

**A CONSTITUTIONAL RIGHT TO OPERATE SECTARIAN PUBLIC
CHARTER SCHOOLS?**

CONSIDERATIONS OF FREE SPEECH AND FREE EXERCISE OF RELIGION
IN CALIFORNIA CHARTER SCHOOLS.

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J. Shelton Baxter

National Center for the Study of Privatization in Education
Teachers College, Columbia University
Box 181, 525 West 120th Street
New York, NY 10027

FORWARD

Whether by stealth or inadvertence the State of California in promulgating its charter school legislation may have created the platform for the expansion of jurisprudence in the areas of free exercise of religion and freedom of religious speech in the public schools, not only within the state, but throughout the nation as a whole¹. The specific statutory provision in question in this regard provides that a charter school in California must be nonsectarian in its programs, admissions policies, employment practices and all other operations².

Provisions contained in the First Amendment to the Constitution of the United States and in Articles Two and Four of the California State Constitution have frequently resulted in litigation in the continuing attempt to define the proper balance between the obligation of the state to refrain from engaging in activities in support of or opposition to religious practices and the right of individuals to pursue their chosen religious viewpoint³.

Multiple claims regarding the “correct” operation of the nonsectarian provision of the Act have been made by both proponents and opponents of the charter school concept. On one side of the spectrum claimants contend that the nonsectarian provision is clear on its face and should be absolutely enforced in actual practice. They contend the provision completely prohibits any activity of a religious nature within a charter school.

Persons on the other end of the spectrum contend the underlying basis for the implementation and operation of charter schools, in the first instance, was to be free of the encumbering bureaucratic procedures and oversight requirements that have characterized, and arguably negatively affected, the public schooling effort. As such, these parties argue, charter schools should be permitted to follow the spirit of their creation and engage in whatever practice the governing body of each school decides is appropriate in light of the mission of the school, including the practice of religious activities, if that will be the case.

The more moderate center position contends that charter schools should be held to the same standards and obligations as any other school in the public school system. Judicial decisions over the approximate most recent twenty years at the federal level, and mirrored in part by California state court decisions, have reached generally more accommodating positions than was previously the case with respect to religious practices in public schools. As of 2004 it now appears to be the case

¹ The relevant legislation which established charter schools in California known as “The Charter Schools Act of 1992” is found at Section 47600 et seq. of the California Education Code, and is hereinafter referred to as the “Act”.

² The requirement appears in the California Education Code, Section 47605(d)(1).

³ At the federal level these provisions are singly and commonly referred to as, the Establishment Clause, the Free Exercise Clause and the Freedom of Speech Clause.

that, subject to the observation of strictly defined limitations, certain religious activities and practices may be permitted within the confines of a public school. The moderates of the center contend that as a minimum, a charter school should be permitted to engage in religious practices to the same extent that any other public school would be permitted to do so.

The contentions regarding the extent to which religious activities or practices may properly transpire in a California charter school have not as of yet been subjected to top-level judicial review at either the federal or California state court levels. However, at such time as judicial precedent is established in these areas, the results may potentially affect the operations not only of California charter schools, but all California public schools as well. Additionally, where the adjudication is within the federal court system, the resultant decisions may affect not only public schools in California, but throughout the nation as a whole. Hence, judicial determination of the appropriate operation of the nonsectarian requirement of the Act, may ultimately become applicable to the operations of all public schools in the United States.

A. State Support for and Legal Limitations on Public Education

There is no express inclusion in the federal constitution that requires the provision of educational services to the citizens of the United States by a state entity. Support for the public educational effort since at least the mid-1800's has traditionally been primarily a function of the individual states and local governments in the United States.⁴ Most of the states include at least general provisions in their respective constitutions for the encouragement of the educational effort⁵ and support of a public school system.⁶ Likewise most state constitutions include one or more provisions for the mandatory funding of the public educational effort by the state.⁷ In view of the widespread evidence found in many state

⁴ Perhaps most eloquently stated in the opinion of the court in the landmark case of *Brown v. Board of Education* [347 U.S. 483, 493 (1954)], "... education is perhaps the most important function of state and local governments ... It is required in the performance of our most basic public responsibilities, even service in the armed services. It is the foundation of good citizenship."

⁵ The constitutional basis for the encouragement of education in California appears at Article IX, Section 1 of the state constitution and provides: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement."

⁶ The constitutional mandate for the support of a system of schools appears at Article IX, Section 5 of the California Constitution and provides: "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established."

⁷ The obligatory funding provision of the California Constitution appears at Article XVI, Section 8 and provides: "From all state revenues there shall be set apart the moneys to be applied by the state for support of the public school system and public institutions of higher learning". For a comprehensive and comparative review of state constitutional provisions regarding the encouragement of education and support and funding of public schools, see: R. Craig Wood and David C. Thompson, *Education Finance Law: Constitutional Challenges to State Aid Plans – An Analysis of Strategies*, (2d ed.), National Organization of Legal Problems of Education, Topeka, Kansas (1996).

constitutions for public support of the educational effort, many find it incongruous that the question of whether education is considered to be a “fundamental right” for citizens today remains an issue disputed in the state and federal courts.⁸

The near-universal support for public education has not been without limitation. Nearly as prevalent in the state constitutions were provisions which specifically prohibited the use of public funds for the support of religious institutions generally, and religious schools specifically.⁹ Largely the result of the efforts of James G. Blaine in the late 1800’s many states in the western United States adopted allegedly anti-religious constitutional provisions as a part of the price of admission to the Union. Similar modifications or additions to the anti-religious constitutional provisions were made to the constitutions of many of the eastern states that had previously established their respective state constitutions.¹⁰

In view of the constitutional support for and limitations on state funding of education it may not be surprising to observe similar limitations in the Act. The religious limitation applicable to charter schools in California provides:

“In addition to any other requirement imposed under this part, a charter school shall be nonsectarian in its programs, admission policies, employment practices and all other operations ...”

Education Code, Section 47605(d)(1)

Hence, California charter schools operate under a nonsectarian requirement included in the Act that mirrors requirements included in the California state

⁸ This is the quandary resulting from the split between courts represented by the decisions in the *Rodriguez* and *Serrano* cases. In *San Antonio Independent School v. Rodriguez*, 411 U.S. 980 (1973) the Supreme Court of the U.S. refused to reverse the decision of the Supreme Court of Texas which determined that wealth was not a suspect category and for that reason education was not a fundamental interest. Conversely, in *Serrano v. Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601 (1973) the Supreme Court of California citing independent state grounds determined education to be a fundamental interest. For representative opposing opinions on the results of the *Rodriguez* / *Serrano* cases see: Allen W. Hubsch, “Education and Self-Government: The Right to Education Under State Constitutional Law,” 18 *Journal of Law and Education* 93, (1989); A. E. Howard, “State Courts and Constitutional Rights in the Day of the Burger Court,” 62 *Virginia L. Rev.* 873 (1976); and Penelope A. Prevelos, “Rodriguez Revisited: Federalism, Meaningful Access and the Right to an Adequate Education,” 20 *Santa Clara L. Rev.* 85 (1980).

⁹ The provision relating to public funds and religious schools appears at Article IX, Section 8 of the California Constitution and provides: “No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.” Also see: Article XVI, Sections 3 and 5 which prohibit the expenditure of public funds for private and religious institutions.

¹⁰ For a review of the political sentiments and events which gave rise to the adoption by many states of the so-called “Blaine Amendments” see: Edward J. Larson, “The Blaine Amendment in State Constitutions,” as appears in, *The School-Choice Controversy – What is Constitutional?*, (James W. Skillen, ed.) The Center for Public Justice, Washington, D.C. (1993). See also: Joseph P. Viteritti, “Blaine’s Wake: School Choice, The First Amendment and State Constitutional Law,” 21 *Harv. J. of L. & Policy* 658 (1998).

constitution prohibiting the use of public funding for the support of religious or private institutions.¹¹ The issues of whether the religious restrictions applicable to California charter schools are more onerous than restrictions applicable to other public schools in California, or to other public schools elsewhere in the United States, are issues which have not yet been subjected to judicial interpretation.

In view of the nonsectarian requirements of the Act the activities of some California charter schools may well provide the opportunity for further judicial refinement of the issues of free exercise of religion and freedom of religious speech in the context of public schools. Specific areas where judicial review seems most likely to occur include the following:

- 1) There is evidence that some California charter schools were organized and previously operated as home schools by persons or groups representing a specific religious point of view or faith, and that in their prior operations daily prayer and religious study were a part of the home school curriculum. The continuation of these activities in the operations of a charter school would seem to conflict with the provisions of the Act.
- 2) There is also evidence that some charter schools hold their physical premises open to use by members of the community at large, including adult groups not related to the school and student groups some of which are affiliated with the school and others not. In some instances the purposes for which these groups meet include religious study and activities that may run counter to the nonsectarian provisions of the Act.
- 3) Some charter schools use their facilities for the sponsorship of a variety of student publications and literary efforts. Reportedly some of these publications are religious in nature and/or espouse a specific religious point of view. The issue that arises is whether the sponsorship by the charter school of a publication that expresses a specific religious viewpoint conflicts with the provisions of the Act.
- 4) Finally, it is apparently the case that some charter schools, both during the application process and thereafter during the operational period, have been assisted by persons or entities identified or affiliated with specific institutions. In some instances the charter school uses facilities provided by the religious entity or conducts its daily schooling efforts within the physical

¹¹ Nonsectarian provisions appear frequently in charter school legislation. A representative example from the Arizona charter school law provides, "...[the charter school] is nonsectarian in its programs, admission policies and employment practices and all other operations", Title 15 *Arizona Revised Statutes*, 15-183 (E)(2). The similar provision in Michigan provides, "... a public school academy shall not be organized by a church or other religious organization and shall not have any organizational or contractual affiliation with or constitute a church or other religious organization," *Michigan Compiled Laws*, Chapt. 380, 380.502 (1).

premises owned by the religious entity. The question arises whether these actions violate the provisions of the Act.

None of the aforementioned sets of circumstances have yet resulted in adjudication by the state or federal courts in California, however all of the activities reportedly continue to transpire within some California charter schools.

B. Evolving Judicial Positions Regarding Education

The First Amendment to the Constitution of the United States contains three provisions that relate singly to: the prohibition of governmental support for religious activities or institutions, the rights of individuals to pursue their religious beliefs or chosen activities and the freedom of individuals to hold their chosen viewpoint with respect to speech or expression¹². Judicial interpretations of First Amendment rights have arisen in many different areas but it is accurate to note many of these cases have arisen in the context of an activity that transpired, or which was prohibited from taking place, in the context of a public educational institution.

The subject matter of this article concerns the federal and California constitutional provisions regarding: the rights of personal choice concerning religious beliefs and activities and the right of an individual to speak or express freely, as the same may be permitted or precluded in the context of a California charter school.

In the numerous judicial cases which relate to the field of education, the law in the United States has not been static. Seemingly similar issues when considered by different courts have reached conclusions which are difficult, at best, to fully reconcile. Examples abound of seemingly contradictory judicial results: in one matter public funding of bus transportation of students to a private school was held to be valid¹³ while a similar case found that a state statute which provided a supplement to the salaries of private school teachers was constitutionally invalid.¹⁴ In another pair of cases, the delivery of educational services by public school teachers within the physical premises of a religious school was held to be unacceptable,¹⁵ while the delivery of the same services to a similar set of students in temporary mobile classrooms located at the curb outside of the same school was found to be acceptable.¹⁶

¹² At the California state level rights and obligations similar to the federal First Amendment rights are included in the state constitution at Article 1, Sections 2 and 4, as well as in other state statutory provisions.

¹³ See: *Everson v. Board of Education*, 330 U.S. 1 (1947).

¹⁴ See: *Board of Education v. Allen*, 392 U.S. 236 (1968).

¹⁵ See: *Aguilar v. Felton*, 473 U.S. 402 (1985).

¹⁶ See: *Agostini v. Felton*, 521 U.S. 203 (1997).

Even a cursory reading of history reveals that through the evolution of human experience, the social practices, beliefs and political and psychological viewpoints of humans change over time. It should not be surprising then, that these changes are reflected in the evolving judicial decisions related to education.

The United States is fairly unique in that it established a dual legal system with one body of statutes and law at the federal level and multiple bodies of statutes and law at the state level. It is widely agreed that where the federal law can be said to have “occupied the field” it will preclude the application of state law to the case or issues in contention.¹⁷ Just as widely agreed upon is that where the federal statutes or case law have not spoken, the states may enact legislation or case law may be created by state courts which go beyond the parameters of existing federal law. This is not hollow judicial theory. There are clear and concrete examples of instances in which state laws or courts have gone beyond the mandates of federal rulings when the field gate has been left open¹⁸.

C. Limitation of Issues: Religious Exercise and Freedom of Speech Under the California Charter School Statute

The specific issues on which this article will focus include: the extent to which religious beliefs or practices and religious related speech may be validly limited or entirely prohibited in California charter schools¹⁹. There is a very ample body of statutory and case law at the federal level with respect to each of these issues and likewise there is significant statutory coverage and case law in California. However, in both of those instances the case law has resulted from actions which have taken place in a TPS and not in a charter school.

There are clear constitutional and statutory provisions in California on these issues which go beyond or, arguably, contradict the holdings of seemingly similar cases and statutes at the federal level²⁰.

¹⁷ The relevant constitutional provision at the federal level appears at Article VI of the U.S. Constitution which provides in applicable part, “... This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and the Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding. In the field of constitutional law this is commonly referred to as the “Supremacy Clause”.

¹⁸ In this regard see the discussion of the “Washington Trilogy”, *infra* at page __, a series of cases from the State of Washington in which the prevalence of state constitutional provisions were recently upheld by the U.S. Supreme Court, despite the fact those provisions were substantially more limiting than would have been the case had the matter been decided under purely federal law.

¹⁹ As used throughout this dissertation the term “schools” shall mean charter schools.

²⁰ One area where the limitations of California constitutional law are clearly more restrictive than those of the federal level occurs at Article IX, Section 8 of the state constitution, see: footnote 9 *supra*. Though no case has yet arisen in California, under the rule to emerge from the “Washington Trilogy”, when the issue is judicially raised counsel will certainly be expected to argue for the superiority of California state constitutional law, even where the activity would not constitute a violation of federal law.

D. Importance of Issues Considered

The First Amendment of the U.S. Constitution has been interpreted to prohibit the government from supporting religious activity. Notwithstanding that interpretation there have been recently evolving judicial doctrines under which some activities of a religious nature have been permitted in publicly supported forums. One line of cases can be read to require that under certain conditions public schools may be used as meeting places for students and non-student groups wishing to pursue religious activities or practices. Similarly, a recent case at a major state university has held that under certain circumstances the university may be validly required to support the publication of a religiously-oriented student publication. A recent line of cases from the State of Washington has held that where a religious limitation which appears in the state constitution is more restrictive than the similar provisions of federal law, that state standard may be validly enforced in certain instances²¹.

In light of this evolving jurisprudence, what are the valid limits of the Act with respect to the nonsectarian requirement for charter schools in California? Is it constitutionally valid for a California charter school to be required to operate in a more restrictive environment than charter schools of other states, or than other California public schools?

This article is an initial attempt to clearly define the present status of the law in these areas. Areas of likely conflict in the context of free exercise and freedom of speech arising from the practices of some California charter schools are explained. The opinion of the author regarding how these areas of conflict will be resolved under current law is expressed. Finally there is an effort to identify areas where further research regarding free exercise and freedom of speech in the context of a California charter school will be necessary.

E. Article Organization

The opening chapter informs the reader of the provision of the Act that requires that California charter schools be nonsectarian in their programs and operations. Introduction of the potential judicial evolution in the areas free exercise and freedom of speech which may result from the Act is provided. There was a possible choice between wide and comparative coverage or an in-depth analysis of the charter schools of a single state. The rationale for that choice is included in this initial chapter.

The second chapter includes a review of the evolution and present status of the case law decisions at both the federal and state levels in the areas of the free exercise of religious beliefs and practices and the freedom of religious speech and

²¹ See the discussion of the “Washington Trilogy”, *infra* at page ___.

expression. The opinion of commentators on the balance between the federal and the state constitutions is reviewed. Additionally, there is a discussion of the distinction between content and viewpoint discrimination in the area of free speech.

The third chapter analyzes the requirements of federal and state case law and statutes in light of the nonsectarian inclusions of the Act. Included in this analysis is a discussion of the arguments that will be made by opposing sides regarding the constitutional validity of the Act. Also reviewed are those areas where actual contradictions may exist between the legal requirements of the Act and actual practices of California charter schools. Areas where judicial review of charter school operations appear to be particularly likely with respect to: the activities and curriculum inclusions of former home schools which have become charter schools, the use of charter school facilities by outside groups for religious activities, the publication by a charter school of a student newspaper with religious inclusions, and the provision of a charter school facility by a religious organization. In each of these instances analysis is provided of the legal arguments competing sides may be anticipated to make in support of their respective positions.

The final chapter concludes with a short review of the issues herein considered and why those issues are important to members of the California charter school community. The chapter a statement of where issues remain undefined at this time. The opinion of the author is expressed on how the arguments of both sides as noted in Chapter III should be resolved under the law in its present state. Finally, notation is made of those areas related to the issues herein considered where further research will be needed.

The following chapter sets forth the evolution and present status of the law at the federal and state levels in the areas of free exercise and freedom of speech in the context of public schools.

Chapter II.

The Evolving Legal Standards

A. Religious Provisions of the Federal Constitution

The First Amendment to the Constitution of the United States contains two religious clauses plus the free speech clause related to religious practice and belief. The first protection prohibits the Congress from legislating with respect to an establishment of religion, while the second protection provides that “Congress shall

make no law ... prohibiting the free exercise [of religion] or abridging the freedom of speech ..." (U.S. Constitution, Amendment 1).

In essence, the "establishment clause" guarantees that the federal government will not impose religion on any person in the United States, while the "free exercise clause" guarantees that each person in the United States will be free to pursue whatever religion, if any, that person may choose.²²

Though there has been significantly greater resort to judicial interpretation of the various rights, duties and obligations with respect to the Establishment Clause, case law which has emerged under the Free Exercise and Freedom of Speech clauses has potentially significant implications for governmental funding programs which may, or may not, be provided for schools, including charter schools.

B. Free Exercise Under the Federal Constitution

The stature of the constitutional principle that the government may not enact laws that suppress religious belief or practice is so well accepted in the United States that there have been relatively few cases decided at the Supreme Court level on the basis of that issue alone. The right to freely pursue and exercise one's religious beliefs has been one of the traditional major motivational factors for persons to immigrate to the United States from colonial times to the present day.²³

An early case that challenged the compulsory education law of the State of Oregon resulted in the adoption of a fundamental theory concerning free exercise and due process in the context of education which remains largely unchanged to the present time (*Pierce v. Society of Sisters*, [Pierce] 1925). The Oregon Compulsory Education Act (the "Ed Law") with certain exceptions required all parents, guardians or other persons having control over a child between the ages of eight and sixteen years to send that child to a *public* school in the district where the child resided.²⁴ The Ed Law, if it had been strictly enforced, would have resulted in the

²² It is ironic that though the religious clauses appear at the very first part of the Bill of Rights, little judicial definition was given to either clause until approximately the last half of the 20th century. For a comprehensive discussion of the evolution of jurisprudence in this area generally see: Jesse H. Choper, "Symposium on Law in the Twentieth Century: A Century of Religious Freedom," 88 *California L. Rev.* 1709 (December, 2000). In a summary statement Professor Choper therein notes, "In recent years the Court has substantially revised its approach to nearly all facets of the Religion Clauses, but the resulting body of law is highly unstable." Despite the present uncertainties several themes have evolved which include the rise of the theme of "neutrality" towards religion and a general approach that appears less separationist and more accommodating of mainstream religions.

²³ As noted in the opinion of Justice Hugo L. Black in the relatively early case of *Everson v. Board of Education*, 330 U.S. 1 (1947) many of the early immigrants to the United States had fled from situations in which they had been forced to support and attend state sponsored churches and where "in efforts to force loyalty to whatever religious group happened to be ... in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured and killed."

