Religious Liberties

The 2008 Presidential Election, the Supreme Court, and the Relationship of Church and State

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Religion and politics enjoy an uneasy relationship in American life, and the 2008 presidential election has proven to be no exception.[1] On one hand, Senator Obama and Senator McCain have come under intense scrutiny because of their association with controversial religious leaders Reverend Jeremiah Wright and Reverend John Hagee, respectively.[2] On the other hand, Pastor Rick Warren's widely praised "Civil Forum on the Presidency" demonstrated that many voters want to hear more, not less, about the candidates' moral values and religious worldviews—and how those views shape their political positions.[3]

"Pastor Rick" moderated the Civil Forum, but when it comes to the constitutionality of faith in the public square, the Supreme Court of the United States sets the terms of the debate. Many of the Court's decisions in this area—which runs the gamut from legislative prayer to school vouchers to animal sacrifice—have been closely divided.[4] The Court decided some fourteen free exercise and establishment cases in the period between 1994 and 2005, when no justice retired. With the recent replacement of Chief Justice William Rehnquist with Chief Justice John Roberts, and of Justice Sandra Day O'Connor with Justice Samuel Alito, there is no guarantee that the current constitutional balance on faith in public life will hold. The next President is likely to appoint at least one, if not two or three, new Supreme Court justices. Taken together, these changes on the Court could have a dramatic effect on issues affecting the religious liberty of millions of Americans.

God alone knows who will win the next presidential election, and precisely what sort of justices he will appoint.[5] Nor can anyone else predict with certainty the issues involving religion that will land on the Supreme Court's docket. In this article, however, we highlight certain issues that are more likely than most to come before the Court in the near future. These include the scope of the First Amendment "ministerial exception" to employment discrimination laws; the meaning of the "substantial burden" requirement of the Religious Land Use and Institutionalized Persons Act; under what circumstances, if any, religious schools have a constitutional right to participate in publicly funded voucher and scholarship programs; and the scope of the government's power to control the nature of religious monuments on public property. With issues such as these on the table, the President who appoints the next Supreme Court justice (or justices) will have a significant opportunity to shape the terms of the legal debate about faith in American public life.

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The Ministerial Exception to Employment Discrimination Laws

The relationship between employment discrimination laws and religious employers such as churches and faith-based charities has become something of a political football in this election. At the Saddleback Forum, Rick Warren asked Senator McCain the following question: "[T]he Civil Rights Act of 1964 allows religious organizations—not just churches, but faith-based organizations—to keep and hire the people that they believe share common beliefs…. Would you insist that faith-based organizations forfeit that right to access federal funds?"[6] Senator McCain responded: "Absolutely not. And if you did, it would mean a severe crippling of faith-based organizations and their abilities to do the things that they have done so successfully." Senator McCain's remarks undoubtedly resonated with the many religious believers who insist that protecting their choice of those who function as ministers is essential to religious liberty because it is necessary to preserve the integrity of their group's religious message and doctrine.

Others, however, insist with equal vigor that the ministerial exception amounts to favoritism of religion and gives religious groups a free pass to discriminate on the public's dime. Senator Obama, while making faith-based and community partnerships a part of his domestic policy, has taken care to address the concerns of those who object to giving federal money to groups that discriminate in hiring on the basis of religion. In a June speech announcing his new Council for Faith-Based and Neighborhood Partnerships, Senator Obama said:

> Now, make no mistake, as someone who used to teach constitutional law, I believe deeply in the separation of church and state, but I don't believe this partnership will endanger that idea—so long as we follow a few basic principles. First, if you get a federal grant, you can't use that grant money to proselytize to the people you help and you can't discriminate against them—or against the people you hire—on the basis of their religion. Second, federal dollars that go directly to churches, temples, and mosques can only be used on secular programs. And we'll also ensure that taxpayer dollars only go to those programs that actually work.[7]

The debate over the hiring practices of publicly funded faith-based service providers, of course, involves the scope of the government's power to attach conditions to funding as well as First Amendment questions. But given the different perspectives of the nation's presidential candidates, it is perhaps not surprising that one of the more significant religious liberty issues to have generated divergent approaches among the lower courts is the scope of the First Amendment's "ministerial exception" to generally applicable employment discrimination laws. Title VII and most state employment laws exempt religious institutions from the general prohibition on religious discrimination in

employment.[8] These statutory exemptions are generally limited to discrimination based on *religion*: for example, in the 1980 case *Equal Employment Opportunity Commission v. Mississippi College*, the Fifth Circuit held that a Baptist college could not be sued for discriminating against a female psychology professor on the basis of her religious views, but could be sued for sex discrimination.[9]

Starting in the 1970s, the federal courts recognized an additional "ministerial exception" to Title VII and other employment discrimination laws, holding that those laws do not apply at all to the relationship between ministers and religious employers.[10] In the leading case of *McClure v. Salvation Army*, the Fifth Circuit held in 1972 that it did not have jurisdiction to consider a Title VII sex discrimination claim brought by a minister against the Salvation Army, a church. Although there was no evidence that the specific employment practices at issue—which included allegations of disparate pay for men and women clergy—had an explicitly religious basis, the Fifth Circuit concluded that exercising jurisdiction would interfere with the Salvation Army's First Amendment right "to decide for itself, free from state interference, matters of church administration and government."[11] The court thus dismissed the case, and the ministerial exception was born.

The Supreme Court has recognized that regulating religious institutions and their employees raises free exercise and establishment issues.[12] As Justice William Brennan once observed: "Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is … a means by which a religious community defines itself."[13] Accordingly, the Court has recognized the validity of legislative accommodations of religious organizations' hiring practices.[14] Moreover, the Court has held that the First Amendment protects the right of expressive private associations to discriminate in selecting leaders who bear responsibility for advocating the association's viewpoints.[15] The Court has not, however, taken the opportunity to explicitly address the ministerial exception.[16]

The Role-Based Approach to the Ministerial Exception

Over the past three decades, every circuit but the Federal Circuit has adopted the ministerial exception in some form.[17] The lower courts differ, however, on how broadly the exception should be applied. On one end of the spectrum are courts such as the First, Seventh, and Tenth Circuits, which have consistently held that the ministerial exception applies to virtually all civil suits between ministers and religious employers.[18] In *Tomic v. Catholic Diocese of Peoria*, for example, the Seventh Circuit held that the exception applies even when "the complaint is not based on and does not refer to religious doctrine or church management (as in most Title VII and other employment-discrimination suits) but it is apparent that a controversy over either may erupt in the course of adjudication."[19] This "role-based" approach holds that federal courts do not have authority to hear most employment disputes between ministers and their religious employers.[20] In an opinion by Judge Richard Posner, the Seventh Circuit set forth the rationale for such a broad ministerial exception:

> [T]he First Amendment concerns [with assuming jurisdiction in ecclesiastical cases] are two-fold. The first concern is that secular authorities would be involved in evaluating or interpreting religious doctrine. The second quite independent concern is that in investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal.[21]

The court referred to this as the "internal-affairs doctrine" and emphasized that the reason for construing the ministerial exception broadly was to avoid state interference with church governance.[22] This version of the ministerial exception protects religious bodies by limiting the scope of the court's inquiry to the nature of the employment relationship, without requiring a religious employer to raise a specifically religious defense to each of the minister-plaintiff's claims.[23]

In *Bryce v. Episcopal Church in the Diocese of Colorado*, the Tenth Circuit took the ministerial exception a step further and adopted a broad "church autonomy doctrine," which it applied to dismiss a sexual harassment suit brought by a youth pastor and her lesbian partner against the pastor's church for allegedly harassing statements made during the course of congregational discussions about whether to continue the pastor's employment.[24] *Bryce* is noteworthy because the Tenth Circuit found that the church autonomy doctrine barred the claims made by the youth minister's partner as well as the youth minister herself. The ministerial exception ordinarily applies only to suits brought by ministers, not suits brought by third parties like the partner in this case. The Tenth Circuit found, however, that the allegedly harassing statements were made in the context of "a theological discussion about the church's doctrine and policy towards homosexuals."[25] "When a church makes a personnel decision based on religious doctrine, and holds meetings to discuss that decision and the ecclesiastical doctrine underlying it," the court explained, "the courts will not intervene."[26]

The Claim-Based Approach to the Ministerial Exception

There are recent signs, however, that the judicial consensus as to the validity of the ministerial exception does not extend to its scope. For example, the Third and Ninth Circuits have handed down opinions that significantly narrow the exception, while the Second Circuit has struggled to find a consistent approach.

