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# The Necessity and Impact of the Proposed Religious Equality Amendment

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The First Amendment does not need to be amended. Only its interpretation does. To do this we need another amendment—nothing less will suffice. Neither an act of Congress nor Department of Education guidelines on religion in public schools will stop judges from continuing to misinterpret the Establishment Clause. Since the problem is constitutional misinterpretation, it can only be solved constitutionally.

## I. THE NEED FOR A CONSTITUTIONAL AMENDMENT ADDRESSING THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE

The problem is as pervasive as it is persistent: courts and public officials act as though the First Amendment *requires*, rather than prohibits, discrimination against religious expression.

Presently it is a legal gauntlet for a junior-high-schooler who wishes to hand out religious literature to interested classmates at school;[1] for a high-schooler who seeks the freedom to pray audibly at a once-in-a-lifetime graduation;[2] for the public em-

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* Steven T. McFarland is Director of the Center for Law and Religious Freedom of the Christian Legal Society and was a member of a group which privately drafted the proposed text of the Religious Equality Amendment co-sponsored by Representative Hyde and Senator Hatch. This article resulted from a presentation given at a conference entitled "A Religious Equality Amendment?" at Brigham Young University on February 12, 1996. The views expressed in his article are those of the Christian Legal Society. *See, e.g.*, Gregory S. Baylor, *The Religious Equality Amendment*, CHRISTIAN LEGAL SOC'Y Q., Summer 1995, at 4.

The author is indebted to Gregory S. Baylor, Esq., Assistant Director of the Center for Law and Religious Freedom of the Christian Legal Society, for his substantial contributions to this article.

1. Hedges v. Wauconda Community Unit Sch. Dist. No. 118, 9 F.3d 1295 (7th Cir. 1993).

2. Lee v. Weisman, 505 U.S. 577 (1992); ACLU v. Blackhorse Pike Regional Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994), *vacated and remanded*, 115 S. Ct. 2604, *on remand*, 62 F.3d 1233 (9th Cir. 1995); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992); Adler

ployee who keeps a Bible in his desk at work or who has religious discussions with a co-worker;[3] for a state legislature that wishes to let parents choose where their children are educated, including religious schools, through a voucher program;[4] for parents who seek standard tutoring services from the school district for their educationally disadvantaged children regardless of which school they choose;[5] or for a religious social service ministry to receive a government grant to help the poor, when such funds are available to private secular agencies.[6]

For each of these requests for equal, not special, treatment, religious citizens currently must fight tenacious opposition every step of the way through courts across the land. These disputes cost millions of dollars in court time and attorney fees. But the most costly injury from the unsettled and frequently erroneous interpretation of the Establishment Clause is the loss suffered by generations of students, parents, ministries, and working Americans who are deprived of their basic civil right to religious liberty.[7] Each day of denied constitutional rights constitutes irreparable harm according to the United States Supreme Court[8] and any honest conscience.

My focus today is not on the illness but on potential remedies. We need to amend the Constitution in order to cure the problem of religious inequality in America. The problem will not

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v. Duval County Sch. Bd., 851 F. Supp. 446 (M.D. Fla. 1994); Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097 (E.D. Va. 1993); Sands v. Morongo Sch. Dist., 262 Cal. Rptr. 452 (Ct. App. 1989), *rev'd*, 809 P.2d 809 (Cal. 1991).

3. Brown v. Polk County, 61 F.3d 650 (8th Cir.) (en banc), *cert. denied*, 116 S. Ct. 1042 (1995); Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992).

4. Wisconsin *ex rel.* Thompson v. Jackson, 546 N.W.2d 140 (Wis. 1996).

5. Aguilar v. Felton, 473 U.S. 402 (1985).

6. Bowen v. Kendrick, 487 U.S. 589 (1988).

7. For example, Professor Michael McConnell and I represented a handful of Christian students at a public high school outside of Seattle who sought permission to gather before school to start their day with prayer, scripture reading, and mutual encouragement. The school superintendent tirelessly fought for nine years to prevent such meetings. The students ultimately won the right to meet, but only after 10 federal court adjudications (including two trips to the U.S. Supreme Court), 18 briefs, 22 depositions, over $400,000 in attorney fees, and seven years of litigation. Garnett v. Renton Sch. Dist. No. 403, 675 F. Supp. 1268 (W.D. Wash. 1987), *aff'd on other grounds*, 874 F.2d 608 (9th Cir. 1989), *vacated and remanded*, 496 U.S. 914 (1990) (requiring further consideration in light of Board of Educ. v. Mergens, 496 U.S. 226 (1990)), *on remand*, 772 F. Supp. 531 (W.D. Wash. 1991), *rev'd on other grounds*, 987 F.2d 641 (9th Cir.), *cert. denied*, 510 U.S. 819 (1993).