²⁴ The Ninth Circuit promptly followed the lead of the U.S. Supreme Court in *Pierce* in upholding the rights of private schools to operate. In *Farrington v. T. Tokushige*, 11 F.2d 710, 1926 U.S. App. LEXIS 2587 (9th Cir. Ct. of App. 1926) the court declared unconstitutional the Foreign Language School Act (Hawaii Rev. Laws Hawaii 1925,

elimination of private primary, preparatory and parochial schools in Oregon. The action was brought by two separate Oregon corporations, one of which operated a religious school, and one a military school.²⁵

The state defended the promulgation of the Ed Law on the grounds it was necessary to prevent “the teaching of disloyalty and subversive radicalism or bolshevism” and to assimilate foreign students through means of a publicly controlled school system (*Pierce*, pp. 515-516). Both assertions were rejected by the U.S. Supreme Court - which affirmed the lower court’s order precluding the enforcement of the Act.

The rule that emerged from *Pierce* was that the Ed Law unreasonably interfered, “with the liberty of parents and guardians to direct the upbringing and education of children under their control” (*Pierce*, pp. 534-5, citing: *Meyer v. Nebraska*, [*Meyer*] 1923).²⁶ In assessing the balance of interests between those of the states and parents, the Court stated, “The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations” (*Pierce*, p. 535). Thus, *Pierce* and *Meyer*²⁷ became the legal cornerstones for the theory of the fundamental right of the parents to determine the course and nature of the education of their children.²⁸

Sections 390-399) which had established a series of: restrictions, taxes, teacher requirements and loyalty oaths applicable only to privately operated schools in Hawaii which were attended on a voluntary basis, outside of the operating hours of normal public schools by students wishing to National Study the Chinese, Japanese and/or Korean languages. See also the decision of the Supreme Court of Hawaii in *Kalihi Japanese Language School v. John Albert Matthewman*, 27 Haw. 830, 1923 Haw. LEXIS 15 (Sup. Ct. of Haw. 1924) in which the court permitted persons acting on behalf of an unincorporated association to amend a pleading to test the validity of the state legislation.

²⁵ For an in depth discussion of the social and legal environments and surrounding circumstances in which *Pierce* arose see: William G. Ross, “Symposium: Education and the Constitution: Shaping Each Other and the Next Century: The Contemporary Significance of *Meyer* and *Pierce* For Parental Rights Issues Involving Education,” 34 *Akron L. Rev.* 177 (2000). See also: William G. Ross, *Forging New Freedoms: Nativism, Education and the Constitution, 1917-1927*, (1994) a work by the same author limited specifically to the period in time during which *Meyer* and *Pierce* arose.

²⁶ A case, resulting from the fears and xenophobia following World War I, in which the teaching of the German language to public high school students had been banned by a state statute.

²⁷ Despite its vintage *Meyer* continues to be frequently followed in decisions of the Ninth Circuit, several recent examples include: *Singh v. Magee*, 1998 U.S. App. LEXIS 16074, 98 Cal. Daily Op. Service 5498 (9th Cir. Ct. of App 1998); *Yniguez v. Arizonans for Official English*, 69 F. 3d 920, 95 Cal. Daily Op. Service 7821 (9th Cir. Ariz. 1995), and *Doe v. Tenet*, 99 F. Supp. 2d 1284, 2000 U.S. Dist. LEXIS 8844 (W. D. Wash. 2000).

²⁸ For an example of a recent decision regarding the rights of parents, see: *Troxel v. Granville*, 120 S.Ct. 2054, (2000) a case in which the U.S. Supreme Court cited *Meyer* and *Pierce* in order to invalidate a state law which allowed a court to permit grandparents to visit a grandchild more than the parents wished to authorize. Another contemporary example of the application of the *Meyer / Pierce* rule arose in a matter decided by the Eleventh Circuit in which the court affirmed the dismissal of a claim that the Immigration and Naturalization Service had denied due process to a six-year-old alien by dismissing his asylum application as void on the ground that the minor lacked the capacity to seek asylum without the consent of his father *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000) *cert. denied*, 120 S. Ct. 2737 (2000). Today the *Pierce / Meyer* decisions are frequently cited for the proposition of the fundamental right of parents to determine the course of their children’s education, however the decisions themselves

However, despite what free exercise proponents may claim to be a wide license for the rights of parents to determine the course of education of their children, in actual practice the courts have upheld the power of the states to regulate in a wide variety of educational areas, including, by way of limited and selected examples: the right to regulate public and private schools within the state, the right to set and regulate school curriculum²⁹ and assessment, and the right to establish and monitor employment standards for teachers and administrators. Hence, despite the broad language included in *Pierce*, subsequent court cases make it clear there are few areas where the free exercise rights of parents will prevail over the power of the state to regulate in the public and private schools.³⁰

Religious Belief

Through the years numerous Supreme Court decisions have repeatedly held that the religious clauses of the First Amendment will protect only claims founded on religious belief (See among others: *Wisconsin v. Yoder*, [Yoder]1972).³¹

“were both formally decided largely on the basis of property rights – the liberty of schools to conduct a business, the right of private school teachers to follow their occupation and the freedom of schools and the parents to enter into contracts”, see Ross, *supra* note 3, p. 186-7.

²⁹ With respect to the right of school authorities to establish and maintain curriculum programs, see: *Mozert v. Hawkins*, 827 F. 2d 1058, 1987 U.S. App. LEXIS 11385 (1987), *infra*, a matter in which the court upheld the right of a public school to continue a reading learning program over the objection of parents who claimed the program was offensive to their particular religious beliefs. For other decisions which have sustained the authority of the state to mandate curriculum and/or procedural requirements over parental objections see: *Fleischfresser v. Directors of School Dist. 200*, 15 F. 3d 680 (7th Cir. 1994) and *Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988) both matters upholding the requirement of standardized testing for home school students, based on the compelling governmental interest in educating all of its citizens; *St. Agnes v. Riddick*, 748 F. Supp. 319 (Dist. Ct. of Md. 1990) which held that satisfactory education of a medical doctor involved a compelling state interest to require that religious hospitals teach all students how to perform medical abortions; *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F. 3d 525 (1st Cir. 1995) a matter involving a parent’s moral disagreement with a subject matter selected by the school; *Newkirk v. East Lansing Public School*, 57 F. 3d 1070 (6th Cir. 1995) a case in which a parent objected to the mandatory psychological counseling of a third grade child; *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (Dist. Ct. of Md. 1969) a case in which participation in a sex education was required as a part of the school curriculum; *Immediato v. Rye Neck School Dist.*, 73 F. 3d 454 (2nd Cir. 1996) a case involving the inclusion of a compulsory community service program in the school curriculum; and *Hubbard v. Buffalo Indep. School Dist.*, 20 F. Supp 2d 1012 (W.D. Texas 1998) a matter which involved the required participation in academic achievement testing. For an introduction to the new territories which may be open for parents to affect curriculum content and pedagogical procedures within the context of a charter school, see: Molly O’Brien, “Free at Last? Charter Schools and the ‘Deregulated’ Curriculum,” *34 Akron L. Rev.* 137 (2000).

³⁰ See: the discussion and related case citations, *infra*, for *Mozert v. Hawkins*.

³¹ Several recent appellate and district level decisions in the Ninth Circuit have followed the precedent followed in *Yoder*, to wit, the requirement of a religious belief in order to establish a valid First Amendment claim. Representative examples include: *Canas-Segovia v. INS*, 902 F. 2d 717, 1990 U. S. App. LEXIS 6169 (9th Cir. 1990)] a matter regarding religious asylum for Salvadorean religious refugees; *Thomas v. Anchorage Equal Rights Comm’n.*, 165 F. 2d 692, 1999 U. S. App. LEXIS 440 (9th Cir. Alaska 1999) a matter involving discharge from employment and receipt of unemployment benefits; *Equal Employment Opportunity Commission v. Fremont Christian School*, 781 F. 2d 1362, 1986 U.S. App. LEXIS 21560 (9th Cir. Cal. 1986) a matter involving different compensation and benefit payments to male and female employees of a private school; and *Callahan v. Woods*, 736 F. 2d 1269, 1984 U.S. App. LEXIS 24014 (9th Cir. Cal.1984) a matter involving the refusal to register an infant

However, in those cases it is clear that *religious belief* is absolutely protected under the Free Exercise Clause (*Cantwell*, pp. 303-304). While it is permissible for a court to analyze and consider the sincerity of a person's religious beliefs, it is beyond the authority of the court to determine the truth or falsity of those beliefs (*United States v. Ballard*, [*Ballard*]1944). A non-inclusive list of additional limitations on government action in the area of religious belief provides: the government may not compel affirmation of a religious belief (*Torcaso v. Watkins*, [*Torcaso*]1961), discriminate against individuals or groups because of their religious beliefs (*Fowler v. Rhode Island*, [*Fowler*] 1953) nor require that all students salute the U.S. flag and recite the pledge of allegiance as a part of the regular daily school program (*Board of Education v. Barnette*, [*Barnette*]1943). Thus, in the setting of the traditional public school (hereinafter, "TPS") students could not be compelled to affirm or refute any specific belief in a religious institution or philosophy, could not be differentiated on the basis of their religious belief or practice and could not be forced against their will to participate in the recitation of patriotic oaths which violated their religious convictions.

Religious Conduct

As opposed to the cases involving issues of religious belief, an additional line of cases has developed which considers *religiously motivated conduct*, as distinguished from pure belief. In those cases where the conduct has been the result of religious belief it is clear the conduct may be subject to limitations for the protection of society (*Cantwell*, pp. 305). In this line of cases a balancing test has evolved which compares the importance of the interest of the state in regulating conduct to the burden imposed on religious conduct (*Yoder*). As a general rule, the greater the burden imposed on religious conduct the more compelling must be the interest of the government that is attempting to be advanced.

Balancing Religious Belief and Religious Conduct

In one case the U.S. Supreme Court attempted to balance the interests of parents of students and the state in the area of free exercise in a matter concerning the refusal of parents in Wisconsin to observe that state's mandatory school attendance law (*Yoder*). The parents who were members of the Amish Mennonite Church had refused to send their children to public or private school after they had finished the eighth grade in violation of the state statute that required school attendance by children until reaching age 16. The parents defended their conviction under the state compulsory attendance statute on the basis that the law violated their right under the Free Exercise Clause of the First Amendment. The State of Wisconsin based its defense on the recognized interest of the state in achieving universal education for all of its citizens.

child with the Social Security Administration and refusal of rights to receive Aid to Dependant Children resulting from that failure.

Based upon a finding of the historic basis for their religious beliefs, and the depth of religious belief and practice in the daily lives of the specific Amish parents and community in question, the *Yoder* Court found that despite its valid interest in furthering education, the state had failed to make an adequate showing that its interest in "... establishing and maintaining an educational system overrides the defendants' right to free exercise of their religion".³² In effect the court determined that to the extent the "home education" efforts of the Amish could adequately prepare their children for that role in the Amish community and in the process would provide less of a burden on their particular religious exercise, the interests of the state in furthering the education of its citizens would not be negatively effected. Regardless of the competing positions regarding the holding of *Yoder*, it is a fact that the case stands as the only instance at the U. S. Supreme Court level in which the failure to comply with mandatory state school attendance laws has been upheld on free exercise grounds.³³ Thus given the factual specificity of *Yoder* and the subsequent history of court decisions in the area, it may be safe to generalize about the wider applicability of the holding only within the narrow parameters of the case, e.g. limited to: the Amish religion, students in the age range of 14 to 16 years and a mandatory school attendance law.

The very narrow nature of the Supreme Court holding in *Yoder* is emphasized in the opinion of the Sixth Circuit Court of Appeals in a matter where inclusions in a reading development series used in grades 1 through 8 in a Tennessee public school were alleged to be repugnant to the religious beliefs of a group of students (*Mozert v. Hawkins*, [*Mozert*] 1987). In *Mozert* a group of parents who did not belong to a single church or denomination, but who considered themselves to be "born again Christians", contended that the exposure of their children to other forms of religion, and feelings, attitudes and values of other students which contradicted their religious views constituted a constitutionally invalid burden on their First Amendment free exercise rights.³⁴ The parents

³² See: Sup. Ct. of Wis., 49 Wis. 2d 430, 447, 182 N. W. 2d 539, 547 (1971).

³³ And even that lack of compliance with the Wisconsin school attendance laws was not applicable to all Amish students, rather only those students in the 14 to 16 year-old age range.

³⁴ For other cases involving school curriculum and the attempts of religiously motivated groups to influence the content of said curriculum, see: *Edwards v. Aguillard*, 482 U.S. 578, 107 S. Ct. 2573 (1987) in which the U.S. Supreme Court overturned a Louisiana statute which required public schools to devote equal time and coverage to the theory of creation science at the same time as the theory of evolution was being taught; and *Smith v. Board of School Commissioners*, 827 F. 2d 684 (11th Cir. 1987) a matter in which a trial court ruling that banned a series of textbooks due to the fact "they promoted a Godless religion," was reversed. For a general review of the cases in which the issue of religious groups attempt to influence or control the curriculum content in a public school setting is detailed, see: Bruce L. McDermott, "Fundamentalists' Efforts to Intervene in Curricular Decisions", 39 *Case W. Res. L. Rev.* 911 (1989). For a detailed longitudinal case National Study of a continuing conflict over values attributable to curriculum inclusions in a single school district, see: Rosemary C. Salomone, "Struggling With the Devil: A Case National Study of Values in Conflict," 32 *Ga. L. Rev.* 633 (1998). Therein the author chronicles events emulating from the creation of a voluntary after-school event centered on a card game in the public schools of Bedford, New York, and how the game became the seed for a battle between parents favoring a fundamentalist or a free exercise curriculum in the public schools of the town.

sought to have their children excused from attendance in the allegedly offensive courses and to home school their children in those subjects.

The *Mozert* Court determined that the mere exposure to ideas or values that a person may find objectionable on religious grounds did not create a burden on free exercise. What was required with respect to the governmental action would be an element of coercion, in order for a constitutional infirmity to exist.³⁵ On the facts in *Mozert* there had been no action to affirm or deny religious belief, or to engage in or to refrain from engaging in any act either required or forbidden by the student's professed religion.³⁶

Hence, under the holding in *Mozert* in the context of a TPS it seems clear that in the normal instance school authorities will be given wide latitude to regulate curriculum and school-sponsored activities and are likely to transgress the free exercise protections of the First Amendment only in those instances where some element of governmental compulsion is involved in requiring an activity which violates a student's religious belief.

Balancing Religious Belief and Religious Conduct - Subtests

In cases where courts find a burden on religion the courts have imposed two burdens of justification on the government. The first requirement is that no regulation imposing a lesser burden on the religious conduct in question will satisfy the government's interest and second, the regulation does not discriminate between

³⁵ On the issue of the requirement of governmental coercion in order to establish a valid free exercise claim see: *Hobbie v. Unemployment Appeals Commission of Florida et al.*, 480 U. S. 136, 107 S. Ct. 1046 (1987). In a matter involving the refusal to pay unemployment compensation to an employee who was dismissed from her position for refusal to work on the Sabbath day of her religion, the U.S. Supreme Court reaffirmed its holdings in *Sherbert* and *Thomas* (infra) finding that where an employee was denied a benefit because of conduct proscribed by her religious faith that the pressure on the employee to modify her behavior and violate her religious beliefs constituted compulsion which could only be justified by the proof by the state that the regulation furthered a necessary compelling state interest. The holding in *Hobbie* was also followed in a similar employment case in the Ninth Circuit, see: *Thomas v. Anchorage Equal Rights Comm'n.*, 165 F. 3d 692, 1999 U.S. App. LEXIS 440 (9th Cir. Alaska 1999). *Hobbie* was cited as well in *East Bay Asian Local Dev. Corp. v. California*, 81 Cal. Rptr. 2d 908 (Cal. App. 3 Dist. 1999) a challenge to exemptions provided to religious organizations from a landmark preservation statute.

³⁶ *Mozert* was cited by the Ninth Circuit Court of Appeals in a case in which a defendant in a tax evasion case was precluded from testifying in his own defense due to his refusal to accept and recite the oath before testimony which involved the word "truth", see: *U.S. v. Ward*, 989 F. 2d 1015, 1992 U.S. App. LEXIS 37300 (9th Cir. Nev. 1993). In reversing the ruling of the District Court, the Court of Appeals held the District Court had abused its discretion in failing to permit the defendant to adopt a similar oath which had the same effect for the purposes of the First Amendment Free Exercise Clause as the oath originally required by the court; see also: *EEOC v. Townley Engineering & Mfg. Co.*, 859 F. 2d 610, 1988 U.S. App. LEXIS 12852 (9th Cir. Ct. of App. 1988) a matter in which an employee was dismissed from employment for refusal to attend a weekly non-denominational devotional service which was required as a part of his employment by a private manufacturing company. The court held that the right of an employee to be free from the forced observation of his employer's religion was at the heart of Title VII's prohibition against religious discrimination, and affirmed an injunction against the forced participation in the service by the employee.

religions, or between religion and non-religion (*Thomas v. Review Board*, [Thomas], 1981).

Laws of General Application

Applying the balancing test and underlying secondary tests, a series of different positions has resulted when a law of general application comes into conflict with religiously motivated actions of a specific religious group. In certain instances the religiously motivated conduct has been entirely banned (*Reynolds v. United States*, [Reynolds], 1878) a case in which a criminal prosecution under a law prohibiting polygamy as practiced in the Mormon Church was upheld. In this area also a state prohibition against the distribution of religious literature by children was upheld when the activities were shown to threaten the health and safety of the children (*Prince v. Massachusetts*, [Prince], 1944).³⁷ A similar case upheld compulsory vaccinations against infectious diseases for children of parents who objected on the basis of religious beliefs (*Jacobson v. Massachusetts*, [Jacobson], 1905).

Though all of the foregoing cases differed significantly in the facts on which they arose, in each matter a law or regulation of general applicability which created an economic burden on a specific person or entity was upheld despite a claim made by the party concerned that the regulation created a burden on what was purportedly religiously motivated conduct. The rule that may be said to flow from the economic burden of religious conduct cases is that in areas where a national policy has been established or where a regulation of general applicability has been established to promote the general welfare or governmental functions, then religious conduct which does not conform to the application of the regulation is unlikely to be protected, even in the instance it may result in an additional economic burden to the claimant.

Thus in the instance of TPS it should be expected that laws of general application intended to protect the health or safety of children or to promote the efficient operation or administration of the educational system are likely to be upheld in the face of claimed violations of free exercise.

Free Exercise – The Employment Cases

An early case in the Supreme Court's modern free exercise jurisprudence set the stage for the adoption of the judicial philosophy which was to prevail for the ensuing thirty-seven years. That case arose in the factual context of a woman in South Carolina who had been denied unemployment compensation after she had

³⁷ See note 6, supra., discussing the balance between free exercise and free speech principles as a basis for the decision in the case.

been discharged from her job (*Sherbert v. Verner*, [*Sherbert*] 1963).³⁸ The woman, a member of the Seventh-Day Adventist Church, had been discharged for her refusal to work on Saturday, the Sabbath Day of that religious institution. After being discharged the plaintiff filed a claim for unemployment compensation under the South Carolina Unemployment Compensation Act. The claim was denied on the basis that the applicant was ineligible to receive benefits if she failed, without good cause, to accept suitable work when it was offered. The plaintiff instituted a legal action based upon the assertion that the disqualifying language of the unemployment act abridged her right to the free exercise of her religion (*Sherbert*, p. 401).

Free Exercise – Compelling State Interest

The *Sherbert* Court found that if the purpose or effect of a law was to impede the observance of one or all religions, or to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect (citing: *Braunfeld*, p. 603). In language which was later to prove significant, the Court held a statute, neutral on its face, could not unduly burden the exercise of religion unless there was a *compelling governmental interest* advanced by the statute (*Sherbert*, p. 403).