The Third Circuit adopted the ministerial exception in *Petruska v. Gannon University* ("*Petruska II*"), after withdrawing a previous panel opinion that, if left standing, would have been the first to disavow the exception.[27] Still, *Petruska II* characterized its version of the exception as "limited," stating: "It does not apply to *all* employment decisions by religious institutions, nor does it apply to *all* claims by ministers. It applies only to claims involving a religious institution's choice as to who will perform spiritual functions."[28] This "claim-based" approach is slightly less deferential to religious institutions than the Seventh Circuit's "role-based" approach.[29] But it is far more in keeping with other federal decisions than was the prior opinion ("*Petruska I*"), which held that "where a church discriminates for reasons unrelated to religion … the Constitution does not foreclose Title VII suits," even when they are brought by "ministerial employees."[30]

In another relatively recent decision, *Elvig v. Calvin Presbyterian Church*, the Ninth Circuit held that a pastor's sexual harassment and retaliation claims against her church were not barred by the ministerial exception.[31] Although the panel concluded that the exception prevented it from evaluating the propriety of a church's decision to demote and fire an associate pastor, it held that the pastor could pursue her hostile work environment claim.[32] The church could only "invoke First Amendment protection from Title VII liability if it claimed doctrinal reasons for tolerating or failing to stop the sexual harassment."[33] The Ninth Circuit has limited its holding to sexual harassment cases, but its rationale is applicable to other kinds of employment discrimination suits as well.[34]

Further adding to the recent confusion among the lower courts, the Second Circuit has twice changed its mind about the ministerial exception. In 2006, the court held that the ministerial exception had been displaced by the Religious Freedom Restoration Act—the first holding to that effect.[35] But earlier this year, in *Reweyemamu v. Cote*, a different panel of the court expressed doubt about this prior holding and adopted the ministerial exception.[36] *Reweyemamu* expressly declined to rule on the exception's scope, so the breadth of the exception in the Second Circuit has yet to be determined.[37] But the case is illustrative of the lower courts' struggle with First Amendment doctrine in this area.

The existence of differing approaches among the lower courts does not guarantee that the Supreme Court will weigh in on the scope of the ministerial exception, of course, let alone whether and how it would enforce such an exception. Still, should the Court take up the issue, its past cases offer a few clues as to considerations that would likely guide its analysis. Employment discrimination laws are neutral laws of general applicability, and under *Employment Division v. Smith* the Free Exercise Clause does not generally exempt religious groups from complying with such laws—even if compliance substantially burdens their religious exercise.[38] On the other hand, the Court in *Smith* held that interference with free exercise, combined with interference with associational rights, might justify heightened scrutiny of the law at issue.[39] Thus, the Court's views on the scope of *Smith*—which are somewhat unknown, given the presence of two new justices and the possibility of more over the next four years[40]—could have a significant bearing on its approach to the assertion of a free exercise exemption from generally applicable employment discrimination laws.

The Court's view of the scope of "expressive association" rights likewise holds the potential to influence its perspective on the ministerial exception. In *Boy Scouts of America v. Dale*, the Court held that expressive associations such as the Scouts have a First Amendment right to an exemption from applications of public accommodations laws that would require them to retain leaders who advocate moral views contrary to those of the organization.[41] As the Court there put it, "the forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[42] Two justices (Rehnquist and O'Connor) in the *Dale* majority have since left the Court, so it remains to be seen how their successors will view the rule of *Dale*. There is no reason in principle why *Dale's* reasoning ought not apply to religious associations, which enjoy the protection of both the Free Speech and Free Exercise Clauses of the First Amendment. On the other hand, the Court's analysis in *Dale* seems more analogous to the claim-based approach than to the role-based approach.[43]

Finally, a number of Supreme Court decisions have recognized limits on the civil courts' ability to second-guess churches' decisions to remove a minister based on concern that the minister lacks the "fitness to serve."[44] As the Court observed in *Serbian Orthodox Diocese v. Milivojevich*, questions involving "the conformity of [ministers] of the church to the standard of morals required of them" are "strictly and purely ecclesiastical"—and thus beyond civil courts' jurisdiction.[45] These decisions, which involve the scope of "church autonomy" under the Religion Clauses, likewise speak to whether the Court would adopt the ministerial exception and, if so, how broadly it would interpret that exception. As Judge Posner emphasized in *Tomic*, ministerial employment suits draw the state into overseeing the internal affairs of religious bodies on issues that involve subjective spiritual judgments—issues that were simply not present in *Smith*, but have influenced the Court in many other cases involving the autonomy of religious associations.[46]

It remains to be seen whether the Court in coming years will adhere to some form of the ministerial exception, and if it does whether it will view the scope of that exception as including only those claims that directly raise religious questions (the claim-based exception), or hold instead that the special establishment and free exercise issues involved in the regulation of internal church governance deprive federal courts of jurisdiction to hear employment lawsuits brought by ministers against religious employers (the role-based exception). Because of its practical importance and the lack of directly controlling Supreme Court precedent, however, the scope of the ministerial exception is among the areas of religious liberty doctrine that may well come before the Court in coming years. And any Supreme Court appointments that follow the 2008 Presidential election could potentially affect the Court's resolution of the matter.

RLUIPA and the "Substantial Burden" Standard

The 2008 presidential election holds the potential to affect not only the Supreme Court's interpretation of the Religion Clauses of the First Amendment, but also its interpretation of statutes involving the relationship between church and state. One statutory issue with potential for Supreme Court review is the meaning of the phrase "substantial burden" in the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[47] Congress enacted RLUIPA after compiling evidence that the decisions of local zoning boards often interfere in practical ways with the religious exercise of churches and other houses of worship.[48] Consistent with free exercise doctrine prior to *Employment Division v. Smith*,[49] RLUIPA prohibits governments from making any land-use decision that imposes a "substantial burden" on religious exercise, unless that land-use decision is the "least restrictive means" of furthering a "compelling governmental interest."[50]

The federal appellate courts have adopted varied readings of RLUIPA's "substantial burden" requirement. For example, the Seventh Circuit holds that a "substantial burden" is one that renders religious practice "effectively impracticable," while the Eleventh Circuit and others have rejected this approach and adopted a less stringent definition of "substantial burden" based on Supreme Court decisions such as *Sherbert v. Verner*.[51] The definition of "substantial burden" has proven to be outcome-determinative in a number of RLUIPA cases, making this a potential issue for review on certiorari in an appropriate case in the years ahead.[52]

