First Amendment Jeopardy!

A City Attorney's Survey of Key First Amendment Issues

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INTRODUCTION

This survey is intended to be a reference guide to First Amendment issues that city attorneys routinely face. Experienced city attorneys approach First Amendment law with great respect, and perhaps even a degree of intimidation. The material presented below will be a starting point for your own in-depth research, not a replacement for it.

Like the popular television game show Jeopardy!, this survey is organized into six categories:

- Assembly, Demonstrations & Parades
- Commercial Speech & Billboards
- Establishment Clause
- Free Exercise Clause & RLUIPA
- Obscenity & Sexually Oriented Businesses
- Speech Rights of Public Employees

The discussion will address First Amendment case law, some Colorado constitutional case and statutory law, and the land use part of the federal Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000dd-1.

An appendix with the text of the relevant constitutional provisions and statutes is attached, as is a table of authorities.

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ASSEMBLY, DEMONSTRATIONS & PARADES

Peaceful Assembly

Modern Supreme Court analysis of the right to assemble peacefully begins with *De Jonge v. Oregon*, 299 U.S. 353 (1937). In *De Jonge*, the Court held unconstitutional an Oregon "criminal syndicalism" law under which the defendant had been convicted and sentenced to seven years' imprisonment for merely assisting in the conduct of a public meeting held by the Communist Party. The Oregon law forbade conducting, or assisting in the conduct of, any assembly of a group that advocated any crime, violence, sabotage or other unlawful means of "effecting industrial or political change or revolution," i.e., the Communist Party at that time. *Id.* at 357. At the time of the public meeting, the Portland police were apparently engaged in less-than-gentle efforts to break a longshoremen's and seamen's strike; the meeting was held by the Communist Party to protest those actions and to recruit new members. *Id.* at 359. There was no evidence that any criminal advocacy occurred at the meeting.

The Supreme Court distinguished its earlier cases upholding similar laws in California and New York against First Amendment attack. The earlier cases held that by writing a "manifesto" in one case, and by forming a "revolutionary" organization in the other, the California and New York defendants engaged in conduct advocating the unlawful overthrow of the government, and that the Constitution did not protect those activities. *Id.* at 363-364; *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925). In fact, as the Court admitted years later, *De Jonge* represented a doctrinal shift to reject state laws that suppressed the right to assemble peacefully. The Court declared assembly rights "fundamental" and "cognate to those of free speech and free press." *De Jonge*, 299 U.S. at 364. In sweeping language, the Court articulated its lasting theorem that protecting fundamental First Amendment rights is the best defense against violent overthrow of the United States:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. *Id.* at 365.

Brandenburg v. Ohio, 395 U.S. 444 (1969) completed the Court's rejection of syndicalism laws that punished criminal advocacy alone. In *Brandenburg*, the leader of a local Ku Klux Klan chapter was convicted under an Ohio syndicalism law described by the Court as "quite similar" to the California law upheld forty-two years earlier in *Whitney,* 274 U.S. 357. The evidence included film of an organizers' meeting at which

the defendant threatened "revengeance" against the President, Congress and the Supreme Court for continuing to "suppress the white, Caucasian race." *Brandenburg,* 395 U.S. at 446. The *Brandenburg* Court added a new "imminent incitement" requirement to restrictions on such otherwise peaceful assemblies:

> . . . the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation ***except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . .*** 'the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' *Id.* at 447-448; *emphasis added, citations omitted*; *but see United States v. Abel*, 469 U.S. 45 (1984).

Post 9/11, the Court continues to follow *Brandenburg*, but in 2002 Justice Stevens wrote a "statement" in connection with denying *certiorari* in a criminal syndicalism case involving an Arizona street gang. *Stewart v. McCoy*, 537 U.S. 993 (2002). He suggested that the Court may not require imminence when the speech performs a "teaching function," i.e., "[l]ong range planning of criminal enterprises – which may include oral advice, training exercises, and perhaps the preparation of written materials – involves speech that should not be glibly characterized as mere "advocacy" and certainly may create significant public danger." *Id.* at 470.

Demonstrations & Parades on Public Property

The Supreme Court's view of demonstrations and parades on public property has likewise developed over the last 100 or so years. In *Davis v. Massachusetts*, 167 U.S. 43 (1897), the defendant was convicted of giving a public address on the Boston Common – apparently a sermon – without a permit from the mayor. The Supreme Court upheld the conviction, notwithstanding the mayor's unfettered discretion to grant or deny a permit, on the theory that the City of Boston had essentially "proprietary" control over the Common:

> For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. *Id.* at 47.

The Court found no problem with the mayor's unfettered discretion because:

> . . . the right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of. . . . *Id.* at 48.

Davis was seriously questioned in *Hague v. CIO,* 307 U.S. 496 (1939), and by 1951, the Court appeared to categorize public property assembly cases under a prior restraint-like analysis. *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951). In *Niemotko*, a group of Jehovah's Witnesses were denied a permit to conduct Bible talks in the public park of the city of Havre de Grace, Maryland. The city had no ordinance or rule of any kind regulating use of the park. *Id.* at 271. The Court found the city's denial unconstitutional, and described earlier cases in which permit schemes were condemned as "prior restraint[s]" that lacked "narrowly drawn, reasonable and definite standards for the officials to follow." *Id.* at 271; *but see Cox v. New Hampshire*, 312 U.S. 569 (1941) [upholding broadly discretionary parade permit requirement]. Likewise, *Forsyth County v. Nationalist Movement,* 505 U.S. 123 (1992), which struck down a Georgia county parade ordinance, is replete with references that suggest prior restraint analysis.

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However, by 2002, the Court had disclaimed ever following a prior restraint analysis in public property speech and assembly cases. Thus, in *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002), a unanimous Court rejected a marijuana advocacy group's claim that the park permit scheme was unconstitutional because it lacked *Freedman v. Maryland,* 380 U.S. 51 (1965) prior restraint procedural protections, including the requirements that the government initiate judicial review of permit denials and that there be a prompt deadline for judicial review. Notwithstanding *Niemotko* and *Forsyth County*, the Court announced that:

> We have never required that a content-neutral permit scheme regulating speech in a public forum adhere to the procedural requirements set forth in *Freedman.* "A licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like." *Id.* at 322-323 [quoting Justice Frankfurter's concurrence in *Niemotko*, 340 U.S. at 282].

Instead, content-neutral time, place and manner regulations must have "adequate standards to guide the official's decision and render it subject to effective judicial review." *Thomas*, 534 U.S. at 323. And, the traditional time, place and manner test applies, i.e., the regulations "must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." *Id.* at 323, n. 3, quoting *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130 (1992); *see also Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984). Moreover, the Court accepted some discretion in the permit system ("may deny"), noting that any abuse of discretion by the permitting authority could be dealt with "if and when a pattern of unlawful favoritism appears . . . ." *Id.* at 325.

Although *Forsyth County v. Nationalist Movement,* 505 U.S. 123 was rejected in *Thomas* with respect to the applicability of prior restraint analysis to content-neutral public property assembly permits, the case survives in some important respects. Of special interest to resource-limited cities, *Forsyth County* instructs that public property permit systems cannot allow a permit fee to be established without "articulated standards" and "objective factors." *Forsyth County,* 505 U.S. at 133. Thus, the County's parade permit failed constitutional muster because it gave the county administrator too much discretion to determine the level of a permit fee, even though it suggested that the fee would be based on actual "expense incident to administration . . . and maintenance of public order." *Id.* at 127.