8. Elrod v. Burns, 427 U.S. 347, 373 (1976).

be fixed by piecemeal litigation before the U.S. Supreme Court nor by legal guidelines from the Department of Education. Nor can it be cured by statute or by government-sponsored tokens of civil religion. Only a constitutional amendment will restore common sense to the interpretation of our First Amendment.

### *A. The Inadequacy of Piecemeal Litigation*

Religious citizens should not have to wait for enlightenment from the U.S. Supreme Court. Indeed, its contradictory decisions are the cause of much of the legal darkness surrounding the interpretation of the Establishment Clause.[9] The Court takes at most one or two religious liberty cases per year, and those few decisions are often hopelessly fractured. The Court's five to four decisions are necessarily fact-dependent, with the swing vote identifying the narrow set of facts in which the majority's holding might apply in the future. As one Supreme Court Justice observed, the Court's Establishment Clause jurisprudence is in "utter chaos and unpredictable change."[10]

In the Court's most recent pronouncement, the swing voter announced that we can expect no unifying test or bright lines, only "quite fine" lines.[11] This portends decades of additional litigation with enormous costs, inconsistent rulings across the land, and one or two narrow answers from the Court each year.

### *B. The Inadequacy of Merely Publicizing Existing Legal Rights*

The Christian Legal Society ("CLS") was one of a handful of organizations on the Drafting Committee of what became a remarkably ecumenical document—*Religion in the Public Schools: A Joint Statement of Current Law*.[12] The *Joint Statement* sum-

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9. For a partial catalog of the conflicting results, see Wallace v. Jaffree, 472 U.S. 38, 110-12 (1985) (Rehnquist, J., dissenting).

10. Antonin Scalia, *On Making It Look Easy by Doing It Wrong: A Critical View of the Justice Department*, *in* PRIVATE SCHOOLS AND THE PUBLIC GOOD 173, 173 (Edward M. Gaffney, Jr. ed., 1981).

11. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2526 (1995) (O'Connor, J., concurring).

12. AMERICAN JEWISH CONGRESS ET AL., RELIGION IN THE PUBLIC SCHOOLS: A JOINT STATEMENT OF CURRENT LAW (1995) [hereinafter JOINT STATEMENT]. Copies can be obtained from the Christian Legal Society, P.O. Box 637, Annandale, VA 22003. Much of the credit for weaving a consensus document among a diverse signatory group spanning the ideological spectrum must go to the Chair of the Drafting Committee, Marc Stern, Esq., of the American Jewish Congress.

marizes in practical terms the current state of the law governing fourteen areas of student religious expression in public schools.

In July of 1995, President Clinton directed the Departments of Justice and Education to restate the *Joint Statement* and distribute it to every school superintendent in the country with a letter from Secretary of Education Richard Riley explaining its significance ("Guidance Letter").[13] The President and Richard Riley should be commended for helping dispel among educators some of the misconceptions that all too often result in suppression of student religious liberty.

The *Joint Statement* and the Administration's Guidance Letter will be helpful if read and followed by educators, parents, and students. They give us a current score card for the law in this area. But they do not change the law that is adverse to religious freedom, nor do they shed light on the legal issues which remain unsettled.[14] The *Joint Statement* and the Guidance Letter also provide no guarantee that the law governing student religious expression will be the same tomorrow.

Indeed, the introduction to the *Joint Statement* admits that the signatory organizations do not necessarily agree with the case law that the *Joint Statement* summarizes.[15] Many of these organizations seek to undo the victories that have been won for religious expression. The CLS and other evangelical signatories, on the other hand, are committed to removing the legal impediments to religious expression by public school students.

While the Guidance Letter should be helpful in instructing educators, parents, and students, much of the problem of religious inequality does not stem from ignorance. Rather, it is rooted in our public officials' obstinacy or lack of political will to vigorously enforce and construe broadly the rights of religious students. The Guidance Letter does nothing to alleviate this problem. It carries no enforcement power; it can be ignored by

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13. Memorandum on Religious Expression in Public Schools, 31 WEEKLY COMP. PRES. DOC. 1227-30 (July 12, 1995); Letter from Richard W. Riley, Secretary of Education, to Superintendents of United States School Districts (Aug. 10, 1995).

