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Recognizing Constitutional Freedoms in the Public Schools: Reasserting State and Local Educational Policy and Practice through Non-Judicial Law

Matthew Hilton

This article describes how statutes affirming the role of academic freedom, freedom of conscience and student expression in the public school were adopted and implemented in the State of Utah. These experiences suggest that with carefully defined legal and political consensus, states can articulate and clarify educational policy within the parameters of current constitutional interpretations by the United States Supreme Court.

I. CONSTITUTIONAL CONFUSION IN UNITED STATES SUPREME COURT OPINIONS REGARDING ASSUMPTIONS AND PHILOSOPHY ABOUT EDUCATION

In 1940, the United States Supreme Court issued a full memorandum opinion regarding conflict between state curriculum practices and the provisions of the free exercise clause of the First Amendment. The Court ruled that

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1. The entire statutory text is included as Appendix A to this article; the regulations are found in Appendix B.
2. The First Amendment to the United States Constitution reads as follows: "Congress shall pass no law respecting the 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 to peaceably assemble, and to petition the Government for redress of grievances." The "establishment" phrase generally refers to the wording
although the pledge of allegiance violated students’ religious convictions, a state government could require students enrolled in public schools to pledge allegiance to the flag.³ Three years later, with a nearly identical factual pattern, the Supreme Court reversed itself and prohibited the practice of requiring students to pledge allegiance to the flag in public schools when the practice was against their religious convictions.⁴

However laudable the result of *Barnette* may be, the changes in philosophical assumptions to justify the result may not be. Both opinions applied radically different assumptions regarding the nature of education and constitutional adjudication. For example, as to the process of constitutional adjudication, the two opinions expressed significantly different assumptions regarding the judicial deference due legislative determinations, the role of science in constitutional determinations, and the purpose of the Bill of Rights. Regarding the structure and nature of education, the two opinions announced different assumptions over the role that the family played in reinforcing or opposing what was taught in the school and the processes by which students internalized moral and citizenship education. Even though the Court announced it was applying identical constitutional provisions, beginning its analysis from mutually exclusive assumptions naturally led the two opinions to completely different conclusions about the source of liberty in a free society and the desired outcome of education.⁵

Like the 1940 and 1943 decisions, modern Supreme Court opinions regarding First Amendment constitutional constraints on public school curriculum offer some clarity as to result, but are inconsistent in their articulated assumptions regarding the nature of people and the system of public education. For example, Supreme Court rulings prohibit public schools (as governmental entities) from endorsing or sponsoring daily Bible reading as a devotional service⁶ and daily or ceremonial prayer,⁷ from inviting ministers of religion on school grounds

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for regular voluntary religious instruction, from posting the Ten Commandments on the classroom wall, and from requiring teachers to present a non-evolutionary theory of creation. On the other hand, the Court has also protected the free exercise prerogatives of students and their parents in many ways. For example, schools may not require participation in specific activities that require participants to violate their consciences, religious beliefs, or practices. States are not allowed to mandate exclusive attendance at public school or beyond a certain level where basic educational skills have been mastered. Congress may provide that schools which choose to allow student clubs to extend to matters of interest outside the curriculum must also allow students that desire to meet for religious or scripturally based reasons to similarly organize during non-instructional time.

Notwithstanding these fairly clear results, these and other Court opinions have been inconsistent in articulating or defining the relationship of the school with the parents or guardians of students. Obviously, in a practical sense, neither the students, their parents, nor the officials change the physical nature of their relationship when they interact with each other throughout the day; modern Court opinions viewing the legal effects of that relationship are not so consistent. This can be demonstrated in at least three different ways.

First, while school officials can act in the role of a parent when preventing obscene or profane speech, the same officials lack parental authority when searching for illegal contraband or allowing school directed religious exercises.

Second, an opportunity provided by school officials for parents to voluntarily remove their child from religious activities held on school grounds is deemed to be

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17. See Engel, 370 U.S. at 423-24, 430; Schempp, 374 U.S. at 207-08.
unconstitutionally burdensome to the parent and the child. 18 However, it is of no constitutional significance that other parents may be required to pay private school tuition so that their children may avoid curriculum perspectives which the parents view as hostile to the parent's religious beliefs and practices. 19

Third, those parents that seek judicial prohibition of governmental conduct on the grounds that it constitutes religious activity are not required to prove that they or their children have been individually coerced by the action of school officials. On the other hand, those who are seeking to establish that the school activity has violated their individually held religious beliefs or practices are required to prove that they have been coerced by school officials. 20

Modern Supreme Court opinions reflect additional inconsistency in their assumptions regarding the nature of students and parochial schools. For example, while "mature" students are presumed competent to form and express their views regarding nationally divisive military operations, 21 to voluntarily choose to attend religious clubs after instructional time, 22 and to independently make the morally and spiritually complex decision regarding an induced abortion, 23 the same students are assumed to be psychologically "coerced" when an invocation or benediction is given at a public school graduation ceremony. 24

The Court's analysis of the parochial schools' ability to provide benefits of secular learning for their students has been similarly inconsistent. In 1968 the Court acknowledged that it had "long recognized that religious schools pursue two goals, religious instruction and secular education." 25 However, three years later, after an examination of the "cumulative criteria developed by the Court over many years," 26 the Court negated...

18. Id.
20. See Jaffree, 472 U.S. 38, 60 n.51 (1985) and cases cited therein; Schempp, 374 U.S. at 203, 222-23; Engel, 370 U.S. at 421, 430-32.
the effect of legislative findings that such schools did provide secular benefits to their students, and thereafter either assumed that private, religious schools conferred no secular benefit on their students, avoided the issue when it was raised in a federal administrative context, or included parental decision making to direct the use of federal funds.

The Supreme Court's inconsistent application of these legal standards and evidentiary assumptions has not gone unnoticed. In the words of one legal scholar,

[i]t is by now notorious that legal doctrines and judicial decisions in the area of religious freedom are in serious disarray. In perhaps no other area of constitutional law have confusion and inconsistency achieved such undisputed sovereignty.

State and federal courts have expressed both caution and apparent concern over the practical effect of the Court's decisions. For example, when the Utah Supreme Court recently ruled on the constitutionality of prayer in public meetings, the Utah Court refused to incorporate the Supreme Court's Lemon test into the establishment clause analysis relevant to Utah's constitution. Writing for four of five justices, Justice Zimmerman observed:

27. See id. at 613-614.
31. Steven D. Smith, Rise and Fall of Religious Freedom in Constitutional Discourse, 140 U. PA. L. REV. 149, 149-150 (1991). To the degree this conclusion is correct, the present state of constitutional law demonstrates that the due process requirements of the Fourteenth Amendment do not become "much more definite when the specific prohibitions of the First become its standard," Barnette, 319 U.S. at 624. "Candor compels acknowledgement, moreover, that [the Court] can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," Lemon, 403 U.S. at 612-13.
32. The Lemon test, adopted by the United States Supreme Court, imposes the following standard for federal establishment clause analysis:

"Every analysis in this area must begin with the consideration of cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . [F]inally, the statute must not foster 'an excessive government entanglement with religion.' (Citations omitted.)"