Thomas assures a favorable standard of review for city public property demonstration permit systems. In 2005, the Tenth Circuit Court of Appeals upheld Denver's use of an *unwritten police department policy* as a sufficient basis for banning sign or banner-carrying protesters from highway overpasses. In *Faustin v. City and County of Denver,* 423 F.3d 1192 (10th Cir. 2005), the Court of Appeals rejected a §1983 action alleging First Amendment violations as a result of the Denver police repeatedly asking an anti-abortion protester to stop displaying a banner reading "ABORTION KILLS CHILDREN" on highway overpasses. Despite the absence of any ordinance or written policy, the Court accepted the policy as a content-neutral, narrowly-tailored regulation creating a reasonable restriction on the time, place and manner of protected speech and leaving open ample alternative channels of communication. *Id.* at 1200. The Court accepted as "significant" the city's interest in both traffic safety and in avoiding interference with traffic control devices. *Id.* at 1200-1201. Denver's "'hundreds of miles of sidewalks and thousands of acres of parks'" were ample alternative fora. *Id.* at 1201. The Court dismissed the potential for an overbreadth "chilling effect" on other forms of overpass-based speech, saying essentially as the Supreme Court did in *Thomas*, that the issue of policy abuse could wait until another day. *Id.* at 1201.

The Emerging Issue of Counter-Demonstrations

The speech and assembly rights of counter-demonstrators have recently gained the courts' attention. Whether boisterous heckling is a protected speech right is unclear, but the Colorado Supreme Court has analyzed and approved the state's prohibition on disrupting lawful assembly.

Dempsey v. State of Colorado, 117 P.3d 800 (Colo. 2005) arose when a group of counter-demonstrators working on Senator Wayne Allard's reelection campaign appeared on Boulder's Pearl Street Mall at a 2002 campaign rally for candidate Tom Strickland. The counter-demonstrators used a bullhorn for a period of time, and may have interfered with gymnasts performing as part of the rally. *Id.* at 802-803. The evidence that the counter-demonstrators actually disrupted the rally was limited to police testimony. *Id.* at 803.

Dempsey argued that § 18-9-108, C.R.S. (2004) was a content-based restriction subject to strict scrutiny, and the evidence was insufficient to show the "significant" disruption required by law. The statute creates a class 3 misdemeanor for "disrupting lawful assembly" as follows:

> A person commits disrupting lawful assembly if, intending to prevent or disrupt any lawful meeting, procession, or gathering, he ***significantly*** obstructs or interferes with the meeting, procession, or gathering by physical action, verbal utterance, or any other means. § 18-9-108, C.R.S. (2004); *emphasis added.*

The Colorado Supreme Court began by acknowledging an "undeniable tension" between heckling and the right to peaceful assembly. *Id.* at 805. In contrast to the old syndicalism cases, the Court noted that one goal of free speech is to "induce dissension," even if the speech "stirs people to anger." *Id.* at 805, citing *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) and *Texas v. Johnson*, 491 U.S. 397, 409 (1989). Nonetheless, laws aimed at disruptive conduct are permissible because the state has a legitimate interest in assuring that "unruly assertion" does not imperil the assembly rights of others. *Dempsey,* 117 P.3d at 805-806. Moreover, the Court was satisfied that the law focused on conduct, rather than speech content, because of the requirement that a defendant "significantly" disrupt a meeting. *Id.* at 806.

The Court continued by analyzing the sufficiency of the evidence under standards approved by the California Supreme Court in *In re Kay*, 464 P.2d 142 (Cal. 1970). Establishing the requisite intent to disrupt the assembly depends on two elements: First, "the nature of the assembly or meeting defines the bounds of appropriate protest," and second, whether the defendant was "aware that his conduct was inconsistent with the customs of the assembly." *Dempsey,* 117 P.3d at 807-808. In short, a bullhorn at a quiet indoor meeting would likely be a "significant" disruption, but, as the Court found in *Dempsey*, a bullhorn at an outdoor political rally did not fall outside the range of acceptable protest. *Id.* at 809.

Distinguish Door-to-Door Solicitation

The foregoing discussion relates to permit systems for activities on public property. Regulating speech on private property is very different, and much more difficult, particularly when religious or political messages are at stake. In *Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton,* 536 U.S. 150 (2002), the Supreme Court yet again rejected a solicitation permit system as applied to the Jehovah's Witnesses. The Court went so far as to say that it need not announce the standard of review being applied "because of the breadth of the speech affected." *Id.* at 164. The Court's description of the issue before it is instructive:

> We granted certiorari to decide the following question: "Does a municipal ordinance that requires one to obtain a permit prior to

> engaging in the door-to-door advocacy of a political cause and to display upon demand the permit, which contains one's name, violate the First Amendment protection accorded to anonymous pamphleteering or discourse?"

The answer is a resounding "yes."

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COMMERCIAL SPEECH & BILLBOARDS

Commercial Speech

Although the mid-20th century Supreme Court resisted admitting it, "pure" commercial speech was not clearly protected by the First Amendment until 1976. Time and again, the Court struggled to explain away and distinguish its 1942 holding that: "the Constitution imposes no such [First Amendment] restraint on government as respects purely commercial advertising." *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942); (no First Amendment protection for the distribution of handbills advertising exhibition of a privately-owned submarine in New York).

Between 1942 and 1976, the Court did acknowledge some degree of First Amendment protection for commercial speech, but in each example the Court made it a point to find public interest or editorial content that added value to the speech beyond the pure commercial message. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) [paid "editorial" civil rights advertisement warrants protection]; *Pittsburgh Press Co. v. Human Rel. Comm'n.,* 413 U.S. 376 (1973) [no editorial content in gender-based want ads so no protection]; Bigelow v. Virginia, 421 U.S. 809 (1975) [advertisement for abortion services protected because of "clear public interest" and it did "more than simply propose a commercial transaction"].

Finally, in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976) the Court held that a ban on advertising prescription drug prices – a purely economic message with neither public interest or editorial content – could not survive First Amendment scrutiny. The Court had by now refined (or expanded) the scope of First Amendment protection:

> . . . even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the ***free flow of information*** does not serve that goal. *Id.* at 765; *emphasis added.*

Consistent with its newly secularized view of the value of *any* information, the Court went on to clarify that commercial speech would not be protected if it were false or misleading, or proposed illegal transactions. *Id.* at 771-772.

The cases following *Virginia Pharmacy Board* assumed as a matter of "commonsense" that a lesser degree of protection would be afforded to commercial speech than to non-commercial speech. *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 455-456 (1978). Consumer protection has become the "typical reason" why commercial speech receives less protection. *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 502 (1996) [quoting *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410 (1993)].

The Court next worked on defining more precisely the permissible scope of commercial speech regulations. In *Central Hudson Gas & Electric Corp. v. Public Service Comm'n. of New York*, 447 U.S. 557 (1980), the four part test was described as:

> The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest ***could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive***. *Id.* at p. 564; *emphasis added.*

The last phrase was initially (and commonly) understood to establish a form of the "least restrictive means" test for commercial speech. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 644 (1985).

By 1989, the Court backed away from so strict an approach for commercial speech, noting that the " . . . scope of regulatory authority . . . would be illusory if it were subject to a least-restrictive-means requirement." *Board of Trustees of State University of N.Y. v. Fox,* 492 U.S. 469, 477 (1989). Instead, *Fox* created a "reasonable fit" test:

> What our decisions require is a '"fit" between the legislature's ends and the means chosen to accomplish those ends,' -- a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed. *Id.* at 480.

Commercial speech regulations must still be "narrowly tailored" to serve a "substantial" government interest, but cities have some discretion to create regulations that have a "reasonable fit" between the government interest and the means to achieve it. *Cincinnati v. Discovery Network, Inc.,* 507 U.S. at 416; *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1250 (10th Cir.2004).