14. For example, whether public school students may elect to have a volunteer lead them in prayer at their graduation. *See* Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994), *vacated and remanded*, 115 S. Ct. 2604 (1995), *on remand*, 62 F.3d 1233 (9th Cir. 1995); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992); Gearon v. Loudoun County Sch. Bd., 844 F. Supp. 1097 (E.D. Va. 1993).

15. JOINT STATEMENT, *supra* note 12, at 1-2.

administrators without even a slight Department of Education penalty.[16]

One final reason the Guidance Letter and the *Joint Statement* are inadequate to prevent discrimination against religious expression is that they only address one aspect of the problem. In contrast, a constitutional amendment would clarify the law, not only in public schools, but in the workplace and the public square as well.

Thus, although administrative guidelines and cooperative summaries of current law are helpful in the short term, they cannot force government officials or judges to prohibit religious inequality.

### *C. The Inadequacy of Statutory Solutions*

Under our constitutional system of checks and balances, an act of the legislative or executive branches can be struck down if deemed inconsistent with the federal Constitution. Although federal statutes trump conflicting state law,[17] federal courts have frequently voided acts of Congress on constitutional grounds,[18] which is why statutes lack the power to correct misapplications of the Establishment Clause.

The history of the Equal Access Act[19] illustrates the shortcomings of statutory solutions to essentially constitutional problems. The Act, which guarantees that public secondary school students may meet on campus for religious discussion during non-instructional time if other student clubs are allowed to meet, was passed by an overwhelming majority of Congress in 1984.[20] Yet the Act did not prevent school districts from ignoring or circumventing the Act's requirements or lower federal courts from

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16. *E.g.*, Settle v. Dickson County Sch. Bd., 53 F.3d 152 (6th Cir.), *cert. denied*, 116 S. Ct. 518 (1995) (teacher gave failing grade to ninth-grader for selecting "The Life of Jesus Christ" as her research topic).

17. U.S. CONST. art. VI.

18. A recent example is the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (1994), which was voided by the Supreme Court on the ground that Congress exceeded its authority to legislate under the Commerce Clause. United States v. Lopez, 115 S. Ct. 1624 (1995).

19. 20 U.S.C. §§ 4071-4074 (1994).

20. 90 CONG. REC. S8,370 (1984) (passing in the Senate 88 to 11); 95 CONG. REC. H7,740 (1984) (passing in the House of Representatives 337 to 77).

voiding its protections on the ground that it violated the Establishment Clause of the First Amendment.[21]

The same fate would undoubtedly await any statute of similar substance. Moreover, statutorily codifying rights that are actually constitutional in origin is not a preferred route, given the ability of a future Congress to repeal or amend a statute by a simple majority vote. Nothing less than a constitutional amendment is broad and durable enough to resolve the problem of religious discrimination.

## II. THE PURPOSES OF THE RELIGIOUS EQUALITY AMENDMENT

The Religious Equality Amendment ("REA"), introduced by Representative Henry Hyde (R-IL) and Senator Orrin Hatch (R-UT), reads as follows:

> Neither the United States nor any State shall deny benefits to or otherwise discriminate against any private person or group on account of religious expression, belief, or identity; nor shall the prohibition on laws respecting an establishment of religion be construed to require such discrimination.[22]

The REA has three principal purposes: to protect freedom of religious expression in public places, including schools and government buildings; to require nondiscrimination in the qualification for and distribution of government benefits, including school vouchers; and to ensure nationwide enjoyment of religious freedom, regardless of state law.

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21. Mergens v. Board of Educ., No. CV 85-0-426, slip op. at 12 (D. Neb. Feb. 2, 1988), *rev'd*, 867 F.2d 1076 (8th Cir. 1989), *aff'd*, 496 U.S. 226 (1990) (finding that the Equal Access Act did not violate the Establishment Clause); Garnett v. Renton Sch. Dist. No. 403, 675 F. Supp. 1268 (W.D. Wash. 1987), *aff'd*, 874 F.2d 608 (9th Cir. 1989), *vacated and remanded*, 496 U.S. 914 (1990), *on remand*, 772 F. Supp. 531 (W.D. Wash. 1991), *rev'd on other grounds*, 987 F.2d 641 (9th Cir.), *cert. denied*, 510 U.S. 819 (1993).