The "Effectively Impracticable" Standard

In *Civil Liberties for Urban Believers v. City of Chicago*, the Seventh Circuit held that a Chicago zoning ordinance requiring that churches seeking to use commercial property for public worship obtain a special use permit was not a "substantial burden" on religious exercise under RLUIPA.[53] There, a group of churches that had been denied permits to use commercial property for religious activities sued the City of Chicago under RLUIPA.[54] The Seventh Circuit rejected the claim, holding that "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."[55] The court reasoned that the difficulties that these churches experienced were no different from those faced by other land users in urban settings such as Chicago, and thus that the challenged ordinance did not violate RLUIPA.[56]

The Second Circuit has likewise adopted a narrow definition of "substantial burden." In *Rector, Wardens, and Members of Vestry of St. Bartholomew's Church v. City of New York*, the Second Circuit rejected the free exercise claim of a church that wished to replace a historic church administration building designated as a New York City Landmark with a high-rise office tower.[57] After the Landmarks Preservation Committee denied its application, the church brought suit.[58] Reasoning that "[t]he central question in identifying an unconstitutional burden is whether the claimant has been *denied the ability* to practice his religion or coerced in the nature of those practices,"[59] the court held that the city's landmark law did not substantially burden the church's religious exercise because the church could continue to use the old building for its programs and activities, albeit on a smaller scale.[60] Although *St. Bartholomew's* was decided under the Free Exercise Clause before RLUIPA became law, the Second Circuit has not backed away from this narrow definition of "substantial burden" in later cases brought under RLUIPA.[61]

The "Significant Pressure" Standard

The Eleventh and Ninth Circuits, by contrast, have both rejected the Seventh Circuit's definition of "substantial burden." In *Midrash Sephardi, Inc. v. Town of Surfside*, for example, the Eleventh Circuit held that a Florida town's zoning law substantially burdened the religious exercise of two Orthodox Jewish synagogues when it excluded places of worship from a downtown business district.[62] The court stated that

> a "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forgo religious precepts or from pressure that mandates religious conduct.[63]

The court in *Midrash Sephardi* rejected the Seventh Circuit's "effectively impracticable" standard because such a definition of "substantial burden" "would render [RLUIPA's] total exclusion prohibition meaningless."[64] RLUIPA's "total exclusion" prohibition states that "[n]o government shall impose or implement a land use regulation that … totally excludes religious assemblies from a jurisdiction; or … unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."[65] In the Eleventh Circuit's view, the "effectively impracticable" standard is not meaningfully different from a prohibition on totally excluding religious assemblies.[66]

The Ninth Circuit has likewise rejected the Seventh Circuit's "substantial burden" standard. In *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, the court held that Sutter County violated RLUIPA when it twice rejected the Guru Nanak Sikh Society's application for a conditional use permit to construct a building for religious assemblies.[67] "For a land use regulation to impose a 'substantial burden,'" the court explained, "it must be 'oppressive' to a 'significantly great' extent. That is, a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise."[68] The court found this standard more in keeping with RLUIPA than the Seventh Circuit's "effectively impracticable" standard, and held in favor of the Guru Nanak Sikh Society.[69]

If the Supreme Court were to take up the meaning of RLUIPA's "substantial burden" standard, how would it rule? Neither Justice Alito nor Chief Justice Roberts decided any RLUIPA or free exercise cases applying the "substantial burden" standard while they were serving on the courts of appeals, so one cannot look to their lower-court opinions for specific guidance on this question. Most federal appellate courts, however, have looked to the Supreme Court's free exercise jurisprudence to define "substantial burden,"[70] and two of the leading cases in this area, *Sherbert v. Verner* and *Thomas v. Review Board*, define "substantial burden" as follows:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[71]

Further, although RLUIPA does not expressly reference the courts' pre-*Smith* interpretation of the "substantial burden" requirement—which originated in cases arising under the Free Exercise Clause—the statute contains a "broad construction clause" that states: "[t]his chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[72] On the other hand, land use regulation is an area in which local governments customarily receive significant deference, and federal courts are reluctant to sit as "super zoning boards."[73] In all events, given the importance of the issue to churches and municipalities alike, the meaning of RLUIPA's "substantial

burden" standard may receive attention from the Court in the years ahead.

School Vouchers, Blaine Amendments, and the "Pervasively Sectarian" Doctrine

Another significant religious liberty issue that might well land on the Supreme Court's docket in the next few years is the status of state laws excluding "pervasively sectarian" schools from school voucher and scholarship programs. The "pervasively sectarian" doctrine set up an "irrebuttable presumption" that certain private religious schools (historically, Catholic schools) were so thoroughly religious that any government aid they received would necessarily be diverted to religious uses. The Supreme Court did not apply the doctrine consistently, however, prompting criticism from all quarters. As Senator Daniel Patrick Moynihan queried, after observing that the Court had approved books for religious schools but not maps: What would the Court do with an atlas—"a book of maps"?[74]

In *Mitchell v. Helms*, decided in 2000, the Supreme Court effectively abandoned the "pervasively sectarian" doctrine, holding that religious schools formerly excluded by the doctrine could receive secular government aid provided to other private schools.[75] Many states, however, still have laws in place that reflect the requirements of the doctrine and exclude religious schools from secular aid programs available to non-religious private schools.[76]

For example, thirty-seven states still have "Blaine Amendments," which ban state aid to "sectarian" institutions, and which arguably provide an adequate and independent state ground for continuing to exclude religious schools from government aid programs now that the federal constitutional barriers have been removed. Religious schools, parents, and students, however, have begun challenging Blaine Amendments and other exclusionary state laws on federal free exercise and equal protection grounds, and there is reason to think that one of these cases will eventually make its way to the Supreme Court—most likely in the form of a challenge to voucher programs that exclude all religious schools, or in a direct challenge to a state Blaine Amendment.[77]

School Vouchers

In 2002, just two years after rejecting the "pervasively sectarian" doctrine in *Mitchell*, the Supreme Court in *Zelman v. Simmons-Harris* rejected an Establishment Clause challenge to a school voucher program that allowed students to direct aid to private religious schools.[78] Then, in the 2004 case of *Locke v. Davey*, the Supreme Court considered the other side of the coin—whether a state could create a college scholarship program that students could use to fund any course of study at any school, religious or secular, except for programs in "devotional theology."[79] The Court reaffirmed that it would not violate the Establishment Clause to permit students to use their scholarship money to study "devotional theology" in preparation for becoming full-time religious workers.[80] But the Court also held that the Free Exercise Clause did not compel the State of Washington to fund the study of "devotional theology," at least when its basis for refusing to do so was not anti-religious animus but anti-establishment concerns about state tax dollars being spent on programs to train ministers.[81]

The Washington scholarship program at issue in *Locke* treated all schools the same, regardless of their religious affiliation. The Court's decision therefore did not address whether a state could choose to exclude only some or all religious schools from a neutral scholarship program that allowed students to apply state funds towards tuition at private schools. Since *Locke*, the Maine Supreme Judicial Court and the First Circuit have held that a tuition-aid program that excludes religious schools from a voucher program available to non-religious private schools does not violate the Free Exercise Clause.[82] By contrast, the Tenth Circuit recently struck down a Colorado scholarship program that excluded some religious schools but not others, based on whether the schools qualified as "pervasively sectarian" under a multi-part statutory test.[83]