More recently, the Court has announced a split test for commercial speech. A *complete* ban on truthful, non-misleading commercial messages will be very closely

scrutinized because total bans typically represent "paternalistic" efforts to protect the public from responding "'irrationally' to the truth." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. at 501-503. Thus, both a law preventing brewers from providing the public with accurate information about the alcoholic content of malt beverages and a complete ban on the advertisement of liquor prices have been struck down by the Court. *Rubin v. Coors Brewing Co.,* 514 U.S. 476 (1995); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484. These cases may presage the ultimate elimination of any lesser First Amendment standard for commercial speech. *Lorillard Tobacco Co., v. Reilly,* 533 U.S. 525, 554-555 (2001) [rejecting limits on tobacco advertising for lack of a "reasonable fit"]; *Thompson v. W. States Med. Ctr.,* 535 U.S. 357 (2002) [rejecting FDA law that prohibited advertising and promotion of particular compounded drugs].

Billboards & Signs

Commercial speech gripped the attention of cities when in 1981 the Supreme Court announced the evolution of a new species of First Amendment law, what it called the "law of billboards." *Metromedia, Inc. v San Diego,* 453 U.S. 490, 501 (1981). Municipal regulation of signs and other outdoor advertising had previously focused on land use and property rights concerns. *Id.* at 498 [citing *Packer Corp. v. Utah*, 285 U.S. 105 (1932); *St. Louis Poster Advertising Co. v. St. Louis*, 249 U.S. 269 (1919); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917)]. By introducing the First Amendment as a weapon for the highly profitable outdoor advertising industry to use against sign regulation, *Metromedia* also launched a new era of costly municipal litigation.

Metromedia distinguished the San Diego ordinance's effect on commercial and noncommercial speech. As to the commercial speech impacts, *Metromedia* applied the four criteria established in *Central Hudson*, 447 U.S. 557, focusing most closely on whether the ordinance would "directly advance" the asserted governmental interests in traffic safety and esthetics. *Metromedia,* 453 U.S. at 508. The Court essentially concluded that the "common-sense judgments of local lawmakers" were sufficient evidence that billboards can distract drivers and cause "esthetic harm." *Id.* at 509-510.

San Diego's ordinance nonetheless failed because it banned noncommercial speech, subject to a few exceptions for religious symbols, commemorative plaques, and temporary political signs, among others. *Id.* at 513. The Court held that:

> Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests. *Id.* at 514.

Metromedia expressly left open whether a total ban on outdoor advertising might be permissible. *Id.* at 515, n. 20; *see also, National Advertising Co. v. City and County of*

Denver, 912 F.2d 405, 409 n. 2 (10th Cir.1990) [noting the possibility that a total outdoor advertising ban might be acceptable].

In *City of Ladue v. Gilleo,* 512 U.S. 43 (1994), the Court addressed an ordinance that banned virtually all sign displays on *residential* property. The Court began by explaining the police power foundation for city sign regulations:

> While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs-just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise. *Id.* at 48.

The Court went on, however, to confirm the Hobson's choice city attorneys face in drafting sign regulations, namely whether to risk a legal challenge because the ordinance regulates too little or a challenge because it regulates too much:

> [Supreme Court decisions] . . . identify two analytically distinct grounds for challenging the constitutionality of a municipal ordinance regulating the display of signs. One is that the measure in effect restricts too little speech because its exemptions discriminate on the basis of the signs' messages. Alternatively, such provisions are subject to attack on the ground that they simply prohibit too much protected speech. *Id.* at 50-51.

The Court ultimately concluded that the City of Ladue's regulations simply banned too much speech because a "special respect for individual liberty in the home has long been part of our culture and our law. . . ." *Id.* at 58. Thus, regulating "temperate" speech from one's home presents an especially daunting challenge for cities.

Private Signs on Public Property

Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) addressed the First Amendment considerations arising from political signs on public property. Los Angeles' content-neutral ordinances forbade sign posting on public property, including poles, trees, bridges, and other typical city facilities. *Id.* at 792. Mr. Vincent was a city council candidate who hired an outdoor advertising firm to post campaign signs; signs reading "Roland Vincent – City Council" were posted on public property by the ad firm and thereafter promptly removed by city staff. Unlike the analytical approach to commercial speech (which uses the four-part analysis of *Central*

Hudson and its progeny), in *Taxpayers for Vincent* the Court used its traditional test for viewpoint-neutral regulations:

> "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 804-805 [quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968) [rejecting First Amendment protection for draft card burning]].

To determine whether the Los Angeles' restriction was "no greater than is essential," the Court used a time, place, or manner test:

> The incidental restriction on expression which results from the City's attempt to accomplish such a purpose is considered justified as a reasonable regulation of the time, place, or manner of expression if it is narrowly tailored to serve that interest. *Taxpayers for Vincent*, 466 U.S. at 808.

The Taxpayers for Vincent argued that the Court should reject the ordinance because temporarily posted political signs would do little to add visual clutter. *Id. a*t 809. And, drawing an analogy to leafleting cases in which the Court concluded that laws against littering were preferable to banning protected speech, the Taxpayers claimed the flat out sign ban went too far. *Id.; see Schneider v. State,* 308 U.S. 147 (1939); *see also, McIntyre v. Ohio Elections Comm'n.,* 514 U.S. 334 (1995). The Court rejected the analogy because the visual blight was created by the medium of expression, i.e., the signs themselves, rather than by a "by-product of the activity," i.e., littering. *Taxpayers for Vincent*, 466 U.S. at 810. Finally, the Court concluded that ample alternatives modes of communication remained available. *Id.* at 812-815. Moreover, "public forum" analysis did not apply to all public property, such as the poles and lampposts, because there was no showing of traditional or designated public forum usage. *Id.*; *see Perry Education Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37 (1983).

Public Forum Analysis

Taxpayers for Vincent addressed a content-neutral ban of signs on public property. More difficult problems arise when city regulations restrict signage on public property differentially, based upon viewpoint or content. In these situations, the Court places far greater emphasis upon the "public forum" analysis than it did in the Los Angeles case. In *Lehman v. Shaker Heights,* 418 U.S. 298 (1974), the Court considered a bus system contract in which the City had required its advertising

contractor to ban all political signs in favor of other advertising. Notwithstanding the obvious content-based restriction, the Court focused primarily on the nature of the public space, recognizing a long line of cases that distinguished First Amendment rights by assessing whether the space in question serves as a public forum traditionally reserved for free speech. *Id.* at 302-303. The Court noted:

> Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. *Id.* at 303.

Accordingly, the Court asked only whether the regulations were "arbitrary, capricious, or invidious" and upheld the contract prohibition against political advertising. *Id.* Later cases have described this standard as a reasonableness test:

> In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)

On the other hand, when city regulations affect speech in a traditional public forum, like a park or street corner, the "highest scrutiny" applies so that they survive "only if they are narrowly drawn to achieve a compelling state interest." *Id.* at 45. But the public forum must indeed be "traditional" in an historical sense, i.e.,:

> . . . "immemorially been held in trust for the use of the public and, time out of mind, . . . been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions." *United States v. American Library Assn., Inc.,* 539 U.S. 194, 205 (2003) [quoting *International Soc. for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 679 (1992)].

Thus, the Court has tended to reject efforts to extend "traditional" public forum strict scrutiny analysis to new locations or media, such as library Internet access. *United States,* 539 U.S. at 206.

Finally, it is important to note that it is possible for cities to create a public forum by "designating" an otherwise non-traditional location for speech activities. In *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788 (1985), the Court stated that:

> . . . a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. *Id.* at 802.