22. H.R.J. Res. 121, 104th Cong., 1st Sess. (1995); S.J. Res. 45, 104th Cong., 1st Sess. (1995). Representative Ernest Istook (R-OK) also proposed a version of the Religious Equality Amendment, one which includes a clause that would permit the federal or state governments to give public acknowledgment to the religious heritage of the people. H.R.J. Res. 127, 104th Cong., 1st Sess. (1995) ("Nothing in this Constitution shall prohibit acknowledgment of the religious heritage, beliefs, or traditions of the people."). The CLS opposes the inclusion of such a clause because it could be seen as contradictory to the Establishment Clause's barrier against government preference for a particular faith. Moreover, in CLS's set of priorities, perpetuating official nods to civil religion is less important than gaining equal treatment for all people of faith.

### *A. Freedom of Religious Expression in Public Places*

The REA is intended to ensure freedom of religious expression in public places and prevent public officials, including judges, from claiming that "separation of church and state" forbids students from expressing their religious beliefs in public classroom discussions or homework assignments, sharing their faith with other students on campus, or distributing religious literature; student valedictorians from offering prayers at public school graduations; or public school teachers from praying with other staff in the faculty lounge. The REA is proposed to allow government employees the freedom to engage in religious speech with co-workers while on duty and to have religious art, calendars or other expressions of religion at their work stations.[23] Additionally, although a citizen's right in her personal capacity to erect religious displays or engage in religious speech in public parks and other public places open to nonreligious expression has been fairly well-established by recent Supreme Court decisions,[24] the REA would bury permanently any lingering doubts.

### *B. Nondiscrimination in the Qualification for and Distribution of Government Benefits*

The REA would not only allow for freedom of religious expression in the public square, but would also prevent discrimination in the qualification for and distribution of government benefits. Far too often in the past, the Supreme Court has denied benefits to and otherwise discriminated against religious or "sectarian" organizations based upon the prevailing misinterpretation of the First Amendment's Establishment Clause. Proponents of the REA, including CLS, seek to stop the disqualification of religious schools, religious social service ministries, and parochial schoolchildren from receiving public funds for education or welfare services. If the government chose to assist private schools or private social service providers generally, then the REA would bar public officials from categorically excluding reli-

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23. Private employees are already free to do this because the First Amendment only applies to government actors.

24. Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

gious schools or organizations that fulfill similar "secular" purposes.

### C. *To Ensure Nationwide Enjoyment of Religious Freedom, Regardless of State Law*

Finally, the REA should ensure nationwide enjoyment of the religious freedom which has been taken from us by the Supreme Court's erroneous construction of the Establishment Clause. Over half the states have constitutions that have been interpreted, or will likely be interpreted, to prevent the exercise of the rights described above.[25] Rights guaranteed under the First Amendment should not vary from state to state. The majority of Americans will understand and support this effort to guarantee national uniformity of interpretation of the First Amendment. Similar conflicts between federalism and constitutional rights have been resolved in favor of preserving the people's constitutional rights.[26]

## III. THE DOCTRINAL EFFECT OF THE RELIGIOUS EQUALITY AMENDMENT

The first clause of the Hyde-Hatch version of the REA contains language very similar to the "equality principle" proposed by Professor Michael McConnell in the early drafting stages of the REA. Professor McConnell suggested the first clause should read: "Neither the United States nor any State shall deny benefits to or otherwise discriminate against any person or group on account of religious expression, belief, or identity."[27] Drafters of

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25. Letter from The Honorable Ernest J. Istook, Jr., Member, U.S. House of Representatives (R-OK), to The Honorable Henry J. Hyde, Member, U.S. House of Representatives (R-IL) (January 4, 1996) (explaining that 28 states have constitutions that have been interpreted, or will likely be interpreted, to prevent the exercise of religious rights).

26. *See, e.g.*, U.S. CONST. art. I, § 10; *id.* amends. XIII, XIV, XV, XVIII, XXIV, XXVI; The Equal Access Act of 1984, 20 U.S.C. § 4071 (1994); The Voting Rights Act of 1968, 42 U.S.C. § 1973bb (1994); The Civil Rights Act of 1964, 42 U.S.C. § 2000a (1994); The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1994). The Tenth Amendment does not support any invocation of "states' rights" here. Religious freedom is a fundamental right with which the *people*—not the states—are endowed by their Creator. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The states have never had inherent power to discriminate on the basis of religious faith or exercise. Thus, a power the states have never had cannot be "reserved to the States" under the Tenth Amendment.