The federal interpretation of the free exercise law continued to follow the compelling interest tests as set forth in *Sherbert* for nearly forty years. Despite the fact that the *Sherbert* tests had the effect of placing the burden on the government to demonstrate why it could not provide an exception to the generally applicable law to a religious adherent, the only challenges based on free exercise grounds which were successful were found in the cases related to unemployment and in one very narrow case related to religion in education.³⁹

A Modification – *Employment Division*

In an Oregon case the Supreme Court refined adopted further restrictions which made it even more difficult for plaintiffs to prevail on a free exercise claim [*Employment Division. v. Smith* [*Employment*] (1990)].

³⁸ Though later overruled in part, certain elements of the *Sherbert* holding are frequently cited and followed in the decisions of the appellate and district courts of the Ninth Circuit. In this regard see the holdings in *Canas-Segovia* and *Thomas*, supra note 10, *Nunez v. City of San Diego*, 963 F. Supp. 912, 1996 U. S. Dist. LEXIS 20928 (S.D. Cal. 1996) and *Kennedy v. Rubin*, 1995 U. S. Dist LEXIS 19834, 77 A. F. T. R. 2d (RIA) 558 (N.D. Cal. 1995).

³⁹ From 1972 until 1990 the United States Supreme Court rejected every claim for religious exemption except in the unemployment and education areas. For a complete discussion of the actual realities of success in those cases actually litigated see: David E. McCraw, “Free Exercise Under the State Constitution: Will the Exception Become the Rule?”, 12 *Touro L. Rev.* 677, (1996); also see generally Michael W. McConnell, “The Origins and Historical Understanding of Free Exercise of Religion”, 103 *Harv. L. Rev.* 1409, (1990).

In that case two Native American men had been denied unemployment compensation after they had been dismissed from their jobs as counselors with a private drug rehabilitation program. The reason for the dismissal of the two men was that they had taken peyote, a hallucinogenic drug, as a part of a ceremony of the Native American Church. The use of peyote was found to violate Oregon criminal law and to constitute a Class B felony. The claim of the two men was the denial of unemployment compensation constituted a violation of their First Amendment free exercise rights.

Importantly, in light of future cases which may arise in the free exercise area, the *Employment* Court noted that the only cases in which the First Amendment had been held to bar a neutral, generally applicable law, were those cases which involved not only a claim arising under the Free Exercise Clause, but also a claim in which other constitutional protections, such as freedom of speech or of the press were involved (*Employment*, p. 881). In effect, the court established for the first time the requirement of the existence of a hybrid constitutional interest (that is, that there be more than a single constitutional violation) in order for the application of the compelling interest of the state to be justified.

The broad rule that resulted from *Employment*, and modified the jurisprudence in the area of free exercise, was that in those cases where a law was neutral and of general applicability, [the law] “need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice” (*Employment*, p. 882).⁴⁰

The opinion of Justice Scalia was important for it formulated the basis of what has since become known as the Hybrid-Rights Doctrine.⁴¹ In most basic essence, the doctrine holds that in order for a governmental entity to be required to demonstrate an ordinance furthers a compelling state interest, the party seeking relief under the Free Exercise Clause must show its cause of action is based not solely on a violation of its free exercise rights, but also on some other constitutional

⁴⁰ One commentator in the area of free exercise has suggested that in the post-*Employment Division* era the present scope of coverage of the Free Exercise Clause is quite small and the clause itself may be close to being redundant, that is its protections are covered or nearly covered by other constitutional protections, see: Mark Tushnet, “The Redundant Free Exercise Clause?”, 33 *Loyola U. of Chicago L. J.* 71 (Fall 2001). Tushnet’s position is based upon his conclusions that: the decision in *Employment Division* did not require states to accommodate their neutral statutes of general applicability to religious practices, much religious activity is protected under the Free Speech Clause and an emerging line of cases see: *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S. Ct. 2446 (2000) defining a right of expressive association adds further protections to the internal activities of religious organizations.

⁴¹ The opinion of Justice Scalia in *Employment Division* in explaining the Hybrid-Rights exception specifically mentions other constitutional protections, “... such as freedom of speech and of the press ... or of the parents...to direct the education of their children” and further, “...it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns” (*Employment Division*, p. 880). For a critique of the rationale of the court opinion in *Employment Division* and a review of how the lower courts have struggled with the interpretation and application of the Hybrid-Rights theory see: William L. Esser IV, “Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?”, 74 *Notre Dame L. Rev.* 211 (October, 1998).

ground (*Employment*, p. 881). The US Supreme Court has directly addressed the Hybrid-Rights Doctrine in only two cases since *Employment*⁴² with the result that there is a split among the lower level federal courts as they have attempted to determine how, if at all, the doctrine should be applied.⁴³ Further complicating the various attempts to interpret and apply the Hybrid-Rights Doctrine is the fact that three of the present Supreme Court Justices have either sharply criticized the doctrine and/or indicated the result in *Employment* should be revisited and overturned.⁴⁴

The message to members of the TPS community as a result of *Employment* is that an action based solely on a free exercise claim is unlikely to succeed unless the claim also includes evidence of the violation of at least one other constitutionally protected right.

Free Exercise – The Requirement of Neutrality and General Applicability

A matter in Hialeah, Florida represents a recent case in which the U.S. Supreme Court has reviewed the standards applicable to the exercise of religious beliefs and practices (*Lukumi v. Hialeah*, [*Lukumi*] 1993).⁴⁵ A part of the religious practices in *Lukumi* included ritual sacrifices of animals as a part of the religious practices.

Strong opposition to the plans for the activities of the church culminated in the adoption by the City Council of Hialeah of a series of resolutions designed to prohibit the planned activities of the Church of Lukumi. An action was brought on

⁴² The two cases subsequent to *Employment* in which the hybrid-rights doctrine are addressed are: *Church of Lukumi* and *Boerne*, *infra*.

⁴³ A recent federal court case which reviews and attempts to rectify the various positions of the federal circuit courts with respect to the interpretation and application of the Hybrid-Rights Doctrine, see: *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999). In *Thomas* the Ninth Circuit held that the state's interest in combating housing discrimination against unmarried couples was not compelling, though the case was dismissed on procedural grounds of ripeness and standing. For a review of the results which have been obtained by the use of the Free Exercise Clause as a defense to the enforcement to state anti-discrimination laws, see: Jack S. Vaitayanonta, "In State Legislatures We Trust?: The 'Compelling Interest' Presumption and Religious Free Exercise Challenges to State Civil Rights Laws", 101 *Columbia L. Rev.* 886 (May 2001).

⁴⁴ With regard to the opposition to or critical view in which the Hybrid-Rights Doctrine is viewed by present members of the U.S. Supreme Court, see: the concurring opinions of Justices Souter and Stevens in *Church of Lukumi* (at p. 566-7) and the concurring opinion of Justice O'Connor in *Employment* (at p. 907).

⁴⁵ The decision in *Lukumi* has been cited in a concurring opinion and followed in several matters by the Ninth Circuit, see: *Goehring v. Brophy*, 94 F. 3d 1294, 1996 U.S. LEXIS 22679 (9th Cir. Cal. 1996) a matter in which a mandatory university registration fee, a part of which was used to subsidize the university health insurance program was determined to be neutral in nature and did not violate the free exercise religious rights of students; and, *In re Tessier*, 190 B.R. 396, 1995 Bankr. LEXIS 1763 (Bankr. D. Mont. 1995) in which a plan for financial reorganization under Chapter 13 of the Bankruptcy Act that included a provision for the monthly charitable giving to the church of the debtors was successfully challenged by the Bankruptcy Trustee, and not defensible under the RFRA.

behalf of the Church and its individual members under 42 U.S. C., Section 1983, citing, among other causes of action, the violation of the Free Exercise Clause of the First Amendment.

The Supreme Court stated the standard (as established in *Employment*) to be applied in cases based on a free exercise claim to be, where the law in question is neutral and of general applicability, it need not be justified by a compelling governmental interest even if it might have the effect of burdening a particular religious practice. However, a law that did not meet the standards of neutrality and general applicability, was required to be justified by a compelling governmental interest.⁴⁶

The court further found in those cases where a law which had as an objective, the infringement upon or restriction of a practice because of [its] religious motivation, the law was not neutral. Upon review of the relevant facts the Supreme Court found the ordinances enacted by the City of Hialeah were not neutral.

The rules then from *Lukumi* placed in the context of an action against a TPS are that in order to prevail a plaintiff must demonstrate that the restrictive law is not neutral on its face or in practice, is not generally applicable to the entire community or is intended to suppress a religious practice or belief.⁴⁷

The rules arising from *Lukumi*, placed in the context of the public support of TPS, gives rise to the question whether the government can be found to intend to suppress a religious practice or belief by virtue of its financial support for public schools, but historic refusal to financially support religious schools. Though often asserted to be the case by free exercise proponents, it is a position that has consistently been rejected by the U.S. Supreme Court.

Summary

In summary, at the federal level the present situation is that students and/or parents are very unlikely to prevail against TPS in an action based solely on a free exercise claim. In only one instance at the Supreme Court level has such a free

⁴⁶ For a decision by the Ninth Circuit Court in which the rationale of *Lukumi* was followed see: [*Yavorhi Cam et al., v. Marion County, Oregon*, 987 F. Supp. 854, 1997 U.S. Dist. LEXIS 20955 (Dist. Ct. of Oregon 1997)] a matter in which certain Oregon Land Use Regulations were determined to result in the favoring of one religious sect over another by the government in the absence of any compelling state interest.

⁴⁷ This remains an area of murky waters, see the recent dissenting opinion of the Ninth Circuit Court of Appeals which cited *Lukumi* viz. "... a law that is non-neutral on its face, like the Oregon regulation at issue here, triggers strict ...scrutiny", even in the absence of evidence of anti-religious animus *KDM v. Reedsport School Dist.*, 210 F. 3d 1098, 2000 U.S. App. LEXIS 7605 (9th Cir. 2000). For the argument that argues that the Ninth Circuit erred in *KDM* see: Note: "Ninth Circuit Upholds Oregon Regulation Limiting Special Education Services to Religiously Neutral Setting," 114 *Harv. L. Rev.* 954 (January 2001). The position taken by the article is that the Ninth Circuit erred in conditioning the level of scrutiny on the magnitude of the burden imposed, rather than on the neutrality or general applicability of the ordinance.

exercise claim been upheld (*Yoder*) and that case was decided on very narrow grounds that have never been extended to any other religious group.

Despite the historic holding that a parent has a fundamental right to determine the course and nature of the education of his/her child (*Pierce*) in actual practice it is clear that the states have the rights to regulate educational practices in many areas, such as curriculum, assessment and employment standards, among others. Additionally, in those areas of permissible regulation, the state's decisions regarding regulation will normally withstand a free exercise claim, unless it can be shown that the regulation was coercive in nature and that the regulation constituted an attempt to impose, indoctrinate, oppose or teach a particular religious value or belief (*Mozert*).

It is clear that while personally held religious beliefs are nearly universally protected from governmental intervention, the same cannot be said for conduct which results from those beliefs. Some religious conduct may be entirely banned as an expression of national policy (*Reynolds*) while restrictions which are generally applicable to the population as a whole will be upheld unless they can be shown to discriminate against or were enacted to preclude a specific religious practice or belief (*Cox, Lukumi*). Likewise a nondiscriminatory law of general applicability will be upheld against a free exercise challenge despite the fact it may create an economic burden for certain persons (*Braunfield, Alamo*).

In the area of employment rights the prior standard requiring the state demonstrate a compelling interest in order to validate regulation of religious exercise has been largely abandoned (*Employment*) and only in the instance where a free exercise challenge can be coupled with the demonstration of the violation of another fundamental right will the state be held to the compelling interest standard. Even in that case the lower federal courts are uncertain, or have refused to attempt to apply the hybrid standard in a consistent manner.

C. Free Exercise Under the California State Constitution

In addition to the provisions of the First Amendment of the U.S. Constitution, most states have adopted state constitutional provisions regarding the protections afforded to their citizens in the areas of free exercise of religion and freedom of speech.⁴⁸ These state constitutional provisions may offer avenues of

⁴⁸ For an historical review of the politics between Protestant and Catholic interests which prompted the adoption by many western states, and modification of existing state constitutions by many eastern states of the so-called "Blaine Amendments" see: Edward J. Larson, "The Blaine Amendment in State Constitutions" as appears in, *The School Choice Controversy – What is Constitutional?*, James W. Skillen, ed., Center for Public Justice, Washington, D. C. (1993).

recourse in the areas of free exercise and freedom of speech that, in the cases of many states, are only now starting to be explored.⁴⁹

However, contrary to what may have been a reluctance on the parts of many state court systems to expand rights and protections in the areas of free exercise and free speech by utilization of state constitutional provisions, the state courts in California have been quite willing to provide more expansive protections in the areas of free exercise, free speech and establishment, based on provisions of the California state constitution⁵⁰.

Potential Conflict – Establishment / Free Exercise / Free Speech

Mention must be made at the outset of the discussion of the California state law provisions in the areas of Establishment, Free Exercise and Free Speech of the recent California Supreme Court Decision in *DiLoreto v. Bd. of Ed. of the Downey Unified School District*, [*DiLoreto*], 1999. Among other inclusions in the opinion of the *DiLoreto* Court was that in the instance where a high school may have violated the free exercise right of a claimant, nonetheless the compelling state interest of the high school in upholding the California state establishment clause may outweigh the admittedly violated free exercise right of the offended party⁵¹. Given the recent vintage of the *DiLoreto* decision it is not yet clear how far the California

⁴⁹ A recent article which explores the track record to date and potential avenues of inquiry under the state constitutional provisions relating to free exercise and freedom of speech see: Joseph P. Viteritti, "Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law," 21 *Harv. J. L. and Pub. Policy* 658 (1998). In the period after the decision of the U.S. Supreme Court in *Employment* numerous commentators have predicted a serious reduction in the protections of free exercise claims at the federal level. By way of one example of a negative comment on the *Employment* decision see: Michael W. McConnell, "Free Exercise Revisionism and the Smith Decision," 57 *U. Chicago L. Rev.* 1109, 1130-53 (1990) in which the author provides a significant criticism of *Employment*, an appraisal of the negative effects of the decision on religious liberty, especially that of members of minority religious sects and a prediction of the abandonment of free exercise as a meaningful constitutional right. Others argue that the seeming void created by the *Employment* decision at the federal level has created at least the opportunity for more activist decision making by the state courts based upon provisions of state constitutional law. For a review of the status of state court actions in the area of free exercise since the decision in *Employment Division* see: Stanley H. Friedelbaum, "Free Exercise in the States: Belief, Conduct and Judicial Benchmarks," 63 *Albany L. Rev.* 1059 (2000). Therein the author focuses on cases arising in the states of Washington and Alaska and concludes that "... the future of state free exercise may be in the same state of flux as its First Amendment counterpart" (p. 1097). There is ample opinion to the effect that such activism would represent a change from the past practice of many, though not all, of the state courts. For a review of the roles played by state courts in the area of religious rights see: G. Alan Tarr, "State Constitutionalism and First Amendment Rights", as appears in, *Human Rights in the States: New Directions in Constitutional Policymaking*, (Stanley H. Friedelbaum ed., 1988). Therein it is the conclusion of the author that "... state courts over the past forty years have played a distinctly subsidiary role [in the protection of religious liberty], applying federal constitutional principles rather than developing state law" (p. 24).

⁵⁰ See the discussion *infra* of *Carpenter v. City and County of San Francisco* and *Alvarado v. City of San Jose*, two separate matters involving issues of free exercise at the California state court level in which the courts utilized a process of balancing of the material facts of each matter in order to resolve an issue of free exercise under state constitutional principles.

⁵¹ For the complete discussion of the inclusions and potential impact of the *DiLoreto* opinion, see: Section D. of this Chapter II at page 38 *infra*.

courts will extend the rule of *DiLoreto* into other areas involving establishment, free exercise and free speech.

The State Constitution

The analogous provisions to the free exercise protections contained in the First Amendment of the U.S. Constitution appear at Article 1, Section 4 of the California State Constitution. The provision in California provides that the holding and exercise of religious belief shall be “without discrimination or preference.” The constitutional language in California provides as follows:

“§4. Religious liberty

Sec. 4. Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion. (California Constitution, Article 1, Section 4)

Free Exercise Under California State Law

To date there is little case law arising under California state law in which a material factor concerned free exercise of religion that arose in the context of a TPS. Those cases arising under state law that have centered on the issue of free exercise have arisen in the areas of the use of public funds for the establishment and support of memorials, criminal prosecution for the possession of a controlled substance and housing rights of cohabiting but non-married persons.

There may be a split in California case law regarding free exercise, depending upon the substantive area in which the case arose. A leading case in the area of religious practice continues to require the state demonstrate a compelling state interest in order to restrict a bona fide religious practice. An initial appellate level case in the area of public housing applied the compelling state interest test, while a subsequent similar case at the state supreme court level found an ordinance barring marital discrimination in housing was religiously neutral and did not require the application of the strict compelling state interest test to be validated.

A recent state case involving a landmark preservation statute as applied to a religious organization found no violation of the “no preference” provision of Article I, Section 4 where the benefit to a religious organization was indirect, remote or incidental. Hence, where the benefit was determined to be “indirect or remote”, there was no violation of the constitutional provisions pertaining to the public

support of religion. Applied by analogy to the operation of a TPS opponents of the sectarian provision of the Act can be expected to assert that the public aid to a religious charter school is merely aid to the educational process that all students in California have a right to receive, and does not amount to the direct or material support of any particular religious belief or activity.

Thus the interpretation under California state law of free exercise rights in the context of a TPS must be interpolated based, in part, on analogy to the free exercise decisions in the areas of public memorials, criminal prosecution for substance possession, public housing and landmark preservation.

Public Funds for the Support of Memorials – California Case Law

Several cases have shed light on the operation of the California *no preference clause* in the context of public expenditures for purported religious purposes or memorials. One “no preference” case considered the ownership and maintenance of a cross located in Mount Davidson Park in San Francisco, which was maintained at the expense of the city (*Carpenter v. City and County of San Francisco*, [*Carpenter*], 1996). The cross included several items of religious significance (two bibles, two rocks from the Garden of Gethsemane and a jug of water from the River Jordan) but no indication of the owner of the cross. In reversing the lower court the appellate court noted the California Constitution guarantees the “free exercise of religion without discrimination or preference” and that the religion clauses of the California Constitution “are read more broadly than their counterparts in the federal constitution” (*Carpenter*, p. 629). In reaching its decision the court analyzed the historical and physical context of the challenged religious display by use of a series of tests including: the religious significance of the display, the size and visibility of the display, the inclusion of religious symbols in the display, the historic background of the display, and the proximity to government property or religious facilities of the display. Finding the display in *Carpenter* failed four of the five tests, the appellate court held that the religious display did violate the no preference provision of Article I Section 4 of the California Constitution.

A similar action involving a statue in San Jose of Quetzalcoatl a deity of Aztec mythology was decided in the other direction on the basis that the statue did not constitute discernible religion and would not be inferred to be an endorsement by the city of a religious cult or purpose (*Alvarado v. City of San Jose*, [*Alvarado*], 1996).

Perhaps more important than the outcome of either *Carpenter* or *Alvarado* was the utilization by the court of a balancing process of the facts and circumstances of each case as a means of analysis of a free exercise issue. These cases may be argued to provide the basis for the application of a balancing test, akin

to the use of a balancing analysis by the federal courts in *Yoder*, at the state constitutional level in California in the analysis of matters involving free exercise. Whether the California courts will be willing to apply a balancing test in the instance of an alleged violation of the no preference clause which arises in the context of a TPS, remains an unanswered question.

Prosecution for Use of a Controlled Substance - California Case Law

An early California case in the area of free exercise concerned whether a group of Native Americans who used peyote during the performance of a religious service could be convicted for a violation of the State Health and Safety Code which prohibited the unauthorized possession of peyote (*People v. Woody*, [Woody], 1964).⁵² The defendants had been arrested during what the state and defendants stipulated was the performance of a religious ceremony. The defendants, members of the Native American Church of the State of California, pleaded not guilty, based on the contention that their possession of peyote was incident to the observation of their religious faith and that the state could not constitutionally invoke the statute against them without abridging their right to the free exercise of their religion. The trial court found the defendants guilty.