Lemon, 403 U.S. at 602, 612-14.
"[T]he United States Supreme Court only devised the Lemon test in 1971 and appears to apply it rather opportunistically. When the Court wants to reach a result that might not flow from a Lemon analysis, it seems quite willing to ignore Lemon. Indeed, the Court's decision in Lee v. Weisman suggests that Lemon may have been all but abandoned. See 112 S.Ct. 2649, 2660-61 (1992). 33

Likewise, federal circuit courts of appeals that have recently applied the Lemon test to sensitive areas of educational curriculum and practices have cautioned against a strict, unfeeling application of the Court's precedent. For example, in 1990, the Tenth Circuit noted that "[i]t is neither wise nor necessary to require school officials to sterilize their classrooms and libraries of any materials with religious references in order to prevent teachers from inculcating specific religious values." 34 In 1992, the Fifth Circuit Court of Appeals observed that "radical efforts to avoid pressuring children to be religious actually teach and enforce notions that pressure the young to avoid all that is religious." 35 To presume that the United States Supreme Court intended such a result to occur would denigrate the Court's own "oft-expressed view that the education of this Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." 36

With inconsistent application of evidentiary assumptions and legal standards, but consistent results that seem to disfavor acknowledgment of a religious or theistically based world view, it is not surprising that educators have been confused regarding the breadth of federal constitutional prohibitions on public school curricula and activities. In 1993 the Utah legislature specifically found that there was a "misplaced but widespread fear among public education personnel" that teaching and studying about the influence of religion was "somehow improper or illegal." 37 Education and

37. House Journal, Fiftieth Legislature, 1993 General Session, at 269 (hereinafter referred to as House Journal); Senate Journal, Fiftieth Legislature,
legal clarification should "help public school officials to appropriately protect and accommodate individual rights in the operation of Utah's schools."\(^{38}\) Determining what was "appropriate" required (1) elimination of the confusion apparent in both constitutional law and the minds of educators and (2) building a widespread consensus that the lines defining lawful conduct were both constitutional and desirable.\(^{39}\)

II. Creating Consensus for Clarifying Educational Policy within Federal Constitutional Constraints

Creating consensus regarding the appropriateness of educational policy and then establishing the same through non-judicial law requires satisfying at least two types of consensus: legal consensus and political consensus. Legal consensus consists of ensuring that as a matter of state and federal constitutional law,\(^{40}\) the educational policy or practice that is sought to be implemented is an option that is not prohibited. Political consensus exists when there is agreement among those that are constitutionally empowered to decide that the proposed action is indeed the most appropriate.

Table I below summarizes this multi-level challenge in ensuring that there is legal consensus that specific policies or practices are not forbidden. Building legal consensus requires that each level must act in harmony with the level above

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1993 General Session, at 483 (hereinafter referred to as Senate Journal).

38. Utah Admin. R., First Reading Rules, R 277-105-2(B) (April 8, 1994) (hereinafter referred to as "Draft Rules").

39. Of course, whether confusion and intentional adherence to the clearly prohibited judicial "results" are eliminated in practice is a function of whether local districts, their employees, parents, and students, understand the constitutionally valid clarifying standards and choose to follow them.

40. See Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481, reh'g. denied 475 U.S. 1091 (1986), on remand 771 P.2d 1119 (Wash.), cert. denied, 493 U.S. 850 (1989) reh'g denied sub. nom. 494 U.S. 1050 (1990) for an example of a case when state law was applied to make a funding option unconstitutional under the state constitution even though it had in fact been found to be constitutional under the federal constitution.
insofar as it attempts to mandate or prohibit certain conduct. For example, government sponsored daily prayer in the public schools has been prohibited by the United States Supreme Court and in Utah by statutory provisions. These prohibitions should indicate to administrators and teachers that legal consensus does not allow school-sponsored prayer in classroom teaching or student activities. Thus, prior to adopting an educational policy or practice, those who are doing so must be sure that they are choosing to act in an area or in a manner upon which there is legal consensus that they have the power to act. Once there is legal consensus, choosing to act cannot be wrong as a matter of law. In a situation where choice is given, educators need not

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41. The search for reasonable certainty in this area often varies depending upon the initial perspective taken regarding the freedom to act. I am aware that there are educators and counsel who believe that in the church-state area nothing can be done unless there is a court opinion requiring educators to act. On the other hand, my preference is that all options are open and available unless one has been specifically prohibited by a court or constitution of appropriate jurisdiction. The choice of one's starting points of analysis has a profound impact on determining what is prohibited or allowed with a reasonable degree of certainty.

42. Apparently, in some places, this awareness is either not widely held or not honored. For example, during 1993, I attended one school district in Utah where a fifth grade graduation and kindergarten Thanksgiving celebration were held. At both events, a public prayer was formally announced and held. Parents who expressed concern to me that prayer was held thought the recently enacted statute had been violated and did not acknowledge that a Supreme Court opinion had not been followed.

43. For example, a legislature is constrained only by constitutional law. The USOE is limited by the constitution and statutory law. A district must follow constitutional law, statutory provisions and USOE regulations. An administrator or teacher must follow the requirements of constitutional law, statutory law, USOE regulations and district policies.
act because of legal mandate, but remain free to act in accordance with their philosophy or practice.

A. Building Legal Consensus in Utah

The early drafts of the Utah constitutional freedoms statutes were submitted to and reviewed by the Religious Liberty Committee, a special committee created to advise the legislature on the propriety of amending the religion provisions of the Utah Constitution. The committee was comprised of legislative leaders, state and local religious leaders, and several lay citizens. Numerous public hearings regarding religious issues were held at the State Capitol and throughout the State. During this process many presumed that if federal constitutional constraints were followed, any constraints under the Utah Constitution would be satisfied. The draft regulations presume the same.

Under federal law, however, careful study and presentations from various perspectives regarding Supreme Court opin-

44. Testimony from Professor J.D. Williams and myself recommended amending the Utah constitutional to clarify that speaking about religion or teaching comparative religion did not violate the language of Article I, §4 of the Utah Constitution which prohibited funding for “religious... instruction.” During the fall of 1994, voters in the State of Utah may choose to eliminate these concerns by adopting a proposed constitutional amendment to Article X of the Utah Constitution which states as follows:

The study of the influence of religion, the comparative study of religions, or the theistic, agnostic and atheistic assumptions relevant to the educational curriculum, including cultural heritage, political theory, moral theory, scientific thought, or societal values, does not constitute either religious instruction or a sectarian practice forbidden by the Utah Constitution.

45. Draft Rule R277-105-3(C) provides as follows:

Court decisions interpreting Constitutional establishment clause provisions are a commonly used source for information about acceptable relationships between government and religion. The Board has also attempted to reflect applicable rulings in the development of this rule. Because of the relative absence of court interpretations concerning the meaning of the Utah Constitution as applied to the public schools, this rule places primary reliance upon interpretations of related clauses in the First Amendment to the United States Constitution. In applying the rule, school officials may presume that any accommodation of religion which would be permissible under applicable rulings interpreting the First Amendment of the United States Constitution, and has not been prohibited in a decision interpreting Utah law which is binding upon the Utah public education system, is permissible in the schools of the State of Utah.
ions revealed two clearly marked guidelines as to when a legislature could seek to reaffirm desirable educational policy. First, the results of many United States Supreme Court opinions defined certain conduct or policies that are clearly prohibited. Second, many times the Court’s efforts to narrowly define the results of each opinion indicate the areas or means by which state and local policy may be established in accordance with the constitution.