27. *See* Gebe Martinez & David G. Savage, *Christian Groups Craft 'Religious Equality' Amendment to Constitution*, L.A. TIMES, April 5, 1995, at A13 ("[The]

the proposed amendment adopted McConnell's statement, but inserted "private" to modify "person or group," clarifying that the REA would not permit government employees to use their official positions to advance or suppress any religious view.[28] The second clause of the REA asserts that "the prohibition on laws respecting an establishment of religion [shall not] be construed to require [religious] discrimination."[29] This clause aims to prevent further schizophrenic interpretations of the First Amendment's Establishment Clause; it rejects interpretations asserting that the Establishment Clause forbids what other First Amendment provisions protect.[30]

As discussed earlier, the primary problems this constitutional amendment was designed to address are the use of the Establishment Clause (1) to justify government suppression of and discrimination against private religious expression and (2) to exclude religious organizations from participating in government benefit programs.[31] Subsections III.A and III.B below consider how successfully the Hyde-Hatch Religious Equality Amendment would solve these two problems.

### *A. Private Speech as "Establishment" of Religion*

#### *1. Student religious expression*

Too many school teachers and administrators erroneously believe that the Establishment Clause is violated when students express their religious beliefs on public school grounds. The proposed REA addresses this misconception, forbidding discriminatory treatment of expression because of its religious content.

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provision states that officials may not 'deny benefits to or otherwise discriminate against any person' because of religion.").

28. *See* H.R.J. Res. 121, *supra* note 22.

29. *Id.* ("[N]or shall the prohibition on laws respecting an establishment of religion be construed to require such discrimination.").

30. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995), *rev'g* 18 F.3d 269 (4th Cir. 1994) (reversing the lower court's holding that a denial of university funds to a student religious publication burdened protected free speech and press rights but was justified by the Establishment Clause); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993), *rev'g* 963 F.2d 1190, (9th Cir. 1992) (reversing the lower court's holding that the Establishment Clause justified a school district's withholding of interpreters to deaf students at a Catholic high school).

31. The third purpose of the REA that was discussed in Part II, to ensure nationwide enjoyment of religious freedom, was less of a substantive target than the other two purposes which will be discussed in this portion of the article.

The REA would prevent the government from claiming that the "separation of church and state" forbids a student to mention Jesus in a classroom discussion, sing a religious song in a homework videotape, draw a nativity scene in art class, share his or her faith with other students, wear religious clothing, or distribute religious literature. The REA would also transform the Equal Access Act's statutory guarantee of equal treatment of student religious groups into a constitutional mandate.[32]

The proposed text would also protect student-sponsored, student-initiated prayer. Under the REA, public school students are "persons" and the quintessential manifestation of the REA's protected "religious expression [or] belief" is prayer, vocal or silent.[33] This plain meaning of the REA's language would also be undergirded by its legislative history.[34]

In addition to allowing student-initiated religious expression in schools generally, this amendment would permit many forms of public school graduation prayer. At most graduation ceremonies, students or outside adult speakers are permitted to share nonreligious thoughts; accordingly, under REA language, speakers would be permitted to pray. However, with the "private person" qualifier, a school board would still be forbidden from crafting the prayer or requiring a student or outside speaker to engage in prayer.[35]

*2. Teacher religious expression*

The rights granted in the proposed amendment extend to "any private person," which term would include public school teachers when their religious expression is done in their private capacity. Thus, public school teachers would not gain new religious expression rights *in the classroom* under the proposed amendment.[36] However, they would find protection for religious

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32. *Cf.* Board of Educ. v. Mergens, 496 U.S. 226 (1990).

33. See the text of the proposed REA, H.R.J. Res. 121, *supra* note 22.

34. *Religious Freedom: Testimony of Michael W. McConnell Before the Senate Judiciary Comm.*, Oct. 20, 1995, *available in* 1995 WL 615788 (F.D.C.H.); *Religious Freedom: Testimony of Steven T. McFarland Before the Senate Judiciary Comm.*, Oct. 20, 1995, *available in* 1995 WL 615770 (F.D.C.H.).

35. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992); School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

36. Courts have not recognized primary and secondary school teachers as having rights of free speech or academic freedom in the classroom. Peloza v. Capistrano Unified Sch. Dist., 782 F. Supp. 1412 (C.D. Cal. 1992), *aff'd per curiam*, 37 F.3d 517

exercise in faculty lounges, outside of work hours, and off-campus.