Upon review the Supreme Court of California reversed noting that, "... the state may abridge religious practices only upon a demonstration that some compelling state interest outweighs the defendants' interests in religious freedom" (*Woody*, p. 815, citing *Sherbert*). The California court added in then-significant dicta, "It is basic that no showing of a merely rational relationship to some colorable state interest would suffice..."(*Woody*, p. 816).⁵³

If a matter which concerned the enforcement of a religiously restrictive regulation in the context of a TPS were to be tried by a California state court, the decision in *Woody* would constitute a part of the basis for the assertion that in order to be enforced the regulation restricting a religious practice would have to represent

⁵² The rationale for the holding of the court in *Woody* has continued to be followed, cited or used as a basis of explanation for the decisions of multiple courts in similar cases, for a non-inclusive set of examples, see: *Arizona v. Whitingham*, 504 P. 2d 954, (Ct. of App. Az, Division 1, 1973) a matter in which a criminal conviction for the use of peyote in celebration of a marriage was overturned; *Golden Eagle v. Johnson*, 493 F. 2d 1185, (9th Cir. Ct. of App. 1974) a criminal due process and search and seizure matter in which the Ninth Circuit Court of Appeals acknowledged the correctness of the holding of the California Supreme Court in *Woody*; *U.S. v. Boyll*, 774 F. Supp 1338, (Dist. Ct. N.M. 1991) a case citing *Woody* in which the court granted a motion to dismiss a prosecution for drug use on the basis that peyote use in a bona fide religious ceremony of the Native American Church was protected under the free exercise clause; and *Vernon v. City of Los Angeles*, 27 F. 3d 1392 (9th Cir. 1994) wherein the court cited *Woody* as support for the finding that for the plaintiff to prevail in an action brought on free exercise grounds, one requirement involved the demonstration of a burden upon the exercise of that person's religious practice.

⁵³ The determination by the California Supreme Court that a compelling state interest need be found in order to uphold an ordinance which would infringe upon religious exercise predated and was directly contrary to the result reached later by the U.S. Supreme Court in *Employment* which applied a different standard in reaching an opposite result.

a compelling interest of the state. Opponents of the application of the compelling state interest test may be expected to distinguish the holding in *Woody* on the basis that it had no relationship to a TPS and, further, involved a prosecution for violation of a criminal statute.

Housing Accommodation – California State Law

A line of cases in which landlords refused to lease property to cohabiting but non-married couples provides evidence of a different view of the California Supreme Court in the area of free exercise.

An early case in which landlords refused to rent residential property to an unmarried cohabiting couple gave rise to the judicial evaluation of whether the violation of a state statute prohibiting marital status discrimination could be overcome by a claim of a violation of the landlords' free exercise rights under the California state constitution (*Donahue v. Fair Employment and Housing Commission*, [Donahue], 1991). The Donahues, whom the court found to be devout Roman Catholics, believed that sexual intercourse outside of marriage was a mortal sin and that to facilitate such behavior also constituted a mortal sin.

In an action against the landlords brought before the Fair Housing and Employment Commission ("FHEC"), the FHEC found that the refusal to rent did constitute a violation of the California Government Code, Section 12955, which prohibited marital status discrimination.⁵⁴ The California Appellate Court however, found that the landlords were entitled to an exemption from that provision of the Government Code, because the interest of the state in protecting the discrimination against unmarried cohabiting couples was not such a paramount and compelling state interest so as to outweigh the landlords' assertion of their right to free exercise of religion under the state constitution (*Donahue*, p. 33).⁵⁵ Clearly included in the court's analysis was a balancing of the interests of the state and the right of religious exercise of the landlord.

The California Appellate Court in *Donahue* took specific notice of the holding of the U.S. Supreme Court in *Employment*.⁵⁶ The *Donahue* Court further noted

⁵⁴ California Government Code, Section 12955 provides in applicable part, that it shall be unlawful for the owner of any housing accommodation to discriminate against any person, "because of the race, color, sex, marital status, national origin, or ancestry of such person." Though not material for the purposes of the subject matter covered in this dissertation, the *Donahue* Court did find that "marital status" for the purposes of the Fair Employment and Housing Commission did include unmarried cohabiting persons.

⁵⁵ Hence, despite the holding of the U.S. Supreme Court in *Employment Division* in *Donahue* decided less than a year later the California Appellate Court balanced the merits of the California ordinance prohibiting discrimination in rental housing to co-habiting non-married couples against the free exercise of religious belief of the landlord and found no compelling state interest in favor of the potential lessees.

⁵⁶ See *Supra.*, p. 12.

that the outcome in *Employment* was contrary to that reached in *Woody*.⁵⁷ However, the court found that notwithstanding the effect of *Employment* on *Woody*, the balancing test and compelling state interest analysis were still applicable under the California state constitutional law (*Donahue*, p.34).⁵⁸ At that point it appeared that California courts would continue to utilize the balancing and compelling state interest analysis in the area of free exercise and housing.⁵⁹

The response of the Supreme Court of California to the dilemma posed in *Donahue* came in a similar refusal to rent action (*Smith v. Fair Employment and Housing Commission*, [Smith], 1996). As in *Donahue*, the petitioner in *Smith* had refused to rent to an unmarried couple on the grounds to do so would violate the petitioner's free exercise rights under both the federal and California state constitutions. Citing California and other sister-state cases⁶⁰ the California Supreme Court held that the FEHC did prohibit the discrimination on the basis of marital status in the area of public housing accommodations (*Smith*, p. 64).

Ultimately the California Supreme Court, following the line of reasoning in *Employment*, found that the Section 12955 of the Government Code was not an ordinance directed against religious exercise, but was a religiously-neutral law that happened to operate in a way which made the landlord's exercise of religion more expensive (*Smith*, p. 66). Though some will argue the result in *Smith* effectively brings California into line with the holding of *Employment*⁶¹ it remains a debated

⁵⁷ In *Employment Division* the U.S. Supreme Court held that a generally applicable and otherwise valid law that had the incidental effect of prohibiting the free exercise of religion did not offend the First Amendment of the U.S. Constitution. Whereas in *Woody*, the California Supreme court held members of the Native American Church were entitled to a constitutionally based exemption from a state law that prohibited the possession and use of peyote.

⁵⁸ It is interesting to note that even where the Ninth Circuit has applied the hybrid test of *Employment Division*, it has consistently done so only in the criminal context. In this regard see: *American Friends v. Thornburgh*, 961 F.2d 1405 (9th Cir. 1991); *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295 (9th Cir. 1991) and *Washington v. Garcia*, 977 F. Supp. 1067 (S.D. Cal. 1997).

⁵⁹ For a recent example in which the Ninth Circuit Court of Appeals followed the balancing and compelling state interest analysis as set forth in *Sherbert* see: *Bollard v. The California Province of the Society of Jesus*, 196 F. 3d 940, 199 U.S. App. LEXIS 30767 (9th Cir Ct. of App. 1999) where the court using a compelling state interest test refused to apply the ministerial exception to Title VII in a matter based on a claim of sexual harassment of a novice priest.

⁶⁰ The California cases cited by the *Smith* Court were: *Hess v. FEHC*, 138 Cal. App. 3d 232 (1982) and *Atkinson v. Kern County Housing Authority*, 59 Cal. App. 3d 89 (1976). Sister-state cases cited included: *Worcester Housing Authority v. Mass. Comm'n Against Discrimination*, 406 Mass. 244 (1989), *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199 (1989).

⁶¹ This remains a contested area. Those who oppose the assertion that *Smith* stands as the California acceptance of the rule of *Employment Division* point out that the California Supreme Court in *Smith* relied heavily in its opinion on the RFRA which was later invalidated in *Boerne*. Further the *Smith* Court in its opinion engaged in substantial balancing of the interests between the rejected lessee and the claimed religious burdens incumbent on the prospective landlord – the very essence of the pre-*Employment* standards in the area of free exercise analysis. Also see: *Foreman*, supra note 17, in which the Ninth Circuit court for the District of Alaska upheld a free exercise defense to a charge of housing discrimination brought by an unmarried cohabiting couple.

question regarding the extent to which California has accepted or rejected the compelling state interest standard⁶² in the area of free exercise and housing.

In any event, the holdings in the *Donahue / Smith* cases would be the grounds for the contention that if a law was determined to be religiously neutral there would be no requirement that the state demonstrate a compelling interest in its enforcement, in the case of the enforcement of a religiously restrictive law in the context of a TPS. The question this poses with respect to the Act is whether California's charter school law can be considered to be religiously neutral in prohibiting sectarian programs, admissions policies, employment opportunities and operations within the context of a charter school.

Summary - California Free Exercise / No Preference

Due to the lack of precedent precisely on point it is not possible to definitively state how a California court will decide a matter concerning the attempt to enforce a religious exercise law in the context of a TPS if that matter is to be decided solely on the basis of California state law.

Arguments on the specific issue of whether the state would be required to show a compelling state interest in order to enforce the religious restriction can be made in both directions on the basis of existing California state law. Should the court elect to follow the reasoning in *Woody*, it would be necessary for the state to demonstrate that it had a compelling interest in the enforcement of the religious restriction. On the other hand should the court decide to follow the rationale of *Donahue / Smith* it would refuse to require the showing of a compelling state interest in order to enforce the restrictive regulation.

In its efforts to determine whether there has been a use of public funds that impermissibly favors religion, or a specific religious belief, it is also possible a California court will apply a balancing test under *Carpenter / Alvarado* in order to determine if a law or regulation prefers religion or a specific religious belief.

In any of the foregoing events, it is apparent that there is at least the possibility of greater license in the court's decision of whether or not to apply the compelling state interest test regarding the enforcement of a religiously restrictive

⁶² Those who argue that California has not rejected the strict scrutiny standard point to a footnote in *Smith* which provides, "...although California and federal standards in this area appear to be analogous, it might be argued that Section 4 [of Article 1 of the California Constitution] offers broader protection because it refers to 'liberty of conscience'" (*Smith*, p. 931, n. 22). The proponents of this position argue this indicates the California Supreme Court is likely to reject the *Employment Division* decision in so far as it rejects the strict scrutiny standard in the area of free exercise. Additionally the court in *Smith* by its own language did not address the issue of whether the FEHA statute furthered a compelling state interest (*Smith*, p. 68).

statute under the law of the State of California, than would be the case if the federal rule as embodied in *Employment* was to be applied.

D. Freedom of Speech Under the Federal Constitution

The freedom to speak or express oneself is not unlimited. When speech or expression will transpire on property owned or operated by a governmental entity the extent to which that speech will be permitted will be subject to a series of First Amendment principles which are largely differentiated by the characterization of the governmental interest in the property.

As discussed below, there are a series of ways those principles may apply if they were to be used by a person to support the argument that it is unconstitutional for California to condition the operations of charter schools on the requirement that they must be nonsectarian.

A Forum of Expression – Public, Nonpublic or Limited Public

For the purposes of analysis of speech or expression which may be protected by the First Amendment the place or medium through which said speech or expression may transpire is referred to as the “forum”. The evolving constitutional definition of what constitutes a forum is substantially broader than that which may be used in non-legal discussions, and may include an auditorium, park or street corner, but also may include a newspaper article, a handbill, a photocopy, a radio broadcast or advertising space at a public bus stop. It is important to recognize that what constitutes a forum is not limited to a physical structure but rather may include the multiple means by which a message is intended to be conveyed to third parties.

In the area of freedom of speech or expression constitutional case law presently characterizes three different types of a forum. At one end of the spectrum is the *traditional public forum* in which expression is generally open to all participants and governmental restrictions on that expression are strictly controlled. At the other end of the spectrum is the *closed or non-public forum* in which the expression is limited solely to the message of the government. Somewhere in between is the *limited public forum* in which the right to engage in expression may be limited to certain groups or specific subjects, but which may not be open to all groups or subject matter.

The leading U.S. Supreme Court case in the area of definition of the character of a forum concerned a dispute over the access to an interschool mail system and teachers’ school mail boxes. The dispute arose between the union which was the exclusive representative of the local bargaining unit and a rival

union which had been denied access to the mail system (*Perry Education Association v. Perry Local Educator's Association* [*Perry*], 1983).⁶³

Initially the *Perry* Court differentiated between the characteristics of three different kinds of forums: the traditional public forum, the public forum created by governmental designation and the nonpublic forum. The Court determined that traditional public forum are those places which “by long tradition or by government fiat have been devoted to assembly and debate” (*Perry*, p. 45). Included within this category would be such venues as public parks and streets.⁶⁴ Additionally, a public forum may be created by the government designation of a place or channel of communication for the use of the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects (*Perry*, p.46).

The characterization of the forum will determine the degree of restriction that may be applied to speech intended to be presented in the forum. In the traditional public forum or one which has been created by government action, the ability of the state to limit expressive activities is sharply circumscribed. In order to enforce a content-based exclusion, the government must demonstrate its regulation is necessary to serve a *compelling state interest* and the regulation is narrowly drawn to achieve that end (*Perry*, p. 49).

In a limited public forum a state may reserve the use of the property for its intended purposes, or to particular speakers, as long as the regulation of speech or expression is reasonable and not an effort to suppress the expression merely because the public officials oppose the speaker's viewpoint. (*Perry*, 1983).

A post-*Perry* matter involving the activities of a high school newspaper provided further definition of the nature of a forum in the context of a public high school. (*Hazelwood School District v. Kuhlmeier* [*Hazelwood*],1988).⁶⁵ In *Hazelwood* the Supreme Court held that school facilities can be deemed to be a public forum only if the school authorities have by policy or practice opened the facilities for the indiscriminate use by the general public (citing: *Perry*). Further, in the case where the facilities have been reserved for other intended purposes, then no public forum

⁶³ The holding in *Perry* has been followed in a variety of circumstances by the Ninth Circuit, see: *United States v. Griefen*, 200 F.3d 1256, 2000 U. S. App. LEXIS 309 (9th Cir. Idaho 2000) which upheld a criminal conviction for trespass to U. S. Forest Service land on the basis of the validity of the governmental restriction on the time, place and manner of the use of said land; *Leventhal v. Vista Unified School Dist.*, 973 F. Supp. 951 1997 U.S. Dist. LEXIS 16970 (S.D. Cal. 1997) an action which successfully challenged the rule of a school district which precluded the presentation of a complaint or charge against an employee of the school district during the public comments period of the monthly school board meeting which was open for public comment; and *Gerritsen v. City of Los Angeles*, 994 F. 2d 570, 1993 U.S. App. LEXIS 11125 (9th Cir. Cal. 1993) which overturned a restriction of the City of Los Angeles on the distribution of handbills in a public park as an invalid time, place and manner restriction on speech in a public forum.

⁶⁴ See *Hague v. CIO*, 307 U.S. 496, 515 (1939).

⁶⁵ In *Hazelwood* the U.S. Supreme Court determined that educators were entitled to exercise greater control over school publications, theatrical productions and expressive activities which might be perceived to bear the imprimatur of the school, so long as the controlling actions “are reasonably related to legitimate pedagogical concerns” (*Hazelwood*, p. 273).

has been created. In that case there was a finding the journalism class which produced the newspaper was a part of the regular curriculum of the school and the supervising teacher had reserved final authority over the production and publication of the newspaper. In addition, each issue of the newspaper was required to be reviewed by the school principal prior to its publication. On those facts the *Hazelwood* Court determined there had been no opening of the school facilities for the indiscriminate use by the general public and concluded the newspaper was not a forum for public expression. Stated generally, the rule to emerge from *Hazelwood* is that where a class or activity is a part of the regular school curriculum and is subject to the supervision of a classroom teacher and further subject to the review of the school administrator, no public forum has been created by that class or activity.

The rules arising from *Perry* and *Hazelwood* placed in the context of a TPS make it clear that where school officials have taken steps not to create a public forum in a school newspaper, the speech of the newspaper remains the speech of the school, and the school will therefore retain broad authority to determine what the content of the speech will be.

It is important to note that in those cases where the courts have considered the characterization of the forum in depth, a great deal of judicial attention has been given to the *actions taken by public authorities* (school administrators or officials in the case of TPS) with respect to the establishment and operation of the forum. The series of limitations and restrictions applied to the high school newspaper in *Hazelwood* were critical factors cited by the court in reaching its determination that the forum in question was a limited public forum rather than a public forum. *Hazelwood* is a clear example of the application of the judicial rule that a limited public forum may limit the use of the forum to specific persons or subject matter as long as the restrictions are reasonable in light of the purpose of the forum and the restriction is not an attempt to suppress the speaker because public officials disagree with the viewpoint being expressed.

Freedom of Speech – Access to the Use of Public School Facilities

Over the most recent twenty-five years a central legal issue at the intersection of questions involving both free exercise and freedom of speech has come to be referred to as the area of “equal access.” The pivotal issue in most of these legal confrontations has been whether the religious clauses of the First Amendment require the exclusion of religious groups or speakers from a limited public forum due to the religious content of their speech or activities. Those espousing the exclusion of religious speech or activity from a limited public forum

have generally relied on the prohibition of governmental support of religious activities, the so-called “Establishment Defense”.⁶⁶

In the context of a TPS, the access cases have focused on the issue of the extent to which a religious organization in the pursuance of its activities has a right to use the facilities of a school-created limited public forum. The law has evolved and over time has generally resulted in expanded use of public school facilities by persons or groups who seek to express a religious point of view.

The initial case in the school-access line arose due to a prohibition by the University of Missouri at Kansas City of the use of its facilities by a religiously oriented student group because, in the opinion of the school, the use of public school facilities by the student group would constitute a violation of the Establishment Clause of the First Amendment (*Widmar v. Vincent [Widmar]*, 1981). The U.S. Supreme Court determined that where a public university had chosen to open its facilities to a variety of student, faculty and staff groups for use after normal class hours, it had created a limited public forum from which religious groups could not be excluded without violating their First Amendment freedom of speech.

The general approach of *Widmar* was extended to public secondary schools through a decision that required secondary schools which had created a limited public forum for activities arranged by non-school-sponsored student-initiated groups must provide equal access to the use of school facilities without regard to the “religious, political, philosophical or other content of the groups seeking to participate” (*Board of Education of the Westside Community Schools v. Mergens [Mergens]*, 1990, pp. 246-247). Following *Mergens* was a finding that an adult community group (as opposed to students or faculty of a public school) which discussed family issues from a religious point of view was entitled to use a public school facility for evening meetings to the same extent as other community groups (*Lamb’s Chapel v. Center Moriches Union Free School District [Lamb’s Chapel]*, 1993).

The most recent decision in the area of equal access to public school facilities continues to widen use of those facilities in the directions implied in *Widmar*, *Mergens* and *Lamb’s Chapel*. The decision in *Good News Club* (*Good News Club v. Milford Central School [Good News]*, 2001) held that where the TPS allowed some non-school-sponsored adult groups to use school facilities just after the end of the school day, the school could not prevent a non-school adult group from using school facilities at the same time of day even if the group’s purpose was to evangelize 6 to

⁶⁶ For a detailed review of the major cases decided by the U.S. Supreme Court in the area of “equal access” during the period of approximately 1980 to 1995, see: Michael Stokes Paulsen, “Developments in Free Speech Doctrine: Charting The Nexus Between Speech and Religion, Abortion, and Equality: A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on “Equal Access” for Religious Speakers and Groups” 29 *U. C. Davis L. Rev.* 653 (Spring 1996)

12 year-old students. The finding of the court was based on the findings emulating from the prior cases: that where a school had established a limited public forum which was opened to a cross-spectrum of non-school groups, the denial of use to such a group based on the religious purposes of the group constituted an impermissible act of viewpoint discrimination, and was therefore constitutionally invalid.⁶⁷

In terms of the rules by which the TPS will be guided which have evolved from the access to public school facility cases, the present situation is that once the decision has been made by the TPS governing body to create a limited public forum and to permit members or groups of the community to use the public school facility for non-curricular activities outside of the normal hours of operation of the school, non-school persons or groups espousing religious points of view may use the public school facility to the same extent as other persons or groups are permitted to do so. This type of permitted use is not dependent upon the age or sophistication of the students involved, as the rule has been extended from the university to the elementary school levels.