For example, while prohibiting government sponsored prayer in the elementary school classroom, the Court clarified that

nothing in the [Engel] decision is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer’s professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise [of state sponsored, written daily prayer in the classroom].

Similarly, while the reading of the Bible as a form of daily devotional or moral instruction was prohibited, academic study that included examination of the Bible was not.

[It might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historical qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with the First Amendment.]

Even when striking down the efforts of Kentucky to post the Ten Commandments on the wall of every classroom, the Court specifically noted that “[t]his is not a case in which the Ten Commandments are integrated into the school curriculum,

46. Engel, 370 U.S. at 435 n.21.
47. Schmepp, 374 U.S. at 225.
where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. Indeed, “forbidding the posting of the Ten Commandments did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization.” Finally, while a religiously motivated requirement to present scientific evidence of a directed rather than evolutionary form of creation was prohibited, the Court acknowledged that

[w]e do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught. . . . [T]eaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction.

While it is true that people of different persuasions can see a proposal from different perspectives, once the constitutional parameters are defined with a reasonable degree of certainty, then it is time to determine how political consensus can be achieved regarding the educational policies and practices that are to be followed.

B. Building Political Consensus for Educational Policy

Once the clear result oriented constitutional lines were drawn to clarify prohibited conduct or policy, extensive work was undertaken to determine where consensus could be achieved regarding the degree of accommodation or separation that was desired for legitimate pedagogical and social reasons. Spending extensive time with the interested members of the Religious Liberty Committee, legislative leaders and expert witnesses clarified the areas where consensus could be built.

49. Aguillard, 482 U.S. at 594.
50. Id. at 593-594.
51. “What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion.” Lemon, 403 U.S. at 619. Regardless, over time, there appeared to be mutual appreciation for the willingness of many to both give and receive needed feedback that contributed to the building of consensus regarding the legislation and regulations.
52. Areas where consensus was not possible, even at this early stage, included whether to define policies by a constitutional amendment rather than by
Once in legislative session, there was additional revising with representatives of the State Office of Education and Attorney General’s Office as well as a review of the result with the Religious Liberty Committee and the appropriate committees of the Legislature.\(^{53}\) Finally, even after the Legislature’s unanimous adoption of the statute and its legislative history, extensive work still followed in building consensus among scholars, practitioners and the State Office of Education over the regulations that were to implement the statute on a state-wide basis.

At least four factors contributed to the ability to build political consensus among educators, lawyers, legislators, and various legal organizations that often represented conflicting perspectives on the issues. First, some of the key issues in the statute—academic expression and student expression—had already had a “trial” run in a local district for almost two years.\(^{54}\) Second, almost a year before the legislation was introduced, then Superintendent Jay B. Taggert formally affirmed statute and whether to apply current statutory protections to a university level.

\(^{53}\) Specific provisions or concepts which were eliminated from or changed in the legislation at this stage because of objections of either the State Office of Education or counsel representing twenty-two districts in the State of Utah included removing the preamble of the bill which reaffirmed by statute various principles present in the Utah Constitution, lowering the level of disruption that would be tolerated in public schools from “materially interferes” with order or discipline to “unreasonably interferes”, and striking freedom of conscience provisions that had been provided for teachers. The change that limited the level of student disruption follows more modern opinions than Tinker. See Note, Planned Parenthood v. Clark County School District: “Having Your Cake and Eating It Too” in Public School Free Speech Cases, 1993 B.Y.U. L. REV. 893.

\(^{54}\) As the result of a law suit filed in state court in Washington County during 1990—and later moved to federal court by the school district—Washington County School District adopted regulations that provided practical experience with the academic freedom and student expression portions of the statute. Key provisions of the policy, read as follows: *FREE EXERCISE OF RELIGION:* The Board recognizes the right of free exercise of religion by individuals, including students, teachers, and other employees. Therefore, the District shall do nothing that will impair the rights or ability of such individuals to the free exercise of their religion in activities not sponsored by the District but held on District property. In addition, during discretionary time on campus, the same persons shall not be restricted in their private, personal religious practices, which shall include study of scriptures or prayer. *FREEDOM OF SPEECH:* In accordance with the freedom of religion and freedom of speech, the District shall not strike out nor inhibit any portions of graduation talks, any classroom discussion, or academic activity solely on the basis that religion, Deity, or personal belief is mentioned. No regulation shall be made of the content of statements of non-District groups or individuals using school facilities regardless of participation of District employees or students in said non-District sponsored activities solely on the basis that religion, Deity, or personal belief is mentioned.” These provisions were eventually reviewed by then State Superintendent Jay B. Taggert, as noted in note 55, infra.
that the students' right to such expression was in accordance with policies of the Utah State Office of Education (USOE) then in effect.\textsuperscript{55} Third, notwithstanding the conflicting opinions by expert witnesses testifying before the Religious Liberty Committee regarding various proposals to revise the religion clauses in the Utah Constitution, there appeared to be near unanimity among experts that, in fact, in the area of public education, there was substantial confusion in the minds of educators and the public regarding what was constitutionally permissible conduct in the public schools. Fourth, the Utah legislature invoked a rarely used procedure, adopting very specific statements of legislative intent in each House immediately after the adoption of the statute.\textsuperscript{56} This specific statement of legislative intent was the foundation for the formulation of administrative rules. This was needed because it was not clear what role the USOE desired to have in the process.\textsuperscript{57} All four circumstances contributed to the ability to build unanimous political consensus in favor of the legislation.\textsuperscript{58}

\textsuperscript{55} As it related to students, "we see no conflict between your policy and applicable State Board of Education policies or rules so far as the students, the general public, and employees acting in their private capacities are concerned." As it related to employee expression of personal belief, "[s]chool agents and employees should be extremely cautious when acting in their official capacities about expressing their personal religious beliefs or the rightfulness or wrongfulness of any other person's religious beliefs or lack thereof." Letter from Jay B. Taggart, Utah State Superintendent of Public Instruction to Steven M. Peterson, Washington County School District Superintendent, April 19, 1991. This opinion letter has legal significance because by statute such opinions are "considered to be correct and final unless set aside by a court of competent jurisdiction or by subsequent legislation." \textit{Utah Code Ann.} §53A-1-303(4) (1993).

\textsuperscript{56} See House Journal and Senate Journal, \textit{supra} note 37.

\textsuperscript{57} Three years earlier the State School Board had twice refused to consider a formal request to promulgate rules regarding the issues addressed by the statutes. In addition, because the overworked legal staff of USOE had been assigned to other matters that had been deemed to have a higher priority, the USOE chose not to be involved on an ongoing basis with the Religious Liberty Committee in the formulation of the statutes.

