pit religious liberty against the liberties or interests of others (and government chooses to side with the others), the record is more scrambled. The state of California was able to circumscribe the activities of an avowedly religious group by forcing an "accept all-comers" policy. Of course, attendance at the university's law school is not a right; however, the price of attendance for those who wanted to join CLS was to deny them admittance to a school-sanctioned organization. Those who wanted to apply the "accept all-comers" policy without an exemption for religious organizations clearly won out here. Nevertheless, the vote was 5-4, meaning that the precedent is not on extremely firm ground.

The as yet unsettled debate over the health care mandate presents another instance of ambiguity. We do not have, but will inevitably get, a court ruling on whatever policy ultimately emerges. The only prediction that can be made at the moment is that it is likely to be a split decision. Naturally, the character of

that split will be heavily influenced by the nature of the policy ultimately adopted. Most likely, the broader the exemption allowed by the executive branch the more likely it will be upheld. However, it is simply too early to predict how the Supreme Court might rule on such a case.

A second major conclusion is that a good bit of free exercise jurisprudence is determined outside the courts. In fact, the ministerial exception is the only area we discussed that was handled exclusively by the courts. The judiciary developed the doctrine from the Free Exercise Clause and applied it without any guidance or involvement from either the legislative or executive branches. In contrast, both land use policy and prisoners' rights were heavily affected by the wording of RLUIPA, something that was debated and decided by the legislative branch.[91] The policy at issues in the CLS case, it is important to stress, was not one that state institutions *had* to adopt; the Court merely ruled on whether the university *could* establish the policy. As we pointed out, some universities have purposely not adopted similar policies, and the legislatures of at least two states have banned their public universities from considering such rules. Regarding the mandate, while it will undoubtedly end up in court, the dimensions of the policy are being shaped by struggles in and with the executive branch. Thus, the final wording of the policy will go far to determine what happens. Free exercise jurisprudence, as developed by the courts, therefore, is only one aspect of free exercise policy.

In sum, the principle of religious free exercise remains a central value in American legal and political life, but its contours are always subject to dispute as new issues emerge and old "gray areas" continue to be debated and litigated. Thus, there is no reason to expect these controversies to abate any time soon.

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91 Of course, the Court could have struck the law down as unconstitutional. However, once the statue was upheld, it set the parameters for later decisions in the entire federal judiciary.

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Џералд Волтман

ПОГЛЕД НА САВРЕМЕНУ СУДСКУ ПРАКСУ У ВЕЗИ СЛОБОДНОГ ИСПОЉАВАЊА ВЕРЕ

Резиме

Од 1990. године дебата око лимита слободе испољавања религије је дошла до судова, Конгреса и извршне власти. Широк спектар проблема се појавио: употреба имовине, права затвореника, верски говори и удружења у школама, црквена аутономија у запошљавању и Обамина политика о захтевима за здравствено осигурање за верске инситуције и послове. Циљ овог рада је да прикаже садашње стање судске праксе кроз истраживање највећих развоја у овим областима. Чини се да онда када слободно испољавање утиче само на индивидуу или верску институцију, верске слободе имају дозвољен широк опсег. Међутим, када се умешају други политички интереси – као што су хомосексуалне групе или групе за представљање жена – ствари су много компликованије.

Кључне речи: слободно испољавање религије, Акт о рестаурацији верске слободе, права затвореника, слобода говора, црквена аутономија, репродуктивне слободе

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