Perhaps most important, principles of access to public school facilities have thus far been applied only to the expression of non-school-sponsored groups during non-instructional time. To date, those principles have not been applied to the school's own message or activities, or to the state's authority to regulate a public school's message, in the form of curriculum, pedagogy, or other school-sponsored activity.

By way of summary of the issues related to the definition of the forum and access to the facilities of a TPS, a public school is under no obligation to open its facilities to the use of the public at large. If the school governing body does elect to open its facilities to the public at large it may establish certain restrictions on the time, place and manner of the permitted use, so long as the restrictions are reasonable in view of the purpose of the forum and do not discriminate against any group or subject matter on the basis of the content of the speech or activity.

Freedom of Speech - Viewpoint Discrimination

⁶⁷ For the most recent lower Federal Court extensions of *Good News Club* see: *Culbertson v. Oakridge School District No. 76*, 258 F.3d 1061 (9th Cir. 2001) which considered whether the state compulsory school attendance school laws had the effect of providing a mandatory "gene pool" of available students to be targeted by religiously oriented groups which fostered after school programs in the nature of the *Good News Club* program. In *Culbertson*, the court held the state compulsion ended at the end of the school day, and there was for that reason no compulsion by the state of engagement in religious activity. However, the part of the *Culbertson* program which required that teachers were required to distribute parental permission slips for students to participate in the after-school religious program was overturned on the basis that the practice went beyond merely providing access to the program in that it put the teachers at the service of the club (*Culbertson*, p. 1065).

If it is determined that a state, by virtue of funding public schools but not religious schools, does not discriminate against religion under the free exercise principles relied upon in *Lukumi*, it is possible in the alternative, that a state may be found to discriminate against selected viewpoints, a constitutionally protected area under the Freedom of Speech Clause of the First Amendment.

A leading case in which the Supreme Court has addressed the issue of viewpoint discrimination concerned the use of a Student Activity Fund (“SAF”) at the University of Virginia (*Rosenberger et al. v. Rector and Visitors of the University of Virginia et al.* [*Rosenberger*], 1995).⁶⁸ The SAF was funded by mandatory student fees and was used, in part, to pay outside contractors who provided printing services for a variety of student publications. The University withheld payment to a contractor which had provided services to a student organization known as “Wide Awake: A Christian Perspective at the University of Virginia” (“WAP”). The District Court and Fourth Circuit Court of Appeals held for the University, though the appellate court did find the actions of the University in enforcing viewpoint discrimination did violate the free speech component of the First Amendment, however the appellate court justified that violation by the university on the basis of its obligation to comply with the Establishment Clause.

The *Rosenberger* Supreme Court, by a 5-4 vote, reversed the lower courts on the basis that the action of the University, both in its terms and its application to WAP, constituted a violation of the right of free speech, and did not constitute a violation of the Establishment Clause. In reaching its decision the court made a clear distinction between content and viewpoint discrimination. Content discrimination was determined to be discrimination against speech due to its subject matter and may be held to be permissible in those cases in which it preserves the limited forum’s purposes. Viewpoint discrimination was determined to be discrimination due to the specific motivating ideology, opinion or perspective of the speaker and was held to be impermissible when directed against speech otherwise within the forum’s limitations (*Rosenberger*, p. 24).⁶⁹ Citing the previous *Perry* holding the Court held:

⁶⁸ The holding in *Rosenberger* has been followed in numerous matters by the Ninth Circuit, see: *Orin v. Barclay*, 272 F. 3d 1207, 2001 U.S. App. LEXIS 24194 (9th Cir. Wash. 2001) an abortion protest case in which a pre-condition of the school demonstration granting authority of limiting the demonstration to secular content was overturned; *Giebel v. Sylvester*, 244 F. 3d 1182, 2001 U.S. App. LEXIS 6177 (9th Cir. Mont. 2001) a case in which the removal of a hand bill from a university bulletin board determined to be a designated public forum was determined to constitute viewpoint discrimination; *Metro Display Adver. v. City of Victorville*, 143 F. 3d 1191, 1998 U.S. App. LEXIS 8832 (9th Cir. Cal. 1998) a matter in which the court determined that the speech of a private individual which appeared in an advertisement on a bus stop sign was not subject to governmental regulation based on the content of the speech or message that it conveyed; and, *Springfield v. San Diego Unified Port Dist.*, 950 F. Supp. 1482, 1996 U.S. Dist. LEXIS 20749 (S.D. Cal. 1996) where a municipal ordinance which included an absolute ban on “proselytizing” in the San Diego municipal airport was invalidated under the public forum doctrine.

⁶⁹ For a recent case upholding a student activity fee see: *Board of Regents of the University of Wisconsin v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346 (2000) in which a mandatory student fee to fund extracurricular speech

“The government must abstain from regulating speech when the specific motivating ideology or the opinion or the perspective of the speaker is the rationale for the restriction.” (*Perry*, p. 46).

The most recent instance in which the U.S. Supreme Court has revisited the issue of viewpoint discrimination in a TPS, also arose in the State of New York and centered, like *Lamb’s Chapel*, on the application of Section 414 of the state education code. In *Good News Club* an applicant had been denied access to the limited public forum of a public school on the grounds that the purpose of the Good News Club was religious in nature. The Good News Club, which was a privately sponsored Christian organization that received no support from the public school system, proposed to use the school premises after normal school hours for a weekly meeting in which students ages 6 to 12 would sing songs, hear Bible lessons, memorize scripture and pray.

Initially, the *Good News Club* Court noted where a state has established a limited public forum, it is not required to allow non-school-sponsored groups to engage in every type of speech during non-instructional time. The issue for resolution was whether the restriction complied with the twin tests of *Cornelius*. The school defended on the basis that it had previously refused to allow access to all other religious groups, and therefore its actions were both reasonable and non-discriminatory.⁷⁰ Following its reasoning in *Lamb’s Chapel* where a community had opened a limited forum to serve a variety of public purposes including events “of a social, civic or recreational use ... pertaining to the welfare of the community”, the Supreme Court found that the teaching of morals and character development to children was a permissible purpose under the policy adopted for the Milford School.⁷¹ In the opinion of the Court, the differences in the methods used (films in *Lamb’s Chapel* and story telling and prayer in *Good New Club*) were indistinguishable. Both modes of speech used a religious viewpoint (*Good News Club*, p. 44). For that reason the exclusion of the Good News Club from use of the school premises constituted unconstitutional discrimination based on viewpoint.

was upheld where there was viewpoint neutrality in allocation of funding to student organizations engaging in such speech. The case had been initiated by a group of students who objected to the religious or political viewpoints expressed by other student groups which received funds from student activity fund.

⁷⁰ A position that had previously been rejected by the U.S. Supreme Court in *Lamb’s Chapel*.

⁷¹ It is interesting to note that in the thinking of the Supreme Court the fact that the teaching of morals and character development to children was accomplished, in part, by such activities as: hearing a Bible lesson, memorizing scripture and prayer was not fatal to the cause of the Good News Club. In the words of the opinion of the Supreme Court, “... the club’s activities did not constitute *mere* (emphasis added) religious worship that was divorced from any teaching of moral value” (*Good News Club*, p. 2). In the dissenting opinions of Justices Stevens and Souter and Ginsburg, significant attention was paid to what was seen as the proselytizing or Christian conversion goals of the activities of the club. It is apparent that the Supreme Court will permit the inclusion of certain traditionally religious type activities as a step towards moral and character development. The open question is where that line will be drawn in each individual case.

Perhaps most importantly in *Good News Club*, the Supreme Court specifically rejected the assertion that the Establishment Clause prohibitions constituted a valid defense in an action based on the claim of a violation of the First Amendment protections of free speech (*Good News Club*, p. 48). In that regard the Court found significance in the facts that: the proposed activities would not have taken place during regular school hours, the activities would not have been sponsored by the school and the activities would have been open to the public at large, not merely to persons espousing a particular religious point of view.

Thus in the analysis of the validity of a restriction on speech which occurs because of a restriction imposed by a TPS the court will first determine whether the restriction was based on the content or subject matter of the speech, or whether the restriction was based on the ideology, opinion or perspective of the speaker. Where the restriction was based on the subject matter of the speech it may be enforced if it preserves the purpose for which the limited forum was founded. Where the restriction was based on the viewpoint of the speaker it will be held to be unenforceable. For those reasons in the case of a restriction on speech imposed by a TPS, the analysis of the purpose for which the particular forum (school activity fund, school publication, school charity drive, etc.) was founded will be critical to the determination of whether or not the restriction on the speech will be upheld or not.

Freedom of Speech - Content Discrimination

As opposed to the situation in *Rosenberger* where the actions of a public entity resulted in the unconstitutional discrimination against the viewpoints of private parties, it is equally clear that when the government appropriates public funds to promote a particular policy, the content of that governmental speech may be validly controlled. In this instance the forum is considered to be non-public. This line of cases is based upon the premise that the government itself is the speaker, and is not attempting to control or influence the speech of others.

In the context of the TPS then, there may be limitations on speech where there is a valid pedagogical reason in furtherance of a school goal or where the speech would be attributable to the school, however where the speech is simply an expression of the viewpoint of an individual student it should be permitted except in the instances where the speech will substantially interfere with the function of the school or negatively impact the rights of other students.

E. Freedom of Speech Under the California State Constitution

The analogous provisions to the federal protections related to the freedom of speech appear at Article 1, Section 2 of the California Constitution. The constitutional language in California provides, in relevant part, as follows:

“§2. Liberty of speech or of the press;

Sec. 2. (a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.” (California Constitution, Article 1, Section 2)

A long line of cases decided by the state courts of California have determined that the free speech provisions of the state constitution are more expansive than their federal counterparts.⁷² The California Supreme Court has held that the state free speech provisions, “... [are] more protective, definitive and inclusive of rights of expression of speech than the federal provisions” (*Robins v. Pruneyard Shopping Center*, [*Robins*], Sup. Ct. CA 1979). However, few of the cases which have found greater expansion for free speech rights in California have arisen in the context of a TPS.

California – Public Forum / Designated Public Forum

In language nearly identical to that at the federal level the “... Traditional public forum has been defined as places such as parks and streets, which historically have been used for the purposes of public assembly” (*Baca v. Moreno Valley Unified School Dist.*, [*Baca*], 1996)⁷³.

The judicial opinion in *Baca* is also important as it contains a recent statement of the distinction in California between a public forum and a limited public forum as those terms are used at the federal level. Under California law a “designated public forum” is a forum created by governmental designation as “a place or channel of communication for use by the public at large ...” (*Baca*, p. 728

⁷² See: *Pines v. Tomson*, 160 Cal. App. 3d 370, 206 Cal. Rptr. 866 (1984) in which the California Appellate Court noted the California constitutional free speech provision was composed of three parts: (1) an affirmation that all persons may freely speak, write and publish their sentiments, (2) a provision for allowing liability once that right is abused, and (3) a prohibition against laws which infringe freedom of speech or press. The *Pines* Court noted, only the third part has a similar provision in the First Amendment of the U.S. Constitution.

⁷³ The test under California law of whether a forum is public is one of *basic incompatibility*, whereas the federal test balances three factors: the purpose of the forum, the extent of use of the forum allowed by the government and the government’s intent in creating the forum (*International Society for Krishna v. City of Los Angeles*, [*ISKCLA*], 1997). Under the more expansive California test, the *ISKCLA* court found the solicitation activities of the plaintiffs were not incompatible with other uses of the airport, and hence, were permissible. The general rule to emerge from *ISKCLA* was that, “locations where the public is free to come and go must be open to expressive activity unless that activity is basically incompatible with the primary use of the facility.” (*ISKCLA*, 1997, p. 965-966). See also the decision of the Federal District Court in a matter involving speech and leaflet distribution in the San Diego International Airport, *Springfield v. San Diego Unified Port Dist.*, 950 F. Supp. 1482, 1996, U.S. Dist., LEXIS 20749 (1996) a matter in which the court applied the *Perry* definitions to determine the nature of a public forum. In *Springfield* the absolute ban on speech and leaflet distribution was held not to be reasonable in view of the purpose of the forum.

citing: *Cornelius*)⁷⁴. Access to a designated public forum may be limited by the government if it designates public property as available only for “use by certain speakers or for the discussion of certain subjects...” (*Cornelius*, p. 803)⁷⁵. In the event the state does limit access to the forum based upon subject matter or speaker identity, access limitations must be reasonable in light of the purpose served by the forum and must be viewpoint neutral (*Baca*, citing: *Lamb’s Chapel*, pp. 392-3). Thus, California follows the federal precedent in the distinctions between a public and a limited public forum and in the limitations that may be applicable to specific groups or subject matter in the limited public forum.

California – Speech in a Limited Public Forum

In addition to its clear statement that a public school is a non-public forum *DiLoreto* constitutes an important statement from the California Supreme Court regarding the consequences of a constitutional conflict between establishment and free exercise rights under California state law.

The case arose in the context of a proposed inclusion of the Ten Commandments and other religious language, in a sign to be placed on the wall of the high school baseball park. The school refused to accept the advertisement on the basis it constituted a violation of the establishment clause of the state constitution and involved excessive governmental entanglement with religion. The prospective advertiser based its claim on the violation of the rights of freedom of speech and free exercise of religion under Article I, Sections 2 and 4 of the California Constitution.

Initially the *DiLoreto* Court determined that the posting of the sign would have constituted an affirmation of the principals of the Jewish and Christian religions, and for that reason violated the “preference” provision of Article I Section 4 of the California constitution (*DiLoreto*, p. 799).⁷⁶

The most significant part of the *DiLoreto* decision, however, was the court’s determination that where a high school may have infringed upon the plaintiffs’ free

⁷⁴ The California Federal District Court has followed the basic tests of *Cornelius* in a matter relating to speech by members of the public at a regularly scheduled school board meeting *Leventhal v. Vista Unified School District*, 973 F. Supp. 951, 1997 .S. Dist. LEXIS 16970 (U.S. Dist. Ct. for S.D. of Cal. 1997). In *Leventhal* the court found a school board by-law which absolutely prohibited criticism of the performance of a school employee at an open school board meeting was invalidated by the standards adopted in *Cornelius*.

⁷⁵ Following a *Cornelius* analysis the California Appellate Court has recently determined that the voter’s pamphlet is not a traditional public forum, but rather a specific instrument funded by the government to inform voters about an upcoming election, *San Francisco Forty-Niners v. Nishioka*, 75 Cal App. 4th 637, 1999 Cal App. LEXIS 902 (Ct. of App. of Cal. 1st App. Dist, 1999).

⁷⁶ The *DiLoreto* Court reasoned that as the Ten commandments were tenets of the Jewish and Christian religions, the sign if permitted would show a preference for those religions to the exclusion of other recognized religious faiths.

exercise rights, the compelling state interest⁷⁷ of the high school in upholding the establishment clause (of the state constitution) outweighed the free exercise right⁷⁸ of the plaintiff (citing: *Brandon v. Board of Ed. of Guilderland Cent. Sch.*, [*Brandon*], Ct. of App. 2nd Cir. 1980).⁷⁹

The holding in *DiLoreto*, then stands for the California state position that in the instance of a public high school, where a conflict may arise between the rights under the establishment clause and the free exercise provisions of the state constitution, the protections of the establishment clause constitute a compelling interest of the state sufficient to overcome the infringement of individual rights in the area of free exercise and free speech.⁸⁰

California – Access to Public School Facilities

The federal rule governing access of religious clubs to the facilities of public secondary schools as determined in *Mergens*, was adopted at the California state level in a matter which arose at Mission Viejo High School (*Van Schoick v. Saddleback Valley Unified School District*, [*VanSchoick*], 2001). Members of the Fellowship of Christian Athletes (“FCA”) brought an action under the EAA based on the refusal of the school to permit the FCA to meet on the school campus and to use school facilities when other non-curriculum related student clubs had been allowed to do so. The school defended on the basis that the other clubs in question (the Key Club, the Girls League, etc.) were curriculum related because participation in said clubs satisfied a graduation requirement that all students must perform eight hours of community service in order to graduate.⁸¹

⁷⁷ Thus implicitly restating the California constitutional position stated in *Donahue*, that the compelling state interest test remained in effect under state law in the area of religious free exercise.

⁷⁸ *Brandon* was an earlier case from the Second Circuit Court of Appeals in which a group of high school students had their request to conduct prayer meetings on campus in one of the school’s rooms, denied on the basis that such use would violate the First Amendment prohibition against the establishment of religion.

⁷⁹ The *DiLoreto* Court also relied on the holding of the U.S. Supreme Court in *Stone v. Graham* [449 U.S. 39, 101 S.Ct. 192 (1980)] in which a statute of the State of Kentucky which required the posting of the Ten Commandments on the wall of each public elementary and secondary school was overturned on establishment grounds. In denying the free exercise violation in *Brandon*, the U.S. Supreme Court noted that the students had not been “coerced” out of their religion, but were free to conduct their religious meetings and prayer groups before or after school, on weekends, and in a church or any other place [than the public school in question].

⁸⁰ In reaching its finding regarding the balance between establishment and free exercise rights in a limited public forum, the *DiLoreto* Court relied on *Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160, 1168 (7th Cir. 1993) a matter in which the distribution of Bibles by members of the Gideon faith to fifth grade students during school hours and on the school premises was invalidated. The *Berger* holding was distinguished from the finding of a religious message in a public forum in *Christ’s Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242 (3d Cir. 1998) in which advertisements with a religious based anti-abortion message were permitted to continue to be posted in subway and railway stations on the basis the venues were public in character.

⁸¹ A provision adopted by the school district Board of Trustees required the participation in the community service activities as a requirement for graduation from the high school and additionally provided that, “... community service was to be a component of the social studies curriculum at each high school grade level” (*Van Schoick*, p. 526).

Quoting *Mergens*, the California court stated that, “the Act should be construed broadly in order to effectuate the congressional purpose of prohibiting discrimination against student religious groups” (*Mergens*, p. 1248).

The Federal Appellate Court for the Ninth Circuit has recently affirmed a school building is not a public forum; however, once the school district makes the election to permit its school buildings and facilities to be used for community activities it may not discriminate between potential users on the basis of the viewpoint held by those persons (*Armstrong v. Oakridge School District No. 76*, [*Armstrong*], 9th Cir. Ct. of App. 2001).⁸² Thus, based on *Armstrong* California will follow the same path as the federal courts (*Mergens* to *Good News Club*) in the access to public school facilities cases.

California - Free Speech Summary

In the area of freedom of speech numerous state court decisions support the assertion that the provisions in the California state constitution are more expansive than those of the US Constitution.

With respect to the distinctions between the different types of a forum and the potential limitations of each type, California largely follows the federal precedent distinguishing between a public and limited-public forum and permitting the application of restrictions to certain groups and subjects in the setting of a limited-public forum.

With respect only to the public forum California follows a rule that is more expansive of the rights of individual speech than is the case at the federal level⁸³. The test in California is whether the speech is basically incompatible with the use of the forum, in which case the strict scrutiny test will be applied to the restriction on speech in that forum.

A TPS in California is a limited public forum and for that reason subject to limitations on the speakers who wish to appear and/or subject matter to be discussed in the forum. The *DiLoreto* case in California has determined that where there is a conflict between the establishment and free exercise interests in speech within a TPS, the state will have a compelling interest to preclude the speech at the expense of the free exercise rights of claimed aggrieved party.

⁸² In *Armstrong* the Ninth Circuit Court of Appeals expressly followed the result of *Good News Club*, with the exception that the policy of the school district to have handbills informing the parents and permission slips to participate in the meetings of the club handed out by regular school teachers was invalidated.

⁸³ With respect to this expansion in California of the public forum rule, the distinction may be largely immaterial to charter schools that have been legislatively and judicially defined as public schools, and under *DiLoreto*, as well as sister cases, a public school is a limited-public forum or “designated forum” as the expression is used in California.