*3. Other public employee expression*

The phrase "any private person" could also cover a non-teacher public employee in many instances. A number of recent cases have considered the extent to which government employees may engage in religious speech in the workplace.[37] Many of these cases have concluded that the Establishment Clause justified the suppression of religious speech on the job.[38] The REA would reverse those outcomes where the recipient of the employee's workplace religious expression was a co-worker, not the general public. Generally, public employees are free to express their nonreligious views verbally with co-workers (though not with the public) while on duty and on their breaks, as well as nonverbally at their work station. The REA would thus guarantee that religious views are not "off-limits" at these times and places. The REA, however, would not apply to a government employee on-duty and in contact with the public; logically, at those times, the employee is not a "private person" but a "government actor."

*4. Private speakers on public property*

Courts have frequently entertained the argument that a private speaker's religious expression violates the Establishment Clause when an onlooker could mistakenly conclude that the government endorsed the religious message simply by permitting it to occur on public property. Religious meetings in public university or school facilities as well as religious holiday displays

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(9th Cir. 1994), *cert. denied*, 115 S. Ct. 2640 (1995); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

Post-secondary faculty *do* have a right of academic freedom in the classroom. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1966). *But see* Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991) (stating that a university professor has no academic freedom rights, is subject to administration's control in the classroom and on campus, and thus may be barred from briefly disclosing his religious "bias" to his students or giving an optional lecture on it annually), *cert. denied*, 505 U.S. 1218 (1992). The Hyde-Hatch proposal would simply bolster this guarantee, insofar as academic freedom is premised on the fact that a professor in class speaks only for herself, not in any official capacity.

37. *See, e.g.*, Tucker v. California Dep't of Educ., No. 94-16267 (9th Cir. filed July 26, 1994); Brown v. Polk County, 61 F.3d 650 (8th Cir. 1995) (en banc).

38. *See, e.g.*, Brown v. Polk County, 832 F. Supp. 1305, 1315-16 (S.D. Iowa 1993).

in public parks have been so challenged. This argument has typically failed.[39] In June of 1995, the Supreme Court again rejected it.[40] If adopted, the REA should foreclose future invocation of such an argument.

In sum, the REA would clarify that discrimination against speech because of its religious content is prohibited, not compelled. The proposal would level the playing field for religious persons in the public school, square and workplace.

### *B. Participation in Funding Programs as "Establishment"*

The REA not only would prevent government discrimination against private religious expression, but also would disable the all-too-successful claim that the Establishment Clause forbids religious individuals or entities from receiving government funding under a program serving some secular purpose.[41] The proposed amendment would not abrogate the Establishment Clause. Rather, it would repudiate the view that nonestablishment is the supreme guarantee of the First Amendment. The REA's second clause specifically rejects interpretations of the Establishment Clause that disqualify citizens from equal participation in neutral government benefit programs. Subsections III.B.1 through III.B.7 below summarize some of the key cases addressing government benefit programs, and describe the probable impact of the REA upon those cases.

#### *1.* Bowen v. Kendrick

In *Bowen*,[42] the Court considered the constitutionality of the Adolescent Family Life Act, an act authorizing federal grants to public and private organizations, including religious organizations, for services and research relating to adolescent sexual relations and pregnancy.[43] Although the Court rejected a facial challenge to the Act's constitutionality,[44] its analysis suggested various limits imposed by the Establishment Clause upon gov-

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39. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981).

40. Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995).

41. *See* Letter from The Honorable Ernest J. Istook te The Honorable Henry J. Hyde, *supra* note 25.

42. Bowen v. Kendrick, 487 U.S. 589 (1988).

43. *See* 42 U.S.C. § 300z (1994).

44. *Bowen*, 487 U.S. at 618.

ernment funding of religious organizations. The opinion suggests that the Establishment Clause (1) requires an absolute ban on government grants to "pervasively sectarian" organizations;[45] (2) prohibits grant recipients from using religious means to achieve secular ends;[46] and/or (3) prohibits grant recipients from advancing religion instead of the secular goals of the program.[47]

The proposed REA would ensure that pervasively sectarian institutions could participate equally in such government funding programs. Its plain language suggests that the government would *not* be permitted to deny benefits on the ground that the recipient uses religious means to achieve secular purposes.[48] However, the proposed amendment would not give religious organizations license to ignore the secular goals of a government program in order to promote their faith.