\textsuperscript{58} Whether one views Divine assistance on behalf of freedom as being a key fifth factor depends on one's perspective and personal experience. Recognizing Divine intervention is not unknown in the American experience. Many declarations of personal faith are included in the Declaration of Independence, state constitutions, official declarations, and personal accounts of early founders of this nation and the state of Utah. Based on my intimate experience over a four year period with the issues involved in this legislation (including unsuccessful efforts to encourage USOE to adopt regulations addressing these issues; the litigation related to and formulation of the Washington County School District policy and its subsequent partial approval by the State Superintendent; drafting, suggesting and revising the legislation and the legislative intent statement for the Religious Liberty Committee and
III. AREAS OF CONSENSUS IN UTAH: ACADEMIC FREEDOM, FREEDOM OF CONSCIENCE AND STUDENT EXPRESSION

A. Clarifying Constitutional Constraints on Academic Freedom

The Utah statute clarifies that those designing and teaching curricula or activities may include the study of religion or other matters containing theistic, agnostic and atheistic assumptions provided it is done in a secular manner and in accordance with other state and local policies. Unlike the requirements in Aguillard, (the Supreme Court creationist science case from Louisiana), the options to include or exclude such matters are left to the academic discretion of the teacher involved and local policy requirements not in conflict with the statute.

Utah Legislature; subsequent work on state-wide regulations; and primary drafting of the proposed constitutional amendment), I am of the opinion that there was Divine assistance in the adoption of this legislation and its implementing regulations. I believe this is evident in at least two ways.

First, there was an unprecedented unanimity regarding the final product. Like the conflicting opinions that led to the adoption of the Bill of Rights to the United States Constitution, I believe that the many conflicting viewpoints that contributed to the legislation and implementing regulations made them much better than had they been drafted from only one perspective or by only one person. The blending of compromises into one text and legislative history may well have contributed to the final unanimity. However, for me, the creation of unanticipated unanimity from such diverse backgrounds and views is evidence of Divine intervention. Political consensus has been recognized as evidence of such an occurrence in our past. Speaking of the United States Constitution, James Madison recognized that overcoming many conflicting viewpoints (including his own) "with a unanimity almost as unprecedented as it must have been unexpected" was evidence of Divine intervention. See James Madison, Federalist Papers, Number 37. Like Madison, some of my initial views and ideas were properly changed and compromised in the consensus building process.

Second, I am aware of the prayers and heartfelt yearnings of many from different beliefs and persuasions regarding the development and adoption of the statute and regulations. For me, this awareness has reaffirmed that "the power of prayer [is] deep in the religious convictions of many" United States v. Ballard, 332 U.S. 78, 87 (1944). Thus, in response to an observation that many "outside" of the legislative process felt I "didn't have a prayer" in having the legislation adopted, I have publicly acknowledged while teaching a graduate seminar that I believe that the statute was adopted precisely because of the significant effort, sacrifice, and prayers of many people.

So long as many people maintain deeply held convictions about the power of prayer and the need to protect the freedom to make moral choices within the framework of constitutional law, I believe there will continue to be Divine assistance in favor of freedom.
The state’s draft regulation R 277-105-4 tracks the statute and clearly outline the guidelines of constitutionally appropriate curricula and teacher conduct in the classroom:

(A) A study, performance or display which includes examination of or presentations about religion, religious thought or expression, or influence thereof in music, art, literature, law, politics, history, or any other portion of the curriculum may be undertaken in the public schools so long as it is designed to achieve permissible educational objectives and is presented within the context of the approved curriculum.

(B) The objective study of comparative religions is permissible but no religious tenet, belief, or denomination may be given inappropriate preferences.

(C) No aspect of cultural heritage, political or moral theory, or societal value may be either included or excluded from consideration in the public schools primarily because it explicitly or implicitly contains theistic, agnostic, or atheistic assumptions.

(D) An analysis of religion, deity, an absolute moral principle, or any other concept that may contain a theistic, agnostic or non-theistic assumption, may be presented when included as an appropriate component or aspect of a broader study, display, presentation, or discussion regarding cultural heritage, political theory, moral theory or a societal value. 59

However, the academic study of these assumptions and concepts is not to be presumed to be a license for school employees to proselytize students at school. Draft Rule R277-105-8 provides the following:

(A) An employee’s rights relating to voluntary religious practices and freedom of speech do not include proselytizing of any student regarding atheistic, agnostic, sectarian, religious, or denominational doctrine while the employee is acting in the employee’s official capacity, nor may an employee attempt to use his position to influence a student regarding the student’s religious beliefs or lack thereof.

However, spontaneous student initiated inquiry regarding belief is not prohibited.

(B) Even though acting in an official capacity, an employee may respond in appropriate and restrained manner to a spontaneous question from a student regarding the employee’s

personal belief or perspective. Nevertheless, because of the special position of trust held by school employees, all such employees should exercise great caution in expressing personal religious beliefs or perspectives, or opinions about the rightfulness or wrongfulness of any other person’s religious beliefs or lack thereof.  

Draft Rule R277-105-7 addressed government sponsored prayer and prior practices allowing many school choirs to sing in a variety of religious services.

A. Public school officers and employees may neither authorize nor encourage prayer or devotional activities in connection with any class, program, presentation or other activity which is under the control, direction, or sponsorship of a public school or school district. This subsection shall not act to restrict rights under R277-105-6.  

B. No school employee or student may be required to attend or participate in any religious worship service, whether in an individual capacity or as a member of a performing group, regardless of where or when the service is held. No penalty may be assessed for failure to attend or perform in such an activity.

C. Subject to the requirements of Subsection R277-105-5, students who are members of performing groups such as school choirs may be required to rehearse or otherwise perform in a church-owned or operated facility if the following conditions are met:

1. the performance is not part of a religious service;
2. the activity of which the performance is a part is neither intended to further a religious objective nor under the direction of a church official; and
3. the activity is open to the general public.

D. Students may voluntarily attend and perform during a religious service as individuals or as members of a group, provided all arrangements are initiated and carried out by students or non-school personnel.

E. Religious activities may be conducted on the same basis as any other non-school activity outside of regular school hours.

60. Draft Rules, R277-105-8.
61. This regulation deals with religious and non-religious student expression and conduct in and outside the classroom and statutory protections afforded the same.
62. This regulation deals with the implementation of the freedom of conscience provisions and the statutory protections afforded the same.
F. Subject to the requirements of R277-105-5, students may be required to visit church-owned facilities when religious services are not being conducted if the visit is intended solely for the purpose of pursuing permissible educational objectives such as those relating to art, music, architecture, or history.

Observations made outside of the State of Utah have concluded that these decisions of the legislature and USOE are justifiable on pedagogical and administrative grounds.

The providing of clarifying guidelines in the areas of academic freedom through board policy in this sensitive area is justified on pedagogical and administrative grounds because it will serve to (1) encourage greater breadth in the selection of curriculum, (2) create greater confidence in our teachers of the appropriateness of their selection, (3) eliminate confusion which invites litigation, and (4) facilitate professional training of employees.

Neither the Utah legislature nor USOE required its teachers to present certain matters; rather, they allowed for the same if the teachers, in their professional discretion and in accordance with other state and local curriculum requirements, chose to do so.