In *Eulitt ex rel. Eulitt v. Maine, Department of Education*, the First Circuit rejected a free exercise and equal protection challenge to a program that allowed parents in school districts without a public high school to receive tuition assistance to send their children to non-sectarian private high schools but not to religious ones.[84] The court held that the program did not infringe free exercise because the program did not prevent parents from sending their children to religious schools using private funds.[85] Citing *Locke*, the Court reasoned that Maine was free to exclude religious schools from tuition assistance as long as it had a rational basis for doing so.[86] Since the parents conceded that their equal protection claims failed under a rational basis test, the First Circuit upheld the program.[87]

In *Anderson v. Town of Durham*, which involved the same program, the Supreme Judicial Court of Maine took the *Eulitt* analysis a step further, concluding that preventing "significant entanglement" between the state and religious schools was a rational basis for excluding religious schools from tuition assistance.[88] The court stated: "After *Zelman,* the State may be permitted to pass a statute authorizing some form of tuition payments to religious schools, but *Locke* and *Eulitt* hold that it is not compelled to do so."[89] The court described Maine's rational basis for excluding religious schools as follows:

> [I]t is possible to envision that there may be conflicts between state curriculum, record keeping and anti-discrimination requirements and religious teachings and religious practices in some schools. These conflicts could result in significant entanglement of State education officials in religious matters if religious schools were to begin to receive public tuition funds and the State moves to enforce its various compliance requirements on the religious schools.[90]

"Parental choice of the school," the court went on to hold, "does not sever the religion-state connection when payment is made by a public entity to the religious school and that payment subjects a school's educational and religious practices to state regulation."[91]

Anderson reflects the Maine court's apparent discomfort with ruling in favor of the parents when the religious schools that would be most directly affected by a change in the Maine program did not join the suit. The lack of a school as plaintiff also played a role in *Eulitt*, where the First Circuit held that the parents, whose children were not enrolled at a private religious school, did not have standing to bring a third-party equal protection claim on behalf of students and officials at

the excluded religious schools.[92] It remains to be seen whether religious schools will join the fray and, if so, whether they will fare any better than did the parents in *Eulitt* and *Anderson*.

In *Colorado Christian University v. Weaver* (*CCU*), by contrast, the Tenth Circuit distinguished *Eulitt* and applied *Davey* and *Mitchell* to strike down a Colorado statute that excluded some, but not all, religious colleges from state scholarship programs.[93] Unlike *Eulitt* and *Anderson*, the plaintiff in *CCU* was Colorado Christian University (CCU), one of the schools excluded by the state law. Under Colorado law, religious schools were evaluated on a case-by-case basis and were excluded from the scholarship programs if they were determined to be "pervasively sectarian" under a multi-part test that required state officials to evaluate various aspects of the schools' religious practices. The Colorado statute was passed in the early 1980s and was intended to conform to then-existing Establishment Clause doctrine.[94]

CCU challenged the validity of the scholarship program after it rejected CCU and a Buddhist university while accepting a Catholic university.[95] In an opinion authored by Judge Michael McConnell, the Tenth Circuit held that the program was unconstitutional because it discriminated among religions and because determining whether a school met the detailed statutory definition of "pervasively sectarian" led to excessive government entanglement with religion.[96] The court read *Davey* narrowly, noting that the majority in *Davey* commended Washington State's scholarship program for extending aid to religious and non-religious schools alike.[97] The court distinguished *Eulitt* because the Maine program excluded all religious schools, whereas the Colorado program required the state to distinguish between merely "sectarian" religious schools and those that were "pervasively sectarian."[98] In a footnote, moreover, the court expressed doubt that *Eulitt* was a proper interpretation of *Davey*.[99]

The Maine exclusion of religious schools at issue in *Anderson* and *Eulitt* is much broader than the Colorado exclusion at issue in *Colorado Christian University*. Thus, the cases do not technically create a circuit split. Still, *Anderson*, *Eulitt*, and *Colorado Christian* demonstrate the enduring effects of the "pervasively sectarian" doctrine on state policy—an issue that is likely to catch the Supreme Court's attention at some point. As the court in *Anderson* noted, when the Maine tuition program was altered to exclude religious schools in 1980s, state officials acted out of a reasonable fear that if they did not do so, they would be sued for violating the Establishment Clause.[100] Yet a post-*Zelman* legislative attempt to reintroduce religious schools to the Maine program failed.[101] Thus, although *Zelman* removed the federal constitutional barriers to restoring the pre-1980 tuition program, political pressure, institutional inertia, and residual anti-establishment concerns nonetheless combined to keep Maine's pre-*Zelman* policy intact. Similarly, Colorado's program continued to apply the "pervasively sectarian" standard, even though the Court's decision in *Mitchell* effectively abandoned it. Taken together, these cases point toward another issue that may, in an appropriate case, come before the Supreme Court in the next few years.

Blaine Amendments

The legal stigma once attached to "pervasively sectarian" schools also persists in the form of Blaine Amendments found in the constitutions of some thirty-seven states. Blaine Amendments ban all state aid to "sectarian schools," a phrase that was widely understood at the time of enactment to refer to Catholic schools. Writing for a four-Justice plurality in *Mitchell*, Justice Thomas observed that

> hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.... Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." Notwithstanding its history, of course, "sectarian" could, on its face, describe the school of any religious sect, but the Court eliminated this possibility of confusion when, in *Hunt v. McNair*, it coined the term "pervasively sectarian"—a term which, at that time, could be applied almost exclusively to Catholic parochial schools and which even today's dissent exemplifies chiefly by reference to such schools.[102]

Writing in dissent in *Zelman*, Justice Breyer likewise acknowledged that historic anti-Catholicism "played a significant role in creating a movement that sought to amend several state constitutions … to make certain that government would not help pay for 'sectarian' (*i.e.,* Catholic) schooling for children."[103] And in *Locke*, Chief Justice Rehnquist observed that the Washington state constitution "contains a so-called 'Blaine Amendment,' which has been linked with anti-Catholicism."[104] Thus, although the Court's two newest justices (who are Roman Catholic) have not declared their views on the history of the "pervasively sectarian" doctrine or the Blaine Amendments in particular, justices of varying ideological stripes have acknowledged the nativist, anti-Catholic sentiments that originally motivated adoption of the Blaine Amendments.

In response to these justices' expressions of concern about this history, a group of parents whose children attended religious schools challenged South Dakota's Blaine Amendment when it was used to prevent public school busses from transporting their children.[105] The Eighth Circuit ultimately dismissed the suit, *Pucket v. Hot Springs School District No. 23-2*, on standing grounds, but given the presence of Blaine Amendments in so many other state constitutions, similar suits are likely to continue to arise.[106] The Court, which has effectively repudiated the "pervasively sectarian" doctrine and acknowledged the Blaine Amendments' discriminatory past, will ultimately be asked to decide their future.

Religious Displays on Public Property

A final area of religious liberty doctrine that the Court may consider afresh involves religious displays on government property. Although the Court issued two decisions on this topic in 2005, both were closely divided and one did not produce a majority opinion. In *Van Orden v. Perry*, the Court rejected an Establishment Clause challenge to a privately-erected Ten Commandments display on the grounds of the Texas state legislature.[107] *Van Orden* split 4-1-4, however, with Chief

Justice Rehnquist in the majority and Justice O'Connor in dissent (Justice Breyer wrote the controlling concurrence). *Van Orden*'s companion case, *McCreary County v. ACLU of Kentucky*, involved a display of historical documents, including a framed copy of the Ten Commandments, located in a Kentucky courthouse.[108] Justice Souter, writing for a majority that also included Justices O'Connor, Stevens, Ginsburg, and Breyer, held that the display was unconstitutional because its stormy history cast doubt on the government's claim that it had a secular purpose in hanging the display.[109] Now that Chief Justice Roberts and Justice Alito have joined the Court, the alliances that gave rise to the fractured opinions in *Van Orden* and *McCreary County* no longer exist.