However, the Court has greatly limited the opportunities for inadvertent creation of "designated" fora by requiring intentional government action to be shown:

> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent. *Id.* at 802; *citations omitted*.

Once created, a designated public forum is subject to the same strict scrutiny review as a traditional public forum. *International Soc. for Krishna Consciousness, Inc.,* 505 U.S. at 678; *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). However, unlike a traditional forum, a designated forum can be closed, i.e., the government "is not required to indefinitely retain the open character." *Perry Ed. Assn.,* 460 U.S. at 46.

In summary, the Tenth Circuit has aptly described the Supreme Court's rulings as creating a three-step framework to be used when analyzing restrictions on private speech on government property:

1. Is the speech protected by the First Amendment at all;
2. If so, identify the nature of the forum;
3. Finally, "'assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard.'"
    a. Public Forum
        i. Content-based: Strict Scrutiny
        ii. Content-neutral: Valid Time, Place or Manner?
    b. Nonpublic Forum: Reasonableness Standard

Wells v. City & County of Denver, 257 F.3d 1132, 1138-1139 (10th Cir. 2001) quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. at 797 (1985). It is likewise apparent that commercial speech on public property should face something less than strict scrutiny, provided it is not a paternalistic total ban on truthful information.

Government Signs on Public Property

There is little law on government signs on public property. As a practical matter, this issue can arise when cities desire to display banners or signs celebrating holidays, community events, seasons, or athletic competitions, to name a few possibilities. These issues are complicated by the practical reality that often city staff wishes to include private sponsorship information on the sign or banner.

The Supreme Court has said: ". . . when the State is the speaker, it may make content-based choices," including viewpoint-based funding decisions. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533 (2001); *Rust v. Sullivan,* 500 U.S. 173 (1991). A split Tenth Circuit Court of Appeals applied *Rosenberger* in *Wells v. City and County of Denver,* 257 F.3d 1132, in the context of Denver's annual holiday display at the City and County Building. *Wells* held that a city holiday display did not create an obligation for the city to accept a nonreligious "winter solstice" display from a private group. The Court addressed the often difficult problem of distinguishing governmental from private speech. The issue appears to have arisen because Denver's display included the names of six corporate sponsors. *Id.* at 1137. The *Wells* majority relied upon a four-part test from the Eighth Circuit Court of Appeals decision that permitted the University of Missouri to reject the Ku Klux Klan's offer to underwrite four segments of National Public Radios "All Things Considered" (under federal law, the KKK offer would have required an on-the-air sponsorship announcement by the station):

> (1) that "the central purpose of the enhanced underwriting program is not to promote the views of the donors;" (2) that the station exercised editorial control over the content of acknowledgment scripts; (3) that the literal speaker was a KWMU employee, not a Klan representative; and (4) that ultimate responsibility for the contents of the broadcast rested with KWMU, not with the Klan. *Id.* at 1140-1141; *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.,* 203 F.3d 1085 (8th Cir.), *cert. denied,* 531 U.S. 814 (2000).

Thus, it would appear that a city's public property sign or banner program can include some private speech, at least in the form of sponsorship information, provided the city's purposes are central and the city controls the display and its contents.

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ESTABLISHMENT CLAUSE

The Religion Clauses of the First Amendment sit juxtaposed in permanent contrast and occasional tension: Government shall make "no law respecting an establishment of religion," but neither shall it forbid "the free exercise thereof." In the context of municipal government, the Establishment Clause is confronted most often in the context of religious displays and activities on public property and during public processes, while the Free Exercise Clause arises in the application of land use regulations to religious organizations. This area of First Amendment law is likely to be very volatile in the coming years with the departures of Chief Justice Rehnquist and Justice O'Connor, and the arrival of Chief Justice Roberts and Justice Alito. Justice O'Connor, in particular, spoke with a unique judicial voice, often standing in the center of a sharply divided court.

Establishment Clause: Religious Displays on Public Property

Lemon v. Kurtzman, 403 U.S. 602 (1971) announced the venerable and by now careworn three-part test for Establishment Clause analysis:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion." *Id.* at 612-613; *citations omitted*.

The Court's current support for *Lemon* is extremely weak. *Lemon* barely survived the twin June 27, 2005 5-4 decisions in *McCreary County v. American Civil Liberties Union of Ky.,* ___ U.S. ___, 125 S.Ct. 2722, 2727-2732, 2005 WL 1498988 (2005) and *Van Orden v. Perry,* ___ U.S. ___, 125 S.Ct. 2854, 2005 WL 1500276 (2005). *McCreary County* struck down one Ten Commandments display while *Van Orden* upheld another.

In *McCreary County*, Justice Souter was joined by Justices Stevens, Ginsburg, Breyer and O'Connor in the majority opinion. Justice O'Connor also filed a concurring opinion. The Court tracked a transparent and disingenuous series of post-litigation steps two Kentucky counties had taken to "secularize" the display of large, gold-framed copies of the King James version of the Ten Commandments located in prominently visible areas of the county courthouses. *McCreary County,* 125 S.Ct. at 2727-2732. These efforts included expanding the displays (after new legal counsel was retained) to include references from the Declaration of Independence, the Congressional Record, and other government tracts referring to God or the Bible. *Id.* at 2729-2730. Against these facts, the majority expressly refused to reject the *Lemon* secular purpose test. *Id.* at 2734. Instead, noting that "governmental purpose is a key element of a good deal of constitutional doctrine," the Court found that the religious

motive of the counties was too apparent to benefit from the "implausible" sanitizing efforts undertaken during litigation. *Id.* at 2734 and 2741.

> The *McCreary County* dissent, penned by Justice Scalia, begins:
>
> I shall discuss first, why the Court's oft repeated assertion that the government cannot favor religious practice is false; . . . . *Id.* at 2748.

From this premise, the dissenters continue to argue that the First Amendment simply does not require "governmental neutrality" between religion and nonreligion. *Id.* at 2750. This approach, if accepted by the Roberts Court, may be viewed as either a striking reversal of established First Amendment doctrine, or simply an effort to rationalize the often blurry line drawn by the Court between permissible and impermissible religious involvement by government. Importantly, Justice Breyer refused to join in Justice Scalia's polemic.

In *Van Orden*, 125 S.Ct. 2854, the balance shifted to a plurality led by then-Chief Justice Rehnquist, and which included Justices Scalia, Kennedy and Thomas. Justice Breyer concurred in the judgment and filed a separate opinion, thus emphasizing his pivotal role. Justices Scalia and Thomas joined in the majority opinion and also filed a concurring opinion. The dissenters included Justices Stevens, Ginsburg and Souter, with a concurring opinion from then-Justice O'Connor and another concurring opinion from Justices Souter, Stevens and Ginsburg.

Van Orden addressed a Ten Commandments display at the Texas State Capitol. The Ten Commandments were a gift from the Fraternal Order of Eagles and part of the twenty-two acre Capitol grounds that included some seventeen monuments and twenty-one historical markers. *Id.* at 2858. The plurality stops short of rejecting *Lemon,* but does focus on the historical character of the display rather than secular or religious purpose:

> Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history. *Id.* at 2861.

The Court continued by citing the long string of cases accepting varying degrees of government acknowledgement of God and religion, noting what it called an "'unbroken history of official acknowledgement'" of the role of religion in American life going back to at least 1789. *Id.* at 2861, quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). Thus:

> Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause. *Van Orden,* 125 S.Ct. at 2863.

Significantly, the Rehnquist plurality opinion did not ignore the contaminating effect of "religious purpose" in Establishment Clause cases, although it carefully avoided even citing *Lemon.* Thus, in describing the limits on the display of religious symbols or messages, the Court described the "improper and plainly religious purpose" it found in a Kentucky statute requiring the Ten Commandments to be posted in every classroom. *Id.* at 2863 [citing *Stone v. Graham*, 449 U.S. 39, 41 (1980)].