B. Protecting Freedom of Conscience

Parents and students' rights to exercise freedom of conscience or religion may not to be infringed by requiring participation in a particular school curriculum or a school activity. Under the Utah law, the right to freedom of conscience could be asserted by a secondary student with notification to the student's parent or guardian, an elementary student with the approval of the parent or guardian, or a custodial parent or legal guardian of a student. "This section protects individual rights of conscience by granting them priority over administra-
tive convenience. The Utah legislature specifically intended to abrogate Smith's limiting effect on parents' and students' free exercise of religion and conscience.

To assert a right of conscience or infringement on religious belief or practice, the student or parent would have to claim that required participation in a portion of the curriculum or activity would submit the student to at least one of the following three occurrences:

1. Participation in such an event would require an affirmance or denial of a religious belief or right of conscience;
2. Participation in a practice forbidden by a religious belief or practice, or right of conscience; or
3. Non-participation in a practice required by religious belief or practice, or right of conscience.

67. House Journal at 270; Senate Journal at 484.

68. This decision served to allow government to limit the free exercise of religion by using a generally applicable law which was not focused at a particular religion. See Employment Division, Dept. of Human Resources v. Smith, 494 U.S. 872 (1990) reh'g denied 496 U.S. 913.

69. House Journal at 271; Senate Journal at 485. Since the enactment of the legislation, the United States Congress enacted the Religious Freedom Restoration Act, known as "RFRA," codified as 42 U.S.C. 2000(b)(b). This would require courts to allow governmental action which "substantially burdens" the exercise of religious freedoms to be limited by "the least restrictive" means requirement; thus, since the statute's reliance on Wisconsin v. Yoder, 406 U.S. 205 (1972) reaffirms the application of the standard in matters of public education, it appears that the "least restrictive" portion of the Utah statute is now required by federal law. However, since the legislature's adoption of the statute and the USOE's regulations all presupposed the statute and rules reflected application of the standard of UTAH CONST., art. III, §1, ("Perfect toleration of religious sentiment is guaranteed,") it would seem that if the "substantially burdened" requirement of RFRA is interpreted to mean anything other than an a requirement of direct interference, then the Utah statute could well impose a higher standard of protection than would be required to initially satisfy the requirements of RFRA.

70. A careful distinction was made in the statutory language between freedom or right of conscience and exercise of religious belief, religious right. This was intended to include protection for those who believe that their conscience has a source that is independent of religion or Deity. The same protection was included in the Draft Rules. The Draft Rules provide that the "exercise of religious freedom means the right to choose or reject religious, theistic, agnostic or atheistic convictions and to act upon that choice." R277-105-1 E.

71. The legislature specifically relied on the well recognized case of Motzert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1067 (6th Cir. 1987), cert. denied 484 U.S. 1066 (1988), which was cited in the Intent Statement. See House Journal at 270; Senate Journal at 484. Like Motzert, the legislation requires that students or their parents demonstrate that the curriculum or activity required them to "affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion." Id. at 1070. However, the legislation and USOE regulations specifically reject the assumption that the granting of opt-out provisions on
The Legislature intended that mere offense to personal preference would not constitute infringement of conscience. Following the lead of United States v. Seeger, the legislature intended that the conduct must violate a duty "superior to those arising from any human relation." The implementing regulation succinctly states that the infringement "must rise to a level of belief that the requested conduct violates a superior duty which is more than personal preference." School personnel are not required or allowed to define the nature of a parent's or student's freedom of conscience or religious belief.

An objecting party is given the right to either request a waiver of participation in entirety or request "a reasonable alternative that requires reasonably equivalent performance by the student of the secular objectives of the curriculum or activity in question." No student can be required to participate in an objectionable activity unless the school official finds that "requiring participation of that particular student is the least restrictive means necessary to achieve a specifically identified educational objective in furtherance of a compelling governmental interest." It appears unlikely that this regulatory standard could ever be satisfied.

grounds of religion or conscience "would result in a public school system impossible to administer." Id. at 1072 (Kennedy, J., concurring.) Cf. id. at 1080 n. 9 (Boggs, J., concurring) ("I do not think that there is any evidence that actually accommodating pupils in practice need be as difficult as the state contends. Indeed, the state espouses a theory of rigidity (and finds alleged experts to support it) that seems a bit ludicrous in this age of individualized attention to many kinds of students languages and interest. There was no evidence of actual confusion or disruption from the accommodation that did take place.") In addition, while Justice Boggs concurred in the opinion in Motzert because of his feeling that judicially mandating the accommodation was "a challenge to the politically-controlled school system," id. at 1079 (Boggs, J., concurring), such a fear need not be relevant in this situation because the decision to accommodate freedom of conscience was a legislative rather than judicial decision.

72. The Utah legislature intended that "the claim that a violation of this 'superior duty' would arise from comprehensive, internalized values rather than a hastily drawn conclusion that any portion of the public school curriculum or school activity was 'distasteful or immoral or absurd or all of these.' Lee v. Weisman, 112 S.Ct. 2649, 2657 (1992)." House Journal at 484-85; Senate Journal at 270.
73. 380 U.S. 163, 175 (1965).
74. House Journal at 270; Senate Journal at 484.
75. Draft Rules, R277-105-5 B.
76. House Journal at 270; Senate Journal at 484.
78. Draft Rules, R 277-105-5 F; Draft Rules R277-105-9-2(d).
As was done in Melissa, Texas, local districts in Utah could articulate compelling reasons to justify allowing these protections for freedom of conscience. Recognizing freedom of conscience as an inalienable right justifies extending the protections.

[T]he right of freedom of conscience and exercise of the religious freedoms of belief and thought are unalienable and fundamental because (1) the dictates of conscience or each person's belief 'depend[s] only on the evidence contemplated by their own minds' and conscience, and (2) reflects the duties owed to the 'Governor of the Universe,' which duties are 'pre­cedent both in order of time and degree of obligation, to the claims of Civil Society.'

If one accepts these political assumptions as being valid and legally significant, there are several pedagogical and administrative grounds to justify protecting freedom of conscience and exercise of religious freedoms. Possible benefits of such a policy could include the following:

(1) encourage students and their families to internalize values of their own choosing, (2) encourage greater confidence in our parents of the ultimate appropriateness of the school curricula and activities that are provided for their children, (3) eliminate confusion which invites litigation, and (4) facilitate professional interaction with and support of the parents in our community.

Encouraging these positive outcomes may well justify the express intent of the Utah legislature and mandate of the USOE that local districts are to ensure that any portion of any curriculum or activity that is repeatedly alleged to interfere with the rights of conscience or exercise of religious freedom of students, parents or legal guardians shall be evaluated to determine whether the educational objectives could be achieved by a less intrusive means.

79. MISD Policies, EMI (LOCAL), Part II, pg. 1, citing Everson v. Board of Education, 330 U.S. 1, 64 (1947), (Rutledge, J., dissenting) (quoting James Madison, "Memorial and Remonstrance Against Religious Assessments").