Last Term, the Court granted certiorari in a free exercise case brought by a religious group seeking to erect its own religious monument in a Utah city park.[110] The case, *Pleasant Grove City v. Summum*, involves a small religious group that wishes to erect a monument containing the "Seven Aphorisms of Summum" in a city park that already includes a privately erected Ten Commandments monument identical to that considered in *Van Orden*.[111] The Tenth Circuit held that the city's decision to exclude the Summum monument—or, indeed, any private monument, religious or non-religious—is subject to strict scrutiny because public parks are traditional public forums.[112] As *Davey* was to *Zelman*, so *Summum* is to *Van Orden*—*Summum* involves a claim that the Free Exercise Clause requires what the Court earlier (and narrowly) said the Establishment Clause permitted. Time will tell whether the new Court uses *Summum* to clarify the meaning of its plurality opinion in *Van Orden*, or follows *Davey*'s lead, finding room for the city's regulations in the "play between the joints" of the Free Exercise and Establishment Clauses.

CONCLUSION

Our constitutional system of government provides for both short- and long-term change. In November, Americans will elect a President to serve for the next four years. But he, with the advice and consent of the elected Senate, will appoint federal judges—likely including Supreme Court justices—who will sit for life. And these federal judges will be called upon to make decisions that set the constitutional parameters for religious participation in public life for decades to come.

As we have noted, it is difficult to predict with any certainty which establishment and free exercise issues will catch the Supreme Court's attention over the next four years. Nonetheless, we have sought to identify a number of areas of religious liberty doctrine—the ministerial exception to employment discrimination laws, the meaning of the "substantial burden" requirement in free exercise cases involving land use, state aid to "pervasively sectarian" schools, and religious monuments on public property—in which there is a notable prospect of Supreme Court intervention. As the lower courts' varied approaches to these issues shows, religious individuals and groups seeking to participate in various ways in public life will continue to clash in the courts with those who find such participation unnecessary or even harmful.

Endnotes

1 Interest in a presidential candidate's religious views is nothing new in U.S. politics. In the 1800 Presidential election, Thomas Jefferson was criticized for being a "deist," while Jefferson's supporters "attacked the right of the clergy to talk about politics." Douglas Laycock, *The Many Meanings of Separation*, 70 U. Chi. L. Rev. 1667, 1677 (2003) (reviewing Philip Hamburger, Separation of Church and State (2002)).

2 Michael Powell & Jodi Kantor, *A Strained Wright—Obama Bond Finally Snaps*, N.Y. Times, May 1, 2008, at A1 (noting Reverend Wright's "latest explosive comments on race and America" and the disintegration of the relationship between Senator Obama and his former pastor); Neela Banerjee & Michael Luo, *McCain Cuts Tie to Pastors Whose Talks Drew Fire*, N.Y. Times, May 23, 2008, at A17 (quoting Senator McCain, who rejected Reverend Hagee's endorsement and distinguished his situation from that of Senator Obama, saying: "Reverend Hagee was not and is not my pastor or spiritual adviser, and I did not attend his church for 20 years.").

This is not the first presidential election in which controversial clerics have caused trouble for candidates. James Blaine's defeat in the 1884 Presidential election is often linked to anti-Catholic remarks by a Presbyterian minister at one of his campaign rallies, which was said to have alienated the Irish-American vote in the crucial swing state of New York. Peter H. Hanna, Note, *School Vouchers, State Constitutions, and Free Speech*, 25 Cardozo L. Rev. 2371 n.98 (2003); *see also* Edward T. O'Donnell, *F.Y.I., Pastors and Politics*, N.Y. Times, May 11, 2008, at CY2 (same); Mark V. Tushnet, *Decoding Television (and Law Review)*, 68 Tex. L. Rev. 1179 n.4 (1990) (noting that "a [Blaine] supporter's reference to the Democratic party offended Irish-Americans living in New York City, thus contributing to James Blaine's loss to Grover Cleveland in the 1884 presidential election").

3 *See, e.g.*, Michael Gerson, *McCain's New Hope: The Candidate Shines at Saddleback Forum*, Wash. Post, Aug. 18, 2008, at A11 ("What took place under Warren's precise and revealing questioning was the most important event so far of the 2008 campaign—a performance every voter should seek out on the Internet and watch.").

4 *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (5-4 vote sustaining the constitutionality of the participation of religious schools in Cleveland's voucher program); Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819 (1995) (5-4 vote holding that the Free Speech Clause prohibits a public university from discriminating against student newspapers with a religious viewpoint in the university's distribution of student funding); Van Orden v. Perry, 545 U.S. 677 (2005) (5-4 vote sustaining the constitutionality of a privately-erected Ten Commandments display on the grounds of the Texas state legislature); McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005) (5-4 vote invalidating a Ten Commandments display in a county courthouse on the ground that it was erected without a legitimate government purpose).

5 The candidates have given some clues, however. During the Saddleback Civil Forum on the Presidency, Pastor Rick Warren asked each candidate which sitting Supreme Court Justice he would *not* have nominated. Senator Obama responded:

> I would not have nominated Clarence Thomas. I don't think that he was a strong enough jurist or legal thinker at the time for that elevation. Setting aside the fact that I profoundly disagree with his interpretations of a lot of the Constitution.
>
> I would not nominate Justice Scalia, although I don't think there's any doubt about his intellectual brilliance, because he and I just disagree.…
>
> John Roberts, I have to say, was a tougher question only because I find him to be a very compelling person… in conversation individually. He's clearly smart, very thoughtful. I will tell you that how I've seen him operate since he went to the bench confirms the suspicions that I had, and the reason that I voted against him…. One of the most important jobs of, I believe, the Supreme Court is to guard against the encroachment of the Executive Branch on the power of the other branches… [a]nd I think that he has been a little bit too willing and eager to give an administration, whether it's mine or George Bush's, more power than I think the Constitution originally intended.

The Saddleback Civil Forum on the Presidency (CNN television broadcast August 16, 2008), Certified Final Transcript at http://www.rickwarrennews.com/docs/Certified_Final_Transcript.pdf [hereinafter "Saddleback Forum"].

When Pastor Warren asked Senator McCain which justices he would not have nominated to the Supreme Court, he replied:

> With all due respect, Justice Ginsburg, Justice Breyer, Justice Souter and Justice Stevens…. I think that the president of the United States has incredible responsibility in nominating people to the United States Supreme Court. They are lifetime positions…. There will be two, maybe three vacancies. This nomination should be based on the criteria of proven record of strictly adhering to the Constitution of the United States of America and not legislating from the bench. Some of the worst damage has been done by legislating from the bench.
>
> And by the way, Justices Alito and Roberts are two of my most recent favorites…. They are very fine and I'm proud of President Bush for nominating them.

Id.