### 2. School District of Grand Rapids v. Ball

The *Grand Rapids*[49] Court considered the constitutionality of a school district's "shared time" and "community education" programs, under which the district provided classes to nonpublic school students at public expense in classrooms located in and leased from the nonpublic schools.[50] The Court found the programs unconstitutional for three reasons: (1) the publicly financed teachers, influenced by the pervasively sectarian nature of the facilities, would indoctrinate the students; (2) the programs convey a message of symbolic union to observers; and (3) the programs subsidize the religious schools' sectarian functions by taking responsibility for their non-religious functions.[51]

To the extent that the proposed amendment curbs the reach of the Establishment Clause, it would overrule *Grand Rapids*.

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45. "[I]t will be open to appellees on remand to show that AFLA aid is flowing to grantees that can be considered 'pervasively sectarian' religious institutions . . . ." *Id.* at 621. Justice Kennedy's concurring opinion, joined by Justice Scalia, rejected the notion that grants to pervasively sectarian institutions always violate the Establishment Clause: "The question in an as-applied challenge is not whether the entity is of a religious character, but how it spends its grant." *Id.* at 624-25 (Kennedy, J., concurring).

46. *Id.* at 621-22.

47. *Id.*

48. *See* H.R.J. Res. 121, *supra* note 22.

49. School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985).

50. *Id.* at 375-79.

51. *Id.* at 385.

The Court's opinion essentially mandates discrimination against the religious schools participating in the program, for it is their religious character or "identity" that disqualifies them.

*3.* Aguilar v. Felton

In *Aguilar*,[52] a companion case to *Grand Rapids*, the Court struck down the use of federal funds to pay the salaries of public employees who taught in parochial schools. The program, as a whole, aided all disadvantaged students, whether in public, secular private, or religious private schools.[53] The Court emphasized that the aid was provided in a pervasively sectarian environment and that the amount of monitoring necessary to ensure purely secular instruction would excessively entangle government with religion.[54]

Again, the REA would dictate a different result in a case like *Aguilar*. Excluding private religious schools from a funding program solely because they are religious would violate the amendment.

*4.* Committee for Public Education & Religious Liberty v. Nyquist

The *Nyquist*[55] Court considered the constitutionality of three financial aid programs for nonpublic schools, students, and parents: (1) direct grants to schools; (2) tuition reimbursements to parents; and (3) tax credits for parents.[56] The Court struck down all three programs on Establishment Clause grounds.[57]

The application of the proposed amendment to this case would likely secure the same result predicted for the above cases. Any denial of benefits to a religious school solely because it is religious would violate the new amendment.

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52. Aguilar v. Felton, 473 U.S. 402 (1985).
53. *Id.* at 404.
54. *Id.* at 408-14.
55. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).
56. *Id.* at 761-69.
57. *Id.* at 769.

### 5. Meek v. Pittenger *and* Wolman v. Walter

*Meek v. Pittenger*[58] and *Wolman v. Walter*[59] involved government aid in the form of educational services and materials to nonpublic schools. In *Meek*, the Supreme Court ruled that the Establishment Clause prohibited most of the challenged aid to religious schools, including counseling services, remedial and accelerated instruction, and psychological, hearing and speech therapy. In *Wolman*, the Court did not allow government funding for instructional materials, instructional equipment, as well as field trip transportation, but did allow government funding for secular textbooks, testing services, and diagnostic services.

The REA would correct these misapplications of the Establishment Clause and permit states to offer all nongovernment schools, regardless of any religious character, the aid denied in these cases.

### 6. Rosenberger v. Rector & Visitors of the University of Virginia

In *Rosenberger*,[60] a Christian student publication challenged its exclusion from access to a university student activities fund. The district[61] and circuit[62] courts concluded that the Establishment Clause justified such discrimination. By a five to four margin, the Supreme Court reversed, holding that the Establishment Clause does not require, and the Free Speech Clause does not permit, that student activity funds be denied to a group solely because its message is religious.[63]

The REA would mandate the same result. A public university could no longer deny benefits to a Christian newspaper on account of its religious viewpoint, nor would such discrimination be constitutionally required. However, as shown above, the amendment would go further than *Rosenberger*, which is narrowly confined to university student activities funds,[64] in eradicating dis-

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58. 421 U.S. 349 (1975).
59. 433 U.S. 229 (1977).
60. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995).
61. Rosenberger v. Rector & Visitors of the Univ. of Va., 795 F. Supp. 175, 181 (W.D. Va. 1992), *aff'd*, 18 F.3d 269 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510 (1995).
62. *Rosenberger*, 18 F.3d at 287.
63. *Rosenberger*, 115 S. Ct. at 2525.
64. *Id.* at 2527-28 (O'Connor, J., concurring).

crimination in the distribution of public benefits to religious citizens.