80. MISD Policies, EMI (LOCAL), Part II, pgs. 2-3 (citations omitted).

81. Draft Rules R277-105-9 A(2)(e); see also House Journal at 270-71; Senate Journal at 485.
Protecting freedom of conscience and the exercise of religious freedom is expressly recognized by the Utah Constitution’s provision that allowing for “[p]erfect toleration of religious sentiment” and protection of conscience. Since Barnette, for fifty years the United States Supreme Court has recognized the right of public school students to protection under the free exercise clause of the First Amendment from compelled affirmations contrary to their conscience. Thus, articulating state and local educational policies to protect freedom of conscience and the exercise of religious freedoms not only can contribute to significant pedagogical and administrative objectives, but also can support and clarify various texts of the Utah Constitution.

C. Defining Parameters of Student Expression

The last section of the Utah statute focused on protecting student expression of personal values and belief. The intent of the Utah legislature was to allow all students regardless of age, to formulate and express their personal views, values, and opinions subject only to the conditions specified. Thus, a limited public forum for students, similar to that upheld in Bell v. Little Axe Independent School District No. 70, 766 F.2d 1391, 1401-1402 (10th Cir. 1985), has been created. This paragraph protects important facets of that perfect toleration of religious sentiment and freedom of conscience (whether expressed as speech or practice) guaranteed under the Utah constitution (Article I, §4; Art.3, §1), with certain narrowly drawn exceptions.

Again, MISD observed that providing this kind of protection furthered important educational and administrative interests.

82. UTAH CONST., art. III, §1.
83. UTAH CONST., art. I, §4. As for MISD, the Texas Constitution provides that “no human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion”. TEXAS CONST., art. I, §6. See also Church v. Bullock, 109 S.W. 115 (1908).
84. Even without RFRA, it is important to remember that the Smith opinion still upheld the validity of Barnette. See Smith, 494 U.S. at 882.
86. House Journal at 271; Senate Journal at 485. It is important to note that the “limited public forum” for student expression created by the statute is not the same as the “limited open forum” under the Equal Access Act, 20 U.S.C. §4071(b) (1992). The right of all students under the “limited forum doctrines” encouraged by the legislature does not create the forum allowed by the Equal Access Act.
Encouraging students to freely express their values and personal beliefs in and outside of the classroom will contribute to their development of basic communication skills, encourage a positive self-image, and foster development of long-term citizenship and ethical behavior. Such practices will further encourage the student to personally internalize the thinking skills and citizenship skills presented in the curriculum. By creating a limited public forum for student expression, students will begin to learn the skills of civil, considered discourse that is the hallmark of a free people.

Time for student expression was appropriately divided into that which would be allowed during instructional time (in the classroom) and that allowed during “discretionary time” (outside of the classroom). Discretionary time included, among other things, free time before and after school, time during recess, lunch, between classes, in the hallways, private time before athletic and other events or activities, and time spent on buses.

However, allowing this limited public forum was conditioned on student compliance with certain standards. Following the lead of the Equal Access Act and the power of the local district to regulate “vulgar, lewd,” and “plainly offensive” speech, any form of expression or conduct which “unreasonably interferes with order or discipline, threatens the well-being of persons or property, or violates concepts of civility or propriety appropriate to a school setting” is inappropriate for the classroom.

Expression outside of the classroom was subject to a slightly less restrictive standard. Prohibited conduct was narrowed to unreasonable interference with “the ability of school officials to maintain order and discipline,” (rather than interference with order and discipline), or actual “endangering” (as opposed to threatening) the well-being of person or property. Standards of civility and decorum continued to be required.

88. See Hazelwood, 484 U.S. at 271 n.4 (1988) (citing Fraser, 478 U.S. 675, 682-84 (1986)).
90. UTAH CODE ANN. §53A-13-101.3(2)(b) (1993). As an addition to what Utah has proposed, the local policies adopted by MISD defined student expression and clarified, among other things, that “[l]iterature or printed materials that a student may choose to distribute need not be written or created by the student.” MISD Policies, Amending Policy FMA (LOCAL), at 2.
The limitations imposed on student expression were intended to be "narrowly drawn exceptions," representative of "compelling governmental interests." Nonetheless, even when justified by these limitations on student expression, the limitations were to be applied by the "least restrictive means" necessary to further the government interest in order, discipline and safety. In practice, this means that when student expression causes disorder, threatens well-being, concepts of civility or decorum that should exist in public schools, the restriction on student expression must interfere the least amount necessary to achieve the protections for people and property outlined in the statute.

IV. CONCLUSION

Careful consideration of pedagogical and administrative needs of students, teachers, administrators and parents can justify the formulation of statutes, regulations and policies that recognize the existence of constitutionally permissible options for teaching about religion and the theistic, agnostic and atheistic assumptions contained in our cultural heritage, political theory, moral theory and societal values. Current Supreme Court opinions presently exempt this type of integrated curriculum from attacks under the establishment clause of the First Amendment.

Creating a limited public forum to encourage student expression and internalization of values is not required by current Supreme Court opinions. However, it is an option for those educational or legislative entities that choose to do so as an effort to encourage student expression as a means of developing basic communication skills and a positive self-image, fostering long-term development of duties of citizenship, moral and ethical behavior, and maintaining civil, considered public discourse. A conscious decision to do so would necessarily presume that such could occur without compromising the educational mission, discipline and decorum of the public school.

It would seem that the requirements to provide protection of free exercise of religion has long been part of state and federal constitutional texts and case law. However, adoption by

91. House Journal at 271; Senate Journal at 485.
92. Id.
educational and legislative entities of express statutes, regulations and policies protecting freedom of conscience and the exercise of religious freedoms from intrusion by government can serve two important purposes. First, any existing confusion regarding the exercise of religious freedom available under federal law in the public schools would be eliminated by a voluntary restoration of the earlier, higher standard of "compelling governmental interest—least restrictive means" analysis. Second, openly protecting freedom of conscience and exercise of religious freedoms encourages students and their families to internalize values of their own choosing, provides parents with greater confidence in the ultimate appropriateness of the school curricula and activities for their child, eliminates possible confusion as to what policies are, and facilitates professional interaction between school employees and parents in the community. Nothing in current state or federal Supreme Court opinions prohibit this type of educational policy-making to be articulated and implemented through appropriate secular means and ends identified in state and local statutes, regulations and policies.

Neither legal nor educational constraints require a continuation of constitutional confusion, professional misjudgment, and public misunderstanding of lawful protections of and constraints on academic freedom, student expression, freedom of conscience, or the exercise of religious freedoms. Careful articulation, drafting, and commitment to the underlying constitutional limitations and secular objectives that would be served by such clarification can be done by state and local legislative and educational entities. To not do so is to abandon an opportunity to be actively involved in the directing and defining of educational policies expressed by law. Failure to exercise that state, local and personal sovereignty could well limit the nature and extent of future freedoms available to all.

(1) The State Board of Education shall establish curriculum requirements under Section 53A-1-402, that include instruction in:
(a) community and personal health; (b) physiology; (c) personal hygiene; and (d) prevention of communicable disease, including acquired immunodeficiency syndrome. That instruction shall stress the importance of abstinence from all sexual activity before marriage and fidelity after marriage as methods of prevention of acquired immunodeficiency syndrome.