For Senator McCain's views on judicial philosophy, see The Federalist Society Online Debate Series, Presidential Candidates on Judicial Philosophy: Senator John McCain (Feb. 4, 2008), http://www.fed-soc.org/debates/dbtid.15/default.asp ("My judicial appointees will understand that the Federal government was intended to have limited scope, and that federal courts must respect the proper role of local and state governments…. My judicial appointees will understand that it is not their role to usurp the rightful functions and powers of the co-equal political branches. I will look for candidates who respect the lawmaking powers of Congress, and the powers of the President."). *See also* Senator John McCain, Remarks on Judicial Philosophy at Wake Forest University (May 6, 2008), http://www.johnmccain.com/informing/news/Speeches/5385b2dd-fc8f-4bc9-9fb0-da2e2f1d9f98.htm.

For Senator Obama's views on judicial philosophy, see *The Situation Room with Wolf Blitzer: Interview with Barak Obama* (CNN television broadcast May 8, 2008), at http://transcripts.cnn.com/TRANSCRIPTS/0805/08/sitroom.01.html (praising judicial perspectives which are "sympathetic … to those who are on the outside, those who are vulnerable, those who are powerless, those who can't have access to political power, and, as a consequence, can't protect themselves from being... dealt with sometimes unfairly."). Senator Obama's judicial appointment philosophy is also reflected in his remarks opposing the nomination of Janice Rogers Brown to the U.S. Court of Appeals for the D.C. Circuit. Senator Obama criticized Justice Brown because of her "judicial activism" and insensitivity to the rights of women and minorities. 151 Cong. Rec. S6178–80 (daily ed. June 8, 2005) (Remarks of U.S. Senator Barack Obama on the nomination of Justice Janice Rogers Brown), available at http://obama.senate.gov/speech/050608-remarks_of_us_senator_barack_o/.

6 Saddleback Forum, Certified Final Transcript at http://www.rickwarrennews.com/docs/Certified_Final_Transcript.pdf.

7 Sen. Barak Obama, Remarks on the Council for Faith-Based and Neighborhood Partnerships (July 1, 2008), http://www.barackobama.com/2008/07/01/remarks_of_senator_barack_obam_86.php. While this statement does not directly address the ministerial exception, it outlines Senator Obama's concern, shared by others, that faith-based groups that receive federal funds should not be allowed to consider religion in hiring.

8 *See, e.g.*, 42 U.S.C. § 2000e-1 (exempting from Title VII "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities"); Minnesota Human Rights Act, Minn. Stat. § 363A.26 (2004) (exempting "any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for educational purposes that is operated, supervised, or controlled by a religious association, religious corporation" with respect to "limiting admission to or giving preference to persons of the same religion or denomination"); New York Human Rights Law, N.Y. Exec. Law § 296.11 (2008) (exempting "any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization from limiting employment … to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained").

9 626 F.2d 477 (5th Cir. 1980).

10 McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); *see also* Rweyemamu v. Cote, 520 F.3d 198, 206–07 (2d Cir. 2008).

11 McClure, 460 F.2d at 560. *See also* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006) (stating that regulating the employment relationship between churches and clergy would likely violate both the Free Exercise Clause and the Establishment Clause by interfering with church governance and requiring courts to pass judgment on matters of doctrine).

12 *See* Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago, 440 U.S. 490, 504 (1979) (declining to apply the National Labor Relations Act to Catholic schools because "[w]e see no escape from conflicts flowing from the [National Labor Relations] Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow").

13 *See* Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 342-43 (1987) (Brennan, J., concurring).

14 *See, e.g.,* Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (sustaining the constitutionality of the Title VII exemption of religious employers, even as to nonreligious positions).

15 Boy Scouts of America v. Dale, 530 U.S. 640, 648 (2000). For an analysis of *Dale* by one of the authors of this article, *see* Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 Minn. L. Rev. 1639 (2001).

16 *See* Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago, 440 U.S. 490, 504 (1979).

17 *See, e.g.*, *Rweyemamu*, 520 F.3d at 206–07 (Second Circuit); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 224–25 (6th Cir. 2007); Petruska v. Gannon University, 462 F.3d 294 (3d Cir. 2006) ("*Petruska II*"); Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004); Alicea-Hernandez v. Catholic Bishop, 320 F.3d 698 (7th Cir. 2003); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648 (10th Cir. 2002) ("church autonomy doctrine"); Equal Employment Opportunity Comm'n v. Roman Catholic Diocese of Raleigh, N.C.,, 213 F.3d 795 (4th Cir. 2000); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000); Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999); Equal Employment Opportunity Comm'n v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991); Natal v. Christian and Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989). *See generally* Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 Harv. L. Rev. 1776, 1776 (2008) ("religious employers have consistently—and successfully—claimed an exemption from employment discrimination laws").

18 *Tomic*, 442 F.3d at 1039; Schleicher v. Salvation Army, 518 F.3d 472, 478 (7th Cir. 2008); Bryce, 289 F.3d 648; Natal, 878 F.2d 1575 (dismissing minister's suit, which alleged harm to property, breach of contract, and emotional distress, because "we deem it beyond peradventure that civil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice"; holding that "[w]here, as here, a cleric's property dispute with his church is made to turn on the resolution ... of controversies over religious doctrine and practice, intervention comprises impermissible entanglement in the church's affairs" (internal citation and quotation omitted)).

19 *Tomic*, 442 F.3d at 1039.

20 This should be distinguished from the procedural question of whether the complaint should be dismissed for lack of subject matter jurisdiction. Some circuits applying the role-based approach have dismissed suits under Federal Rule of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction), while others have applied the exception at summary judgment or on Rule 12(b)(6) motions. *See, e.g., Hollins,* 474 F.3d at 224–25 (Sixth Circuit case affirming the 12(b)1 dismissal of clergy member's ADA suit against a religious hospital); *Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d at 799–800, 805 (Fourth Circuit case affirming the 12(b)(1) dismissal of a lay music director's Title VII sex discrimination and retaliation claims against a Catholic diocese); *cf. Shaliehsabou*, 363 F.3d at 301 (Fourth Circuit case affirming summary judgment based on the ministerial exemption in an FSLA case brought by a kosher food inspector against a Jewish nursing home); *Gellington*, 203 F.3d at 1301–02 (Eleventh Circuit case affirming summary judgment based on the

ministerial exception in a retaliation and constructive discharge case brought by a pastor against church); *Combs*, 173 F.3d at 343–44 (Fifth Circuit case affirming summary judgment in a pregnancy and sex discrimination case brought by a pastor against a church).

21 *Id.* at 1039 (quoting *Combs*, 173 F.3d at 350 (internal citations omitted)).

22 *Id.* at 1042.

23 *See, e.g., Schleicher*, 518 F.3d at 477–78 (adopting "a presumption that clerical personnel are not covered by the Fair Labor Standards Act [29 U.S.C. § 201]," which "can be rebutted by proof that the church is a fake, the 'minister' a title arbitrarily applied to employees of the church even when they are solely engaged in commercial activities, or, less flagrantly, the minister's function entirely rather than incidentally commercial").

24 289 F.3d 648 (10th Cir. 2002).

25 *Id.* at 651.

26 *Id.* at 660. The Tenth Circuit also stated:

> The church autonomy doctrine is not without limits, however, and does not apply to purely secular decisions, even when made by churches. Before the church autonomy doctrine is implicated, a threshold inquiry is whether the alleged misconduct is rooted in religious belief … . Of course churches are not—and should not be—above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions.

Id. at 656 (internal quotations and citations omitted). *Cf. Ogle v. Hocker*, No. 06-2236, 2008 WL 2224863 (6th Cir. May 29, 2008) (unpublished) (permitting one bishop to sue another bishop for defamation and intentional infliction of emotional distress based on remarks made in sermons about the first bishop's sexual orientation).