Finally, California cases have adopted the federal rule (a la *Mergens*) regarding access to school facilities by non-school-sponsored groups. Once the decision has been made to open school facilities to outside groups for discussion of selected subject matter, the governing authority may not discriminate regarding the use of the facility based on the identity of the group or views to be expressed.

The foregoing case law at the federal and California state levels forms the basis on which future decisions regarding the Act in the area of free exercise and freedom of speech will be made. The arguments that opponents and proponents of the constitutional validity of the Act will make will draw directly on the findings in this Chapter II. As well, the validity, or not, of the selected activities of some California charter schools as discussed in Chapter III will likely be decided in accordance with the legal principles set forth in this Chapter II.

Chapter III.

Free Exercise and Freedom of Speech in California Charter Schools

A. Nonsectarian Activity

A leading legal definitional source defines the term “sectarian” as “of or pertaining to a particular religious sect.”⁸⁴ That definition however, provides little guidance as to how the term may be used in the analysis of day-to-day activities of California charter schools. Few judicial decisions at either the federal or California state levels have attempted to provide a rigorous definitional analysis of the meaning of the expression “nonsectarian” as that term is used in the Act.

Those cases that have focused on the obligations and proscriptions which arise under the religious provisions of the First Amendment and the similar provisions of the California constitution, do so by analogy by reaching a conclusion as to the constitutional validity, of specific activities which have taken place. Whether a decision is rendered in the constitutional area of establishment, free exercise or freedom of speech, to the extent that a judicial definition of the term “nonsectarian” exists, it may be extrapolated from the factual scenarios which have provided the settings for the constitutional interpretation of the First Amendment and related provisions of the California constitution.

There have been a significant number of actions and activities that have been permitted under interpretations of the Establishment Clause, and therefore presumptively constitute nonsectarian activities which would not violate the prohibitions of the Act. Among others, permitted activities have included:

⁸⁴ Blacks Law Dictionary, 7th Edition, Bryan A Garner, Ed., West Group, St. Paul, 1999.

reimbursement to parents for the cost of public transportation to a religious school (*Everson*), the validation of property tax exemptions provided to religious institutions (*Walz*), aid for the provision of secular services in a religious school (*Nyquist*), reimbursement of expenses in the administration and evaluation of state required standardized student assessments of religious school students (*Regan*), lending textbooks acceptable for use in the public schools directly to students at religious schools (*Meeke*), provision of standardized testing and scoring, diagnostic services and therapeutic and remedial services to students of religious schools (*Wolman*), deduction by taxpayers of certain expenses related to tuition, textbooks and transportation (*Mueller*), vocational rehabilitation services provided by a religious college (*Witters*), language interpretation support services provided in a religious school (*Zobrest*), the provision of Title I services to educationally disadvantaged students by public school teachers in a religious school (*Agostini*), and provision of tuition vouchers to low-income parents for the attendance by their children at a religious school chosen by them, including a religious school (*Jackson/Zelman*).

There are as well a series of activities that have been determined to be permissible when analyzed under the Free Exercise and Freedom of Speech Clauses of the First Amendment, and therefore, presumed not to violate the sectarian prohibitions of the Act if they were to occur in a charter school. The right of a parent to decide for his/her child to attend a private or religious school (*Pierce*) or one that provides instruction in a foreign language (*Meyer*), the right of a parent to determine based on religious convictions for his/her child not to attend a public school (*Yoder*), the right to receive unemployment compensation for dismissal from employment while engaged in religious practice and at least one other constitutional protected activity (*Employment*), the freedom to engage in personal religious practices which are subject only to laws and regulations that are neutral in nature and of general applicability (*Lukumi*), and the right to receive support for the expression through student publications to the same extent that other student groups receive similar support (*Rosenberger*). It is also clear that once a public school has opened its facility for use by the community at large, that under free exercise jurisprudence all members of the community are entitled to use the facility on an equal basis regardless of the religious nature of the activity or speech planned (*Widmar – Good News Club*). Under existing U.S. Supreme Court jurisprudence, the presumption is that the engagement in any of these activities in, or by, a charter school its students or staff, would not be proscribed under the Act.

B. Congruence Between Federal and California Law

Records from the California Department of Education indicate that 4,077 nonpublic schools were operating in the state as of May 2002. Of the approximate 650,000 students in private schools in California, approximately 514,000, or 79.2%

attend schools that were affiliated with a particular religious institution or belief.⁸⁵ Thus a reading of the nonsectarian provision on the face of the Act when coupled with the recognition of the real effect of prohibition of public aid to private schools, can be argued to be, in large part, the prohibition of public aid to religious charter schools in California. How then are other religious activities or forms of support of religious schools which are permitted by the case law under the Establishment, Free Exercise or Freedom of Speech Clauses to be determined in the context of a California charter school which may wish to engage in those same activities or avail that same support?

Based upon those two provisions of the Act it is not difficult to imagine that it is only a matter of time until a legal action may be instituted based upon the allegation that the California Charter Schools Act invalidly discriminates against sectarian activities which are otherwise constitutionally valid. If a legal action was to be initiated seeking to invalidate the Act on the basis that it invalidly discriminates against religious beliefs or prohibits conduct or speech because the conduct has been undertaken for religious reasons, how would such a matter be judicially resolved?

C. The Arguments Regarding the Constitutional Validity of the Act

The path of judicial decision making in the areas of free exercise and freedom of speech has taken several directions, the history of which is sufficient to provide both the supporters and the opponents of the Act with a substantial base to support their contrary arguments regarding the constitutional validity of the nonsectarian inclusions of the Act.

Federal Court Level

Those seeking to overturn the validity of the Act on U.S. constitutional grounds may be expected to rely on the decisions in the line of cases which commenced with the holdings in *Pierce* and *Meyer* and have culminated with the holdings in *Church of Lukumi* and *Rosenberger*.

Constitutional Invalidity of the Act

Initially the opponents of the Act can be expected to argue there is a long standing recognition of the constitutionally protected fundamental right of a parent to determine the course and nature of his child's education (*Pierce*). For a parent in

⁸⁵ The number of private schools includes only those schools with six or more students that have filed the R-4 Private School Affidavit with the Office of Private Schools of the California Department of Education. This information was obtained via telephone conversation with Teresa Cantrell of the Office of Private Schools, May 30, 2002. Of those schools with a church affiliation by far the most significant was the Catholic Church which enrolled 56.4% of all students enrolled in church-affiliated schools. The determination of the existence of an affiliation was made by the responding school and the basis for that determination was also self-determined.

California who may wish for his child to benefit from attendance at a school that includes religious content in its programs but has the flexibility of being organized as a charter school, the exercise of these fundamental rights has been precluded by the Act. It is further the case that where there may be a conflict between the interest of the state in furthering the education of all of its citizens, even that important interest of the state will give way to the fundamental right the parent has to determine the course of his child's education (*Yoder*).

The opponents of the validity of the Act will assert that the right to hold a religious belief is absolutely protected under U.S. Supreme Court jurisprudence (*Cantwell*). Opponents of the Act will argue that in assessing religious conduct there is necessarily a balancing test the court must consider. That test balances the interest of the state to regulate the conduct in question versus the degree of burden on a person's religious conduct. In this case the interest of the state is simply to preclude the incidence of religious practices in schools it supports. On the other hand the burden on the individual student is absolute. Under the Act there is absolutely no possibility for a student who so chooses, to attend a school that offers the benefits of a charter school format and operation and also includes religious exercise or speech as a component of its educational services.

Opponents of the Act will argue further that the balancing test of *Cantwell* was expanded by subsequent jurisprudence (*Thomas*). The first part of the bifurcated expansion of the balancing test provides that no regulation which imposes less of a burden on the religious exercise will satisfy the governmental interest in the regulation. Here the opponents of the Act will argue the ban is complete in nature, and that a lesser limitation could be implemented which would achieve the interests of the government. By way of one example the religious practices and activities of the school: could be limited to after regular school hours, could be required to be conducted by persons other than the regular charter school staff and could be open to participation by all members of the community, rather than solely the students of the charter school. The second expansion of the *Thomas* balancing test provides the regulation may not discriminate between religions or between religion and non-religion. Here the opponents of the Act should concede the Act does not discriminate between religions because it applies on its face to all religions. However, opponents should contend the Act does discriminate between religion and non-religion. The clear effect of the Act is that Charter schools that desire to incorporate religious exercise or speech in their activities, simply may not exist. Opponents should contend the Act by its inclusion of the sectarian prohibition specifically targets religion (as opposed to non-religion) for negative treatment.

Federal jurisprudence for nearly forty years followed the principle that where the purpose or effect of a law was to impede the observation of one or all religions, the state was required to show a compelling state interest was being furthered by

the law in order for the law to be constitutionally valid (*Sherbert*). A later decision narrowed the rule established in *Sherbert* by holding that where a law was neutral on its face and of general applicability the state was required only to demonstrate that it had a rational basis for the promulgation of the law (*Employment*). Opponents of the Act will assert that by virtue of the inclusion of the nonsectarian provisions the Act is simply not neutral on its face (*Lukumi*), or as applied. The effect of the Act on the implementation and operation of charter schools is absolute, non-religion – yes, religion – no.

The opponents of the Act will also assert the invalidity of the Act under the theory of the hybrid rights doctrine, as also established in *Employment*. Under that judicial theory in the event more than one constitutionally protected right has been violated the state will be held to demonstrate a compelling state interest in order for the law or regulation to be valid. Opponents of the Act will argue that is precisely the case in this instance. Not only is the free exercise of religion being denied but the freedom of speech as well by virtue of the viewpoint discrimination inherent in the application of the Act.

In reliance on the rationale in *Rosenberger*, opponents of the validity of the Act will assert that in promulgation of the Act the baseline purpose of the California legislature was to provide an expansion of educational opportunity and diversity of educational experience for students in the state. Clearly there was no intent to advance religion by virtue of the enactment of the Act, hence any assertion of the Establishment defense by supporters of the Act is simply not meritorious.

Opponents of the Act will also argue that it is constitutionally invalid for the reasons that it constitutes viewpoint discrimination in violation of the principle of freedom of speech of the First Amendment. Here opponents of the Act will argue that the failure to support or permit religious charter schools because of their motivating ideology, opinion or perspective, as in *Rosenberger*, constitutes impermissible discrimination against otherwise permissible speech. Further, in reliance on the rules of *Cornelius*, opponents will point out that in addition to the prohibition of discrimination based on viewpoint, that a restriction on speech must be reasonable in view of the purpose for which the forum was created. Here California charter schools should be held to the same standards as the TPS which, as a minimum under *Widmar to Good News Club* rules, do permit religious actions and activities to a limited extent.

In anticipation that the proponents of the validity of the Act will claim the Act is valid because of the greater restriction on religious activity and expression as mandated by the California Constitution the opponents of the Act will assert an additional position which arises under the philosophical approach suggested in *Rosenberger*. Opponents will contend that inherent in the application of the Act itself was a legislative attempt to create a diversity of educational experiences

within the educational system of California. Based on the argument that all schools teach values and in the process give rise to multiple viewpoints of their students, once the forum for expression of viewpoints has been opened under both *Lukumi* and *Rosenberger*, a program to aid that educational effort must be neutral in character and cannot discriminate against any viewpoint based on the content thereof. In this case the Act clearly discriminates against a religious viewpoint and for that reason should be invalidated. Through the implementation of the charter school program, opponents will contend the state has encouraged diversity in the activities, procedures and viewpoints of its schools, and having crossed that bridge of viewpoint creation the state may not then refuse to support a certain set of schools because of the religious viewpoint they may incorporate into their activities.

Constitutional Validity of the Act

Those seeking to support the constitutional validity of the Act on federal grounds can be expected to base their arguments on inclusions in many of the same cases in the line of cases commencing with *Pierce / Meyer* and culminating with the holdings in *Rust* and *National Endowment*.

Proponents of the validity of the Act will not disagree with the *Pierce / Meyer* rule. They will point out, however, there has been no case decided at any level in the United States which determined that the government will be required to pay for any or all decisions a parent may make regarding that course of education. Further distinguishing the operation of the Act from the factual circumstances of *Pierce*, there is no danger that any school in California will be closed or forced cease to operate by virtue of the Act. Private schools, including private religious schools, will be able to continue to operate in the same manner as they did prior to the promulgation of the Act. As such proponents will contend the Act is neutral as respects the continuing operations of religious schools.

Proponents of the constitutional validity of the Act will concur that the religious belief of an individual is absolutely protected (*Cantwell*), however it is only belief which has the constitutional right to be absolutely protected (*Yoder*). Proponents will assert the operation of charter schools in California clearly involves more than a simply expression of religious belief. By the simplest definition the daily activities of any charter school involves conduct, which in this case the opponents of the Act claim should be permitted to be religious in nature. In the case where both religious belief and religious conduct are involved there must be a balancing between the interest of the State being furthered by the Act and the burden on the individual's exercise of religion (*Cantwell*). Here the argument of the proponents will rest on two basic premises: first, the state as a matter of constitutional law is prohibited from taking any action which will result in the

establishment of religion, and in any event, the Act does not create any religious burden on the individual. There is no prohibition of the attendance by any child of a private or religious school and there is simply no present legal basis for contending that religious education must be paid for by the expenditure of public funds.

With reference to the more exacting balancing test as set forth in *Thomas*, proponents will take the position with respect to the first test that there is no restriction in the Act which imposes a limitation on the religious exercise or activity which students may engage in. They may pursue those activities through attendance at a religious school, or may even pursue those activities on the premises of a public school as long as the rules set forth in *Good News Club* are observed. The second test set forth in *Thomas* requires that the Act not discriminate between religion and non-religion. Here the proponents will assert there is no inclusion in the Act which differentiates between religious and non-religious activity in any manner which is not otherwise supported by the U.S. constitution and case law interpretation thereof. It is not a case of first instance in the Act that public funds may not be used to support religious institutions, but a matter of a long judicial record decided on that precise issue.

Proponents will assert that the state only need show that there was a rational basis for the enactment of the Act, and not that the Act furthers a compelling state interest (*Employment*). In this case there is abundant opinion from educational experts that the operations of charter schools will enhance the educational opportunities of the students of the State of California and will create a more robust educational system within the state as a whole. It should be pointed out that the only constitutional issue being contested is whether there may be religious exercise in a charter school.

Proponents will contend that the Act is neutral and generally applicable, both as applied and on its face. There is no specific reference in the Act to any religion, religious activity or religious practice as was the case of the city council resolutions in *Lukumi*. Neither was there any attempt in the Act to single out a single or specific group of persons or institutions. By its nature the Act applies to all the schools and school students in the State of California.

The argument will be made that the facts surrounding the operation of the Act are distinct from those in *Rosenberger* that were found to constitute impermissible viewpoint discrimination. Under the Act there is no collection of funds from students who will attend charter schools, in fact tuition payments are specifically prohibited. Likewise there is no publication nor limited-public forum under the Act to which charter school students are being denied an equal access to the same extent constitutionally permitted to other students.

Perhaps the strongest argument of the proponents in support of the validity of the Act is that the actions of the California legislature in including the non-sectarian provision in the Act did not constitute invalid viewpoint discrimination aimed at the control of speech of a private party, but rather, was a valid exercise of governmental policy in choosing to fund one governmental activity and not another (*Rust*). Proponents will assert that in the enactment of the Act the government itself was acting as the speaker and there was no intent or resulting effect that unconstitutionally limits the freedom of speech of a private individual. As such, the withholding of authorization to operate from religious charter schools was a valid governmental plan for promoting public education and does not involve impermissible viewpoint discrimination.

In further support of their position that the Act does not result in viewpoint discrimination proponents will point out that advocates of religious charter schools are not foreclosed from pursuing their religious ends and engaging in religious exercise and speech via other means. By way of one example they may conduct their religious schooling as a private school. The other alternative open to the advocates of religious charter schools, is that their religious exercises and activities may validly be conducted, even in public school facilities, if done so after the normal hours of operation of the school by persons other than the regular faculty of the school if the activities are open to the public (*Good News Club*).

California State Court Level

In the event an action to test the constitutional validity of the Act was to be brought in the courts of the State of California the question will arise as to what extent the previously noted federal cases and precedents will control the outcome of the case, and to what extent the statutes and case law from the State of California will affect those federal precedents. There are certain legal areas where the proponents or opponents of the validity of the Act will argue the law of California is more expansive than the federal law, and should for that reason produce a different outcome than would be the case if the matter were to be contested in a federal court.

Constitutional Invalidity of the Act

Proponents of the invalidation of the Act will point out that the California Supreme Court has adopted the policy that in order for the state through the enactment of legislation to abridge the exercise of religious practices it must demonstrate that some compelling state interest outweighs the individual's interest in religious freedom (*Woody*). Proponents should acknowledge that such a position is contrary to the outcome reached later by the U.S. Supreme Court in *Employment*, however courts located in California and in reliance on California state law, have upheld the compelling state interest test since the time of the *Employment* decision (*Goehring*). Additionally, where the courts in California have utilized the hybrid

test as established in *Employment*, they have done so only in matters which were criminal in nature (*Washington*), and there is no element of “criminality” presented by the Act. Based on that theory, proponents will argue that there has been no California court decision which has determined there is a compelling state interest in the operation of only non-sectarian schools.

Proponents of the invalidity of the Act will assert that California has adopted a balancing test under which governmental actions which burden religious conduct must be balanced against the severity of the burden imposed on religion (*Donahue / Molko*). Though the decision in *Donahue* was later overturned in *Smith*, California courts have continued to follow the balancing and compelling state interests tests as late as 1999 (*Bollard*). Additionally, even the *Smith* opinion itself noted that the California position on free exercise may be broader than the position of the federal courts on the basis of the language “liberty of conscious” of Article 1 of the California Constitution.

Finally the proponents of the invalidity of the Act will point out in a matter related to religious speech included in the billboards of a high school athletic field, that the reasoning behind the exclusion of the religious signage was determined by the California court to be a constitutionally valid compelling state interest of the school (*DiLoreto*).

Constitutional Validity of the Act

Those seeking to support the validation of the Act will assert that the rule in *Woody* is not controlling to the analysis of the validity of the Act. Initially, *Woody* was decided before the U.S. Supreme Court decision in *Employment*, and if not expressly overruled by the decision, it was implicitly overruled because of the very high degree of similarity of the facts of the two cases. Both cases turned on the prosecution for the use of a controlled substance the defense to which was the use of the substance was condoned by the church in question and therefore a proper exercise of religious belief and practice. *Employment* should also be controlling of the decision in *Woody* for the reason that though it was a decision of a California state court *Woody* was not decided on independent state law grounds, but rather on cases decided at the federal level (*Sherbert, Baunfield and Cantwell*). Even though no mention of *Woody* was made in *Employment Division* the Supremacy Clause commands that the holding of *Woody* can not stand as it is in direct conflict with decisional law of the highest court of the land, and for that reason alone may not serve as legal precedent. Ultimately the proponents of the validity of the Act will assert that in any event the holdings of *Woody* and *Employment* are not relevant to the analysis of the Act as they were both based upon the prosecution for criminal activity, and there is no criminal activity created or permitted by the operations of charter schools.

Supporters of the validity of the Act will assert that the holdings in the housing accommodation cases, though decided on the basis of California law, are of minimal relevance in the analysis of the permissibility of religious exercise under the Act. The housing cases essentially considered whether rental housing could be denied to persons because the acts of those persons would violate the religious beliefs of the owner of the housing (*Donahue / Molko*). The right to participate in a housing market unaffected by the viewpoint of private owners is simply too far removed from the issue of religious practices in charter schools to be of precedent value. In any event proponents will point out that that *Donahue* was specifically over-ruled in *Smith* which determined there was a compelling state interest in the area of public housing which, on balance, justified the burden on religious belief and practice, contested in *Donahue* and *Smith*.

One of the strongest arguments the proponents of the validity of the Act will make will be based on the results in *DiLoreto*. Therein the California Supreme Court held that a public school was a limited public forum, and that speech and activities in the school were subject to the reasonable control of school authorities. Additionally, and of more critical importance the proponents will argue was the finding in *DiLoreto*, that in that instance of a potential conflict between the rights of religious free exercise and considerations of establishment in the context of public schools, the government had a compelling state interest to uphold the prohibition of establishment activities at the expense of free exercise.