The separate concurring opinion of Justice Scalia was predictable in arguing (while citing his previous dissents) that:

> . . . there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgement, or, in a nonproselytizing manner, venerating the Ten Commandments. *Id.* at 2864 (Scalia, J., concurring.)

Justice Thomas's concurrence goes a step further by reminding the Court of his position that the Establishment Clause is but a "federalism provision" that should not be incorporated against the states. *Id.* at 2865 [quoting *Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 46 (2004) (opinion concurring in judgment)]. Justice Thomas then argues for an "original intent" interpretation that would apply the Establishment Clause so as to forbid only "actual legal coercion" of "religious orthodoxy" by the federal government. *Van Orden,* 125 S.Ct. at 2865. (Thomas, J., concurring.)

Justice Breyer concurred in the judgment only. His separate opinion is critical because it clearly shows his own dissatisfaction with the notion that the *Lemon* test can be applied mechanically or reliably. *Id.* at 2869. (Breyer, J., concurring.) Unlike the plurality and Scalia/Thomas concurrences, however, Justice Breyer insists on a "constitutional line" between church and state, as well as "separation." *Id.* Justice Breyer, as a pivotal vote on the Establishment Clause, thus appears to insist that the Court retain the principle of government neutrality.

Like the Texas State Capitol in *Van Orden*, the Colorado State Capitol includes Lincoln Park and a Ten Commandments monument gifted by the Fraternal Order of Eagles. In *State v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013 (Colo. 1995), a closely divided Colorado Supreme Court almost precisely presaged the United States Supreme Court's approach in *Van Orden* by focusing on the context of the monument in Lincoln Park where it is inconspicuously situated among several other statues and monuments. *Id.* at 1025. The Court also explained that it analyzes the Colorado Constitution's [no] "Preference Clause" under traditional federal Establishment Clause principles. *Id.* at 1019; Colo. Const. Art. II, § 4 ["Nor shall any preference be given by law to any religious denomination or mode of worship."]. It is unclear whether

the Colorado Supreme Court might be inclined to attach special significance to the Colorado Constitutional language in the future.

The Special Problem of Religious Holiday Displays on Public Property

It is worth separately mentioning religious holiday displays on public property. In the Tenth Circuit, *Lynch v. Donnelly,* 465 U.S. 668, 674 (1984) is clearly sound precedent for Christian holiday displays such as a crèche (nativity scene depicting the birth of Jesus Christ), Christmas tress or jolly old (secular) Saint Nick. *Wells v. City and County of Denver,* 257 F.3d at 1138, n.3; [citing *Citizens Concerned for Separation of Church & State v. City and County of Denver,* 508 F.Supp. 823 (D. Colo. 1981)]. A few words elaborating on *Lynch* are worthwhile.

First, it is important to keep in mind that the legislative record is often crucial in Establishment Clause cases. Thus, excessive or "central" reliance on religious purposes for a display can be a fatal flaw. In *Lynch,* as in *Van Orden*, the Court focused on the "historical origins of this traditional event long recognized as a National Holiday." *Lynch, 465 U.S. at 680 citing Citizens Concerned for Separation of Church and State v. City and County of Denver*, 526 F.Supp. 1310 (D. Colo. 1981). The Court further described the "narrow question" at issue as whether there was a "secular purpose" for the display. *Lynch,* 465 U.S. at 681. But, the purposes of the display need not be "exclusively secular;" some mixed purpose is acceptable. *Id.* at 681, n. 6. However, the Court did make it a point to note that there had been no "contact with church authorities" with respect to the crèche. *Id.* at 684.

In Colorado, the courts have accepted Christian displays based upon a secular and legitimate municipal purpose to "'promote a feeling of good will, to depict what is commonly thought to be the historical origins of a national holiday, and to contribute to Denver's reputation as a city of lights.'" *State v. Freedom From Religion Foundation, Inc.,* 898 P.2d 1013, 1019 (Colo. 1995) [quoting *Conrad v. City and County of Denver,* 724 P.2d 1309, 1313-1315 (Colo. 1986)].

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FREE EXERCISE CLAUSE & RLUIPA

Free Exercise Clause

The Free Exercise Clause provides absolute freedom of religious belief and expression:

> The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).

Nonetheless, compliance with "'valid and neutral laws of general applicability" is not excused by the Free Exercise Clause. *Id.* at 879 [quoting *United States v. Lee,* 455 U.S. 252, 263, n. 3 (1982)]. However, when the "neutral and general" standard is not met, ultra-rigorous scrutiny applies:

> A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) [quoting *McDaniel v. Paty,* 435 U.S. 618, 628 (1978)].

The Free Exercise Clause has been examined in many contexts that are typically not relevant to cities, such as conscientious objection to war, polygamy and drug laws. On the other hand, a combination of economics, Supreme Court decisions, and subsequent Congressional reaction have turned municipal zoning and land use into a constitutionalized field when religious organizations are the applicant.

RLUIPA

Municipal zoning and land use law traditionally treated church uses favorably, often allowing them as a matter of right in residential zones. Eugene McQuillin, 8 *The Law of Municipal Corporations* 485-86 (3d ed. 2000). This is particularly true in Colorado where a divided Supreme Court once held that "blanket exclusion of churches from single and double family residence districts . . . was not in furtherance of the health, safety, morals or general welfare of the community." *City of Englewood v. Apostolic Christian Church,* 362 P.2d 172, 175 (Colo. 1961), *overruled in City of Colorado Springs v. Blanche,* 761 P.2d 212, 217 (Colo. 1988).

More recently, post-WWII low-density, automobile dependent development appears to have contributed to the development of so-called "megachurches." Jonathan D. Weiss & Randy Lowell, *Supersizing Religion: Megachurches, Sprawl, and*

Smart Growth, 21 St. Louis U. Pub. L. Rev. 313, 315-316 (2002). These institutions often create far more traffic, noise and congestion than the Rockwellian vision of a Sunday service in a steeple-topped neighborhood church. Moreover, many new congregations find it necessary or desirable to seek homes in strip malls or other "recycled" commercial or industrial space located in areas that city planners never envisioned for assembly uses. The net result of these factors has been a new era of conflict between growing church congregations and municipal planning laws.

Under *Employment Division, Dep't. of Human Resources,* 494 U.S. 872, neutral and generally applicable zoning laws would not ordinarily run afoul of the Free Exercise Clause. However, this case provoked a Congressional reaction to restore (or impose) the strict scrutiny, compelling interest standard for religious exercise. Thus, the Religious Freedom Restoration Act forbade government from substantially burdening a person's exercise of religion, even if the burden resulted from a rule of general applicability, unless the government could demonstrate the burden was in furtherance of a compelling governmental interest. RFRA was struck down by the Supreme Court in *City of Boerne v. Flores,* 521 U.S. 507 (1997), on the grounds that Congress had exceeded the remedial powers granted to it by § 5 of the Fourteenth Amendment.

In 2000, Congress (and President Clinton) reacted yet again with resounding bipartisan approval of the Religious Land Use and Institutionalized Persons Act. RLUIPA is founded on better sources of Congressional authority than RFRA, relying upon Spending and Commerce Clauses. *See* Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 Geo. Mason L. Rev. 929, 948-953 (2001). In a nutshell, RLUIPA creates the following federal land use requirements when a city is applying zoning or land use laws to any person, including a religious assembly or institution:

- Substantial Burden Rule: The regulation cannot impose a "substantial burden on the religious exercise" unless the government demonstrates that imposition of the burden meets a compelling interest/least restrictive means test.