27 462 F.3d 294, 299 (3d Cir. 2006).

28 *Id.* at 307.

29 For example, the district court in *Petruska* found that the ministerial exception precluded it from exercising jurisdiction over any part of the suit, but the panel in *Petruska II* held that the plaintiff's contract claim survived the exception. *Cf.* Petruska v. Gannon University, 350 F. Supp. 2d 666, 682–84 (W.D. Pa. 2004), *with Petruska II*, 462 F.3d at 312.

30 448 F.3d 615, at para. 3 ("Petruska I"), *withdrawn and replaced by* 462 F.3d 294 (3d Cir. 2006) ("Petruska II"). The opinion in *Petruska I* was vacated because the authoring judge (Judge Edward Becker) passed away and another judge belatedly recused himself.

31 375 F.3d at 963.

32 *Id.* at 960.

33 *Id.*

34 *See, e.g.,* Werft v. Desert Southwest Annual Conference of United Methodist Church, 377 F.3d 1099, 1101 (9th Cir. 2004) ("We must decide whether the claim of a minister, seeking damages from his church for employment discrimination based on a failure to accommodate his disabilities, falls within either the ministerial exception first articulated in McClure v. Salvation Army, 460 F.2d 553 (5th Cir.1972), or the theory of Bollard v. California Province of the Society of Jesus, 196 F.3d 940 (9th Cir.1999) (sexual harassment claims fall outside ministerial exception).").

35 *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006). *Hankins* was an age discrimination case in which a panel of the court declined to adopt the ministerial exception and held that the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (1993) ("RFRA"), applied instead. This approach was sharply criticized by the Seventh Circuit in *Tomic*, 442 F.3d at 1042, which declined to follow *Hankins*' holding and stated that the ministerial exception (a constitutional doctrine) is "a long-established doctrine that gives greater protection to religious autonomy than RFRA," and that "a serious constitutional issue would be presented if Congress by stripping away the ministerial exception required federal courts to decide religious questions." *Id.*

36 *Reweyemamu*, 520 F.3d 198.

37 *Reweyemamu,* 520 F.3d at 209 ("We need not attempt to delineate the boundaries of the ministerial exception here, as we find that Father Justinian's Title VII claim easily falls within them."). The ministerial exception adopted in *Reweyemamu* has been interpreted narrowly by one district court, which denied a church's motion to dismiss under the ministerial exception. Rojas v. Roman Catholic Diocese of Rochester, 2008 WL 2097505, at *8-9 (W.D.N.Y. May 19, 2008) ("In the instant case, the Court has no idea why [the church] terminated Plaintiff's employment, and therefore it cannot determine whether an investigation into Plaintiff's dismissal from employment would involve any entanglement with religious doctrine. To the extent that Defendants are maintaining that a court may never inquire into a church's stated reasons for terminating a minister, that argument appears to have been rejected by *Rweyemamu.*" (internal footnotes omitted)).

38 494 U.S. 872, 884–85 (1990).

39 *Id*. at 882.

40 When Justice Alito was a member of the Third Circuit bench, he wrote an opinion interpreting *Smith* narrowly and holding that a police department was required to accommodate observant Muslim officers who needed to wear beards for religious reasons, so long as the department permitted other officers to wear beards for medical reasons. Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3d Cir. 1999). To our knowledge, Chief Justice Roberts did not decide any Free Exercise Clause issues while a member of the D.C. Circuit bench. Since joining the Supreme Court, he authored the Court's decision in Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006), which unanimously held that U.S. members of a Brazilian-based Christian Spiritist Sect had a statutory right under RFRA to use a hallucinogenic tea called hoasca for religious purposes, notwithstanding the fact that hoasca is a Schedule I substance with no medical use. *Id.* at 425. This decision, however, involved statutory rather than constitutional free exercise analysis. *Id.* at 439.

41 Boy Scouts of America v. Dale, 530 U.S. 640 (2000). For an analysis of *Dale* by one of the authors of this article, *see* Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 Minn. L. Rev. 1639 (2001).

42 *Dale*, 530 U.S. at 648.

43 *See, e.g., id.* at 647 ("[W]e must determine whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints.").

44 Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 698, 702 (1976).

45 426 U.S. 696, 714 (1976).

46 *Tomic*, 442 F.3d at1039–40.

47 42 U.S.C. § 2000cc *et seq.*

48 146 Cong. Rec. S7774–75 (daily ed., July 27, 2000) (Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) ("The right to assemble for worship is at the very core of the free exercise of religion. …The hearing record compiled massive evidence that this right is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. … Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.' Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic. Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks—in all sorts of buildings that were permitted when they generated traffic for secular purposes.").

49 494 U.S. 872 (1990) (holding that, in most free exercise cases, neutral laws of general applicability that incidentally burden religious exercise need not satisfy strict scrutiny).

50 42 U.S.C. § 2000cc ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the

government demonstrates that imposition of the burden on that person, assembly, or institution…is in furtherance of a compelling governmental interest; and…is the least restrictive means of furthering that compelling governmental interest.").

51 374 U.S. 398 (1963). *See* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) [hereinafter "CLUB"] (adopting the "effectively impracticable" standard); Rector, Wardens, and Members of Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 355 (2d Cir. 1990) (stating, in a pre-RLUIPA free exercise case, that a "substantial burden" was one which denied the claimant the ability to practice his religion or coerced him to engage in a practice contrary to his religion). *Cf.* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227–28 (11th Cir. 2004) ("We decline to adopt the Seventh Circuit's definition [of 'substantial burden,' but] we agree that 'substantial burden' requires something more than an incidental effect on religious exercise."); *see also* Guru Nanak Sikh Soc. of Yuba City v. County of Sutter, 456 F.3d 978, 988 & n.12 (9th Cir. 2006) (rejecting the Seventh Circuit's "effectively impracticable" standard and stating that under Ninth Circuit precedent "a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise.").

52 *See, e.g., CLUB*, 342 F.3d at 761; *Midrash Sephardi*, 366 F.3d at 1227–28.

53 *CLUB*, 342 F.3d at 761–62.

54 *Id.* at 755.

55 *Id.* at 761.

56 *Id.* The Seventh Circuit backed away from the narrow definition of "substantial burden" in Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 900 (7th Cir. 2005). The *Sts. Constantine and Helen* court stated that "[i]f a land-use decision, in this case the denial of a zoning variance, imposes a substantial burden on religious exercise… and the decision maker cannot justify it, the inference arises that hostility to religion, or more likely to a particular sect, influenced the decision." *Id.* at 901. The court held that the burden in that case was substantial, because, although "[t]he Church could have searched around for other parcels of land… or… continued filing applications with the City … in either case there would have been delay, uncertainty, and expense." The court concluded that the fact"[t]hat the burden would not be insuperable would not make it insubstantial." *Id.*

Despite this, the restrictive definition of "substantial burden" reappeared in Vision Church v. Village of Long Grove, 468 F.3d 975, 997 (7th Cir. 2006) (citing *CLUB* and the "effectively impracticable" standard). Another panel applied the more restrictive standard and distinguished *Sts. Constantine and Helen* on the basis that the church in that case had already purchased the property it sought to rezone, and because "[i]n that case the denial was so utterly groundless as to create an inference of religious discrimination, so that the case could equally have been decided under the 'less than equal terms' provision of RLUIPA, which does not require a showing of substantial burden." Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846, 851 (2007).

57 *St. Bartholomew's*, 914 F.2d at 351–52.

58 *Id.* at 352.