*7. Benefits cases: conclusion*

The REA would not permit the government to transgress the core purpose of the Establishment Clause—to maintain government neutrality towards religion. The amendment would not permit the government to single out religion for special treatment. For instance, nothing in the amendment would change the Establishment Clause's prohibition of legislation providing special financial support to the Episcopal Church or to all denominations or sects in general. The plain meaning of the REA's phrase "deny benefits to or otherwise discriminate against" would not create new affirmative obligations to spend money on religion. The phrase merely guarantees that government programs treat religious organizations similarly to other private organizations.

### *C. Unaffected Religion Clause Precedent*

The Religious Equality Amendment would not dictate a different result in certain Establishment Clause cases, though the CLS believes they were incorrectly reasoned as well. For example, the amendment would not change those cases holding that the Establishment Clause prevents government from accommodating a community defined by religion or individuals in need of religious accommodation.[65] Nor would the amendment alter the result in those cases holding that the Establishment Clause bars a government from legislating if the court suspects it has done so to advance a religious interest.[66]

In addition, the amendment would not address problems involving the Free Exercise Clause or the Religious Freedom Restoration Act. For instance, anti-discrimination statutes have been frequently invoked to challenge religiously motivated housing decisions.[67] In these cases, it has been argued that the appli-

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65. *See, e.g.*, Board of Educ. v. Grumet, 114 S. Ct. 2481 (1994) (holding that the Establishment Clause was violated by a state law permitting a homogenous religious community its own public school district so that its children could avoid ridicule by outsiders); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (holding that the Establishment Clause voided a stete law guaranteeing private sector employees the right not to work on one's sabbath).

66. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987).

67. *See, e.g.*, Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994), *cert. denied*, 115 S. Ct. 460 (1994); Smith v. Fair Employment & Hous. Comm'n,

cation of such laws does not impose a "substantial burden" on religious exercise under the circumstances and that any burden is justified by a "compelling government interest."[68]

Neither would the REA affect the outcome of a case like *Romer v. Evans*,[69] which concerned the constitutionality of a Colorado constitutional amendment by referendum that prevented subdivisions of state government from conferring protected class status upon homosexuals. The legal basis of that dispute was the Equal Protection Clause, not the First Amendment Religion Clause. Thus, although the REA would have substantial impact on Establishment Clause jurisprudence, it would leave other areas of law involving religious issues intact.

## IV. SUMMARY OF THE LEGAL EFFECT OF RELIGIOUS EQUALITY AMENDMENT

The REA challenges the legal and cultural conclusion that religion must be kept distinct from public life. It does not give religion special treatment; it merely guarantees official neutrality. Misinterpretations of the Establishment Clause have led judges and other government decisionmakers to conclude that nonreligious expression is "more equal" than religious expression and that many religious organizations and citizens cannot equally participate in or enjoy the provision of government-funded services. The REA's first clause would guarantee equal expression and reject discriminatory exclusion of religious individuals and institutions. Its second clause would clarify that the Establishment Clause should not be construed to require the religious discrimination that is enjoined by the first clause.

## V. CONCLUSION

In fashioning a remedy, one must consider how broad, deep and intractable is the disease of government-sponsored religious discrimination. It is not confined to public schools, but infects every venue in which government and its citizens

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913 P.2d 909 (Cal. 1996) (plurality opinion), *petition for cert. filed*, 65 U.S.L.W. 3034 (U.S. July 8, 1996) (No. 92-212); Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994); *cf.* Paquette v. Regal Arts Press, Inc., 656 A.2d 209 (Vt. 1994) (challenging printer's religiously motivated refusal to print proabortion materials).

68. *Smith*, 913 P.2d at 922-23.

69. 116 S. Ct. 1620 (1996).

interact—public facilities, public funding, public employment, schools, and universities. Relief from religious inequality is *not* just one more Supreme Court decision away. Neither will administrative guidance or statutes bring equality and common sense back to the treatment of religion in America. This constitutional problem demands a constitutional answer.

The amendment sought by CLS and others is about equality, not majoritarian intolerance. It is about authoritatively resolving a costly, divisive, and seemingly interminable struggle through the most democratic process available. The Religious Equality Amendment is about fundamental freedom. And its time has come.