(2) Instruction in the courses described in Subsection (1) shall be consistent and systematic in grades eight through 12. At the request of the board, the Department of Health shall cooperate with the board in developing programs to provide instruction in those areas.

(3) The board shall adopt rules that provide that the parental consent requirements of Sections 76-7-322 and 76-7-323 are complied with, and rules that require a student's parent or legal guardian to be notified in advance and have an opportunity to review the information for which parental consent is required under Sections 76-7-322 and 76-7-323. The board shall also provide procedures for disciplinary action for violation of Section 76-7-322 or 76-7-323.

(4) Honesty, temperance, morality, courtesy, obedience to law, respect for and an understanding of the Constitutions of the United States and the state of Utah, the essentials and benefits of the free enterprise system, respect for parents and home, and the dignity and necessity of honest labor and other skills, habits, and qualities of character which will promote an upright and desirable citizenry and better prepare students for a richer, happier life shall be taught in connection with regular school work.


(1) Any instructional activity, performance, or display which includes examination of or presentations about religion, political or religious thought or expression, or the influence thereof on music, art, literature, law, politics, history, or any other element of the curriculum, including the comparative study of
religions, which is designed to achieve secular educational objectives included within the context of a course or activity and conducted in accordance with applicable rules of the state and local boards of education, may be undertaken in the public schools.

(2) No aspect of cultural heritage, political theory, moral theory, or societal value shall be included within or excluded from public school curricula for the primary reason that it affirms, ignores, or denies religious belief, religious doctrine, a religious sect, or the existence of a spiritual realm or supreme being.

(3) Public schools may not sponsor prayer or religious devotionals.

(4) School officials and employees may not use their positions to endorse, promote, or disparage a particular religious, denominational, sectarian, agnostic, or atheistic belief or viewpoint.


(1) If a parent with legal custody or other legal guardian of a student, or a secondary student, determines that the student's participation in a portion of the curriculum or in an activity would require the student to affirm or deny a religious belief or right of conscience, or engage or refrain from engaging in a practice forbidden or required in the exercise of a religious right or right of conscience, the parent, guardian, or student may request:

(a) a waiver of the requirement to participate; or (b) a reasonable alternative that requires reasonably equivalent performance by the student of the secular objectives of the curriculum or activity in question.

(2) The school shall promptly notify a student's parent or guardian if the student makes a request under Subsection (1).

(3) If a request is made under this section, the school shall:

(a) waive the participation requirement; (b) provide a reasonable alternative to the requirement; or (c) notify the requesting party that participation is required. The school shall ensure that the provisions of Subsection 53A-13-101.3(3) are met in connection with any required participation.


(1) Expression of personal beliefs by a student participating in school-directed curricula or activities may not be prohibited or penalized unless the expression unreasonably interferes with order or discipline, threatens the well-being of persons or prop-
erty, or violates concepts of civility or propriety appropriate to a school setting.

(2) (a) As used in this section, discretionary time means noninstructional time during which a student is free to pursue personal interests. (b) Free exercise of voluntary religious practice or freedom of speech by students during discretionary time shall not be denied unless the conduct unreasonably interferes with the ability of school officials to maintain order and discipline, unreasonably endangers persons or property, or violates concepts of civility or propriety appropriate to a school setting. (3) Any limitation under Sections 53A-13-101.2 and 53A-13-101.3 on student expression, practice, or conduct shall be by the least restrictive means necessary to satisfy the school's interests as stated in those sections, or to satisfy another specifically identified compelling governmental interest.
APPENDIX B

R277. Education, Administration.
R277-105-1. Definitions.
   A. “Board” means the Utah State Board of Education.
   B. “Conscience” means a standard based upon learned experiences, a personal philosophy or system of belief, religious teachings or doctrine, an absolute or external sense of right and wrong which is felt on an individual basis, a belief in an external Absolute, or any combination of the foregoing.
   C. “Discretionary time” for students means school-related time that is not instructional time. It includes free time before and after school, during lunch and between classes or on buses, and private time before athletic and other events or activities.
   D. “District” or “school district” means a public school district, the Utah Schools for the Deaf and the Blind, or an Applied Technology Center.
   E. “Exercise of religious freedom” means the right to choose or reject religious, theistic, agnostic, or atheistic convictions and to act upon that choice.
   F. “Guardian” means a person who has been granted legal guardianship of a child in accordance with state law.
   G. “Instructional time” means time during which a school is responsible for a student and the student is required or expected to be actively engaged in a learning activity. It includes instructional activities in the classroom or study hall during regularly scheduled hours, required activities outside the classroom, and counseling, private conferences, or tutoring provided by school employees or volunteers acting in their official capacities during or outside of regular school hours.
   H. “Parent” means a biological or adoptive parent who has legal custody of a child.
   I. “USOE” means the Utah State Office of Education.

   A. This rule is adopted pursuant to Utah Constitution Article X, Section 3 which vests general control and supervision of public education in the Board. It is based upon the First Amendment to the Constitution of the United States; Article I, Section 4, Article III, Sections 1 and 4, and Article X, Section 1 of the Utah State Constitution which speak of rights of con-
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science, perfect toleration of religious sentiment, the free exercise of religion, and prohibitions against the establishment of religion or the imposition of secular control in the schools; Section 53A-13-101(4), which directs that curriculum promoting respect for parents and home, morality, qualities of character and respect for and an understanding of the Constitutions of the United States and the State of Utah be taught in connection with regular school work; and Sections 53A-13-101.1 through 53A-13-101.3, which provide direction for the USOE and school districts regarding curriculum, freedom of conscience, exercise of religious freedoms, and student expression.

B. The purpose of this rule is to help public school officials to protect and accommodate individual rights in the operation of Utah's schools.

R277-105-3. Interpretive Context for the Rule.

A. The Board recognizes the importance of religious belief and practice and other expressions of conscience in the lives of many people, the critical role that such beliefs have played in the development of societies and cultures throughout the world, and the influence that these beliefs continue to have on concepts and interpretations relating to school curricula. The Board also recognizes that Utah is becoming a pluralistic society with an increasing diversity of peoples and beliefs, and that this diversity will require the development of greater tolerance and understanding among the people of the state.

B. The Constitution of Utah prohibits the use of the powers of government to encourage or discourage religious beliefs or practices, or to repress rights of conscience. Given their unique relationship to children attending the public schools, school officials must be particularly careful to remain neutral in matters relating to religion, while striving to accommodate the religious beliefs and practices and the freedom of conscience of students and their parents.

C. Court decisions interpreting Constitutional establishment clause provisions are a commonly used source for information about acceptable relationships between government and religion. The Board has attempted to reflect applicable rulings in the development of this rule. Because of the relative absence of court interpretations concerning the meaning of the Utah Constitution as applied to the public schools, this rule places primary reliance upon interpretations of related clauses in the First Amendment to the United States Constitution. In apply-
ing the rule, school officials may presume that any accommodation of religion which would be permissible under applicable rulings interpreting the First Amendment to the United States Constitution, and has not been prohibited in a decision interpreting Utah law which is binding upon the Utah public education system, is permissible in the schools of the State of Utah.