59 *Id.* at 355 (emphasis added).

60 *Id.* at 355–56.

61 *See, e.g.,* Westchester Day School v. Village of Mamaroneck, 386 F.3d 183, 189–90 (2d Cir. 2004) (dismissing a religious school's RLUIPA claim because the zoning board's decision was not a "complete denial" of the school's proposed renovations).

62 *See* 366 F.3d 1214, 1222 (11th Cir. 2004).

63 *Id.* at 1227.

64 *Id.*

65 42 U.S.C. § 2000cc(b)(3).

66 The court went on to rule in favor of the synagogues under RLUIPA's equal treatment provision. *Midrash Sephardi*, 366 F.3d at 1232&33 (applying 42 U.S.C. § 2000cc(b)(1)("[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.")).

67 456 F.3d at 981–85. Also of note is *Navajo Nation v. United States Forest Service*, 535 F.3d. 1058 (9th Cir. 2008). There, several Native American groups challenged the U.S. Forest Service's decision to permit the use of artificial snow in a ski area on a mountain the groups considered sacred. *Id.* at 1062–63. The Native American groups filed suit under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (1993) ("RFRA"), and the Ninth Circuit held that permitting artificial snow did not "substantially burden" the Native Americans' religious practices under RFRA. The court stated:

Where, as here, there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs, there is no "substantial burden" on the exercise of their religion.

Id. at 1063. The court also rejected the Native American groups' effort to rely on RLUIPA caselaw, holding that RLUIPA applies to state and local regulation of private property, not Federal management of national park land. *Id.* at 1077 (noting that even under the "substantial burden" standard in the Ninth Circuit's RLUIPA cases, their claims would fail).

68 *Id.* at 988.

69 *Id.* at 988–90 & n.12, 992.

70 *See, e.g., Guru Nanak Sikh Society*, 456 F.3d at 988 ("The Supreme Court's free exercise jurisprudence is instructive in defining a substantial burden under RLUIPA."); *CLUB*, 342 F.3d at 760 ("Although the text of [RLUIPA] contains no … express definition of the term 'substantial burden,' RLUIPA's legislative history indicates that it is to be interpreted by reference to [the Religious Freedom Restoration Act] and First Amendment jurisprudence.") In contrast to RLUIPA, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(1), which applies only to the federal government, expressly references "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)."

71 *Thomas,* 450 U.S. 707, 717–18 (1981); *accord Sherbert,* 374 U.S. at 406 & n.6.

72 42 U.S.C. § 2000cc-3(g).

73 *See, e.g., Mikeska v. City of Galveston,* 451 F.3d 376, 382 (5th Cir. 2006) (noting that federal courts "are to resist becoming 'super zoning boards'" but concluding that "[w]e have plainly and consistently held that zoning decisions are to be reviewed by federal courts by the same constitutional standards that we employ to review statutes enacted by the state legislatures." (internal citation and quotations omitted)).

74 124 Cong. Rec. 25661 (1978).

75 530 U.S. 793, 828–29 (2000). Four Justices in *Mitchell* (Thomas, Rehnquist, Scalia, and Kennedy) expressed the view that the "pervasively sectarian" doctrine should be overruled. *Id.* Two Justices (O'Connor and Breyer) adopted reasoning that was narrower, but inconsistent with the doctrine. *Mitchell*, 530 U.S. at 851 (O'Connor, J., concurring in the judgment).

Since *Mitchell*, numerous federal agencies have stated that the doctrine is no longer good law. For example, the Department of Housing and Urban Development stated in 2004 that

> [T]he Supreme Court's "pervasively sectarian" doctrine—which held that there are certain religious institutions in which religion is so pervasive that no government aid may be provided to them, because their performance of even "secular" tasks will be infused with religious purpose—no longer enjoys the support of a majority of the Court. Four Justices expressly abandoned it in *Mitchell v. Helms*, 530 U.S. 793, 825[–]29 (2000) (plurality opinion), and Justice O'Connor's opinion in that case, joined by Justice Breyer, set forth reasoning that is inconsistent with its underlying premises. (*See id.* at 857[–]58 (O'Connor, J., concurring in judgment) (requiring proof of "actual diversion of public support to religious uses").) Thus, six members

Participation in HUD's Native American Programs by Religious Organizations; Providing for Equal Treatment of All Program Participants, Final Rule, 69 Fed. Reg. 62164, 62166 (October 22, 2004) (codified at 24 C.F.R. pts. 954, 1003); *see also* Participation in Department of Health and Human Services Programs by Religious Organizations; Providing for Equal Treatment of All Department of Health and Human Services Program Participants, Final Rule, 69 Fed. Reg. 42586, 42587–88 (July 16, 2004) (codified at 45 C.F.R. pts. 74, 87, 92, 96) (same).

76 *See, e.g.,* Colorado Christian University v. Weaver, 534 F.3d 1245 (10th Cir.2008) (striking down part of a Colorado law that incorporated the "pervasively sectarian" standard).

77 *Colorado Christian University*, 534 F.3d 1245; Pucket v. Hot Springs School District No. 23-2, 526 F. 3d 1151 (8th Cir. 2008).

78 536 U.S. 639 (2002). *Zelman* held that the Ohio primary and secondary school voucher program was constitutional because it was "entirely neutral with respect to religion," provided "benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district" and permitted "such individuals to exercise genuine choice among options public and private, secular and religious," making it a "program of true private choice." *Id.* at 662–63.

79 540 U.S. 712 (2004).

80 *Id.* at 719.

81 *Id.* at 724.

82 Anderson v. Town of Durham, 895 A.2d 944 (Me. 2006); Eulitt ex rel. Eulitt v. Maine, Department of Education , 386 F.3d 344 (1st Cir. 2004).

83 *Colorado Christian University*, 534 F.3d at 1250.

84 386 F.3d 344.

85 *Id.* at 354–55.

86 *Id.* at 356–57.

87 *Id.* at 356.

88 895 A.2d 944.

89 *Id.* at 961.

90 *Id.*

91 *Id.*

92 *Eulitt*, 386 F.3d at 252–53.

93 *Colorado Christian University*,534 F.3d at 1250..

94 *Id.* at 1250–51.

95 *Id.*

96 *Id.*

97 *Id.* at 1255–56.

98 *Id.* at1256.

99 *Id.* at n.4.

100 895 A.2d at 957–58.

101 *Id.* at 949.

102 *Mitchell*, 530 U.S. at 828–29.

103 536 U.S. at 721 (Breyer, J., dissenting) (joined by Justice Stevens and Justice Souter).

104 540 U.S. at 723 n.7.

105 Pucket v. Hot Springs School District No. 23-2, 526 F. 3d 1151, 1153 (8th Cir. 2008).

106 *Id.* at 1163.

107 545 U.S. 677 (2005); *cf.* McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005) (holding that a Ten Commandments display in a county courthouse was unconstitutional because it was erected without a legitimate government purpose).

108 545 U.S. 844 (2005).

109 *Id.* at 872–74, 881.

110 Pleasant Grove City, Utah v. Summum, 128 S.Ct. 1737 (2008). Oral argument is scheduled for November 12, 2008. Supreme Court of the United States, October Term 2008, Argument Calendar for the Session Beginning November 3,2008,

http://www.supremecourtus.gov/oral_arguments/argument_calendars/MonthlyArgumentCalNovember2008.htm.

111 Summum v. Pleasant Grove City, 483 F.3d 1044, 1047 (10th Cir. 2007).

112 *Id.* at 1050–52.