  - ✓ The substantial burden rule applies when the formal or informal regulations or practices allow "individualized assessments" of land uses; when the program or activity receives federal assistance; or when the substantial burden affects interstate or foreign commerce, or commerce with Indian tribes.

- Equal Terms Rule: Religious assemblies or institutions cannot be treated "on less than equal terms" than a nonreligious assembly or institution.

- Non-Discrimination Rule : No discrimination on the basis of religion or denomination.

- Total Exclusion Rule: Religious assemblies cannot be totally excluded from a city.

- Unreasonable Limitation Rule: Religious assemblies, institutions and structures cannot be unreasonably limited. 42 U.S.C. §§ 2000cc (a) and (b).

RLUIPA also provides for a shift in the burden of persuasion on the elements of a claim once the plaintiff produces prima facie evidence. 42 U.S.C. § 2000cc-2(b). This burden shift does not apply to the plaintiff's burden of persuasion on whether the law, regulation or government practice "substantially burdens" the plaintiff's exercise of religion. *Ibid.*

At first glance, RLUIPA might strike terror into the heart of a city attorney faced with a religious land use issue. One might wonder, for example, whether a particular exaction or condition of approval is a "substantial burden," a term which RLUIPA surprisingly does not define. Must the city show a "compelling interest" for each restriction that differs from the application or request? Moreover, the religious plaintiff's bar is relatively well organized, so it is very possible that a religious land use applicant will be represented by counsel from the outset, whether apparent to city staff or not. Fortunately, the emerging case law is taking a practical, conservative approach to RLUIPA.

While "substantial burden" is not defined in RLUIPA, both the Seventh and Tenth Circuit Court of Appeals have quoted RLUIPA's legislative history for a definition:

> "The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise." *Grace United Methodist Church v. City of Cheyenne,* 427 F.3d 775, 795 (10th Cir. 2005); *Civil Liberties for Urban Believers v. City of Chicago,* 342 F.3d 752, 760-761 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004).

Grace United Methodist Church, 427 F.3d 775 addressed both constitutional and RLUIPA claims. On the constitutional claims, the court relies upon *Employment Div. v. Smith,* 494 U.S. 872 and its progeny to explain that special land use permits and variances are neutral rules of general applicability, absent discriminatory animus or application. *Grace United Methodist Church,* 427 F.3d at 784.

Grace United Methodist Church applied a similar analysis to the RLUIPA claim. The case came on appeal after a jury found that Cheyenne's denial of a variance for a church child care center did not violate RLUIPA's substantial burden rule. *Id.* at 793. The church challenged the jury instructions. *Id.* The jury instruction was upheld,

save its use of the word "fundamental" which was found not to be prejudicial. The instruction read:

> A government regulation "substantially burdens" the exercise of religion if the regulation: (1) significantly inhibits or constrains conduct or expression that manifests some tenet of the institutions belief; (2) meaningfully curtails an institution's ability to express adherence to its faith; or (3) denies an institution reasonable opportunities to engage in those activities that are ***fundamental*** to the institution's religion.
>
> Thus, for a burden on religion to be "substantial," the government regulation must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution is insufficient. *Id.* at 794, n. 4; *emphasis in original*.

The court explained that while RLUIPA does not define "substantial burden," its definition of "religious exercise" is more relaxed than prior case law, so it includes activities that are neither compelled by or central to a system of religious belief. *Id.* at 796. Thus, although not found to be prejudicial error in the jury instruction, the term "fundamental" is not consistent with RLUIPA. *Id.* The Court did not specify an appropriate term, but at trial the church had requested the term "important" rather than "fundamental." *Id.* at 794.

Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 addressed a broad challenge to Chicago's zoning ordinance by well-organized and diverse church groups. The Seventh Circuit Court of Appeals formulated its "substantial burden" test for RLUIPA as follows:

> . . . in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise -- including the use of real property for the purpose thereof within the regulated jurisdiction generally -- effectively impracticable. *Id.* at 761.

The Court rejected the claim that the scarcity of sites available under the city's zoning ordinance, combined with processing costs and land costs imposed a substantial burden, noting that the "harsh reality of the marketplace" was not cognizable under RLUIPA. *Id.* Finally, and importantly, the Court accepted Chicago's post-litigation zoning amendments that equated church assemblies with other similar assembly uses, thus removing any argument that the former distinction was discriminatory. *Id.* at 762.

In summary, RLUIPA's impact has been blunted by the courts' willingness to equate land use and zoning, including use permit and variance systems, with the neutral, generally-applicable regulations approved by the Supreme Court under the Free Exercise Clause. Nonetheless, it does appear that land use regulations that impair a core religious activity will be subject to RLUIPA scrutiny.

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OBSCENITY & SEXUALLY ORIENTED BUSINESSES

Obscenity

In 1957, the Supreme Court "squarely" addressed whether obscenity is "utterance within the area of protected speech and press." *Roth v. United States*, 354 U.S. 476 (1957). Referring to the Constitution's history, the Court reasoned that all ideas having "even the slightest redeeming social importance" deserve First Amendment protection. *Id.* at 484. Thus, obscenity does not deserve protection because it is "utterly without redeeming social importance." *Id.* The Court also began the difficult and perhaps Quixotic task of defining "obscene." Noting that sex and obscenity are not synonymous, the Court said that obscene material is "material which deals with sex in a manner appealing to prurient interest." *Id.* at 487. The Court said that "prurient" meant "material having a tendency to excite lustful thoughts," then digging itself deeper into the quagmire, turned to Webster:

> Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. *Id.* at 487, n. 20.

Finally, the Court said its own precedent defining obscenity was not "significant[ly] different" from the tentative draft of the A.L.I. Model Penal Code:

> ". . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . ." *Id.*

The Court continued by expressing concern that obscenity laws should not interfere with speech and press rights to address sex. *Id.* at 488. Thus, the Court explained that obscenity would not be judged on the basis of either particularly sensitive people or selected passages of material. *Id.* at 489. Finally, the Court announced its famous test for obscenity:

> . . . whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. *Id.* at 489.

By 1973, the Court had modified and expanded the *Roth* test into its present form:

> "(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin,* 408 U.S. 229,

> 230 (1972) [quoting *Roth v. United States,* 354 U.S. at 489]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) ***whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.***" *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 497 (1985) [quoting *Miller v. California,* 413 U.S. 15, 24 (1973)]; *citations in original; emphasis added*; *see also Memoirs v. Massachusetts,* 383 U.S. 413 (1966).

Miller added the third requirement, i.e., the absence of serious literary, artistic, political or scientific value. *Brockett,* 472 U.S. at 497, n. 7. In sum, the publication or display obscenity can be prohibited (if one can ascertain what actually constitutes obscenity).

In Colorado, municipal regulation of obscenity has been preempted by the state as a matter of statewide concern. *Pierce v. City and County of Denver,* 565 P.2d 1337 (1977); §§ 18-7-101-103, C.R.S. Moreover, the relevant "community standard" is statewide as well. *People v. Tabron*, 544 P.2d 380 (1976).

Regulating Sexually Oriented Businesses

As a practical matter, very little true (meaning unprotected) obscenity finds its way to America's Main Streets. Most cities are concerned with sexually oriented businesses. These businesses often involve speech, either directly in the form of verbal or graphic expression, or indirectly through other modes of artistic expression such as dancing. Examples include movie theatres, adult entertainment arcades, "exotic" dancing and bookstores. Two forms of constitutionally-feasible sexually oriented business regulation have emerged in the fifty years since *Roth.* First, cities have attempted to disperse sexually oriented businesses to avoid creating "red light" districts where undesirable "secondary effects" occur. Second, cities have directly licensed sexually oriented businesses in order to assure that the operators meet objective, minimum standards for the protection of the health and safety of the community.