D. Areas Where Constitutional Conflict May Arise Under the Act.

The Act has not yet been judicially tested at either the federal or state level however based on informal reports of activities in which some charter schools are engaged there is a high degree of likelihood of the judicial review of certain practices. The areas where judicial review of charter school activities appear most likely include: the inclusion of prayers and religious study in the school curriculum; the use of school premises by outside groups, including groups engaging in religious activities; the sponsorship by schools of student publications including religious publications; and the use by schools of physical facilities which are provided by, or are a physical part of, a religious institution. The discussion of the basis the proponents and opponents of each of these charter school practices may be expected to make to support their position follows.

Prayers and Religious Activities in a Charter School

Prior to the promulgation of the Act there had been a statistically small but wide-spread practice of home schooling in California. Frequently this practice included the parents of a single family simply electing to educate their children at home as opposed to attendance at a public or private school. For the most part these

“home schools” were not incorporated or registered with the California Department of Education as private schools, but were conducted on a largely informal basis.

With the promulgation of the Act there arose an economic incentive for the “home schools” to form themselves as charter schools. After 1992 financial aid from state and local sources became available to “home school / charter schools” at approximately the same per pupil rate as state and local financial assistance was provided to the TPS. In many cases this financial carrot was a sufficient incentive to motivate them to reconstitute their home school efforts as a charter school under the Act.

Among others the report of the Little Hoover Commission found that many of the “home school / charter schools” routinely included prayers, religious study and other religious activities in their daily activities. There are anecdotal reports these practices have continued after the reformation of the “home school” into a charter school.

The issue is whether the acts of engagement in daily prayers, religious study or other religious activities may be validly precluded by the provisions of the Act which require that, “... a charter school shall be nonsectarian in its programs ... and all other operations...”.

Federal Courts

If an action were to be instituted in the Federal Courts supporters of the right for “home school / charter schools” to include prayers, religious study or other religious activities in their curriculum can be expected to rely on the holdings of *Pierce* and *Meyer*, *Yoder*, *Church of Lukumi* and *Rosenberger*, in support of their position.

Supporters of the Activities of “Home School / Charter Schools”

Supporters of the “home school / charter school” activities will argue under the *Pierce / Meyer* doctrine that federal courts have historically honored the fundamental right of parents to determine the nature of their children’s education. In California this right has been violated by the Act in the cases of those parents who wish to avail the advantages offered by charter schools and at the same time wish to have some element of religious practice included in the educational process of their children. Supporters will point out there is no violation of the state’s interest in the furtherance of the education of all of its citizens as was asserted in *Yoder*, rather in this instance the parents wish to exercise their fundamental interest by inclusion in a state sponsored educational program under the absolute direction of state authorities.

Supporters of the religious practices of “home school / charter schools” will argue there is no element of religious coercion or of the failure to equally protect the fundamental rights of other parents involved in the activities of “home school / charter schools”. Charter schools by definition are schools of choice to which an individual must specifically apply in order to gain admission. Parents who do not wish to have religious practices included in the educational process of their children may elect to attend a TPS or another charter school with different curriculum inclusions.

Supporters of the “home school / charter school” practices will cite the long standing principal in the federal courts first arising under *Shebert*, that where the purpose or effect of a law is to impede the observation of one religion, or all religions, the state must demonstrate that a compelling state interest is being furthered by the law in order for it to be constitutionally valid. Though the rule of *Shebert* was narrowed in *Employment*, supporters will distinguish the latter case on the basis that it was a matter arising from a criminal prosecution for use of a controlled substance, and for that reason not applicable to a civil matter involving public sponsored education. Supporters will also assert that the instance of “home school / charter schools” fulfills the constitutional hybrid exception noted in *Employment*, in that there are violations of two constitutional protections, namely: free exercise and freedom of speech, and for that reason the state still must demonstrate it has a compelling state interest in the enforcement of the regulation. Supporters may be expected to further argue that irrespective of the applicability of *Sherbert / Employment*, the nonsectarian provisions of the Act are not neutral, either on their face or as applied in actual practice (*Lukumi*). The effects of the Act if strictly controlled are very clear: religion – no, non-religion – yes. Clearly this constitutes the impediment of not one religion, but all religions.

With respect to the holding of the recently decided Washington Trilogy, supporters will contend that the result of that line of cases is not applicable to the situation of prayers in “home school / charter schools” which clearly constitute at least a limited public forum for the purpose of speech analysis. In the Washington trilogy there was no forum for public speech, but rather, a scholarship program to assist needy and academically qualified students. In the instance of a limited public forum, supporters will argue, the rules of *Rosenberger* would necessarily come into judicial consideration and in this instance would result in the judicial finding of the presence of constitutionally invalid viewpoint discrimination.

Supporters of the activities of the “home school / charter schools” will also assert the application of the nonsectarian provisions of the Act to their activities constitutes viewpoint discrimination of the nature found to be violative of the First Amendment freedom of speech in *Rosenberger*. Supporters will point to the fact that among other stated purposes in the Act for the formation and operation of charter schools are to: “... improve pupil learning ... [and] ... provide parents and

students with expanded choices of educational opportunities...”. Supporters will argue that under *Rosenberger*, where a limited public forum has been created that all groups must be entitled to participate in the forum on an equal basis and the denial of the right to participate in the forum because of the viewpoint expressed by that group constitutes impermissible viewpoint discrimination. Here the supporters will argue that the very creation of the right to operate a charter school, in and of itself, constitutes the creation of a limited public forum to which groups may not validly be denied access simply due to the point of view they wish to express.

In summation, the supporters of the right for “home school / charter schools” to include prayers, religious study or other religious activities in the curriculum and daily activities of their charter school will assert: the parents have the fundamental right to determine the nature and content of their child’s education, this right is violated by the Act which precludes religious inclusions in the programs and other activities of charter schools, and, since the operation of the Act will impede all religions the state must demonstrate a compelling interest in the enforcement of the Act for it to be valid. A further reason for the invalidation of the Act is that it is not neutral facially or in practice as it clearly discriminates against religious activity and encourages non-religious activity. Finally, the state having formulated a limited public form must permit all parties to express their respective views in that forum and to not do so will constitute constitutionally impermissible viewpoint discrimination.

Opponents of the Activities of “Home School / Charter Schools”

Those who contend the religious activities of “home school / charter schools” violate the Act and should be prohibited will rely on different interpretations of many of the same federal cases cited by the supporters commencing with *Pierce / Meyer*, including *Rust* and *National Endowment* and culminating in the Washington Trilogy.

Opponents will concede the rule of *Pierce / Meyer* favoring the fundamental right of parents to determine the nature of their child’s education, but will point out in actual practice the state has reserved and exercised the unilateral right to regulate public education in a variety of areas including curriculum selection and teaching standards (*Mozert*, et al.). Opponents will also note there has been only one instance in which the absolute right to determine the nature of his child’s education has been upheld at the U.S. Supreme Court level (*Yoder*) and that case focused on compulsory attendance laws and not on the issue of curriculum content which is the critical issue in the instance of the religious activities of “home school / charter schools”.

The argument will also be raised by the opponents of the activities of “home school / charter schools” that what is constitutionally protected is the right to

religious belief, but that protection does not necessarily become extendable to religious conduct (*Cantwell*). The determination of permissible conduct requires a balancing of the interests of the state which are being furthered under the Act with the burden on the rights which the supporters of “home school / charter schools” seek to exercise by virtue of their religious activities in charter schools. Opponents will assert the interest sought to be furthered by the state is the preservation of the federal constitutional provision that prohibits the state from taking any action which will result in the establishment of religion.

The second side of the balancing argument which opponents will assert is that the Act does not create any burden on the religious exercise of the supporters of “home school / charter schools”. Opponents will observe in this regard there is absolutely no provision in the Act which precludes the attendance by any student of any school that student may choose: private, religious or public. If a student elects to attend a school with religious inclusions in the school’s curriculum, the student is completely free to do so, it is simply the fact that the government may not be required to pay for that education (*Rust / National Endowment*).

The opponents will note there is an additional alternative open to the supporters of “home school / charter schools” who wish to include religious activities within the operations of their school. California charter schools have been legislatively and judicially determined to be public schools, and for that reason will be held to the same legal standards as a TPS. The access line of cases (*Widmar* through *Good News Club*) have concluded that public school facilities may be utilized by student groups and outside groups unrelated to the school for the conduct of activities, including religious activities, so long as the activities are conducted outside of the hours of normal operations of the school, the activities are conducted by persons other than the administrators, teachers and staff of the school and the activities are open to the public at large.

Opponents will argue that prayers and religious activities in “home study / charter schools” are precisely what may be precluded by California state constitutional provisions under the decisions reached in the Washington Trilogy. The provisions of Article IX, Section 8 are clear, that “No public money shall ever be apportioned for ... any ... sectarian ... school”. Stricter state provisions may be upheld even though they go further than the related federal provisions under the holdings of the Washington Trilogy.

In summation, the opponents of the inclusions of religious activities in the curriculum and activities of “home school / charter schools” will assert that while the right to hold religious belief is near absolute the right to engage in religious conduct is subject to regulation, the parents of children do have the fundamental right to determine the nature of their child’s education but that right has frequently given way to state regulation in the area of public education. There has been only

one case at the Supreme Court level which has upheld the absolute right of the religious free exercise of the parent over the interest of the state and that case was based on a mandatory school attendance law and not the inclusions in school curriculum.

California State Court Level

Supporters of the Activities of “Home School / Charter Schools”

If the issue of the permissibility of the religious activities of “home school / charter schools” was to be determined based on state constitutional law, the supporters may be expected to rely on the holdings of: *Woody*, *Donahue / Molko*, *DiLoreto* and *Van Schoick*.

Supporters will point out that where a regulation can be shown to abridge or limit religious exercise the burden will be on the state to demonstrate the compelling interest which the state seeks to further outweighs the burden on the religious exercise rights of the individual (*Woody*). Supporters will argue here the burden on religious activity in charter schools is absolute – there can be no sectarian activity in charter schools, whereas non-sectarian activities are permitted. Supporters should concede that the holding in *Woody* does not agree with the holding in *Employment*, however the California courts have only chosen to utilize the holding of the latter case in matters which were criminal in nature. The holding in *Employment* can be clearly differentiated from the case of curriculum inclusions in “home school / charter schools” which does not present any issue of criminality.

Finally, supporters of religious activities in “home school / charter schools” will note that public schools have been judicially determined to constitute a limited public forum in California (*DiLoreto*) and state case law regarding the access to a limited public forum has accepted the federal rule culminating in *Good News Club* (*Van Schoick*) which permits religious activities in a TPS under certain limited conditions. Clearly inherent in the utilization of this line of argument is the acceptance by the supporters of religious activities in “home school / charter schools” of the limitations on religious activities as set forth in the *Widmar* through *Good News Club* line of cases.

Opponents of the Activities of “Home School / Charter Schools”

The opponents of the right to include prayers, religious study or other religious activities in “home school / charter schools” will base their state law arguments on the holdings of: *Employment*, *DiLoreto*, *Lopez / Cohen* and *Leventhal*.

Though *Employment* was a federal case, it was more importantly a decision of the U.S. Supreme Court. Though *Employment* did not specifically overrule the

holding in *Woody*, the opponents will contend that it did so implicitly, by virtue of an opposite decision on nearly identical facts. As a decision of the highest court of the land the outcome of *Employment* should control the issue of the level of state interest required to invalidate a regulation which impedes a religious practice, and that level of interest should be one of a rational interest rather than a compelling state interest.

Finally, opponents will put substantial emphasis on the holding of the California Supreme Court in *DiLoreto* that determined in the case of conflict between rights and obligations arising under the Establishment Clause and the Free Exercise Clause of the state constitution the protections of the Establishment Clause will be given preference. The financial support of “home school / charter schools” which do include prayers, religious study or other religious activities in their daily curriculum is a clear violation of the establishment principles, and for that reason alone the practice should be precluded irrespective of the impact on the religious practices of the supporters of “home school / charter schools”.

Use of a Charter School By Outside Groups for Religious Activities

California charter school legislation has not until recently provided funding for the acquisition of a physical plant for a charter school. The provision which took effect in November 2003 provides for bond issuance procedures that may eventually provide physical facilities for approximately one-half of the present charter school population.

In some instances the requests for multiple uses of the charter school facilities include uses that constitute religious activities which may be argued to violate the “... nonsectarian ... programs ... and all other operations ...” requirements of the Act. In view of that requirement the issue which may arise is to what extent, if any, may the physical plant of a California charter school be used by students or unrelated third parties for the conduct of: prayer services, religious study or other religious activities?

Federal Courts

If an action were to be initiated in the federal court system to uphold the right of a charter school to utilize its facility in part for the purposes conducting prayers, religious study or other religious activities supporters of the action would likely center their arguments on the holdings of the *Widmar* to *Good News Club* line of cases and *Rosenberger*.

Supporters of the Use of Charter School Facilities for the Conduct of Religious Activities

Supporters of the use of charter school facilities for religious activities will point out that a public school has been held to constitute a limited public forum (*Perry*) and in those instances where school officials have chosen to open the school to a variety of student and faculty groups for use after normal school hours a limited public forum has been created from which religious groups may not be excluded (*Widmar*). The rule of *Widmar* was extended to public secondary schools in *Mergens* and to unrelated outside adult community groups in *Lambs Chapel*. Finally the rule was extended to the use of primary school facilities in *Good News Club* with the requirements that: the use of the school facility must be outside of the normal school hours of operation, the religious activity may not be conducted by the members of the administration, teaching faculty or other staff of the school and the activity must be open to the public.

Supporters of the conduct of religious activities in charter schools will also argue that because a charter is a public school, it is also a limited public forum. Enabling provisions of the Act provide (among others) the purposes for the creation of charter schools included: [to] “improve pupil learning” and “provide parents and students with expanded choices of educational opportunities...”. Supporters will argue that both of those purposes are being served by providing expanded activities and curriculum, which in this instance happen to be religious in nature. Under *Rosenberger* supporters will then argue that once the State of California established a forum for expression vis-à-vis the charter school program, it could not then deny the use of the forum to persons because of the viewpoint they wish to express, without violating the constitutional protections of the freedom of speech.

If the matter were to be conducted under California state law the supporters of religious activities in charter schools would follow the same lines of argument based on the holding in *Van Schoick* which effectively adopted the federal rule as set forth in the *Widmar* to *Good News Club* line of cases.

Opponents of the Use of Charter School Facilities for the Conduct of Religious Activities

Opponents of the conduct of religious activities in charter schools will base their arguments on a different interpretation of *Rosenberger* and also the obligations of school officials to act when the speech of a student will be attributable to the school as set forth in *Hazelwood*.

In the instance where a school has retained its limited public forum status, opponents will point out that public schools officials retain broad authority to determine what the content of speech when that speech will bear the imprimatur of the school (*Hazelwood*). Here the opponents will argue that the speech which is constituted by prayers, religious study and religious activities is, by definition,

religious in nature. The attribution of religious speech to a public school constitutes a clear violation of the prohibitions of the Establishment Clause and has not been upheld in any federal court decision.

Opponents will also argue that the facts of *Rosenberger* which involved a limited public forum in the setting of a major university should be distinguished from the daily realities of often small charter schools which include students at the primary and secondary levels. Opponents will argue that university students are more likely to have the maturity and developed intellectual capabilities to be able to evaluate and analyze the content of a message which may be partially religious in nature. The same is not the case for children as young as five years who are more likely to be coerced by friends or adults into participation in the religious activities conducted within the walls of a charter school. Opponents will also note that *Rosenberger* is further distinguished due to the fact that the fund there in question was created by the individual contributions of the university students and was not a result of direct state funding, as is the case for California charter schools. For those reasons, opponents will contend that the activities including: prayer, religious study or other religious activities should not be permitted in a charter school to any degree.

If the matter were to be determined under the law of California the opponents will be able to strengthen their argument based on the holding in *DiLoreto*. In that matter the California Supreme Court held that in the instance of a conflict between the establishment and free exercise rights of the state constitution, the protections of the establishment clause constitute a compelling state interest sufficient to overcome the burden on the individual's rights of free exercise and free speech (*DiLoreto*). As such the opponents will argue notwithstanding the *Van Schoick* acceptance of the federally based equal access cases, the proposed religious activity within a public school constitutes a clear violation of the California establishment and no preference clauses and is therefore impermissible.

Student Publications With Religious Viewpoints Published In A Charter School

There have been a series of reports of publications written by the students of a charter school which have included religious subject matter and/or encouraged specific religious beliefs or points of view. The issue which is presented is the extent to which a publication composed in a charter school or by charter school students may validly treat religious subject matter or points of view in light of the inclusion of the nonsectarian requirements of the Act.

Federal Courts

Proponents who favor of the right of students of a charter school to produce publications which contain religious content or encourage a religious viewpoint will rely most heavily on the holding arising from *Rosenberger* and the access line of cases.

Proponents of the Right of a Charter School to Support a Publication Which Includes Religious Content

In order to prevail to any degree proponents of the right of charter school students to engage in the publishing of articles with religious content and/or viewpoint should concede the rules set forth in the access line of cases would have to be observed in order for the publication to retain constitutional validity. That is, the resulting publication would have to be produced outside of the normal hours of the school's operations, there could be no involvement in the publication by the administrators, faculty or other staff of the school and the act of the preparation of the publication would be open to the participation of the wider public as a whole. Proponents will argue that if those requirements are observed the publication should be permitted in the cases of high school students (*Mergens*), outside groups of interested persons with no connection to the school (*Lamb's Chapel*), and even to the level of a primary school with children in the age range of 6 to 12 years (*Good News Club*).

Proponents of the right of charter school students to produce publications with religious content will also argue the precedent for their assertion was clearly validated in *Rosenberger*. The rule of *Rosenberger* which the proponents will argue is determinative of the issue concerning religious publications in a charter school, is that where a limited public forum has been established the act of the denial of the use of that forum to a specific group because of the viewpoint it wishes to express constitutes constitutionally invalid viewpoint discrimination. In the case of a charter school once the forum has been opened groups wishing to engage in the production of a publication irrespective of the subject matter, be it: outdoor gardening, scuba diving, religion, etc., must have equal access to the use of the forum.

Opponents of the Right of a Charter School to Support a Publication Which Includes Religious Content

Opponents of the right of charter school students to produce publications with religious content or favoring a specific religious point of view will support their arguments based upon the holding in *Hazelwood* and different interpretations of the holdings in *Rosenberger* and the access line of cases.

In reviewing the activities of a high school newspaper *Hazelwood* determined there was an obligation on the parts of the school administration and the

supervising teacher to review and exercise final authority over the content of a student publication when that publication was a part of the regular activities of the school and could be interpreted to bear the imprimatur of the school. Opponents will argue that any publication with religious content produced during the normal operations of a charter school and under the supervision of a teacher or administrator of the school clearly violates the prohibitions of the access line of cases.

Opponents of student religious publications in charter schools will argue that the holding of *Rosenberger* must be distinguished from the facts regarding a religious publication in a charter school. Opponents will point out that the very vast part of the funding and financial support for the existence and operation of a charter school comes from public sources, and not as in *Rosenberger*, from private contributions. Under the prohibitions of the establishment clause public funding may not be used to support a publication with religious content of the nature suggested by these facts.

Use by a Charter School of a Physical Facility Owned or Operated by a Religious Institution

For the first ten years of operation of the Act with one exception there was no provision for state assistance with the provision of the physical facility to be used by a California charter school. The sole exception was a provision of the Education Code which provided that in those cases where the school district in which a charter school was located had an unused building that preference for the use of that building should be given to a charter school. In actual practice this was reported to be a rather hollow provision, due to the fact that few school districts had buildings suitable for classroom instruction which were not already in use. Starting in November 2003 individual school districts have bonding authority for the construction and maintenance of charter school facilities, subject to the requirement that the resulting charter school may only be used for students who reside within the school district. Given the fact that reportedly nearly half of charter school students attend a school in a school district other than where they reside, this means that nearly half of the California charter school students will continue to attend a school that has not received financial assistance from state or local authorities for the retention of its physical facility.