**R277-105-4 Creation and Implementation of Curriculum**

A. A study, performance, or display which includes examination of or presentations about religion, religious thought or expression, or the influence thereof in music, art, literature, law, politics, history, or any other portion of the curriculum may be undertaken in the public schools so long as it is designed to achieve permissible educational objectives and is presented within the context of the approved curriculum.

B. The objective study of comparative religions is permissible, but no religious tenet, belief, or denomination may be given inappropriate emphasis.

C. No aspect of cultural heritage, political or moral theory, or societal value may be either included or excluded from consideration in the public schools primarily because it explicitly or implicitly contains theistic, agnostic, or atheistic assumptions.

D. An analysis of religion, deity, an absolute moral principle, or any other concept that may contain a theistic, agnostic, or non-theistic assumption, may be presented when included as an appropriate component or aspect of a broader study, display, presentation, or discussion regarding cultural heritage, political theory, moral theory or a societal value.

**R277-105-5 Requests for Waiver of Participation in School Activities**

A. A parent, a legal guardian of a student, or a secondary student may request a waiver of participation in any portion of the curriculum or school activity which the requesting party believes to be an infringement upon a right of conscience or the exercise of religious freedom in any of the following ways:

1. it would require an affirmance or denial of a religious belief or right of conscience;
2. it would require participation in a practice forbidden by a religious belief or practice, or right of conscience; or
3. it would bar participation in a practice required by a religious belief or practice, or right of conscience.
B. A claimed infringement under Subsection A must rise to a level of belief that the requested conduct violates a superior duty which is more than personal preference.

C. If a minor student seeks a waiver of participation under Subsection A, the school shall promptly notify the student's parent or legal guardian about the student's choice. In the event of a conflict, a parent's or legal guardian's wishes shall prevail over those of a minor student.

D. A parent, guardian, or secondary student requesting a waiver of participation under Subsection A may also suggest an alternative that requires reasonably equivalent performance by the student of the objective of the curriculum or activity that is believed to be objectionable.

E. In responding to a request under Subsection A, the school shall:
   (1) waive participation by the student in the objectionable curriculum or activity;
   (2) provide a reasonable alternative as suggested by the parent or secondary student, or other reasonable alternative developed in consultation with the requesting party, that will achieve the objectives of the portion of the curriculum or activity for which waiver is sought; or
   (3) deny the request.

F. A request for waiver of required participation shall not be denied unless the responsible school official finds that requiring the participation of that particular student is the least restrictive means necessary to achieve a specifically identified educational objective in furtherance of a compelling governmental interest.

G. In responding to a request under Subsection A, the school shall not require an affected student to accept a sub-standard or educationally deficient alternative.

H. Permitting the submission of requests for participation waivers, and the provision of reasonable alternatives, is intended to facilitate appropriate protection and accommodation of a requesting party's asserted right of conscience or exercise of religious freedom, and shall not be considered to be an attempt by a school official to endorse, promote or disparage a particular religious or non-religious viewpoint.

R277-105-6 Student Expression

A. A student participating in a classroom discussion, presentation, or assignment, or in a school sponsored activity,
shall not be prohibited from expressing personal beliefs of any kind nor be penalized for so doing, unless the conduct:

1. unreasonably interferes with order or discipline;
2. threatens the well-being of persons or property; or
3. violates concepts of civility or propriety appropriate in a school setting.

B. Students may initiate and conduct voluntary religious activities or otherwise exercise the religious freedom on school grounds during discretionary time. Individuals not currently enrolled as students in the school may neither conduct nor regularly attend the activities. School officials may neither conduct nor actively participate in the activities, but may be present as necessary to ensure proper observance of school rules and may limit or prohibit student activities under this section which:

1. unreasonably interfere with the ability of school officials to maintain order and discipline;
2. threaten the well-being of persons or property; or
3. violate concepts of civility or propriety appropriate in school setting.

R277-105-7. Worship services and church-owned facilities

A. Public school officers and employees may neither authorize nor encourage prayer or devotional activities in connection with any class, program, presentation or other student activity which is under the control, direction, or sponsorship of a public school or school district. This Subsection shall not act to restrict student rights under R277-105-6.

B. No school employee or student may be required to attend or participate in any religious worship service, whether in an individual capacity or as a member of a performing group, regardless of where or when the service is held. No penalty may be assessed for failure to attend or perform in such an activity.

C. Subject to the requirements of Subsection R277-105-5, students who are members of performing groups such as school choirs may be required to rehearse or otherwise perform in a church-owned or operated facility if the following conditions are met:

1. the performance is not part of a religious service;
2. the activity of which the performance is a part is neither intended to further a religious objective nor under the direction of a church official; and
(3) the activity is open to the general public.

D. Students may voluntarily attend and perform during a religious service as individuals or as members of a group, provided all arrangements are made by students or non-school personnel.

E. Religious activities may be conducted on the same basis as any other non-school activity outside of regular school hours.

F. Subject to the requirements of R277-105-5, students may be required to visit church-owned facilities when religious services are not being conducted if the visit is intended solely for the purpose of pursuing permissible educational objectives such as those relating to art, music, architecture, or history.

R277-105-8. Expressions of Personal Belief by Employees

A. An employee's rights relating to voluntary religious practices and freedom of speech do not include proselytizing of any student regarding atheistic, agnostic, sectarian, religious, or denominational doctrine while the employee is acting in the employee's official capacity, nor may an employee attempt to use his position to influence a student regarding the student's religious beliefs or lack thereof.

B. Even though acting in an official capacity, an employee may respond in an appropriate and restrained manner to a spontaneous question from a student regarding the employee's personal belief or perspective. Nevertheless, because of the special position of trust held by school employees, employees should exercise great caution in expressing personal religious beliefs or perspectives, or opinions about the rightfulness or wrongfulness of any other person's religious beliefs or lack thereof.


A. Supervision and Training

(1) Local school boards and their employees shall cooperate and share responsibilities in implementing Sections 53A-13-101 et. seq. U.C.A.

(2) Each local school board shall adopt and implement policies and training in accordance with these regulations and the provisions of Sections 53A-13-101 et. seq. U.C.A., to include the following:

(a) the person to whom a request for waiver of participation or substitution of another activity is to be directed;
(b) how notice is to be given to the parent of a minor secondary student who makes a request pursuant to an exercise of freedom of conscience or exercise of religious freedom under Sections 53A-13-101.2 and 53A-13-101.3 U.C.A. (1993);

(c) how appeals may be taken from a decision to require participation in any curriculum or activity after a request to either waive participation or allow substitution of another activity has been made by a parent, legal guardian or secondary student, including suspension of participation requirements until a ruling on the appeal is issued;

(d) ensuring that no student will be compelled to participate in any curriculum or activity after a request to waive participation or allow substitution of another activity has been submitted unless it is determined that requiring the participation of that particular student is the least restrictive means necessary to achieve a specifically identified educational objective in furtherance of a compelling governmental interest; and

(e) ensuring that any portion of any curriculum or activity that is repeatedly alleged to interfere with the rights of conscience or exercise of religious freedom of students, parents or legal guardians shall be evaluated to determine whether the educational objectives could be achieved by less intrusive means.