Secondary Effects Regulations

In *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976), the Court upheld Detroit's zoning ordinances that required adult businesses to be spaced 1000 feet apart, and 500 feet from any residential area. The ordinances were challenged as vague, content-based prior restraints on protected speech. *Id.* at 58. The case is difficult to categorize because five members of the Court did not agree on a single rationale for the decision. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986). While the district court and court of appeals analyzed the zoning as a content-based restriction and prior restraint requiring a compelling state interest, the Supreme Court appeared to analyze the issue as a commercial speech problem, i.e., whether there was an appropriate fit between the zoning restriction and the city's

interest in preserving neighborhoods. *Id.* at 67-71. The Court likewise seemed persuaded that a mere limitation on *where* adult films could be shown did not raise content-based censorship concerns. *Id.* at 71-73.

Young was followed by *Renton,* 475 U.S. 41. In *Renton*, the Court attempted to sort out the uncertain doctrinal categorization left over from *Young*, noting that: "At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres* does not appear to fit neatly into either the 'content-based' or the 'content-neutral' category." *Id.* at 47. The Court criticized and rejected the court of appeals' approach which had looked at whether content was a "motivating factor" of the city council. *Id.* The Court went on to conclude that the Renton ordinance was concerned not with content, but with the so-called "secondary effects" of adult businesses, and was therefore subject to intermediate scrutiny under the time, place and manner standard:

> The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. *Id.* at 50.

Finally, and critically for cities with limited resources, the Court approved the city's reliance upon studies conducted in other jurisdictions as factual support for ordinance findings about the damaging secondary effects of over-concentrated sexually oriented businesses. *Id.* at 930-931.

More recently, *Renton* survived the Supreme Court's review in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), which produced a plurality decision, two concurring opinions and a dissent. The plurality included both former Chief Justice Rehnquist and former Associate Justice O'Connor. The plurality's unremarkable holding was that crime reduction serves a substantial governmental interest, thus meeting *Renton's* intermediate scrutiny test for content-neutral time, place and manner restrictions. *Id.* at 438-439. In the last analysis, the case probably is best described as standing for the proposition that the judiciary will defer to legislative factual data and problem solving approaches. *Id.* at 440.

Justice Scalia's concurrence was based upon his view that the "business of pandering sex" is not constitutionally protected. *Id.* at 443 (concurring opn.).

Justice Kennedy, concurring in the judgment, had a noteworthy approach given the recent retirement of two of the four members of the plurality. Justice Kennedy questioned whether "content-neutral" was really the right description for *Renton*-style ordinances, and further worried that the plurality was expanding *Renton* by neglecting consideration of whether the regulation would unduly suppress speech to "reduce the costs of secondary effects." Justice Kennedy reasoned:

> It is no trick to reduce secondary effects by reducing speech or its

> audience; but a city may not attack secondary effects indirectly by attacking speech. *Id.* at 450 (concurring opn.).

City of Los Angeles may portend a reinvigoration of the "ample alternative modes" analysis for *Renton*-style dispersion ordinances.

Sexually Oriented Business Licensing

Sexually oriented business licensing by cities is a far more complicated legal proposition than *Renton*-style secondary effects regulations. But each mode of regulation has a separate end. Secondary effects ordinances address neighborhood impacts, while licensing serves to assure the business patrons and community that basic health and safety standards are satisfied.

In *Bantam Books v. Sullivan*, 372 U.S. 58, 69-70 (1963), the Court explained that a system by which the government empowers itself to review and approve – that is, censor – potentially protected speech raises special constitutional concerns. The special concerns arise because "prior administrative restraints" allow the state to avoid the procedural safeguards of a criminal trial. But the Court alluded only generally to the procedural safeguards it might require of a licensing system:

> We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint. *Id.* at 70.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Supreme Court analyzed Maryland's film licensing law. The defendant had been convicted of showing a film without first submitting it to the board of censors. *Id.* at 52. The Court announced the specific procedural safeguards that must accompany prior restraints on speech imposed by the government. These have been summarized as:

> (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227 (1990) [relying upon *Freedman v. Maryland,* 380 U.S. at 58-60].

In *FW/PBS, Inc.,* 493 U.S. 215, 220, the Court examined a Dallas ordinance that established a comprehensive licensing system for what the Court termed "sexually oriented businesses." The court of appeals characterized the ordinance as a set of *Renton*-style time, place, and manner regulations, and excused its non-compliance with *Freedman* as unnecessary. *Id.* at 222. The Supreme Court readily determined that the licensing system constituted a prior restraint system that was subject to *Freedman*

safeguards. Of particular concern to the Court was the absence of any required timeframe to assure prompt issuance of the permit. *Id.* at 226-227. However, the Court held that *Freedman's* requirement that the censor initiate judicial review would not be required because: 1) the city's ordinance called for ministerial review of only the general qualifications of each applicant, rather than judgment on the content of any speech; and, 2) an unsuccessful applicant (who as a result could not operate their business at all) would have a stronger incentive to go to court on his or her own than might a movie license applicant as in *Freedman* (who would have only one film censored at a given time). *Id.* at 230.

FW/PBS, Inc. did not answer whether Texas (or Dallas) law provided the prompt judicial review required under *Freedman*, or whether prompt *review* meant a prompt *decision*. In *City of Littleton v. Z.J. Gifts D-4,* LLC, 541 U.S. 774 (2004), the Supreme Court addressed these questions. First, the Court held that prompt judicial review must include a prompt decision. *Id.* at 781. Second, and most importantly, the Court held that existing Colorado law establishes sufficient procedures to assure prompt judicial decisions. *Id.* at 782. This conclusion was very significant because other court of appeals circuits had concluded that special expedited judicial review requirements were necessary, thus triggering a rush of state and local legislation. *See, e.g.*, *Baby Tam & Co. v. Las Vegas,* 154 F.3d 1097 (9th Cir. 1998); Cal. Code Civ. Proc., § 1094.8.

In sum, cities may license sexually oriented businesses provided the ordinance has objective, content-neutral criteria, specific, brief timeframes for permit review and issuance, and the availability of prompt judicial review and decision.

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SPEECH RIGHTS OF PUBLIC EMPLOYEES

> The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. *Garcetti v. Ceballos,* 126 S.Ct. 1951, 1957 (May 30, 2006)

In *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563 (1968), the Supreme Court held unconstitutional as applied a state law under which a high school teacher was fired for criticizing his employers in a letter he wrote to a local newspaper. The letter criticized the board of education and superintendent for their handling of past proposals to raise new school revenue. *Id.* at 564. The Court clearly announced that a public employee's speech could not be restricted without regard for the First Amendment. *Id.* at 568. On the other hand, the Court also recognized that the government's interests as an employer would permit some speech restrictions. *Id.* The problem, the Court said, is:

> . . . to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Id.* at 568.