In response to the tension resulting from the lack of provision for a physical facility in which a charter school may operate, numerous operators of charter schools have entered into either beneficial or market rate arrangements with a third-party owner of a building which is suitable for use as a charter school. In certain instances the third-party supplier of the building has been a religious entity or religiously affiliated institution. In some instances the charter school became the sole user of the building in question, while in other cases the building was used

jointly by the charter school and the religious entity or religiously affiliated institution. The issue that may arise is whether the use of a building, owned by a religious entity or religious institution, for the operations of a charter school, on either a stand alone or joint basis, is a permissible activity under the Act.

Federal Court

In the event of the use of a religious property for the conduct of its activities the ultimate determination of the court will likely depend upon its interpretation of the constitutionally required balance between the obligations of the state under the establishment clause and the rights and obligations of a private individual under the free exercise clause.

Supporters of the Right of a Charter School to Operate in A Facility Provided by or Occupied With a Religious Entity

Supporters of the right of a charter school to use the facilities of a religious entity or institution will argue that under the establishment clause it is not the style or function of the physical structure in which any school is housed which has been found to violate the establishment preclusions of the First Amendment. Rather it has been the nature or content of the teaching or learning activities within the school that, in part, have been found to violate the principle of establishment. Supporters will argue that what is involved in the case of the use of a building owned by a religious entity is no more constitutional infirm than the use by the school of any other physical plant. Supporters will point to the evolving nature of the activities which have been determined to be permissible in schools, which among other activities now permit public school teachers to enter the premises of religious schools for the purpose of teaching non-sectarian subject matter (*Agostini*). If the public payment for teaching services provided in the setting of a sectarian school is constitutionally permissible, so too should be the provision of nonsectarian teaching services be permitted within a school which occupies a building which is merely owned by a religious entity.

Opponents of the Right of a Charter School to Operate in A Facility Provided by or Occupied With a Religious Entity

Opponents of the right of a charter school to utilize facilities provided by a religious entity will point to the long line of holdings under the establishment clause that have upheld the provision by the state of aid to religious entities or organizations, the so-called "Establishment Defense". Additionally, and without regard to any direct monetary benefit which may be provided to the religious entity, opponents will argue that the specter of a publicly funded charter school conducting its operations within the confines of a building owned by a religious entity, or worse yet, conducting its operations in a building jointly occupied with a religious entity,

will simply be perceived in the public arena to constitute the support of the efforts of that religious entity by the state, a constitutional infirmity under the First Amendment.

If the matter were to be determined in a California state court, opponents would buttress their argument by use of the holding in *DiLoreto*, which briefly stated holds that in those cases of conflict between the rights and obligations of the state under the establishment clause and the rights and obligations of an individual under the no preference clause of the California constitution, the rights of the state will be superior to those of the individual.

Summary

The purpose of the analysis in this chapter was to identify those areas which in actual practice in California charter schools may result in judicial review, and to identify and analyze the main lines of argument which proponents and opponents on each side of the particular practice may be anticipated to take.

It is sufficient to note that many of the cases cited at both the federal and California state levels have been decided by the narrowest margin. At the US Supreme Court level there have been numerous votes of 5-4, while at the California Supreme Court level there have been many decisions reached by a 4-3 margin. It is apparent that the change of a single justice on either court may produce decisions in a different direction than has been the track record thus far. What course the future judicial appointments of either court will take is open to conjecture, but without any doubt at least bears the potential to affect the jurisprudential track established to this point.

California has elected to follow the rules of the access line of cases, however there is uncertainty whether California will follow the rule of *Employment Division* in those cases which are not criminal in nature. That is, if the statute in question is religiously neutral, the state will not be required to demonstrate a compelling state interest in order to enforce the statute. There is additionally state Supreme Court precedent in California (*DiLoreto*) for the proposition that where establishment obligations of the state conflict with the free exercise rights of an individual, the state will prevail.

Certain practices of some California charter schools appear to be particularly likely to trigger judicial review, either under the Act or under the federal or state constitution.

Some former home schools included prayers and/or religious activities in their daily activities. Under the access line of cases at either the federal or California state court level such activities would be likely to be determined to be

constitutionally valid only is said activities were: conducted outside of the normal school hours of operations, conducted by persons other than the administrators, faculty or staff of the school, and were open to the general public at large.

A charter school is a public school and in most cases will therefore constitute a limited public forum, in which the subject matter of speech or speaker may be subject to valid limitations. When held open to use by public groups or persons, persons proposing to participate in religious activities may validly use the physical facility of a charter school to the same extent that other public groups are permitted to do so.

A charter school has an obligation to regulate activities and speech which will be perceived by the public to bear the imprimatur of the school. Unless the rules of the access line of cases are observed, it is unlikely that student publications expressing or encouraging specific religious viewpoints will be found to be constitutionally valid.

Some charter schools receive sponsorship in various forms from a religious entity or institution. Whether the assistance will be determined to be legally valid will likely determined on a case-by-case basis and will depend upon whether the assistance is determined to be secular or sectarian in nature.

Finally, it may now be strongly argued on the basis of the Washington Trilogy, that in certain circumstances state constitutional provisions may be upheld as valid and enforceable even where that would not have been the case under the federal constitution. Those who opposed the outcome of the Washington Trilogy will contend its results are inapplicable to public school cases as there was no forum for speech created by the scholarship programs under scrutiny in the Washington Trilogy cases.

Chapter IV.

Summary, Current Status of Areas of Potential Legal Conflict, Future Developments and Further Research

A. Summary

The nonsectarian provisions of the California charter school legislation may provide the opportunity for the expansion of the existing constitutional jurisprudence in the areas of religious free exercise and freedom of religions speech, not solely within the State of California, but at the national level as well. Additionally, due to the fact that charter schools in California have been judicially and legislatively determined to be public schools, evolving jurisprudence in the

areas of free exercise and freedom of religious speech resulting from conflicts related to a charter school, will arguably be fully applicable to all public schools as well.

In the final three decades of the Twentieth Century, and as a general proposition, the balance of power between the constitutional areas of the First Amendment dealing with establishment and free exercise rights and obligations experienced a period of relative moderation. During the period constitutional areas which had formerly been strictly divided by the stark wall between church and state experienced numerous judicial decisions which tended to be more accommodating of the beliefs and activities of the individual person and less absolute on the issue of strict religious separation.

In the area of free exercise the courts have nearly universally upheld the right of an individual to hold whatever religious belief may be acceptable to that individual (*Cantwell*). However, when an individual begins to engage in activities based upon the exercise of that religious belief, the courts have upheld a series of limitations in protection of the superior interests of the state. In the area of education several early cases (*Pierce / Meyer*) spoke broadly of the interests of the parent to determine the course of education of their children. However, only one case in the area of free exercise (*Yoder*) protected the right of a parent to so act, and that was a matter regarding mandatory school attendance and not curriculum or the daily activities which transpired in the school. In the main, issues potentially affecting free exercise, such as: curriculum inclusions, content of student publications, speech of individual students, etc. have been decided in favor the school (*Mozert / Hazelwood / Tinker*).

One area where there has been a notable expansion of the rights of free exercise in the context of public schools has concerned the right of outside persons to use a public school facility for religious purposes or activities. A series of decisions, known as the equal access line of cases (*Widmar / Mergens / Lambs Chapel / Good News Club*), has expanded the right to use public school facilities for religious activities from: college students, to outside adult groups to student high school groups to groups of children as young as first grade. Those rights are not absolute and are conditioned on the activities being conducted during periods which are not the normal hours of operation of the school, the exercises may not be fostered or aided by the administrators, faculty or staff of the school and the activity must be open to the participation of the public at large.

One area of free exercise in which a limited number of decisions have been rendered, but which is potentially applicable to the judicial determination of the validity of the Act concerns a law or regulation which specifically targets the exercise of a religious belief or practice. The general rule in the area of the infringement or regulation of a religious practice is that the law or regulation must

be neutral and generally applicable to all persons (*Lukumi*). Where a regulation attempts to restrict a religious practice because of its religious motivation, the principle of neutrality will be likely to invalidate the regulation.

Even in the event it will be determined that the state does not discriminate against religion under the free exercise principles set forth in *Lukumi* by virtue of funding public but not religious charter schools, it may be possible to assert that the state does discriminate against selected viewpoints, in this instance, a religious viewpoint, which is a constitutionally protected area under the Freedom of Speech clause of the First Amendment.

The leading case in the free speech area of constitutional analysis evolved from the restriction of use of a student activity fund at the University of Virginia (*Rosenberger*). In that matter the university determined that payments from the fund for non-religious student publications were permissible while payment for a student publication which espoused a religious viewpoint was impermissible. Critical to the decision in *Rosenberger* was the distinction between content and viewpoint discrimination. Content discrimination was determined to be discrimination against speech due to its subject matter, and was held valid in the case where it preserved the purpose of the limited public forum in which the speech transpired. Viewpoint discrimination, conversely, was determined to be discrimination based on the motivating ideology, opinion or perspective of the speaker and was held to be impermissible when directed against speech otherwise within the limitation of the forum.

It is under these two constitutional provisions regarding free exercise of religion and the freedom of religious speech that the validity of the Act will likely be determined. As set forth in Chapter III hereof, valid and coherent arguments may be asserted by both supporters and opponents of the constitutionally validity of the Act.

B. Current Status of Areas of Potential Legal Conflict

At issue in this article is the provision of the California charter school enabling legislation which provides that a charter school must be, "... nonsectarian in its programs ... and all other operations...".

Some parties assert that the Act constitutes an absolute ban on any religious practice or activity within a charter school, while others contend as a minimum a charter school should be permitted the same degree of religious exercise as a TPS. Others take the position that as charter schools were created to eliminate state regulation, they should be free to include religious study and activities if they so choose.

Though difficult to predict with certainty, cases involving California charter schools seem especially likely to arise in matters relating to: the curriculum inclusions and practices of some home school / charter schools, the use of the charter school facility by outside groups for religious activities, the inclusion of religious subject matter in student publications, and the use by a charter school of a physical facility owned or operated by a religious person or organization.

The following sections of this chapter present the viewpoints of the author, based upon the actual present state of the law, as to how the conflicts noted in Chapter III would be judicially resolved if tested at this time.

1. Curriculum Inclusions and Practices of Home School / Charter Schools

There is anecdotal information that persons engaged in home schooling prior to the promulgation of the Act formalized their educational efforts in order to be eligible to receive public funding to operate as a charter school. There is evidence that at least some of these home schooling efforts routinely included prayers, religious study and religious activities in the curriculum of their home schooling efforts, and in some instances these religious practices have continued after the qualification as a charter school.

The inclusions of prayers, religious study and other religious activities in the normal course of operations of a publicly supported charter school, absent any other limitation, would almost certainly be found to violate the nonsectarian provisions of the Act and the relevant provisions of the federal and California constitutions as well. Up to the present time there is absolutely no decision at the top levels of the California or federal court systems which supports the proposition that clearly religious activities, including prayers, may be authorized or supported by the administration, faculty or other staff of a public school if conducted during the normal hours of operation of the school. Hence, the conduct of prayers or other religious activities by the administrator, faculty member or staff member of a home school / charter school, absent any other limitation, is nearly certain to be invalidated by a federal court or a California state court.

Assuming a charter school meets the criteria to qualify as a limited public forum and, further, that allowances have been made for community groups to use the charter school facility, then the activities including: prayers, religious study or other religious activities may well be permissible so long as they are conducted outside of the normal hours of the school's operations, the activities are conducted by persons other than the administrators, teachers or staff or the school and the activities are open to the participation of the public at large.

The determination of the actual facts of a case to arise in this area will likely dictate the resolution of the matter. However, based upon the present status of the

federal and California law, the assertion that prayers or other religious activities may be validly included in the curriculum of a California charter school would be judicially denied.

2. Access to Charter School Facilities for Religious Exercise

With some exception, most charter schools do in one manner or another occupy a physical premises in which the activities of the school will be conducted. Charter schools have been both, judicially and legislatively determined to be public schools, and for that reason, subject to the same legal operating limits and restrictions as any other public school. In the case of TPS both federal courts and the courts of the State of California have determined that students, faculty and outside parties unrelated to the school have limited rights to use the physical premises of a public school for the purposes of religious exercise and speech, where the school has been held open for the use by other non-religious groups.

The two-fold threshold tests for the adjudication of the rights of access for the purposes of religious exercise or speech as determined in the *Widmar-Good News Club* line of cases are: that the charter school constitutes a limited public forum, and that the governing body of the charter school has held its physical facility open for the use of outside third parties unrelated to the school. In this regard, there is little doubt a charter school (as is the case with nearly all TPS) constitutes a limited public forum.

Hence, if the matter was to be decided at this time, and on the assumption that the governing board of the charter school had made its physical facility available to the use of persons or groups unrelated to the school, then based on the principal of viewpoint discrimination, a charter school would likely be judicially required to permit the use of its facility by persons or groups seeking to engage in religious study or activities, to the extent that the limitations as set forth in the access line of cases are fully observed.

3. Publications with Religious Content by a Charter School

Whether charter school students will be permitted to engage in the publication of a student newspaper with religious content or the inclusion of specific religious viewpoints will likely turn on whether the actions related to the publication would be perceived to constitute an action, or bear the imprimatur, of the charter school.

Where the publication with religious content was prepared in the course of a normally scheduled journalism class of the charter school, directed by a teacher employed by the school and subject to the review of the administrators of the school, it is highly likely that such circumstances would amount to the support of the school

of the publication and for that reason would violate the Act and the relevant provisions of the federal and California constitutions. Under these circumstances the actions of the charter school would be judicially barred.

Conversely, if the publication was intended to be a limited open forum for the expression or exchange of views of all members of the community, if the publication was prepared away from the school site and not as a part of a regularly scheduled class of the school and there was no oversight by a teacher or administrator of the charter school, the publication even with its religious content would not be likely to be found to be in violation of the Act or of the relevant constitutional proscriptions.

4. Support of Charter Schools by Religious Institutions

There are ample indications that some charter schools receive direct support from religious institutions or persons who espouse specific religious beliefs. In some instances this support takes the form of the provision of the space in which the charter school conducts its operations, by a religious person or entity. How this potential conflict between actual charter school practice and the letter of the law will be resolved will likely turn, in part, on which forms of support the courts will determine are sectarian.

Though once public assistance to a religious school was nearly absolutely prohibited, recent decisions have followed a more accommodating line of reasoning and have permitted public aid to religious schools where the aid could be considered to be religiously neutral. Public assistance to religious schools in the forms of: subsidized standardized academic testing, language support assistance, provision of teaching assistance in secular areas (chemistry, physical science, home economics, etc.) and the provision of temporary classroom space, have all been held to be permissible public funding activities. It is under this principle of religious neutrality that the provision of space by a religious person or entity for a charter school to use as its facility for operations would likely be measured. It is the case as well, that in the determination of the validity of the First Amendment religious rights and obligations, both the federal and California state courts have resorted to a methodology of systematic balancing of the principle facts of a matter. It is likely that a mechanism of balancing of the overall facts would be employed with respect to the judicial analysis of the provision of operating space by a religious person or entity to a charter school.

In many of the cases in this area the courts have focused on two distinctly different factors: the extent to which the activity in question represents an effort to inculcate or further a religious viewpoint, and the perception on the part of the general public whether the activity is religious in nature.

To the extent that the space provided for the use of the charter school was provided on a market rate basis, or even below the market rate, with no further obligation to the provider of the space on the part of the charter school, it is unlikely a court would find a violation of the federal constitution. The same conclusion would be reached in the case where the space provided was devoid of religiously linked symbols. As well, the California state constitutional provisions speak in terms of the prohibition of public assistance to religious institutions, and that is not the case here, which rather involves assistance from a religious person or entity to a public entity. The theory recently to emerge from the Washington Trilogy is not likely relevant in such a case, as that line of cases was based on a student scholarship program which was determined not to constitute a limited public forum. As previously noted, there is little doubt that a charter school would be very likely to be considered to be a limited public forum, and for that reason, subject to the content / viewpoint distinctions on which basis the *Rosenberger* decision was decided. Hence, even though California does have very strong nonsectarian requirements in various places of its state legislation, they would not likely come into consideration in this instance.

In the instance where a charter school is physically housed in the same physical structure as a religious institution there is a logical possibility that the perception in the public arena would be that the school was operating as a part of the religious entity. To the extent the perception that the charter school and the religious entity were directly linked or associated, the practice of jointly sharing space would likely be held to be constitutionally impermissible.

C. Future Developments and Further Research

There are few cases at either the federal or California state levels which have specifically focused on a precise definition of the term “sectarian”. Rather, the courts have focused on specific activities which when analyzed through the filter of the religious provisions of the First Amendment have thereafter been determined to be in accord with, or violate, the establishment or free exercise provisions of the First Amendment, or the similar provisions of the California Constitution.

The outcomes of cases at either end of the spectrum of religious exercise in the context of a charter school are fairly easy to predict. A curriculum plan which proposed to include religious prayers during the normal school day conducted by public teachers in a school classroom from which members of the public were barred, would almost certainly be held to be constitutionally invalid. Conversely, a program which proposed to permit outside groups to use the physical facility of a charter school for religious study or exercise outside of the normal school hours of operation, where no public school administrators, teachers or other staff members participated and the event was open to the public at large, is likely equally certain

to be decided not to violate the sectarian provisions of the Act or related constitutional provisions.

The difficulties in predicting the result of a court determination concerning “sectarian” behavior potentially will arise in cases where the factual scenarios are not so clear-cut. What will be the determination of a matter where an Islamic Mosque provides school room space free of charge to a charter school and provides religious instruction in that room, but after the normal school day? Will there be a different result if there is a rental charge for the space, either on a beneficial basis or at market rates? What decision will result if the space is across town from the mosque, if it is immediately adjacent to the mosque or if it is a part of the mosque itself? These are factual scenarios in the areas of free exercise and freedom of speech on which courts have yet to opine.

Another set of scenarios may turn on the possible financial contribution from a religious organization to a charter school. May a Jewish synagogue make a contribution to a charter school for its general operating fund? What if the contribution is earmarked solely for the support of educational efforts in the areas of math and science? Does the same judicial result attach if the contribution is made for general purposes, but specifically includes the study of religion generally? What if the limitation for religious study provides specifically for the study of Jewish and Christian religions, but precludes the study of all other religions? What if the contribution requires that it only be used for the study of the Jewish religion? It remains an open question with respect to which of the foregoing factual scenarios will be determined by the courts to cross the line of the sectarian preclusion of the Act.

What of the provisions of services to a charter school? Will a retired Catholic priest with a Ph.D. in physics from UC-Berkeley be permitted to teach science in the charter school? What instead if the priest rather than being retired is still the Rector of St. Anne’s Catholic Church in San Anselmo and teaches physics in his off hours from the church? What of the situation where the priest, in addition to teaching physics also will teach a general class on world religions? What result in the situation where the priest will teach a course specifically on Catholic theology, however open to students of all religious persuasions? In the area of services provided to a charter school where the courts will draw the line regarding acceptable non-sectarian behavior remains to be determined.

As the foregoing examples demonstrate, the determination of what will meet the sectarian test of the Act may not be as straight forward as may have seemed to be the case at the outset. In all likelihood judicial decisions in this area will have to be made on a case-by-case basis, and may provide limited precedent insight from one matter to another.

In addition to the uncertainties which arise due to the gaps which exist between the facts of those cases which have been decided, there is the element of the constant changing composition of the top and appellate level courts at both the federal and California state levels. Many of the most critical decisions noted herein have been decided by a single vote. In the practical world of partisan politics, it has certainly been the practice at both the federal and state level for the chief executive to appoint persons to the judiciary who will reflect the political viewpoints of the chief executive. In the coming years there are substantial possibilities that the political affiliations of the person occupying the White House or the Executive Mansion in Sacramento will change from one political party to another. In the event of the change of the political affiliations of the chief executive, it is likely as well, the political viewpoints of the subsequent nominees to the top level courts in both the federal and California state judicial systems will also change.