In *Connick v. Myers,* 461 U.S. 138 (1983), the Court clarified and somewhat limited *Pickering.* In *Connick*, the employee claimed retaliation as a result of her transfer and subsequent preparation of an internal questionnaire about working conditions in a district attorney's office. *Id.* at 141. The questionnaire addressed the "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." *Id.*

The Court recognized that *Pickering* might sweep too broadly, and explained that its purpose was not to "constitutionalize the employee grievance:"

> The repeated emphasis in *Pickering* on the right of a public employee ***'as a citizen, in commenting upon matters of public concern,'*** was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter. *Id.* at 143 and 154; *emphasis added.*

The Tenth Circuit Court of Appeals describes a multi-tier test derived from

Pickering and its progeny:

> First, the court must decide whether the speech at issue touches on a matter of public concern. If it does, the court must balance the interest of the employee in making the statement against the employer's interest 'in promoting the efficiency of the public services it performs through its employees.' Third, if the preceding prerequisites are met, the speech is protected, and plaintiff must show her expression was a motivating factor in the detrimental employment decision. Finally, if the plaintiff sustains this burden, the employer can still prevail if it shows by a preponderance of the evidence that it would have made the same decision regardless of the protected speech. *Schalk v. Gallemore,* 906 F.2d 491, 494-495 (10th Cir. 1990); *Montgomery v. City of Ardmore*, 365 F.3d 926, 938-939 (10th Cir. 2004); [*cf. David v. City and County of Denver*, 101 F.3d 1344, 1355 (10th Cir. 1996) ("In deciding whether a particular statement involves a matter of public concern, the fundamental inquiry is whether the plaintiff speaks as an employee or as a citizen.")].

The Tenth Circuit formulation shows an important omission that has become crucial: *Schalk* fails to emphasize or even mention that the employee must be speaking ***as a citizen***, rather than as an employee.

The Supreme Court has recently punctuated the importance of *Schalk's* omission of the "as a citizen" requirement. In *Garcetti v. Ceballos,* 126 S.Ct. 1951, the Court addressed allegedly retaliatory actions taken against a deputy district attorney as a result of an internal memorandum he prepared commenting on serious misrepresentations found in a sheriff's affidavit. The Court identified distinct interests served by the First Amendment. First, while the employee's speech rights are important, a broader function of "promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion" is also served through employee speech. *Id.* at 1958. On the other hand, the government's interest as an employer must be considered because when public employees "speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions." *Id.* at 1958.

The Court then explained the key to its analysis: "The controlling factor in Ceballos' case is that his expressions were made pursuant to his [official] duties as a calendar deputy." *Id.* at 1960. Thus, the Court explained:

> We hold that when public employees make statements pursuant to their official duties, ***the employees are not speaking as citizens*** for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. *Id.* at

1960; *emphasis added.*

The Court's rationale included:

> Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. *Id.* at 1960.

But, the Court rejected the notion that employee speech occurring solely within the workplace should never be protected:

> Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like "any member of the general public," to hold that ***all speech*** within the office is automatically exposed to restriction. *Id.* at 1959; *emphasis added.*

The Court partially answered Justice Souter's dissent by warning public employers that using "excessively broad job descriptions" to "restrict employees' rights" would not be accepted. *Id.* at 1961. The Court said:

> The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes. *Id.* at 1962.

The Court also answered Justice Souter by leaving itself room to define a different standard in cases where "academic freedom" is involved:

> There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching. *Id.* at 1962.

In sum, *Garcetti* must be viewed as a new landmark in public employee speech. The Court has clearly recognized that public employers have a strong, legitimate, and usually fairly applied interest in managing workplace behavior. On the

other hand, public employee speech on matters of public concern, particularly *outside* the workplace, will be protected unless workplace disruption or its impact on workplace efficiency is manifest.

Public employee speech may, of course, include political speech such as the display of political buttons or signs. The Tenth Circuit has recognized several special government interests that supplement *Pickering* with respect to political speech. In *Horstkoetter v. Department of Public Safety*, 159 F.3d 1265, 1269 (10th Cir. 1998), the Court of Appeals upheld an Oklahoma Highway Patrol general order that provided:

> Members shall not display any partisan political sticker or sign on motor vehicles operated by them or under their control and shall not publicly display any partisan political stickers or signs at their residences.

The case arose when the wives of two troopers placed yard signs at their homes supporting a challenging candidate for county sheriff. *Id.* The Court applied *Pickering,* but recognized that restrictions on public employee speech had been accepted since the 1880's as a result of several special concerns, including:

1) protection of public employees' job security,
2) eradication of corruption,
3) promotion of efficiency in government offices, and
4) encouragement of impartiality, and the public perception of impartiality, in government services. *Id.* at 1272; *United States Civil Serv. Comm'n. v. National Ass'n. of Letter Carriers,* 413 U.S. 548 (1973); *United Public Workers v. Mitchell,* 330 U.S. 75 (1947); *Ex parte Curtis,* 106 U.S. 371 (1882).

Horstkoetter makes it clear that a broader, and probably stronger, array of government interests may justify restrictions on public employees when political speech is at issue.

It should be noted that *Horstkoetter* also concluded that the troopers' wives had standing, but only to raise the claims of their husbands. *Horstkoetter,* 159 F.3d at 1279. The Ninth Circuit has accepted *Horstkoetter's* standing analysis, but the Eight Circuit has not, concluding instead that the spouse of an employee bound by a city charter's anti-electioneering provision has standing to assert her own injury. *Biggs v. Best, Best & Krieger*, 189 F.3d 989 (9th Cir. 1999); *International Ass'n. of Firefighters of St. Louis v. City of Ferguson*, 283 F.3d 969 (8th Cir. 2002).

Finally, while beyond the scope of this survey, city attorneys should be aware of a parallel track of Supreme Court and Tenth Circuit law addressing the very limited circumstances when political loyalty, affiliation or association may be appropriately required by a public employer. These cases usually arise when an employee alleges

discipline or termination on the basis of loyalty or party affiliation. *Branti v. Finkel*, 445 U.S. 507 (1980); *Snyder v. City of Moab*, 354 F.3d 1179 (10th Cir. 2003).

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APPENDIX

CONSTITUTIONAL AND STATUTORY TEXT

The First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Colorado Constitution, Article II, § 4, "Religious Freedom:"

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.

Colorado Constitution, Article II, § 10, "Freedom of Speech and Press:"

> No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.

The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc to 2000dd-1.

United States Code
Title 42. The Public Health and Welfare
➜ Chapter 21C. Protection of Religious Exercise in Land Use and by Institutionalized Persons

§ 2000cc. Protection of land use as religious exercise

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

§ 2000cc-1. Protection of religious exercise of institutionalized persons

(a) General rule

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

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which--

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

§ 2000cc-2. Judicial relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit

Adjudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

(e) Prisoners

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation

If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

§ 2000cc-3. Rules of construction

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected

Nothing in this chapter shall--

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this chapter.

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law

With respect to a claim brought under this chapter, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this chapter.

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

(h) No preemption or repeal

Nothing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this chapter.

(i) Severability

If any provision of this chapter or of an amendment made by this chapter, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, the amendments made by this chapter, and the application of the provision to any other person or circumstance shall not be affected.

§ 2000cc-4. Establishment Clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

§ 2000cc-5. Definitions

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause " means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government"--

(A) means--

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

§ 2000dd. Prohibition on cruel, inhuman, or degrading treatment or punishment of persons under custody or control of the United States Government

(a) In general

No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(b) Construction

Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.

(c) Limitation on supersedure

The provisions of this section shall not be superseded, except by a provision of law enacted after January 6, 2006, which specifically repeals, modifies, or supersedes the provisions of this section.

(d) Cruel, inhuman, or degrading treatment or punishment defined

In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

§ 2000dd-1. Protection of United States Government personnel engaged in authorized interrogations

(a) Protection of United States Government personnel

In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity

from prosecution for any criminal offense by the proper authorities.

(b) Counsel

The United States Government may provide or employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation of an officer, employee, member of the Armed Forces, or other agent described in subsection (a) of this section, with respect to any civil action or criminal prosecution arising out of practices described in that subsection, under the same conditions, and to the same extent, to which such services and payments are authorized under section 1037 of Title 10.

Current through P.L. 109-227 approved 05-29-06

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

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